



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI, MILIMANI LAW COURTS**

**JUDICIAL REVIEW DIVISION**

**JUDICIAL REVIEW APPLICATION NO. 74 OF 2018**

**In the matter of an application by Pelt Security Services Limited for Judicial Review orders**

**and**

**In the matter of Article 10, 22, 23 (3) (f), 47(1), 50(1), 165(6) &(7) and 259(1) of the Constitution.**

**and**

**In the matter of Fair Administrative Action Act, 2015**

**and**

**In the matter of Section 8 and 9 of the Law Reform Act, Chapter 26**

**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**

**and**

**In the matter of The County Government of Laikipia Tender for Provision of Security Services (Tender No. LCB/B18/2017-2018)**

**Republic.....Applicant**

**and**

**Public Procurement Administrative Review Board.....Respondent**

**County Government of Laikipia.....1<sup>st</sup> Interested Party**

**Sparklink International Limited.....3<sup>rd</sup> Respondent**

**Pelt Security Services Limited.....Ex-Parte Applicant**

**JUDGMENT**

***Introduction.***

1. Tendering plays a vital role in the delivery of goods and services in our society. It is for this reason that the Constitution obliges organs of state to ensure that a procurement process is fair, equitable, transparent, competitive and cost-effective. [1] Where the procurement process is shown not to be so, courts have the power to intervene.

2. Public procurement law contains the principles, policies and procedures that guide contracting public authorities and entities that buy works, goods or services on the market, with a view to ensure that public funds are spent efficiently, effectively, in a non-discriminatory and competitive manner, through transparent tendering processes.

3. The starting point for an evaluation of the proper approach to an assessment of the constitutional validity of outcomes under the State procurement process is Article 277 (1) of the Constitution which provides that when a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

4. The [Public Procurement and Asset Disposal Act](#)[2] (hereinafter referred to as the Act) and The Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as the Regulations) prescribes the framework within which procurement policy must be implemented. A decision to award a tender constitutes administrative action so the provisions of Article 47 of the Constitution and the Fair Administrative Action Act[3] from which a cause of action for the Judicial Review of administrative action arises, apply to the process.[4]

5. Section 3 of the Act provides that Public procurement and asset disposal by State organs and public entities shall be guided by the following values and principles of the Constitution and relevant legislation—(a) the national values and principles provided for under Article 10; (b) the equality and freedom from discrimination provided for under Article 27; (c) affirmative action programmes provided for under for under Articles 55 and 56; (d) principles of integrity under the Leadership and Integrity Act, 2012; (d) the principles of public finance under Article 201; (e) the values and principles of public service as provided for under Article 232; (e) principles governing procurement profession, international norms; (f) maximization of value for money; (g) ...and ....

6. Section 28 of the act provides that the functions of the Review Board shall be— (a) reviewing, hearing and determining tendering and asset disposal disputes; and (b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law.

7. Statutes do not exist in a vacuum.[5] They are located in the context of our contemporary democracy. The rule of law and other fundamental principles of democratic constitutionalism should be presumed to inform the exercise of all official powers unless Parliament expressly excludes them. There may even be some aspects of the rule of law and other democratic fundamentals which Parliament has no power to exclude.[6] The courts should therefore strive to interpret powers in accordance with these principles.

8. The Respondent dismissed the *ex parte* applicant's Request for Review on 7<sup>th</sup> February 2018 and ordered the procuring entity to proceed with the procurement in accordance with the law. In its Request for Review, the *ex parte* applicant had sought to nullify the award to the second Interested Party and an order awarding the tender to it plus costs.

9. The *ex parte* applicant now seeks to review the said decisions and seeks the following orders:-

*a. An order of Certiorari to quash the decision of the Public Procurement Administrative Review Board dated 7<sup>th</sup> February 2018 in Request for Review Application No. 13 of 2018.*

*b. An order of Mandamus to compel the first Interested Party to award the tender to the ex parte applicant.*

*c. Costs to be awarded to the ex parte applicant.*

10. It is convenient to state that an administrative decision is flawed if it is illegal. A decision is illegal if it: - (a) contravenes or exceeds the terms of the power which authorizes the making of the decision; (b) pursues an objective other than that for which the power to make the decision was conferred; (c) is not authorized by any power; (d) contravenes or fails to implement a public duty.

11. Judicial Review remedies are meant to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law. The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The instrument will normally be a statute or Regulations. The courts when exercising this power of construction are enforcing the rule of law, by requiring administrative bodies to act within the “four corners” of their powers or duties. They are also acting as guardians of Parliament’s will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of Parliament’s enactments.

12. Where discretion is conferred on the decision-maker the courts also have to determine the scope of that discretion and therefore need to construe the statute purposefully.[7] One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation.

### **Factual Matrix**

13. The *ex parte* applicant states that the Respondent failed to exercise its jurisdiction. It is alleged that the decision was affected by the fraud of a third party, namely; the second Interested Party. The *ex parte* applicant states that the second Interested Party declined to attend the hearing to produce an original certificate to rebut allegations of forgery. It is contended that the said failure was aimed at concealing the fraud by misrepresenting facts that misled the procuring entity, the first Interested Party. The *ex parte* applicant also alleges that the Respondent failed to uphold judicial standards of fairness. While admitting that the Respondent acted in good faith, the *ex parte* applicant avers that the Respondent erred through fraud committed by a third Party.

14. The *ex parte* applicant also states that the decision was procedurally unfair because the Respondent's failed to enforce its summons to the second Interested Party to produce the original certificate, hence, denied the *ex parte* applicant an opportunity to impugn the evidence, which

is a denial of the right to a fair hearing. It also alleges that the Respondent failed to contact the second Interested Party to confirm the genuineness of its refusal to attend, and, that, it acted unfairly by requiring the ex parte applicant to file an affidavit by Protective Security Industry Association, yet it did not require the same from the second Interested Party.

15. The ex parte applicant further states that the Respondent committed an error of law in that it failed to appreciate that in public law, the term fraud imputes no moral obliquity, but, it concerns due discharge of fiduciary duty. Also, it argues that, the decision failed to appreciate the deliberate misconduct by the second Respondent.

16. Additionally, the ex parte applicant states that the Respondent failed to take into account relevant considerations, such as, breach of section 87 (3) of the Act failing to notify the ex parte applicant that its tender was not successful, the reasons thereof and the successful tenderer; and, that, it breached section 135(3) of the act by entering into contract with the second Interested Party before the expiry of 14 days. Also, the ex parte applicant states that the Respondent breached section 138 (1) of the act by failing to publish and publicize the contract award.

17. Further, the ex parte applicant states that the Respondent acted irrationally and unreasonably, in that, the decision is not connected to the purpose of Article 227 of the Constitution, or the information before the Respondent and that it approbates and reprobates in finding that the certificate was not a forgery and at the same time finding that the same is a criminal offence under section 176 of the act.

18. The ex parte applicant also states that the second Interested Party did not satisfy the mandatory requirement number 10 of the Evaluation Criteria and therefore its bid was not the successful tender. Lastly, the ex parte applicant states that it "concluded" that the first Interested Party entered into a contract with the second Interested Party before notifying the ex parte applicant that its tender was not successful.

#### **Respondent's Replying Affidavit.**

19. The Respondent's Secretary, **Mr. Hennock Kirungu** swore the Replying Affidavit dated 28th May 2018. He averred that after the ex parte applicant filed the Request for Review, it served a copy thereof upon the first Interested Party notifying it of the pending Review and requiring it to make an appearance in accordance with Regulation 74 (1) and 74 (2) of the Public Regulations. He averred that the Respondent heard the parties, considered the parties pleadings and only took into consideration the facts presented before it and relevant to the issues, and, that, its decision was based on its finds that:- (a) the second Interested Party had attached to its bid the Protective Security Industry Association membership certificate dated 27th June 2017 showing that it was a member of the association, hence, its finding that it presented a valid certificate; (b) that the Respondent considered that ex parte applicant's submission that the said certificate was a forgery and noted that the said allegation was criminal in nature, hence, it lacked jurisdiction to determine the issue; (c) that no agreement was availed to support the allegation that the agreement was signed prematurely; (d) in making the decision, the Respondent considered all the documents of evidential value and submissions placed before it; (e) that the decision was within its mandate as per section 173 of the act; (f) that the applicant has not demonstrated unreasonableness, irrationality, impropriety or illegality.

#### **First Interested Parties Replying Affidavit.**

20. **Chrispin Jamba** swore the Replying Affidavit dated 4th April 2018. He averred that:- (a) the jurisdiction of the Respondent to review a decision of a procuring entity is donated by section 173 of the act; (b) it is a requirement that once a Request for Review is filed, the Respondent serves all the parties including the successful bidder; (c) that once a party is accorded an opportunity, it is their responsibility to ensure that they appear and adduce evidence; (d) failure by a party to appear does not divest the Respondent jurisdiction to hear and determine the complaint before it.

21. **Mr. Jamba** also averred that:- (a) whereas the appearance by the applicant and the procuring entity is mandatory in terms of Regulation 80 which stipulates consequences of non-appearance, the appearance of a successful bidder is not mandatory; (b) once a successful bidder is notified, that is sufficient; (c) failure by the second Interested Party to appear did not divest the Respondent of its jurisdiction; (d) the issue of the possible evidence the second Interested Party could or could not have produced had they appeared before the Respondent is an extraneous consideration, is highly speculative, and in any event, the burden of prove lied on the ex parte applicant to prove its case.

