IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

IN THE JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 459 OF 2016

IN THE MATTER OF AN APPLICATION BY GIANT FOREX BUREAU DE' CHANGE LIMITED

FOR JUDICIAL REVIEW OF THE NATURE OF CERTIORARI AND MANDAMUS

AND

IN THE MATTER OF NAIROBI BUREAU DE CHANGE LIMITED VS. KENYA AIRPORTS AUTHORITY,

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD APPLICATION NO. 65 OF 2016

AND

IN THE MATTER OF LAW REFORM ACT SECTION 8 AND 9 CHAPTER 26 LAWS OF KENYA

AND

IN THE MATTER OF ORDER 53OF THE CIVIL PROCEDURE RULES, 2010

AND

IN THE MATTER OF SECTION 175 OF THE PUBLIC PROCUREMENT AND DISPOSAL ACT, 2015,

AND

AND IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, NO. 4 OF 2015

AND

IN THE MATTER OF ARTICLE 22(3), 47 & 227 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS IN

THE NATURE OF CERTIORARI AND PROHIBITION AND MANDAMUS

BETWEEN

REPUBLIC...APPLICANT

VERSUS

THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD.........RESPONDENT

NAIROBI BUREAU DE CHANGE LIMITED...............................1ST INTERESTED PARTY

KENYA AIRPORTS AUTHORITY...2ND INTERESTED PARTY

EX-PARTE

GIANT FOREX BUREAU DE' CHANGE LIMITED

JUDGMENT

1. The Application giving rise to this cause was filed by the Ex-Parte Applicant **GIANT FOREX BUREAU DE' CHANGE LIMITED** on the 7th of October 2016 following the decision by the Respondent Public Procurement Administrative Review Board who in Public Procurement Administrative Review Applications **No. 65 of 2016**, **Nairobi Bureau De Change Limited Vs. Kenya Airports Authority** held That That: **the Applicant was guilty of material non-disclosure of High Court Misc. App. No. 561 of 2014, Giant Forex Bureau De Change Limited v Kenya Airport Authority** and hence did not meet the criteria required under the Tender document; The review Board thereby annulled the decision to award the exparte applicant the tender by the 2nd Interested Party, who are The Kenya Airports Authority and directing That the tender be awarded to the 1st Interested Party herein **Nairobi Bureau De Change Limited**.

2. The exparte applicant complains That;

a. The Respondent in its decision failed to ensure fair administrative action, rationality and objectivity in all public bodies including itself.

b. The Respondent made an error of fact and law by failing to recognize the tenets of the doctrine of Subrogation and finding That the Applicant was guilty of non-disclosure and That it did not meet the criteria required under the Tender document thereby annulling the decision to award it the tender by the 2ndInterested Party and awarding it to the 1st Interested Party herein.

c. The Respondent failed to appreciate That the substantive and sole subject of the Applicant's Request to Review the award of Tender No. KAA/306/2015-2016 to the Successful Bidder, and in particular, nondisclosure of the existence of ***High Court Misc. App. No. 561 of 2014***, ***Giant Forex Bureau De Change Limited v Kenya Airport Authority,*** was unwarranted, misleading and made with intent to deceive the Respondent to the detriment of the Applicant herein as the said dispute is and has never been one between the Applicant and the 2nd Interested Party.

d. The cited suit which sought for recovery proceedings against the 2ndInterested Party herein for Kshs. 27, 764, 50/= was instituted by Kenindia Assurance Company Limited and NOT the Applicant under the **doctrine of Subrogation** after it had fully compensated the Applicant for the loss they suffered as a result of an unforeseen inferno That gutted down the Successful bidder's premises at Jomo Kenyatta International Airport on 7th August 2013.

e. **The said dispute in law did not amount to any litigation between the Applicant and the 2nd Interested Party** resulting from any contracts executed within the past 5 years or currently under execution as was required to be disclosed by bidders under the litigation history as stipulated under Clauses 2.3.2 & 2.31 of the Invitation to Tenderers and Clause 2.20 of the Appendix to Instructions to Tenderers.

f. The declaration by the Applicant That it had no litigation history whatsoever **as against the Respondent from any contracts**, past or present was precise, concise and accurate as relates to the information That was required to be provided by the Respondent in respect to the tender.

g. At all material times prior to, during and after the Award of the Tender to the Applicant, the 2nd Interested Party was aware of the said suit arising out of the doctrine of subrogation as it indeed entered appearance in the said suit and subsequently filed various pleadings in its defence to the claim as specifically pleaded by Kenindia Assurance Limited. As such the claim That the Applicant was guilty of non-disclosure and That it only became aware of the dispute after it issued the award is thus false and calculated to prejudice the Applicant

h. The assertion by the Respondent That the Applicant was guilty of material nondisclosure is purely unsubstantiated, frivolous, vexatious, incompetent and an abuse of process and devoid of merit.

i. The failure by the Respondent to appreciate That nullification of the award to the Applicant by the 2nd Interested Party would occasion the latter a Kshs. 3,700,000/= loss every year for a period of 5 years was devoid of consideration of Public interest visa vie the individual interest and as such in contravention of the Constitution.

3. the remedies sought by the Applicant in these judicial review proceedings are:

a. That an order of **CERTIORARI** be issued by this Honourable Court to bring into this Court and quash the 1st Respondent's decision dated 22nd September, 2016 in Application No. 65 of 2016 and in particular the following orders:-

i. That the Applicant herein breached the provisions of the Public Procurement and Disposal Act by failing to disclose the existence of ***High Court Misc. App. No. 561 of 2014**, **Giant Forex Bureau De Change Limited v Kenya Airport Authority*** which was a mandatory requirement for all bidders;

ii. That due to the aforesaid breach, the award of Tender No. KAA/306/2015/2015-2016 for the Development and Operation of a foreign exchange service (FOREX) at the Jomo Kenyatta International Airport, T1A Arrivals-LOT 1: Level to the Applicant herein be and is hereby annulled; and

iii. That the Tender No. KAA/306/2015/2015-2016 for the Development and Operation of a foreign exchange service (FOREX) at the Jomo Kenyatta International Airport, T1A Arrivals-LOT 1: Level 0 be and is hereby awarded to the Applicant.

iv. That the request for review by the Applicant dated 1st September 2016 and lodged with the Review Board on the same day be and is hereby allowed.

b. That an order of **MANDAMUS** be issued by this Honourable Court to compel the 3rd Respondent to re-award the Tender to the Applicant who is legally the Successful Bidder.

c. That costs of and incidental to the application be provided for.

4. the Respondent, and interested parties through their Replying Affidavits opposed the application herein

contending that the Respondent's decision was justified and that the Applicant was guilty of the material non-disclosure of the existence of ***High Court Misc. App. No. 561 of 2014***, ***Giant Forex Bureau De Change Limited v Kenya Airport Authority*** which was a mandatory requirement for all bidders.

5. They further contended that despite the said suit having been filed under the tenets of the doctrine of subrogation, the Applicant owned the same and would still benefit from the same. Lastly they contended that despite the huge difference in the concession fee offered by the Applicant herein and the 1st Interested Party, the same did not matter as the 1st Interested Party had satisfied and surpassed the expectations of the 2nd Interested Party. In the foregoing, the Respondent, 1st and 2ndinterested parties contended that the Application was an abuse of process and should be dismissed with costs.

6. The Respondent further contended that the Application as presented was an appeal which in its opinion does not meet the threshold of Judicial Review.

7. In the replying affidavit sworn by **STANLEY C. MIHESO** a Senior Officer of the Public Procurement Administrative Review Board, it was deposed on behalf of the respondent Review Board That on 1st September, 2016, the 1st Interested Party filed a Request for Review before the Respondent challenging the award of the Tender No. KAA/306/2015-2016 for the development and operation of a foreign exchange service at Jomo Kenyatta International Airport, Terminal 1A, Arrivals – Lot 1: Level 0.

8. that after receiving the Request for Review, from the 1st Interested Party, the Respondent served a copy on the, 2nd Interested Party notifying it of the pending Review and requiring it to make an appearance for the hearing of the Review, in accordance with Regulation 74 (1) and 74(2) of the Public Procurement and Disposal Regulations, 2006, hereinafter referred to as "the Regulations."

9. That the Respondent heard the parties on 16th September, 2016, considered their pleadings and submissions, determined the application for review and delivered its ruling on 22nd September, 2016.

10. That the Respondent only took into consideration facts That were presented before it and were relevant in deciding the above issues.

11. That the Respondent 's decision was based on its findings That:

> a. The suit number Giant Forex Bureau De Change Limited – Kenya Airports Authority (Nai HC Misc. Appl. No. 561 of 2014) was a suit between the procuring entity and the successful bidder.
>
> b. Whether or not the litigation in question related to subrogation or not, the successful bidder was required to disclose the existence of the said suit in its tender document so long as the procuring entity was named as a party to the suit.
>
> c. It is only upon such a disclosure That the bidder would have gone ahead to explain the purpose and the import of the suit to the procuring entity and the tender.
>
> d. It does not matter That the suit was instituted pursuant to the insurer's right of subrogation but what matters was That there was a pending litigation in which the successful bidder and the procuring entity were named as parties.
>
> e. The duty to make disclosure of a pending litigation in a bidder's tender document lies with the bidder and it is not up to the procuring entity to make such an inquiry.
>
> f. The successful bidders tender was non-responsive under the Provisions of Clause 2.20 of the Appendix to the instructions to Tenderers and the successful bidder ought to have been disqualified at the preliminary evaluation stage.
>
> g. The procuring entity also breached the provisions of Section 55(5) of the Act which requires a

state organ or a public entity to consider as ineligible a person for submitting false, inaccurate or incomplete information about his or her qualifications.

h. Under the provisions of Section 79(1) of the Act 2015 a tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender document which was not the case in this particular instance in so far as the successful bidder's tender was concerned.

i. The procuring entity ought to have exercised its powers under Regulation 47(1)(f) and (2) of the Public Procurement and Disposal Regulations 2006.

