



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW CAUSE NO. 470 OF 2016

REPUBLIC.....APPLICANT

VERSUS

THE PRINCIPAL SECRETARY MINISTRY OF MINING.....RESPONDENT

EX-PARTE

AIRBUS HELICOPTERS SOUTHERN AFRICA (PTY) LTD

JUDGEMENT

Introduction

1. By a Notice of Motion dated 5th day of October, 2016 the applicant herein, **Airbus Helicopters Southern Africa (pty) Ltd**, sought the following orders:

1. An order of Mandamus to direct the respondent to execute the formal contract in respect of the Tender No. MOM/T/2015-2016 dated 9/11/2015 for the Supply, Delivery and Commissioning of a new helicopter.

2. An Order that the respondent does pay the cost of the proceedings.

Applicant's Case

2. According to the applicant, it is a company duly incorporated within the laws of South Africa and dealing substantially in manufacturing of helicopters and provision of efficient civil and military helicopter solutions to its customers from a diverse range of fields, such as national security services, search and rescue operations and tourism service providers.

3. In these proceedings it was averred by the applicant that on 9th November, 2015, the Ministry of Mining advertised for bids for a tender for the supply, delivery and commissioning of the new helicopter subsequent to which the applicant herein tendered its bid and was declared the successful tenderer. Pursuant thereto, on 3rd December 2015, the respondent wrote to the applicant informing it *inter alia* that its bid had been successful and that the contract documents would be prepared for the applicant's signature.

4. It was averred that the applicant did indeed accept the tender award by way of a letter dated 10th

December, 2015, following which the applicant began manufacturing the helicopter in accordance with the tender and on instructions from the applicant, Messrs. Kaplan & Stratton Advocates wrote to the respondent on 11th July, 2016, intimating the applicant's frustration with the respondent's inaction and calling for the respondent to finalize the terms of performance between the parties. Despite receiving the letter on 12th August, 2016, the respondent however failed and/or neglected to respond to the queries therein. Pursuant to clause 30 in Section C of the Tender, the applicant submitted a Performance Guarantee signed on 5th January, 2016 thereby performing its obligations under the Tender. According to the applicant, clause 28.2 of the Tender clearly stipulates that the "*notification of award will constitute the formation of the contract.*" In light of this clear provision within the Tender, the applicant proceeded to commence the manufacture of the Helicopter, thereby incurring significant costs to that end and this was communicated to the respondent by way of a letter dated 1st June, 2016.

5. The applicant averred in its above letter dated 1st June, 2016, it expressed its frustration with the respondent's delay in formalizing the contract between the parties in accordance with the tender and sought to have the entire process expedited but the respondent failed to respond to the letter. It was further contended that whereas In clause 29.1 further provides that "*at the same time as the Procuring entity will send the tenderer the contract form provided in the tender documents, incorporating all agreements between the parties*", the respondent failed to formalize the agreements between the parties and neglected the applicant's entreaties to perform its obligations under the tender in that respect.

6. The applicant averred that its representative met the representatives of the Ministry of Mining, with one such meeting being held on 17th December, 2015 during which the respondent assured the applicant that the contract would be formalized, but to no avail. The applicant lamented that in spite of its numerous requests to do so and the meetings held to discuss the formalization of the contract; the respondent failed and/or neglected to forward the contract documents for signature by the applicant, in accordance with the undertaking given in the Notification of award dated 3rd December, 2015, yet the respondent was required to forward the said contract documents within 14 days of its letter.

7. It was the applicant's case that seeing as the applicant has already commenced the process of constructing the helicopter, the respondent's failure to formalize the agreement between the parties will invariably cause the applicant substantial financial loss and damage to its business and the applicant will suffer substantial loss.

8. It was submitted on behalf of the applicant that the right to fair administrative action as enshrined under Article 47 of the Constitution has been the subject of substantial litigation both in Kenya and within the region, presumably in an effort to set parameters for what amounts to reasonableness in the actions taken by public bodies. The applicant reproduced the said Article which provides as follows:

"(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall –

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration.

9. It was submitted that pursuant to sub article (3) above, the ***Fair Administration Action Act of 2015*** was subsequently enacted to breathe life into Article 47 above and section 2 of the Act defines "administrative action" as:

(i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or

(ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.

10. In the applicant's view, the latter limb of the definition would apply with equal force to the circumstances of the case herein and for the significance of Article 47 reference was made to the decision of **Githinji, JA** in **Judicial Service Commission vs. Mbalu Mutava & Another [2015] eKLR** wherein he rendered himself thus:

“Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of *ultra vires* from which administrative law under the common law was developed.”

11. The applicant submitted that the procedural impropriety in this case lies in the Respondent's deafening silence following the ex parte Applicant's acceptance of the tender award and that the Respondent's failure to give any reasons for failing to adhere to its undertaking under the Notification of Award to deliver the contract documents for the ex parte Applicant's signature is a clear violation of the latter's rights under Article 47. Similarly, Article 227 binds procurement entities while contracting for goods and services to do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective, requirements which the Respondent flouted these. To the applicant, despite awarding the tender to the ex parte Applicant herein as the successful bidder, the Respondent failed to finalise the process by forwarding the contract documents as promised within the Notification of award and this failure constitutes bad faith, is unfair and a blatant contravention of the Applicant's rights under Article 47.

