REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE 298 OF 2015

REPUBLIC ……...…..…….……APPLICANT

VERSUS

THE PUBLIC PRIVATE PARTNERSHIPS

PETITION COMMITTEE (THE PETITION COMMITTEE) …1ST RESPONDENT

KENYA PORTS AUTHORITY ……...…..……..2ND RESPONDENT

AND

BOLLORE/TOYOTA TUSHO CORPORATION,

KAMIGUMI CO. LTD, MITSUI ENGINEERING &

SHIP BUILDING CO. LTD

MOMBASA MAIZE MILLERS LTD……...……..1ST INTERESTED PARTY

INTERNATIONAL CONTAINER TERMINAL …...…..2ND INTERESTED PARTY

EX PARTE

APM TERMINALS

CONSOLIDATED WITH

JR CASE NO. 325 OF 2015

REPUBLIC ……...…….APPLICANT

VERSUS

THE PUBLIC PRIVATE PARTNERSHIPS

PETITION COMMITTEE (THE PETITION COMMITTEE) …..1ST RESPONDENT

KENYA PORTS AUTHORITY ……...……2ND RESPONDENT

AND

APM TERMINALS BV ……...…….1ST INTERESTED PARTY

BOLLORE/TOYOTA TUSHO CORPORATION,

KAMIGUMI CO. LTD MITSUI ENGINEERING &

SHIP BUILDING CO. LTD

MOMBASA MAIZE MILLERS LTD……...……2ND INTERESTED PARTY

EX PARTE

INTERNATIONAL CONTAINER TERMINAL SERVICES, INC. (ICTSI)

JUDGEMENT

CONSOLIDATION AND INTRODUCTION

1. For reasons that will become apparent in the course of this judgment, I have decided to deliver a consolidated judgement in respect of **Nairobi High Court JR. Misc. Civil Application No. 298 of 2015, Republic v Public Private Partnerships Petition Committee & 3 others ex parte APM Terminals BV** (hereinafter simply referred to as **JR No. 298 of 2015**) and **Nairobi High Court JR Misc. Application No. 325 of 2015, Republic v The Public Private Partnerships Petition Committee (the Petition Committee) and 3 others ex parte International Container Terminal Services Inc. (ICTSI)** (hereinafter simply referred to as **JR No. 325 of 2015**). The lead file will be **JR No. 298 of 2015.**
2. In April, 2015 Kenya Ports Authority (KPA) invited proposals from twelve shortlisted/prequalified entities to operate Phase 1 of the Second Container Terminal (Mombasa Port Development Project – MPDP) under a concession agreement. APM Terminals BV; the consortium of Ballore/Toyota Tsusho Corporation, Kamigumi Co. Ltd, Mitsui Engineering & Ship Building Co. Ltd & Mombasa Maize Millers; and International Container Terminal Services Inc. were among the invited entities. The deadline for the submission of the proposals was 26th June, 2015.
3. Through a letter dated 16th July, 2015, KPA (hereinafter simply referred to as the Contracting Authority) wrote to the ex parte Applicant in **JR No. 298/2015** informing it that its bid had failed at Stage 1: Preliminary Evaluation for lack of valid tender security. APM Terminals BV being aggrieved by its disqualification filed **Petition No. 2 of 2015** before the Petition Committee.
4. At the same time, through letters also dated 16th July, 2015 the Contracting Authority notified the consortium of Ballore/Toyota Tsusho Corporation, Kamigumi Co. Ltd, Mitsui Engineering & Ship Building Co. Ltd and Mombasa Maize Millers; and International Container Terminal Services Inc. that their bids had failed at Stage II, the Technical Evaluation for the reasons contained in those letters.

5. International Container Terminal Services Inc. filed **Petition No. 4 of 2015** before the Petition Committee. The consortium of Ballore/Toyota Tsusho Corporation, Kamigumi Co. Ltd, Mitsui Engineering & Ship Building Co. Ltd & Mombasa Maize Millers Ltd also challenged its disqualification before the Petition Committee through **Petition No. 3 of 2015.**

6. The ex parte Applicant in **JR No. 298 of 2015** is APM Terminals BV whereas the consortium of

Ballore/Toyota Tsusho Corporation, Kamigumi Co. Ltd, Mitsui Engineering & Ship Building Co. Ltd & Mombasa Maize Millers Ltd is the 1st Interested Party. International Container Terminal Services Inc. (ICTSI) is the 2nd Interested Party

7. International Container Terminal Services Inc. is the ex parte Applicant in **JR No. 325 of 2015.** APM Terminals BV is the 1st Interested Party and the consortium of Ballore/Toyota Tsusho Corporation, Kamigumi Co. Ltd, Mitsui Engineering & Ship Building Co. Ltd & Mombasa Maize Millers Ltd is the 2nd Interested Party.
8. The Petition Committee and Kenya Ports Authority/the Contracting Authority are the 1st and 2nd respondents in the two Judicial Review applications which are the subject of this judgement.

9. The Petition Committee is established under Section 67 of the Public Private Partnerships Act, 2013 to **"consider all petitions and complaints by a private party during the process of tendering and entering into a project agreement under this Act."**

10. When the three petitions (**Petitions Nos. 2, 3 and 4 of 2015**) came up for directions before the Petition Committee on 31st August, 2015, the petitioners made applications for the production of certain documents by the Contracting Authority. At the close of the arguments on the matter, the Petition Committee delivered its ruling on the same date (31st August, 2015) dismissing the petitioners' requests for the documents identified as the Stage 1 Preliminary Evaluation Report and the Stage 2 Technical Evaluation Report.

JR NUMBER 298/2015

11. On 10th September, 2015, the ex parte Applicant in **JR No. 298 of 2015** approached this Court and obtained leave to commence judicial review proceedings. Subsequently, the said Applicant filed the Notice of Motion dated 15th September, 2015 seeking orders that:

> **"1. An Order of Certiorari do issue to bring into this Honourable Court for the purpose of being quashed the decision contained in the 1st Respondent's ruling dated 31st August 2015 declining the request by the Applicant for disclosure and production to the Applicant of the Evaluation Report prepared by the 2nd Respondent and or analysis of how preliminary evaluation was carried out in respect of Tender No KPA/125/2014-15/CS - Selection of the Concessionaire for Phase 1 of the Second Container Terminal Port of Mombasa, Kenya.**
>
> **2. An Order of Mandamus do issue to direct the 2nd Respondent to disclose and produce to the Applicant under oath the Evaluation Report prepared by the 2nd Respondent and/or analysis of how preliminary evaluation was carried out in respect of Tender No KPA/125/2014-15/CS- Selection of the Concessionaire for Phase 1 of the Second Container Terminal Port of Mombasa, Kenya.**
>
> **3. Costs of and incidental to this suit."**

12. According to the statutory statement filed together with the application for leave on 10th September, 2015, the grounds upon which the Applicant seeks relief are:

> **"1. THAT the 1st Respondent's decision contained in its ruling dated 31st August 2015 declining the request by the Applicant for disclosure and production to the Applicant of the Evaluation Report prepared by the 2nd Respondent and or analysis of how preliminary evaluation was carried out in respect of Tender No KPA/125/2014-15/CS – Selection of the Concessionaire for Phase 1 of the Second Container Terminal Port of Mombasa is unreasonable. The 1st Respondent knew or ought to have known that the findings and inferences in the Evaluation Report form the substratum of the dispute**

before it and a sight of the content thereof by the Applicant is extremely crucial to the just determination of the dispute.

