**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW AND CONSTITUTIONAL DIVISION**

**MISC APPLICATION NO. 133 OF 2016**

**IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA**

**AND**

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

**AND**

**IN THE MATTER OF THE PUBLIC PROCUREMENT AND DISPOSAL ACT, 2005 (REPEALED)**

**AND**

**IN THE MATTER OF THE PUBLIC PROCUREMNT AND ASSET DISPOSAL ACT, 2015**

**AND**

**IN THE MATTER OF APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW FOR ORDERS OF CERTIORARI**

**BETWEEN**

**HAJI MOTORS LIMITED.....1ST APPLICANT**

**FINKENS HOLDINGS LIMITED.....2ND APPLICANT**

**MAEJI KAIHO INTERNATIONAL LIMITED.....3RD APPLICANT**

**VERSUS**

**THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD.....1ST RESPONDENT**

**AND**

**THE CABINET SECRETARY FOR MINISTRY OF DEFENCE.....1ST INTERESTED PARTY**

**SAMEER AFRICA LIMITED.....2ND INTERESTED PARTY**

## JUDGEMENT

## Introduction

1. By a Notice of Motion dated 22nd March, 2016, the ex parte applicant herein, **Haji Motors Limited, Finkens Holdings Limited** and **Maeji Kaiho International Limited**, seek the following orders:

> 1. **This Honourable Court be pleased to grant an order of CERTIORARI to remove to this Court and quash the decision of the Respondent delivered on *4th March, 2016* in *PPARB Application No. 08/2016 of 12th February, 2016*.**
>
> 2. **The costs of this application be provided for.**

## Ex Parte Applicants' Case

2. According to the applicants, the Government through the Ministry of Defence invited the public to submit tenders for the supply of various tyres, tubes and lubes for use by the military, vide tender No. MOD/423(01103)2015 – 2016 and that the 2nd Applicant herein among other participants submitted their tenders, which were opened in the presence of the participants or their representatives. It was averred that at the tender opening, the tender submitted by Sameer Africa Limited (the applicant in the procurement review proceedings), the 2nd interested party herein (hereinafter referred to as "Sameer") was declared unresponsive for failure to submit a Tax Compliance Certificate and a Form CR12, which were mandatory requirements for the tender. This declaration was announced in the presence and hearing of all the participants or their representatives, among them being the representatives of Sameer. Thereafter, the tenders that were responsive including the 2nd Applicant's herein proceeded to the technical and financial evaluation stages at the conclusion of which the bid submitted by the 2nd Applicant herein emerged successful and it was notified of the success of its tender on 17th November, 2015. Similarly, the rest of the participants whose tenders were not successful including Sameer were notified of that fact at the same time.

3. It was averred that no contract was signed between the government and the 2nd Applicant until 14 days had passed, in line with section 68(2) of the ***Public Procurement and Disposal Act, 2005*** (Repealed) (hereinafter referred to as "the repealed Act") which period according to the applicants was to allow any party aggrieved by the tender results to seek review by the Public Procurement Administrative Review Board (hereinafter referred to as "the Board"). However, none of the unsuccessful bidders challenged the award to the 2nd Applicant herein within the Statutory Fourteen (14) Days period, and accordingly the procuring entity proceeded to sign a contract with the 2nd Applicant in accordance with the provisions of the repealed Act.

4. It was averred that after signing the contract with the Ministry of Defence as aforesaid, which contract required the 2nd Applicant herein to supply the goods forming the subject matter of the contracts for a period of one (1) year, the 2nd Applicant proceeded to make arrangements with various banks and financial institutions to obtain the requisite financing to enable it discharge its obligations under the contract. It also entered into collateral contracts and other arrangements with its supplier of tyres and tubes (Treadsetters Tyres Limited) from whom it intended to buy tyres, tubes and lubes to be delivered to the Ministry of Defence pursuant to the contract.

