



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW APPLICATION NO. 540 OF 2017**

**BETWEEN**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW  
ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS.**

**AND**

**IN THE MATTER OF ARICLES 10, 22, 23(3)(f),47(1),50(1)  
AND 165(6)&(7) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT**

**AND**

**IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM ACT AND IN THE  
MATTER OF ORDER 53(1) OF THE CIVIL PROCEDURE RULES 2010**

**AND**

**IN THE MATTER OF SECTION 175(1) OF THE PUBLIC  
PROCUREMENT AND ASSET DISPOSAL ACT, 2015**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**PUBLIC PROCUREMENT ADMINISTRATIVE**

**REVIEW BOARD.....RESPONDENT**

**KENYA POWER & LIGHTING**

**COMPANY LIMITED.....INTERESTED PARTY**

**EX PARTE:**

**TRANSCEND MEDIA GROUP LIMITED**

## JUDGMENT

### The Application

1. The application that is before this Court for determination is the Amended Notice of Motion dated 12<sup>th</sup> June 2018, that was filed by Transcend Media Group Limited, a limited liability company incorporated in Kenya and the ex parte Applicant herein (hereinafter referred to as “the Applicant”). The Applicant is seeking the following orders in the said Amended Notice of Motion:

**a) An order of Certiorari to remove to the High Court for purposes of quashing the Respondent’s decision dated 17<sup>th</sup> August 2017 in Request for review No 70 of 2017.**

**b) An order of Prohibition to prohibit the Interested Party from evaluating awarding and or implementing the tender for Prequalification Of Suppliers For Provision of Advertising & Media Services (Tender No. KPI/9A.2/OT/50/CS/17-18).**

**c) An Order of Mandamus to compel the Interested Party to re-evaluate and award tender number KP1/9AA-2/OT/46-CS/15-16.**

**d) Costs of the application.**

2. The Respondent is the Public Procurement Administrative Review Board, which is established under section 27 of the Public Procurement and Disposal Act (hereinafter the “Act”), and is tasked with the mandate of dealing with disputes arising in procurement processes. The Interested Party on the other hand is Kenya Power & Lighting Company Limited, a limited liability company which was the procuring entity in the subject tenders herein.

3. The Applicant had initially sought and was granted leave to file its initial substantive Notice of Motion which was dated 31<sup>st</sup> August 2017, in which it had *inter alia* sought orders of prohibition to prohibit the Interested Party from evaluating, awarding or implementing tender numbers KP1/9AA-2/OT/03/CS/17-18, KP1/ 9AA-2/OT/04/CS/17-18 and KP1/9AA-2/OT/05/CS/17-18. However, in the course of the hearing of the initial Notice of Motion, the Interested Party informed the Court that it had cancelled the said tenders, and the said prayer for prohibition in the initial Notice of Motion was consequently marked as spent by the parties, who did not submit thereon.

4. The Interested Party subsequently on 30<sup>th</sup> January 2018 advertised a tender for the Prequalification of Suppliers for Provision of Advertising and Media Services (Tender No KP1/9A. 2/OT/50/CS/17-18). The Applicant thereupon filed an application by way of a Notice of Motion dated 5<sup>th</sup> February 2018, in which he sought and was granted orders by this Court in a ruling delivered on 30<sup>th</sup> May 2018, that the prayer for prohibition in the initial Notice of Motion be reinstated, and tender number KP1/9AA-2/OT/03/CS/17-18, KP1/9AA-2/OT/04 /CS /17-18 and KP1/9AA-2/ OT /05/CS /17-18 be substituted with tender number KP1/9A.2/OT/50/CS/17-18 and be heard in the merits.

5. The Applicant was also granted leave to file and serve the amended Notice of Motion, an amended statement, a further affidavit of need be, and further submissions. The Respondent and Interested Party were granted corresponding leave to file and serve further affidavits in response and further submissions.

6. The grounds for the Applicant’s application are thus found in its Amended Statement date dated 12<sup>th</sup> June 2018, and the verifying affidavit and further affidavit sworn on 28<sup>th</sup> August 2017 and 12<sup>th</sup> June 2018 respectively, by Anthony Gatheca, its Chief Executive Officer. The Applicant’s Advocates on record, Onyoni, Opini & Gachuba Advocates, filed four sets of submissions dated 11<sup>th</sup> December 2017, 29<sup>th</sup> December 2017, 22<sup>nd</sup> January 2018 and 12<sup>th</sup> June 2018.

7. The Respondent’s response was in submissions dated 23<sup>rd</sup> January 2018 filed by Chilaka Lumiti, a Litigation Counsel at the Attorney General’s Chambers. The Interested Party on its part filed a replying affidavit sworn on 15<sup>th</sup> September 2017 by Justus Ododa, its Legal Assistant, and a second replying affidavit sworn on 23<sup>rd</sup> October 2018 by Jude Ochieng, its Acting Manager, Legal Services. Its Advocates on record, Robson Harris & Company Advocates, filed two sets of submissions dated 18<sup>th</sup> January 2018 and 24<sup>th</sup> October 2018 respectively.