2. **THAT the 1st Respondent's decision declining the request by the Applicant for disclosure and production to the Applicant of the Evaluation Report is irrational as the 1st Applicant itself is already seized of the Evaluation Report. The 1st Respondent failed to consider the relevant fact that the Report does not contain any confidential and or financial declarations by the bidders and in any event the rest of the bidders are not opposed to its production.**
3. **THAT the production and disclosure of the Evaluation Report would not in any way prejudice the Respondents, the other bidders or the tender process. It would in fact promote transparency and accountability and thereby promote public and investor confidence in the process. The refusal of the production is contrary to public policy.**
4. **THAT the 1st Respondent's decision is in breach of the natural law and constitutional principles of fair hearing as it unjustly denies the Applicant the opportunity to rely on the Evaluation Report while assisting the 2nd Respondent to conceal the full nature of its defense to the Petition.**
5. **THAT the 1st Respondent's decision is unconstitutional as it is discriminatory and unduly curtails the Applicant's right of access to information for the purposes of protecting its interests and rights as set out in the Petition.**
6. **THAT the decision is an affront on the Applicant's legitimate expectation that the 1st Respondent would act impartially as a neutral arbiter in the dispute.**
7. **THAT the 1st Respondent's decision if left to stand would make the entire Petition procedurally unfair as it gives the 2nd Respondent undue advantage.**
8. **THAT the decision by the 1st Respondent is so unreasonable and outrageous that it has elicited negative editorial commentaries in the *Daily Nation* of 1st September 2015 and has cast the integrity of the entire tender process in negative light.**
9. **THAT in arriving at the impugned decision the 1st Respondent did not take into account the fact that the production and issuance of the Evaluation Report would not prejudice any of the parties involved which was a relevant consideration.**
10. **THAT the 1st Respondent's decision is founded on several errors of law in interpreting the law and the constitution including:**

    a. **Erroneously concluding that Article 50(1) of the Constitution does not create a right to fair hearing within the context of the Petition;**
    b. **Erroneously concluding that the Applicant had sought to rely on the provisions of Article 50(2) of the Constitution which relate to criminal proceedings;**
    c. **Erroneously finding that Article 227(1) of the Constitution in providing *inter alia* that procurement process should be equitable and fair does not apply to the disclosure of evaluation criteria applied in procurement process;**
    d. **Erroneously concluding that Article 227(1) of the Constitution needed to expressly provide for the Evaluation Report to be made available for the Article to be applicable to the Applicant's request for disclosure;**
    e. **Erroneously concluding that the Committee does not have powers in law to order production of documents in proceedings before it for the use of parties.**

11. **THAT the 1st Respondent's decision was irrational since it disregarded the Applicant's alternative prayer to make copies of the Evaluation Report already lodged with the 1st Respondent."**

13. In support of its case, the Applicant submitted that in making its decision dated 31st August, 2015, the Petition Committee knew or ought to have known that the findings and inferences in the Evaluation Report form the substratum of the dispute before it and a sight of the contents thereof, by the Applicant, is extremely crucial to the just determination of the dispute.

14. Further, that the decision of the 1st Respondent is so unreasonable and outrageous that it elicited negative editorial commentaries in the Daily Nation of 1st September, 2015 and has cast the integrity of the entire tender process in negative light.
15. It is the Applicant's case that the Petition Committee's decision declining the request by the Applicant for disclosure and production of the Evaluation Report is irrational as the Petition Committee itself is already seized of the Evaluation Report. Further, that the decision of the Petition Committee was irrational as it disregarded the Applicant's alternative prayer to make copies of the Evaluation Report already lodged with the Petition Committee.
16. In support of the argument on the irrationality of the decision of the Petition Committee, counsel for the Applicant cited the decision in **Associated Provincial Pictures Ltd v Wednesbury Corporation [1948] 1 KB 223** where irrationality was defined thus:

> **"In the present case we have heard a great deal about the meaning of the word 'unreasonable'. It is true the discretion must be exercised reasonably. What does that mean? Lawyers familiar with the phraseology commonly used in relation to the exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It is frequently used as a general description of the things that must be done. For instance, a person entrusted with a discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey those rules, he may be said, and often is said, to be acting 'unreasonably'. Similarly, you may leave something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ, I think it was, gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith. In fact, all those things largely fall under one head."**

17. Another authority cited by counsel for the Applicant is that of **Council of Civil Service Unions v Minister for Civil Service [1984] 3AII ER 935** in which Lord Diplock defined irrationality as follows:

> **"By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' (see Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 1AII ER 680, [1948] 1 KB 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."**

18. Turning to the assertion that the Petition Committee failed to consider the relevant factors, the Applicant submitted that the Petition Committee failed to consider the relevant fact that the Evaluation Report does not contain any confidential and or financial declarations by the bidders and in any event the rest of the bidders are not opposed to its production. Further, that the production of the Evaluation Report would not prejudice the parties. According to the Applicant, failure to take this relevant consideration into account rendered the Petition Committee's decision irrational.
19. In support of the assertion that failure to take into account relevant factors renders a decision irrational and susceptible to judicial review, the Applicant cited the decision in **Republic v Public Procurement Administrative Review Board & 3 others ex- parte Olive Telecommunication PVT Limited [2014] eKLR** in which it was stated that:

> **"However, while we reiterate that this Court in exercise of its supervisory jurisdiction by way of judicial review ought not to usurp the powers of the Board, where the Board fails to consider relevant evidence and considers irrelevant ones this Court must intervene where the failure to do so renders the decision so grossly unreasonable as to render it irrational."**

20. It is the Applicant's case that the Petition Committee's decision breached the principle of a fair hearing. According to the Applicant, the Petition Committee's decision is in breach of the natural justice and constitutional principle of fair hearing as it unjustly denies it the opportunity to rely on the Evaluation Report. The Applicant contends that its request for the Evaluation Report was based on the need to advance its right to a fair hearing as the Evaluation Report would enable it question the criteria and/or methodology used by the Contracting Authority in assessing its technical proposal.
21. The Applicant also contends that the decision of the Petition Committee is unconstitutional as it is discriminatory and unduly curtails its right to access information for purposes of protecting its interests and rights. Further, that the Petition Committee's decision denies the Applicant the opportunity to see from the Evaluation Report whether the Applicant was treated in the same way with the other bidders by the Contracting Authority with respect to the evaluation of mandatory requirements so as to conform to the constitutional threshold of non-discrimination and fairness.
22. As for procedural impropriety, the Applicant submits that if the decision of the Petition Committee is left to stand, it would make the entire Petition procedurally unfair as it gives the Contracting Authority undue advantage. The Applicant holds the view that the Petition Committee's decision to decline to order the Contracting Authority to produce the Evaluation Report which forms the substratum of the dispute before it (the Petition Committee) is an unfair practice which amounts to misuse of power.
23. In support of the assertion that procedural impropriety is a ground for issuance of judicial review orders, the Applicant cited the case of **Pastoli v Kabale District Local Government Council & others [2008] 2 EA 300** in which it was stated that:

> **"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….**
>
> **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."**

24. Other decisions cited in support of this point are **R v Inland Revenue Commissioners exparte Unilever PLC [1966] STC 6811; HTV Ltd v Price Commission [1976] I.C.R. 170;** and **Keroche Industries Limited v Kenya Revenue Authority & 5 others [2007] KLR 240**.
25. Finally, the Applicant impugned the Petition Committee's decision on the ground of illegality. The Applicant started by pointing out that illegality was defined in the **Council of Civil Service Unions v Minister for Civil Service [1984] 3 All ER 935** case as follows:

> **"By illegality' as a ground far 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."**

26. It is the Applicant's case that in the ruling delivered by the Petition Committee on 31st August, 2015 the reasons given for declining the request for production and disclosure of the Evaluation Report were as follows:

> **"(i) That the Applicant could not rely on Article 35(1) of the Constitution to seek the production and disclosure since the Applicant is a corporate body;**
>
> **(ii) Article 50(1) does not aid the application since Article 50(2) relates to matters of a criminal nature;**
>
> **(iii) The requirement of Article 227(1) of the Constitution which requires public**

procurement to be fair, equitable, transparent, competitive and cost effective does not mean that the Evaluation Report should be made available to all bidders."

27. According to the Applicant, the interpretation of the law and Constitution by the Petition Committee is founded on several errors of law, including:

a. erroneously concluding that Article 50(1) of the Constitution does not create a right to fair hearing within the context of the Petition;
b. erroneously concluding that the Applicant had sought to rely on the provisions of Article 50(2) of the Constitution which relate to criminal proceedings;
c. erroneously finding that Article 227(1) of the Constitution in providing, *inter alia,* that procurement process should be equitable and fair does not apply to the disclosure of evaluation criteria applied in procurement process;
d. erroneously concluding that Article 227(1) of the Constitution needed to expressly provide for the Evaluation Report to be made available for the Article to be applicable to the Applicant's request for disclosure; and
e. erroneously concluding that the Petition Committee does not have powers in law to order production of documents in proceedings before it for use of parties.