22. **Mr. Jamba** also averred that:- (a) there was no duty on the Respondent to force the second Interested Party or any of the parties to attend the hearing; (b) that the ex parte applicant did not submit any evidence to prove any of the grounds it alleges the Respondent failed to consider; (c) that the allegations of irrationality and unreasonableness are based on lack of appreciation of the jurisdiction of the Respondent as provided under the act; (d) the ex parte applicant has failed to appreciate that allegations of forgery are criminal in nature and cannot be proved by way of letters.

#### **23. Ex parte applicant's supplementary Affidavit.**

24. **Mr. Isaiah Mutura Kirema**, the ex parte applicant's Chief Executive Officer, swore the supplementary Affidavit dated 12th July 2018. He averred that the second Interested Party was bound by the Respondent's directive to attend hearing and that the membership certificate was a relevant issue before the Respondent.

#### **Issues for determination.**

25. I find that the following issues fall for determination, namely:-

- a. Whether the Respondent's jurisdiction remained constructively unexercised.
- b. Whether the decision is tainted by an error of law.

- c. Whether the Respondent failed to take into account relevant considerations.
- d. Whether the decision is irrational and unreasonable.
- e. Whether this court can engage in merit Review.

**a. Whether the Respondent's jurisdiction remained constructively unexercised.**

26. The crux of the ex parte applicant's counsel's argument as far as I understand it is that the issue of fraud was raised before the Respondent, that, the ex parte applicant proved the fraud, and, that the second Interested Party refused to attend the hearing to defend its membership certificate issued by the Protective Security Industry Association. Counsel argued that the Respondent's jurisdiction remained "constructively unexercised because it failed to compel the second Interested Party to attend the proceedings." He argued that the Respondent "failed to contact the second Interested Party to procure its attendance. Though admitting that the Respondent acted in good faith, counsel submitted that, "it erred by reason of fraud of the second Interested Party."

27. In his supplementary submissions, counsel argued that by dint of section **176 (1) (m)** of the act, the Respondent was under a duty to ensure compliance of its orders. He argued that the Respondent is not bound by rules of evidence, and, that there is nothing in sections **28** and **173** of the act barring the Respondent from hearing matters relating to fraud.[\[8\]](#)

28. The Respondent's counsel's rejoinder was that the Respondent acted within its statutory powers.

29. The first Interested Party's counsel argued that:- (a) the Respondent's jurisdiction is derived from the law and not from the attendance of the parties; (b) the statutory requirement that the Respondent serves all the parties under section **170** of the act does not extend to forcing or ensuring such parties appear before it; (c) that whereas Regulation **80** stipulates consequence of non-appearance by the applicant and the Respondent, it does not envisage consequences for non-attendance of a successful bidder, hence, such appearance is not mandatory; (d) that ex parte applicant had the burden of proving its assertions.

30. Section **170** of the act lists the parties to a review as:- **(a)** the person who requested the review; **(b)** the accounting officer of a procuring entity; **(c)** the tenderer notified as successful by the procuring entity; and, **(d)** such other persons as the Review Board may determine.

31. Regulation **74(4)** provides that "the Secretary shall, within fourteen days of the filing of the request, notify all other parties to the review of the filing and such parties may, at their own expense, obtain copies of the request for review. Regulation **75(1)** provides that "the Secretary shall give reasonable notice of the date fixed for hearing to all parties to the review." Further, Regulation **76** provides that "any party to a request filed under Regulation **73** shall, at the hearing thereof, be entitled to be represented by an advocate or any other person of his own choice."

32. Regulation **80** provides that "If on the day set for the hearing of a review for which due notification has been given- (a) the applicant appears and the procuring entity fails to appear, the hearing of the request for review shall proceed in the absence of the procuring entity unless the Review Board deems it fit to adjourn the hearing; (b) the procuring entity appears and the applicant does not appear, the request for review shall be dismissed unless the Board deems it fit to adjourn the hearing; (c) if both parties fail to appear, the request for review shall be dismissed unless the Board deems it fit to adjourn the hearing."

33. Whereas the above rule provides for attendance at the hearing and consequences of non-attendance, it does not mention an Interested Party. The ex parte applicant's argument is that the moment allegations of fraud were raised against the successful bidder who was named as an Interested Party in the Request for Review, the Review Board was duty bound to compel its attendance to answer the allegations. The ex parte applicant argues that failure to summon the second Interested Party amounted "to constructive failure to exercise its jurisdiction."

34. Jurisdictional error will occur where the decision-making body fails to exercise the jurisdiction conferred on it. This may be because the body actually declined to make the decision; alternatively, and more often, it is a 'constructive failure' to exercise jurisdiction. That is to say, the decision is made in a factual sense but as a result of the error the body failed to exercise the jurisdiction conferred upon it.[\[9\]](#) The difficulty is being more precise about the kind of error that will amount to a jurisdictional error or a failure to exercise jurisdiction.

35. A constructive error may be disclosed when a tribunal 'misunderstands the nature of its jurisdiction and, in consequence, applies a wrong test, misconceives its duty, fails to apply itself to the real question to be decided or misunderstands the nature of the opinion it is to form. Of the non-exhaustive list[\[10\]](#) of errors set out in *Craig v South Australia*,[\[11\]](#) we are concerned only with when making 'erroneous findings' amounts to jurisdictional error in relation to tribunal decisions. It is only in 'some circumstances' that such errors will affect a tribunal's exercise of power. As a rule, there is no error of law in simply making a wrong finding of fact.[\[12\]](#) The usual exceptions are where the factual error involves a 'jurisdictional fact', or if there is no evidence to support the finding of fact. Otherwise, so long as the inference is open on the material, however inadequate, any error will not be unlawful. This includes where an inference was drawn as a result of illogical or unsound reasoning. As Mason CJ said in *Australian Broadcasting Tribunal v Bond*:-[\[13\]](#)

*"Even if the reasoning whereby the Court reached its conclusion of fact were demonstrably unsound, this would not amount to an error of law on the face of the record. To establish some faulty (e.g. illogical) inference of fact would not disclose an error of law."*

36. Thus, at common law, want of logic is not synonymous with error of law. So long as there is some basis for an inference - in other words, the particular inference is reasonably open - even if that inference appears to have been drawn as a result of illogical reasoning, there is no place for Judicial Review because no error of law has taken place.

37. It should be recalled that the Review Board is the arbiter. It is required to hear the parties before it. It is enjoined to remain fiercely

independent. It cannot descend into the arena of the dispute or act in a manner that can be construed even in the slightest manner to suggest that it is assisting a party before it. Proper exercise of its jurisdiction includes maintaining its independence and remaining fiercely so. I find the submission on the alleged "constructive failure to exercise its jurisdiction" totally unfounded and lacking legal basis.

38. The *ex parte* applicant was required to adduce evidence to establish the alleged fraud. He who alleges must prove. It cannot make allegations and shift the burden to the arbiter of facts to summon a party or a witness help its case. The duty of the Respondent is to hear the parties before it. Regulation 80 stipulates consequences on non-attendance of the party Requesting the Review and the procuring entity. The Regulation does not mention an Interested Party. Had Parliament intended that the Respondent summons a party who does not appear, nothing would have been easier for it to do so, than to say so in clear terms.

39. Courts generally grant tribunals a degree of latitude when it comes to dealing with evidence. Courts have said that the weighing of various pieces of evidence is generally a matter for the tribunal, and 'merely to ignore "relevant material" does not establish jurisdictional error.'<sup>[14]</sup> There is no obligation on decision makers 'to refer to every piece of evidence and every contention made by an applicant in their written reasons'; and, inferences should not be drawn that an issue or evidence has been overlooked simply because a piece of evidence was not expressly discussed in the course of the reasons for decision.

40. A justification sometimes offered by courts on review for leaving matters of facts/evidence to tribunals is the advantage that decision-makers have over the supervising courts in relation to evaluating the evidence and assessing credibility. But if a court on review regards a tribunal's fact-finding methodology is deficient, the court will be disposed to intervene. None, the less, courts are reluctant to become involved in factual and evidentiary controversies. This is consistent with the proper limits on Judicial Review that requires courts not to intrude upon the merits of the decision. The Respondent made a final on the alleged fraud. Inviting this court to find otherwise on the same issue is a merit review.

41. Judicial intervention is posited on the idea that the objective is to ensure that the agency did remain within the area assigned to it by Parliament. If the agency was within its assigned area then it was *prima facie* performing the tasks entrusted to it by the legislature and hence not contravening the will of Parliament, then a court will not interfere with the decision. No argument has been presented before me to show that by "failing to summon the Interested Party," the Respondent acted outside its legal mandate or that it improperly exercised its discretionary powers. There is no provision of the law or the Regulations requiring the Respondent to summon an Interested Party. It follows that the argument that the Respondent's jurisdiction remained constructively unexercised if totally flawed and lacks legal basis. The reverse is correct. By proceeding to hear the case notwithstanding the fact that the second Interested Party did not attend, the Respondent acted within its jurisdiction. The Respondent was not statutorily required to summon the second Interested Party to answer the allegations raised by the *ex parte* applicant. Unfortunately, that is not what the law provides. Even where a Respondent fails to attend court, the case proceeds *ex parte* and that does not relieve the party alleging the burden of prove. The burden of prove remained on the shoulders of the *ex parte* applicant. I find no illegality on the part of the Respondent. The Respondent cannot be faulted for failing to "constructively exercise jurisdiction" where the law did not provide for it to summon an Interested Party.

42. The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The instrument will normally be the Constitution, a statute or delegated legislation. The courts when exercising this power of construction are enforcing the Rule of Law, by requiring public bodies to act within the "four corners" of their powers or duties. They are also acting as guardians of Parliament's will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of Parliament's enactments.

