



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 622 OF 2016

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL

REVIEW ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF: THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT, 2015

AND

THE PUBLIC PROCUREMENT REGULATIONS, 2006

AND

IN THE MATTER OF: THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

AND

IN THE MATTER OF: APPLICATION NO. 98 OF 2016 OF 2ND DECEMBER, 2016

CONCERNING TENDER NO. MOD/423 (01103) 2016/2017

CONCERNING THE SUPPLY OF FRESH MEAT (BEEF)

ON BONE TO ELDORET BASED UNITS.

REPUBLICAPPLICANT

- VERSUS-

PUBLIC PROCUREMENT ADMINISTRATIVE

REVIEW BOARD.....1ST RESPONDENT

MINISTRY OF DEFENCE.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

JOSEPH CHESIRE CHEMUNA T/A

EX-PARTE

ADAN OSMAN GODANA T/A ELDORET STANDARD BUTCHERY

JUDGMENT

1. On the **13th December, 2017** the *ex-parte* applicant **ADAN OSMAN GODANA T/A ELDORET STANDARD BUTCHERY** was granted leave by the Court to file a substance Notice of Motion application for judicial review orders of certiorari and prohibition. Vide a notice of motion dated 10th January, 2017 and filed in court on 11th January, 2017, the *exparte* applicant filed a judicial review Notice of Motion seeking the following substantive judicial review orders:

1. An Order of Certiorari removing to this court for purposes of being quashed the decision of the Public Procurement Administrative Review Board made on the 7th December, 2016 in Application No. 98 of 2nd December, 2016;

2. An Order of Prohibition to prohibit and restrain the second respondent from acting upon the decision made by the 1st respondent made on 7th December, 2016 or and signing any contract with any persons or entity other than the applicant in respect of the tender in question;

3. The costs of this application be provided for.

2. The *exparte* applicant's motion is supported by the statutory statement, verifying affidavit and exhibits filed together with the chamber summons for leave dated 9th December, 2016. The *exparte* applicant is Adan Osman Godana T/A Eldoret Standard Butchery and his case is borne out of a decision made by the First Respondent **PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD** concerning **Tender No. MOD/423 (01103) 2016/2017** concerning the supply of fresh meat (beef) on bone to Eldoret based units of the Ministry of Defence.

3. Vide the decision rendered on 7th December, 2016; the First Respondent disallowed the Applicant's request for review. Previously, the interested party herein **JOSEPH CHESIRE CHEMUNA T/A AVENUE BUTCHERY** had filed Request for **Review No. 72/2016 of 9th September, 2016** before the First Respondent herein and against the Second Respondent herein wherein the Second Respondent **MINISTRY OF DEFENCE** had raised certain issues that included the legality of the bid as tendered by the interested party claiming that the same had been signed by one **PHILLIP KIPKETER KOSGEY, who was alleged to be a stranger** but that the Review Board did not address fully the issue and instead made a decision on the 30th September 2016 annulling the entire process and directing the Second Respondent the Procuring Entity (**MINISTRY OF DEFENCE**) to *inter-alia* carry out a fresh technical and financial evaluation of all the tenders and award the tender to the lowest evaluated bidder within 7 days of the date of the decision.

4. The *exparte* applicant complains that the decision aforesaid was not adhered to and that there was nothing on record to show that the Second Respondent (the Procuring Entity) had followed the decision and strictly within the days as ordered by the Board and consequently the decision of the Board now a subject of these proceedings is tainted with **ILLEGALITY** bearing in mind that the *ex-parte* Applicant was never notified of the outcome of the re-evaluation process and award of the tender within the seven (7) days or at all and in any event as prescribed by the law.

5. It is further claimed that in light of the foregoing, the decision of the Board now a subject of these proceedings is tainted with **ILLEGALITY** and that no sensible person would have arrived at the aforesaid decision bearing in mind that the alleged bid by the interested party herein did not meet the minimum mandatory qualifications including *inter-alia* that the same was tendered and or executed by

one **PHILLIP KIPKETER KOSGEY** who is a stranger bearing in mind that the interested party herein is a business name run by one **JAMES CHESIRE CHEMUNA**.

6. It is alleged that the above position notwithstanding, the First Respondent proceeded in its aforesaid Ruling to direct the Second Respondent to proceed with the procurement process and finding that the award of the tender to the interested party was valid and proper.

7. Further, that on the juridical person of the interested party herein, the procuring entity had contended that the tender was signed by **PHILLIP KIPKETER KOSGEY** while the supporting documents were in the name of **JOSEPH CHESIRE CHEMUNA**.

8. The exparte applicant further claims that the decision of the Board is tainted with **ILLEGALITY** bearing in mind that the earlier decision of the Board was not complied with and that in any event the exparte applicant was never notified of the outcome of the re-evaluation process and award of the tender **within seven (7) days** or at all and in any event as prescribed by the law bearing in mind that the **doctrine of notice** is fundamental in any legal process.

9. In light of the foregoing, it was the exparte applicant's case that the interested party herein was not qualified within the meaning of the instructions to bidders as contained in the tender document and thus there was no basis for an award to be made to the interested party herein.

10. It is further the exparte applicant's case that the aforesaid decision is tainted with **ILLEGALITY** to the extent that the Board did not consider all the germane issues as raised by the Applicant in its Request for Review and that the review Board proceeded to misapply and or profane the doctrine of **RES JUDICATA** and in so doing the First Respondent breached its duty to act judicially by failing to apply its judicial mind to all the issues as raised by the Applicant thereby occasioning injustice on the applicant.

11. The exparte applicant further claims that the confirmation of the award to a non- responsive bidder was not in compliance with the Public Procurement and Asset Disposal Act, 2015 and that the same was in breach of the principles of natural justice and fair administrative justice, the rule of law and the legal imperatives of public procurement of fairness, equity transparency, competition and cost effectiveness, good governance, integrity and accountability.