28. It is therefore the Applicant's case that the Petition Committee's decision is tainted with illegality and its application for judicial review should be allowed.
29. The 1st Interested Party filed submissions in support of the application. It is the 1st Interested Party's case that the Petition Committee's decision is tainted with irrationality. According to 1st Interested Party, the Petition Committee's decision did not comply with Articles 227(1) and 35(1) of the Constitution as the same amounted to taking away transparency from a procurement process and denying the ex parte Applicant information. It is the 1st Interested Party's position that the petitioners before the Petition Committee were thus denied an opportunity to adequately prepare their case and fully respond to the case of the Contracting Authority.
30. The 1st Interested Party asserted that the Petition Committee disregarded the right to a fair administrative process as guaranteed by Article 47 of the Constitution. In addition, the 1st Interested Party argued that the decision denied them the information which they required in order to effectively put forward their cases.
31. In support of the assertion that fairness is a key ingredient of natural justice, the 1st Interested Party cited the decisions in **Onyango Oloo v Attorney General [1988-1989] EA 456** and **Nairobi High Court JR No. 266 of 2014, Republic v Cabinet Secretary for Ministry of Interior & Coordination of National Government & another ex parte Leah Owiti De Caro.**
32. On the alleged illegality of the Petition Committee's decision, the 1st Interested Party submitted that the Petition Committee not only failed to take the provisions of the Constitution into consideration but also failed to uphold the rule of law and the principles upheld by the Constitution. The case of **Rahab Wanjiru Njuguna v Inspector General of Police & another [2013] eKLR** is cited in support of the assertion that judicial review is available where a decision is illegal.
33. The 1st Interested Party introduced a novel argument in support of the need to avail the Evaluation Report to the petitioners. It was argued that although the Public Private Partnerships Act, 2013 did not provide clear and direct guidelines on the documents that can be availed to bidders, a parallel legislation namely the Public Procurement & Disposal Act, 2005 (PP&DA) provides for confidentiality just like the Public Private Partnerships Act, 2013 but opens a window for disclosure of evaluation reports to bidders in certain circumstances. It is the 1st Interested Party's case that the Petition Committee ought to have been guided by the PP&DA instead of solely relying on Regulation 40(5) of the Public Private Partnership Regulations, 2014.
34. The 1st Interested Party further submitted that Regulation 40(5) of the Public Private Partnership Regulations, 2014 provides for confidentiality during the evaluation process only with the aim of preventing any party from influencing the evaluation process.
35. On its part, the 2nd Interested Party supported the application through the supporting affidavit of

Gidraph Migwi sworn on 16th October, 2015. It is the 2nd Interested Party's case that the decision of the Petition Committee was contrary to the principles of natural justice and public policy, unreasonable, irrational, unfair, unconstitutional, and made in error of the law. Counsel for the 2nd Interested Party made oral arguments to advance this position.

36. The Petition Committee/1st Respondent opposed the application by way written submissions dated 15th October, 2015. The 1st Respondent's position is that the Applicant has not established that its decision is illegal, unreasonable or breached the rules of natural justice in order to attract judicial review orders. It is the 1st Respondent's submission that the grounds for grant of judicial review were highlighted in the Ugandan case of **Pastoli v Kabale District Local Government Council & others [2008] 2 EA 300** as irrationality, illegality and procedural impropriety.

37. Citing the decision of this Court in **Republic v Public Procurement Administrative Review Board & another ex parte Gibb Africa Ltd & another [2012] eKLR,** counsel for the Petition Committee asserted that judicial review looks at the decision–making process to ensure that it is fair and does not deal with the merits of the decision. It was contended that judicial review cannot be equated to an appeal.

38. Counsel for the Petition Committee went ahead and submitted that it is not enough for an applicant to claim that a decision is unlawful or irrational. There is need to place evidence of illegality or irrationality before the Court. In support of this submission, reliance was placed on the decision of this Court in **Republic v Kenya Power & Lighting Company & another [2013] eKLR** in which I stated:

> **"It is not enough for an applicant in judicial review proceedings to claim that a tribunal has acted illegally, unreasonably or in breach of the rules of natural justice. The actual sins of a tribunal must be exhibited for judicial review remedies to be granted."**

39. As for the assertion by the Applicant and interested parties that its decision breached Article 35(1) of the Constitution, the Petition Committee argued that the right protected by the said Article is conferred only to natural persons who are citizens of Kenya. The 1st Respondent asserted that since the Applicant is not a natural person it is not entitled to the right to information under Article 35(1) of the Constitution. It is the Petition Committee's submission that in reaching this particular position, the decisions of the High Court were cited and relied upon and reliance on the decisions of the High Court cannot be said to be unreasonable.

40. It is also the Petition Committee's case that it found that the Applicant had cited Articles 50(1) and 227 of the Constitution and such a finding cannot be said to be unreasonable. All in all, the Petition Committee holds the view that the Applicant is seeking a review of the merits of its decision and that cannot happen through a judicial review application.

41. The Contracting Authority/2nd Respondent opposed the application through the replying affidavit sworn on 8th October, 2015 by Justus Omae Nyarandi, the Chairman of the Contracting Authority's Proposal Evaluation Team. The affidavit gives extensive details about the procurement in question. I will, however, only highlight those portions of the affidavit relevant to the issues before this Court.

42. It is the Contracting Authority's case that the Applicant was afforded an opportunity to argue its application for production and or inspection of documents before the Petition Committee. As the Applicant has not impugned the process adopted by the Petition Committee, the application herein has no merit as judicial review is concerned with the process taken in arriving at a decision and not the merits of the decision itself.

43. The Contracting Authority asserts that the Public Private Partnership Act, 2013 which established the Petition Committee as a specialized quasi–judicial tribunal in respect of public private partnerships arrangements, does not have a provision for appeal. Therefore, the Contracting Authority contends that, in filing these proceedings, the Applicant is calling upon this Court to sit on appeal against the decision of the Petition Committee which is an act not allowed by the law.

44. It is the Contracting Authority's position that the issue surrounding the decision to declare the Applicant's bid unsuccessful for providing a non-compliant bid security can be fully canvassed without adverting to the Technical Evaluation Report. According to the Contracting Authority, the Tender Document as amended by the *Addenda* as read together with the Public Private

Partnership Regulations, 2014 provides a complete answer to the Applicant's Petition.

45. The Contracting Authority contends that the Applicant wishes to go on a fishing expedition in the Technical Evaluation Report which will make it privy to confidential competitor information to the prejudice of the Kenyan public. According to the Contracting Authority, the Technical Evaluation Report contains comments by the Technical Evaluation Team during evaluation, a summary of the comparative information provided by all bidders including their financial capacity as separate entities or consortia (including long term profitability projections, return on equity and equity ratios), their individual and aggregate performance indicators at the selected ports, their historical mobilization strategies, business plans among other information. The Contracting Authority therefore submits that if the information is released when the process is still ongoing, it would undermine the entire bidding process.
46. It is the Contracting Authority's position that confidentiality is provided for by Regulation 40(5) of the Public Private Partnership Regulations, 2014. Further, that Paragraph 8 of Section 2 in the Instructions to Bidders in the Tender Document also provides that the bidders' information shall be handled confidentially by the Contracting Authority. It is the Contracting Authority's submission that by subjecting themselves to the tender process the Applicant and the interested parties are bound by the confidentiality clause in the Tender Document.
47. It is also the Contracting Authority's case that the legislative framework governing the bidding process does not envision or place an obligation upon a contracting authority to release information to bidders regarding the bidding process before the completion of the entire process.
48. The Contracting Authority also argues that fair competition between bidders will be distorted in the event that the confidential commercial information in their bids is disclosed. It is the Contracting Authority's view that such disclosure will be against public interest as it will open up the tender to manipulation and possible bid rigging.
49. The Contracting Authority's position is that if the Technical Evaluation Report is given to the Applicant, the Applicant will have an unfair commercial advantage over other bidders as it will have access to commercially sensitive information about them but the other bidders will not have access to the Applicant's information in other stages of evaluation as its bid was not evaluated.
50. Further, that not all bidders are represented in these proceedings and it would be grossly unfair and prejudicial to them if a decision to disclose the Technical Evaluation Report is made without taking into account their views.
51. The Contracting Authority asserts that the mandate to make a determination on disclosure or otherwise of the Evaluation Report is vested on the Petition Committee by Parliament. Also, that the Petition Committee is an expert quasi-judicial body capable of scrutinizing the Technical Evaluation Report and the Tender Document against the petitions filed in order to arrive at a just decision.
52. The Contracting Authority urged the Court to dispose of the matter expeditiously so that the project can proceed. According to the Contracting Authority the successful bidder is expected to receive and test the equipment to be used for the project and the equipment has started arriving in the country. Also, that the time for repaying the loan used in the project is drawing near.
53. In further support of its position, the Contracting Authority submitted that it is the practice in Kenya, both under the Public Private Partnerships Act, 2013 and the PP&DA, for evaluation reports not to be disclosed to bidders. This practice, the Contracting Authority asserts, also holds true in the European Union.
54. Further, that practice also requires that evaluation reports are only provided to the quasi-judicial body established to review complaints made by bidders. It is the Contracting Authority's argument that in order to facilitate a bidder's capacity to prosecute a complaint, a contracting authority or procuring entity provides a summary of the reasons for the rejection of the bid as extracted from the evaluation report.
55. It is the Contracting Authority's contention that in accordance with Section 60 of the Public Private Partnership Act, 2013, any information can only be released to the bidders or the public after the execution of a project agreement. Also, that Regulation 40(5) of Public Private Partnerships Regulations, 2014 requires a proposal evaluation team to preserve the confidentiality of a tender evaluation process.
56. The Contracting Authority referred the Court to Section 44 of the PP&DA which prohibits disclosure of information obtained during a procurement process. According to the Contracting

Authority, the Public Procurement & Administrative Review Board has routinely declined requests for publication of evaluation reports by parties to proceedings before it and this has been upheld by this Court.