12. That the Respondent made a Decision on 22nd September, 2016 and gave the following orders:-

a. The Request for Review dated 1st September, 2016 and which was filed with the Board on the same day be and is hereby allowed.

b. The decision made by the procuring entity on 24th August, 2016 awarding Tender NO. KAA/306/2015-2016 for the development and operation of a Foreign Exchange Service at Jomo Kenyatta International Airport Terminal 1A Arrivals under lot 1 to the successful bidder M/s Giant Forex Bureau De Change Limited be and is hereby annulled and set aside.

c. The Board declares That Giant Forest Bureau De Change Limited ought to have been declaring as non-responsive at the preliminary evaluation stage and ought to have been disqualified at That stage.

d. The Board directs that the procuring entity shall proceed with and complete the procurement process herein by awarding the tender to M/s Nairobi Bureau De Change Limited the Applicant herein at its tender price of Kshs. 2,300,000.

e. The procuring entity shall not terminate or re-advertise the said tender as sought by the procuring entity during the hearing of this Request for Review.

f. That each party shall bear its own costs of this Request for Review.

13. That in making its decision, the Board considered all documents of evidentiary value placed before the Respondent by the parties and the submissions of the parties on each of the issues raised in the Request for Review.

14. THAT the decision by the Board was a decision made within its mandate, and the specific sections of the law in particular Section 173 of the Public Procurement and Asset Disposal Act 2015, on which the Board's decision was pegged.

15. That the Applicant has not demonstrated by an iota of truth That the Board was unreasonable in arriving at its decision or That the Board was guilty of unreasonable exercise of power and irrationality in arriving at its decision. The decision by the Board is grounded in law after review of all material conditions placed before it and importantly in line with its mandate to uphold public procurement process.

16. That the Applicant has not demonstrated That the Board in arriving at its decision was guilty of any illegality, impropriety of procedure and irrationality to warrant the variance of the order of the Board.

17. That on the allegation That the Board's orders were a form of abuse of power, the Board in arriving at its decision complied with the requirements of Section 173 of the Act.

18. THAT the Applicant's application is therefore, made in bad faith, has no merit and is only calculated to discredit the credibility of the Respondent's mandate and function, while ultimately eroding the public's confidence in procurement procedures and processes.

19. That therefore the Court should dismiss the Applicant's Application for Judicial Review as it lacks merit since the Board's decision was nothing short of reasonable, consistent and in line with the exercise of its powers and the provisions of the Act.

20. the first interested party opposed the exparte applicant vide a Replying Affidavit dated 3rd November, 2016 filed on 4th November, 2016 sworn by **Violet M Kairu**, its Managing Director seeking dismissal of this application with costs to it.

21. In her depositions, it was contended that the 2nd Interested Party ('**the Procuring Entity**') by tender advertisement dated 4th April, 2016 invited Expressions of Interest for the Development and Operation of A Foreign Exchange Service (FOREX) at Jomo Kenyatta International Airport, T1A Arrivals- Lot 1: Level 0.

22. The tender documents stipulated various preliminary qualification requirements under Clauses 2.3.2 & 2.31.1 of the Invitation to Tenderers and Clause 2.20 of the Preliminary Examination & Tender Responsiveness. Of particular significance to this dispute is that it was a mandatory requirement under Clause 2.20 of the Preliminary Examination & Tender Responsiveness That all tenderers were under an obligation to provide a true position of their respective litigation history for the last five years. Additionally, the remarks by the Procuring Entity on Tender Completeness were:

> *Bidders to Comply:*
>
> *Firms that are evaluated as non-responsive shall be disqualified from further re-evaluation.*

23. Those Six tenderers submitted their bids to the Procuring Entity. The procuring entity after evaluation and consideration of all bidders chose the Applicant herein as the successful bidder with the 1st interested party being ranked second 2nd in the overall score. This decision was communicated by the Procuring Entity to Nairobi Bureau via a letter dated 24th August, 2016.

24. Aggrieved by the decision of the Procuring Entity, Nairobi Bureau filed **Request for Review No. 65 of 2016 between Nairobi Bureau De Change and Kenya Airports Authority** on 1st September, 2016 before the Public Procurement Administrative Review Board. ('**the Board'**).

25. The Request for Review was founded on *inter alia* the following grounds:

> *a. The Kenya Airports Authority failed to carry out proper due diligence investigations to establish whether Giant Forex Bureau had complied with the Preliminary Requirements as is stipulated under Clauses 2.3.2 & 2.31.1 of the Invitation to Tenderers (Tender No. KAA/306/2015-2016 and Clause 2.20 of the Appendix to Instructions to Tenderers.*
>
> *b. The Kenya Airports Authority failed to establish and/or while aware, ignored That it is currently involved in various disputes with Giant Forex Bureau the subject of litigation including* ***High Court Misc. Appl. No. 561 of 2014: Giant Forex Bureau De Change Limited -versus- Kenya Airports Authority*** *where Giant Forex Bureau De Change Limited has claimed the sum of at least Kshs. 27,764,506.00 from Kenya Airports Authority.*
>
> *c. The said material non-disclosure by Giant Forex Bureau constitutes a breach of Section 55(4) and (5) of the Public Procurement and Disposal Act, 2015 which stipulate as follows:*
>
> > **Section 55(4)**
> >
> > > **A State organ or public entity shall require a person to provide evidence or information to establish That the criteria under sub-section (1) are satisfied.**
> >
> > **Section 55(5)**

State organ or public entity shall consider as ineligible a person for submitting false, inaccurate or incomplete information about his or her qualifications.

d. The said material non-disclosure by Giant Forex Bureau constitutes a breach and/or non-conformity with Section 79(1) of the Public Procurement and Disposal Act, 2015 which stipulates as follows:

A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents.

e. The said material non-disclosure by Giant Forex Bureau and the omission by the Kenya Airports Authority to address itself to the pending litigation against it constitutes a breach and/or non-conformity with Section 80(1) and (2) of the Public Procurement and Disposal Act, 2015 which stipulates as follows:

s. 80(1): The evaluation committee appointed by the accounting officer pursuant to section 46 of this Act, shall evaluate and compare the responsive tenders other than tenders under section 82(3).

s. 80(2): The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents …'

f. The said material non-disclosure by Giant Forex Bureau and the omission by the Kenya Airports Authority to properly address itself to the pending litigation against it constitutes a breach and/or non-conformity with Section 83(1) of the Public Procurement and Disposal Act, 2015 which stipulates as follows:

s. 83(1) :An evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act.

g. The omission by the Kenya Airports Authority to properly address itself as to the pending litigation by Giant Forex Bureau against it constitutes a blatant violation of Regulation 47(1)(f), 47(2) and 48(1) of the Public Procurement and Disposal Regulations, 2006which stipulate as follows:

Reg. 47(1) Upon opening of the tenders under section 60 of the Act, the evaluation committee shall first conduct a preliminary evaluation to determine whether-

f. **<u>all the required documents and information have been submitted</u>.**

Reg. 47(2):The evaluation committee shall reject tenders, which do not satisfy the requirements set out in paragraph (1).

Reg.48(1): A procuring entity shall reject all tenders, which are not responsive in accordance with section 64 of the Act.

g. The said material non-disclosure by Giant Forex and the omission by the Kenya Airports Authority to properly address itself to the pending litigation against it constitutes a blatant violation of ***Clauses 2.3.2*** *and* ***2.31.1*** *of the Invitation to Tenderers being:*

Clause 2.3.2: The Tenderer is expected to examine all instructions, forms, terms and particulars in the tender documents. Failure to furnish all information required by the tender documents or to submit a tender not substantially responsive to the tender documents in every respect will be at the tenderer's risk and may result in rejection of

its tender.

Clause 2.31.1: The procuring entity requires That tenderers observe the highest standard of ethics during the procurement process and execution of contracts…

*h. The said material non-disclosure by Giant Forex Bureau and the omission by the Kenya Airports Authority to properly address itself to the pending litigation against it constitutes a blatant violation of **Clause 2.20** of the Appendix to Instructions to Tenderers (Tender No. KAA/306/2015-2016) wherein it stipulates as follows(please refer to page 14 thereof):*

Having met the Preliminary requirements, successful firms will be subjected to a technical evaluation.

Only the firms meeting the technical requirements BELOW shall be subjected to further evaluation based on the financial criteria.

i. Nairobi Bureau submits That it was perfectly clear under the afore-cited provisions of the Act, the Regulations and the Invitation to Tenderers (Tender No. KAA/306/2015-2016 as well as the Appendix to Instructions to Tenderers That a tenderer's proposal would be subjected to a technical evaluation only upon having been certified as been compliant with all the Preliminary Requirements, Appendix V: Litigation History being among them.

j. Nairobi Bureau believes That the failure and/or disregard by Kenya Airports Authority of the pending litigation by Giant Forex Bureau De Change Limited denied it of a fair playing field, violated its right to compete fairly against Giant Forex Bureau De Change Limited which has resulted in financial loss and suffering on the part of the Applicant.

26. That the Public Procurement Administrative Review Board upon hearing and consideration of the above grounds for review determined that the successful bidder's tender was non- responsive under the provisions of Clause 2.20of the Appendix of the Invitation to Tenderers and thus in contravention of Section 79 (1) & 55(5) and should have been disqualified at the preliminary evaluation stage. That in effect, the Board allowed the Request for Review and directed the Procuring Entity to proceed with and complete the procurement process by awarding the tender to Nairobi Bureau at its tender price of Kshs. 2,300,000.

27. The 2nd interested party opposed the application and filed a replying affidavit sworn by **KATHERINE KISILA** the Corporation Secretary of the 2nd Interested Party who deposed that via Tender No: KAA/306/2015-2016, the 2nd Interested Party invited bids for the Tender for the Development and Operation of a Foreign Exchange Service (Forex) at Jomo Kenyatta International Airport. **THAT** the following six (6) bidders submitted their bid documents:-

a. Giant Forex Bureau De Change

b. Kenza Bureau De Change

c. Nairobi Bureau De Change

d. Rand Forex Bureau

e. Travel Point Forex

f. Westlands Forex Bureau Exchange Ltd

28. That as per the copy of the Tender Document already submitted to this Honourable Court by the Ex Parte Applicant, there were various requirements set out including one on Litigation History, under Appendix V.