5. It was disclosed that on 8th December, 2015, shortly after signing the contract with the Ministry of Defence as aforesaid, and after entering into the aforesaid collateral contracts and making arrangements with the supplier as aforesaid, Sameer at various times sent its employees by the name of **Symon Chomba Mugo** (Telephone Number 0720-781366) and **Anthony Karanja Kariuki**, its Trade and Development Manager, (Telephone Number 0733-891001) to the deponent of the verifying affidavit's

office, where they engaged him in negotiations with a view to convincing him that the 2nd Applicant should purchase the goods forming the subject matter of the contract herein from it instead of importing the same from abroad or buying from elsewhere. It was disclosed that the aforesaid employees of Sameer told hm that their employer had stocked large quantities of the tyres, tubes and lubes because it had hoped to win the tender and now that it lost the tender, it could not sell the same anywhere locally in view of the fact that the majority of the tyres and tubes (being meant specifically for military use) cannot be sold locally to any other person. Now that it was stuck with them, its only option was to convince the successful bidders to buy the tyres, tubes and lubes from it instead of importing them from abroad.

6. It was averred that the said **Symon Chomba Mugo** threatened that Sameer would do everything possible to ensure that either the award to the 2nd Applicant was cancelled or that it was frustrated, if their proposal was rejected. However, the said proposal was denied by the 2nd Applicant) refused their proposal and according to the applicants, it was upon that refusal that Sameer made good its threat whereby it lodged a request for review of the tender before the Public Procurement Administrative Review Board, the Respondent herein, on 12th February, 2016 asking for orders reversing the decision of the Award Committee and annulling the award.

7. In the applicants' view, the order issued by the Respondent which purported to annul the awards to the 2nd Applicant herein is null and void because the Respondent acted outside its jurisdiction by purporting to entertain a request for review three (3) months after the unsuccessful party was notified that it lost the tender and three (3) months after the occurrence of the alleged breach in clear violation of the provisions of section 167 of the repealed Act. To the applicants, the said order was null and void because the Respondent purported to entertain a request for review after the contract had already been signed by the 2nd Applicant contrary to the provisions of the ***Public Procurement and Asset Disposal Act, 2015*** in section 167 (4) (c) (also provided in section 93(1)(c) of the repealed Act) which prohibits review of procurement proceedings where a contract has been signed. It was further contended that the decision violated the rules of natural justice when it entertained and heard the request for review in the absence of and without the knowledge of the 2nd Applicant in the following manner:

a. The notification of the filing of the Request for Review by Sameer was sent to the 2nd Applicant through Registered Post and received on the very day when the 2nd Applicant was to appear for the hearing, being on 2nd March, 2016.

b. While the Ministry of Defence (who were not going to suffer from any adverse decision by the Board) were served personally, the 2nd Applicant herein whose registered office is in Nairobi was not served personally with the aforesaid notification.

c. No effort whatsoever was made by the Respondent to call the 2nd Applicant to collect the notification letter from their offices, now that the hearing date was fixed only a few days away in spite of the fact that its telephone numbers were indicated on the aforesaid notification letter.

d. The Respondent was obviously aware that the 2nd Applicant herein was entitled by law to at least seven (7) days' notice, which period would be sufficient to appoint advocates and be ready to be heard in opposition to the request for review which was heard on 2nd March, 2016.

e. The Respondent was aware or ought to have known that it was impossible for a letter sent by Registered Post on 2nd March, 2016 to be received by the recipient before 2nd March, 2016, and this is a fact which they could very easily have ascertained if they has asked the secretary to the tribunal to furnish them with proof of service of the notification letter upon the 2nd Applicant herein; as they are required in law to do before embarking on the hearing of the request for review.

f. The failure to give the 2nd Applicant herein the opportunity to be heard before the impugned decision was made therefore violated the 2nd Applicant's herein rights to a fair hearing under

Articles 47 and 50 of the Constitution of Kenya and thereby rendered the entire proceedings and Ruling made by the Respondent null and void *ab initio*.

