



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JR MISC. CIVIL APPLICATION NO. 65 OF 2014

**IN THE MATTER OF AN APPLICATION BY BURA SECONDARY SCHOOL FOR SEEKING
LEAVE TO COMMENCE JUDICIAL REVIEW PROCEEDINGS FOR CERTIORARI AND
PROHIBITION**

AND

**IN THE MATTER OF PUBLIC PROCUREMENT AND DISPOSAL ACT 2005 (AT NO. 3 OF
2005) AND PUBLIC PROCUR**

EMENT AND DISPOSAL REGULATIONS 2006

AND

IN THE MATTER OF PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REPUBLICAPPLICANT

VERSUS

THE PROCUREMENT

ADMINISTRATIVE REVIEW BOARD.....1ST RESPONDENT

ABDI BUTHUL SHAFAT

T/A BURA ENTERPRISES.....2ND RESPONDENT

EX-PARTE: BURA SECONDARY

SCHOOL

JUDGEMENT

1. By a Notice of Motion dated 19th February, 2014, the *ex parte* applicant herein, **Bura Secondary School**, seeks the following orders:

- 1. THAT this application be certified urgent and be heard urgently.**
- 2. THAT an order of Certiorari to remove to the High Court and quash the decision of**

the Public Procurement Administrative Review Board delivered on 5th February 2014 in the request for review No. 1 of 2014 annulling the award of the tender numbers BSS/01/2013, BSS/02/2013 and BSS/07/2013 to M/s Bura Shopping Centre and directing the procuring entity Bura Secondary School to award the tender in respect of the tenders numbers BSS/01/2013, BSS/02/2013 and BSS/07/2013 to Abdi Buthul Shafat T/a Bura Enterprises.

3. THAT an order of Prohibition to prohibit Bura Enterprises from signing any contract or supplying any goods to the Applicant in relation to the tender numbers BSS/01/2013, BSS/02/2013 and BSS/07/2013.

4. THAT an order of Prohibition to prohibit the 2nd Respondent, its officers, agents or employees or otherwise however from relying on the Ruling of the Public Procurement Administrative Review Board delivered on 5th February 2014.

5. THAT the Judicial Review proceedings to operate as a stay of the award and implementation of the order/Ruling/award of the Public Procurement Administrative Board delivered on 5th February 2014.

6. THAT the costs of this application be provided for.

Ex Parte Applicant's Case

2. The same application was supported by a verifying affidavit sworn by **Jilo Tola Miriji**, the applicant's Principal on 17th February, 2014.
3. According to the deponent, on or about October 2013 the Applicant sent out request for quotation vide letter dated 31st October 2013 for food items. By a further letter dated 13th November 2013 the Applicant sent out a request for quotation for supply of meat and goat. Pursuant thereto several parties responded to the request for quotation among them, **Bura Enterprises** and **Bura Shopping Centre**.
4. On 14th November 2013 at the executive Board meeting held at the school and attended by the deponent the Board resolved to re-advertise after noting a few Applicants submitted their quotations and on 4th December 2013 the tender committee met, deliberated and awarded the tender accordingly and the Applicants who tendered and sent request for quotation were accordingly notified.
5. On 10th January, 2014 the second Respondent filed a request for review against the decision of the Chairman, Tender Committee, Bura Secondary School in the matter of tender numbers BSS/01/2013, BSS/02/ and BSS/07/2013 with the 1st Respondent.
6. The Applicant responded to the request for review and the Board on 5th February 2014 ordered as follows:-
 1. That the award of the tender No's BSS/01/2013, BSS/02/2013 and BSS/07/2013 to M/s Bura Shopping Centre is hereby annulled.
 2. The Board in exercise of its powers conferred by **Section 98(c)** of the **Public Procurement and Disposal Act, 2005**, (hereinafter referred to as the Act) directs the Procuring Entity, M/s Bus Secondary School to award tenders No's BSS/01/2013, BSS/02/2013 and BSS/07/2013 Mr. Abdi Buthul Shafat trading as M/s Bura Enterprises, being the lowest priced bidder forth with at the prices provided in his Request for Quotation.
 3. The Board makes no orders as to costs.
7. It was this decision which provoked the instant application.