12. It was submitted that in addition to being procedurally unfair and in violation of its rights under the Constitution, the Respondent's inaction is unlawful, unreasonable and unfair and reference was made to **Paul Kuria Kiore vs. Kenyatta University [2016] eKLR** a case in which the Court relied on **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**, **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478 at 479**.

13. Based on the foregoing, it was contended that the Respondent's failure and refusal to abide by the terms of the Tender as well as the Notification of Award and its unending silence on the matter amount to action that is unlawful, unreasonable and unfair. In this respect the applicant relied on section 68(1) of the ***Public Procurement and Disposal Act***.

14. To the applicant, it was expected that since no clarifications or corrections were sought, the next stage as per the mandatory requirements of section 68 above was to execute the contract. Instead, the Respondent simply went quiet following notification of the award, despite the persistent efforts of the ex parte Applicant to finalise the contract. To it, there is therefore no reason, plausible or otherwise for the Respondent's failure to comply with the mandatory provisions of the above-mentioned provision as well as its undertaking under the notification of award hence the Respondent's argument as suggested in the Grounds of Opposition filed herein that the ex parte Applicant is seeking to enforce private law rights through a public law forum is without basis. In the applicant's view, section 68 provides the framework for entering into a contract post-notification of award and this is the right the ex parte Applicant seeks to enforce.

15. In this case it was contended that if a contract had been executed, perhaps such an argument would

have been available. However, no private law rights have arisen between the parties at all as no contract has been executed. Having refused and/ or neglected to enter into a contract with the Applicant, the Respondent has created a dispute in which only public law remedies are available. In that regard therefore, the only recourse available to the Applicant is that of judicial review. It was therefore contended that in conjunction with its Constitutional rights enumerated hereinabove, the ex parte Applicant's application before this Court is well founded and entirely merited.

16. Similarly, the argument that the Respondent is cash strapped is also misplaced since this is a matter of fact, which can only be interrogated by production of evidence and cannot under any stretch of the law be posited in a Grounds of Objection, a pleading whose sole purpose should be to present pure points of law in response to an application. The Applicant therefore urged this Court to disregard this allegation in its entirety.

17. According to the applicant, having determined that the Respondent has acted against the Applicant's right to fair administrative action and that such actions are unlawful, unreasonable and unfair, it is only just that an order compelling the Respondent to sign a formal contract be issued. To the applicant, the power available to this Honourable Court to grant the orders sought has been restated and entrenched in the law in Kenya, and was considered by the Court in **Republic vs. Commissioner of Customs Services Ex parte Imperial Bank Limited [2015] eKLR** where it relied on the holding of Nyamu J, as he then was, in **Republic vs. The Commissioner of Lands Ex parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998** where he stated *ex cathedra* that:

“The High Court has the same power as the High Court in England up to 1977 and much more because it has the exceptional heritage of a written Constitution and the doctrines of the common law and equity in so far as they are applicable and the Courts must resist the temptation to try and contain judicial review in a straight jacket...Although judicial review has been bequeathed to us with defined interventions namely illegality, irrationality and impropriety of procedure the intervention has been extended using the principle of proportionality...The court will be called upon to intervene in situations where authorities and persons act in bad faith, abuse power, fail to take into account relevant considerations in the decision making or take into account irrelevant considerations or act contrary to legitimate expectations...Even on the important principle of establishing standing for the purposes of judicial review the Courts must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them...Judicial review is a tool of justice, which can be made to serve the needs of a growing society on a case-to-case basis...”

18. In addition to the above, the ex parte Applicant contended that it had a legitimate expectation after accepting award of the tender by its letter dated 10th December 2015, that the Respondent would follow through on the promise made in the Notification of Award that *“the contract documents are being prepared and you will be called upon to sign them after fourteen days have elapsed from the date of this letter...”*. This expectation is amplified by the provisions of section 68(1) of the ***Public Procurement and Disposal Act*** cited hereinabove that the parties are required to enter into a contract in the terms expressed within the tender document. It is also further confirmed by the provisions of Clause 28.2 of the Tender which clearly stipulates that the *“notification of award will constitute the formation of the contract”*. Immediately thereafter, Clause 29.1 further provides that *“at the same time as the Procuring entity notifies the successful tenderer that its tender has been accepted, the Procuring entity will send the tenderer the Contract Form provided in the tender documents, incorporating all agreements between the parties”*.

19. To the applicant, it is on the basis of these various unequivocal undertakings that the ex parte Applicant proceeded to commence the construction of the Helicopters, subject of the tender. To that end, the ex parte Applicant invariably incurred substantial financial loss due to the Respondent's inaction in the intervening period: Loss and damage to which the Respondent is estopped from denying liability.