29. That it was a mandatory requirement That Applicants provide information of any history of litigation or arbitration proceedings resulting from contracts executed in the last five years or currently under execution or otherwise indicate if there was none.

30. That the Ex Parte Applicant submitted its tender document in which it indicated that it has never been involved in any litigation or arbitration matters whatsoever.

31. THAT the Ex Parte Applicant was initially found to be the lowest evaluated bidder and an award letter accordingly issued.

32. that on 16th September 2016, the 1st Interested Party filed a Request for Review before the Respondent. The 1st Interested Party challenged the award on the ground That the Ex Parte Applicant ought to have been declared as non-responsive for failure to comply with the requirements of clause 2.20 of the Appendix to the instructions to Tenderers; which required all bidders to declare whether they had any pending litigation and or arbitration.

33. that by a decision dated 22nd September 2016, the Respondent found in favour of the 1st Interested Party and directed the 2nd Interested Party to proceed with and complete the procurement process by awarding the tender to the 1st Interested Party.

34. that there was only one issue canvassed before the Respondent as acknowledged at pages 23 to 24 of the Decision:

> *It was common ground in this Request for Review That at the time the successful bidder submitted its tender there was a pending litigation namely Giant Forex Bureau De Change Limited – vs – Kenya Airports Authority (Nai HC Misc. Appl. No. 561 of 2014). The successful bidder however explained this by stating That the suit did not legally belong to it but to Kenindia Assurance Limited under the doctrine of subrogation and any money recovered through the litigation would be the property of the Insurance Company and That the successful bidder would not receive any extra funds from the litigation.*
>
> ...
>
> *The question for the Board is to* (sic) *therefore answer whether the successful bidder ought to have been declared non-responsive at the preliminary evaluation stage by virtue of the non-disclosure of the existence of the pending litigation.*

35. that the Respondent having considered submissions by all the parties, held that:

> *The Board is however of the respectful view That whether or not the litigation in question related to subrogation or not, the successful bidder was required to disclose ... It is only upon such a disclosure That the procuring entity would have gone ahead to explain the purpose and the import of the suit to the procuring entity and the tender. It does not therefore matter in the Board's view That the suit was instituted pursuant to the insurer's right of subrogation but what matters was That there was a pending litigation in which the successful bidder and the procuring entity were named as parties.*

36. that this being a Judicial Review Application, then this Honourable Court's determination is confined to whether it can entertain review of the foregoing determination by the Respondent.

37. that in That regard thereof, the Respondent correctly applied the law on the issue placed before it for determination.

38. that a look at the subject High Court pleadings attached to the Ex Parte Applicant's affidavit at page 43 therein will confirm this position. For instance, that the Certificate of Urgency makes reference to the

fact That "the Applicant is apprehensive That if the orders are not granted they stand to lose their claim..." That the Applicant in that matter is stated as Giant Forex Bureau De Change Limited (the Ex Parte Applicant herein).

39. that in the grounds in support of its Notice of Motion in That Application, it is unequivocally stated in part:

> *1. THAT the Applicant (Giant Forex Bureau De Change Limited) intends to pursue recovery proceeding against the Respondent for a sum of Kshs. 27,764,506/= being the loss they suffered as a result of the inferno That gutted down their offices at the Respondent's premises ...*
>
> ....
>
> *6. that the Applicant stands to suffer irreparable loss if this Application is not heard and determined expeditiously.*

40. that in any event, in a subrogation claim, the insurance company is not given rights against third parties. The rights can only be enforced by the insured personally and the insurance company will only use its rich resources to facilitate the prosecution of the claims. That such litigation is still done on behalf of and in the name of the insured person.

41. that further, as can be seen from page 65 of the Ex Parte Applicant's pleadings herein, the subject dispute is traceable to the contract dated 16th November 2012 and signed on 29 November 2012 hence well within the five years' timeframe required under Appendix V to the tender document.

42. that consequently, the Respondent was correct in finding That the Ex Parte Applicant's tender was non-responsive.

43. that turning to the pronouncement substituting the decision of the 2nd Interested Party with one awarding the Tender to the 1st Interested Party, That the Respondent acted within its powers under section 173 (b) of the Public Procurement and Asset Disposal Act.

44. that as regards paragraph (o) of the Statutory Statement, the said firm of Gicheru and Company Advocates is not on the 2nd Interested Party's panel of external lawyers for the period 2015-2017.

45. that it follows therefore that the Ex Parte Applicant's application is an abuse of the Court process, is bad in law and against the public interest.

SUBMISSIONS

46. the exparte applicant's counsel submitted on the following issues:

*a. **Whether the Respondent in evaluating the Review erred in its decision to find That the Applicant herein was guilty of Material non-disclosure of the existence of High Court Misc. App. No. 561 of 2014, Giant Forex Bureau De Change Limited v Kenya Airport Authority in its bid for the Tender.***

47. It was the Applicant's submission that the Respondent's decision dated the 22nd September 2016 and marked as annexture BL5 at page 178 to the Applicant's supporting affidavit was substantively irrational and erroneous in fact and in law.

48. That as a requirement, the Litigation History form that formed part of the tender documents provided That bidders were required to disclose any history of litigation or arbitration resulting from any contracts executed within the past 5 years.

49. That the Applicant clearly through documents presented in court and the oral presentation by its

Counsel submitted That it had no dispute with the 2nd Interested Party; a position which the Applicant still holds to date.

50. That the said **High Court Misc. App. No. 561 of 2014, Giant Forex Bureau De Change Limited v Kenya Airport Authority**, is and has never been one between it and the Respondent.

51. The Applicant submitted that the said suit as instituted fell under the tenets of the **principles of Subrogation.** Further thereto, that the said suit, which in particular sought recovery proceedings against the 3rd Respondent herein for Kshs. 27, 764, 506/=, was instituted by Kenindia Assurance Company Limited under the doctrine of **Subrogation** after it had fully compensated the Applicant for the loss they suffered as a result of an unforeseen inferno That gutted down the whole and the only international arrival terminal by then at Jomo Kenyatta International Airport on 7th August 2013 where unfortunately the Applicant's premises was located.

52. In support of this assertion the Applicant urged the Respondent to appreciate the principles of the said Doctrine of Subrogation. And cited The **Halsbury's Laws of England**, stating that the **Doctrine of Subrogation** applies to all contracts of non-marine insurance which are contracts of indemnity, such as, for example, contracts of fire insurance and goes further to state the following on the nature of the doctrine:

> ***"Subrogation, in the strict sense of the term, express the insurers to be placed in the position of the assured so as to be entitled to the advantage of all the rights and remedies which the assured possesses against third parties in respect of the subject matter...The precise nature of the third party's liability to the assured is immaterial. Subrogation applies even to a statutory liability... The right does not arise until the insurers have admitted their liability to the assured and have paid him the amount of the loss."***

53. further, That **Halsbury's Laws of England** goes further to state That:

> ***"In the absence of a formal assignment of the right of action, the insurers cannot sue the third party in their own names; they must bring the action in the name of the assured. It is his duty, on receiving a proper indemnity against costs to permit his name to be used in such action."***

54. In addition thereto, it was submitted that the Black's Law Dictionary's definition of subrogation was given as:

> ***"The substitution of one party for another whose debt the party pays entitling the paying party to rights, remedies, or securities That would otherwise belong to the debtor. Or simply put the substitution of one person for another, That is one is allowed to stand in the shoes of another and assert That person's rights against the Defendant.***

55. Based on the foregoing, it was the submission of the Applicant herein that if the Respondent considered the above principle of law, it would make a finding That:

> a. It was the duty of the Applicant, upon being fully compensated by Kenindia Assurance Company Limited, to permit/ lend **the use of its name** in the action for recovery of damages against the 3rd Respondent.
>
> b. Kenindia Assurance Company Limited instituted the dispute in question, That is, ***High Court Misc. App. No. 561 of 2014*****in the name** of the Applicant.
>
> c. Even though the suit was filed in the Applicant's name, it is a dispute between the Insurance Company and the 3rd Respondent as the Applicant merely lent its name to the Insurer who instituted the suit against the 3rd Respondent.

d. It is therefore a fallacy to opine That the lending of such name is equivalent to the Applicant being an actual party to the suit.

e. Despite the use of its name, the Applicant has no intent of getting any payments from the 3rd Respondent as the case is not in any way and/or manner its case.

f. The Applicant is not party to the suit, has no interest in the suit and is not affiliated in any way to the suit.

g. The suit is thus not the Applicant's and as such the Applicant was not under obligation in the litigation history of the tender document to disclose the same nor was it guilty of non-disclosure as alleged. As such it cannot be forced to assume someone else's suit.

56. Further That as confirmed by the demand letter from the insurance company to the 2nd Interested Party and further the Supporting Affidavit dated 5th August 2014 and sworn by one Christine Oraro *(contained at Page 297 and 281 of the Applicant's bundle of documents respectively),* it is the insurance company **AND NOT** the Applicant herein who lay claim against the 2nd Interested Party from the onset.