57. In support of the statement that this Court has declined requests for disclosure of information in evaluation reports, the Contracting Authority cited the decision of Majanja, J in **Nairobi High Court Constitutional Petition No. 43 of 2012, Famy Care Ltd v the Public Procurement Administrative Review Board & 5 others.**
58. The Contracting Authority asserts that the decision by the Petition Committee not to order the release of the Technical Evaluation Report to the petitioners, does not amount to denying them a fair hearing and neither does it amount to a breach of any of their rights. It is submitted for the Contracting Authority that the right to a fair hearing is not a 'one size fit all' prescription but depends on the circumstances of each case.
59. The Contracting Authority submits that what is necessary is to ensure there is a fair process and this will depend on the circumstances of each case. The decisions in **Bushell v Secretary of State [1980] 2 All ER 608** and **Collmore & another v Attorney General of Trinidad & Tabago [1969] 2 All ER 1207** were referred to in support of this argument.
60. Also cited in support of this position is a statement by the Court of Appeal in **Kenya National Examinations Council v Republic, Civil Appeal No. 266 of 1996.** In that case the Court stated:

> **"The question of whether the Council is in law bound to hear a candidate before it cancels the result must remain for consideration on another occasion, though if we were forced to decide it in this matter, we would ourselves be inclined to take the view that it might place an unnecessarily heavy burden on the shoulders of the Council to insist on a hearing before cancellation. That mode of procedure may also destroy the confidentiality necessary to marking of examinations."**

61. The Contracting Party urges the Court to conclude that the process of bid evaluation requires confidentiality in order to prevent prejudice of legitimate commercial interests of bidders or inhibit fair competition.
62. The Contracting Authority also asked this Court to adopt the argument of Dr. Albert Sanchez Graells, a Senior Lecturer at the University of Leicester to the effect that excess levels of transparency in public procurement may have the negative impact of increasing the likelihood of cartelisation of markets. I will in due course consider the arguments of Dr. Sanchez Graells in his article titled: **The difficult balance between transparency and competition in public procurement: Some recent trends in the case law of the European Courts and a look at the new Directives, University of Leicester School of Law, Research Paper No. 13-11.**
63. The Contracting Authority's position is that the Applicant was given the reason for the rejection of its bid. Further, that a copy of the Tender Opening Minutes which contains comparative information regarding the mandatory requirements of the tender was filed with the Petition Committee. It is the Contracting Authority's position therefore that the Applicant has sufficient information to argue its case before the Petition Committee. In addition, the Contracting Authority contends that the Technical Evaluation Report is already with the Petition Committee and it can use its inquisitorial powers to verify any allegations made by the parties.
64. According to the Contracting Authority, the Applicant already has all the necessary information to prosecute its case and the request for the Technical Evaluation Report is just but a fishing expedition that cannot be the basis for declaring a decision unreasonable or irrational.
65. The Contracting Authority asserts that the Applicant has not established the allegation that the decision of the Petition Committee was irrational or unreasonable. According to the Contracting Authority, a commentary in the Daily Nation casting aspersions on the tender process is not a test of what is unreasonable or irrational since the subjective opinion of a reporter cannot form the basis of such a weighty determination.
66. In order to show that the decision of the Petition Committee is reasonable, the Contracting Authority referred the Court to **De Smith's Judicial Review, 6th Edition** where at page 551 what amounts to Wednesbury Unreasonableness is defined as follows:

> **"Substantive review in English law has been dominated by the concept of**

unreasonableness closely identified with the famous formulation by Lord Greene M.R. in the *Wednesbury* case, that the courts can only interfere if a decision "is so unreasonable that no reasonable authority could ever come to it." That formulation attempts, albeit imperfectly, to convey the point that judges should not lightly interfere with official decisions on this ground. In exercising their powers of review, judges ought not to imagine themselves as being in the position of the competent authority when the decision was taken and then test the reasonableness of the decision against the decision they would have taken. To do that would involve the courts in a review of the merits of the decision, as if they were the recipients of the power. For that reason Lord Greene in *Wednesbury* thought that an unreasonable decision under this definition "would require something overwhelming" (such as a teacher being dismissed on the ground of her hair)."

67. It is the Contracting Authority's assertion that the decision does not come anywhere near something overwhelmingly absurd since the decision of the Petition Committee captures the arguments by all parties, identifies the issues for determination and arrives at conclusions on each of them based on authorities.
68. The Contracting Authority argues that the Petition Committee cannot be said to have failed to consider relevant factors as there was a clause in the Tender Document barring disclosure of information relating to evaluation of proposals.
69. The Contracting Authority contends that the Petition Committee did not breach the natural justice principle of fair hearing and there is no evidence of procedural impropriety as alleged by the Applicant.
70. Additionally, the Contracting Authority states that there is nothing to support the Applicant's claim that the decision of the Petition Committee is tainted with illegality. It is the Contracting Authority's position that as written in 6th Edition of **De Smith's Judicial Review** at page 225, illegality can only be established if one or more of the following conditions exist:

"An administrative decision is flawed if it is illegal. A decision is illegal if it:

a. **contravenes or exceeds the terms of the powers which authorizes the making of the decision;**
b. **pursues an objective other than that which the power to make the decision was conferred;**
c. **is not authorized by any power;**
d. **contravenes or fails to implement a public duty."**

71. It is therefore the Contracting Authority's case that the decision of the Petition Committee was legal.
72. The Applicant filed a Supplementary Affidavit sworn by its Commercial Director, Robert Gechure Kerama on 16th October, 2015. In the Supplementary Affidavit, the Applicant concentrated on a new allegation to the effect that the Contracting Authority's decision to disqualify the Applicant was influenced by another bidder. This assertion was based on the revelation by the Contracting Authority that one of the bidders had alerted it about the Applicant's non-compliance with the requirement for the provision of a valid security.
73. Through the Supplementary Affidavit it was averred that this judicial review application does not challenge the merits of the decision but squarely falls into the judicial review province. The Applicant maintained its position that the decision of the Petition Committee deprives it of the opportunity to examine or challenge evidence, forces it to accept the factual assertions of its adversary and purports to review the Applicant's case without giving the Applicant an opportunity to look at the Evaluation Report. The Applicant contends that its complaints cannot be justly determined if it is not given an opportunity to look at the Evaluation Report.
74. On the question of confidentiality, the Applicant replied that there is nothing confidential about what it seeks as the preliminary evaluation was confined to the basics. It is the Applicant's case that the fact that the Evaluation Report is available to the Petition Committee does not take away the Applicant's right to the Evaluation Report.
75. On the Contracting Authority's argument that there is need to expedite the matter, the Applicant

asserted that the need for expedition is not an excuse for breach of constitutional provisions.

JR NUMBER 325 OF 2015

76. The case of the ex parte Applicant in **JR No. 325 of 2015** is that after it submitted its bid, it subsequently received a notification dated 16th July, 2015 from the Contracting Authority informing it that its bid had been disqualified. The notification disclosed to the Applicant the reasons for the rejection of its technical bid.

77. Being aggrieved by the disqualification, the Applicant filed **Petition No. 4 of 2015** before the Petition Committee.

78. On 31st August, 2015 when the Petition came up for mention, the Applicant applied to be supplied with the Technical Evaluation Report by the Contracting Authority. It is the Applicant's case that its application was made pursuant to, *inter alia*, Articles 35, 47, 50 and 227 of the Constitution, Section 29 of the Public Private Partnerships Act, 2015 as well as regulations 47 and 48 of the Public Private Partnerships Regulations, 2014.