8. The parties’ respective cases are as follows.

### The Applicant’s Case

9. The Applicant gave the background to its application, and stated that the cause of action arises from the Tender for Provisions of Advertising & Media Services (hereinafter Tender Number KP1/9AA-2/OT/46-CS/15-16) which was advertised by the Interested Party on 8<sup>th</sup> March 2016. That on 25<sup>th</sup> May 2016, the Interested Party awarded the tender to Scanad Kenya Limited, and the Applicant, being aggrieved by the said award filed a Request for Review No 40 of 2016 with the Respondent. The Respondent in its ruling on the said request annulled the award and substituted the same with an award to the Applicant.

10. That the Interested Party thereupon filed an application for judicial review in Judicial Review No. 302 of 2016, whereupon this Court (Odunga J.) quashed the award of the tender to the Applicant, and remitted the matter back to the Respondent in a judgment delivered on 29<sup>th</sup> May 2017. The Respondent on 14<sup>th</sup> July 2017 directed the Interested Party to re-evaluate the tender and award the tender within 14 days, and the Interested Party on 19<sup>th</sup> July 2017 notified the Applicant of the termination of the tender on the ground that the tender validity thereof had expired on 26<sup>th</sup> July 2016. On 20<sup>th</sup> July 2017, the Interested Party subsequently advertised three tenders for procurement of media and advertising services, being tender number KP1/9AA-2/OT/03/CS/17-18, KP1/9AA-2/OT/04 /CS /17-18 and KP1/9AA-2/ OT /05/CS /17-18.

11. The Applicant, being aggrieved by the said termination and advertisement of the three tenders, filed yet another Request for Review with the Respondent, being Request for Review No 70 of 2017, and on 17<sup>th</sup> August 2017 the Respondent delivered the impugned ruling in which it dismissed the said Request for Review. The Applicant thereupon commenced the present judicial review proceedings. The Applicant annexed copies of the various rulings, orders and advertisement and termination of tenders referred to in the foregoing.

12. The main grounds for the Applicant's application are first, that the Respondent's decision of 17<sup>th</sup> August 2017 was arrived at by error of law that the tender validity period was not subject to the statutory stay under section 168 of the Act, and had expired by virtue of section 87(1) of the Act. Further, that the said decision was arrived at by error of law that a re-evaluation was subject to section 87(1) of the Act, and failed to apply international best practice and norms pursuant to section 3(g) of the Act to determine the purpose and effect of tender validity on evaluation of tenders.

13. The Applicant's submissions on the first ground were that tenders can only be terminated under section 63(1) as opposed to section 87 (1) of the Act. Further, that by holding that the tender validity period had lapsed, and that no evaluation could be undertaken, the Respondent fell into error by misapplying the law on tender validity period. According to the Applicant, the position in law is that once a tender award is challenged before the High Court, the tender valid period remains in abeyance until the matter is concluded.

14. Therefore, that the tender validity period remained in abeyance until the request for review and judicial review applications were determined. For this proposition they relied on the decision to this effect in the South African case of **Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another, [2015] ZACC 22**

15. It was also submitted that the Respondent's failure to evaluate the purpose of tender validity period constituted a fetter of its discretion, and that the purpose of the tender validity is to ensure that tenderers do not vary their tenders during the evaluation stage, and its not an indispensable condition for evaluation and award of tender and execution of a contract. The Applicant cited the decision in **European Dynamics Luxembourg and Evropaiki Dynamiki v Joint Undertaking Fusion for Energy T-553/13.EUA:T:2015:918** for the proposition that it's in the interest of the contracting authority to complete its assessment before the expiry of the tenders validity period, and exceeding that time-limit cannot render the procedure unlawful, nor can it constitute a ground for cancellation of then evaluation of the tenders.

16. The Applicant contended that it is not in dispute that the Interested Party awarded the Tender for provision of advertising and media (Tender No KP1/9AA-2/OT/46/CS/16-16) to Scanad Kenya Limited on the 25<sup>th</sup> May 2016, and that the award was within the tender validity period. That it is that award that was the subject of the request for review No 40 of 2016 and Judicial review No 302 of 2017. The issues of the tender validity period and its expiry only arose during the re-evaluation of the tender pursuant to the directions of the Respondent.

17. Therefore that these circumstances are very different from the ones in **Telkom SA Limited v Merid Trading Limited (2011) JOL 26617 (GNP)** where the validity period had expired before the tender was awarded. They further submitted that indeed the decision was distinguished by **Trencon Construction Company (Pty) Limited vs Industrial Development Corporation Of South Africa Limited and Another[2015] ZACC 22**. The conclusion by the Applicant was that the tender validity period was in abeyance since the 10<sup>th</sup> June 2016, and it's still awardable to the Applicant, and it relied on the case of **Africa Limited, Lantech Africa Limited, and Toshiba Corporation Consortium vs Public Procurement Administrative Review Board & Another, (2017) eKLR**

18. The second ground raised by the Applicant was that the Respondent's decision was arrived through failure to consider whether tender numbers KP1/9AA-2/OT/03/CS/17-18, KP1/9AA-2/OT/04 /CS /17-18 and KP1/9AA-2/ OT /05/CS /17-18 amounted to tender splitting. The Applicant urged that this frustrated the legislative purpose for which it was established and failed to give effect to fairness, equity, transparency and competition contrary to Article 227 of the Constitution and section 3 of the Act. Further, that in the tender for Prequalification of Suppliers for Provision of Advertising and Media Services (Tender No KP1/9A. 2/OT/50/CS/17-18). the Interested Party is seeking to procure the same services as those in the Tender for Provisions of Advertising & Media Services (Tender Number KP1/9AA-2/OT/46-CS/15-16) that it had terminated.