43. Determining whether a precondition is or is not a jurisdictional fact is always a question of statutory interpretation. If the statutory construction leads to the conclusion that Parliament intended that the factual reference can only be satisfied by the actual existence (or non-existence) of the fact or facts', the review court is required to give effect to that intention by inquiry into whether the fact or facts exist. If Parliament intended any other party (other than those listed in Regulation 80) to be served, nothing would have been easier to do than to state so. If Parliament intended the exercise of the Respondent's jurisdiction to be conditional upon the attendance of the parties, it would have provided so in clear terms. The *ex parte* applicant's argument of "constructive failure to exercise jurisdiction" lacks legal basis and must fail.

#### ***b. Whether the decision is tainted by an error of law.***

44. The *ex parte* applicant's counsel argued that the decision is amenable for review on grounds of error of law<sup>[15]</sup> because the Respondent failed to appreciate that fraud in administrative law does not possess its usual everyday meaning but rather no moral obliquity and that the second Interested Party's conduct constituted moral turpitude that is abhorred by public law.

45. The Respondent's counsel in his rejoinder argued that the purpose of Judicial Review is to ensure that the individual is given fair treatment and to ensure that the decision was arrived at in accordance with the law.<sup>[16]</sup>

46. On his part, the first Interested Party's counsel submitted that the Respondent acted within the law and that the allegation that the Respondent ought to have exercised criminal jurisdiction is misconceived in law.

47. Judicial Review is concerned with testing the legality of the administrative decisions. A classic statement of the scope and nature of judicial review is to be found in the judgment of Brennan J in *Attorney-General (NSW) v Quin*:-

*"The essential warrant for judicial intervention is the declaration and enforcing of the law affecting the extent and exercise of power: that is the characteristic duty of the judicature as the third branch of government...The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error."*<sup>[17]</sup>

48. At common law, errors of law must go to jurisdiction except in the case of applications under the writ of *certiorari*, which covers non-

jurisdictional errors of law on the face of the record. A decision does not 'involve' an error of law unless the error is material to the decision in the sense that it contributes to it so that, but for the error, the decision would have been, or might have been, different. [18] There is no error of law in making a wrong finding of fact. [19]

49. On review, if a court finds that a decision has been made unlawfully, the powers of the court will generally be confined to setting the decision aside and remitting the matter to the decision-maker for reconsideration according to law. [20] It follows from this that there will be circumstances in which although a decision is not the correct or preferable decision on the facts, it will not be open to Judicial Review. Conversely, there may be situations where a decision is the correct or preferable one, but may be set aside because it is subject to legal error.

50. Considering the issue of the alleged forgery, the Respondent observed that "the Board noted that the applicant did not provide the Board with any affidavit sworn by any member of the Protective Industry Association but only supplied the Board with letters alleging forgery. Forgery by its very nature is a serious offence and the applicant ought to have provided acceptable evidence whether by way of affidavit or otherwise to support the allegation of forgery."

51. To me, the above finding is clear. It cannot be described as an error of law or error of fact. The *ex parte* applicant was under a duty to provide evidence to prove its allegations. Section 107 (1) of the Evidence Act [21] provides that "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." Sub-section (2) provides that "when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person." The *ex parte* cannot make allegations, fail to submit evidence, and turn back to accuse the Respondent of committing an error of law for failing to uphold its argument or failing to summon another person to rebut the allegations. Courts do not go out to fish for evidence, they determine matters on the basis of the material presented before it.

52. I have severally stated that all cases are decided on the legal burden of proof being discharged (or not). **Lord Brandon** once remarked:- [22]

*"No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take."*

53. Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by **Rajah JA** in *Bristone Pte Ltd vs Smith & Associates Far East Ltd:-* [23]

*"The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him"*

54. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. As was held in **Republic vs. Kenya Power & Lighting Company Limited & Another** [24] thus:-

*"It is not enough for an applicant in judicial review proceedings to claim that a tribunal has acted illegally, unreasonably or in breach of rules of natural justice. The actual sins of a tribunal must be exhibited for judicial review remedies to be granted."*

55. Once it has been established that a statutory body has made its decision within its jurisdiction following all the statutory procedures, unless the decision is shown to be so unreasonable that it defies logic, the court cannot intervene to quash such a decision or to issue an order prohibiting its implementation since a Judicial Review court does not function as an appellate court. Besides, the purpose of Judicial Review is to prevent statutory bodies from injuring the rights of citizens by either abusing their powers in the execution of their statutory duties and function or acting outside of their jurisdiction. Judicial Review cannot be used to curtail or stop statutory bodies or public officers from the lawful exercise of power within their statutory mandates. [25] I find that the argument that the Respondent committed an error of law lacks substance either in law or in fact.

### ***c. Whether the Respondent failed to take into account relevant considerations.***

56. The *ex parte* Applicant's counsel submitted that the Respondent failed to take into account relevant considerations in that it focused only on the eligibility of the certificate, but ignored the fact that the first Interested Party breached section 87 (3), 135 (3) and 138 (1) of the act and argued that the Respondent is entitled to review the entire procurement process. [26]

57. The Respondents counsel cited *Kenya Pipeline limited vs Hyosun Ebara Co Ltd & two Others* [27] whereby it was held that the Review Board is a specialized body and is better equipped to handle disputes relating to breach of duty by the procuring entity.

58. The first Interested Party's counsel argued that the Respondent considered all the matters placed before it including the alleged breach of sections 87(3), 135(3) and 138(1) of the act. Further, he argued that where the proceedings are regular, certiorari will not issue. [28]

59. Section 87(3) of the act provides that "When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof."

60. Section 135(3) of the act provides that "The written contract shall be entered into within the period specified in the notification but not before 14 days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period."

61. Reaching at a decision on the basis of irrelevant considerations, or by disregarding relevant considerations, is one of the manifestations of irrationality. So, as stated in the case *R v Secretary of State for Social Services, ex parte Wellcome Foundation Ltd.*,<sup>[29]</sup> it is a reviewable error either to take account of irrelevant considerations or to ignore relevant ones, provided that if the relevant matter has been considered or the irrelevant one is ignored, a different decision or rule might (but not necessarily would) have been made. Many errors of law and fact involve ignoring relevant matters or taking into account of irrelevant ones. Ignoring relevant considerations or taking account of irrelevant ones may make a decision, or rule unreasonable.

62. As Cooke J pointed out in the case *Ashby v. Minister of Immigration*<sup>[30]</sup> considerations may be obligatory i.e. those which the Act expressly or impliedly requires the Tribunal to take into account and permissible considerations i.e. those which can properly be taken into account, but do not have to be.<sup>[31]</sup> Where the decision-maker fails to consider those obligatory considerations expressed or implied in the Act, the decision has to be invalidated. Whereas, in the case of permissive considerations, the decision-maker is not required to strictly abide to such considerations. Rather, the decision-maker is left at discretion to take the relevant considerations having regard to the particular circumstances of the case by ignoring those irrelevant ones from consideration. The number and scope of the considerations relevant to any particular decision or rule will depend very much on the nature of the decision or rule.

63. All that the courts do is to decide whether the particular consideration(s) specified by the complainant ought or ought not to have been taken into account.<sup>[32]</sup> In effect, under this head the courts only require the decision-maker to show that specified considerations were or were not adverted to. In technical terms, the burden of proof is on the applicant, but the respondent will have to provide a greater or less amount of evidence as to what factors were or were not considered and how they affected the decision. A mere catalogue of factors ignored or considered may not be enough.<sup>[33]</sup> It suffices to say that where the decision-maker fails to take relevant considerations into account but takes those irrelevant ones, there is high probability that the outcome of the decision may be affected by defects than not. So, the interference of the court to review such kind of decisions seems justifiable.

64. If, in the exercise of its discretion on a public duty, an authority takes into account considerations which the courts consider not to be proper, then in the eyes of the law it has not exercised its discretion legally. On the other hand, considerations that are relevant to a public authority's decision are of two kinds: there are mandatory relevant considerations (that is, considerations that the statute empowering the authority expressly or impliedly identifies as those that must be taken into account), and discretionary relevant considerations (those which the authority may take into account if it regards them as appropriate). If a decision-maker has determined that a particular consideration is relevant to its decision, it is entitled to attribute to it whatever weight it thinks fit, and the courts will not interfere unless it has acted in a *Wednesbury-unreasonable* manner. This is consistent with the principle that the courts are generally only concerned with the legality of decisions and not their merits.

65. When determining if a decision-maker has failed to take into account mandatory relevant considerations, the courts tend to inquire into the manner in which the decision-maker balances the considerations. However, once the decision-maker has taken into account the relevant considerations, the courts are reluctant to scrutinize the manner in which the decision-maker balances the considerations. This can be gleaned from the case of *R. v. Boundary Commission for England, ex parte Foot* (1983),<sup>[34]</sup> where the Court of Appeal of England and Wales was unwilling to overrule certain recommendations of the Commission as it had rightfully taken all the correct considerations laid down in the relevant statute. The Court emphasized that the weighing of those relevant considerations was a matter for the decision maker, not the courts.<sup>[35]</sup>

66. The above statement of law was endorsed in *Tesco Stores Ltd. v. Secretary of State for the Environment* (1995),<sup>[36]</sup> a *planning law* case. Lord Hoffmann discussed the "distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority".<sup>[37]</sup> His Lordship stated:-

*"Provided that the planning authority has regard to all material considerations, it is at liberty (provided that it does not lapse into Wednesbury irrationality) to give them whatever weight the planning authority thinks fit or no weight at all."*

67. When exercising a discretionary power a decision-maker may take into account a range of lawful considerations. Some of these are specified in the statute as matters to which regard may be had. Others are specified as matters to which regard may not be had. There are other considerations which are not specified but which the decision-maker may or may not lawfully take into account.<sup>[38]</sup> If the exercise of a discretionary power has been influenced by considerations that cannot lawfully be taken into account, or by the disregard of relevant considerations required to be taken into account (expressly or impliedly), a court will normally hold that the power has not been validly exercised.