8. According to the deponent, the first Respondent did not take any or every reasonable precaution to ensure fairness in the exercise of its decision and by the refusing to order re-tendering of the tender the economic interests protected by **Article 46(1)** of the Constitution were prejudiced and as such it ought to be set aside. In his view, should the 2nd Respondent proceed with the implementation of the award of tender the Applicant will suffer irreparable loss as the 2nd Respondent may not meet the terms of the tender consequently adversely affecting the needs of the school. To him, the Board and its decision was irrational, unreasonable and acted outside the law and lacks propriety by awarding the 2nd Respondent who had not passed the evaluation process.
9. It was deposed that the 2nd Respondent has been supplying food stuffs, goats and meat to the school for the last eight (8) years and the order of the Board is contrary to Rules and 59 (2)(c) of the **Public Procurement and Disposal Regulations 2006** (hereinafter referred to as the Regulations).
10. To the deponent, the Board although it is mandated by law to conduct a review not only the allegations made in the application for review before it but failed also to review of the entire procurement process to see that it complies with the prescribed procedures to ensure that the objects of the Act are fulfilled.
11. It was contended that the Applicant has the right standing to pursue this matter before this Honourable Court and this is a classic case of desperate and misguided attempt by the 1st Respondent to prevent the Applicant from pursuing this matter.

1st Respondents' Case

12. In reply to the application, the Respondent filed a replying affidavit sworn by **Pauline O. Opiyo**, its secretary on 19th March, 2014.
13. According to the deponent, the proceedings herein are fatally defective for the following reasons:-
 - (a) The *ex-parte* Applicant herein Bura Secondary School, is a Public Secondary School as provided for in the **Basic Education Act**, Act No. 14 of 2013.
 - (b) It is trite law that a school falling under the aforementioned Basic Education is not a person capable of suing or being sued in its own name.
 - (c) The *ex-parte* Applicant herein therefore lacks the requisite *locus standi* to sustain the proceedings herein.
 - (d) Similarly, the leave to institute the present proceedings obtained by the *ex parte* Applicant herein on 18th February 2014 is a nullity in law as it was obtained by an entity which lacked the *locus standi* to do so.
 - (e) The proceedings herein are therefore incurably defective as they are premised on leave granted to an entity that was not endowed with the legal personality to institute the *ex parte* proceedings in the first instance.
14. It was further deposed prayers 3 and 4 of the Notice of Motion herein are incapable of being issued against the 2nd Respondent for the following reasons:
 - (a) The 2nd Respondent is a private citizen carrying on business in the name of Bura Enterprises.
 - (b) It is trite law that orders of Judicial Review are issued against public bodies performing public functions and not private citizens.
 - (c) The 2nd Respondent does not owe any public duty towards the *ex-parte* Applicant.

15. To the deponent, the Judicial Review proceedings herein are fatally defective and the same should be dismissed forthwith with costs to the Respondents.
16. With respect to the merits, the deponent deposed that the 1st Respondent received the *Ex-parte* Applicant's Request for Review on the award of Tenders Numbers BSS/01/2013, BSS/02/2013 and BSS/07/2013 for the Supply of Foodstuff, Supply of Foodstuff and other items and for Supply of Meat/Goats on 19th January, 2014. When the matter first came up for hearing before the 1st Respondent on 22nd January 2014, it was adjourned to 29th January 2014 at the request of the *ex-parte* Applicant. In her view, the 1st Respondent exercised fairness in allowing the adjournment since it gave the Applicant herein adequate time to prepare for the hearing. Thereafter, the 1st Respondent heard parties on 29th January, 2014 and delivered its Ruling on 5th February 2014 and in allowing the Request for Review before it by the 2nd Respondent herein based its decision on the following findings:
- (a) That the "Request for Quotation" document did not contain evaluation criteria as per the requirements of **Section 66(2)** of the **the Act**.
 - (b) That there being no other evaluation criteria the procuring entity, the Applicant herein, could only use the price as the evaluation criteria.
 - (c) That the prices of the Applicant in the Request for Quotation were the lowest as required by Section 89(4) of the Act.
17. The Respondent's position was that in arriving at its decision, the 1st Respondent was guided by the provisions of the Act, the Regulations made thereunder, the tender documents, the facts as presented before it by the parties and no extraneous issues whatsoever were considered and that the decision by the 1st Respondent was made within its mandate, and the specific sections of the law on which its decision was based have expressly been set out. In the 1st Respondent's view, the application herein does not meet the threshold for grant of Judicial Review remedies as the Applicant has not demonstrated the existence of any grounds for the grant of the orders sought and that some of the grounds advanced by the Applicant in its Statutory Statement for seeking Judicial Review orders are not among those provided for in law.
18. To the deponent, the Applicant has not demonstrated how its economic interests protected by Article 46(1) of the Constitution have been prejudiced and as such this remains just an allegation and further the Applicant has not demonstrated how its decision was irrational, unreasonable or outside the law and as such this is just a misconceived allegation.
19. It was therefore the 1st Respondent's position that the Applicant herein is actually challenging the merits of the decisions of the 1st Respondent albeit disguised as a Judicial Review application which ought to challenge the procedure of arriving at a decision hence the application is unmeritorious, fatally defective and is an abuse of the court process and should be dismissed with costs to the Respondents.