8. It was further contended that the order made by the Respondent which purported to annul the award to the 2nd Applicant was defective and therefore null and void because it was grounded upon misrepresentation, wilful suppression of the truth and concealment of material facts as illustrated hereunder:

a. Sameer Africa lied that it did not receive notification that its tender was unsuccessful. First, at the very beginning of the process, during the tender opening, it was informed in the presence and hearing of all the other participants that its tender was unresponsive and would not proceed to the next stages of technical and financial evaluation because it had failed to submit the Tax Compliance Certificate and the Form CR12. Second, it was notified at the end of the evaluation just like every other party who participated in the tender process that its bid was unsuccessful.

b. Sameer Africa lied that it was not aware of the result of the tender. As early as 8th December, 2015 through its officers aforesaid, it had already approached the deponent with a proposal to sell the tubes and tyres to the 2nd Applicant or else risk a challenge of their tender award.

c. Sameer Africa lied that the technical and financial evaluation were flawed and prejudiced their rights and interests, yet it knew that it never reached that stage and its bid was never entitled to be evaluated either financially or technically, and accordingly could not be affected by any flaw in the technical and financial evaluations.

d. Sameer Africa sought to annul the award to the 2nd Applicant herein when it was clear that its rights could not have been prejudiced in any way by the evaluation proceedings given that its bid failed *in limine* at the very beginning during the Tender Opening stage.

9. The Applicants' reiterated that the Respondent acted ultra vires in entertaining a request for review outside the validity period of the tender and purporting to annul the procurement proceedings long after the procurement process had ended and that this was clear from the Statement in support of the Request for Review by Sameer where it indicated clearly the period of the tender as 150 days, which lapsed on 7th February, 2016. It was contended that the Respondent acted unreasonably in entertaining the request for review and annulling the tender award when the 2nd Applicant herein had already entered into binding commercial agreements with its suppliers and had made huge financial commitments with them pursuant to the contracts signed between itself and the government, and it subsequently stands to lose hundreds of millions of shillings. The decision by the Respondent herein has therefore threatened to completely ruin the 2nd Applicant's business as it is exposed to huge losses both to its financiers as well to its suppliers. Further, the Respondent acted unreasonably in annulling the tender award when it knew or ought to have known that the goods forming the subject matter of the contract had been sourced and partly delivered as the contract was for one (1) year. It is obvious that the contract must have been sourced (either partly or fully) and must have been delivered (either partly or fully) to the Ministry of Defence. In addition, the Respondent acted unreasonably in annulling the tender when it knew or ought to have known that the majority of the goods forming the subject matter of the contract, which had already been sourced from their party suppliers ready for delivery to the Ministry of Defence as aforesaid, are goods that can only be used by the military and cannot therefore be sold to any other person locally. The Respondent was also accused of being unreasonable and irrational in entertaining the request for review on the basis that Sameer had suffered or risked to suffer loss or damage by reason of the evaluation process, when it was very clear and even admitted by Sameer in its Request for Review, that its tender was unresponsive from the word go for failure to submit compulsory documents and was declared as such well before the technical and financial evaluation process began.

10. It was the applicants case that the Respondent's conduct of the review proceedings and the decision made therein offends the rules of natural justice, reason, rationality and prejudices the interests of the 2nd Applicant and that the Respondent acted unfairly towards the 2nd Applicant and as a result it stands to

suffer immense and unjustified economic loss and hardship to the tune of tens of millions.

**2nd Interested Party's Case**

11. On the part of the 2nd interested party, **Sameer**, it was averred that Sameer filed the Review application to review the decision of the 1st Respondent contained in the letter dated 17th November, 2015 but received by Sameer on 9th February, 2016.

12. It was averred that the review board considered Sameer Africa's review application, the replies and submissions made by all parties who participated and delivered its decision on allowing Sameer Africa's review application.