20. The applicant submitted that the principle of legitimate expectation was elaborated upon in the case of

Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi [2007] eKLR where the Court held that:

“...legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher public interest beneficial to all including the respondents, which is, the value or the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation. An abrupt change as was intended in this case, targeted at a particular company or industry is certainly abuse of power. Stated simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way... Public authorities must be held to their practices and promises by the courts and the only exception is where a public authority has a sufficient overriding interest to justify a departure from what has been previously promised.”

21. Similar reliance was placed on **Republic vs. Attorney General & Another Ex Parte Waswa & 2 Others [2005] 1 KLR 280** where it was held that:

“The principle of a legitimate expectation to a hearing should not be confined only to past advantage or benefit but should be extended to a future promise or benefit yet to be enjoyed. It is a principle, which should not be restricted because it has its roots in what is gradually becoming a universal but fundamental principle of law namely the rule of law with its offshoot principle of legal certainty. If the reason for the principle is for the challenged bodies or decision makers to demonstrate regularity, predictability and certainty in their dealings, this is, in turn enables the affected parties to plan their affairs, lives and businesses with some measure of regularity, predictability, certainty and confidence. The principle has been very ably defined in public law in the last century but it is clear that it has its cousins in private law of honouring trusts and confidences. It is a principle, which has its origins in nearly every continent. Trusts and confidences must be honoured in public law and therefore the situations where the expectations shall be recognised and protected must of necessity defy restrictions in the years ahead. The strengths and weaknesses of the expectations must remain a central role for the public law courts to weigh and determine.”

22. In conclusion the applicant submitted that flowing from the above incontrovertible wealth of authorities, it is safe to state that the ex parte Applicant’s legitimate expectation was well placed and quite reasonable in the circumstances. The Respondent’s inaction with regard to its failure to execute the formal contract however flouts all principles of reasonableness, lawfulness and fairness and goes against the very principles upon which our Constitution is founded. Such conduct is the reason for establishment of the authority to issue judicial review reliefs as those sought in this case.

23. It is on this basis that the ex parte Applicant called upon this Court to issue the orders for mandamus sought, compelling the Respondent to execute the formal contract in respect of the Tender No. MOM/T/01/2015-2016 dated 9th September 2015 for the Supply, Delivery and Commissioning of a new helicopter awarded to the Applicant without further delay.

24. According to Miss Malik, learned counsel for the applicant the option of filing a suit for damages for breach of contract does not arise since pursuant to section 68(3) of the ***Public Procurement and Disposals Act***, no contract is entered into until a written contract is signed hence the applicant has no alternative remedies. It was submitted that the applicant was under impression that the notification would constitute a contract as a result of which it continued building the helicopter.

25. To learned counsel, judicial review can be based on statutory breach of legitimate expectation and unfairness. In this case, the letter was specific that the contract would be signed. The applicant’s case that that it was seeking that the Respondent meets its statutory obligation as opposed to breach of contractual obligations as there was no contract.

Respondent's Case

26. The Respondent, in opposition to the application filed the following grounds of opposition:

1. That the Notice of motion application is defective has no merit and is based on a misconception of the law.
2. That the respondent is not under any statutory obligation to perform a public duty out of which he can be compelled to execute the contract so as to warrant orders of mandamus and the ex-parte applicant has neither demonstrated that a public law right which he enjoyed has been infringed. See BERKSHIRE ex parte WALSH (1985) QB 152, MAURICE OKELLO v PERMANENT SECRETARY MINISTRY OF LANDS AND HOUSING [2008] eKLR.
3. That the applicant is not seeking to enforce a public law right but a private contractual right and as such his remedy lies in private contract law and not public law in the nature of judicial review. See ZAKHEM CONSTRUCTION (KENYA) LIMITED v PERMANENT SECRETARY, MINISTRY OF ROADS & PUBLIC WORKS & ANOTHER [2007] eKLR.
4. That the ex-parte applicant's redress lies in the ordinary Civil Courts where he can ask for specific performance, breach of contract or refund of his monies, or damages as the case may be.
5. That even if the ex-parte applicant was to succeed, Judicial Review is a discretionary remedy so that if the court were to compel the Respondents it would be interfering with the exercise of the Permanent Secretary discretion as the court cannot dictate the terms of a contract between two parties. It can only enforce the terms. So this court cannot force a marriage between two parties.
6. That the respondent is currently lacking funds to finance the contract and as such is not in a position to execute the contract.
7. That the respondent prays that the notice of motion application be dismissed with costs to the respondent.

27. It was submitted on behalf of the Respondent that it does not have funds to execute the contract and as such it would be impractical to compel it to execute the contract as sought by the ex-parte applicant.