2nd Respondent's Case

20. On behalf of the 2nd Respondent the application was opposed vide a replying affidavit sworn by **Abdi Buthul Shafat**, its sole proprietor on 10th March, 2014.
21. According to the deponent, this matter as brought before this Honourable Court is defective, vexatious and an abuse of the court process and the same should be dismissed at the first instance and that the Applicant herein lacks the local standi and/or has failed to demonstrate that he has the legal capacity to institute these proceedings before this Honourable Court and as such this matter ought to be dismissed with costs.
22. According to him, the Applicant herein failed to obey the Orders issued by this Honourable Court on the 19th day of February 2014 directing the Applicant to file the Judicial Review application within seven (7) days of the said order and as such this matter ought to be dismissed with costs as the actions of the Applicant in failing to adhere to the said Court Orders clearly demonstrates that

- the Applicant's actions are malicious and aimed to frustrating the 2nd Respondent's rights. Further by failing to adhere to the order of the Honourable Court issued on the 19th day of February 2014, the Applicant is in breach of the mandatory provisions of **Order 53 Rule 3(1), (2) and (3)** of the **Civil Procedure Rules 2010** and as such there exists no competent matter before this Honourable Court for determination. It was therefore his view that the Applicant does not qualify for the reliefs sought in the Statutory Statement considering that due process and procedure was flouted in seeking the same.
23. It was deposed that the Applicant sent to the 2nd Respondent a request for quotation dated the 31st day of October 2013 for food items and a further request for quotation for meat and goat dated the 13th day of November 2013 pursuant to which the 2nd Respondent duly submitted its quotations and in line with the provisions of the Act and the **Public Procurement and Disposal Regulations 2006** (hereinafter referred to as the Regulations).
24. Upon perusal of the 2nd Respondent's quotations and the requisite documents accompanying the quotation, the tender committee was satisfied that the same was in order and satisfied the threshold required by the Applicant. On the 4th day of December 2013, the Applicant's tender committee met, deliberated and proceeded on the wrong principles and in blatant disregard and breach of the provisions of the Act and the Regulations awarded the said tender Numbers BSS/01/2013, BSS/02/2013 and BSS/07/2013 to the 2nd Respondent's competitor **M/s Dura Shopping Centre**. In his view, the decision to award the said tenders to **M/s Bura Shopping Centre** was maliciously motivated, unfounded, unlawful and aimed at denying the 2nd Respondent the tender even after the tender committee established that the 2nd Respondent was the lowest bidder in all the tenders. This belief was based on the fact that the reason and/or explanation given for denying the 2nd Respondent the tender was vague considering that the Applicant failed to establish the yard stick or the measuring parameters it relied on in concluding that the prices quoted by the 2nd Respondent had been under-quoted. To him, the Public Procurement Oversight Authority Market Price Index for October 2013 does not cover the food stuffs tendered for. He therefore averred that the decision of the tender committee to deny the 2nd Respondent the tender and award the same to **M/s Bura Shopping Centre** is illegal since it breached the mandatory provisions of Section 89(4) of the Act which directs that successful bidder is the one with the lowest prices.
25. Aggrieved with the said decision the 2nd Respondent on the 10th day of January 2014, duly instituted review proceedings before the Public Procurement Administrative Review Board during whose proceedings the laid down review procedures and regulations were followed to the letter and on the 5th day of February 2014 the Review Board annulled the award of tenders numbers BSS/01/2013, BSS/02/2013 and BSS/07/2013 to **M/s Bura Shopping Centre** and being properly constituted and guided by the provisions of Act, it ordered the procuring entity **M/s Bura Secondary School** to award the tenders numbers BSS/01/2013, BSS/02/2013 and BSS/07/2013 to the 2nd Respondent herein.
26. In the 2nd Respondent's view, the Public Procurement Administrative Review Board rightfully applied the law applicable and found that the method for tendering adopted by the Procuring Entity was the Request for quotation method as per Sections 88 and 89 of the Act and while clearly directing itself on the law, rightfully held that since the tendering method chosen by the Procuring Entity was the Request for Quotation method, the 'Request for Quotation' document should have contained the evaluation criteria as per the requirements of **Section 66(2)** of the Act in absence of which the Procuring Entity would only use the price as the evaluation criteria. Guided by the above finding it held that the 2nd Respondent quoted the lowest prices as required by **Section 89(4)** of the **Procurement and Disposal Act 2005** and as should have been the successful bidder.
27. It was therefore contended that the Public Procurement Administrative Review Board was right in law in finding that in the circumstances the only evaluation criteria available to the Procuring Entity was the lowest quotation criteria and as such the Procuring Entity had no reasonable grounds to disqualify the 2nd Respondent's quotation.
28. Based on advice from his counsel, the deponent believed that the spirit and aim of the Act at Section 2 was to ensure fair competition, accountability, integrity and transparency during the