19. Reliance was placed on the case of **Republic v National Police Service Commission ex-parte Chacha, (2016) eKLR** for the holding that statutes are interpreted by reference to their purpose, and statutory powers must be exercised for the purpose for which they were conferred. The Applicant further submitted that section 175 (1) of the Act stays procurement proceedings once judicial review has been sought by an aggrieved party, and the Respondent's decision has been in abeyance since the Applicant sought judicial review proceedings. Therefore by commencing fresh procurement proceedings, the Interested Party acted contrary to the law.

20. Lastly, the Applicant relied on the case of **Kenya National Examination Council vs Republic Ex-parte Geoffrey Gathenji Njoroge & 9 Others [1997]eKLR** for the scope of judicial review remedies.

### **The Respondent's Case**

21. The Respondent relied on the cases of **Kenya National Examination Council vs R, Civil Appeal No 266 of 1996**, and **Associated Provincial Picture House Ltd vs Wednesbury Corporation (1974) 2 ALL ER 680** for the scope, reach and basis of judicial review orders. It was the Respondent's submission that its decision was in line with procuring rules and regulation, and it had the powers to hear the Applicant's Request for Review.

22. Further, that every party was accorded an opportunity to be heard during the hearing of the Request for Review, and that it considered the submissions made by the parties, examined the documents submitted to it and made a determination on all the issues presented before it. The Respondent pointed out that it also gave the reasons for its decision. Therefore that the Respondent accorded the Applicant a fair hearing.

23. According to the Respondent, the order of certiorari cannot be granted as the Applicant has not shown that the Respondent acted in an *ultra vires* manner. Further, that the grounds upon which the Applicant's application is premised are on contested facts which are not

amenable to judicial review. The Respondent relied on **Republic vs Judicial Service Commission Ex-parte Pareno, (2007) 1 KLR** for this proposition.

24. The Respondent also submitted that judicial review is not about the merits of the decision but the decision making process, and relied on the cases of **Municipal Council of Mombasa vs Republic & Umoja Consultants Ltd, Civil Appeal No 185 of 2001** and **Pastoli vs Kabale District Local Government Council and Others, [2008] 2 EA 300** for this proposition. However, that the Applicant is seeking to be heard on the merits of the Respondent's decision, which the Court does not have the jurisdiction to delve into.

#### **The Interested Party's Case**

25. The Interested Party in its first replying affidavit confirmed that it advertised the first Tender for Provisions of Advertising & Media Services (Tender Number KP1/9AA-2/OT/46-CS/15-16), which was the subject of the Requests for Review in Applications No 40 of 2016 and Application No 70 of 2017 before the Respondent. Further, that the main issue affecting the said tender was its tender validity period, which was set by the Interested Party as 120 days from the date of opening of the tender. That the said tender was opened on 29<sup>th</sup> March 2016 and the 120 days lapsed on 29<sup>th</sup> July 2016.

26. Therefore, that the first tender died a natural death and cannot be revived, since the parties who participated may have altered their respective commercial interests as per the expired tender documents. That subsequently, the Interested Party flouted Tenders KP1/9AA-2/OT/03/CS/17-18, KP1/9AA-2/OT/04 /CS /17-18 and KP1/9AA-2/ OT /05/CS /17-18, which were challenged in the Request for Review by the Applicant in Application No 70 of 2017, and which the Respondent held it lacked jurisdiction over.

27. The Interested Party averred that the decision to advertise the said three subsequent tenders was lawful, as it is within its prerogative of organizing and conducting its business as a bulk purchaser and supplier of electric energy. However, that the said tenders have since been terminated by the Interested Party.

28. In its further affidavit, the Interested Party disclosed that it advertised the tender for Prequalification of Suppliers for Provision of Advertising and Media Services (Tender No KP1/9A. 2/OT/50/CS/17-18) which was to close on 13<sup>th</sup> February 2018. Further, that the Applicant failed to disclose that they obtained the tender documents and submitted its bid for the said tender. Therefore, that being a bidder, the Applicant has not commenced any review proceedings before the Public Procurement Administrative Review Board to warrant the invoking of the Courts jurisdiction.

29. Further that the application is defective as the court has been asked to prematurely exercise jurisdiction, as the Respondent has not made any decision with regard to Tender No KP1/9A. 2/OT/50/CS/17-18 that is capable of being reviewed.

30. The Interested Party in its submissions urged that judicial review is concerned with the process of decision making as opposed to the merits of the decision, and that the court cannot intervene to quash a matter unless it has been shown that the decision is unreasonable and defies logic. Reliance was placed on the decision in **Kenya Pipeline Company Limited vs Hyosung Ebara Company Limited & 2 Others (2012) eKLR** for this position, and the holding that the Respondent is a specialised body better equipped to handle disputes relating to breach of duty by the procuring entity than the High Court.