80. After the application was rejected by the Petition Committee, the Applicant moved this Court and obtained leave to commence these judicial review proceedings. Through the notice of motion application dated 5th October, 2015 the Applicant therefore prays for orders that:

> **"a) An ORDER OF CERTIORARI do issue to remove to this Honourable Court and quash the decision of the 1st Respondent rendered on 31/08/2015 denying the Applicant the Technical Evaluation Report as relates to the evaluation of its Technical Proposal/Bid in relation to that tender dealing with the operating, equipping, and managing of Phase 1 of the Second Container Terminal Port of Mombasa Kenya-Tender No. KPA/125/2014-15 CS ("the Second Container Terminal Project")**
>
> **b) AN ORDER OF MANDAMUS do issue to compel the 2nd Respondent, its agents and/or officers either by itself or through the 1st Respondent to avail to the Applicant the Technical Evaluation Report as relates to the evaluation of the Applicant's Technical Proposal/Bid in relation to that tender dealing with the operating, equipping, and managing of Phase 1 of the Second Container Terminal Port of Mombasa, Kenya-Tender No. KPA/125/2014-15 CS ("the Second Container Terminal Project")**
>
> **c) The costs of this application be borne by the Respondents."**

81. From the papers filed in Court by the Applicant, its case is that the disclosure application made before the Petition Committee was meant to ensure that it was provided with the documents which informed the Contracting Authority's decision to disqualify its technical proposal. The Technical Evaluation Report would have assisted it to question the criteria and/or methodology used by the Contracting Authority in assessing its technical proposal. Further, that the Technical Evaluation Report would have enabled it to interrogate and respond to certain positive averments which had been made by the Contracting Authority in response to its Petition.

82. The Applicant obtained leave to commence these judicial review proceedings on 28th September, 2015. From the statutory statement dated the same date, the grounds upon which relief is sought are:

> **"4.1 The 1st Respondent contrary to the principles of natural justice and in direct contravention of Articles 35, 47,50 and 227 of the Constitution, Section 29 of the Public Private Partnerships Act, Act No. 15 of 2015 ("the Act") as well as Regulations 47 and 48 of the Public Private Partnerships Regulations ("the Regulations") declined to grant the Applicant's application to be provided with the document-the Technical Evaluation Report, which informed the 2nd Respondent's decision to disqualify its technical proposal.**

4.2 Through the application the Applicant sought to advance its right to a fair hearing as it would be in a position to question the criteria and/or methodology used by the 2nd Respondent (through itself or through the Technical Evaluation Team) in assessing its technical proposal.

4.3 Similarly, through the application the Applicant sought to be provided with the Technical Evaluation Report in order to interrogate and respond to certain positive averments which had been made in the Replying Affidavit to the Petition sworn by the 2nd Respondent. The said positive averments in the 2nd Respondent's Replying Affidavit were relying on information from the Technical Evaluation Report.

4.4 The aforesaid action by the 1st Respondent *was made in bad faith, in contravention of the Applicant's right to fair administrative action as enshrined under Article 47 of the Constitution and in further contravention of the principles of natural justice and in direct contravention of the Applicant's right to a fair hearing and contrary to Articles 50 and 227 of the Constitution.*

4.5 Similarly, the action by the 1st Respondent amounted to unreasonableness or actual bias against the Applicant as one of the parties to the litigation before the Petition Committee, *to wit:* the 2nd Respondent is possessed of the Technical Evaluation Report and is using it to discredit the Applicant's case.

4.6 The 1st Respondent in rendering its decision of 31/08/2015 also acted in error of law by *inter alia* pronouncing that fundamental rights for instance the right to information are limited in so far as the Applicant is concerned as well as giving a narrow and restricted interpretation to constitutionally recognised inalienable rights like the right to a fair hearing."

83. In advancing the Applicant's case, the advocates for the Applicant started by appreciating that judicial review is concerned with reviewing the decision making process and not the merits of the decision in respect of which the application for judicial review is made.

84. Counsel for the Applicant then proceeded to lay the basis for the Applicant's case by stating that the Petition Committee's decision made short shrift of the Applicant's right to a fair hearing as recognised under common law, Article 50 of the Constitution and the rules of natural justice. It is the Applicant's assertion that Article 50(1) of the Constitution provides a right to every person to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or an independent and impartial tribunal or body.

85. According to the Applicant, the right to be heard necessarily entails the right to information. In support of this proposition the Applicant cited the 5th Edition of **Judicial Review Handbook** by **Michael Fordham** where at page 587 it is stated that:

"Hand in hand with the right to be heard is a right to be given sufficient information to enable proper representations. This allows representations to be properly informed and avoids unfair secrecy or the relevant person later being unfairly taken by surprise…….. *In re D (Minors)(Adoption Reports: Confidentiality)* [1996] AC 593, 603 H-604 A ("it is a first principle of fairness that each party to a judicial review process shall have an opportunity to answer by evidence and argument any adverse material which the tribunal may take into account when forming its opinion. This principle is lame if the party does not know the substance of what is said against him (or her), for what he does not know he cannot answer"); …. *R v P Borough Council, ex p S [*1999] Fam 188, 220 C ("One of the basic requirements of procedural fairness is that the decision-maker must disclose to the person affected, in advance of the decision, information of relevance to the

decision so that the person affected has an opportunity to controvert it or to comment on it")

86. It is the Applicant's case that in order to present a robust case before the Petition Committee, it is necessary for it to be provided with the Technical Evaluation Report. The Applicant's contention is that as per regulations 47 and 48 of the Public Private Partnerships Regulations, 2014, a technical evaluation report is the document which sets out the criteria and/or methodology to be used by a contracting authority to assess a private party's technical proposal. Therefore, in order for the Applicant to controvert and/or question the criteria and/or methodology used in disqualifying its technical proposal it ought to be given access to the Technical Evaluation Report.
87. The Applicant asserts that it is important to note that under Regulation 47, a proposal evaluation team is, in assessing the technical proposals of bidders, required to adhere to the criteria set out in the tender documents. It is therefore the Applicant's position that the Technical Evaluation Report would afford it an opportunity to interrogate the Proposal Evaluation Team's adherence to the mandatory requirement of Regulation 47.
88. The Applicant submits that paragraphs 15, 27, 31, 32 and 35 of the Contracting Authority's replying affidavit to the Applicant's Petition before the Petition Committee has positive averments which can only be responded to by the Applicant upon perusal of the Technical Evaluation Report. The Applicant asserts that as a consequence of the denial of the Technical Evaluation Report, its right to fair hearing has been breached by the Petition Committee's impugned decision. This, according to the Applicant, is a breach of the right to fair administrative action as recognised under Article 47 of the Constitution.
89. Turning to its assertion that the decision of the Petition Committee was unreasonable, the Applicant averred that the decision was unreasonable in that it failed to take into account the fact that the Contracting Authority was in possession of the Technical Evaluation Report. The Applicant contends that as was stated in the case of **Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1947] 2 AII ER 680,** failure to take into account relevant factors or taking into account irrelevant factors in reaching a decision amounts to unreasonableness on the part of a public body.
90. The Applicant's view is that in an adversarial system of adjudication of disputes the litigants ought to be presented with a level playing field and to this end the Petition Committee ought to have directed that the Applicant be provided with the Technical Evaluation Report to enable it present its case adequately and at the same time controvert the case of the Contracting Authority.
91. Submitting on the ground that the Petition Committee's decision was unfair, the Applicant postulated that no party would have been prejudiced had it been given the Technical Evaluation Report.
92. It was also the Applicant's submission that the Petition Committee's decision is replete with instances where the law was blatantly disregarded or misinterpreted. In support of the assertion that errors of law will attract judicial review proceedings, the Applicant cited the 2009 Edition of **Judicial Review Law, Procedure and Practice** where at Page 128 the author, Peter Kaluma, writes:

"A decision of an administrative authority can be quashed if there is an error of law apparent on the face of the record, even if the error is non-jurisdictional. Error is apparent on the face of record if it can be ascertained merely by examining the record without having recourse to other evidence. The error must be self-evident, patent or manifest. It must not require in-depth examination or long-drawn process of reasoning or argument to establish. An error which has to be established by lengthy and complicated arguments is not an error of law apparent on the face of the records."

93. The Applicant asserted that it was erroneous for the Petition Committee to find that Article 50 of the Constitution only applies to criminal proceedings. Further, that it was erroneous for the Petition Committee to hold that had Article 227 of the Constitution intended that bidders be provided with evaluation reports it would have said so.
94. The Applicant urged this Court to quash the decision of the Petition Committee and compel the

Contracting Authority to avail it a copy of the Technical Evaluation Report.

95. The respondents relied on the grounds and arguments similar to those in **JR No. 298 of 2015** in opposing the Applicant's case. I therefore do not deem it necessary to reproduce their submissions.

96. APM Terminals BV (the 1st Interested Party) and the consortium of Ballore/Toyota Tshusho Corporation, Kamigumi Co. Ltd, Mitsui Engineering & Ship Building Co. Ltd & Mombasa Maize Millers Ltd (2nd Interested Party) supported the application.