- tendering process and that the Public Procurement Administrative Review Board was right in annulling the award of the tender by the Procuring Entity since the same failed to meet the requirements of the Act since it was in the best interest of both the Applicant and the 2nd Respondent for the Public Procurement Administrative Review Board to award the tender to the 2nd Respondent since ordering the re-tendering would have led to more wastage of time and resources and further delayed the delivery of the much needed basic commodities to the Applicant considering the nature of the Applicant and the beneficiaries of the commodities and this would have led to far reaching consequences to the school fraternity.
29. To him, there is no irreparable loss that would be occasioned to the Applicant if the 2nd Respondent is allowed to proceed supplying the goods ordered by Public Procurement Administrative Review Board since the 2nd Respondent has been supplying the Applicant with the same food stuffs for the last eight years. In his view, the Applicant stands to suffer no irreparable loss arising from the fact that it may not meet the terms of the tender since it is the 2nd Respondent herein that has all along for the last eight years been tendering and supplying the Applicant with the said food stuff and the Applicant has at no single time complained of the delivery and at no time has the 2nd Respondent failed on its part to supply the food stuff. By allowing the 2nd Respondent to supply the food stuffs to the Applicant, the Applicant's interests would be more protected since it would be getting the said goods at a relatively lower prices as compared to the other bidders whose prices were higher.
30. It was asserted that the 2nd Respondent has demonstrated that it is an entity of good standing and stable and capable of supplying the said commodities to the Applicant considering that it has been the sole supplier of the said commodities to the Applicant for the last eight years and the Applicant has at no time complained and/or questioned the 2nd Respondent's capabilities and efficiency hence the decision of the Public Procurement Administrative Review Board in awarding the tender to the 2nd Respondent was not only fair but rational and reasonable for the interests of all the parties.
31. According to the 2nd Respondent, it stands to suffer irreparable loss and far reaching damages if this application is not dismissed and the 2nd Respondent allowed to supply the food stuff since the 2nd Respondent had already gone the extra mile in obtaining the goats and meat for the Applicant after the decision of the Public Procurement Administrative Review Board to award it the tender and halting of the same means that the 2nd Respondent has to incur further expenses in feeding and taking care of the animals until this matter is heard and determined.
32. It was contended that the Applicant's actions are malicious, mean and vexatious calculated at economically frustrating the 2nd Respondent considering that the Applicant still owes the Respondent a debt of about Kshs 600,000/= arising from goods supplied to the Applicant in previous tenders.
33. The 2nd Respondent urged the Court to dismiss the application with costs.

Applicant's Submissions

34. According to the applicant, by failing to give effect to section 98(c) of the Act which empowers the Board upon completing a review to substitute the decision of the Review Board for any decision of the procuring entity in the procurement proceedings, the Board committed an error of law on the face of the record. It was submitted that since the subject procurement was a Request for Quotations governed exclusively by sections 88 and 89 of the Act, by basing its decision on section 66 of the Act, the Board was not only in error but its action was illegal and irrational.
35. It was further submitted that by failing to review the entire procurement process to determine whether it complied with the prescribed procedures, the decision was procedurally flawed hence the Board's decision was unreasonable. In support of this submission the applicant relied on **Republic vs. The Public Procurement Review Board & Another ex parte UTO Creations Studio Limited [2013] eKLR.**
36. By awarding the tender to the 2nd Respondent who had not passed the evaluation process, it was submitted the Board acted outside the law.
37. It was further submitted that the Board breached the rules of natural justice and considered

- irrelevant facts and left out irrelevant ones. To support this submission the applicant relied on **Universal Print Group (PTY) Limited vs. Public Procurement Review Board HCMA 785 of 2007, Republic vs. The Public Procurement Administrative Review Board & Another HCMA No. 540 of 2008 and Republic vs. Republic Procurement Review Board ex parte Kenya Medical Supply Agency & 3 Others [2010] eKLR.**
38. On locus the applicant relied on **Mureithi & 2 Others vs. Attorney general & 5 Others NBI HCMA No. 158 of 2005 [2006] 1 KLR 443.**
39. On whether judicial review orders can issue against the 2nd Respondent it was submitted that the same can issue if the ruling of the 1st Respondent is found to be wanting.