13. To Sameer, the decision by the review board was fair, reasonable, rational, intra vires the jurisdiction donated by the act and the rules and that the said jurisdiction was consequently exercised regularly and rationally in the circumstances for reasons that:

a. All the parties represented during the hearing were heard extensively and no party was denied the right to be heard and no such protest was made and recorded during the hearing. The allegation, therefore that there was a breach of the tenets of natural justice is false and misguided.

b. All the issues that the review board dealt with were issues that had been raised by the parties and the review board, under section 173 of the Act, had the jurisdiction to hear and determine the said issues in the manner and with the result that did. No new issues or grounds were introduced by the Board and no such specific issues have been identified.

c. On the evidence before it, the review board was satisfied that the 1st Interested Party (hereinafter called the Procuring Entity) was in breach of sections 69 and 67 and Regulation 66 by failing to notify Sameer Africa of the outcome of its bid.

d. Time within which an unsuccessful bidder should file a review application starts to run upon formal notification of the outcome of the tender. In this case therefore time begun to run on 9th February, 2016 when Sameer Africa received the notification. The allegation therefore, that the review board entertained the review application three (3) months after notification is factually incorrect and therefore legally untenable.

e. In view of the contents of paragraph (d) above, Sameer Africa only leant that its bid was declared unresponsive on 9th February, 2016 and the allegations by the applicants to the contrary are false, unfounded and lack factual evidence at all.

f. The applicants having admitted that they received the notifications as to the date of the hearing, they cannot then say that they were denied a chance to be heard and that there was, therefore no breach of natural justice.

g. The review board having found as facts that the procuring entity failed to formally notify Sameer Africa of the outcome of its bid and further that the procuring entity breached terms of the tender documents and the Act and Regulations by splitting and awarding the tender to three bidders (the present applicants), the review board was entitled to issue the orders it issued.

h. The statutory powers donated to the review Board under Section 173 of the act are wide and includes the orders of annulment of the awards and ordering retender and the said powers were properly exercised in the circumstances of this case.

14. It was contended that the allegations by the applicants that Sameer Africa lied, misrepresented and or failed to make full disclosure to the review board are fictitious baseless and misleading since:

i. Sameer Africa was not aware of the outcome of the tender process until 9th February, 2016 when it received the formal notification.

ii. The allegations that Sameer Africa issued threats to the applicants is baseless and solely intended to unfairly prejudice and poison the courts mind. In any event, all these allegations are hearsay without any evidential value or at all.

iii. It is regrettable and unfortunate that the applicants have opted to use the court proceedings to spread rumours and to malign and tarnish the good name of Sameer Africa and the allegations with respect to the issuance of threats are a diversionary strategy aimed at diverting the court's attention from the real issues for consideration in these proceedings.

iv. There is no requirement compelling the applicants or any other party in the tyre industry to purchase tyres exclusively from Sameer Africa and in any such requirement would be deemed to be a restrictive trade practice and would contravene the ***Competition Act,*** (2010).

v. Sameer Africa has not entered into any contract, arrangement or discussions with the applicants with the intention or requiring then to purchase tyres exclusively from Sameer Africa and the averment in this respect is factually incorrect.

vi. Other than the allegations contained in the application Sameer Africa has not previously received any complaint from the applicants nor has it received any request from the competition authority to make any representations in respect of any such complaint.

vii. The fact that Sameer Africa's bid was classified as unresponsive did not take away its rights under the act to challenge the entire tender process.

15. That the execution of a contract, of its does not take away the review board's statutory powers to entertain and determined a review application where the review board finds merit in it. Indeed, the review board has statutory powers to annual and cancel a contract that is signed pursuant to a tender process that the review board finds flawed.