12. The respondents did not file any reply to the exparte applicant's application.

13. The interested party filed a replying affidavit sworn jointly by **Joseph Chesire Chemuna and Phillip Kipketer Kosgey T/A Avenue Butchery** in opposition to the Notice of Motion and deposing that the entire process of challenging tender vide Request for Review No. 72 of 2016 was heard and determined in favour of the interested party vide a ruling made on 30th September 2016.

14. That on 16th November, 2016 the exparte applicant being dissatisfied with the ruling of the Board dated 30th September 2016 filed a formal request for review which was later amended and that the said amended request for review was considered by the Review Board and in a ruling delivered on 7/12/2016 dismissed the exparte applicant's application for review and directed the procuring entity 2nd respondent to award the tender to the interested party who was the lowest bidder.

15. That upon the procuring entity being served with the said ruling, it complied by writing a letter of compliance dated 30th November, 2016.

16. That the interested party is a partnership between Mr Chemuna and Mr Phillip Kipketer Kosgey hence it is not true that the latter was a stranger to the proceedings before the Review Board.

17. That after the first review, the interested party did on 10/11/2016 receive a notification for supply of fresh meat on bone from the procuring entity.

18. That the mandatory 14 days started running from 30/9/2016 to 14/10/2014 hence the request for

review was filed long after the lapse of the 14 days, instead of moving to the High Court on appeal.

19. That the issue of illegality cannot arise because the *ex parte* applicant was notified but opted to file a review instead of an appeal.

20. The parties advocates filed written submissions which they adopted canvassing their respective client's positions in this matter.

THE EXPARTE APPLICANT'S SUBMISSIONS

21. The *ex parte* applicant submitted that Section 80 of the Public Procurement and Asset Disposal ACT, 2015 provides as follows:-

80. Evaluation of tenders

(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 rejected under [section 82\(3\)](#).

(2) **The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents** and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered.

(3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)—

(a) the criteria shall, to the extent possible, be objective and quantifiable;

(b) each criterion shall be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality, time and service for the purpose of evaluation; and

(4) The evaluation committee shall prepare an evaluation report containing a summary of the evaluation and comparison of tenders and shall submit the report to the person responsible for procurement for his or her review and recommendation.

(5) The person responsible for procurement shall, upon receipt of the evaluation report prepared under subsection (4), submit such report to the accounting officer for approval as may be prescribed in regulations

(6) The evaluation shall be carried out within a maximum period of thirty days.

(7) The evaluation report shall be signed by each member of evaluation committee.

22. The *ex parte* applicant alleged that the alleged successful bidder i.e. the interested party herein, JOSEPH CHESIRE CHEMUNA T/A AVENUE BUTCHERY did not meet a mandatory minimum requirements and that he had perpetuated an illegality by tendering fraudulent/false documents *ex-facie* in light of the documentary evidence as exhibited in the Request for Review filed before the Board and also in this Honorable Court.

23. That the Board did not address the legality of the aforesaid documents thereby prejudicing the *ex parte* applicant herein.

24. Further, it was contended that the Review Board had no powers to make orders that violate the express provisions of the law and that in doing so it exceeded the requirements expressly set out in the tender document.

25. Further, that the Review Board cannot disregard mandatory provisions of the Public Procurement and Asset Disposal Act, 2015 and where it does so, it amounts to a fundamental misdirection or failure to address the applicable law or a fundamental error of law thereby rendering the decision reached devoid of legality and therefore void.

26. It was also the exparte applicant's submission that a procurement process is not complete or done by just coming up with a mathematically lowest tenderer on top of the pile but the integrity of reaching there is equally important.

27. The exparte applicant relied on the cases of: **PPRB vs. KRA Misc. Civil Application No. 540 of 2008, [2008] eKLR** in which the Court held:

“To my mind, failure by the Respondents to have regard to mandatory provisions of the Act concerning procurement procedures...violated the purpose of the Act which is clearly stated in Section 2...I find that any breach of a mandatory statutory provision does prejudice in some way the Section 2 objectives...Adherence to the applicable law is the only guarantee of fairness and in the case of procurement law the only guarantee of the attainment of fair competition, integrity, transparency, accountability and public confidence. There cannot be greater prejudice to the applicant than failure by the decision maker to comply with positive law. Failure to adhere to the applicable law, gives rise to a presumption of bias and prejudice contrary to the argument put forward by the Respondent's counsel. The job in my view was not complete or done by just coming up with the mathematically lowest tenderer on top of the pile. The integrity of reaching there is equally important to this court. In many cases it is procedural propriety which is the stamp of fairness.”

28. The above position was also adopted by this Court in Nairobi JR No. 513 of 2015 - **Republic –vs. The Public Procurement and Administrative Review Board & 2 Others ex parte Akamai Creative Limited** in which the Court held the view that:

“It is therefore clear that 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.”

29. It was further submitted that in this case, the interested party has out rightly pleaded an illegality by entering into a contract with the Second Respondent which contract was purportedly entered into on the 7th December, 2016.

30. That the Respondents' conduct is a clear circumvention of the law and an attempt to frustrate the judicial process which is in motion bearing in mind that the alleged contract in question is bad in law in light of the salient provision of section 175 of the Public Procurement and Asset Disposal ACT,2015 which states thus;

175. Right to judicial review to procurement:-

(1) A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board's decision, failure to which the decision of the Review Board shall be final and binding to both parties.

(2) The application for a judicial review shall be accepted only after the aggrieved party pays a percentage of the contract value as security fee as shall be prescribed in Regulations.

(3) The High Court shall determine the judicial review application within forty-five days after such application.

(4) A person aggrieved by the decision of the High Court may appeal to the Court of Appeal within

seven days of such decision and the Court of Appeal shall make a decision within forty-five days which decision shall be final.

(5) If either the High Court or the Court of Appeal fails to make a decision within the prescribed timeline under subsection (3) or (4), the decision of the Review Board shall be final and binding to all parties.

(6) A party to the review which disobeys the decision of the Review Board or the High Court or the Court of Appeal shall be in breach of this Act and any action by such party contrary to the decision of the Review Board or the High Court or the Court of Appeal shall be null and void.

(7) Where a decision of the Review Board has been quashed, the High Court shall not impose costs on either party.

