**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**JR CASE NO. 109 OF 2015**

**REPUBLIC.....APPLICANT**

**VERSUS**

**PUBLIC PROCUREMENT**

**ADMINISTRATIVE REVIEW BOARD.....1ST RESPONDENT**

**MINISTRY OF INDUSTRIALIZATION**

**& ENTERPRISES DEVELOPMENT…….……2ND RESPONDENT**

**INDUSTRIAL & COMMERCIAL**

**DEVELOPMENT CORPORATION LIMITED…….3RD RESPONDENT**

**EX-PARTE**

**PETER JUMAH KURIA T/A SCOPE DESIGNS SYSTEMS**

**JUDGEMENT**

1. From the pleadings and submissions filed by the parties in this matter, it emerges that sometimes in the year 2012 the Ministry of Industrialization and Enterprises Development ("the Ministry') advertised tender number RFP ELDORET SME PARK MOI/RFP/013/ 12-13 for consultancy services for the Design and Documentation of Proposed Small and Medium Enterprises (SME) Park to be constructed in Eldoret. The ex parte Applicant Peter Jumah Kuria T/a Scope Designs Systems participated in the tender and emerged the winner.
2. According to a letter dated 19th November, 2014 addressed to the Attorney General by Principal Secretary of the Ministry a letter of notification of award of tender was issued to the ex parte Applicant on 10th January, 2013. However, no contract was signed between the ex parte Applicant and the Ministry.
3. In these proceedings the Attorney General has been sued on behalf of the Ministry as the 2nd Respondent. The 3rd Respondent, Industrial and Commercial Development Corporation Limited (ICDC) later joined the negotiations on the ground that it was going to provide the land upon which the SME Park was to be developed. However, the negotiations did not yield a contract.
4. The ex parte Applicant subsequently filed Request for Review No. 11 of 2015 on 27th February,

2015 before the 1st Respondent, the Public Procurement Administrative Review Board ("the Board"). The 1st Respondent in that matter was the Ministry of Industrialization and Enterprises Development. ICDC was the 2nd Respondent.

5. Before the application for review could be heard by the Board, ICDC raised a preliminary objection. A ruling in regard to that preliminary objection was delivered on 24th March, 2015 in which the preliminary objection was upheld and the ex parte Applicant's request for review was struck out.
6. Thereafter the ex parte Applicant approached this Court and obtained leave on 7th April, 2015 to commence these judicial review proceedings.
7. Through an undated notice of motion application filed on 30th April, 2015 the ex parte Applicant prays for orders as follows:

**"1. An order of Certiorari removing to the High Court for purposes of being quashed the decision of the Public Procurement Administrative Review Board made on the 24th March 2015 in Application No. 11 of 2015 of 27th February, 2015 and in particular the following orders:**

a. **That the 2nd Respondent (sic) was the proper procuring entity and that the Applicant therefore wrongly enjoined the 2nd Respondent as a party to this Request for Review.**
b. **Upon awarding the Tender to the Applicant, the Applicant could not therefore lawfully seek for the Award of the same tender to be made in its favour by the Board.**
c. **Awarding the Applicant one Tender twice would be superfluous. The Applicant already has an Award in its favour and the only difficulty it apparently has is having the relevant party to the tender process signing a contract agreement.**
d. **As the Board has previously stated in other request for Review it can only grant a relief which is specifically set out in the body of the pleadings. There is therefore no legal basis upon which the Board can grant a prayer that is not specifically pleaded.**

**2. THAT an order of Prohibition to prohibit and restrain the 3rd Respondent from acting upon the decision made by the 1st Respondent on the 24th March 2015 or and/or signing any contract with any persons or entity other than the Applicant in respect to the tender in question.**

**3. THAT the costs of this application be provided for.**

**4. THAT such further or other relief as the Honourable Court may deem just and expedient to grant."**

8. According to the statutory statement dated 7th April, 2015 and the verifying affidavit of Peter Jumah Kuria of the same date, the decision of the Board was made in breach of the rules of natural justice, was unreasonable, unlawful and breached the ex parte Applicant's legitimate expectation.

9. The 1st and 2nd respondents opposed the application through grounds of opposition dated 24th June, 2015. The grounds of opposition are:

**"1 THAT the application herein is unmerited and therefore an abuse of the due processes of the court.**

**2. THAT there were no orders made by the Public Procurement and Administrative Review Board, the Board only allowed the Preliminary Objection and dismissed the request for review.**

**3. THAT the Applicant being aggrieved with the decision of the Review ought to have gone for an appeal.**

**4. THAT the decision of the board was made within its mandate and the specific sections of the law and the Board considered only the provisions of the Act and the facts presented before it by the parties.**

**5. THAT the Board could not award a tender to the Applicant which tender had already been awarded by the procuring entity and the board can only grant what has been specifically prayed for.**

**6. THAT the Application herein is made in bad faith has no merit and is only calculated to discredit the credibility of the 1st Respondent's mandate and function.**

**7. THAT the application herein should be dismissed with costs to the respondents."**

10. ICDC opposed the application through the replying affidavit of its Corporation Secretary, Grace Magunga. Its case is that the Board rightly held that it was not the procuring entity since the entire tender process was commenced and concluded by the Ministry.
11. ICDC contends that the advertisement of the tender, the evaluation process and the award of the tender were all undertaken by the Ministry. It is ICDC's case that the Board's decision was on a point of preliminary objection on its misjoinder and the Applicant should have sought to proceed with the request for review against the Ministry which had been found by the Board to be the proper procuring entity.