16. According to Sameer, in view of the confirmation by the procuring entity at the hearing that no contact had been signed the documents now produced by the applicants showing that contracts were signed in December 2015 are suspect and could have been prepared, executed and back dated to hoodwink this Court. In the alternative, if indeed contracts had been signed but the procuring entity chose to deliberately mislead the review board the review board cannot be faulted for proceeding in the manner it did. In any case, contracts that are the pedigree of a flawed process should be rendered *void abnitio.*

17. It was contended that the judicial review remedy of certiorari sought by the applicants is not available to them and that the applicants have miserably failed to meet the threshold for the grant of such orders in that:

a. For the order of certiorari, it has not been shown that the review board acted in excess of jurisdiction, that there is an error on the face of the record, or that there was breach of natural justice of that the review board failed to take into account relevant factors but took into account irrelevant factors. No specific and identified instances have been demonstrated by the applicants.

b. The application herein is suspect and appears to have been filed with the sole purpose of obtaining a stay of execution upon obtaining leave to apply for the order of certiorari, with the intention of ensuring that the applicants supply the procuring entity with sufficient stock for the term specified in the alleged contracts, hence rendering the outcome of this application superfluous.

c. The application has been filed purely for economic gain on the part of the applicants and is an abuse of the process of this Court.

d. To the extent that the act and regulations specified the manner and mode in which the review board discharges is statutory duties and with the review board having discharged such duties in the manner and mode prescribed, no order of certiorari can be issued against it.

e. in the entire motion and supporting affidavits the applicants have premised their cases on irrelevant material facts that do not bear on the special jurisdiction of a judicial review court which amounts to challenging the merits of the review board's decision. Judicial review is concerned not with the merits of a decision but the decision making process.

18. In the interested party's view, the applicants' application is an appeal disguised as a judicial review process and it ought and should fail with costs.

**Applicant's Rejoinder**

19. In their rejoinder, the applicants averred that even though they received a notice of the hearing of the review, the same was already overtaken by events since the Respondent dispatched the notice at the postal office on the very same day the review was being heard and hence did not give the Applicants any time to prepare or even file a response to the application for review. Consequently, the Applicants herein were not present at the hearing and were not heard on the Application. This, it was contended was contrary to section 170 of the ***Public Procurement and Disposals Act, 2015*** that requires that the tenderers notified as successful (in this case the Applicants) should be parties to the review proceedings; accordingly, the Respondent was required to notify all concerned parties including the Applicants herein of a request for review, so as to give them an opportunity to make representations on the same. However, the Respondent failed or neglected to actually notify the Applicants herein for the purpose of making representations on the review application since a notice dispatched at the post office on the day of the hearing is surely not any notice at all.

20. It was reiterated that at the time the application for review was being heard the Applicants herein had already signed contracts for the supply of the various items pursuant to the tender award, and contrary to the allegations made in the Replying Affidavit, there is no indication from the Respondent's decision that the 1st Interested Party indicated otherwise. In deed if such an indication was given, it was a misrepresentation of the actual facts and the contracts clearly show that they were signed on various dates within the first week of December, 2015, long before the application for review was filed. Given that the tender was awarded on 17th November, 2015 and the contracts signed between the Applicants herein and the 1st Interested Party were for one (1) year, the Respondent ought to have anticipated that by the time it was February (when the application for review was filed) the Applicants had already started performance under the contracts, and that they were the most exposed to suffer harm in the event the award was annulled.

21. It was contended that the Respondent violated the rules of natural justice, the right to fair administrative justice and acted irrationally and unreasonably in hearing and pronouncing judgement on the review application without hearing the Applicants herein, and accordingly the decision made is null and void.

**Determinations**

22. Having considered the application, the affidavits in support of and in opposition to the application as well as the submissions filed.

23. In my view these proceedings are based on two substantive grounds. The first issue is whether the applicants were afforded an opportunity of being heard in the review while the second issue is whether the review was filed after the execution of the contract hence the Board had no jurisdiction to entertain the same.