31. According to the *ex parte* applicant, the procuring entity cannot enter into any binding contract with a tender within the first 14 days of the decision of the Review Board bearing that the proceedings herein were brought within time.

32. The position above was further fortified by several decisions of this Honorable Court including **JR 371 OF 2016 Republic v Public Procurement Administrative Review Board Ex-parte Syner Chemie Limited**, and in the **Republic v Public Procurement Administrative Review Board Ex-parte Noble Gases International Limited**(2013) eKLR where the court was emphatic, concerning section 100 of the repealed 2005 Act which is in *parimateria* with section 175(1) of the current 2015 Act and where it was observed that:

“In my view, where Judicial Review proceedings are commenced within 14 days from the date of the respondent’s decision, the said decision is neither final nor binding and hence ought not to be implemented. Thus, there is an automatic stay under order 53 of the Civil Procedure Rules. The 14 days is a window period availed to serve the purpose of limiting the time frame within which a review against the Board’s decision can be lodged in the High Court for purpose of expediency and conclusiveness of the Board’s decision as these activities are time bound and the procurement process ought not to be held hostage to indefinite proceedings.....

The decision of the Board after the application for review has been filed remains subject to the court’s directions and decision. This provision answers the core question in contention that is whether the filing of Judicial Review proceedings before the High Court within the prescribed period of 14 days acts as an automatic stay. I take the position that section 100 of the ACT implies that the Board’s decision is to be kept in abeyance until the court makes its final decision. The use of the term “shall take effect” discloses the legislative purposes and intent.

For all practical purposes, the Board’s decision was ‘frozen’ so to speak until such a time as the High Court issued an order of Judicial Review contemplated under the Section over the decision or after the lapse of the 14 days period, whichever comes first. I find and hold that provision a statutory stay.”

33. The *ex parte* applicant also relied on the decision by Hon Justice Kasule of Uganda wherein he explained the meaning of illegality, irrationality and procedural impropriety in the case **Pastoli v Kabale District Local Government Council & others** [2008] 2 EA 300 as follows:

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

Illegality is when the decision making authority commits an error of law in the process of

taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality.....

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

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

34. On irrationality and procedural impropriety it was submitted that the First Respondent did fully address the germane issues as raised by the Applicant in its Request for Review and that the Board proceeded to misapply and or profane the mandatory instructions to the bidders as contained in the tender document and in so doing the First Respondent breached its duty to act judicially by failing to apply its judicial mind to all the issues as raised by the parties thereby occasioning injustice on the *ex-parte* applicant therein.

35. Reliance was placed on Pastoli Case (Supra) where Procedural Impropriety was stated to mean when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.

36. According to the *ex-parte* applicant the Board and the procuring Entity unlawfully failed to adhere to **Clauses 2.31, 4, 9 (b), and 15** of the Tender document which provided a two-stage evaluation process and that had the process been observed in accordance with the law, the Board would have found out that the interested party was not qualified especially having relied on fraudulent and fictitious documents which required disqualification immediately but that unfortunately, the germane issues raised by the *ex-parte* applicant were never properly and validly considered.

37. The *ex-parte* applicant further relied on the case of *Republic v North and East Devon Health Authority, EXP Coughlan* 34 where the Court of Appeal held that:

"To be proper, consultation must be undertaken at a time when proposals are still at a formative stage, it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be consciously taken into account when the ultimate decision is taken."

38. On violation of legitimate expectation, it was submitted by the *ex-parte* applicant that the doctrine of legitimate expectation is all about an administrative body charged with making decisions affecting the rights of others, acting fairly. It was therefore averred that the decision of the Respondent violates the legitimate expectations of the Applicant and members of the public that it shall abide by the law. Reliance was placed on **Miscellaneous Case 37 of 2010 Republic v City Council of Nairobi Ex-parte Kenya Taxi Cabs Association (2010)eKLR** where the court while referring to Lord Diplock at page 406-409 of the **Council for Civil Service Union V The Minister for Civil Service (HL 1984) (1985) 1 AC 375**, the Court had this to say of legitimate expectation

“–for a legitimate expectation to arise, the decisions must affect (the) other person by depriving him of some benefits or advantage which either:

i. he had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which has been given an opportunity to comment; or

ii. he has received assurance from the decision maker will, not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.”

39. It was submitted that the Respondent is expected to abide by the statutory provisions that govern its functions and it is expected to act fairly. However, that in the instant case, the Respondent failed to carry out its mandate in accordance with the law and hence breached the applicant’s expectation. That there was an implied duty of fairness attached to all administrative acts such as what the Respondent’s officers purported to do, and that the only fair action that could be taken in the instant case was to follow due process and make a decision in accordance with the law.

40. The *ex parte* applicant further submitted that the Applicant’s legitimate expectation that the tender in question will be awarded in accordance with a system that is fair, equitable, transparent, competitive and cost effective and in accordance with the law has been frustrated and denigrated.

41. That, in the Request for Review as taken out by the Applicant herein, the First Respondent did not fully address the germane issues as raised by the parties, for instance, the strong allegation raised by the *ex-parte* Applicant lamenting that the bid document by the interested party was tendered by an authorized person who was a stranger and that the same was tainted with false and fraudulent documents which was never addressed by the Board and as result an injustice was occasioned on the *ex-parte* applicant herein.

42. It was therefore the *ex parte* applicant’s submission that the Board considered **IRRELVANT FACTS** and failed to consider **RELEVANT ONES**.reliance was placed on **Zachariah Wagonza & Another vs. Office of the Registrar Academic Kenyatta University & 2 Others [2013] eKLR** where it was held:

“Concerning irrelevant considerations, where a body takes account of irrelevant considerations, any decision arrived at becomes unlawful. Unlawful behavior might be constituted by (i) an outright refusal to consider the relevant matter; (ii) a misdirection on a point of law; (iii) taking into account some wholly irrelevant or extraneous consideration; and (iv) wholly omitting to take into account a relevant consideration.”