1st Respondent's Submissions

40. On behalf of the 1st Respondent, it was submitted that the ex parte applicant herein being a public secondary school as provided for in section 35 of the *Basic Education Act* which establishes a Board of Management, has no legal personality to institute these proceedings. Accordingly the only body with the mandate to sue and be sued on its behalf is the Board of Management and there is no evidence that the deponent of the verifying affidavit had the authority of the Board of Management to institute these proceedings.
41. Based on the case of **Kenya National Examinations Council vs. Republic ex parte Gathenji & Others [1997] KLR** it was submitted that the orders sought are not available against the 2nd Respondent since it is not a public body.
42. It was submitted based on **R vs. Judicial Service Commission ex parte Pareno [2004] 1 KLR** it was submitted that judicial review is concerned about the process rather than the merits of the decision yet in the instant case what is before the Court is an appeal disguised as a judicial review application. It was submitted that the grounds relied upon are not the grounds for judicial review application. To the 1st Respondent there is no attempt to demonstrate the allegation of unfairness made by the applicant. To the contrary both the 2nd Respondent and the applicant were given an opportunity to prepare and submit on their respective cases.
43. It was submitted that if the applicant was aggrieved by the decision it ought to have appealed against the same. Under section 98 of the Act, it was submitted the 1st Respondent was within its powers to award the tender to the 2nd Respondent hence the application ought to be dismissed with costs.

2nd Respondent's Submissions

44. For the 2nd Respondent, it was similarly submitted that the applicant lacks locus standi to institute these proceedings since it is not a legal entity. In support of this submission the 2nd Respondent relied on **Registrar of Co-operative Societies vs. Mukuuni Secondary School HCCC No. 859 of 2001** and **Peter Karanja & Others vs. Samuel Kinyanjui Mungai & Others Nakuru HCCC No. 329 of 2001.**
45. It was further submitted that the 2nd Respondent not being a public body the orders sought cannot issue against it based on **Council for Civil Service Unions vs. Minister for Civil Service [1985] AC 374 at 401D** and **Republic vs. Kenya National Highway Authority & 7 Others ex parte Kenya Transporters Association & 7 Others JR No. 208 of 2012.**
46. It was submitted that the process followed by the 1st Respondent was legal and the decision arrived at was reasonable, proper and fair in the circumstances. On the authority of **Republic vs. Principal Magistrate's Court Murang'a & 4 Others ex parte Milka Nyambura Wanderi & Another JR Application No. 34 of 2011** and **Rahab Wanjiru Njiguna vs. Inspector General of Police & Another JR Appl. No. 187 of 2013,** the Court was urged to find that the application is not properly before the Court and dismiss the same.

Determinations

47. Having considered the foregoing, this is the view I form of the matter.

48. The first issue for determination is whether the applicant had the locus standi to bring these proceedings.
49. It is not in doubt that the body which can sue and be sued on matters affecting a Public School is the Board of Management. The only issue for determination is what constitutes a “suit”. Under section 2 of the **Civil Procedure Act**, “Suit” means all civil proceedings commenced in any manner prescribed. The term “suit,” means a following, any legal proceeding of a civil kind brought by one person against another one, which is “pursuit, prosecution, legal process” See **Ranchod Morarji Morjaria Alias Tapoo and Another vs. Adija Hasan Abdalla [1984] KLR 490.**
50. Even an “action” which has been construed to have a wider meaning than a suit properly speaking deals with civil proceedings. In **Nganga vs. Nganga Nairobi HCCC No. 1406 of 1972 [1975] EA 161,** it was held:

“The word “suit” is defined in section 2 of the Civil Procedure Act to mean “all civil proceedings commenced in any manner prescribed”. In the Interpretation and General Provisions Act (Cap 2) the word “action” means any civil proceedings in a court and includes any suit as defined in section 2 of the Civil Procedure Act. The word “action” is not defined in the Limitations of Action Act, but it is clear from the definition in the Interpretation and General Provisions Act that “action” includes any suit or civil proceedings in any court. As the word “action” has a wider meaning than “suit” it must inevitably include originating proceedings as well as ancillary and interlocutory proceedings.”

51. In **Mureithi & 2 Others (For Mbari Ya Murathimi Clan) vs. Attorney General & 5 Others** (supra) it was held:

“The respondents have contended that this matter is time barred under the Limitation of Actions Act cap 22. However the Act does not apply to judicial review which is *sui generis*. “Suit” as defined in s 2 of the Civil Procedure Act means “all civil proceedings commenced in any manner, prescribed” “Action” under the Interpretation and General Provisions Act cap 2 means “all civil proceedings in a Court and includes any suit as defined in s 2 of the Civil Procedure Act.” Since the actions set out in Part II of the Limitation of Actions Act cap 22 of the Laws of Kenya must have the same meaning as set out above, the Act has no application to judicial review matters and constitutional matters. In this connection, as indicated above, under the topic “undue delay” judicial review matters have to be filed promptly and heard with expedition once filed – and certainly a delay of 40 years is hopelessly outside any reasonable limit even for *mandamus* and prohibition.”