31. The Interested Party's position on the tender validity period was that the life of a tender is defined by section 87 of the Act, which is clear that notification of an award may only be made during the tender validity period, while section 88 stipulates the manner in which the same may be extended. Further, that this position has been interpreted in various authorities, and relied on the decisions by the Respondent in **Delta Guards (k) Limited vs Kenya Power & Lighting Company Limited, PPARB No 2 of 2009** and **Lantec (African) Limited vs Ministry of Finance, PPARB No 2 of 2007**. The Interested Party also cited the decision in **Telkom SA Limited vs Merid Trading Limited(2011) JOL 26617(GNP)** for the proposition that the extension must be done before the validity period expires. It was submitted in this respect that it is not in dispute that the tender validity period was not extended as provided for in section 88 of the Act and therefore lapsed.

32. On the allegations of frustration of the legislative purpose, the Interested Party submitted that the purpose of the Act and the procurement regulations is to ensure that the procurement proceedings are conducted in an efficient, fair, competitive, accountable, and transparent manner, and in a way that inspires public confidence in the procurement procedure. They pointed to the requirement of the accounting officer to give notice in writing of an extension to each person under section 88(2) to ensure transparency and equity in the tender process. They further pointed that the provisions of section 135 of the Act that a written contract may only be executed between the parties during the tender validity period and on the instant case none may be executed on account of the expired validity period.

33. Specifically on the Tender for Prequalification of Suppliers of Provision of Advertising & Media Service (Tender No KP1/9A.2/OT/50/CS/17-18), the Interested Party submitted that the issue for determination is whether the matter falls within the purview of judicial review proceedings. It was its submission that the proceedings brought before court are brought within Section 175(1) of the Act, and the question then would be which decision by the Respondent is before this Court.

34. The Interested Party contended that section 167 of the Act gives the forum which the Applicant, as a candidate in Tender No KP1/9A.2/OT/50/CS/17-18, can canvass any issue as regards the said Tender. That the Applicant has in this regard not commenced any review proceedings before the Respondent nor has there been any decision by the Respondent to warrant the invoking the jurisdiction of this Court with respect to the said Tender. Further, that that where there is an alternative dispute resolution mechanism, this Court should not usurp that role of that mechanism.

35. Lastly, that judicial review is concerned with the process that a statutory body employs to arrive at a decision, and that there has not been a decision made by the Respondent as regards the said tender, and therefore no justification for the invocation of the jurisdiction of this Court.

## The Determination

36. I have considered the arguments made by the parties, which revolve around two issues, namely whether the Respondent made errors of law in its decision of 17<sup>th</sup> August 2017, and whether this Court can issue the orders sought by the Applicant.

37. In this respect, I note that the issue of this Court's jurisdiction to entertain the Applicant's prayer for prohibition by the Applicant in relation to the Interested Party's tender for Prequalification of Suppliers for Provision of Advertising and Media Services (Tender No KP1/9A. 2/OT/50/CS/17-18) was addressed and dealt with finality in the ruling delivered herein by this Court on 30<sup>th</sup> May 2018 on the Applicant's application dated 5<sup>th</sup> February 2018 seeking leave to include the said prayer in its Notice of Motion.

38. This Court held as follows in this regard:

**“On the first issue, the Interested Party's position is that section 167 of the Act divests this Court of jurisdiction, and that the proper forum to hear any grievances by the Applicant as regards the Fifth tender is the Respondent, given that the Applicant has submitted a bid for the said tender. Section 167 of the Act provides as follows:**

**“(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.**

**(2) A request for review shall be accompanied by such refundable deposit as may be prescribed in the regulations, and such deposit shall not be less than ten per cent of the cost of the contract.**

**(3) A request for review shall be heard and determined in an open forum unless the matter at hand is likely to compromise national security or the review procedure.**

**(4) The following matters shall not be subject to the review of procurement proceedings under subsection (1)—**

**(a) the choice of a procurement method;**

**(b) a termination of a procurement or asset disposal proceedings in accordance with section 62 of this Act; and**

**(c) where a contract is signed in accordance with section 135 of this Act.”**

The issue of whether or not the said section ousts the jurisdiction of this court was extensively dealt with by Odunga J. in Republic v Independent Electoral and Boundaries Commission & Another Ex Parte Coalition for Reform and Democracy & 2 Others [2017] eKLR where the learned Judge held as follows:

**“173. With respect to the matters raised in these proceedings, it is clear that the applicant could not move the Review Board for determination. I agree with the IEBC that pursuant to section 167(1) of the *Public Procurement and Asset Disposal Act, 2015* administrative review is available only to the candidates or tenderers and that the Applicant was neither a candidate nor a tenderer in the subject procurement. Strictly speaking therefore it was not the spirit or text of that law that parties other than candidates or tenderers should be permitted to challenge procurement processes through the procedure provided for under the Act. To that extent I agree that persons who fall within the category of the Applicant herein have no locus to commence proceedings before the Review Board.**

**174. This does not however mean that a person aggrieved by the action of the Procuring Entity, in such circumstances is left without a remedy. In my view, the remedy in such circumstances is to be found in section 174 of the *Public Procurement and Asset Disposal Act* which provides as follows:**

***The right to request a review under this Part is in addition to any other legal remedy a person may have.***

**175. In my view a person who would otherwise be locked out from invoking the provisions of the *Public Procurement and Asset Disposal Act* is not barred from seeking alternative remedy under other provisions of the law. This was the position adopted by this Court in Elias Mwangi Mugwe vs. Public Procurement Administrative Review Board & 5 Others [2016] eKLR where the Court expressed itself as hereunder:**