43. It was also submitted that the Respondent’s conduct is capricious, arbitrary, oppressive and unfair and cannot be justified within the rule of law and therefore in the circumstances of the case it is the interest of justice that the prayers sought be granted.

SUBMISSIONS BY THE INTERESTED PARTY

44. According to the interested party, the following issues flow for determination in this matter:

a. Whether Interactions between the Interested Party and the 2nd Respondent exemplifies the intention to form of a contract?

b. Whether the Notification Letter issued by the Respondent to the Interested Party amounts to an Acceptance of Offer and, if so, whether a Contract was formed between the Interested Party and the 2nd Respondent?

c. Whether the 2nd Respondent’s Conduct and their Interactions with the Interested Party created Legitimate Expectation?

d. Whether the Orders prayed for can be granted

45. On whether Interactions between the Interested Party and the Respondent exemplifies the intention to form of a contract, it was submitted that The Black's law dictionary Tenth Edition, defines a contract as an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable in law. That for a contract to be valid certain features have to be present. The elements that make a contract are:

i. Offer- which is simply a proposal made by one party (the offeror) to another party (the offeree) indicating a willingness to enter a contract.

ii. Acceptance is the agreement of the offeree to be bound by the terms of the offer.

iii. Genuine Agreement-Offer and acceptance go together to create genuine agreement, or a meeting of the minds. Agreement can be destroyed by fraud, misrepresentation, mistake, duress, or undue influence.

iv. Consideration- which describes the thing of value promised to the other party in a contract in exchange for something else of value promised by the other party. This mutual exchange binds the parties together.

v. Capacity reminds us that the law presumes that anyone entering a contract has the legal capacity to do so. Minors are generally excused from contractual responsibility, as are mentally incompetent and drugged or drunk individuals;

vi. Legality-parties are not allowed to enforce contracts that involve doing something that is illegal. Some illegal contracts involve agreements to commit a crime or a tort others involve activities made illegal by statutory law.

46. In this case, the interested party submitted that the contract in question is one obtained through the restricted tendering process. That the procuring entity, in this case the Department of Defense welcomed bids from the public and the interested party was one of the bidders. That the interested party was the lowest bidder and that since the law is clear that the lowest bidder gets the tender contract, and as there is no question with the capacities of the interested parties and the respondent to contract, the court should not interfere with the contract which has already been entered into.

47. It was also submitted that an offer must be accepted for a contract to be termed as complete. Further, that in the case of tendering process, , the procurement entity sends out advertisements to members of the public, which in law is what is called an invitation to treat. That an ***Invitation to treat*** is not an offer, but an indication of a person's willingness to negotiate a contract. Reliance was placed on **Harvey v Facey**, (no citation given) an indication by the owner of property that he or she might be interested in selling at a certain price, for example, has been regarded as an invitation to treat.

48. It was submitted that the courts have tended to take a consistent approach to the identification of invitations to treat, as compared with offer and acceptance, in common transactions. That the display of goods for sale, whether in a shop window or on the shelves of a self-service store, is ordinarily treated as an invitation to treat and not an offer; and that the holding of a public auction will also usually be regarded as an invitation to treat, as shown by the excerpt of the letter dated 10th November 2016 which read as:

“To Avenue Butchery,

P.o Box 8444-30100

Eldoret

REFERENCE:NOTIFICATION FOR SUPPLY OF FRESH MEAT (BEEF) ON BONE TO ELDORET BASED UNITS THROUGH RESTRICTED TENDERING.

Reference is made to the above procurement in which you were invited to participate.”

49. It was submitted that Members, who wish to take part in the tendering, will apply to the tenders by placing their bids. Placing bids amounts to making an offer. That the Interested party in this case made this offer. He quoted Ksh 370 per kilogram of meat as his offer to the respondent. that this was an offer intimating the Interested Party`s willingness to enter a contract.

50. On whether the Notification Letter issued by the Respondent to the Interested Party amounts to an Acceptance of Offer and, if so, whether a Contract was formed between the Interested Party and the 2nd Respondent, the interested party submitted that the question before this court is not as to whether the contract was valid or not, the question is rather, how was the acceptance communicated? and whether the acceptance was valid as to make the contract complete?

51. According to the interested party, Vide a letter dated 10th November 2016 the 2ndrespondent made communication to the Interested Party with regard to the offer that the interested party had made with the following heading:-

"NOTIFICATION FOR SUPPLY OF FRESH MEAT (BEEF) ON BONE TO ELDORET BASED UNITS THROUGH RESTRCITED TENDERING.

Reference is made to the above procurement in which you were invited to participate.

This is to notify you that your offer is accepted as follows:....."

52. It was submitted that what is important for this court is what was the *intention* of the respondent with regard to the above communication.

53. In the interested party`s view, "***Intention***" is objectively judged by the courts. Reliance was placed on the English case of **Smith v. Hughes (1871) LR 6 QB 597** which emphasizes that the important thing is not a party`s real intentions but how a reasonable person would view the situation. This is due mainly to common sense as each party would not wish to breach his side of the contract if it would make him or her culpable to damages, it would especially be contrary to the principle of certainty and clarity in commercial contract and the topic of mistake and how it affects the contract.

54. As to whether it was the intention of the 2ndrespondent to accept the offer that had been made by the Interested Party, reliance was placed on **G.H. Treitel, in his book, The Law of Contract, 10th edition, p.16 which defines Acceptance** as a final and unqualified expression of assent to the terms of an offer.

55. It was submitted that it is no defense to an action based on a contract for a defendant to claim that he never intended to be bound by the agreement if under all the circumstances it is shown at trial that his conduct was such that it communicated to the other party or parties that the defendant had in fact agreed. Signing of a contract is one way a party may show his assent.

56. Further, it was argued that the essential requirement is that there be evidence that the parties had each from an objective perspective engaged in conduct manifesting their assent. That this manifestation of assent theory of contract formation may be contrasted with older theories, in which it was sometimes argued that a contract required the parties to have a true meeting of the minds between the parties.