24. In this case, the applicants contend that the notice notifying them of the hearing date was received by them on the very date of the hearing hence they were unable to attend the hearing. Article 47(1) and (2) of

the Constitution provide:

> ***(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.***
>
> ***(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.***

25. The general position on the right to a hearing was restated in ***Halsbury's Laws of England Fourth Edition Vol. 1 page 90 para 74*** as follows:

> **"The rule that no man shall be condemned unless he has been given prior notice of the allegations against him and a fair opportunity to be heard is a cardinal principle of justice...Although, in general the rule applies only to conduct leading directly to a final act or decision, and not to the making of a preliminary decision or to an investigation designed to obtain information for the purpose of a report or a recommendation on which a subsequent decision may be founded, the nature of an inquiry or a provisional decision may be such as to give rise to a reasonable expectation that persons prejudicially affected shall be afforded an opportunity to put their case at that stage; and it may be unfair not to require the inquiry to be conducted in a judicial spirit if its outcome is likely to expose a person to a legal hazard or other substantial prejudice. As has already been indicated, the circumstances in which the rule will apply cannot be exhaustively defined, but they embrace a wide range of situations in which acts or decisions have civil consequences for individuals by directly affecting their legitimate interests or expectations. In a given context, the presumption in favour of importing the rule may be partly or wholly displaced where compliance with the rule would be inconsistent with a paramount need for taking urgent preventive or remedial action; or where disclosure of confidential but relevant information to an interested party would be materially prejudicial to the public interest or the interests of other persons or where it is impracticable to give prior notice or an opportunity to be heard; or where an adequate substitute for a prior hearing is available."**

26. In **Geothermal Development Company Limited vs. Attorney General & 3 Others [2013] eKLR,** it was held that:

> **"As a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against it. *Elementary justice and the law demands that a person be given full information on the case against him and given reasonable opportunity to present a response*. This right is not limited only in cases of a hearing as in the case of a court or before a tribunal, but when taking administrative actions as well. (See** *Donoghue v South Eastern Health Board* **[2005] 4 IR 217).** Hilary Delany **in his book,** *Judicial Review of Administrative Action,* ***Thomson Reuters 2nd edition, at page 272,*** **notes that, *'Even where no actual hearing is to held in relation to the making of an administrative or quasi-judicial decision, an individual may be entitled to be informed that a decision which will have adverse consequences for him may be taken and to notification of the possible consequences of the decision'*…Article47 enshrines the right of every person to fair administrative action. Article 232 enunciates various values and principles of public service including *'(c) responsive, prompt, effective, impartial and equitable provision of services' and '(f) transparency and provision to the public of timely, accurate information'*…Fair and reasonable administrative action demands that the taxpayer would be given a clear warning on the probable consequences of non-compliance with a decision before the same is taken; in this case, the Company should in no uncertain terms have received information as to the implication of the letter and the consequences of its failure to make good the payments demanded in the notice. (See Supreme court decision in** *TV3 v Independent Radio and Television Commission* **[1994] 2 IR 439)…In many jurisdictions around the world, it has long been established that notice is a matter of procedural fairness and an important component of natural justice. As such, information provided in relation to administrative proceedings must be sufficiently precise to put the individual on notice of**

**exactly what the focus of any forthcoming inquiry or action will be. (*See* *Charkaoui v Canada* [2007] SCC 9, *Alberta Workers' Compensation Board v Alberta Appeals Commission* (2005) 258 DLR (4th), 29, 55 and *Sinkovich v Strathroy Commissioners of Police (1988) 51 DLR (4th) 750).***"

27. This was the position adopted by **Kasanga Mulwa, J** in **Republic vs. Registrar of Companies *ex parte* Githungo [2001] KLR 299,** where he held that natural justice requires that persons who might be affected by administrative acts, decisions or proceedings be given adequate notice of what is proposed.