57. It was submitted That as per the decision of the Honourable Justice Mwongo in the case of ***Vinu K. Patel V Shiva Carriers Ltd (2012) eKLR;*** the Judge noted that subrogation creates an equitable cause of action, citing with approval the decision of Lord Blackburn in **Burnand vs. Rodocanchi (1882) 7 app. Cas 333 at 389** who explained the doctrine of subrogation as hereunder:

> ***"The general rule of law(and it is obvious justice) is That where there is a contract of indemnity(it matters not whether it is a marine policy or a policy against fire or land…) and loss happens, anything which reduces That loss reduces or diminishes the amount which the indemnifier is bound to pay; and if the indemnifier has already paid it, then if anything which diminishes the loss comes into the hands of the person to whom he has paid it, it becomes an equity That the person who has already paid the full indemnity is entitled to be recouped by having That amount back."***

58. The applicant's counsel further relied on the High Cour's decision in ***Civil Appeal No. 78 of 2013, Leslie John Wilkins v Buseki Enterprises Limited (2015) eKLR*** upholding the judgment of Honourable J. Gandani which sufficiently dealt with this issue. The court in the said matter opined as follows;

> *"The purpose of insurance is to replace the loss and is not a contract of making profit.* ***The Plaintiff here in his testimony stated he was fully compensated by his insurer. The Plaintiff here cannot therefore claim for the same amount from the Defendant as this would be double compensation. Only the Plaintiff's insurer can have a claim against the Defendant. Under the doctrine of subrogation after the insurer has replaced the loss, they can step into the shoes of the insured and can recover any claims they have against the 3rd party.*** *This rule was intended to prevent the insured from receiving a double benefit through recovery from the 3rd party therefore making a profit from the unfortunate event."*

56. It was thus the Applicant's humble submission as was stated before the Respondent during the hearing of the Review that the aforesaid suit did not belong to it and further That the said suit was rightfully instituted by the Insurance Company under the doctrine of Subrogation.

60. Further, it was submitted that the clear terms of engagement and agreement *(marked as "BL7")* signed by the Applicant whilst assigning its rights under the principle of Subrogation, the same stated That:

> ***"I/We hereby assign transfer and abandon to you all my/our right title and interest in and to the said money and the proceeds thereof (to the extent provided by the law) and all rights and remedies against any person or persons whatsoever in respect thereof.***

61. It was submitted that in view of the foregoing, asserting in the tender that it was the owner of the suit would be a fallacy and a breach of the subrogation agreement entered with the Insurance Company. That in turn that this would open up the Applicant to litigation battle with the insurance company on the premise that it was seeking for double compensation.

62. In the foregoing the Applicant submitted that it was concise and accurate in the information that it tendered to the 2nd Interested Party as the suit indeed belonged to the Insurers and not it as was erroneously found by the Tribunal. It was further submitted That contrary to the assertion by the 1st interested Party that the amount claimed by the insurance company was the exact amount it compensated the Applicant; not a penny more or less.

63. In addition it was submitted That the requirement on the tender document on the litigation history *(produced as annexture BL12)* clearly spelt out That:

> ***"Applicants, including each of the partners of a joint venture, should provide information of any history of litigation or arbitration resulting from contracts executed in the last five years or currently under execution. If none, please indicate NONE.***

64. It was submitted that the said form did not provide any room for explanation but was limited to the above requirement. Further That even if the Applicant had an existing suit, which it did not, then an answer in the affirmative would be limited to the year the suit was filed, the award for or against it, the matter in dispute and the disputed amount but not the events preceding the institution of the suit thereby rendering it non-compliant without giving it any room for explanation as to why That particular suit was filed in the first place.

65. The applicant maintained that it did not have any pending suit with the 2nd Interested Party let alone any other entity in the country. In addition that the issue which makes the general disclosure a fallacy is for example; in the instant case, will the Applicant herein be required to disclose the existence of this Judicial Review Application in future when bidding for a tender simply because it instituted it after feeling that its rights had been infringed upon in the first place? Or will it be barred from offering the services its best placed to provide on account of this dispute before the court?

66. It was submitted that in answering these questions, one should look at the overriding objective of the litigation history requirement in the tender documents. The Applicant submitted that the issue should be weighed as against a particular interest in a suit that has been instituted against the procuring entity in the past.

67. It was thus the Applicant's submission that in any circumstance, when one institutes a suit against a party, the main aim is to benefit from the outcome of the said suit/ to reap the rewards thereof, which is not the case in the said High Court **Misc. App. No. 561 of 2014, Giant Forex Bureau De Change Limited v Kenya Airport Authority**. And that as clearly stated from the onset, the Applicant had no interest in the suit and could not therefore benefit from the said suit despite its name being used by the Insurer under the doctrine of Subrogation demanded.

68. It was further submitted that as per the Subrogation rights assigned to the Insurer, the Insurance Company claimed a sum of Kshs. 27, 764, 506/= from the 2nd Interested Party which sums were the exact amount as that compensated to the Applicant herein. That the Applicant thus had no interest neither did it stand to benefit in any manner whatsoever from the outcome of the said suit.

69. It was submitted that disclosing the said suit to the 2nd Interested Party herein would mean that the Applicant owned the said suit and stood to benefit from its outcome, and that this in turn would be a lie and would only unfairly prejudice it. Reliance was placed on the words of the Honourable J. Gandani quoting with approval ***Leslie John Wilkins v Buseki Enterprises Limited that:***

> ***"The Plaintiff here cannot therefore claim for the same amount from the Defendant as this***

would be double compensation. Only the Plaintiff's insurer can have a claim against the Defendant…

Under the doctrine of subrogation after the insurer has replaced the loss, they can step into the shoes of the insured and can recover any claims they have against the 3rd party.

70. The Applicant submitted further That the suit was instituted by the Insurer and That it was merely under a duty to lend its name to it and that the conclusion by the Respondent and the Interested Parties that the lending of such name is equivalent to the Applicant being the actual party to the suit is therefore flawed as would be a conclusion that an Insurance Company cannot sue in the name of the Insured. Reliance was placed on the decision of the High Court in ***Schenker & Co. East Africa Ltd v Josphat Waithaka Mumbura (2015) eKLR*** where Justice H. Waweru in discussing the principle of Subrogation noted that:

"The learned magistrate's appreciation of this doctrine was clearly skewed; he reasoned That since the insurance company had received its premium from the plaintiff, there was no basis for it to pursue reimbursements of costs and expenses incurred in repairing the appellant's vehicle for That would amount to double payment. The learned magistrate might not be aware but by reasoning the way he did, he was in essence challenging the very doctrine of subrogation itself; he was challenging the law as we understand it.

71. Further reliance was placed on the English decision of the Honourable court in ***Caledonia North Sea Ltd versus British Telecommunications Plc. (Scotland) & Others (2002) UKHL*** as quoted with approval in ***Schenker & Co. East Africa Ltd v Josphat Waithaka Mumbura [supra]*** where the House of Lords expressed the doctrine of subrogation in simpler and clearer terms as per the words of **Lord Bingham of Cornhill** expressed in paragraph 11 of the judgment thus:-

'***The law has long been settled in England and Wales as(I understand) in Scotland, That an insurer who has fully indemnified and insured against a loss covered by contract of insurance between them may ordinarily enforce, in the insurer's own name, any right or recourse available to the insured.'***

72. That the learned judge further made reference to Lord Cairns LC speech in ***Simpson & Co versus Thompson (1877) 3 App cases 279,286***where after considering several decisions on the doctrine and the manner of pursuing the insurer's rights under it, he said:-

> ***'My Lords, these authorities seem to me to be conclusive that the right of the underwriters is merely to make such claims for damages as the insured himself could have made, and it is for this reason That(according to English mode of procedure) they would have to make it in in his name…'***

73. It was further submitted that in closing of its determination on the issue of subrogation, the learned judge Simpson in the above matter Court finally stated That;

"….As noted in the case of **Simpson & Co versus Thompson (ibid)**, ***the insurer has every right to bring a claim for reimbursement in the name of the insured; this, the insurance Company for East Africa Limited did and specifically pleaded the doctrine in the amended plaint. It was erroneous on the part of the learned magistrate to insist That the company should have sued in its own name…"***

74. It was therefore submitted that the decision by the Respondent which the Applicant seeks to review was made of error in fact and in law as the 2nd Interested Party took it upon itself to decide that the Applicant was engaged in a legal dispute with it while the simple truth of the matter was that there was no dispute between the two parties herein at all and therefore nothing to disclose.

b. ***On Whether the Respondent's decision was biased***

75. It was submitted that prior to, during and after the hearing of the Review Application, the learned Chairman of the Respondent, Mr. Paul Gicheru, failed to disclose to the parties that his firm of Advocates; Gicheru and Company Advocates rendered Legal Services to the 2nd Interested Party herein. It was therefore submitted that although the 2nd Respondent had denied the same, it had not provided any evidence to the contrary or categorically stated why it did not disclose this fact. That the Respondent on its part has elected to deliberately ignore the issue in its reply as if it was never raised.

76. It was thus submitted that the adjudication by the Respondent was biased as serious questions of integrity would arise in its decision are put forward. ***That the minimum That the chair would have said is as follows; my firm is in the panel of the 2nd Interested Party; Anyone who will feel prejudiced in a case concerning my own clients should voice their objection before we commence hearing the matter.***

77. The court was urged to be guided by the decision of the Honourable Justices **Karanja, Okwengu, Mwera, GBM Kariuki & Mwilu, JJ.A** in the Court Of Appeal decision in ***Standard Chartered Financial Services Limited & 2 others v Manchester Outfitters (Suiting Division) Limited (Now Known As King Woollen Mills Limited & 2 others [2016] Eklr*** who observed:

> ***"It is clear That the issue of bias negates the twin virtues of impartiality and independence of the Court of the Judge hearing and determining a matter. These two principles are the hallmark of a fair trial as espoused in section 77 of the retired Constitution of Kenya and Article 50 of the current Constitution…"***

78. That the learned Judges further went ahead and quoted with approval the words of **Lord Hope of Craighead** in ***R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte [2000] 1 AC 119 (In Re Pinochet*** who stated:

> ***"One of the cornerstones of our legal system is the impartiality of the tribunals by which justice is administered. In civil litigation the guiding principle is That no one may be a judge in his own cause: nemo debet esse judex in propria causa. It is a principle which is applied much more widely than a literal interpretation of the words might suggest. It is not confined to cases where the judge is a party to the proceedings. It is applied also to cases where he has a personal or pecuniary interest in the outcome, however small… {Emphasis Ours}***
>
> ***…the nature of the interest is such That public confidence in the administration of justice requires That the judge must withdraw from the case or, if he fails to disclose his interest and sits in judgment upon it, the decision cannot stand. It is no answer for the judge to say That he is in fact impartial and That he will abide by his judicial oath. The purpose of the disqualification is to preserve the administration of justice from any suspicion of impartiality. The disqualification does not follow automatically in the strict sense of That word, because the parties to the suit may waive the objection. But no further investigation is necessary and, if the interest is not disclosed, the consequence is inevitable." {Emphasis Ours}***

79. It was submitted that the Chairman of the Respondent acted in a biased manner as he indeed had an interest in the matter considering that he was in the 2nd Interested Party's panel of legal service providers. That a **decision in favour of the Respondent would be viewed by ordinary citizenry EVEN IF RIGHT to have indeed been arrived at to maintain the good relations between him and the 2nd Interested Party.** On the other hand a decision against the interests of the 2nd Interested Party would affect their contractual relationship.