52. On the other hand in **The Commissioner of Lands vs. Hotel Kunste Civil Appeal No. 234 of 1995 [1995-1998] 1 EA 1,** the Court of Appeal held:

“S. 136 (1) and (2) of the [Government Proceedings Act], provides as follows: “136 (1) All actions, unless brought on behalf of the Government, for anything done under this Act shall be commenced within one year after the cause of action arose and not afterwards. (2) Notice in writing of the action and the cause thereof shall be given to the defendant one month at least before the commencement of the action.” Neither the *Government Lands Act*, the *Government Proceedings Act*, nor the *Civil Procedure Act*, and Rules made thereunder, have a definition of the term “action”. The term is defined under s.3 of the *Interpretation and General Provisions Act*, Cap 2 Laws of Kenya, thus: “.....means any civil proceedings in a Court and includes any suit as defined in section 2 of the Civil Procedure Act.”...That definition without more does not tell us much. However, when looked at together with the provisions of s.8 of the *Law Reform Act*, Cap 26 Laws of Kenya, we are able to discern that an application for an Order of Certiorari or any of the prerogative orders is not an action. S.8(1), of that Act provides as follows: “8(1) The High Court shall not, whether in the exercise of its Civil or Criminal exercise of its Civil or Criminal jurisdiction, issue any of the prerogative Writs of Mandamus, prohibition or Certiorari.” By virtue of the provisions of

S.7 of the *Administration of Justice (Miscellaneous Provisions) Act, 1938*, of the United Kingdom, which is applicable in this country by reason of S.8 (2) of the *Law Reform Act*, prerogative writs were changed to be known as “Orders”, except for the writ of habeas corpus. So S.8 (1) above denies the High Court the power to issue orders of mandamus, prohibition and certiorari while exercising Civil or Criminal jurisdiction. What that then means is that notwithstanding the wording of S.13A, above, which talks of proceedings, is exercising the power to issue or not to issue an order of certiorari the Court in neither exercising Civil nor Criminal jurisdiction. It would be exercising special jurisdiction which is outside the ambit of S. 136 (1) of the *Government Lands Act*, and also, S. 13 A of the *Government Proceedings Act*, which, had the matter under consideration been an action, would properly have been invoked to defeat the present matter. It should be noted that S. 13A, above, when read closely, its wording, clearly shows that a suit within the meaning of the term “Suit” in S. 2 of the *Civil Procedure Act* is envisaged.”

53. It is clear that the power to sue and be sued conferred upon the said Board of Management would not extend to criminal matters. Conversely, since judicial review proceedings are neither criminal nor civil, it is my view that that provision would not to that extent be applicable to judicial review. Dealing with the issue of standing, Nyamu, J (as he then was) in *Mureithi & 2 Others (for Mbariya Murathimi Clan) vs. Attorney General & 5 Others* (supra) held as follows:

“The function of standing rules include: to restrict access to judicial review; to protect public bodies from vexatious litigants with no real interest in the outcome of the case but just a desire to make things difficult for the Government. Such litigants do not exist in real life – if they did the requirement for leave would take care of this; to prevent the conduct of Government business being unduly hampered and delayed by excessive litigation; to reduce the risk that civil servants will behave in over cautious and unhelpful ways in dealing with citizens for fear of being sued if things go wrong; to ration scarce judicial resources; to ensure that the argument on the merit is presented in the best possible way, by a person with a real interest in presenting it (but quality of presentation and personal interest do not always go together); to ensure that people do not meddle paternalistically in affairs of others.....Judicial review courts have generally adopted a very liberal approach on standing for the reason that judicial review is now regarded as an important pillar in vindicating the rule of law and constitutionalism. Thus a party who wants to challenge illegality, unreasonableness, arbitrariness, irrationality and abuse of power just to name a few interventions ought to be given a hearing by a court of law.....The other reason is that although initially it was feared that the relaxation of standing would open floodgates of litigation and overwhelm the Courts this has in fact not happened and statistics reveal or show that on the ground, there are very few busybodies in this area. In addition, the path by eminent jurists in many countries highlighting on the need for the courts being broadminded on the issue....Under the English Order 53 now replaced in that country since 1977 and which applies to us by virtue of the *Law Reform Act Cap 26* the test of locus standi is that a person is aggrieved. After 1977 the test is whether the applicant has sufficient interest in the matter to which the application relates. The statutory phrase “person aggrieved” was treated as a question of fact – “grievances are not to be measured in pounds and pence”.....Although under statute our test is that of sufficient interest my view is that the horse has bolted and has left the stable – it would be difficult to restrain the great achievements in this area, which achievements have been attained on a case to case basis. It will be equally difficult to restrain the public spirited citizen or well organised and well equipped pressure groups from articulating issues of public law in our courts. It is for this reason that I think Courts have a wide discretion on the issue of standing and should use it well in the circumstances of each case. The words person aggrieved are of wide import and should not be subjected to a restricted interpretation. They do not include, if course, a mere busybody who is interfering in things that do not concern him but this include a person who has a genuine grievance because an order has been made which prejudicially affects his interests and the rights of citizens to enter the lists for the benefit of the public or a section of the public, of which they themselves are members. A direct financial or legal interest is not