**“...any person who has no automatic right to participate in the review proceedings may properly resort to other available modes of ventilating his rights.”**

**176. It is not in doubt that one of the available remedies for challenging a decisions made by the IEBC is to apply for judicial review which is what the ex parte applicant sought in these proceedings.”**

On appeal, the Court of Appeal (Musinga JA and Murgor JA, with Gatembu JA dissenting) upheld the learned Judges decision on the issue of the High Court's jurisdiction in Al Ghurair Printing and Publishing LLC v Coalition for Reforms

and Democracy & 2 Others, [2017] eKLR, and in addition noted that the Supreme Court of Kenya in Communications Commission of Kenya vs Royal Media Services Ltd [2014] eKLR held that the Constitution of Kenya, 2010 has elevated the process of Judicial Review to a pedestal that transcends the technicalities of common law, and as a result all power of judicial review in Kenya is founded upon the Constitution.

In the present application, the Applicant's case is that the Fifth Tender is related to the First, Second, Third and Fourth Tenders, which are already the subject of the substantive Notice of Motion that is pending before this Court. As this Court is the one currently seized of proceedings relating to the said Tenders and not the Respondent, then this Court is the appropriate forum to give a decisive determination if indeed such a relationship exists or not, and to provide the appropriate orders as the case may be. In any event, the Applicant is also entitled to independently seek such relief under section 174 of the Act."

39. The tender for Prequalification of Suppliers for Provision of Advertising and Media Services (Tender No KP1/9A. 2/OT/50/CS/17-18) was the Fifth Tender referred to in the said ruling. The findings of this Court in the said ruling still remain valid, and it is also notable that to hold that this Court has no jurisdiction as regards the issues raised with respect to Tender No KP1/9A. 2/OT/50/CS/17-18 would be tantamount to allowing parties to circumvent and defeat judicial review proceedings by floating new tenders during the pendency of proceedings challenging related tenders, which would be in abuse of the process of Court.

40. In considering the remaining issues, it is imperative at the outset to delineate the parameters of this Court's powers in judicial review. The broad grounds for the exercise of judicial review jurisdiction were stated in the case of Pastoli vs Kabale District Local Government Council & Others [2008] 2 EA 300 at pages 303 to 304 thus:

"In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University*, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).

Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality.....

Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph "E".

Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876)."

41. In addition, the parameters of judicial review were addressed by the Court of Appeal in the case of Municipal Council of Mombasa vs Republic & Umoja Consultants Limited, Nairobi Civil Appeal No. 185 of 2001, [2002] eKLR as follows:

"The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review."

42. It was also emphasized by the Court of Appeal in Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) KLR that while *Article 47* of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act reveals an implicit shift of judicial review to include aspects of merit review of administrative action, reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act.

#### *On Whether the Respondent acted in error of law*

43. In determining whether or not the 1<sup>st</sup> Respondent acted in error of law, regard is made to the description of illegality by Lord Diplock in Council of Civil Service Union v Minister for the Civil Service [1985] AC 374 at 410 as a failure by a public body to understand correctly the law that regulates its decision making power, or a failure to give effect to that law.

44. This Court is also guided by the expose on when errors of law will arise in decisions made by a public body, as expounded in Halsbury's Laws of England, 4<sup>th</sup> Edition at paragraph 77 as follows:

"There is a general presumption that a public decision making body has no jurisdiction or power to commit an error of law;

thus where a body errs in law in reaching a decision or making an order, the court may quash that decision or order. The error of law must be relevant, that is to say it must be an error in the actual making of the decision which affects the decision itself. Even if the error of law is relevant, the court may exercise its discretion not to quash where the decision would have been no different had the error not been committed. Where a notice, order or other instrument made by a public body is unlawful only in part, the whole instrument will be invalid unless the unlawful part can be severed. In certain exceptional cases, the presumption that there is no power or jurisdiction to commit an error of law may be rebutted, in which case the court will not quash for an error of law made within jurisdiction in the narrow sense. The previous law which drew a distinction between errors of law on the face of the record and other errors of law is now obsolete. A public body will err in law if it acts in breach of fundamental human rights; misinterprets a statute, or any other legal document, or a rule of common law, takes a decision on the basis of secondary legislation, or any other act or order, which is itself ultra vires; takes legally irrelevant consideration into account, or fails to take relevant considerations into account, admits inadmissible evidence, rejects admissible and relevant evidence, or takes a decision on no evidence, misdirects itself as to the burden of proof, fails to follow the proper procedure required by law; fails to fulfil an express or implied duty to give reasons or otherwise abuses its power.”

45. It is therefore necessary when deciding whether a law has been correctly interpreted, to identify and construe the scope of the applicable statutory provisions. In the present application, two allegations are made by the Applicant as regard the erroneous interpretation of the law by the Respondent in the impugned decision. The first is as regards its interpretation of the law on the tender validity period, and specifically that the Respondent erred in failing to find that the tender validity period as regards the Tender for Provisions of Advertising & Media Services (Tender Number KP1/9AA-2/OT/46-CS/15-16) was held in abeyance once the award was challenged, and until the matter was concluded.