12. Further, that the Board was correct in holding that the Applicant could not seek an award of a tender already awarded to him as it would have been superfluous to do so.
13. It is ICDC's case that no orders can issue against it as it was not the procuring entity. In addition, ICDC asserts that no transfer of procurement responsibility had been executed as required by Section 27(6) of the Public Procurement and Disposal Act, 2005 (PP&DA) and the Board could not have forced it and the Ministry to enter into a procurement responsibility transfer agreement.
14. From the pleadings of the parties, it is clear that the question to be determined in this matter is whether the Applicant has established the grounds for grant of judicial review orders.
15. Judicial review is a tool used by the courts to ensure that the actions and decisions of public authorities or public officers are reasonable, lawful and made within the rules of natural justice. In the **Council of Civil Service Unions v Minister for the Civil Service [1984] 3 ALL ER 935** case, the Court stated the grounds for grant of judicial review as follows:

**"Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would 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. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.**

**By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd, v. Wednesbury Corporation [1948] 1 K.B. 223). 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. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system.**

**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. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."**

16. In the case before me, the Applicant alleges that the Board breached the rules of natural justice. The evidence before this Court clearly shows that the Applicant was heard before the decision was made. I do not see how the Board can be accused of breaching the rules of natural justice.
17. The Applicant also argued that the Board's decision of 24th March, 2015 was erroneous and unreasonable in that the Board concluded that ICDC was not the procuring entity and yet evidence had been placed before it of the tripartite nature of the tender. According to the Applicant, that evidence showed that the Ministry was providing the finance whereas ICDC was providing the land.
18. It is the Applicant's case that the transfer of the procurement responsibility from the Ministry to ICDC was approved by the Public Procurement Oversight Authority ("the Authority") and the Attorney General. Further, that ICDC's board had consented to the transfer of procurement responsibility. It is the Applicant's case therefore that it was unreasonable for the Board to find that ICDC was wrongly enjoined to the application for review. The Applicant therefore concludes that the Board's decision is Wednesbury unreasonable **(Associated Provincial Picture Houses Ltd. v Wednesbury Corporation [1948] 1 KB 223).**
19. The Applicant also relied on the decision in the case of **Pastoli v Kabale District Local Government Council and others [2008] 2 EA 300** where it was stated that:

**"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 accepted moral standards…."**

20. I have carefully looked at the arguments of the Applicant. It should be noted from the outset that judicial review is concerned with the process used in reaching a decision. It is not the business of a judicial review court to delve into the merits of the decision of a competent tribunal.
21. In **Municipal Council of Mombasa v Republic & Umoja Consultants Limited, Nairobi Civil Appeal No. 185 of 2001 ([2002] eKLR)** the Court of Appeal stated that:

**"The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review."**

22. The competency of the Board to hear and determine the matter that was placed before it is not in dispute. The jurisdiction of the Board was clearly enunciated by the Court of Appeal in **Kenya Pipeline Company Limited v Hyosung Ebara Company Limited & 2 others [2012] eKLR** when it stated that:

**"The Review Board is a specialized statutory tribunal established to deal with all complaints of breach of duty by the procuring entity. By Reg. 89, it has power to engage an expert to assist in the proceedings in which it feels that it lacks the necessary experience. S. 98 of the Act confers very wide powers on the Review Board. It is clear from the nature of powers given to the Review Board including annulling, anything done by the procurement entity and substituting its decision for that of the procuring entity that the administrative review**

**envisaged by the Act is indeed an appeal. From its nature the Review Board is obviously better equipped than the High Court to handle disputes relating to breach of duty by procurement entity. It follows that its decision in matters within its jurisdiction should not be lightly interfered with. Having regard to the wide powers of the Review Board we are satisfied that the High Court erred in holding that the Review Board was not competent to decide whether or not the 1st Respondent's tender had met the mandatory conditions. The issue whether or not the 1st Respondent's tender was rightly rejected as unresponsive was directly before the Review Board and the Board had jurisdiction to deal with it. In conclusion, it is manifest that the application for Judicial Review was not well founded. The 1st Respondent did not establish that the Review Board had acted without jurisdiction or in excess of jurisdiction or in breach of rules of natural justice or that the decision was irrational. The Judicial Review was not confined to the decision making process but rather with the correctness of the decision on matters of both law and fact. So long as the proceedings of the Review Board were regular and it had jurisdiction to adjudicate upon the matters raised in the Request for Review, it was as much entitled to decide those matters wrongly as it was to decide them rightly. The High Court erred in essence in treating the judicial review application as an appeal and in granting judicial review orders on the grounds which were outside the scope of Judicial Review jurisdiction."**