57. It was further argued that under the "meeting of the minds" theory of contract, a party could resist a claim of breach by proving that although it may have appeared objectively that he intended to be bound by the agreement, he had never truly intended to be bound. This is unsatisfactory, as the other parties have no means of knowing their counterparts` undisclosed intentions or understandings. **They can only act upon what a party reveals objectively to be his intent.**

58. In the view of the interested party, from a reasonable point of view, it interpreted the conduct and communications of the respondent as constituting an acceptance. Reliance was placed on **Felthouse v.**

Bindley (1862) 142 ER 1037 where it was observed that in a contract, Silence cannot be construed as acceptance, and that this requirement of an objective perspective is important in cases where a party claims that an offer was not accepted, taking advantage of the performance of the other party.

59. Here, the interested party urged the court to apply the test of whether a reasonable bystander (a “fly on the wall”) would have perceived that the party has impliedly accepted the offer by conduct.

60. In their view, a look at the Notification letter dated 10th November 2016 leaves no doubt that the 2nd Respondent indeed and clearly gave his acceptance to the offer of the interested party and from this acceptance, the Interested Party depended on it.

61. The interested party also ventured into the “*mirror image rule*” which states that if you are to accept an offer, you must accept an offer exactly, without modifications; if you change the offer in any way, this is a counter-offer that kills the original offer. However, a mere request for information is not a counter-offer. It was submitted that the respondent made his intentions to contract with the interested party clear, and so, he accepted the contract.

62. It was further submitted that being the lowest bidder, the Interested Party won the opportunity to supply to the respondent by law. That the Notification of acceptance of offer by the respondent was a matter of fact, the fact being that the respondent had sealed a contract with the interested party hence the notification was an acceptance and that the interested party believed the notification to be an acceptance.

63. **On Whether The 2nd Respondent’s Conduct and their Interactions with the Interested Party created Legitimate Expectation?** reliance was placed on the decision by the supreme court of India which pronounced itself on the issue of legitimate expectation in the matter [2006 (8) SCJ 721], [sic] where it had the following words to say:

“What is legitimate expectation? Obviously, it is not a legal right. It is an expectation of a benefit, relief or remedy that may ordinarily flow from a promise or established practice. The term 'established practice' refers to a regular, consistent predictable and certain conduct, process or activity of the decision-making authority. The expectation should be legitimate, that is, reasonable, logical and valid. Any expectation which is based on sporadic or casual or random acts, or which is unreasonable, illogical or invalid cannot be a legitimate expectation. Not being a right, it is not enforceable as such. It is a concept fashioned by courts, for judicial review of administrative action. It is procedural in character based on the requirement of a higher degree of fairness in administrative action, as a consequence of the promise made, or practice established.”

64. Further reliance was placed on the case of **Diana Kethi Kilonzo & another -vs- The Independent Electoral & Boundaries Commission (IEBC) & 2 Others**, at Para 133, where the Court addressed the issue of legitimate expectations in the following terms:

“At its core, and in its broad sense, the doctrine of legitimate expectation is said to arise out of a promise made by a public body or official which the person relying on anticipates will be fulfilled. It is also said to arise out of the existence of a repeated or regular practice of the public body or official which could reasonably be expected to continue. Essentially, once made, the promise or practice creates an estoppel against the public body or official, so that the person benefitting from the promise or practice would continue to so benefit, and that the promise or practice would not be withdrawn without due process or consultation.”

65. It was submitted that the interested party had a legitimate expectation in that the wordings in the Notification Letter **This is to notify you that your offer is accepted as follows:-** amounted to a **Promise made by a public body or official**. and that the words in the same notification letter **“A contract Agreement shall be signed between yourselves and the Kenya Ministry of Defence, on notice.....”** amounted to a **promise to be fulfilled**.

66. **It was submitted that there was a repeated or regular practice** and that it is a requirement by the Public Procurement and Disposal Act that the lowest bidder is awarded a tender by the procuring entity and the interested party having won the tender, the interested party was assured of the contract with the respondent. And that to further reassure the interested party, the respondent wrote the Notification letter communicating their acceptance. This is the normal practice done in the normal course of business.

67. It was further submitted that **Once made, the promise or practice creates an estoppel against the public body or official**, and that no doubt a promise was given by the respondent as to the acceptance of the interested party's offer; and that anyone reading the notification letter will see this promise hence it would be a breach for the respondent to renege or be allowed to back off from their promise.

68. On whether the prayers asked are justiciable? The interested party urged the court to take cognizance of the fact that this court is now seized with fact that the *Exparte* Applicant had no valid contract by the time he was approaching this honorable court for orders of stay.

69. It was further submitted that the *Exparte* Applicant did not disclose this information to this honorable court, a fact that would have been in compliance with the full disclosure principle as set out in ***Giella versus Cassman Brown***. Further, that that the Interested Party complied with all the tendering requirements and bid as his competitors also did.

70. It was contended that the Interested Party having been declared as the lowest bidder and in consequence the winner of the tender was entitled by law to be the sole supplier to the 2nd Respondent in Compliance with Public Procurement and Disposal Act.

71. That the Interested Party duly signed a contract with the 2nd Respondent on the 7th of December 2016 and should therefore be recognized by law as having a valid contract with the 2nd Respondent.

72. It was submitted that the above grounds are vindicated by a letter dated 30th November 2016, written by the 2nd Respondent (Ministry of Defence) and addressed to the Secretary of the 1st Respondent, the 2nd Respondent confirming that indeed the Interested Party was the lowest bidder and had effectively won the contract.

73. The interested party therefore urged the court to grant it the following prayers:

- a. A declaration order recognizing that the Interested Party is the Sole beneficiary of the tender contract as he was the lowest bidder
- b. A declaration order recognizing that a Legitimate Expectation was created by Notification Letter dated 10th November
- c. A Declaration order recognizing that the Interested Party is the sole beneficiary of the contract signed effectively on the 7th of December 2016
- d. An order of **MANDAMUS** to compel the *Exparte* Applicant to stop acting or purporting to act as suppliers to the 2nd Respondent owing to the fact that the contract between the two had lapsed effectively in November 2016 by operation of the a law.
- e. Any other order that this honorable court deems fit and just in the circumstances.