28. To the Respondent, strictly speaking, under the *The Law of contract Act*, no contract has been formally executed between the parties and as such no contractual obligations have arisen yet. It is only upon formal execution of a contract that a party can be compelled to perform its contractual obligations. In line with section 68(3) of *The Public Procurement & Disposal Act* which is the governing law, "**No contract is formed between the person submitting the successful tender and the procuring entity until the written contract is entered into**"

29. The respondent therefore submitted that there is no basis upon which it can be compelled to execute the contract. It was further submitted that the application is not within the purview of judicial review and as such is fatally defective since the remedies lie in civil law as opposed to public law. The respondent therefore submitted that it was not under any statutory obligation nor is there statutory underpinning to perform a public duty under the *Mining Act* out of which it can be compelled to execute the contract so as to warrant orders of *mandamus*.

30. It was contended that there is no recognized public law wrong committed by the respondent to justify intervention of Court by way of judicial review as the ex-parte applicant has neither demonstrated that a public law right which he enjoyed has been infringed.

31. In support of its submissions the Respondent relied on Berkshire ex parte Walsh (1985) QB 152,

Maurice Okello vs. Permanent Secretary Ministry of Lands and Housing [2008] eKLR and Staff, Disciplinary Committee of Maseno University & 2 Others vs. Ochong Okello [2012] eKLR.

32. In the respondent's view, the ex-parte applicant is not seeking to enforce a public law right but a private contractual right which is not tenable in judicial review and as such his remedy lies in private contract law and not public law in the nature of judicial review. To this end the respondent relied on the case of **Zakhem Construction (Kenya) Limited vs. Permanent Secretary, Ministry of Roads & Public Works & Another [2007] eKLR.**

33. The respondent submitted that even if the ex-parte applicant was to succeed, Judicial Review is a discretionary remedy so that if the court were to compel the Respondent it would be interfering with the exercise of the Principal Secretary's discretion as the court cannot dictate the terms of a contract between two parties. It can only enforce the terms. So this court cannot force a marriage between two parties.

34. In his oral address, **Mr Odhiambo**, learned counsel for the Respondent contended that once the applicant was notified of the success of the tender, it was not directed to start the assembling of the aircraft and should have waited for the final execution of the contract.

35. The Court was therefore urged to dismiss the Motion with costs to the Respondent.

Determinations

36. Having considered the application, the affidavit in support of the Motion and grounds opposition as well as the rivalling submissions, this is the view I form of the matter.

37. The parameters of judicial review were set out by the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** as follows:

“The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way...These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...”

38. In **Prabhulal Gulabchand Shah vs. Attorney General & Erastus Gathoni Miano** Civil Appeal No.24 of 1985 the Court of Appeal stated that:-

“The person seeking *mandamus* must show that there resides in him a legal right to performance of a legal duty by a party against whom the *mandamus* is sought or alternatively that he has a substantial personal interest and the duty must not be permissive but imperative

and must be of public rather than private nature.”

39. In Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543 Goudie, J expressed himself, inter alia, as follows:

“Mandamus is essentially English in its origin and development and it is therefore logical that the court should look for an English definition. Mandamus is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen’s Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. Mandamus is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature...In cases where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest the court has jurisdiction to grant mandamus to compel the fulfilment.”

40. This position was appreciated in The Republic v. Director – General of East African Railways Corporation, ex parte Kaggwa (1997) KLR 194, in which Chesoni, J (as he then was) stated:

“Mandamus is neither a writ of course neither a writ of right but a discretionary remedy which the court will grant only if there is no more appropriate remedy. In other words, if there is a satisfactory alternative remedy available to the applicant, the court will not grant mandamus. Adequate alternative remedy is an important limitation to the availability of an order of mandamus. The purpose of Mandamus is to compel the performance of a public duty or an act contrary to, or evasive of, the law; and it does not lie against a public officer as a matter of course and where one or more, of the bars or limitations exists, the court will, usually, not exercise its discretion in favour of the applicant. These bars are: that there is an alternative specific remedy at law; that there is no possibility of effective enforcement, or performance will be impossible by reason of the circumstances, like lack of power or means to obey on the part of the Respondent; and that it will result in interference by the judicial department with the executive arm of the government...All in all, these bars are discretionary; but there has to be a good reason for them not to apply to a particular case where they exist.” [Emphasis added].

41. In the English case of R (Regina) vs. Dudsheath, ex parte, Meredith [1950] 2 All E.R. 741, at 743, Lord Goddard C. J. said -

“It is important to remember that “mandamus” is neither a writ of course nor a writ of right, but that it will be granted if the duty is in the nature of a public duty, and specially affects the rights of an individual, provided there is no more appropriate remedy. This court has always refused to issue a mandamus if there is another remedy open to the party seeking it. This is one of the reasons, no doubt, why, where there is a visitor of a corporate body, the court will not interfere in a matter within the province of the visitor, and especially this is so in matters relating to educational bodies such as colleges. ”

42. The foregoing position reflects the traditional jurisprudence on judicial review. In my view Article 47 of the Constitution is now emphatic on the fairness of administrative action. The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. It is meant to uplift the quality of public decision making, and thereby ensure for the citizen civilised governance, by holding the public authority to the limit defined by the law. Judicial review is therefore an important control, ventilating a host of varied types of problems.