28. Section 4(3) of the ***Fair Administrative Action Act, 2015,*** a statute enacted pursuant to Article 47 of the Constitution, provides as follows:

***(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-***

***(a) prior and adequate notice of the nature and reasons for the proposed administrative action;***

***(b) an opportunity to be heard and to make representations in that regard;***

***(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;***

***(d) a statement of reasons pursuant to section 6;***

***(e) notice of the right to legal representation, where applicable;***

***(f) notice of the right to cross-examine or where applicable; or***

***(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.***

29. In **R vs. Secretary of State for the Home Department ex parte Doody [1994] 1 AC 531, 560-G**, **Lord Mustill** held:

**"Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both."**

30. Similarly, in **Hoffmann-La Roche (F) & Co. AG vs. Secretary of State for Trade and Industry [1975] AC 295, 368D-E** it was held that the commissioners;

**"…must act fairly by giving to the person whose activities are being investigated a reasonable opportunity to put forward facts and arguments in justification of his conduct of these activities before they reach a conclusion which may affect him adversely."**

31. Under section 96(c) of the repealed Act (which is in *pari materia* with section 170(c) of the 2015 Act), the parties to a review include the person who has been notified of the success of his tender, proposal or quotation, who in this case are the applicants. Rule 74(4) of the Regulations provides as follows:

***The Secretary shall, within fourteen days of the filing of the request, notify all other parties to the review of the filing and such parties may, at their own expense, obtain copies of the request for review.***

32. Section 37(1) of the Act is however clear that:

***If the procurement procedure used is open or restricted tendering or a request for proposals, communications between the procuring entity and a person seeking a contract for the procurement shall be in writing.***

33. It is therefore clear that the Respondent was under an obligation to notify the applicants of the filing of the request for review. That notification to be meaningful had to afford the applicants sufficient time within which the applicants could not only secure the relevant documents but also adequately prepare for their case. Where the notification is made in such a way as to coincide with the date of the hearing, that cannot by any stretch of imagination be deemed to meet the requirement of fairness in administrative action. In this case, it is contended that this is what happened. As was appreciated by this Court in High Court Miscellaneous Application No. 267 of 2014 – **Republic vs. Public Procurement Administrative Review Board & 3 Others**:

> **"The applicant having denied notification, it was upon the Procuring Entity to prove on the standard of balance of probability that the applicant was duly notified of the decision of the Procuring Entity. To contend that the applicant ought to have adduced evidence from its computer that it did not receive the notification would not only amount to shifting the onus of proof but to compel the applicant to prove a negative. I appreciate that under Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya, "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." I also appreciate the legal maxim that *omnia praesumuntur legitime facta donec probetur in contrarium* (all things are presumed to have been legitimately done, until the contrary is proved). However, as was held by Seaton, JSC in the Uganda Case of J K Patel vs. Spear Motors Ltd SCCA No. 4 of 1991:**
>
> **"The proving of a negative task is always difficult and often impossible, and would be a most exceptional burden to impose upon a litigant. The burden of proof in any particular case depends on circumstances in which the claim arises. In general the rule which applies is *ei qui affirmat not ei qui negat incumbit probatio.* It is an ancient rule founded on considerations of good sense and it should not be departed from without strong reasons...As applied to judicial proceedings the phrase "burden of proof" has two distinct and frequently confused meanings, (1) the burden of proof as a matter of law and pleading – the burden, as it has been called, of establishing a case, whether by preponderance of evidence, or beyond reasonable doubt; and (2) the burden of proof in the sense of adducing evidence...The *onus probandi* rests, before evidence is gone into, upon the party asserting the affirmative of the issue; and it rests, after evidence is gone into, upon the party against whom the tribunal, at the time the question arises, would give judgement if no further evidence were adduced."** See **Constantine Steamship Line Ltd vs. Imperial Smelting Corp [1914] 2 All ER 165 (H.L); Trevor Price vs. Kelsall [1975] EA 752 at 761; *Phippson on Evidence* 12th Ed Para 91; Phippson At Para 95.**
>
> **Similarly, the Supreme Court of Uganda in Sheikh Ali Senyonga & 7 Others vs. Shaikh Hussein Rajab Kakooza and 6 Others SCCA NO. 9 of 1990 was of the view that the general rule that he who alleges must prove applies and since it was the appellants who were alleging that the fifth appellant was qualified, to hold that the negative must be proved by the respondents would be to impose an unnecessary burden on them."**