DETERMINATION:

74. This court has carefully considered the foregoing and in my humble view, the main issue for determination is whether the *exparte* applicant is entitled to the judicial review orders sought.

75. The history of this matter is that the Ministry of Defence in Tender No. MOD/423(01103)2016/2017

FOR SUPPLY OF FRESH MEAT ON BONE TO Eldoret based Units advertised an open tender which was opened on 23rd June 2016 at Ulinzi House in the presence of the tenders' representatives presence.

76. the tender opening results were as follows:

- i. Linkgen Suppliers Ltd.....Kshs400 per kilo
- ii. Kenya Meat Commission....Kshs 400 per klo
- iii. Avenue Butchery.....Ksh 370 per kilo
- iv. Peema Investments Co. Ltd....Kshs 380 per kilo
- v. Eldoret Standard Butchery...Kshs 380 per kilo.

77. The evaluation Committee of the Procuring Entity carried out evaluation of the bids through the preliminary, technical and the financial evaluation stages.

78. Four of the bidders qualified to the technical evaluation stage but Peema Investments Co Ltd was disqualified at the preliminary stage for failure to provide the Public Health Certificate as required by the tender documents.

79. The evaluation committee then carried out a physical evaluation of the bidders and based on the criteria used found the interested party herein to be the most responsive bidder at Kshs 380 per kilo for two years. The reasons were that the firm was recommended by the physical evaluation committee and secondly it was the previous supplier with good experience and past performance.

80. On 9th September, 2016 Avenue Butchery lodged request for review against the decision of the procuring entity to award the tender to the interested party.

81. On 20th September, 2016, the Review Board after considering the request for review made against the decision of the **Ministry of Defence in Tender No. MOD/423(01103)2016/2017 FOR SUPPLY OF FRESH MEAT ON BONE TO Eldoret based Units** by the applicant Avenue Butchery represented by Phillip Kosgey and Joseph Chesire directors of the applicant allowed the request for review and annulled the tender and directed the procuring entity to admit the applicant into the evaluation process and conduct a fresh technical and financial evaluation of all tenders and award to the lowest evaluated bidder within 7 days of the date of the Review Board's decision. Each party was ordered to bear its own costs of the request for review.

82. Following the above decision, the PE evaluated the tenders again on **7/10/2016** and awarded the tender to the interested party herein venue Butchery for being the lowest evaluated bidder at kshs 370 per kilo for one year **FROM THE DATE OF CONTRACT AS AND WHEN REQUIRED.**

83. Dissatisfied with the above decision of the PE, the exparte applicant herein Eldoret Standard Butchery filed a request for review on **17th November, 2016** to the Review Board seeking annulment of the tender to the interested party; that the award be made to it and that the procuring entity be condemned to pay costs of the said second request for review to the applicant.

84. In this latter request for review, the exparte applicant herein complained that:

- i. The PE had not complied with the decision of the Review Board in No. 72/2016 to readmit the exparte applicant and evaluate its tender and make an award within 7 days from the date of the review board's DECISION;
- ii. The Board had failed to address itself to the genuineness of or legality of documents produced by the interested party mainly the issue of log books and issue of juridical person of the interested

party;

iii. That the applicant was not notified of the outcome of the evaluation and award.

85. The Review Board after considering the review application by the exparte applicant dismissed it on all fours on **7th December, 2016** hence this judicial review application which was initiated on 13th December, 2016 by way of an application for leave and upon such leave being granted, the substantive motion was lodged on 10th January, 2017.

86. In dismissing the request for review, the review board was clear that it was satisfied, after reviewing all the documents placed before it, that the PE carried out a comprehensive reevaluation of the tenders as directed. further, the board found that it could not delve into the issue of eligibility of the interested party as that issue had been determined in the earlier review decision given on 30th September, 2016 which decision had not been appealed from to the High Court and that in any event, the issue of eligibility is for the Procuring Entity to determine and not the review board.

87. On the issue of notification, the Review Board found that even though there was a letter of notification which was not proved to have been served on the exparte applicant, the applicant had been given an opportunity to ventilate its grievances hence there was no prejudice.

88. Therefore, on whether the exparte applicant is entitled to the judicial review orders made, this court must first and foremost establish the scope of judicial review remedies of certiorari and prohibition.

89. The scope of judicial review was clearly set out by **Lord Diplock** in the persuasive authority of **Council for Civil Service Unions v Minister for Civil Service [1985] AC 374 at 401 D** when he stated:

“Judicial review has I think developed to a stage today when one can conveniently classify under three heads, the grounds upon which administrative action is subject to control by judicial review: the first ground I will call illegality, the second irrationality and the third procedural impropriety.”

By illegality as a ground for judicial review, I mean that the decision maker must understand correctly the law that regulates his decision making power and must give effect to it.

By irrationality, I mean what can now be succinctly referred to as Wednesbury (unreasonableness) it applies to a decision which is so outrageous in its defiance of 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... I have described the third head as procedural ‘impropriety’ rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision.”

90. This court is aware of the fact that judicial review remedies being discretionary the court would not grant them in certain circumstances even if the same are merited. As was appreciated in **Halsbury's Laws of England 4th Edition Vol. 1 (1) paragraph 12 pg. 270:**

“The remedies of quashing orders (formerly known as order of certiorari); prohibition orders (formerly known as orders of prohibition; mandatory orders (formerly known as orders of mandamus) are all discretionary. The court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief, the court will take into account the conduct of the party applying and consider, whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. [emphasis added].

Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or

further, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question; would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfillment. The court has an ultimate discretion whether to set aside the decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow a temporary decisions to take their course, considering the compliance and intervening if at all later and in retrospect by declaratory orders.”

91. In **Republic v National Transport & Safety Authority & 10 Others Exparte James Maina Mugo [2015] eKLR Odunga J** held *inter alia*:

“The rationale for this is that judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect determine the merits of the dispute the court would not have jurisdiction in a judicial review proceedings to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil courts” or “criminal courts.” [emphasis added].