68. It may be immaterial that an authority has considered irrelevant matters in arriving at its decision if it has not allowed itself to be influenced by those matters<sup>[39]</sup> and it may be right to overlook a minor error of this kind even if it has affected an aspect of the decision.<sup>[40]</sup> However, if the influence of irrelevant factors is established, it does not appear to be necessary to prove that they were the sole or even the dominant influence. As a general rule it is enough to prove that their influence was material or substantial. For this reason there may be a practical advantage in founding a challenge to the validity of a discretionary act on the basis of irrelevant considerations rather than extraneous purpose, though the line of demarcation between the two grounds of invalidity is often imperceptible.<sup>[41]</sup>

69. If the ground of challenge is that relevant considerations have not been taken into account, the court will normally try to assess the actual or potential importance of the factor that was overlooked,<sup>[42]</sup> even though this may entail a degree of speculation. The question is whether the validity of the decision is contingent on strict observance of antecedent requirements. In determining what factors may or must be taken into account by the authority, the courts are again faced with problems of statutory interpretation. If relevant factors are specified in the enabling Act it is for the courts to determine whether they are factors to which the authority is compelled to have regard.<sup>[43]</sup> If so, may other, non-specified considerations be taken into account or are the specified, considerations to be construed as being exhaustive?

70. A decision may be invalid (where an irrelevant consideration has been taken into account by a decision-maker. Two issues commonly arise in applying this criterion; one what matters were taken into account by a decision-maker? This is primarily an issue of fact, to be answered by analysis of evidence; and, two, were any of the matters that were taken into account an irrelevant consideration? This is

commonly an issue of law, resolved by construction of the statute that confers a power. A criteria of relevance may also be found outside a statute, by reference to other aspects of the legal framework within which decision-making occurs.

71. A court will be **cautious** in deciding that an issue that was taken into account was irrelevant. In the simplest scenario, the legislation will exhaustively list the considerations or factors that can be taken into account. However, more often it will be necessary to draw inferences from other features of the legislation, including; Language of the statute, Purpose or object, The subject matter of the statute, The nature of the power being exercised and The nature of the office held by the decision-maker.

72. The principal focus will always be the words of the statute but other legal assumptions may be taken into account by the court, such as: A general legal presumption that legislation can never be administered to advance the personal interests of the decision-maker; International conventions; Humanitarian considerations; Racial and sexual bias would be an irrelevant consideration as a result of anti-discrimination legislation and Serious factual errors may be equated with irrelevant considerations.

73. A conclusion that a particular matter was considered can often be drawn from such evidence as:-A statement of reasons; Contemporaneous administrative decisions; Reliance by the decision maker upon an irrelevant policy statement.

74. A reading of the decision of the Review Board shows that the ex parte applicant raised the same grounds before the Review Board. Flowing from the material and the arguments before it, the Board framed and considered one primary issue, namely, whether the procuring entity complied with the law and the tender documents in awarding the tender.

75. Judicial review is not the re-hearing of the merits of a particular case. Rather, it is where a court reviews a decision to make sure that the decision-maker used the correct legal reasoning or followed the correct legal procedures. Judicial review is a more limited right than a right of appeal. The limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind. It is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion, which the legislator has vested in the administrator. Its role is to set limits on the exercise of that discretion, and a decision made within those boundaries cannot be impugned. [44]

76. The court will merely require the decision-maker to take the relevant considerations into account; it will not prescribe the weight that must be accorded to each consideration, for to do so could constitute a usurpation of the decision-maker's discretion. [45] The law remains, as I see it, that when a functionary is entrusted with a discretion, the weight to be attached to particular factors, or how far a particular factor affects the eventual determination of the issue, is a matter for the functionary to decide, and as he/it acts in good faith (and reasonably and rationally) a court of law cannot interfere.

77. In my view there were no grounds for finding that the Respondent failed to take account of relevant considerations when making its decision. A reading of the impugned decision leaves me with no doubt that the Respondent did not fail take into account relevant considerations nor did it take into account irrelevant considerations.

**d. Whether the decision is irrational and unreasonable.**

78. The ex parte Applicant's counsel submitted that the decision is irrational and unreasonable [46] because it is not connected to the purpose of Article 227 of the Constitution, nor, was it within the purview of section 176 of the act. He argued that under section 7 (2) (i) (iii) (iv) of the Fair Administrative Action Act, [47] a decision is amenable to Judicial Review on grounds of unreasonableness and irrationality. He cited *Republic vs Inspector General of Police & Another ex parte Patrick Macharia Nderitu* [48] where it was held that to succeed in an application for Judicial Review, an applicant has to show that the decision or act complained of is tainted with illegality, irrationality or procedural impropriety.

79. The first Interested Party's counsels submission was that that the applicant has failed to establish that the Respondent acted unreasonably or irrationally within the Wednesbury Principle.

80. Addressing a similar issue in *Republic v Public Procurement Administrative Review Board ex parte Trippex Construction Company Limited & another* [49] I observed that Rationality, as a ground for the Review of an administrative action is dealt with in Section 7(2) (i) of Fair Administrative Action [50] which provides that:-

“ A court or tribunal under subsection (1) may review an administrative action or decision, if-

i. the administrative action or decision is not rationally connected to-

- a) the purpose for which it was taken;
- b) the purpose of the empowering provision;
- c) the information before the administrator; or
- d) the reasons given for it by the administrator.”

81. Chaskalson P, in *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* stated that :-[51]

*“The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle.”*

82. In applying the test of rationality, the reviewing Court will ask: is there a rational objective basis justifying the connection made by the administrative decision-maker between the material made available and the conclusion arrived at.[\[52\]](#)

83. Reasonableness, as a ground for the review of an administrative action is dealt with in Section 7 (2) (k) of the Fair Administrative Action Act.[\[53\]](#) A court or tribunal has the power to review an administrative action if the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*[\[54\]](#) O’Regan J approved the reasonableness test which was stated as follows by Lord Cooke in *R v Chief Constable of Sussex, ex parte International Trader’s Ferry Ltd*.[\[55\]](#)

*“The simple test used throughout was whether the decision in question was one which a reasonable authority could reach. The converse was described by Lord Diplock... as ‘conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt’. These unexaggerated criteria give the administrator ample and rightful rein, consistently with the constitutional separation of powers. ... Whatever the rubric under which the case is placed, the question here reduces, as I see it, to whether the chief constable has struck a balance fairly and reasonably open to him.”*

84. The test of *Wednesbury unreasonableness* has been stated to be that the impugned decision must be “objectively so devoid of any plausible justification that no reasonable body of persons could have reached it[\[56\]](#) and that the impugned decision had to be “verging on absurdity” in order for it to be vitiated.[\[57\]](#) In *Prasad v Minister for Immigration*,[\[58\]](#) the Federal Court of Australia held that in order for invalidity to be determined, the decision must be one which no reasonable person could have reached and to prove such a case required “something overwhelming.” It must have been conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt, and when “looked at objectively... so devoid of any plausible justification that no reasonable body of persons could have reached them”.

85. A decision which fails to give proper weight to a relevant factors may also be challenged as being unreasonable.[\[59\]](#) It is a well-established principle that if an administrative or quasi-judicial body takes into account any reason for its decision which is bad, or irrelevant, then the whole decision, even if there are other good reasons for it, is vitiated.[\[60\]](#)

86. In my above cited decision, I observed that Review by a court of the reasonableness of decision made by another repository of power is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process but also with whether the decision falls within a range of possible, acceptable outcomes which are defensible with respect to the facts and law. Differently stated, the following propositions can offer guidance on what constitutes unreasonableness:-

- i. *Wednesbury unreasonableness is the reflex of the implied legislative intention that statutory powers be exercised reasonably;*
- ii. *This ground of review will be made out when the Court concludes that the decision fell outside the area of decisional freedom which that legislative assumption authorizes, that is, outside the “range” within which reasonable minds may differ;*
- iii. *The test of unreasonableness is whether the decision was reasonably open to the decision-maker in the circumstances of the case. To say that the decision was “not reasonably open” is the same as saying that “no reasonable decision maker” could have made it;*

87. If a statute which confers a decision-making power is silent on the topic of reasonableness, that statute should be construed so that it is an essential condition of the exercise of the powers that it be exercised reasonably. The legal standard of reasonableness must be the standard indicated by the true construction of the statute. It is necessary to construe the statute because the question to which the standard of reasonableness is addressed is whether the statutory power has been abused.

88. Legal unreasonableness comprises any or all of the following, namely; specific errors of relevancy or purpose; reasoning illogically or irrationally; reaching a decision which lacks an evident and intelligible justification such that an inference of unreasonableness can be drawn, even where a particular error in reasoning cannot be identified; or giving disproportionate or excessive weight — in the sense of more than was reasonably necessary — to some factors and insufficient weight to others.[\[61\]](#)

89. The court’s role remains strictly supervisory. It is concerned with determining whether there has been a lawful exercise of power having regard, in particular, to the terms, scope and purpose of the statute conferring the power. In circumstances where reasonable minds might differ about the outcome of, or justification for, the exercise of power, or where the outcome falls within the range of legally and factually justifiable outcomes, the exercise of power is not legally unreasonable simply because the Court disagrees, even emphatically, with the outcome or justification. If there is an evident, transparent and intelligible justification for the decision or if the decision is within the ‘area of decisional freedom’ of the decision-maker, it would be an error for the court to overturn the decision simply on the basis that it would have decided the matter differently.