The focus of cases may range from matters of grave public concern to those of acute personal interest; from general policy to individualised discretion; from social controversy to commercial self-interest; and anything in between. As a result, judicial review has significantly improved the quality of decision making. It has done this by upholding the values of fairness, reasonableness and objectivity in the conduct of management of public affairs. It has also restrained or curbed arbitrariness, checked abuse of power and has generally enhanced the rule of law in government business and other public entities. Seen from the above standpoint it is a sufficient tool in causing the body in question to remain accountable.

43. However, it is important to remember that Judicial Review is a special supervisory jurisdiction which is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal (rehearing) on the merits. The question is not whether the judge disagrees with what the public body has done, but whether there is some recognisable public law wrong that has been committed. Whereas private law proceedings involve the claimant asserting rights, judicial review represents the claimant invoking supervisory jurisdiction of the Court through proceedings brought nominally by the Republic. See **R vs. Traffic Commissioner for North Western Traffic Area ex parte Brake [1996] COD 248.**

44. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal and procedural validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through taking into account an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence. See **Reid vs. Secretary of State for Scotland [1999] 2 AC 512.**

45. Whereas the general position is that in judicial review, the Court is only concerned with the process through which the decision is arrived at rather than the merits of the decision itself, in practice, the distinction between the two is rather blurred. That this is so was appreciated by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others [2016] KLR,** where the Court expressed itself at paras 55-58 as hereunder:

55. An issue that was strenuously urged by the respondents is that the appellant's appeal is bad in law to the extent that it seeks to review the merits of the Minister's decision while judicial review is not concerned with merits but propriety of the process and procedure in arriving at the decision. Traditionally, judicial review is not concerned with the merits of the case. However, Section 7 (2) (1) of the Fair Administrative Action Act provides proportionality as a ground for statutory judicial review. Proportionality was first adopted in England as an independent ground of judicial review in R v Home Secretary; Ex parte Daly [2001] 2 AC 532. The test of proportionality leads to a "greater intensity of review" than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision play a much greater role. Proportionality invites the court to evaluate the merits of the decision; first, proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions; secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations; thirdly, the intensity of the review is guaranteed by the twin requirements in Article 24 (1) (b) and (e) of the Constitution to wit that the limitation of the right is necessary in an open and democratic society, in the sense of meeting a pressing social need and whether interference vide administrative action is proportionate to the legitimate aim being pursued. In our view, consideration of

proportionality is an indication of the shift towards merit consideration in statutory judicial review applications.

56. Analysis of *Article 47* of the Constitution as read with the Fair Administrative Action Act reveals the implicit shift of judicial review to include aspects of merit review of administrative action. *Section 7 (2) (f)* of the Act identifies one of the grounds for review to be a determination if relevant considerations were not taken into account in making the administrative decision; *Section 7 (2) (j)* identifies abuse of discretion as a ground for review while *Section 7 (2) (k)* stipulates that an administrative action can be reviewed if the impugned decision is unreasonable. *Section 7 (2) (k)* subsumes the dicta and principles in the case of *Associated Provincial Picture Houses Ltd v Wednesbury Corp.* [1948] 1 KB 223 on reasonableness as a ground for judicial review. *Section 7 (2) (i) (i)* and *(iv)* deals with rationality of the decision as a ground for review. In our view, whether relevant considerations were taken into account in making the impugned decision invites aspects of merit review. The grounds for review in *Section 7 (2) (i)* that require consideration if the administrative action was authorized by the empowering provision or not connected with the purpose for which it was take and the evaluation of the reasons given for the decision implicitly require assessment of facts and to that extent merits of the decision. It must be noted that the even if the merits of the decision is undertaken pursuant to the grounds in *Section 7 (2)* of the Act, the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in *Section 11* of the Act. On a case by case basis, future judicial decisions shall delineate the extent of merit review under the provisions of the Fair Administrative Action Act.

57. In *Mbogo & another -v- Shah* (1968) EA 93 at 96, this Court stated that an appellate court will not interfere with the exercise of discretion by a trial court unless the discretion was exercised in a manner that is clearly wrong because the judge misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. The dictum in *Mbogo -v- Shah* (*supra*) and the principles of rationality, proportionality and requirement to give reasons for decision are pointers towards the implicit shift to merit review of administrative decisions in judicial review.

58. The essence of merit review is the power to substitute a decision. Under the *Fair Administrative Actions Act*, there is no power for the reviewing court to substitute the decision of the administrator with its own decision. This imposes a limit to merit review under the Act. *Section 11 (1) (e)* and *(h)* of the Fair Administrative Action Act permits the court in a judicial review petition to set aside the administrative action or decision and or to declare the rights of parties and remit the matter for reconsideration by the administrator. The power to remit means that decision making on merits is the preserve of the administrator and not the courts.

46. Whereas I agree judicial review remedies may be invoked even in cases which were traditionally no go zones such in matters of commercial self-interest, it is my view that for the Court to do so, the transaction itself must have some elements of statutory underpinning. In this case, according to the applicant what underpins the subject transaction is section 68 and in particular subsection (1) of the *Public Procurement and Disposal Act*. The said section provides that:

(1) The person submitting the successful tender and the procuring entity shall enter into a written contract based on the tender documents, the successful tender, any clarifications under section 62 and any corrections under section 63.