46. The Respondent’s decision in this regard was as follows:

**“The Board has considered the documents and the submissions made by the parties regarding the above four grounds and finds based of the undisputed facts before it that the first tender was advertised on 8<sup>th</sup> Mach, 2016 and closed on 29<sup>th</sup> March, 2016 with a tender validity period of 120 days. A period of 120 days in the normal course of things therefore lapsed on 6<sup>th</sup> June, 2016.**

It is abundantly clear from the provisions of the Act and more particularly from the provisions of Section 87(1) of the said Act that a tender can only be awarded during the tender validity period. The said Section 87(1) of the Act provides as follows:

*Section 87(1): “Before the expiry of the period during which tenders remain valid, the accounting officer of the Procuring Entity shall notify in writing the person submitting the successful tender that his tender has been accepted.”*

This legal position is now well settled and has been the subject matter of several decisions by the High Court and the Board as illustrated by the case of Bricks Security Services Limited -vs- Egerton University PPARB Appl. No. 23 of 2018 where the board stated as follows at page 6 of the said decision:-

*“The Board finds that the Procuring Entity ought to have notified the successful tendered by 5<sup>th</sup> July, 2008. In this particular instance, the Procuring Entity did not do so until 9<sup>th</sup> July, 2008. The Board holds that the tender validity period expired on 5<sup>th</sup> July 2008 and since the Procuring Entity did not extend the period, the tender then lapsed with expiry of the tender validity period. In the circumstances, there was no tender to be awarded as the life of the tender had lapsed on 5<sup>th</sup> July, 2008.”*

It is also now trite that where the period of tender validity is due to expire the only option open to the Procuring Entity is to extend the tender validity period before the same expires. The tender validity period cannot therefore be extended when the same has already lapsed. This legal position is illustrated by among other decisions the case of Vulcan Limited –vs- Ministry of Health (PPARB Appl. No. 45 of 2004 where the Board held as follows:-

*“...The Board considers that with regard to its validity, a tender must be valid on the date it is opened and thereafter for the requisite duration indicated by the tender conditions. As such, the duration of the validity of a tender should be counted commencing from and including the date of tender opening and expiring on the last day indicated in the tender conditions.”*

The Board further declared as follows:-

*“That the proper procedure for the Procuring Entity to follow is to extend tender validity before it expires and before making an award and also to ensure that a bid bond must be valid at the time the award is being made by the tender committee...”*

Having set out the law, the Board will therefore proceed to examine the other issues raised as set out above in order to determine whether the same can upset the above general legal position and the first issue that the Board deems fit to consider is whether the existence of the various pending litigations between the same parties prevented the tender validity period from running.

The Board respectively finds that the existence of pending proceedings before the Board cannot prevent the tender validity

period from running. The Board further finds that the correct position is that under the provisions of Section 168 of the public Procurement and Asset Disposal Act which was in the same terms as the Public Procurement and Disposal Act (now repealed) a notice by the Secretary of the Review Board and any stay order contained therein can only affect the procurement process from proceedings further but cannot act as an extension of the tender validity period nor can it stop the tender validity period from running. This position was clearly set out by the Board in the case of Delta Guards (K) Ltd and Guardforce Security Ltd –vs- Kenya Power and Lighting Company Ltd (PPARB) Appli. No. 2 of 2009) where the Board held as follows:

*“The argument that time stopped running when a notice was issued by the secretary on 23<sup>rd</sup> September, 2008 is an afterthought and no stretch of argument on Section 94 of the Act can support that submission. A plain reading of Section 94 clearly shows that it only stops the Procuring Entity from taking further steps in the procurement proceedings. The tender validity period is governed by Section 6(1) of the Act as the Board has already held.”*

The board now turns to the Applicant’s contention that the Procuring Entity cannot terminate procurement proceedings on the ground that the tender validity period has lapsed. Under the provisions of Section 63(1) of the Act which states as follows,

*Section 63 (1) “An accounting officer of a procuring entity, any, at any time, prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies-*

*(a) the subject procurement have been overtaken by-*

*(ii) operation of law; or*

*(ii) substantial technological change*

*(b) .....”.*

The Board is of the respectful view that under the provisions of Section 63(1) (i) of the said Act, one of the grounds upon which a Procuring Entity can terminate procurement proceedings is on the ground that the same has been overtaken by the operation of law. It is common knowledge that one of the statutes enacted by parliament is the Public procurement and Asset Disposal Act, 2015. The said act requires at Section 87(1) that a tender must be awarded within the tender validity period. However once the tender validity period lapses the requirement under Section 87(1) of the Act cannot be met and that, in the Board’s view, amounts to the same thing as a procurement process being overtaken by operation of law.

In any event and as demonstrated by the above authorities once the tender there is even no need to terminate the same.

On the two last grounds set out above namely that the Procuring Entity ought to have extended the tender validity period owing to the pending litigations or that that letter of termination was not signed by the Procuring Entity’s accounting officer, the Board finds that the two grounds were not pleaded and cannot therefore ordinarily give rise to any legal remedy,

But even assuming that the Board was wrong on the above finding, the two grounds of attach would still not stand for the simple reason that Section 88 of the Act and Clause 3.25.2 of the tender document only gave the Procuring Entity the discretion to extend time and if it failed to do so that factual position cannot be changed since the undisputable position fact still remains that the tender literally died when the stipulated period of 120 days lapsed. The said Clause 3.25.2 of the tender document stated as follows:

*“Validity of Tenders*

*1.25.1 .....*

*1.25.2 In exceptional circumstances KPLC may extend the Tender Validity period. The extension shall be in writing. The tender security provided under paragraph 3.24 shall also be extended. A tendered shall not be required nor permitted to modify its tender during the extended period.”*

Before proceeding to consider the second issue raised by the Applicant, the Board wonders how the Applicant’s insistence on having a tender which has ceased to exist be evaluated to conclusion. This is for the obvious reason that even if this tender is evaluated and recommendation of award made to the Applicant, no lawful letter of notification of award can be issued to the Applicant under the provisions of Section 87(1) of the Act. Such an action would amount to what the Board would considers as a futile exercise or an act in vain and just like nature therefore a Procuring Entity and bidders should not engage is what amount to an academic exercise.