80. As such, it was submitted that in every decision made by a judicial body and/or public institution, public interest is paramount. That the decision issued by the Respondent was biased and this also explains why the Respondent failed in the first place to disclose that he had a working relationship with the 2nd Interested Party.

81. That therefore one cannot be faulted for further arguing that the reason why despite the Respondent

knowing that the Applicant had rightfully qualified for the tender award with an annual concession fee of Kshs. 6,000,000/= and with the 1st Interested Party having offered a much lower fee of Kshs. 2,300,000/=, it still went ahead and arbitrarily awarded the 1st Interested Party the tender in order to maintain good relations.

82. That this means that the 2nd Interested party would incur a **Kshs. 3,700,000/= loss** every year for a period of 5 years.

83. It was submitted that it appears like the Applicant goose had already been cooked even before the decision by the Respondent had been rendered. The Applicant submitted that it is being subjected to biased decisions, witch-hunt and deceitful actions by the Respondent and the 2nd Interested Party all in effort to discredit it.

84. It was submitted that the discretion of the Court on an application of this kind has to be exercised upon the established principles of law. That in this case, this Honourable court has to consider the doctrine of subrogation and whether the Respondent indeed erred in fact and law in giving a decision that clearly goes against this established principle.

85. It was submitted that the execution of the Respondent's judgment will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the tender process.

86. In conclusion, it was submitted that in granting the review orders being sought by the Applicant herein, the Court must not only look at the conduct of the parties herein but all circumstances including public interest. That in this case, the Applicant's conduct allows it to enjoy the benefits of the orders sought herein hence its application ought to be allowed with costs.

THE RESPONDENT'S SUBMISSIONS

87. The respondent's submissions mirror the depositions in the replying affidavit of Mr Stanley Miheso, while setting out the scope of Judicial review and the grounds upon which an applicant can challenge a decision of the administrative body which are illegality, irrationality/unreasonableness and procedural impropriety. Those are the grounds set out in several cases including R.V **Kenya power and Lightning Co Ltd and another [2-13] eKLR while citing the Wednesbury Corporation case; Grain Bulk Handlers Limited v JB Maina and Co. Limited and 2 others[2006]eKLR Civil Service Union v Minister for the Civil Service [1985]AC2 ;Pastoli v Kabale District Local Government Council and others[2008]2EA;An application by Bukoba Gymkhana Club [1963]EA 478 at 479.**

88. According to the respondent, its decision does not meet the threshold of unreasonableness, illegality and neither was it arrived at with procedural impropriety and that the applicant has not demonstrated the test.

89. It was submitted that what the applicant was seeking from this court is determination of the merits of the respondent's decision and not procedural impropriety. That there is indeed no challenge to the procedure adopted by the respondent in arriving at its decision. Reliance was placed on **RV Kenya Revenue Authority Exparte Yaya Towers Limited [2008] eKLR** wherein the court warned that the court should not substitute its own decision for that of the administrative authority to decide the matter in question.

90. It was therefore submitted that the court exercising judicial review jurisdiction should not act as the court of appeal, which the applicant in this case had done. Several decisions were cited including **Seventh Day Adventist Church (EA) Limited v PS Ministry of Nairobi Metropolitan Development and another[2014]eKLR and Municipal Council of Mombasa V R and Umoja Consultants Ltd CA 185 OF 2001.**

91. It was submitted that the applicant had not demonstrated that it was entitled to the judicial review

orders of certiorari and mandamus hence the application should be dismissed with costs to the respondent.

1ST INTERESTED PARTY'S SUBMISSIONS

92. On behalf of the 1st interested party it was submitted that the following issues arise for determination by the Honorable Court:

a. **Whether the decision of the Public Procurement Administrative Review Board dated 22nd September, 2016 was rational, reasonable and sound in law.**

b. **Whether the Applicant is entitled to the orders sought.**

93. On the first issue above, it was submitted that the fundamental principles that guide Judicial Review proceedings have to be analyzed, while relying heavily on **Peter Kaluma** in his book, **Judicial Review, Law Procedure and Practice, page 46 which** enumerates as follows:

> *'The remedy of judicial review is radically different from those of review and appeal. Judicial Review is not an appeal from a decision but a review of the decision making process and the legality of the decision making process itself. When determining an appeal, the court is concerned with the merits of a decision. Conversely, in Judicial Review the courts exclusive concern is with the legality of the administrative action or decision in question. Thus instead of substituting its own decision for That of some other body, as happens in appeals, the court in an application for judicial review is concerned only with the question as to whether or not the action under attack is lawful or should be allowed to stand or be quashed.'*

94. That the distinction is reiterated by the Court of Appeal in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd[2002]eKLR** as follows:

> *"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to 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…The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision."*

95. The 1st interested party urged the court to take cognizance of the indisputable fact that the Application herein does not challenge the procedural fairness or otherwise of the Board in setting aside the decision of the Procuring Entity but only challenges the substantive merit of the said decision.

96. That in determining the substantive merit of the Board's decision, it is imperative to highlight the background upon which it draws its mandate which is from **Article 227** of the Constitution which provides:

> **'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.'**

97. It was submitted That For the purposes of achieving this Constitutional Objective, Parliament then enacted the Public Procurement and Disposals Act (*hereinafter referred to as the Act*) which in view of Hon. Justice Nyamu (as he then was) in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati** **Nairobi HCMA No. 1260 of 2007 [2008] KLR 728** was:

> *"…to maximize economy and efficiency as well as to increase public confidence in those procedures…..The intention of efficiency is noble and must be appreciated if the development*

agenda is to be achieved...The said Act also has other objectives namely to promote the integrity and fairness of the procurement procedures and to increase transparency and accountability. Fairness, transparency and accountability are core values of a modern society like Kenya. They are equally important and may not be sacrificed at the altar of finality. The Court must look into each and every case and its circumstances and balance the public interest with That of a dissatisfied applicant."

98. It was submitted that in its decision of 22nd September, 2016 the Board lawfully and rightfully exercised its mandate in upholding a procurement system of fairness, accountability and transparency by holding that the Applicant's bid was non-responsive under Clause 2.20 of the Invitation to Tenderers and 2.3.2 & 2.31.1 of the Appendix to the Instructions to Tenderers; and as a consequence it set aside the decision of the Procuring Entity.

99. That this was occasioned by the failure by the Applicant to disclose in its tender proposal its litigious dispute with the Procuring Entity in **High Court Misc. Appl. No. 561 of 2014: Giant Forex Bureau De Change Limited -versus- Kenya Airports Authority** where Giant Forex Bureau De Change Limited has claimed the sum of at least **Kshs. 27,764,506.00** from Kenya Airports Authority, the Procuring Entity.

100. It was submitted that the material non-disclosure is not only contrary to the tender requirements set out by the Procuring Entity as submitted above but also contrary to *inter alia* section 79(1) of the Public Procurement and Disposal Act, 2015 which stipulates as follows:

A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents.

101. It was submitted that in correctly citing the Case of **Reliable Electrical Engineering M. Ltd -vs- Kenya Ports Authority (PPARB No. 21)** the Board ruled that the act of non-disclosure of the litigation history in the tender document by the Applicant was a fatal omission and thus a blatant violation of Clauses 2.3.2 and 2.31.1 of the Invitation to Tenderers being: **Clause 2.3.2**

The Tenderer is expected to examine all instructions, forms, terms and particulars in the tender documents. Failure to furnish all information required by the tender documents or to submit a tender not substantially responsive to the tender documents in every respect will be at the tenderer's risk and may result in rejection of its tender.

Clause 2.31.1:*The procuring entity requires That tenderers observe the highest standard of ethics during the procurement process and execution of contracts…*

102. It was submitted that the Board, further in allowing the Application for Review by **Nairobi Bureau de Change** found that the Procuring Entity also breached the provisions of Section 55 of the Act which required that a state organ or a public entity to consider as ineligible a person for submitting false, inaccurate or incomplete information about his or her qualifications.

103. **On the Doctrine of Subrogation, it was submitted that** the Applicant has not denied that it did not disclose the existence of **High Court Misc. Appl. No. 561 of 2014:Giant Forex Bureau De Change Limited -versus- Kenya Airports Authority** where it sued the Procuring Entity for the sum of at least Kshs. 27,764,506.00. That the Applicant however contends that there was no duty to disclose as the said claim as it was instituted by Kenindia Assurance Limited (hereinafter referred to as '***the insurer'***) under the doctrine of subrogation. The court was urged to find agreement with the findings of the Board as enumerated at page 28 of its decision that:

"The Board wishes to emphasize that any bidder who participates in a tender process participates in a serious exercise *which cannot be brought to an end just because one bidder fails to comply with a mandatory requirement. Every bidder in a procurement process always has a legitimate expectation That the process will proceed to the end and it matters not That the only bidder remains at the end of the evaluation process as long as the bidder has met all the*

requirements of the tender. [Emphasis added]

104. That although the Applicant's contended that under the said doctrine they were only a dummy having been compensated by the insurer and that they had surrendered their rights and interests to the insurer in any claim they could legally seek as against the Procuring Entity, the court should note that submissions on this issue were made before the Board and upon consideration as follows at page 25:

> ***'The Board is however of the respectful view That whether or not the litigation in question related to subrogation or not , the successful bidder was required to disclose the existence of the said suit in it's tender documents so long as the procuring entity was named as a party to the suit.*** *It is only upon such a disclosure that the procuring entity would have gone ahead to explain the import of the suit to the procuring entity and the tender.* ***It does not therefore matter in the Board's view That the suit was instituted pursuant to the insurers right of subrogation but what matters was That there was a pending litigation in which the successful bidder and the procuring entity were named as parties.'***

105. It was submitted that the above reasoning by the Board is rooted in the provisions of the Public Procurement and Disposal Act, 2015 and cannot be said to amount to an error of law or fact.