90. I have carefully examined the impugned decision. I have also considered the final orders made. There is nothing to show that a reasonable Tribunal, faced with the same set of facts and the law would have arrived at a different conclusion. In other words, applying the above tests of unreasonableness and irrationality, I find that the *ex parte* applicant has not demonstrated that the decision is tainted with unreasonableness or irrationality.

91. It is trite that Judicial intervention in Judicial Review matters is limited to cases where the decision was arrived at arbitrarily, capriciously or *mala fide* or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose, or where the functionary misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or where the decision of the functionary was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter.

92. It has been said repeatedly that<sup>[62]</sup> The Review Board is a specialized statutory tribunal established to deal with all complains of breach of duty by the procuring entity. From the nature of powers given to the Review Board including annulling, anything done by the procurement entity and substituting its decision for that of the procuring entity that the administrative review envisaged by the Act is indeed an appeal. From its nature the Review Board is obviously better equipped than the High Court to handle disputes relating to breach of duty by procurement entity. It follows that its decision in matters within its jurisdiction should not be lightly interfered with.

93. An administrative functionary that is vested by statute with the power to consider and make a decision is generally best equipped by the variety of its composition, by experience, and its access to sources of relevant information and expertise to make the right decision. The Court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary.

94. The essence of a discretion in the true sense is that, if the repository of the power follows any one of the available courses, he would be acting within his powers, and his exercise of power could not be set aside merely because a Court would have preferred him to have followed a different course among those available to him. A discretion in the true sense is found where the functionary has a wide range of equally permissible options available to it. There is no argument before me that the Respondent abused its discretion or acted outside its permissible range of discretion.

95. In contrast, where a body has a discretion in the loose sense, it does not necessarily have a choice between equally permissible options. Instead, a discretion in the loose sense – means no more than that the body is entitled to have regard to a number of disparate and incommensurable features in coming to a decision.

96. When a tribunal exercises a discretion in the true sense, it would ordinarily be inappropriate for a Review court to interfere unless it is satisfied that this discretion was not exercised – “judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a body or tribunal properly directing itself to all the relevant facts and principles.

97. A Judicial Review court ought to be slow to substitute its own decision solely because it does not agree with the permissible option chosen by the tribunal court. Where a tribunal is granted wide decision-making powers with a number of options or variables, a Judicial review court may not interfere unless it is clear that the choice the tribunal has preferred is at odds with the law. If the impugned decision lies within a range of permissible decisions, a Judicial Review court may not interfere only because it favours a different option within the range.

***e. Whether this court can engage in merit Review and if so, to what extent?.***

98. Counsel for the ex parte applicant in his supplementary submissions argued that section 7 (2)(i) of the Fair Administrative Action Act<sup>[63]</sup> expanded the scope of Judicial Review and as was held in *Suchan Investment Ltd vs Ministry of National Heritage & Culture & 3 Others*.<sup>[64]</sup> He submitted that the court can look into the merits, and, that the conflict between the Law Reform Act<sup>[65]</sup> and the Fair Administrative Action Act<sup>[66]</sup> must be resolved in favour of the later and cited *Republic vs Public Procurement Administrative Review Board ex parte Synber-Chemie Ltd*.<sup>[67]</sup> Further, he argued that the decision is amenable to review by dint of Article, 23 (3)(f), 47(3) and 165(6)&(7) of the Constitution.

99. The Respondents counsel termed this application as an appeal disguised as a Judicial Review Application. <sup>[68]</sup> He further argued that Judicial Review remedies are discretionary and that the court can decline them even where they are merited. <sup>[69]</sup> He also argued further that this court is not empowered to correct the Respondent's decision, <sup>[70]</sup>but, it must confine itself to illegality, impropriety of procedure and irrationality.<sup>[71]</sup>

100. The *ex parte* applicant's counsel cited the above two cases to buttress his argument. It important to examine the facts of the two cited cases so as to appreciate their relevancy and precedential value (if any) to the instant case. It is settled law that a case is only an authority for what it decides. This was correctly observed in *State of Orissa vs. Sudhansu Sekhar Misra* where it was held:-<sup>[72]</sup>

*"A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. On this topic this is what Earl of Halsbury, LC said in *Quinn vs. Leatham*,<sup>[73]</sup>that "Now before discussing the case of *Allen vs. Flood*<sup>[74]</sup> and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides..." (Emphasis added)*

101. The ratio of any decision must be understood in the background of the facts of the particular case. <sup>[75]</sup> It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it. <sup>[76]</sup> It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision. <sup>[77]</sup>

102. Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. <sup>[78]</sup> In deciding such cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another. <sup>[79]</sup> To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not

at all decisive. Precedent should be followed only so far as it marks the path of justice, but one must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches.[80] My plea is to keep the path of justice clear of obstructions which could impede it.

103. In *Republic vs Public Procurement Administrative Review Board ex parte Syner-Chemie*[81] cited by the *ex parte* applicants counsel, the question before the court was whether or not the court could grant extension of time in a Judicial Review proceeding. In the said case, the applicant had approached the court with an application for leave to apply for Judicial Review Orders. The court granted the leave sought and ordered the applicant to file and serve the substantive motion within **10** days from the date of the order. However, the applicant, instead of filing the substantive motion as ordered, filed a motion but whose prayers were a replica of the chamber summons for leave. In other words, there was no prayer for Judicial Review orders to issue pursuant to the leave granted.

104. The question to be answered in the said case was whether, upon such leave having been granted, in the absence of a valid Notice of Motion filed within the period allowed the could enlarge time under Order **50(6)** of the Civil Procedure Rules and /or Section **59** of the Interpretation and General Provisions Act,[82] as read with section **95** and **63 (e)** of the Civil Procedure Act[83] in order to permit the applicant to file the Notice of Motion within an enlarged period. The issue was enlargement of time in a Judicial Review proceeding.

105. Resolving the issue, the learned judge correctly observed that there are two schools of thought on the issue. *First*, is the school of thought which propagates that no such enlargement of time for filing of a substantive motion is envisaged in Order **53** of the Civil Procedure Rules. She added that the same proponents argue that owing to the special procedure adopted in Judicial Review proceedings, a party, other than invoking Order **53** of the Civil Procedure Rules cannot invoke the provisions of the Civil Procedure Act[84] and the Rules made there under.[85]

106. The court went on to identify the second of thought which supports the position that the court can extent the period stating:-

*"... the question is whether this court, in the present constitutional framework should still let the former intricacies and obscurities hamper the provision of effective redress to facilitate access to justice for all or should it adopt a flexible approach, which is not necessarily crafting or innovating its jurisdiction, but bearing in mind that much of the old case law on the reach of the Judicial Review remedies may not be of such practical relevance today... the Court must adopt the interpretation of the silent provisions that best effectuates the legislative intent.*

*In arriving at such a view, this court appreciates that Judicial Review has its origin in common law which is still applicable in our statutes today (see section 12 of the Fair Administrative Action Act, 2015), and which is judge made law, law made by judges in the absence of relevant constitutional or statutory provisions..."*

107. After analyzing the law and comparable jurisprudence, the court allowed the extension of time observing:-

*97. With the enactment of Fair Administrative Action Act, 2015 which Act implements Article 47 of the Constitution to give effect to the right to fair administrative action, the above Act effectively modifies the Law Reform Act and Order 53 of the Civil procedure Rules on flexibility in the application of the law to the circumstances of a particular case, with the sole intention of achieving substantive justice for the parties and especially where no prejudice is shown to be occasioned to the respondents or interested parties herein.*

*98. In my modest view, no statute can be enacted with the sole intention of doing an injustice to parties. Article 47 of the constitution elevates fair administrative action from a common law action to a constitutional right under the Bill of rights. The same position applies to Article 48 of the Constitution which commands the state to ensure that all persons are facilitated to access justice without any impediments.*

*99. Further, Article 20(3) (a) of the Constitution commands that in applying a provision of the Bill of Rights like in this case Article 47 of the Constitution on the right to fair administrative action which is invoked by the *exparte* applicant in this case, a court should **'develop the law to the extent that it does not give effect to a right or fundamental freedom', and to 'adopt the interpretation that most favours the enforcement of a right or fundamental freedom.'** [Emphasis added].in my view, it would hamper the enforcement of the right to administrative action if the law Reform Act and Order 53 of the Civil Procedure Rules were strictly interpreted to exclude any room for enlargement of time where there is sufficient cause shown by the party applying for such enlargement of time.*

108. Also cited is *Suchan Investment Limited v Ministry of National Heritage & Culture & 3 other* [86] where the Court of Appeal stated that:-

*"pursuant to Section 12 of the Fair Administrative Action Act, the general principles of common law and rules of natural justice continue to apply in review of administrative actions. The Section provides that the Act is in addition to and not in derogation from the general principles of common law and the rules of natural justice. This means that the common law principles on judicial review of administrative action under the heads of illegality, irrationality, procedural impropriety and proportionality are relevant and applicable in Kenya. (See the common law principles as expounded by Lord Diplock in **Council of Civil Service Unions v Minister for the Civil Service**[1985] AC 374). See also the principle of reasonableness as stated in the case of **Associated Provincial Picture Houses Ltd v Wednesbury Corp.** [1948] 1 KB 223.)"*

109. The core issue in the *Suchan* case was failure by the Minister to provide reasons for the impugned decision. The Court of Appeal observed:-

*"Under Article 47 (2) of the Constitution as read with the provisions of the Fair Administrative Actions Act of 2015, the*

common law position that there is no duty to give reasons for administrative decision is no longer a general principle of law in Kenya. A shift has taken place and there is requirement to give reasons for administrative decisions. **(See also Section 45 (2) (a) and (b) of the Employment Act No. 11 of 2007).** In **Judicial Service Commission -v- Hon. Justice Mutava Mbalu, Civil Appeal No. 52 of 2014**, Githinji JA in considering the duty to give reasons for administrative action in light of **Article 47 (2) of the Constitution** expressed that reasons for decision should be given as a matter of right where a right under the Bill of Rights has been or is likely to be adversely affected by the administrative action and not otherwise; that the right to be given written reasons for the decision can be limited by law for a reasonable and justifiable cause."