required in the test of sufficient interest.....In my view the Courts must resist the temptation to try and contain judicial review in a straight jacket. Even on the important principle of establishing standing for the purposes of judicial review the Courts must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them.....The applicants are members of a Kikuyu clan which contends that during the Mau Mau war (colonial emergency) in 1955 their clan land was unlawfully acquired because the then colonial Governor and subsequently the presidents of the Independent Kenya Nation did not have the power to alienate clan or trust land for private purpose or at all. In terms of Order 53 they are “persons directly affected”. I find no basis for giving those words a different meaning to that set out in the case law above. The Court has to adopt a purposive interpretation. I have no hesitation in finding that the clan members and their successors are sufficiently aggrieved since they claim an interest in the parcels of land which they allege was clan and trust land and which is now part of a vibrant Municipality. I find it in order that the applicants represent themselves as individuals and the wider clan and I unequivocally hold that they have the required standing to bring the matter to this Court. Moreover in this case I find a strong link between standing and at least one ground for intervention – the claim that the land belonged to the clan and finally there cannot be a better challenger than members of the affected clan.”

54. It is my view and I so hold that there was nothing to bar the applicant from invoking this Court’s judicial review jurisdiction.

55. That brings me to the issue whether judicial review orders can be granted against the 2nd Respondent or any other individual as opposed to a public body. In Mureithi & 2 Others (For Mbari Ya Murathimi Clan) vs. Attorney General & 5 Others (supra) it was held:

“The other reason why the claim must fail is that the 5th and 6th respondents are not public bodies but only some juristic land owners. Thus the remedies of *mandamus*, prohibition or *certiorari* are only available against public bodies. The 5th and 6th respondents could be sued in respect of the ownership of the land should the applicants have evidence that the alienation was not done in accordance with the outlined provisions of the relevant Land Registration Acts under which the parcels fall, they might also have relief for full compensation under the Trust Land provisions of the Constitution if as stated above, land adjudication and registration or the setting apart were not done as envisaged under the Constitution and the Land Adjudication Act. There is no proof that the alternative remedies as set out above would be less convenient beneficial, or effectual.”

56. A similar view was expressed by the Court of Appeal in The Commissioner of Lands vs. Hotel Kunste Civil (supra).

57. Accordingly, it is my view and I so hold that the orders sought herein against the 2nd Respondent cannot be granted.

58. The next issue for determination is whether the 1st Respondent’s decision was unlawful. In its determination the 1st Respondent identified two issues for determination and these according to it were firstly, whether the procuring entity evaluated the tenders in accordance with the provisions of section 67 of the Act and Regulation 19(2) of the Legal Notice No.106 of 18th June, 2013 and secondly, whether the notification of the outcome of the tender was in accordance with the provisions of section 67 of the Act and Regulation 19(2) of the said Legal Notice. The 1st respondent observed that the procuring entity used the “Request for Quotation” method for procurement method and that the “Request for Quotation” document had no evaluation criteria indicated, nor did it request for any other details apart from the contract of the bidder and their price. Whereas the “Price Evaluation” was done by comparing the bid price to the prices of the market survey and “government procurement price”, how the comparison was to be calculated to arrive at the lowest evaluated price was not indicated in the documents provided by the Procuring Entity.

59. The 1st Respondent then found that the procurement had to observe section 89(2)(b) that envisages a competitive process and in this regard the “Request for Quotation” should have

contained evaluation criteria pursuant to section 66(2) of the Act and in absence of any set of requirements the Procuring Entity would only use the price as the evaluation criteria. Therefore pursuant to section 89(4) the 1st Respondent found that as the applicant (the 2nd Respondent herein) quoted the lowest prices as required by section 89(4) the ground of appeal succeeded.

60. In the absence of any other evaluation criteria the 1st Respondent found that as the said applicant provided the lowest quotation the Procuring Entity had no reasonable grounds to disqualify his quotation. Consequently the Board pursuant to section 89(c) of the Act annulled the award of the tender to the ex parte applicant and directed that the same be awarded to the 2nd Respondent herein.