106. It was further submitted that with regard to the law and in addition to Section 79(1) of the Public Procurement and Disposal Act, Regulation 47(1)(f), 47(2) and 48(1) of the Public Procurement and Disposal Regulations, 2006 stipulate that:

> **Reg. 47(1) :Upon opening of the tenders under section 60 of the Act, the evaluation committee shall first conduct a preliminary evaluation to determine whether-**
>
> g. **<u>all the required documents and information have been submitted</u>.**
>
> **Reg. 47(2):The evaluation committee shall reject tenders, which do not satisfy the requirements set out in paragraph (1).**
>
> **Reg.48(1): A procuring entity shall reject all tenders, which are not responsive in accordance with section 64 of the Act.**

107. It was submitted that it would be absurd to then find an application for judicial review on the argument that the above reasoning by the Board be deemed by this Court as an act that is ultra-vires, or one which occasions an error of law or fact, or is unreasonable or irrational.

108. On the applicant's plea that there was no duty to disclose the said litigation against the Procuring Entity as the said claim was instituted by Kenindia Assurance Limited under the doctrine of subrogation; and contention that under the said doctrine they were only a dummy and having been compensated they had donated their rights and interests in respect of the claim against the Procuring Entity; it was respectfully submitted that the above argument by the Applicant is wrong in law, false and misleading. That the cannons of insurance couldn't be clearer as the insured, at all times remains in control of the proceedings under the principle of subrogation.

109. That there is no privity of contract between the insurer and the third party and although the assured subrogates his right to institute proceedings, the assured maintains control of the proceedings and is entitled to take proceedings against third parties to recover his loss and cannot be restrained from doing so by the insurer before or after payment of what is due under the policy. Reliance was placed on **Mac GILLVRAY & PARKINGTON** on **Insurance Law, 8th Edition** at page 495 where it is stated:

> ***"Control of Proceedings.***
>
> ***Even if he has been paid out under the policy, but continues proceedings to gain compensation for his uninsured loss, the insurers cannot interfere if he is willing to prosecute a claim for the***

whole loss. The insured must conduct the litigation with proper regard for the insurer's interest, and may be liable in damages for misconducting the litigation, in particular the abandoning rights to the prejudice of the insurer.

110. **Further reliance was placed on Odunga's Digest in Civil Case Law and Procedure** at page 2150, paragraph 4773 where the learned judge states:

> *'The right to subrogate does not create privity of contract between the Insurance Company and the third party; it only gives the Insurance company the right to take over the rights and privileges of the insured and therefore must be brought in the same name of the insured.* **Oppis vs Lion of Kenya Insurance Company Civil Appeal Number 185 of 1991).**

111. That the above position has been expressed by the Court of Appeal in **Octagon Private Investigation Security Services -vs- Lion of Kenya Insurance Co. [1994] eKLR** as follows**;**

> *"The right of subrogation in a contract of insurance cannot create privity of contract between the insurance company and third parties.* ***All That it gives an insurance company is the right to take over the rights and privileges of the insured under an insurance policy but if the insurance company wishes to exercise against third parties the rights and privileges so taken over from the insured, then it (the insurance company) can only do so on behalf of and in the name of the insured****. We think* ***Mr J B Byamugisha*** *in his book "Elements of Insurance Law in East Africa" correctly states the law when he says at pg 109 under the heading "More on Subrogation":*
>
> ***"The insurance company is not given rights against third parties. The rights must and can only be enforced by the insured personally (to whom they are actually owed). Normally, the insurance company will use its rich resources to prosecute the claims; but, even then, it will do so on behalf of and in the name of the insured person.…"***[Emphasis added]

112. Further, that in **African Merchant Assurance Company Limited v Kenya Power and Lighting Company Ltd [2016]eKLR** the Court quoted the following texts and expressed itself on this issue as follows:

> Chalmers on Marine Insurance Act, 1906, 6th edition at page 126 states as follows: -
>
> > *"Speaking broadly the insurer in the absence of special contract must exercise all remedies arising from subrogation in the name of the assured. It follows that the insurer is entitled to the use of the assured's name, but if the insurer wishes to bring an action he must, of course be prepared to indemnify the assured as regards costs."*

113. Further reliance was placed on **Halsbury's Laws of England, Volume 22, 3rd edition(1958) at page 263** which states as follows: -

> *"In the absence of formal assignment of the right of action, the insurers cannot sue the third party in their own names; they must bring the action in the name of the assured. It is his duty, on receiving a proper indemnity against costs, to permit his name to be used in such action."*

114. It was submitted that the applicant herein intend to mislead the court by canvasing principles of abandonment/assignment as principles of subrogation. In abandonment, the assured donates all rights, control of proceedings and or otherwise to the insurer.

That as opposed to abandonment, in subrogation the insurer is not permitted to keep sums acquired of subrogation in an amount exceeding the amount of the payment made to the insured and thus the Applicants herein stood to enjoy from the fruits of **High Court Misc. Appl. No. 561 of 2014: Giant Forex Bureau De Change Limited -versus- Kenya Airports Authority** if the Court awards an amount exceeding that which they obtained as compensation for the insured risk. Reliance was further placed on **Mac GILLVRAY & PARKINGTON on Insurance Law, 8th Edition** at page 479 where it is stated:

"He (the insurer) acquires no proprietary rights over the subject matter of the insurance as a result of subrogation, but rather is subrogated to the assured personal rights of suit against third parties in respect of the event causing the loss.

115. That the above position is further buttressed in the *locus classicus* of **Yorkshire Insurance Co. vs Nibset Shipping Co. 1962 2Q.B 330** where the Court in determining who is entitled to the excess amounts obtained by the insurer held as follows:

"It follows That in my view the insurer's rights in this case were limited to recovering from the assured the amount overpaid, That is to say 72,000/-. He is entitled to no more. The principle, I think is a simple one. "

116. From the foregoing, it was submitted that the Applicant maintained control of the proceedings in **High Court Misc. Appl. No. 561 of 2014: Giant Forex Bureau De Change Limited -versus- Kenya Airports Authority** and had a duty to disclose it as a Preliminary Requirement as was stipulated under Clauses 2.3.2 & 2.31.1 of the Invitation to Tenderers and Clause 2.20 of the Appendix to Instructions to Tenderers. Further, when presented with this fact during the course of proceedings before the Board, the Procuring Entity stated emphatically that had it known of the material non-disclosure by the Applicant, they would not have awarded the tender to the Applicant.

117. Therefore, that whether or not the claim arises from a tortious act or a contractual act as argued by the Applicant remains immaterial in this instance; the intent of the clause on Preliminary Requirements for Tender Responsiveness was categorically titled *'Declaration of Litigation History'*; that the Applicant acknowledged at the hearing before the Board that it knew of the existence of the suit but nevertheless chose not to disclose its existing dispute with the Procuring Entity despite express stipulations and requirements under the law towards providing such information. The court was therefore urged to hold as correct the following finding by the Board:

'… what matters was that there was a pending litigation in which the successful bidder and the procuring entity were named as parties.'

118. It was further submitted that the assertion by the Applicant that the Procuring Entity stands to lose Kshs. 3,700,000 annually for a period of 5 years is frivolous and vexatious. That this issue was canvassed before the Board and particularly in the Further Affidavit of Nairobi Bureau de Change filed before the Board on 16th September, 2016 at paragraphs 32 – 37. Further, that the Board correctly pronounced itself on this issue as follows at page 29 of its decision:

'As for the present Applicant, the Board finds That it offered an annual concession fee of Kshs. 2,300,000 which was way above the proposed annual concession fees of Kshs. 1,000,000 set by the procuring entity in the tender document. The Applicant was therefore within the accepted limit.'

119. In view of the foregoing, it was submitted that the Board acted in accordance with the law in its decision dated 22nd September, 2016 and therefore, the Ex Parte Applicant is not entitled to the prayers sought hence the court should dismiss the Ex Parte Applicant's Application dated 5th October, 2016 with costs to the 1st Interested Party.

THE 2ND INTERESTED PARTY'S SUBMISSIONS

120. The 2nd Interested Party relied on its List and Bundle of Authorities dated 16 December 2016 and the background facts as articulated in its Replying Affidavit sworn by Katherine Kisila on 18 November 2016 and the Respondent's Decision dated 22nd September 2016.

121. The 2nd interested party outlined the **Parameters of Judicial Review as stipulated in Republic v Administrative Review Board Public Procurement & 2 others Exparte Hoggers Limited [2015] eKLR** the court summed up the parameters of judicial review as follows:

49. The parameters of judicial review were set out by the Court of Appeal in ***Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001*** *in which it was held That:*

*"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to 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…**The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision."***

50. In ***Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR*** *it was held That the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself.* ***It is important to remember in every case That the purpose of the remedy of Judicial Review is to ensure That the individual is given fair treatment by the authority to which he has been subjected and That it is no part of That purpose to substitute the opinion of the judiciary or of the individual judges for That of the authority constituted by law to decide the matter in question.*** *Unless That restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285 and* ***Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60.*** *I* (Emphasis added) (See Highlighted Paragraphs at pages 27 to 28 of the Bundle of Authorities)

122. It was therefore submitted that it was clear that the powers of the Court in Judicial review are limited as was stated below:

Where the proceedings are regular upon their face and the inferior tribunal has jurisdiction in the original narrow sense (That is to say, it has power to adjudicate upon the dispute) and does not commit any of the errors which go to the jurisdiction in the wider sense, the quashing order (certiorari) will not ordinarily be granted on the ground That its decision is considered to be wrong either because it misconceived a point of law or misconstrued a statute (except the misconstruction of a statute relating to its own jurisdiction) or That its decision is wrong in matters of fact or That it misdirects itself in some matter. (Emphasis added) - **Civil Appeal No. 145 Of 2011 Kenya Pipeline Company Limited V Hyosung Ebara Company Limited & 2 Others [2012] eKLR.**

123. Consequently, the 2nd Interested Party submitted that the principles for Judicial Review are now well established in law., and that at no point in its pleadings does the Ex Parte Applicant set out how its case fits into the above legal boundaries of judicial review.