110. It is beyond argument that the facts in the two cases cited by the *ex parte* applicants counsel can be distinguished from the facts and circumstances in the instant case.

111. Section 12 of the Fair Administrative Action Act<sup>[87]</sup> bears the short title Principles of common law and rules of natural justice. It provides that "this Act is in addition to and not in derogation from the general principles of common law and the rules of natural justice." My reading of this provision is that the act did not throw through the window the common law principles governing Judicial Review matters. The only qualification, in my humble view, is, such common law principle must be read in a manner that is consistent with the Constitution.

112. It is evident that the *ex parte* applicants counsel seems to be confusing the expanded scope of Judicial Review remedies under our transformative Constitution and a merit review as opposed to a Judicial Review jurisdiction which is limited in scope to the traditional grounds for Judicial Review of illegality, irrationality and procedural impropriety. This is evident from the provisions of the Constitution and the Fair Administrative Action Act<sup>[88]</sup> he has cited. This can also be gleaned from his argument of what he refers to as "conflict" between the Law Reform Act<sup>[89]</sup> and the Fair Administrative Action Act.<sup>[90]</sup>

113. I find it apposite to refer to Republic v Speaker of the Senate & Another *ex parte* Afrison Export Import Limited & Another<sup>[91]</sup> where I expressed myself as follows:-

"Section 7 (1) of Part two of the sixth schedule to the Constitution provides that:-

(1) "All law in force immediately before the effective date continues in force and shall be construed with alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this constitution."

All law must conform to the constitutional edifice. It follows that the provisions of sections 8 and 9 of the Law Reform Act<sup>[92]</sup> and Order 53 of the Civil Procedure Rules must conform to the Constitution or be construed with such adaptations, alterations, modifications so as to conform with the Constitution.

As the Supreme Court of Appeal of South Africa observed<sup>[93]</sup> "All statutes must be interpreted through the prism of the Bill of Rights." This statement is true of decisions made by statutory bodies and State organs. The governing statute and the resultant decision must be interpreted through the prism of Article 47 of the Constitution. It is beyond argument that Article 47 codifies every person's right to fair administrative action that is *expeditious, efficient, lawful, reasonable and procedurally fair*.<sup>[94]</sup> Our constitution recognizes a duty to accord a person procedural fairness or natural justice when a decision is made that affects a person's rights, interests or legitimate expectations.

Judicial Review is now entrenched in the Constitution. The concept of Judicial Review under the Constitution of Kenya is similar to that under the Constitution of South Africa where the South African Court held in *Pharmaceutical Manufacturers Association of South Africa in re ex parte President of the Republic of South Africa & Others*<sup>[95]</sup> that "the common law principles that previously provided the grounds for Judicial Review of public power have been subsumed under the Constitution and, insofar as they might continue to be relevant to Judicial Review, they gain their force from the Constitution. In the Judicial Review of public power, the two are intertwined and do not constitute separate concepts." The court went further to say that there are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. Rather, there was only one system of law shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.

The entrenchment of the power of Judicial Review, as a constitutional principle should of necessity expand the scope of the remedy. First, parties, who were once denied Judicial Review on the basis of the public-private power dichotomy, should now access Judicial Review if the person, body or authority against whom it is claimed exercised a quasi-judicial function or a function that is likely to affect his rights. Second, the right to access the Court is now constitutionally guaranteed. This makes the requirement for the existence of a decision, order or proceedings should be read to include any administrative action as defined in section 2 of the Fair Administrative Action Act.<sup>[96]</sup> Third, an order of Judicial Review is one of the reliefs for violation of fundamental rights and freedoms under Article 23(3)(f). Fourth, section 7 of the Fair Administrative Action provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to a court in accordance with section 8; or a tribunal in exercise of its jurisdiction conferred in that regard under any written law. Section 7 (2) of the act provides for grounds for applying for Judicial Review.

Court decisions should boldly recognize the Constitution as the basis for Judicial Review. Judicial review is now a constitutional supervision of public authorities involving a challenge to the legal validity of the decision.<sup>[97]</sup> Time has come for our Courts to fully explore and develop the concept of Judicial Review in Kenya as a constitutional supervision of power and develop the law on this front. Courts must develop Judicial Review jurisprudence alongside the mainstreamed "theory of a holistic interpretation of the Constitution.

Judicial Review is no longer a common law prerogative, but is now a constitutional principle to safeguard the constitutional principles, values and purposes. The Judicial Review powers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by the Constitution.

*It is therefore my conclusion that all that an applicant is required to do is to demonstrate that the impugned decision whether it is a letter order or proceedings violates or threatens to violate the Bill of Rights or violation of the Constitution. No matter how noble and worthy of admiration the common law principles are, if they are simply irreconcilable with constitutional parameters, then the Constitution must prevail. Suffice to say that the ex parte applicants have in the recitals in the heading to their application invoked Articles 21 (1), 23 (3) (f), 25 (c), 27 (1), 47 (1), 49 (1) (d) & 50 (2) of the Constitution."*

114. Our Constitution is similar to the South African Constitution. Also, our Fair Administrative Action Act<sup>[98]</sup> resembles the South African PAJA. Judicial pronouncements from South African courts on the issue under consideration can offer useful guidance. In its decision in *Minister for Immigration and Citizenship v SZJSS*<sup>[99]</sup> the South African High Court reaffirmed the proper role of courts in reviewing administrative decisions. The Court held that: — courts should not delve into the merits of administrative decisions on the ground that the decision-maker did not give 'proper, genuine and realistic consideration' to the evidence before it — the weighing of evidence, and the preference for some evidence over other, is a matter for decision-makers, not for courts exercising supervisory jurisdiction.

115. The High Court affirmed what was said by Brennan J:-<sup>[100]</sup>

*"The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone."*

116. The Court then considered the origins of the phrase 'proper, genuine and realistic consideration,'<sup>[101]</sup> and noted that those comments related to the exercise of discretionary power in accordance with a rule or policy, without having regard to the merits of a particular case. The High Court also cited, with apparent approval, Basten JA's warning<sup>[102]</sup> concerning the language of 'proper, genuine and realistic consideration':-

*"That which had to be properly considered was 'the merits of the case'. Taken out of context and without understanding their original provenance, these epithets are apt to encourage a slide into impermissible merits review." (Emphasis added)*

117. In my view, the Constitution expanded the scope of Judicial Review. In the past it was believed that only powers conferred by statutes and exercisable by public authorities were the subject of courts' Judicial Review jurisdiction. This position has changed and the position today is that it is not the source of power or the kind of authority that matters; instead it is the nature of the function that is today considered by the courts as the principal gauge for the reviewability or otherwise of functions. The guiding principle is that so long as an individual's right stands to be affected by the decision or action of an authority, the action of such an authority will be subject to judicial control. The Court of Appeal of Kenya has stated that<sup>[103]</sup> "The law relating to judicial review had not yet reached the furthest or the last frontier and that courts must endeavor to expand the grounds of intervention depending on the circumstances before them."

118. Differently stated, the entrenchment of the power of Judicial Review, as a constitutional principle should of necessity expand the scope of the remedy and the discretion and the power of the court to in such cases guided by the purposes, values and principles of the Constitution and the constitutional dictate to develop the law on that front. Parties, who were once denied Judicial Review on the basis of the public-private power dichotomy, should now access Judicial Review if the person, body or authority against whom it is claimed exercised a quasi-judicial function or a function that is likely to affect his rights.

119. Addressing the issue whether a court in a Judicial Review proceeding can engage in a merit review, the Court of Appeal in *Energy Regulatory Commission v S G S Kenya Limited & 2 others*<sup>[104]</sup> as late at 11<sup>th</sup> May 2018, cautioned against "delving into the merits of the decision as one would do when dealing with an appeal." The Court of Appeal rendered itself as follows:-

*"In so doing, the learned Judge fell into error. Our holding on this point is consistent with a long line of decision of this Court including, quite recently, in **OJSC POWER MACHINES LIMITED, TRANSCENTRURY LIMITED & CIVICON LIMITED (CONSORTIUM) vs. PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD & 2 OTHERS [2017] eKLR** where it was stated that;*

*"Save for a limited scope, which we shall return to later, the court, considering a judicial review application, must never consider its role as appellate court and must avoid any temptation to go into the substance of the impugned decision itself or to ask questions, whether there was or there was no sufficient evidence to support the decision of the public body concerned. It is not for the court or individual judges to substitute their opinion for that of the public body constituted by law to decide the matter in question. See *Republic vs. Kenya Revenue Authority ex parte Yaya Towers Limited* (2008) Misc. Civil Appl. No. 374 of 2006. In judicial review proceedings, the mere fact that the public body's decision was based on insufficient evidence, or on misapplication of evidence, cannot be a ground granting judicial review remedies. Whether that decision was right or not, the affected party ought to challenge it on appeal. In reaching its determination, it must, however, be recognized that a tribunal or statutory body or authority has jurisdiction to err and the mere fact that in the course of its inquiry it errs on the merits is not a ground for quashing the decision by way of judicial review as opposed to an appeal. It is only an appellate tribunal which is empowered and in fact enjoined in cases of the first appeal to re-evaluate the evidence presented at the first instance and arrive at its own decision on facts. Whereas a decision may properly be overturned on an appeal, it does not necessarily qualify as a candidate for juridical review. See *East African Railways Corp. vs. Anthony Sefu Far-Es-Salaam* (1973) EA 327."*

See also **BIREN AMRITLAL SHAH & ANOR vs. REPUBLIC & 3 OTHERS [2013] eKLR**.