The Board therefore finds that there was no breach of the law by the Procuring Entity in undertaking the termination of the first tender and this ground of review therefore fails and is disallowed.”

47. The provisions on the tender validity period are found in section 70( 6)(h) of the Act, which provides that the contents of a standard tender documents shall include a statement of the period during which tenders must remain valid. Section 88 of the Act further provides as



follows as regards extension of this period:

**“(1) Before the expiry of the period during which tenders shall remain valid the accounting officer of a procuring entity may extend that period.**

**(2) The accounting officer of a procuring entity shall give in writing notice of an extension under subsection (1) to each person who submitted a tender.**

**(3) An extension under subsection (1) shall be restricted to not more than thirty days and may only be done once.**

**(4) For greater certainty, tender security shall be forfeited if a tender is withdrawn after a bidder has accepted the extension of bidding period under subsection (1).”**

48. Section 135 of the Act on the creation of procurement contracts is also relevant, and provides as follows:

**“ (1) The existence of a contract shall be confirmed through the signature of a contract document incorporating all agreements between the parties and such contract shall be signed by the accounting officer or an officer authorized in writing by the accounting officer of the procuring entity and the successful tenderer.**

**(2) An accounting officer of a procuring entity shall enter into a written contract with the person submitting the successful tender based on the tender documents and any clarifications that emanate from the procurement proceedings.**

**(3) The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period.**

**(4) No contract is formed between the person submitting the successful tender and the accounting officer of a procuring entity until the written contract is signed by the parties.**

**(5) An accounting officer of a procuring entity shall not enter into a contract with any person or firm unless an award has been made and where a contract has been signed without the authority of the accounting officer, such a contract shall be invalid. “**

49. Lastly, section 63(1) provides for termination of procurement proceedings as follows:

**“(1) An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies—**

**(a) the subject procurement have been overtaken by—**

**(i) operation of law; or**

**(ii) substantial technological change;**

**(b) inadequate budgetary provision;**

**(c) no tender was received;**

**(d) there is evidence that prices of the bids are above market prices;**

**(e) material governance issues have been detected;**

**(f) all evaluated tenders are non-responsive;**

**(g) force majeure;**

**(h) civil commotion, hostilities or an act of war; or**

**(i) upon receiving subsequent evidence of engagement in fraudulent or corrupt practices by the tenderer.”**

50. The relevant timelines in the matter that was before the Respondent were 8<sup>th</sup> March 2016 when the subject tender was advertised, 25<sup>th</sup> May 2016 when the tender was awarded to a third party, and 19<sup>th</sup> July 2017 when the Interested Party terminated the first tender on the ground that the tender validity period had expired on 27<sup>th</sup> July 2016. The Applicant filed the first Request for Review on 13<sup>th</sup> June 2016, on which a ruling was delivered on 4<sup>th</sup> July 2017. On 26<sup>th</sup> July 2017 the Applicant filed the second Request for Review. Therefore, the award was made, and the First Request for Review was filed before 27<sup>th</sup> July 2016 when it is alleged that the tender validity period had expired.

51. The question that needs to be answered by this Court is whether the Respondent correctly interpreted the provisions of the law on the effect of the litigation before it on the tender validity period. The Respondent in this respect held that a notice by the Secretary of the Review Board and any stay order contained therein can only affect the procurement process from proceedings further but cannot act as an extension of the tender validity period, nor can it stop the tender validity period from running. It in this respect relied on its previous decisions on this interpretation, which are not binding on this Court, and which were decided before the Public Procurement and Asset Disposal Act of 2015 was enacted.

52. I find that this position is erroneous for three reasons, Firstly, section 168 of the Act provides that upon receiving a request for a review under section 167, the Secretary to the Review Board shall notify the accounting officer of a procuring entity of the pending review from the Review Board and the suspension of the procurement proceedings in such manner as may be prescribed. The effect of a stay is to suspend whatever action is being stayed, including applicable time limits, as a stay prevents any further steps being taken that are required to be taken, and is therefore time-specific and time-bound.

53. Proceedings that are stayed will resume at the point they were, once the stay comes to an end, and time will continue to run from that point, at least for any deadlines defined by reference to a period of time, which in this case included the tender validity period. It would also be paradoxical and absurd to find that procurement proceedings cannot proceed, but that time continues to run for the same proceedings.