23. This court in reviewing the decision of the Board must be careful least it crosses into the area reserved for the Board by the PP&DA. Having said so, it should be remembered that sometimes the court is required to consider the merits of the decision in order to decide whether the same is reasonable or not.
24. From the material placed before the court, can one say the decision of the Board was unreasonable? I have reviewed the letters exchanged between the Applicant, the Ministry and ICDC and it is clear that the procurement in question was initiated and concluded by the Ministry. It was only after the tender had been awarded that ICDC was roped in. The predicament of the Ministry was clearly brought out in the letter dated 19th November, 2014 addressed to the Attorney General by the Principal Secretary, Dr. Wilson Songa. That letter states, *inter alia:*

**"Preparations for the development of the park were initiated in financial year 2011/2012. As the Ministry required land on which to develop the park, it preferred Industrial and Commercial Development Corporation (ICDC) as a strategic partner as the former is the registered owner of 135 Acres of land in Eldoret, Uasin Gishu County. It is worth to note that no Memorandum of Understanding was executed between the parties. The Board of Directors also did not give the requisite authority through board resolution to the parties to undertake the project."**

25. From that letter, and the other letters before the court, it is clear that ICDC was not a party to the procurement. The Board was therefore correct in finding that ICDC was not the procuring entity. There was no valid transfer of procurement responsibility as envisaged by Section 27(6) of the PP&DA and Rule 18 of the Public Procurement and Disposal Regulations, 2006. The transfer of procurement responsibility was done after the tender process had been concluded and the tender awarded to the Applicant by the Ministry.
26. Another finding by the Board is that the Applicant had already been awarded the tender by the Ministry and issuance of an order awarding the same tender to the Applicant was superfluous. Again the Principal Secretary's letter dated 19th November, 2014 clearly shows that a letter of notification of award was given to the Applicant on 10th January, 2013. The tender was therefore awarded to the Applicant two years prior to the filing of the Request for Review before the Board.
27. The Applicant's key prayer in the Request for Review was for an order directing the procuring entity to award him the tender. The Board correctly concluded that the Ministry was the procuring entity. The Board also rightly concluded that the Ministry had already awarded the tender to the Applicant. Maybe the Applicant wanted an order directing the Ministry to enter a contract with him. He, however, did not ask for such an order and the Board was right in concluding that it would be superfluous to order an award of the tender yet the tender had already been awarded to

him by the Ministry. The decision of the Board was therefore reasonable considering the facts that had been placed before it.

28. In the circumstances of this case, the Applicant has not established grounds for issuance of judicial review orders. His application therefore fails and the same should be dismissed.
29. It should be noted that the Ministry erred by floating a tender when it knew it had no capacity of awarding it to the successful bidder as it did not own the land on which the project was to be developed.
30. Having said all what I have said in this judgement, I must note that the Applicant had no valid application before this Court. Leave was granted to the Applicant to commence these proceedings on 7th April, 2015. His substantive notice of motion was filed on 30th April, 2015 which was outside the 21 days allowed by order 53 Rule 3(1) which states:

**"3. (1) When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty-one days by notice of motion to the High Court, and there shall, unless the judge granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion and the day named therein for the hearing."**

31. In the circumstances of this case, the leave had lapsed and there was no valid application before the Court. No leave had been obtained from the court to file the substantive notice of motion out of time.
32. The importance of filing the substantive notice of motion within twenty one days from the date of grant of leave was clearing expressed by the Court of Appeal in **Wilson Osolo v John Ojiambo Ochola & another [1996] eKLR** when it stated that:

**"It was a mandatory requirement of Order 53 rule 3(1) of Civil Procedure Rules then (and it is now again so) that the notice of motion must be filed within 21 days of grant of such leave. No such notice of motion having been apparently filed within 21 days of 15th February, 1982 there was no proper application before the Superior Court. This period of 21 days could have been extended by a reasonable period had there been an application under Order 49 of the Civil Procedure Rules. There was no such application save the one dated 28th April, 1994. That came too late in the day in any event and the learned judge erred in even considering the extension of time some 12 years after the event."**

33. The end result is that the application before this court fails. Had there been a valid notice of motion before the court, I would have awarded the Applicant costs against the Ministry for the reason that the Applicant had been engaged in a futile procurement exercise by the Ministry. However, in the circumstances of this case the Applicant's application is dismissed with no order as to costs.

Dated, signed and delivered at Nairobi this 6th day of Oct., 2015

**W. KORIR,**

**JUDGE OF THE HIGH COURT**