92. In **Joram Mwenda Guantai v The Chief Magistrate Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170** the Court of Appeal held:

“It is trite that an order of prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to discontinue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies not only in excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not however lie to correct the course, practice or procedure of an inferior tribunal or wrong decision on the merits of the proceedings – equity so the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the judge has the power to intervene and the High Court has the inherent power and the duty to secure fair treatment for all persons who are brought before court or to a subordinate court and to prevent an abuse of the process of the court.”

93. The above cases demonstrate the role of judicial review as procedure that courts use to supervise the exercise of public power to ensure those who exercise that power do not exceed constitutional or statutory jurisdiction. It is also clear that from the principles espoused in the above cited cases that judicial review is concerned with reviewing the decision which has been made without authority or in excess thereof by a public body in contravention of individual rights.

94. The factors and requirements that an applicant seeking redress has to satisfy for the courts to entertain and review the decision of a public body has also been elucidated in the cases discussed hereinabove. One of the cardinal principles in judicial review cases is that the concern of the courts has nothing to do with the merits of the decision but the process in arriving at that decision. The High Court's supervisory jurisdiction in judicial review cases is to evaluate the fairness of the action or decision complained of with a view to varying or setting it aside to ensure that fair treatment is accorded to the claimant.

95. What the courts do in judicial review is to ensure that an applicant before it is given fair treatment by the body or individual complained of. The judicial review jurisdiction does not extend to decide the merits of the matters in question.

96. In this case, the court is called upon to confine itself to the questions of whether the respondent more specifically the Review Board's decision to dismiss the request for review vide its ruling of 7th December, 2016 exceeded its powers; breached the exparte applicant's legitimate expectation; committed an error of law; committed a breach of natural justice; reached a decision which it could reasonably not

have reached; or amounts to abuse of its powers or acted malafides/in bad faith.

97. In the persuasive authority of **Hangsraz Mahatma Gandhi Institute & 2 Others [2008] MR 127** it was stated:

“Judicial Review is not a fishing expedition in unchartered seas. The course had been laid down in numerous case laws. It is that this court is concerned only with reviewing, not the merits of the decision reached, but of the decision making process of the authority concerned. It would scrutinize the procedure adopted to arrive at the decisions to ascertain that it is in uniformity with all elements of fairness, reasonableness and most of all its legality. It must be borne in mind and which had been repeated many times by this court that it is not its role to substitute itself for the opinion of the authorities concerned. This court on a judicial review application does not act as a court of appeal of the decision of the body concerned and it will not interfere in any way in the exercise of the discretionary power which the statute had granted to the body concerned. However it will intervene when the body concerned had acted ultra vires its powers, reached a decision which is manifestly unreasonable in the Wednesbury sense; had acted in an unfairly manner and the applicant was not given a fair treatment.”

98. In this case, for the court to overturn the decision of illegally, unfairly or arbitrarily and with procedural impropriety. In a persuasive decision by the Indian High Court, of **Jagdish vs. State of Orissa Appeal (Civil) 5699 of 2006 decided on 11 December, 2006** it was held:

"Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. its purpose is to check whether choice or decision is made 'lawfully' and not to check whether choice or decision is 'sound.' when the power of judicial review is invoked in matters relating to tenders or award of contracts, detain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful Tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succor to thousands and millions and may increase the project cost manifold. therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions: i) whether the process adopted or decision made by the authority is malafides or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: 'the Decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached.'

99. Examining the grounds upon which the application by the exparte applicant relies upon, and its submissions it is clear that the exparte applicant complains of issues such as the procuring entity failing to comply with the ruling of the Review Board that the reevaluation be done within 7 days; that the procuring entity failed to notify the exparte applicant of the decision to award the tender to the interested party; that the interested party was not eligible to be awarded the tender; that the instructions to tenderers were not adhered to hence the interested party was a non-responsive bidder; that documents submitted by the interested party regarding ownership of motor vehicles were forgeries.

100. On the part of the interested party, it focused on the law of contract and the contract which was already entered into between itself and the procuring entity while maintaining that the contract was valid.

101. It must, however, be appreciated that this court is not concerned with the validity or otherwise of the contract between the parties at this stage but on the legality, rationality and or the procedural propriety of the decision made by the Review Board on 7th December, 2016, since the contract in question was made after the impugned decision.

102. An analysis by this court of the complaints raised by the *exparte* applicant, has not established any illegality, irrationality and or procedural impropriety in the decision made by the Review Board which chose to remain an observer to these proceedings.

103. What the *exparte* applicant has emphasized all along is on the merits of the decision of the Review Board since the Review Board only determined the issue of whether or not the procuring entity had complied with its decision of 30th September, 2016 which was mainly that the procuring entity do readmit the interested party herein Avenue Butchery's tender into the evaluation process and conduct a fresh technical and financial evaluation of all tenders and award to the lowest evaluated bidder within 7 days of the date of that decision.

104. In arriving at the above decision, the court notes that the decision of 7th December, 2016 addressed all the issues raised by the *exparte* applicant in the application for review and therefore whether or not the decision in question was merited is not within the province of this Court exercising judicial review jurisdiction to determine. The *exparte* applicant had the opportunity to lodge an appeal against the decision of the Review Board and not to seek for judicial review of the same.

105. In my humble view, what this court is being asked to do is to reexamine and reassess the evidence adduced before the Review Board and arrive at its own independent conclusion as is required under section 78 of the Civil Procedure Act.

106. For example, the issue of whether or not the interested party as described herein Joseph Chesire Chemuna T/A Avenue Butchery was a partnership or sole proprietorship is a question to be determined based on evidence to be adduced and therefore only an appeal court would probe further to determine the true position in view of the joint affidavits on record by **Joseph Chesire Chemuna and Phillip Kipketer Kosgey T/A Avenue Butchery**.

107. Further, it is not in the province of this court to make a finding that the interested party's documents submitted in the tendering process were fraudulent or false *ex facie*, in the absence of evidence of fraud.