124. It was further submitted that what the Ex-parte Applicant is seeking under the guise of Judicial Review is for the Court to exercise an appellate jurisdiction and re-evaluate the facts and the law afresh in order to arrive at a decision that could this time be favourable to the Ex-parte Applicant. It was submitted that this Court lacks the jurisdiction to engage in such an exercise. Reliance was placed on **Republic v Commissioner Of Customs Services Ex-Parte Africa K-Link International Limited[2012]eKLR** where it was held:

"It must always be remembered that judicial review is concerned with the process a statutory body employs to reach its decision and not the merits of the decision itself. Once it has been established That a statutory body has made its decision within its jurisdiction following all the statutory procedures, unless the said 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. The court cannot substitute its own decision with that of the Respondent."*

125. On whether there was merit in the exparte applicant's claim, it was submitted that under section 173 of the Public Procurement and Asset Disposal Act, upon completing a review, the Review Board (Respondent) may do any one or more 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.

126. It was submitted that the Respondent extensively considered the issue raised by the Ex Parte Applicant herein and a proper decision rendered pursuant to section 173 above. That the Respondent found that the 1st Interested Party was the only bidder who met the mandatory conditions under the Tender Document while the Ex Parte Applicant's tender was unresponsive. That based on the provisions of the law and authorities noted above, these were issues properly before the Respondent and it had jurisdiction to deal with the same.

127. On whether the decision of the Respondent may now be challenged under Judicial Review, it was submitted that , if so, then the decision may only be challenged on the grounds of illegality, procedural impropriety and irrationality. Based on the Ex Parte Applicant's pleadings, it was submitted that the decision seems to be challenged on the ground of irrationality. It was submitted that in **Republic v Administrative Review Board Public Procurement & 2 others Exparte Hoggers Limited (Supra)**, the court elaborated as follows:

*"Irrationality as fashioned by **Lord Diplock** in the **Council of Civil Service Unions Case** takes the form of Wednesbury unreasonableness explicated by Lord Green and applies to a decision which is **so outrageous in its defiance to logic or of accepted moral standards** That no sensible person who had applied his mind to the question to be decided could have arrived at it.*

128. On the doctrine of subrogation, reliance was placed on **Octagon Private investigation Security Services v Lion of Kenya Insurance Co. [1994] eKLR**, where the Court of Appeal had an opportunity to deal with the proper interpretation of the doctrine of subrogation as follows:

The right of subrogation in a contract of insurance cannot create privity of contract between the insurance company and third parties. ... if the insurance company wishes to exercise against third parties the rights and privileges so taken over from the insured, then it (the insurance company) can only do so ***on behalf of*** *and in the name of the insured. We think Mr J B Byamugisha in his book "Elements of Insurance Law in East Africa" correctly states the law when he says at pg 109 under the heading "More on Subrogation":*

*"The insurance company is not given rights against third parties. The rights must and can only be enforced by the insured personally (to whom they are actually owed). Normally, the insurance company will use its rich resources to prosecute the claims; but, **even then, it will do so on behalf of ...*** the insured person.*…"*

129. Further reliance was placed on **Thomas Muoka Muthoka & Another V Ernest Jacob Kisaka [2007] eKLR**, where the court noted:

*"A claim of subrogation does not mention the insurance company as a party. **The party is the plaintiff...**. "*

130. In view of the foregoing, it was submitted that the Respondent was correct in holding that the Ex Parte Applicant did have a pending litigation case, which it failed to disclose. That the subject litigation is traceable to the contract dated 16th November 2012 and signed on 29 November 2012 between the 2nd Interested Party and the Ex Parte Applicant for provision of Forex Bureau Services at Jomo Kenyatta International Airport.

131. That the Respondent's decision has backing in law and cannot therefore be described as so outrageous in its defiance to logic that no sensible person who had applied his mind to the question to be decided could have arrived at it. In the circumstances, no Judicial Review orders can be issued.

132. With regard to the pronouncement substituting the decision of the 2nd Interested Party with one awarding the Tender to the 1st Interested Party, the 2nd Interested Party it was submitted that the Respondent acted within its powers under section 173 (b) of the Public Procurement and Asset Disposal Act. That the Respondent based its decision on the fact that the 1st Interested Party satisfied all the requirements under the Tender Document including providing a concession fee that was well above the minimum amount of Kshs. 1,000,000 set out therein. The "Successful Bidder" having now been disqualified, then pursuant to section 86 of the Act, the Applicant stood as the best-evaluated bidder.

133. That whereas the Applicant might not have offered the highest concession fee among all the bidders, it offered the highest concession fee amongst the responsive and qualified bidders. That Under Article 227 of the Constitution, 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. As such, in addition to cost-effectiveness, such a tender process should be fair, equitable and competitive. Reliance was placed on **Republic v Public Procurement Administrative Review Board & 2 others Ex Parte MIG International Limited & another [2016] eKLR where** the Court opined:

*"It is however my view that in public procurement and disposal, the starting point is the Constitution. A procurement must therefore, before any other consideration is taken into account whether in the parent legislation or the rules and regulations made thereunder, meet the constitutional threshold of fairness, equity, transparency, competitiveness and cost-effectiveness. In other words any legislative consideration which does not espouse these ingredients can only be secondary to the said Constitutional dictates. **In my view, cost-effectiveness for example does not infer That the Procuring Entity must go for the lowest tender no matter the results of the evaluation of the bid. Therefore apart from the lowest tender, the procuring entity is under an obligation to consider all other aspects of the tender as provided for in the tender document and where a bid does not comply with the conditions stipulated therein it would be unlawful for the procuring entity to award a tender simply on the basis That the tender is the lowest.**"*

134. That the effect of the above principle is that where a bid does not comply with the conditions stipulated in the tender document, it would be unlawful for a procuring entity to award a tender simply on the basis that the tender offered the highest amount. Applying that principle to the present circumstances, it emerges that the Ex Parte Applicant cannot use its non-responsive bid as a reference point in its own evaluation of other bidders. The Tender Document set out a minimum concession fee of Kshs. 1,000,000 and the 1st Interested Party did meet this requirement.

135. **On the prayers sought, it was submitted that** with regard to an application for an order of certiorari, the Ex Parte Applicant has not established any ground to justify granting of such orders. In this regard, the 2nd Interested Party reiterated the Court of Appeal decision in the case of ***Kenya Pipeline Company Limited* (Supra)** where it was stated:

Where the proceedings are regular upon their face and the inferior tribunal has jurisdiction in the original narrow sense (That is to say, it has power to adjudicate upon the dispute) and does not

commit any of the errors which go to the jurisdiction in the wider sense, the quashing order (certiorari) ***will not ordinarily be granted on the ground That its decision is considered to be wrong either because it misconceived a point of law or misconstrued a statute (except the misconstruction of a statute relating to its own jurisdiction) or That its decision is wrong in matters of fact or That it misdirects itself in some matter****.*

136. The Court went on to conclude That:

The 1st Respondent did not establish that the Review Board had acted without jurisdiction or in excess of jurisdiction or in breach of the rules of natural justice or that the decision was irrational. ***The Judicial Review was not confined to the decision making process but rather the correctness of the decision on matters of both law and fact. So long as the proceedings of the Review Board were regular and it had jurisdiction to adjudicate upon the matters raised in the Request for Review, it was as much entitled to decide those matters wrongly as it was to decide them rightly***

137. On mandamus, the 2nd Interested Party observed that such order is discretionary and of a most extensive remedial nature. In the present instance, the request is inseparably intertwined with the prayer for certiorari and the Ex Parte Applicant having failed to place before this Honourable Court sufficient grounds for grant for certiorari, the prayer for mandamus must fail as well.

DETERMINATION

138. I have considered all the parties' respective positions in this matter. In my humble view, the issues for determination are as follows:

a. ***Whether the Chairman of the Review Board was one of the panel advocates for the 2nd interested party and therefore whether the decision of the Respondent was biased in its decision.***

139. Conflict of interest is a situation that has the potential to undermine the impartiality of a decision maker because of the possibility of a clash between the person's self-interest and professional interest or public interest. It is a situation in which a party's responsibility to a second party limits its ability to discharge its responsibility to a third party.

140. In the instant case, the applicant claims that it raised the issue of the Chairman of the Review Board being an advocate for the 2nd interested party but that there was no denial of the allegation.

141. No doubt, if the chair had a monetary interest it is appropriate that he abstains from participating in the proceedings for review to avoid the appearance of a conflict of interest. However, the 2nd respondent stated clearly that during the period of the procurement process 2015-2017 the Chairman was not in the panel of the 2nd interested party's advocates. Section 107 of the Evidence Act is clear that he who alleges must prove. In this case, it was upon the applicant who alleged that the Chairman of the Review Board had a conflict of interest in the Review process to adduce evidence by way of a letter of instructions or other communication to show that he was in the panel of advocates for the 2nd interested party during the period. It was not for the 2nd interested party to prove that the Chairman of the Review Board was not one of its advocates in their panel. The applicant failed to discharge that burden. Its attempt to discharge the burden of proving that there was conflict of interests and therefore possible bias is by way of some listing of approved service providers for the 2nd interested party from page 527 to 528 of the bundle for chamber summons for leave but the document does not show for which year the procurement of the Chairman's legal services were made.