120. The argument propounded by the *ex parte* applicant is a clear invitation to this court to move away from the purpose of Judicial Review proceedings and delve into merit review which is outside the scope of Judicial Review proceedings. There is a clear distinction between the expanded scope of Judicial Review grounds and the role and scope of Judicial Review proceedings. Save in limited cases such as clear violation of Article 47 rights and the Fair Administration Act such as the right to give reasons as in the earlier cited case, a Judicial Review

should not delve into a merit review. A court of review is concerned only with the lawfulness of the process by which the decision was arrived at, and can set it aside only if that process was flawed in certain defined and limited respects. Judicial review is about the decision making process, not the decision itself. The role of the court in judicial review is supervisory. It is not an appeal and should not attempt to adopt the 'forbidden appellate approach'

121. As was held in *Republic vs Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji* [105]:-

*“Judicial review applications do not deal with the merits of the case but only with the process. In other words judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant.....”*

122. It is worth setting out a further passage from Brennan J's judgment in *Quin*:-[106]

*“Some advocates of judicial intervention would encourage the courts to expand the scope and purpose of judicial review, especially to provide some check on the Executive Government which nowadays exercises enormous powers beyond the capacity of the Parliament to supervise effectively. Such advocacy is misplaced. If the courts were to assume a jurisdiction to review administrative acts or decisions which are 'unfair' in the opinion of the court - not the product of procedural unfairness, but unfair on the merits - the courts would be assuming a jurisdiction to do the very thing which is to be done by the repository of an administrative power, namely, choosing among the courses of action upon which reasonable minds might differ:.... The law of judicial review cannot conflict with recognition of the legal effectiveness of the due exercise of power by the other branches of government. If judicial review were to trespass on the merits of the exercise of administrative power, it would put its own legitimacy at risk. ... If the courts were to postulate rules ostensibly related to limitations on administrative power but in reality calculated to open the gate into the forbidden field of the merits of its exercise, the function of the courts would be exceeded.”*

123. In view of my analysis herein above, I find and hold that the invitation by the ex parte applicant that this court engages in merit review in impermissible and lacks basis in law. A reading of section 12 of the Fair Administrative Action Act [107] and the authorities I have cited herein above reinforces my view.

#### **Conclusion and final determination.**

124. Section 173 of the Act provides for the powers of the Review Board. It provides that upon completing a review, the Review Board may do any of the following- (a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety; (b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings; (c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings; (d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and (e) order termination of the procurement process and commencement of a new procurement process.

125. The above section has been the subject of determination in numerous case in this Country. Discussing a similar provisions in The Public Procurement and Disposal Act, [108] which was repealed by the current act, the Court of Appeal in *Kenya Pipeline Ltd vs. Hyosung Ebara Company Ltd.* [109]

*“The Review Board is a specialized statutory tribunal established to deal with all complains of breach of duty by the procuring entity. By Reg. 89, it has power to engage an expert to assist in the proceedings in which it feels that it lacks the necessary experience. S. 98 of the Act confers very wide powers on the Review Board. It is clear from the nature of powers given to the Review Board including annulling, anything done by the procurement entity and substituting its decision for that of the procuring entity that the administrative review envisaged by the Act is indeed an appeal. From its nature the Review Board is obviously better equipped than the High Court to handle disputes relating to breach of duty by procurement entity. It follows that its decision in matters within its jurisdiction should not be lightly interfered with.”*

126. Lord Reid in *Animistic -vs- Foreign Compensation Commission* [110] held that:-

*“It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word 'jurisdiction' has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in questions. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question*

wrongly as it is to decide it rightly.”(Emphasis added).

127. Judicial intervention in Judicial Review matters is limited to cases where the decision was arrived at arbitrarily, capriciously or *mala fide* or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose, or where the functionary misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or where the decision of the functionary was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter. *No illegality, irrationality or procedural impropriety has been established in the manner in which the Board approached and determined the issues before it.* An administrative decision can only be challenged for **illegality, irrationality and procedural impropriety**. A close look at the material presented before me does not demonstrate any of the above. The decision has not been shown to be illegal or *ultra vires* and outside the functions of the Respondent. A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

128. Certiorari is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles.

129. The *ex parte* applicant seeks an order of *Mandamus* to compel the Respondent to award the tender to it. *Mandamus* is a judicial command requiring the performance of a specified duty which has **not been** performed.' Originally a common law writ, *mandamus* has been used by courts to review administrative action.<sup>[111]</sup> *Mandamus* is employed to compel the performance, when refused, of a ministerial duty, this being its chief use. It is also employed to compel action, when refused, in matters involving judgment and discretion, **but not to direct** the exercise of judgment or discretion in a particular way, nor to **direct the retraction or reversal of action already taken in the exercise of either.**<sup>[112]</sup>

130. The discretionary nature of the Judicial Review remedies sought in this application means that even if a court finds a public body has acted wrongly, it does not have to grant any remedy. Examples where discretion will be exercised against an applicant may include where the applicant's own conduct has been unmeritorious or unreasonable, for example where the applicant has unreasonably delayed in applying for judicial review, where the applicant has not acted in good faith, or where a remedy would impede the authority's ability to deliver fair administration, or where the judge considers that an alternative remedy could have been pursued.

131. An administrative functionary that is vested by statute with the power to consider and make a decision is generally best equipped by the variety of its composition, by experience, and its access to sources of relevant information and expertise to make the right decision. The Court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary.

132. It is not disputed that the Respondent is vested with powers to make the decision in question. No abuse of such powers has been alleged or proved. It has not been shown that this power was not exercised as provided for under the law. It has not been proved that the Respondent acted outside its powers or the decision was arrived at after taking into account irrelevant or extraneous matters. It is my view that the nature and circumstances of the decision fall into the category of areas which are not disturbed by the courts unless the decision under challenge is illegal, irrational, or un-procedural.

133. The power of the Court to Review an administrative action is extraordinary. It is exercised sparingly, in exceptional circumstances where **illegality, irrationality or procedural impropriety** has been proved. How that conclusion is to be reached is not statutorily ordained and will depend on established principles informed by the constitutional imperative that administrative action must be lawful, reasonable and procedurally fair.<sup>[113]</sup>

134. In view of my analysis of the issues discussed herein above and my conclusions, I find that the *ex parte* applicant has not demonstrated any grounds for this court to grant the orders sought. Accordingly, I dismiss the *ex parte* Applicant's Application dated 23<sup>th</sup> February 2018 with costs to the Respondents and the first Interested Party.

Orders accordingly.

**Signed, Delivered and Dated at Nairobi this 3<sup>rd</sup> day of December 2018**

**John M. Mativo**

**Judge**

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[1] Article 227 of the Constitution.

[2] Act No. 33 of 2015.

[3] Act No. 4 of 2015.

[4] See *Minister of Health and another vs New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) paras 95-97; *Bato Star Fishing (Pty) Ltd vs Minister of Environmental Affairs and others* 2004 (4) SA 490 (CC) paras 25-26.

[5] *R. vs Secretary of State for the Home Department Ex p. Pierson* [1998] A.C. 539 at 587 (Lord Steyn: "Parliament does not legislate in a

vacuum. Parliament legislates for a...liberal democracy based upon the traditions of the common law . . . and . . . , unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law”).

[6] *Jackson vs Attorney General* [2005] UKHL 56; [2006] 1 A.C. 262 at [120] (Lord Hope), [102] (Lord Steyn), [159] (Baroness Hale suggest that the rule of law may have become “the ultimate controlling factor in our unwritten constitution”; and see J. Jowell, “Parliamentary Sovereignty under the New Constitutional Hypothesis” [2006] P.L. 262.

[7] Sir Rupert Cross, *Statutory Interpretation*, 13th edn. (1995), pp.172–75; J. Burrows, *Statute Law in New Zealand*, 3rd edn. (2003), pp.177–99. For a recent example in Canada see *ATCO Gas and Pipelines Ltd vs Alberta (Energy and Utilities Board)* [2006] S.C.R. 140.

[8] Citing *Republic vs Public Procurement Administrative Review Board & Another ex parte Uto Creations Studio Limited* {2013}eKLR, *Kenya Pipeline Company Ltd vs Corporate Business Forms Limited* {2016}eKLR & *Consortium of H. Young & Co. (EA) Ltd & Yantai Jereh Petroleum Equipment and Technologies Co Ltd vs Public Procurement Administrative Review Board & 2 Othes* {2017}eKLR.

[9] 6 Kristen Walker QC, ‘*Jurisdictional Error Since Craig*’, (2016) 86 AIAL Forum 35 at 38 referring also to Gleeson CJ in *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [41].

[10] See *Kirk v Industrial Relations Commission* (2010) 239 CLR 531 at [73] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[11] {1995} 184 CLR 163.

[12] *Waterford v The Commonwealth* (1987) 163 CLR 54 at 77 (Brennan J). this was endorsed by the High Court in *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at 154 [44] (Gleeson CJ, Gummow, Kirby and Hayne JJ).

[13] *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 356 (Mason CJ, with whom Brennan, Toohey and Gaudron JJ agreed quoting *R v District Court; Ex parte White* (1966) 116 CLR 644 at 654 (Menzies J).

[14] *Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99 at [97].

[15] Citing *Republic vs Public Procurement Administrative Review Board & Another ex parte Uto Creations Studio Limited* {2013}eKLR.

[16] Citing *Seventh Day Adventist Church (EA)Ltd. vs Permanent Secretary, Ministry of Nairobi Metropolitan & Another* {2014}eKLR.