97. In fact, the 1st Interested Party who is the Applicant in **JR No. 298 of 2015** went ahead and demanded the full Technical Evaluation Report and not an excerpt as prayed by the Applicant herein.

98. According to the replying affidavit sworn on 16th October, 2015 by Robert Gechure Kerama, the 1st Interested Party's case is that it is necessary for the Contracting Authority to disclose and produce the complete Technical Evaluation Report so that it can be ascertain or verified how the 1st Interested Party's bid was evaluated alongside the other bids. It is also the 1st Interested Party's case that its contention before the Petition Committee that the Contracting Authority applied an unfair, inconsistent and discriminatory evaluation method can only be supported by information contained in the Technical Evaluation Report.

99. Through oral submissions made by Mr. Ngatia, the only point taken up is a letter dated 6th July, 2015 addressed to the Contracting Authority by one of the bidders, Hutchison Ports Investments s.a.r.l. pointing out its concerns about the non-compliant bids of the ex parte applicants in these two applications. Although Mr. Ngatia discussed the letter, it must be noted that the same was not part of the record in **JR No. 325 of 2015**. It was, however, exhibited by the Contracting Authority in **JR No. 298 of 2015**.

100. The 2nd Interested Party supported the application based on the same arguments advanced in **JR No. 298 of 2015.**

ANALYSIS AND DETERMINATION

101. Upon reflection on, and review of, the material placed before the Court by the parties in these two applications, it becomes clear that the question for the determination of the Court is whether the Applicant has met the conditions for grant of judicial review orders.

102. Parties made heavy weather about the illegality of the communication of one of the bidders to the Contracting Authority. I must state without further delay that this issue is not before this Court. The issue before this Court is the decision made by the Petition Committee on 31st August, 2013.

103. The orders of certiorari, prohibition and mandamus are available where a body amenable to judicial review has acted illegally, irrationally or in contravention of the rules of natural justice – see **Pastoli v Kabale District Local Government Council and others [2008] 2 EA 300** and **Council of Civil Service Unions v Minister for the Civil Service [1984] 3 ALL ER 935.**

104. For an applicant to succeed in an application for judicial review it is necessary to establish that the action or decision being challenged is tainted with illegality, irrationality or procedural impropriety. It is not enough for one to allege illegality, irregularity or procedural impropriety. The allegations must be proved for the orders to issue–see the decision of this Court in **JR No. 92 of 2011 R v The Public Procurement Administration Review Board & another ex parte Gibb Africa Ltd & another**.

105. It needs to be remembered that the Petition Committee is established under Section 67 of the Public Private Partnerships Act, 2013 to **"consider all petitions and complaints submitted by a private party during the process of tendering and entering into a project agreement under this Act." Petitions Nos. 2, 3 and 4 of 2015** were therefore correctly and properly before the Petition Committee. The particular question namely the notice to produce was also properly before the Petition Committee.

106. In such a situation it would be easy to dismiss the applicants' application acting on the law as pronounced by the Court of Appeal in **Kenya Pipeline Company Limited v Hyosung Ebara Company Limited & 2 Others [2012] eKLR** where it was stated that:

> **"Moreover, where the proceedings are regular upon their face and the inferior tribunal**

has jurisdiction in the original narrow sense (that is, to say, it has power to adjudicate upon the dispute) and does not commit any of the errors which go to jurisdiction in the wider sense, the quashing order (certiorari) will not be ordinarily granted on the ground that its decision is considered to be wrong either because it misconceived a point of law or misconstrued a statute (except a misconstruction of a statute relating to its own jurisdiction) or that its decision is wrong in matters of fact or that it misdirects itself in some matter."

107. In the same judgement, the Court of Appeal explained why the judicial review power should be exercised with restrain in the case of the Public Procurement Administrative Review Board. The Court stated:

"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."

108. I would think that the same argument should be applicable to the Petition Committee. Looking at the membership of the Petition Committee it is possible to have a professional and knowledgeable administrative body capable of handling petitions and complaints without attracting persistent intervention through judicial review.

109. Nevertheless, the decision of the Petition Committee needs close scrutiny for two reasons. Firstly, the Public Private Partnerships Act, 2013 does not provide an appeal mechanism against the decisions of the Petition Committee. If the Petition Committee reaches a wrong decision its repercussions on public procurement will be long lasting and devastating. An argument that an application like the one before this Court is a disguised appeal should be treated with a lot of caution for an aggrieved private party has no other option, apart from judicial review, of correcting bluntly wrong and unjust decisions. In a situation where there is no window for appeal, judicial review takes a higher pedestal.

110. Secondly, the Court has to closely and carefully consider the decision and its impact, not only on the petitions currently before the Petition Committee, but on complaints and petitions to be filed in future.

111. There is therefore need to consider the arguments of the ex parte applicants before a decision is reached as to whether judicial review is available in the circumstances of this case. The respondents at one point submitted that disclosure can only happen upon the execution of a project agreement as provided by Section 60 of the Public Private Partnerships Act, 2013. That Section states:

"60. Publishing information upon execution of project agreement

(1) A contracting authority shall, upon the execution of a project agreement by the parties, publish in at least two newspapers of national circulation and in the electronic media, the results of the tender together with the following information—

(a) the nature of the project;

(b) the scope of the project;

(c) the successful bidder;

(d) the project cost at net present value

(e) the project value and tariff; and

(f) the duration of the project.

(2) The Committee may prescribe the manner in which the contracting authority shall publish the information specified in subsection (1)."

112. Looking at the said provision, it is clear that it is about publication of information for the benefit of the public. It has nothing to do with the kind of information a losing bidder will require in order to prosecute a complaint in respect of public procurement. I therefore conclude that nothing relevant to this matter is found in Section 60.
113. The respondents did urge this Court to find that confidentiality of bids is a necessary element of public procurement and the Petition Committee was therefore correct in reaching a decision that the petitioners should not have access to the Preliminary Evaluation Report and the Technical Evaluation Report.
114. It was also the respondents' position that the decision of the Petition Committee was correct as that is the position that has been upheld by the Public Procurement Administrative Review Board and this Court.
115. I will state without further ado that the decisions of the Public Procurement Administrative Review Board are not binding on this Court. That does not, however, mean that this Court cannot consider those decisions and even agree with them.
116. As regards the decisions of this Court, they are of persuasive value and this Court will follow them if it agrees with the reasoning in the decisions. I will therefore proceed to consider the cited decisions.
117. The first decision is that of Majanja, J in **Famy Care Limited v Public Procurement Review Board & another & 4 others [2012] eKLR.** A review of this decision clearly reveals that it did not in any way address the question of confidentiality of evaluation of bids. What had happened in that case was that a preliminary objection had been taken up by the advocate for the 2nd Respondent on the ground that the Petitioner was a limited liability company incorporated in India and could not therefore enjoy the right guaranteed by Article 35(1) of the Constitution.
118. The learned Judge upheld the preliminary objection on two grounds namely that the right to information provided by Article 35(1) of the Constitution was only available to Kenyan citizens and that right could only be enjoyed by natural persons and not juridical persons.
119. The only comment on disclosures was to the effect that:

"The other disclosures shall be dealt with in the context of the provisions of the Public Procurement & Disposal Act, 2005 and as no affidavit has been filed on behalf of the Public Procurement Administrative Review Board, I shall not comment on the issue at this stage."

120. The other case cited by the respondents in support of the proposition that this Court has upheld confidentiality of the information contained in evaluation reports is that of Mumbi Ngugi, J in **Nairobi law Monthly Company Limited v Kenya Electricity Generating Company & 2 others [2013] eKLR.** Once again I note that the confidentiality of evaluation of bids in public procurement was not an issue in that matter. The issues were similar to those dealt with by Majanja, J in **Famy Care Limited (supra).**
121. No other authority was cited from the local jurisdiction on this matter. The 2nd Interested Party pointed out that Section 44 of the PP&DA could be of assistance to the Court. That Section provides:

"44. Confidentiality

(1) During or after procurement proceedings, no procuring entity and no employee or agent of the procuring entity or member of a board or committee of the procuring

entity shall disclose the following—

(a) information relating to a procurement whose disclosure would impede law enforcement or whose disclosure would not be in the public interest;

(b) information relating to a procurement whose disclosure would prejudice legitimate commercial interests or inhibit fair competition;

(c) information relating to the evaluation, comparison or clarification of tenders, proposals or quotations; or

(d) the contents of tenders, proposals or quotations

(2) This section does not prevent the disclosure of information if any of the following apply—

(a) the disclosure is to an employee or agent of the procuring entity or a member of a board or committee of the procuring entity involved in the procurement proceedings;

(b) the disclosure is for the purpose of law enforcement;

(c) the disclosure is for the purpose of a review under Part VII or an investigation under Part VIII or as required under section 105;

(d) the disclosure is pursuant to a court order; or

(e) the disclosure is allowed under the regulations.