142. Therefore, I have no hesitation but to find and hold that the applicant's allegation of bias was not only imaginary but unsubstantiated. I dismiss that allegation as lacking proof.

b. ***Whether the applicant's non-disclosure of history of litigation with the 2nd interested party rendered it a nonresponsive tenderer***

143. The exparte applicant made very vigorous and elaborate useful submissions on this issue while admitting that albeit there was litigation between itself and the 2nd interested party, but that it was not litigation perse between the two entities. It maintained that it had lend its name to be used by the insurance company to claim compensation for the loss suffered when the 2nd interested party's premises were razed down. That the insurance company having compensated the applicant, the said insurance company was entitled under the doctrine of subrogation to claim from the 2nd interested party and the only way was to use the applicant's name. Iam totally in agreement with the exparte applicant's submission and the authorities relied on by Mr Oyatta counsel for the applicant are relevant on the question of applicability of the doctrine of subrogation which is an established legal principle.

144. It is also not in dispute that at page 543 of the Chamber Summons for leave, there is an appendix to the tender documents, being instructions to tenderers for compliance and one such instruction is that **bids shall be evaluated on their responsiveness to preliminary requirements as set out thereunder inter alia, any litigation history, and that firms would be evaluated as non-responsive and shall be disqualified from further evaluation if they do not comply with the tender requirements.**

145. The litigation form history is on page 561 of the chamber summons bundle as appendix V, directing That the applicants, including each of the partners of a joint venture, should provide information of **any history of litigation or arbitration resulting from contracts executed in the last five years or currently under execution and if none, to indicate NONE.**

146. The tender document does not indicate that the litigation history referred to must be between the applicant(s) and the procuring entity. It requires disclosure of **any litigation history** or arbitration resulting from contracts executed in the last 5 years.

147. It is not in dispute that the applicant had pending litigation history with the procuring entity at the material time of the submission of the tender documents and whether or not it was litigation subject of the doctrine of subrogation; in my humble view, it fitted very well in the category of ***any litigation history*** *within the five year period* involving a contract of insurance, and which litigation history ought to have been disclosed in the tender documents. The applicant chose not to disclose. That non-disclosure on the part of the exparte applicant is not only contrary to the tender requirements set out by the Procuring Entity but was also contrary to among others, section 79(1) of the Public Procurement and Disposal Act, 2015 which stipulates that:

> ***"79(1) A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents."***

148. Under Regulations 47(1)(f), 47(2) and 48(1) of the Public Procurement and Disposal Regulations, 2006, (made under the repealed Act) it is stipulated That:

> ***"47(1) upon opening of the tenders under section 60 of the Act, the evaluation committee shall first conduct a preliminary evaluation to determine whether-***
>
> ***g) All the required documents and information have been submitted.***
>
> ***47(2) the evaluation committee shall reject tenders, which do not satisfy the requirements set out in paragraph (1).***
>
> ***48(1) a procuring entity shall reject all tenders which are not responsive in accordance with section 64 of the Act.***

149. It is also important to note that the requirement for disclosure of any litigation history would not necessarily disqualify a tenderer from proceeding to the next level of evaluation, but non-disclosure would, and that is what the tender document stipulates. In my humble view, the requirement for disclosure of any litigation history within the specified period is necessary as specified in the tender document as the disclosure may highlight any risk in the tenderer's financial situation assuming that all

pending or even concluded litigation will be or was resolved against the Applicant.

150. Disclosure of any litigation history may also indicate the Applicant's unacceptable behavior in execution of contracts, and not necessarily contracts between it and the procuring entity. Procuring entities are expected to be on guard against any Contractor who habitually resorts to excessive claims, arbitration, and litigation in the execution of contracts resulting in awards or decisions against them and therefore they include that mandatory clause in the tender documents to evaluate the tenderer's capacity to bid. For the litigation history to be evaluated, applicants should be required to list any legal disputes they have had over a stated period of time (normally five years) that resulted in litigation or arbitration proceedings, with an indication of the parties involved, and the resolution of the dispute which information would inform the procuring entity whether or not it is risky to contract with the tenderer. It is not meant to disadvantage the tenderer or at all in the tendering process. It is for that reason that I find that the Review Board's finding on the issue of nondisclosure of any litigation history cannot be found to have been irrational, unreasonable or with procedural impropriety or even illegal.

151. As earlier stated, the applicant did not disclose the existence of the any litigation history, now that it concedes that its name was used for purposes of claiming compensation from the 2nd interested party procuring entity by the insurance company.In my humble view, the applicant's non-disclosure of any litigation history and therefore the existence of or pendence of **High Court Misc. Appl. No. 561 of 2014: Giant Forex Bureau De Change Limited -versus- Kenya Airports Authority** which case was within the threshold of the requirement of disclosure of any litigation history with the last 5 years, disentitled the applicant from proceeding to the next stage of the evaluation process and I would wholly agree with the Review Board's findings on the effect of non-disclosure of any litigation history.

152. The applicant in my view was not being truthful in its filling of the tender documents when it indicated under any litigation history as **NONE**, knowing very well that there was a history of litigation which litigation was still pending. The applicant should have disclosed the litigation history and provided an explanation of the nature of the litigation. This is so because any person reading the citation of the litigation, in the absence of details of the cause of action would not tell whether or not the matter involved the doctrine of subrogation.

153. Section 55 of the Act Public Procurement and Asset Disposal Act requires that a state organ or a public entity would consider as ineligible a person for submitting false, inaccurate or incomplete information about his or her qualifications. In this case, the applicant obviously submitted incorrect and therefore false information that it had None litigation history when by its own documents produced herein, it is evident that it had litigation history within the 5 year period stipulated.

154. It is for the above reasons that I find that the applicant's non-disclosure of any history of litigation with the 2nd interested party rendered it a nonresponsive tenderer.

*c. **Whether the application for judicial review is infact a challenge of the merits of the decision or decision-making process.***

155. Even if the Review Board's decision may have been wrong on the issue of non-disclosure of any litigation history, but that does not in itself entitle the applicant to judicial review orders. The Court of Appeal in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd [2002]eKLR** stated as follows on the scope of judicial review:

> ***"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to 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…The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision."***

156. The same Court of Appeal in the case of **KENYA PIPELINE COMPANY LIMITED V HYOSUNG EBARA COMPANY LIMITED & 2 OTHERS[2012] eKLR** noted:-

> ***"We have similarly set out the grounds of the Judicial Review application and the findings of the High Court. We have, in addition, considered the submissions made by the respective counsel in High Court. Upon analysis of the grounds of the judicial review application, the submissions of the 1st Respondent's counsel in support of the Judicial Review application, the replying submissions and the judgment of High Court, we have unhesitatingly come to the conclusion That the application for Judicial Review was for all intents and purposes an appeal from the decision of the Review Board. It was a Judicial Review application only in name but in essence it was an appeal against the findings of fact and law by the Review Board."***

157. I entirely agree with the decisions of the Court of Appeal. Judicial review is not an alternative to an appeal. It seeks to examine the decision making process. Once it is established that the process which led to the making of a decision complied with the basic legal requirements then a judicial review court must down its tools.

158. The applicant approached this court on grounds of bias, unreasonableness and irrationality. It has however not established that the Review Board was biased or that it acted unreasonably or irrationally. The applicant might have been wrong in its decision and appreciation of the doctrine of subrogation. That misapprehension, or error of law or fact, however, is not an issue within the judicial review purview of this court. This proposition was upheld by the Court of Appeal in the cited **KENYA PIPELINE COMPANY LIMITED** (supra) case in the following words:-

> ***"The Review Board is a specialized statutory tribunal established to deal with all complaints 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.***
>
> ***Having regard to the wide powers of the Review Board we are satisfied That the High Court erred in holding That the Review Board was not competent to decide whether or not the 1st Respondent's tender had met the mandatory conditions. The issue whether or not the 1st Respondent's tender was rightly rejected as unresponsive was directly before the Review Board and the Board had jurisdiction to deal with it.***
>
> ***In conclusion, it is manifest that the application for Judicial Review was not well founded. The 1st Respondent did not establish that the Review Board had acted without jurisdiction or in excess of jurisdiction or in breach of rules of natural justice or that the decision was irrational. The Judicial Review was not confined to the decision making process but rather with the correctness of the decision on matters of both law and fact. So long as the proceedings of the Review Board were regular and it had jurisdiction to adjudicate upon the matters raised in the Request for Review, it was as much entitled to decide those matters wrongly as it was to decide them rightly.***
>
> ***The High Court erred in essence in treating the judicial review application as an appeal and in granting judicial review orders on the grounds which were outside the scope of Judicial Review jurisdiction."***

159. It is now settled law that there is always the temptation to descend into the arena and substitute the tribunal's decision with that of the court. A judicial review court must avoid this temptation. Where a party is dissatisfied with the decision of a tribunal like the applicant herein, then the best option is to file

an appeal as provided for by the law that establishes the particular tribunal. Although judicial review is a powerful tool for checking on the excesses of public bodies, it must always be remembered that its scope is indeed limited and the court exercising judicial review jurisdiction should not act as an appellate court.

160. In this case, what the applicant has asked the court to do is to find that the Review Board fell in error when it found that there was nondisclosure of any litigation history when infact, there was no litigation history between the applicant and the procuring entity. In my humble view, that is in essence urging the court to find on the merits of the decision of the Review Board and not faulting the review process.

161. The applicant also raised the issue of losses which can only be canvassed in the Civil Court not through judicial review proceedings. Accordingly, I find and hold that the applicant's challenge of the Review Board's decision hinges on the merits of the decision and not of the decision-making process.

d. ***Whether the applicant is entitled to the prayers sought?***

162. For the above reasons, I find that the applicant has not established that it is entitled to the prayers sought. There is no challenge to the legality of the decision of the Review Board and neither has the applicant challenged the procedure adopted by the Review Board in arriving at the impugned decision. Accordingly, I proceed to dismiss the application for judicial review and order each party to bear their own costs of the chamber summons for leave and for these judicial review proceedings.

Dated, signed and delivered in open court at Nairobi this 4th day of April, 2017.

R.E.ABURILI

JUDGE

In the presence of:

Mr David Oyatta for the exparte applicant

Mr Odhiambo for the Respondent

Miss Mwiki for the 1st interested party

Mr Moenga for 2nd interested Party

CA: Mohamed