(2) The written contract shall be entered into within the period specified in the notification under section 67(1) but not until at least fourteen days have elapsed following the giving of that notification.

(3) No contract is formed between the person submitting the successful tender and the procuring entity until the written contract is entered into.

47. To better understand this provision, it is necessary to read the same with section 36 of the said Act which provides *inter alia* as follows:

(1) A procuring entity may, at any time, terminate procurement proceedings without entering into a contract.

(2) The procuring entity shall give prompt notice of a termination to each person who submitted a tender, proposal or quotation or, if direct procurement was being used, to each person with whom the procuring entity was negotiating.

(3) On the request of a person described in subsection (2), the procuring entity shall give its reasons for terminating the procurement proceedings within fourteen days of the request.

(4) If the procurement proceedings involved tenders and the proceedings are terminated before the tenders are opened, the procuring entity shall return the tenders unopened.

(5) The procuring entity shall not be liable to any person for a termination under this section.

(6) A termination under this section shall not be reviewed by the Review Board or a court.

(7) A public entity that terminates procurement proceedings shall give the Authority a written report on the termination.

(8) A report under subsection (7) shall include the reasons for the termination and shall be made in accordance with any directions of the Authority with respect to the contents of the report and when it is due.

48. This provision was dealt with in **Republic vs. National Social Security Fund Board of Trustees [2015] eKLR** where this Court expressed itself as follows:

“It is clear that the above provision does not require that the notification of the termination of the tender precedes the termination itself. What the section requires is that each person who submitted a tender, proposal or quotation be notified of the termination thereof and on request by such a person furnish the reasons therefor. However it is expressly stated that in the event of such termination the procuring entity shall not be liable therefor. It is therefore clear that the applicant cannot question the decision by the Respondent to terminate the tender. Whereas the Respondent was under a statutory obligation to furnish the applicant with the reasons for the termination of the Tender, the consequences for the failure to do so, in my view, do not encompass the quashing of the decision to terminate the tender under the aforesaid provision. This however, does not mean that the applicant may not have recourse in law for the omission by the Respondent to be notified of the same. My view, however, is that such recourse cannot be by way of an application for *certiorari* as the applicant seeks in this application. Whereas it was alleged that the Respondent did not afford the applicant an opportunity of being heard before terminating the tender, as I have said no legal provision has been cited in support of the contention that a notice was a prerequisite to such termination. The provision simply says that the notice of termination be given *promptly*. That the Respondent is empowered by the Act to terminate the tender at any time without entering into the contract is not in doubt.”

49. According to the applicant section 68(1) aforesaid places a duty on the procuring entity, the Respondent herein, to enter into a written contract where there are no clarifications. Firstly, I do not understand the said provision to place a duty on the Respondent to enter into a contract since the same Act empowers the Respondent to terminate the procurement process at any time before a contract is

entered into and it is agreed that there was no such contract. My understanding of the said provision is that where the procuring entity decides to enter into a contract it is required to do so on the basis of the tender documents, the successful tender, any clarifications under section 62 and any corrections under section 63. It is an elementary principle of statutory interpretation that in order to arrive at the true intention of the legislature, a statute must be considered as a whole and sections of an Act are not to be read in isolation and that when a question arises as to the meaning of a certain provision in a statute, it is not only legitimate but proper to read that provision as a whole. All the constituents parts of a statute are to be taken together and each word, phrase or sentence is to be considered in light of the general purpose of the Act itself hence the words, phrase occurring in a statute are to be taken not in isolation or in a detached manner dissociated from the context, but are to be read together and construed in the light of the purpose and object of the Act itself. The above mentioned principle equally applies to different parts of the same section which must be construed as a whole whether or not one of its parts is a saving clause or a proviso and that the subsection must be read as parts of the integral whole as being interdependent, each portion throwing light if need be on the rest since it is an elementary rule that construction of a section is to be made of all the parts together.

50. The applicant's statement, with due respect is therefore too broad since section 36 of the Act empowers the Respondent to terminate the procurement proceedings any time before a contract is entered into. That section therefore gives the Respondent the power to decide whether or not to conclude the procurement process. It is trite that where the body concerned has a discretion on what decision to make the Court cannot direct it to decide in a particular manner. Therefore for the Court to direct the Respondent to enter into the contract, the Court would be directing the Respondent to exercise its discretion in a particular manner.

51. It is however trite that discretion must be exercised in good faith and reasonably. It is now clear that even in the exercise of what may appear to be *prima facie* absolute discretion conferred on the executive the Court may interfere. The Court can therefore intervene in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See the decision of Nyamu, J (as he then was) in **Republic vs. Minister for Home Affairs and Others ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 (HCK) [2008] 2 EA 323.**

52. Therefore it is clear that power ought to be properly exercised and ought not to be misused or abused. According to **Prof Sir William Wade in his Book *Administrative Law*:**

“The powers of public authorities are...essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land...regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose...But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by

those set in power over them...”