(3) Notwithstanding the provisions of subsection (2), the disclosure to an applicant seeking a review under Part VII shall constitute only the summary referred to in section 45(2)(e).

(4) Any person who contravenes the provisions of this section shall be guilty of an offence."

122.Section 44 should be read together with Section 45 which reads:

"45. Procurement records

(1) A procuring entity shall keep records for each procurement for at least six years after the resulting contract was entered into or, if no contract resulted, after the procurement proceedings were terminated.

(2) The records for a procurement must include—

(a) a brief description of the goods, works or services being procured;

(b) if a procedure other than open tendering was used, the reasons for doing so;

(c) if, as part of the procurement procedure, anything was advertised in a newspaper or other publication, a copy of that advertisement as it appeared in that newspaper or publication;

(d) for each tender, proposal or quotation that was submitted—

(i) the name and address of the person making the submission; and

(ii) the price, or basis of determining the price, and a summary of the other principal terms and conditions of the tender, proposal or quotation;

(e) a summary of the evaluation and comparison of the tenders, proposals or quotations, including the evaluation criteria used;

(f) if the procurement proceedings were terminated without resulting in a contract, an explanation of why they were terminated;

(g) a copy of every document that this Act requires the procuring entity to prepare; and

(h) such other information or documents as are prescribed.

(3) After a contract has been awarded or the procurement proceedings have been terminated, the procuring entity shall, on request, make the records for the

procurement available to a person who submitted a tender, proposal or quotation or, if direct procurement was used, a person with whom the procuring entity was negotiating.

(4) The procuring entity may charge a fee for making the records available but the fee shall not exceed the costs of making the records available.

(5) No disclosure shall be made under subsection (3) that would be contrary to section 44(1), but a disclosure, under subsection (3), of anything described in paragraphs (a) to (f) of subsection (2) shall be deemed not to be contrary to paragraphs (b) to (d) of section 44(1).

(6) A procuring entity shall maintain a proper filing system with clear links between procurement and expenditure files."

123. A reading of the cited sections show that confidentiality is indeed a requirement in evaluation of bids both during and after the process. Sections 44 and 45 of the PP&DA are clear on the purpose of confidentiality, the circumstances under which disclosure may be made and the extent of the disclosure. I do not think that the said provisions will be of much help in this case. For that reason, whatever statements I make in this judgement shall not be applicable to public procurement under the PP&DA or any proceedings thereunder as the provisions on confidentiality under the two acts are quite different.
124. Regulation 40(5) of the Public Private Partnerships Regulations, 2014 is the provision that is relevant to these proceedings. It states as follows:

> **"The proposal evaluation team shall preserve the confidentiality of a tender evaluation process and shall not be influenced or directed by any person regarding the evaluation of a proposal except in accordance with the Act and these Regulations."**

125. There was no reference by any of the parties to any provision requiring confidentiality in the Public Private Partnerships Act, 2013. The requirement for confidentiality is only found in the Public Private Partnerships Regulations, 2013. In my view, the said Regulation limits confidentiality to the proposal evaluation team. I do not think that provision applies to the Petition Committee and I am even more doubtful if that requirement for confidentiality is applicable to this Court.
126. As already stated, no local case law has been cited in support of the application for the disclosure of the Preliminary Evaluation Report and the Technical Evaluation Report by the ex parte

applicants and the interested parties. The 2nd Respondent cited a research paper by Dr. Sanchez Graells to demonstrate that even in the European Union confidentiality is the norm.

127. The author does indeed advocate for confidentiality but he confirms that the case law from both the Court of Justice (CJEU) and the General Court (GC) of the European Union support transparency.

128. The author notes:

> **"In their recent decisions interpreting this duty to disclose evaluation documentation to disappointed bidders in order to allow them to effectively challenge award decisions, the CJEU and the GC have reinforced very strict debriefing standards that require contracting authorities to provide substantial information concerning other tenderers' offers (notably, at least, the winning tenderer's) to all participating tenderers.**
>
> **The EU Courts have considered that this obligation is sufficiently discharged only when the contracting authority provides very detailed information about the tender evaluation process and, in particular, gives information that enables the disappointed tenderer to perform a relative comparison of its offer vis-à-vis the tender of the winning bidder – with the only limits that the contracting authority is not obliged to provide a full copy of the evaluation report, nor a detailed comparative analysis of the successful tender and of the unsuccessful tender (but, in principle, could do either of those things if the authority so wished). In particular, the CJEU has considered appropriate that the contracting authority (in that case, the European Commission) provided the disappointed tenderer with extracts of the evaluation report that**
>
> > **'contained tables relating, in particular, to the technical evaluation of the tenders […] and indicating, for each award criterion, the number of points obtained by [the disappointed tenderer] in comparison with the successful tenderer, broken down each time into sub-criteria, as well as the maximum number of points attainable per sub-criterion and the weighting of each of each of those sub-criteria in the overall evaluation."**
>
> **From the Judgment, it is not only clear that the current practice is to debrief disappointed tenderers in full, but also that the current rules require the disclosure of certain information (of most relevance, the name of the winning bidder) that may create excessive transparency – as any tenderer is in a position to fully understand the content of the winning bid and consequently, can take that (otherwise) confidential information into consideration in future tenders."**
>
> **[citations omitted].**

129. The research paper by Dr. Sanchez Graells argues for confidentiality but courts in the European Union are for transparency.

130. Two decisions from the United Kingdom cited by Mr. Ngatia for the Applicant also support disclosure. The decisions are **Geodesign Barriers Limited v the Environmental Agency [2015] EWHC 1121(TCC)** and **Roche Diagnostics Ltd v Mid Yorkshire Hospitals NHS Trust [2013]EWHC 933(Tcc), [2013] ALL ER D 133 (Apri), [2013] PTSR D 35.** The two cases were decided by Coulson, J.

131. In **Roche Diagnostics Ltd (supra)** the learned Judge laid down the broad principles applicable to requests for early specific disclosure in procurement proceedings. The Judge stated that:

> **"In my view, the following broad principles apply to applications for early specific disclosure in procurement cases:**

a. **An unsuccessful tenderer who wishes to challenge the evaluation process is in a uniquely difficult position. He knows that he has lost, but the reasons for his failure are within the peculiar knowledge of the public authority. In general terms, therefore, and always subject**

to issues of proportionality and confidentiality, the challenger ought to be provided promptly with the essential information and documentation relating to the evaluation process actually carried out, so that an informed view can be taken of its fairness and legality.

b. **That this should be the general approach is confirmed by the short time limits imposed by the Regulations on those who wish to challenge the award of public contracts. The start of the relevant period is triggered by the knowledge which the claimant has (or should have) of the potential infringement. As Ramsey J said in *Mears Ltd v Leeds City Council* [2011] EWHC 40 (QB), "the requirement of knowledge is based on the principle that a tenderer should be in a position to make an informed view as to whether there has been an infringement for which it is appropriate to bring proceedings".**

c. **However, notwithstanding that general approach, the court must always consider applications for specific disclosure in procurement cases on their individual merits. In particular, a clear distinction may often be made between those cases where a *prima facie* case has been made out by the claimant (but further information or documentation is required), and those cases where the unsuccessful tenderer is aggrieved at the result but appears to have little or no grounds for disputing it.**

d. **In addition, any request for specific disclosure must be tightly drawn and properly focused. The information/documentation likely to be the subject of a successful application for early specific disclosure in procurement cases is that which demonstrates how the evaluation was actually performed, and therefore why the claiming party lost. Other material, even if caught by the test of standard disclosure, is unlikely to be so fundamental that it should form the subject of a separate and early disclosure exercise.**

e. **Ultimately, applications such as this must be decided by balancing, on the one hand, the claiming party's lack of knowledge of what actually happened (and thus the importance of the prompt provision of all relevant information and documentation relating to that process) with, on the other, the need to guard against such an application being used simply as a fishing exercise, designed to shore up a weak claim, which will put the defendant to needless and unnecessary cost."**

132. The importance of a tender evaluation report was highlighted in **Geodesign Barriers Limited (supra)** as follows:

> **"I have to say that I find that evidence extraordinary. In my experience, a Contracting Authority produces some kind of Tender Evaluation Report as a matter of routine, in order to aid and support the decision-making process. That Report will deal with all the evaluation criteria relevant to the procurement exercise, and will identify, in respect of each bid, the scores awarded, together with a brief explanation for each score. Where a question is more general, such as the so-called 'binary' question as to whether or not the tenderer's design met the mandatory performance specification, there will usually be something recorded in writing recording the answer to that question in respect of each tender. Sometimes that will be done by reference to various key elements of the specification itself. Such a Tender Evaluation Report also forms the basis of the subsequent debriefing/feedback exercise when the tenderers are informed of the result."**