34. In this case since the Respondent was obliged to notify the applicants of the fact of the filing of the review application, and as the applicants have averred that the notification was received on the very day of the hearing, it was incumbent upon the Respondent to adduce evidence showing when the notification was in fact dispatched. In the absence of such evidence, this Court has no option but to believe the applicants.

35. That being the position, it is clear that the applicants were not afforded adequate opportunity to present their case before the Board before the Board arrived at its decision. From the proceedings exhibited the Board did not even make an attempt to ascertain whether in fact all the parties to the review were notified.

36. Since it is a Constitutional obligation on the part of the Board to afford the applicants a fair hearing before a decision adverse to the applicants is made, it was incumbent upon the respondent, in light of the denial by the applicants that they were not notified of the intended action in good time, to prove that that was in fact not the case. For a hearing to be said to be fair not only should the case that the respondent is called upon to be meet be sufficiently brought home to him and adequate or reasonable notice to enable him deal with it given, but the authority must by its conduct evince an intention to carr out a genuine investigation of the matter and arrive at a fair determination rather than to just satisfy the legal requirement. In other words an opportunity of being heard must be real and meaningful both in substance and procedurally though the obligation does not mean that a person must be heard. Once a reasonable opportunity is afforded and not utilised, one cannot be heard to lament that his right to fair administrative action was infringed. In this respect, ***Halsbury's Laws of England***, 5th Edn. Vol. 61 page 545 at para 640 states:

> **"The *audi alteram partem* rule requires that those who are likely to be directly affected by the outcome should be given prior notification of the action proposed to be taken, of the time and place of any hearing that is to be conducted, and of the charge or case they will be called upon to meet. Similar notice ought to be given of a change in the original date and time, or of an adjourned hearing…The particulars set out in the notice should be sufficiently explicit to enable the interested parties to understand the case they have to meet and to prepare their answer and their own cases. This duty is not always imposed rigorously on domestic tribunals which conduct their proceedings informally, and a want of detailed specification may exceptionally be held immaterial if the person claiming to be aggrieved was, in fact, aware of the nature of the case against him, or if the deficiency in the notice did not cause him any substantial prejudice…*Notification of the proceedings or the proposed decision must also be given early enough to afford the person concerned a reasonable opportunity to prepare representations or put their own case. Otherwise the only proper course will be to postpone or adjourn the matter*."**

37. Where the rules of natural justice are violated the natural consequences are that the proceedings are thereby rendered still-born. That being the case, it does not matter whether the same decision would have been arrived at had the applicant been heard. As was held in **Onyango Oloo vs. Attorney General [1986-1989] EA 456**:

> **"The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...Denial of the right to be heard renders any decision made null and void ab initio."**

38. Having arrived at the decision that the applicants' right to a fair hearing were violated, it follows that it would be prejudicial to determine the issue of whether the contract had been executed by the time the application for review was made. That determination will have to await the hearing *de novo* of the application for review.

**Order**

39. Accordingly, I find merit in this Motion and I grant an order of certiorari removing into this Court for the purposes of being quashed and quashing the decision of the Respondent delivered on 4th March, 2016 in PPARB Application No. 08/2016 of 12th February, 2016. I further direct the Respondent to rehear the said request *de novo* while strictly adhering to the rules of natural justice.

40. In the circumstances there will be no order as to costs.

41. Orders accordingly.

**Dated at Nairobi this 6th day of October, 2016**

**G V ODUNGA**

**JUDGE**

***Delivered in the presence of:***

***Miss Fundi for the Applicant***

***Cc Mwangi***