53. To hold that the Respondent is the sole judge when it comes to the exercise of discretion would be to throw the rule of law out of the window and whittle away the Constitutional safeguards provided under Article 47 of the Constitution. Accordingly the Courts are empowered to investigate allegations of abuse of power and improper exercise of discretion.

54. In this case, the Respondents have not sworn any affidavit to explain the reasons why they did not proceed with the procurement process. The attempt to do so in learned counsel’s submissions was, with due respect, too casual to be taken seriously. The applicant claims that it had legitimate expectation that a contract would be entered into. In **CCSU vs. Minister for the Civil Service [1984] 3 All ER, 935** where **Lord Diplock** states, at page 949:-

“To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either (a) by altering rights or obligations of that person which are enforceable by or against him in private law or (b) by depriving him of some benefit or advantage which either (i) he has in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it on which he has been given an opportunity to comment or (ii) he has received assurance from the decision maker that it will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.”

55. It is a requirement that for the doctrine of legitimate expectation to be successfully invoked, the expectation must in the first place be legitimate “in the sense of an expectation which will be protected by law”. See **R vs. Department for Education and Employment, ex p Begbie [2000] 1 WLR 1115, 1125C-D**. This was the view adopted in **Royal Media Services Limited & 2 Others vs. Attorney General & 8 Others [2014] eKLR** where it was held that:

“...legitimate expectation, however strong it may be, cannot prevail against express provisions of the Constitution. If a person or a statutory body promises a certain relief or benefit to a claimant or undertakes to do something in favour of a claimant but in a way that offends the Constitution, the claimant cannot purport to rely on the doctrine of legitimate expectation to pursue the claim or the promise.”

56. In other words since the doctrine of legitimate expectation is based on considerations of fairness, even where benefit claimed is not procedural, it should not be invoked to confer an unmerited or improper benefit. **See R vs. Gaming Board of Great Britain, ex p Kingsley [1996] COD 178 at 241.**

57. Similarly in **South Bucks District Council vs. Flanagan [2002] EWCA Civ. 690 [2002] WLR 2601 at [18]** it was held that:

“Legitimate expectation involves notions of fairness and unless the person making the representation has actual or ostensible authority to speak on behalf of the public body, there is no reason why the recipient of the representation should be allowed to hold the public body to the terms of the representation. He might subjectively have acquired the expectation, but it would not be a legitimate one, that is to say it would not be one to which he was entitled.”

See also **Rowland vs. Environment Agency [2002] EWHC 2785 (Ch); [2003] ch 581 at [68]; CA [2003] EWCA Civ 1885; [2005] Ch 1 at [67].**

58. However as was held in **Republic vs. Kenya Revenue Authority ex parte Shake Distributors Limited Hcmisc. Civil Application No. 359 of 2012:**

“...the cornerstone of legitimate expectation is a promise made to a party by a public body

that it will act or not act in a particular manner. For the promise to hold, the same must be made within the confines of the law. A public body cannot make a promise which goes against the express letter of the law.”

59. The three basic questions were identified in R (Bibi) vs. Newham London Borough Council [2001] EWCA Civ 607 [2002] 1 WLR 237 at [19] as follows:

“In all legitimate expectation cases, whether substantive or procedural, three practical questions rise, the first question is to what has the public authority, whether by practice or by promise, committed itself; the second is whether the authority has acted or proposes to act unlawfully in relation to its commitment; the third is what the court should do.”

60. In De Smith, Woolf & Jowell, “Judicial Review of Administrative Action” 6thEdn. Sweet & Maxwell page 609 it is stated that:

“A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in government’s dealings with the public.”

61. In Republic vs. Attorney General & Another Ex Parte Waswa & 2 Others [2005] 1 KLR 280 it was held:

“The principle of a legitimate expectation to a hearing should not be confined only to past advantage or benefit but should be extended to a future promise or benefit yet to be enjoyed. It is a principle, which should not be restricted because it has its roots in what is gradually becoming a universal but fundamental principle of law namely the rule of law with its offshoot principle of legal certainty. If the reason for the principle is for the challenged bodies or decision makers to demonstrate regularity, predictability and certainty in their dealings, this is, in turn enables the affected parties to plan their affairs, lives and businesses with some measure of regularity, predictability, certainty and confidence. The principle has been very ably defined in public law in the last century but it is clear that it has its cousins in private law of honouring trusts and confidences. It is a principle, which has its origins in nearly every continent. Trusts and confidences must be honoured in public law and therefore the situations where the expectations shall be recognised and protected must of necessity defy restrictions in the years ahead. The strengths and weaknesses of the expectations must remain a central role for the public law courts to weigh and determine.”

62. The rationale for this doctrine was restated in R vs. Devon County Council ex parte P Baker [1955] 1 All ER where it was held:

“...expectation arises not because the claimant asserts any specific right to a benefit but rather because his interest in it is one that the law holds protected by the requirements of procedural fairness; the law recognises that the interest cannot properly be withdrawn (or denied) without the claimant being given an opportunity to comment and without the authority communicating rational grounds for any adverse decision.”