54. I am in this respect persuaded by the decision in **UK Highways A 55 Ltd vs Hyder Consulting (Uk) Ltd (2012) EWHC 3505 (TCC)** that proceedings had automatically continued from the point they left once a stay was lifted, and therefore time for service of particulars of a claim had expired in the interim period between when the initial stay expired and a second stay was agreed upon. It was also held in **R (H) vs Ashworth Special Hospital Authority (203) 1 WLR 127** that the purpose of a stay is to preserve the *status quo* pending the final determination of a claim for review, and to ensure that a party who is eventually successful in his or her challenge will not be denied the full benefit of his or her success. The relevant *status quo* that will determine a successful party's benefit in the instant case includes the tender validity period.

55. Secondly, section 135 of the Act provides for a standstill period of fourteen days between the notification of an award and the conclusion of a contract, to enable any party who wishes to challenge an award decision to do so. A plain interpretation of this section would therefore mean that as long as there is a challenge to an award decision, there is a standstill period, and no action can be taken on an award. In the event that there is no stay, there will then be a need for the Respondent or procuring entity to extend the tender validity period if it becomes necessary to do so to conclude the procurement proceedings.

56. Lastly, on extension of the tender validity period, the Respondent found that Clause 3.25.2 of the tender document only gave the Procuring Entity the discretion to extend time, and that if it failed to do so that factual position cannot be changed since the undisputable position fact still remains that the tender literally died when the stipulated period of 120 days lapsed. This is contrary to the specific construction of extension of time provided in section 59 the Interpretation and General Provisions Act which is as follows:

**“Where in a written law a time is prescribed for doing an act or taking a proceeding, and power is given to a court or other authority to extend that time, then, unless a contrary intention appears, the power may be exercised by the court or other authority although the application for extension is not made until after the expiration of the time prescribed.”**

57. I thus find that the interpretations by the Respondent of the applicable provisions on the tender validity period, in light of the proceedings before it, was erroneous for the foregoing reasons.

58. The second allegation of error was as regards the Respondent's findings on whether the Interested Party acted in breach of the provisions of Section 54(1) of the Act on splitting of tenders when it invited bids for three separate tenders. The Respondents finding in this regard was that it lacks jurisdiction to determine this issue under section 167 of the Act in view of the Applicant's own admission that it was not yet a candidate or a tenderer in the three tenders. This was a valid finding that cannot be faulted by this Court, and there was no error made on the part of the Respondent, as its jurisdiction is clearly delineated in section 167 of the Act as follows:

**“(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.**

**(2) A request for review shall be accompanied by such refundable deposit as may be prescribed in the regulations, and such deposit shall not be less than ten per cent of the cost of the contract.**

**(3) A request for review shall be heard and determined in an open forum unless the matter at hand is likely to compromise national security or the review procedure.**

**(4) The following matters shall not be subject to the review of procurement proceedings under subsection (1)—**

**(a) the choice of a procurement method;**

**(b) a termination of a procurement or asset disposal proceedings in accordance with section 62 of this Act; and**

**(c) where a contract is signed in accordance with section 135 of this Act.”**

***Whether the Applicant is entitled to the relief sought***

59. On the last issue as regards the relief sought, the Applicant has sought orders of certiorari, prohibition and mandamus. The Court of Appeal held in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996** *inter alia* as follows as regards the nature of the two judicial review orders:

““Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way... These principles mean that an order of *mandamus* compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter.”

60. This Court has found that the Respondent's findings as regards the tender validity period in its decision of 17<sup>th</sup> August 2017 were made in error of law. The Applicant is thus entitled to the order sought of certiorari to quash the impugned order. The effect of the order of certiorari once granted, will be to restore the status to the position it was before the said decision, which is that the Request for Review No 70 of 2017 by the Applicant will remain undecided.

61. As regards, the order of mandamus that is sought by the Applicant, *section 11 (1) (e) and (h) of the Fair Administrative Action Act* permits this court to remit a matter that has been quashed or set aside back to the decision maker for reconsideration. However, this Court cannot grant the orders of mandamus on the terms sought by the Applicant, as it cannot direct the Respondent to undertake its duties in a particular manner, nor can mandamus issue against the Interested Party, as it is the decision of the Respondent and not of the Interested Party that has been impugned by this Court.

62. Lastly, on the order of prohibition sought, the same is merited as the effect of remitting the Applicant's Request for Review back to the Respondent for consideration will be that there will be a stay under section 168 of the Act prohibiting any further proceedings on the subject matter of the Request for Review, and any actions by the Interested Party in this regard will therefore be unlawful.

63. In the premises, this Court orders as follows:

**1) The Applicant's Amended Notice of Motion dated 12<sup>th</sup> June 2018 is allowed in terms of the following orders:**

**a) An order of Certiorari be and is hereby issued to remove into this Court for quashing, the Respondent's decision dated 17<sup>th</sup> August 2017 in Request for Review No 70 of 2017.**

**b) An order of Prohibition be and is hereby issued prohibiting the Interested Party from evaluating, awarding and or implementing the tender for Prequalification Of Suppliers For Provision of Advertising & Media Services (Tender No. KPI/9A.2/OT/50/CS/17-18).**

**c) The Applicant's Request for Review No. 70 of 2017 is hereby remitted back to the Respondent for fresh hearing and determination in accordance with all the applicable laws.**

**d) That Respondent and Interested Party shall meet the costs of the Applicant's Amended Notice of Motion dated 18<sup>th</sup> June 2018.**

64. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 7<sup>TH</sup> DAY OF DECEMBER 2018

P. NYAMWEYA

JUDGE