133. In the cited case, disclosure revealed very disturbing information. This is what the Judge found out:

> **"As I observed in my brief oral judgment at the end of the hearing, the absence of a contemporaneous Tender Evaluation Report of any kind in this case raises a significant question mark as to the transparency and clarity of the procurement exercise. It gives rise to a whole host of questions. For example; how can any of the tenderers be certain that there has been a fair and transparent process if the documentation relating to that process is a miscellaneous collection of manuscript notes, some written on the back of an old notebook, and some subsequent documents produced for the debriefing/feedback exercise? Furthermore, how**

could that latter category of documents have even been prepared, if there were no contemporaneous documents recording the results of the evaluation? Take for example the comparison document which shows that the scores awarded to the claimant and Inero, in respect of the second stage technical questions, were the same. How could the writer of that document (whoever they were) have been sure that the scores were indeed the same, if there were no contemporaneous record of the scores actually awarded? How was the detail in that debriefing/feedback document prepared if there was nothing on which it could have been based?"

134. The case law from the European Union courts and the United Kingdom explain why it is necessary to have disclosure in certain cases. The main reason is that sometimes a losing bidder cannot advance its case without the benefit of the information contained in an evaluation report. In a country like Kenya where there are persistent reports of shenanigans in public procurement, there is a pressing need for disclosure of the contents of the evaluation report. It is only such disclosure which will assure those who participate in public tenders that the tender process is above board.
135. Another reason why there should be transparency regarding evaluation of bids is the need to put the proposal evaluation teams on notice. When doing evaluations, they will be aware that light will be shed into the rooms in which private enterprises win business from government and its agencies. There should be nothing to hide and there should be nothing to be ashamed of where goods and services of good quality are being procured at the best prices in the market.
136. There was an assertion by the respondents that there is no provision for discovery before administrative bodies like the Petition Committee. Case law from other jurisdiction indicates that there is no harm in having prehearing discovery in administrative proceedings.
137. In the case of **Shively v Stewart (1966) 65 C. 2d 475** it was stated that:

"The Legislature's silence with respect to prehearing discovery in administrative proceedings does not mean, however, that it has rejected such discovery. Instead, as in the case of criminal discovery…it has left to the courts the question whether modern concepts of administrative adjudication call for common law rules to permit and regulate the use of the agencies' subpoena power to secure prehearing discovery.

Statutory administrative procedures have been augmented with common law rules whenever it appeared necessary to promote fair hearings and effective judicial review."

138. The same position was taken by the United States Court of Appeals, District of Columbia Circuit in **Riley McClelland v Cecil D Andrus & others 606 F.2d 1278 (D.C. Cir. 1979)** when it was stated that:

"The extent of discovery that a party engaged in an administrative hearing is entitled to is primarily determined by the particular agency: both the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure are inapplicable and the Administrative Procedure Act fails to provide expressly for discovery; further, courts have consistently held that agencies need not observe all the rules and formalities applicable to court room proceedings……

Some agencies have of their own accord adopted regulations providing for some form of discovery in their proceedings. In addition to being bound by those rules, the agency is bound to ensure that its procedures meet due process requirements…..Therefore, discovery must be granted if in the particular situation a refusal to do so would so prejudice a party as to deny him due process."

139. In my view the law as stated in the cited decisions is good law. Where it would be in the interests of justice to allow discovery, an administrative tribunal should do so even where its rules do not expressly provide for discovery. The main point to consider is whether denial of discovery would result in denial of justice to a party. Discovery serves to protect the right to a fair hearing.

140. In the case at hand, the Petition Committee Guidelines, 2014 as published in Vol. CXVI – No. 124 of the Kenya Gazette of 17th October, 2014 do not expressly provide for discovery.
141. As was stated by Mumbi Ngugi, J in **Nairobi Law Monthly Limited (supra), "the right to information is at the core of the exercise and enjoyment of all other rights by citizens."** There are certain rights which cannot be enjoyed if information is denied. In the instant case, it is likely that the right to a hearing (Article 50) may not be enjoyed by the losing bidders unless information held by the Contracting Authority is availed to them.
142. In asking for information from the Contracting Authority, the petitioners before the Petition Committee are not asking for information under Article35 of the Constitution. They are simply seeking to protect their right to fair administrative process and fair hearing as provided by Articles 47 and 50(1) of the Constitution.
143. The decision as to whether or not disclosure should be made in a given procurement lies with the Petition Committee. In making decisions on disclosure, the Petition Committee should be guided by the already cited principles enunciated by Coulson, J in **Roche Diagnostics Ltd (supra).**
144. Where a losing bidder desires disclosure, the application should be made at the time of filing the petition or complaint. The same should be accompanied by the reasons for the application for the disclosure and the specific information required to be disclosed. If applications for disclosure are not processed without delay, they will end up delaying procurement proceedings.
145. At the end of it all, it is clear that the Petition Committee erred in dismissing the applications for discovery. The result of the rejection of the applications may have resulted in a denial of an opportunity to the applicants to prosecute their complaints from a point of knowledge. The decision of the Petition Committee does not promote transparency in public procurement as envisaged by Article 227 of the Constitution and Section 29 of the Public Private Partnerships Act, 2013.
146. Article 227(1) provides:

> **"227. (1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective."**

147. This message about transparency and competitiveness is repeated by Section 29 as follows:

> **"29. (1) Except as otherwise provided for under this Act, all projects shall be procured through a competitive bidding process.**
>
> **(2) In procuring and awarding a contract to a private party under this Act, a contracting authority shall be guided by the principles of transparency, free and fair competition and equal opportunity in accordance with the guidelines made under this Act."**

148. In order for contracting authorities to embrace fairness, transparency, competitiveness, equity and cost-effectiveness in public procurement, the Petition Committee must stress this message by giving decisions that encourage and support these principles. A decision that goes against these principles is a decision against public policy.
149. I therefore find that in rejecting the applications for discovery, the Petition Committee failed to take into consideration a relevant fact namely Article 227 of the Constitution and Section 29 of the Public Procurement Partnerships Act, 2013 which require transparency in public procurement. The decision could have also denied the petitioners a hearing even before the hearing commenced. Those are sufficient grounds for grant of judicial review orders. The two applications succeed. The decision of the Petition Committee issued on 31st August, 2015 is called into this Court and quashed.

DISPOSAL

150. Issuing orders directing the Contracting Authority to provide information from the Evaluation Report to the petitioners would amount to usurpation of the Petition Committee's mandate. The Petition Committee is a new administrative organ and it is necessary that it be given space to

develop robust jurisprudence in matters in which it has jurisdiction. It is the body with knowledge and expertise in matters of public private partnerships and it should be allowed to decide how far disclosure should go considering that confidentiality remains important in public procurement.

151. In regard to **JR 298 of 2015,** I find that the necessary information has already been availed to the Applicant through the minutes of the tender opening. There is nothing else that the Contracting Authority can disclose to this Applicant. The application for disclosure by the Applicant needs no further consideration by the Petition Committee. The information this particular Applicant already has is sufficient for it to prosecute its Petition before the Petition Committee.

152. As for the Applicant in **JR No. 325 of 2015** and the consortium of Bollore/Toyota Tusho Corporation, Kamigumi Co. Ltd, Mitsui Engineering & Mombasa Maize Millers Ltd, I find that their application for disclosure needs to be considered afresh. The decision as to whether or not disclosure is appropriate belongs to the Petition Committee.

153. If the Petition Committee concludes that there is need for disclosure, it is the one to set the boundaries of that disclosure bearing in mind that confidentiality is still a very important principle. It will decide whether to give redacted reports to the petitioners. It may impose an order of secrecy on the petitioners so that one petitioner's information may be different from that of the other petitioner and the petitioners are barred from disclosing the information to anybody else.

154. The order in respect of **JR No. 325 of 2015** is that the applications for disclosure by the Applicant and the consortium of Ballore/Toyota Tsusho Corporation, Kamigumi Co. Ltd, Mitsui Engineering & Mombasa Maize Millers Ltd are remitted to the Petition Committee for consideration afresh.

155. Each party in the two judicial review applications will meet own costs of the proceedings.

Dated, signed and delivered at Nairobi this 5th day of Nov., 2015

W. KORIR,

JUDGE OF THE HIGH COURT