63. In this case, the law itself recognises that a procurement process may be terminated before a contract is entered into and that in such event, the procuring entity does not incur any liability. In such event it is doubtful whether the bidder or tenderer is entitled to reasons for such an act.

64. What happens where however after the tenderer has been notified of the success of the tender, the procuring entity leaves it in a state of indefinite suspense without either entering into the contract or terminating the procurement process? In my view the procuring entity is clearly under a duty and the bidder legitimately expects that the procurement entity will make a decision either way and notify it

accordingly. In such event the Court is entitled to compel the procurement entity to make a decision and notify the bidder so as to enable the bidder to take any step available to it under the law.

65. It is however too presumptuous in light of the provisions of section 36 of the Act for the tenderer to assume that a contract will definitely be entered into and proceed with the commencement of the project. In the 8th Edition of *Garner's Administrative Law*, B. L. Jones and K. Thompson observed at page 259 that:

“We may turn next to the operation of *audi alteram partem* in relation to decisions as to privileges, or ‘licences’. It is first necessary to note various different kinds of decisions that may be taken in relation to privileges. For example, the decision may be to revoke an existing ‘licence’, to refuse to review an existing ‘licence’, or to refuse the initial grant of a ‘licence’. In relation to each of these types of decision the expectations of the person affected is of much significance. Did the citizen have legitimate expectation of success, or was he simply ‘hoping against hope’ of obtaining, retaining, or being granted renewal of, a ‘licence’? How do these factors influence the manner of operation of the *audi alteram partem* rule?”

The revocation of a privilege may generally be regarded as comparable to the act of taking away ‘property’. It will usually defeat the privilege-holder’s legitimate expectation that it will continue for its initially granted time-span, and accordingly the *audi alteram partem* rule will normally apply with some vigour. Such has, for example, been shown in cases where members have been expelled from clubs without the substantial procedural rights which the courts have been prepared to imply into their contracts of membership.

Conversely, one who had no more than a mere hope of favour and failed to obtain it has lost nothing, save an advantage to which he had no legitimate expectation. The demands of procedural justice will in such a case be significantly less great.”

66. It is clear that by placing the applicant in a state of suspense, the Respondent failed to exercise its statutory duty, not to enter into a contract, and to notify the applicant of that decision. In those circumstances what remedy lies in favour of the applicant?

67. Article 23 of the Constitution provides that a court "may grant appropriate relief, including a declaration of rights" when confronted with rights violations. Under the said Article, the Applicant is entitled to 'appropriate relief' which means an effective remedy: An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Section 11 of the *Fair Administrative Action Act, 2015* provides as follows:

(1) In proceedings for judicial review under section 8 (1), the court may grant any order that is just and equitable, including an order

(a) declaring the rights of the parties in respect of any matter to which the administrative action relates;

(b) restraining the administrator from acting or continuing to act in breach of duty imposed upon the administrator under any written law or from acting or continuing to act in any manner that is prejudicial to the legal rights of an applicant;

(c) directing the administrator to give reasons for the administrative action or decision taken by the administrator;

(d) prohibiting the administrator from acting in a particular manner;

(e) setting aside the administrative action or decision and remitting the matter for reconsideration by the administrator, with or without directions;

(f) compelling the performance by an administrator of a public duty owed in law and in respect of which the applicant has a legally enforceable right;

(g) prohibiting the administrator from acting in a particular manner;

(h) setting aside the administrative action and remitting the matter for reconsideration by the administrator, with or without directions;

(i) granting a temporary interdict or other temporary relief; or

(j) for the award of costs or other pecuniary compensation in appropriate cases.

68. This Court is therefore empowered to fashion appropriate remedies. It must however be noted that in so doing the Court ought not to interfere with the merits of the Respondent's decision. One of the reliefs that the Court may grant is an order compelling the performance by an administrator of a public duty owed in law and in respect of which the applicant has a legally enforceable right. In this case the Respondent had a duty both under Article 47 of the Constitution and section 4 of the ***Fair Administrative Action Act, 2015*** and the applicant had a right to administrative action which was expeditious, efficient, lawful, reasonable and procedurally fair. The Respondent clearly did not comply with this requirement.

69. To that extent the applicant's application is merited.

Order

70. Accordingly, the order that commends itself to me and which I hereby grant is an order of *mandamus* compelling the Respondent to, within 30 days of service of this decision, notify the applicant of the procurement process between it and the applicant. In default of compliance, an order of *mandamus* shall issue forthwith compelling the Respondent to execute the formal contract in respect of the Tender No. MOM/T/2015-2016 dated 9/11/2015 for the Supply, Delivery and Commissioning of a new helicopter.

71. The applicant will have the costs of these proceedings to be borne by the Respondent.

72. It is so ordered.

Dated at Nairobi this 13th day of January, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Malik for the ex parte applicant

Mr Odhiambo for the Respondent

CA Mwangi