108. In addition, the *exparte* applicant focused on generalities of illegalities having been committed by the Review Board without expressly stating what specific illegalities were in issue. It was not stated what principles of natural justice and fair administrative justice, rule of law and the legal imperatives of fairness, equity, transparency, competitiveness and cost effectiveness, good governance, integrity and accountability was being addressed.

109. Albeit this court had to, at the stay stage, deal with the issue of the procuring entity entering into a contract with the interested party before expiry of 14 days from the date of the decision of the Review Board which was on 7th December, 2016, it should be appreciated that that contract, however *prima facie* illegitimate it was, but in essence, having regard to the circumstances of this case, the illegitimacy therefore has not affected the merits of these proceedings which is the issue of legality, rationality and procedural propriety of the decision of the review Board.

110. The *exparte* applicant lamented that its legitimate expectation that the Review Board and the PE would obey the law was breached. However, the law regarding the applicability of that principle of legitimate expectation is clear.

111. On what legitimate expectation is, **Halsbury's Laws of England, 4th Edition Volume 1(1) paragraph 92** states:

“ A person may have a legitimate expectation of being treated in a certain way by an

administrative authority even though there is no other legal basis upon which he could claim such treatment (see O' Rerilly V Macknan [1983] 2. AC 237 at 275. The expectation may arise either from a representation or promise made by the authority, including an implied representation, or from consistent practice. In all instances the expectation arises by reason of the conduct of the decision maker, and is protected by the courts on the basis that principles of fairness, predictability and certainty should not be disregarded."

112. In **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others** Nairobi HCMA No. 743 of 2006 [2007] KLR 240 the Court explained legitimate expectations as follows:

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

113. In **Republic V Kenya Revenue Authority exparte Shake Distributors Limited** HC Misc Civil Application No. 359 of 2012, the court held:

"such an expectation arises where a decision maker had led someone affected by the decision to believe that he will receive or retain a benefit or advantage (including that a hearing will be held before a decision is taken)."

114. In **Republic Vs Commissioner for Investigations & Enforcement Exparte Wananchi Group Kenya** [2014] e KLR it was observed that the claim for legitimate expectation must be made within the confines of the law and that *where there are express provisions of the law, there cannot be a legitimate expectation to the applicant since legitimate expectation cannot arise in the face of clear statutory provisions.*

115. From the decision of **Keroche Industries Ltd Vs Kenya Revenue Authority & Others** (supra), a legitimate expectation can only be invoked against the public authority where there is discretion in the public authority's performance of a public duty and not where there is clear statutory provision as to how a public duty should be performed. In other words, a public authority cannot undertake or promise an applicant that the public authority shall not obey the law so as to favour the applicant, and neither can it promise that it shall obey the law since obedience of the law is not discretionary except where the law itself so pronounces as such.

116. **P. Cane on Administrative Law, 4th Edn (OUP, 2004), pp. 205-206 and Chris Hilson, Policies, the Non-Fetter Principle and The Principle of Substantive Legitimate Expectations: Between a Rock and a Hard Place** 11 *Judicial Review* 289 2006 at p. 290) stated::

"A legitimate expectation will arise only if the court thinks that there is no good reason of public policy why it should not. This is why the word 'legitimate' is used rather than the word 'reasonable': the matter is not to be judged just from the claimant's point of view. The interest of the claimant in being treated in the way expected has to be balanced against the public interest in the unfettered exercise of the decision-maker's discretion; and it is the court which must ultimately do this balancing."

117. In this case, it has not been shown that the exparte applicant had been promised that the Review

Board shall do anything for the ex parte applicant. Accordingly, I do not find that the ex parte applicant had any legitimate expectation which has been violated by the Review Board. The alleged legitimate expectation is too generalized and remote.

118. The claim that the decision of the review Board failed to take into account or to consider relevant/germane factors or that it took into account irrelevant factors was never supported by any material particulars allegedly ignored or taken into account. I reject it.

119. The allegation that the procuring entity did not comply with the decision of the Review Board in Review case No 72 of 2016 is not for this court to purport to punish the procuring entity for disobedience of the decision of the review Board in the absence of any substantive application for contempt of court and as that issue was dealt with by the Review Board in the single issue that it framed for determination. This court cannot therefore purport to substitute the decision of the Review Board with its decision as it will be acting *ultra vires*.

120. On the other hand, the claim by the interested party that the request for review whose decision was made on 30th September, 2016 was filed out of the stipulated 14 days is a matter that should have been raised and concluded with the decision thereof and any aggrieved party should have raised it on appeal from that decision and not to escalate it to this forum which is totally a different forum.

121. Further, the interested party in its concluding submissions urged the court to grant it some substantive orders of judicial review for which either no leave was sought and or obtained or it is therefore absolutely impossible for this court to issue orders like prayers in a counterclaim suit yet no judicial review proceedings were filed by the interested party before this court for consideration.

122. For the foregoing reasons, i find that although the authorities relied on by either the applicant and or the interested party are relevant, but are inapplicable to the circumstances of this case.

123. Accordingly, I find that the ex parte applicant's application is devoid of merit and i proceed to dismiss it. The orders of stay granted pending hearing and determination of these proceedings granted accordingly lapse.

124. Costs are in the discretion of the court. In this case, the respondents did not file any responses to the application. they left it to the interested party to defend a the respondents'; position and in the process, the interested party waded into irrelevancies and extraneous matters including the law of contract and how this court had erred in granting stay on being misled by the ex parte applicant that the contract was signed on 7th December, 2016 when the ex parte applicant's contract for supply of beef on bone to the procuring entity had expired on 30th November, 2016 and even proceeded to urge the court to issue substantive orders when it is clear that the interested party had no cause before the court for determination. For those reasons, i find that this is not an appropriate case for awarding costs.

125. In the premises, I order that each party shall bear their own costs of these judicial review proceedings.

Dated, signed and delivered in open court at Nairobi this 6th day of June, 2017.

R.E.ABURILI

JUDGE

In the presence of:

Mr Masika Counsel for the ex parte applicant

N/A for Respondents

Mr LAGAT h/b for Okara for the interested party

CA: George