[17] {1990} 170 CLR 1, 35 – 36.

[18] *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 353 per Mason CJ. See also comments by Toohey and Gaudron JJ at 384.

[19] *Waterford v Commonwealth* (1987) 163 CLR 54, 77.

[20] *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559, 578-579, 598-600.

[21] Cap 80, Laws of Kenya

[22]In *Rhesa Shipping Co SA vs Edmunds* {1955} 1 WLR 948 at 955

[23]{2007} 4 SLR (R) 855 at 59

[24]{2013} eKLR.

[25] See **Githua J in *Republic vs. Commissioner of Customs Services ex-parte Africa K-Link International Limited Nairobi HC Misc. JR No. 157 of 2012* [2012] eKLR.**

[26] Citing *Republic vs Public Procurement Administrative Review Board & Another ex parte Uto Creations Studio Limited* {2013}eKLR.

[27] {2012}eKLR.

[28] Citing *East African Railways Corp vs Anthony Sefu Da es salaam* HCCA No. 19 of 1971.

[29] {1987} 1 WLR 1166.

[30] {1981} 1 NZLR 222 at 224.

[31] See *Wade & Forsyth*, p.381.

[32] See *Cannock Chase DC v Kelly* [1978] 1 All ER 152.

[33] *R v Lancashire CC, ex parte Huddleston* [1986] 2 All ER 941

[34] *R. v. Boundary Commission for England, ex parte Foot* [1983] EWCA Civ 10, [1983] Q.B. 600, C.A. (England and Wales).

[35] *Ibid.*

[36] *Tesco Stores Ltd. v. Secretary of State for the Environment* [1995] UKHL 22, [1995] 1 W.L.R. 759, H.L. (UK).

[37] *Ibid.*

[38] These three considerations were set out by Simon Brown L.J. in *R. v Somerset CC Ex p. Fewings* [1995] 1 W.L.R. 1037, at 1049.

[39] *R. v London (Bishop)* (1890) 24 Q.B.D. 213 at 226–227 (affd. on grounds not identical, sub nom. *Allcroft v Bishop of London* [1891] A.C. 666); *Ex p. Rice; Re Hawkins* (1957) 74 W.N. (N.S.W) 7, 14; *Hanks v Minister of Housing and Local Government* [1963] 1 Q.B. 999 at 1018–1020; *Re Hurle-Hobbs' Decision* [1944] 1 All E.R. 249

[40] *Hounslow LBC v Twickenham Garden Developments Ltd* [1971] Ch. 233, 271; *R. v Barnet & Camden Rent Tribunal Ex p. Frey Investments Ltd* [1972] 2 Q.B. 342; *Bristol DC v Clark* [1975] 1 W.L.R. 1443 at 1449–1450 (Lawton L.J.); *Asher v Secretary of State for the Environment* [1974] Ch. 208 at 221, 227.

[41] *Marshall v Blackpool Corp* [1935] A.C. 16; *Padfield v Minister of Agriculture, Fisheries and Food* [1968] A.C. 997; *R. v Rochdale MBC Ex p. Cromer Ring Mill Ltd* [1992] 2 All E.R. 761.

[42] *R. v London (Bishop)* (1890) 24 Q.B.D. at 266–227, 237, 244; *Baldwin & Francis Ltd v Patents Appeal Tribunal* [1959] A.C. 663 at 693 (Lord Denning); *R. v Paddington Valuation Officer Ex p. Peachey Property Corp Ltd* [1966] 1 Q.B. 380.

[43] On mandatory and directory considerations, see 5–049; e.g. *Yorkshire Copper Works Ltd v Registrar of Trade Marks* [1954] 1 W.L.R. 554 (HL held that the Registrar was bound to have regard to specific factors to which he was prima facie empowered to have regard); *R. v Shadow Education Committee of Greenwich BC Ex p. Governors of John Ball Primary School* (1989) 88 L.G.R. 589 (failure to have regard to parental preferences).

[44] As noted by Mason J (as he then was) in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*, {1986} 162 CLR 24, 40-41 citing *Wednesbury Corporation* [1948] 1 KB, 228.

[45] Lawrence Baxter *Administrative Law* 1ed (1984) at 505.

[46] Citing section 7(10)(i)(iii) &(iv) of the Fair Administrative Action Act ; *Mahon vs Air New Zealand Ltd. and Republic vs Inspector General of Police & Another ex parte Patrick Macharia Nderitu* {2015}eKLR.

[47] Act No. 4 of 2015.

[48] {2015}eKLR.

[49] JR No 605 2015.

[50] Act No. 4 of 2015.

[51] [2000 \(4\) SA 674](#) (CC) at page 708; paragraph 86.

[52] *Trinity Broadcasting (Ciskei) v ICA of SA* 2004(3) SA 346 (SCA) at 354H- 355A Howie P

[53] Act No. 4 of 2015.

[54] {2004} ZACC 15; [2004 \(4\) SA 490](#) CC at 512, para 44.

[55] {1995} 1 All ER 129 (HL) at 157.

[56] See *Bromley London Borough Council vs Greater London Council* {1983} 1 AC 768 (at [821]).

[57] *Puhlhofer v Hillingdon London Borough Council* [1986] 1 AC 484.

[58] {1985} 6 FCR 155

- [59] Minister for Aboriginal Affairs v Peko Wallsend Ltd (1986) 162 CLR 24 per Mason J (at 41).
- [60] See Patel vs Witbank Town Council 1931 TPD 284 Tindall J said (at 290);
- [61] Justin Gleeson, "Taking stock after Li", in Debbie Mortimer (ed) Administrative Justice and its Availability (Federation Press, 2015) 37.
- [62] Supra.
- [63] Act No 4 of 2015.
- [64] see Court of Appeal decision in *Kenya Pipeline Ltd vs. Hyosung Ebara Company Ltd* {2016}eKLR.
- [65] Cap 26, Laws of Kenya.
- [66] Act No 4 of 2015.
- [67]{2016}eKLR.
- [68] Citing *Municipal Council of Mombasa vs Republic & Another* {2002}eKLR & *Republic vs Kenya Power & Lighting Co Ltd & Another* {2013}eKLR
- [69] Citing *Republic vs Judicial Service Commission ex parte Pareno* {2004}KLR 203 at 219.
- [70] Citing *Republic vs Keny Revenue Authority ex parte Yaya Towers Ltd* {2008}eKLR.
- [71] Citing *Bivac International SA (Bureau Veritas)* (2005) 2EA 43 and *Pastoli vs. Kabale District Local Government Council and Others* {2008}2EA 300.
- [72] MANU/SC/0047/1967.
- [73] {1901} AC 495.
- [74] {1898} AC 1.
- [75] *Ambica Quarry Works vs. State of Gujarat and Ors.* MANU/SC/0049/1986.
- [76] Ibid.
- [77] *Bhavnagar University v. Palitana Sugar Mills Pvt Ltd* (2003) 2 SC 111 (vide para 59)
- [78] In the High Court of Delhi at New Delhi February 26, 2007 W.P.(C).No.6254/2006, *Prashant Vats Versus University of Delhi & Anr.* (Citing Lord Denning).
- [79] Ibid.
- [80] Ibid.
- [81] *Republic vs Public Procurement Administrative Review Board ex parte Syner-Chemie* {2016} eKLR.
- [82] Cap 2, Laws of Kenya.
- [83] Cap 21, Laws of Kenya.
- [84] Ibid.
- [85] Citing See *Republic Vs Kahindi Nyafula & 3 Others Exparte kilifi South East Farmers Co- Operative Society* [2014] e KLR by Angote J, applying *Welamudi vs The Chairman Electoral Commission of Kenya* [2002] KLR 285 and *Republic V Kenya Bureau of Standards & Others* [2006] EA 345.
- [86] {2016} eKLR.
- [87] Act No. 4 of 2015.
- [88] Ibid.

[89] Cap 26, Laws of Kenya.

[90] Act No. 4 of 2015.

[91] {2018}eKLR.

[92] Cap 26, Laws of Kenya.

[93] *Serious Economic Offences vs Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO and* [2000]

[94] Article 47(1) of the Constitution of Kenya, 2010

[95] 2000 (2) SA 674 (CC) at 33.

[96] Act No. 4 of 2015.

[97] See *Republic vs Commissioner of Customs Services Ex parte Imperial Bank Limited* {2015} eKLR.

[98] Act No. 4 of 2015.

[99] {2010} HCA 48.

[100] In *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 36.

[101] Which has its source in certain observations by Gummow J in *Khan v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 291.

[102] In *Swift v SAS Trustee Corporation* [2010] NSWCA 182 at [45].

[103] *Republic v Attorney General and Registrar of Societies* Miscellaneous Application 769 of 2004.

[104] {2018} eKLR.

[105] {2014} eKLR.

[106] *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 37-38.

[107] Act No. 4 of 2015.

[108] Act [No. 3 of 2005](#).

[109]{2012} eKLR.

**[110] {1969} 1 All ER 20.**

[111] W. GELLON & C. BYSE, *Administrative & Review Law, Cases and comments* 119-20 (5th ed. 1970). Originally, mandamus was a writ issued by judges of the King's Bench in England. American courts, as inheritors of the judicial power of the King's Bench, adopted the use of the writ.

[112] *Wilbur vs. United States ex rel. Kadrie*, 281 U.S. 206, 218 (1930). See also Jacoby, *The Effect of Recent Changes in the Law of "Nonstatutory" Judicial Review*, 53 GEO. IJ. 19, 25-26 (1964).

[113] See *Gauteng Gambling Board vs Silverstar Development* 2005 (4) SA 67 (SCA) paras 28-29