61. Section 88 of the Act provides:

A procuring entity may use a request for quotations for a procurement if—

(a) the procurement is for goods that are readily available and for which there is an established market; and

(b) the estimated value of the goods being procured is less than or equal to the prescribed maximum value for using requests for quotations.

62. Section 89 of the Act on the other hand provides as follows:

(1) This section sets out the procedure for a procurement using a request for quotations.

(2) The procuring entity shall prepare a request for quotations that sets out the following—

(a) the name and address of the procuring entity;

(b) the specific requirements prepared under section 34 relating to the goods being procured;

(c) an explanation of where and when quotations must be submitted; and

(d) anything else required under this Act or the regulations to be set out in the request for quotations.

(3) The procuring entity shall deal with the request for quotations in accordance with the following—

(a) the procuring entity shall give the request to such persons as the procuring entity determines;

(b) the request must be given to as many persons as necessary to ensure effective competition and must be given to at least three persons, unless that is not possible; and

(c) the procuring entity shall give the request to each person early enough so that the person has adequate time to prepare a quotation.

(4) The successful quotation shall be the quotation with the lowest price that meets the requirements set out in the request for quotations.

(5) The following shall apply with respect to the contract resulting from a procurement by a request for quotations

(a) the procuring entity shall place a purchase order with the person submitting the successful quotation; and

(b) the person submitting the successful quotation shall confirm the purchase order in writing.

(6) If there will not be effective competition unless foreign persons participate, the following shall apply—

(a) the request for quotations must be in English;

(b) the technical requirements must, to the extent compatible with requirements under Kenyan law, be based on international standards or standards widely used in international trade;

(c) a person submitting a quotation may, in quoting prices or providing security, use a currency that is widely used in international trade and that the request for quotations specifically allows to be used; and

(d) any general and specific conditions to which the contract will be subject must be of a kind generally used in international trade.

63. Part IV of the Act provides for the general procurement rules and Section 29(1) and (2) which falls under the said part provides:

(1) For each procurement, the procuring entity shall use open tendering under Part V or an alternative procurement procedure under Part VI.

(2) A procuring entity may use an alternative procurement procedure only if that procedure is allowed under Part VI.

64. Under section 72 of the Act, Part VI sets out the requirements for the procurement procedures that are alternatives to open tendering. One of the alternative procurement procedures provided under Part VI is the request for quotations which is the procedure which was adopted by the procuring entity in the instant case. However the 1st respondent found that the procuring entity ought to have complied with section 66(2) of the Act. That section appears under Part V of the Act which Part relates to “Open Tendering”. Pursuant to section 29(1) of the Act alternative tendering is as the name suggest alternative to open tendering and pursuant to section 50 of the Act Part V of the Act “sets out the requirements for open tendering”. It therefore follows that to the extent that section 66 of the Act fell under Part V, it was erroneous for the 1st respondent to find that the procuring entity ought to have complied with the said section. However under section 89(4) of the Act, the law requires that the “successful quotation shall be the quotation with the lowest price that meets the requirements set out in the request for quotations.” In other words the procuring entity was obliged to opt for the quotation with the lowest price. This in my view is clearly in tandem with the provisions of Article 227(1) of the Constitution which provides:

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

65. It ought to be appreciated that the enactment of the Act itself was informed by consideration of public interest. In **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728**, Nyamu, J (as he then was) recognised the public interest in the enactment of the Act when he stated as follows:

“Section 2 of the Public Procurement and Disposal Act, 2005 is elaborate on the purpose of the Act and top on the list, is to maximize economy and efficiency as well as to increase public confidence in those procedures. The Act was legislated to hasten or expedite the Procurement Procedures for the benefit of the public. Indeed, sections 36(6) and 100(4) of

the Act which are ouster clauses, were tailored to accelerate finality of Public Projects. The intention of efficiency is noble and must be appreciated if the development agenda is to be achieved. The Court cannot ignore that objective because it is meant for a wider public good as opposed to an individual who may be dissatisfied with the procuring entity. However the Court must put all public interest considerations in the scales and not only the finality consideration. The said Act also has other objectives namely to promote the integrity and fairness of the procurement procedures and to increase transparency and accountability. Fairness, transparency and accountability are core values of a modern society like Kenya. They are equally important and may not be sacrificed at the altar of finality. The Court must look into each and every case and its circumstances and balance the public interest with that of a dissatisfied applicant. Adjudication of disputes is a constitutional mandate of the Courts and the Court cannot abdicate from it.”

66. The 1st Respondent found that the applicant herein was the lowest priced bidder at the prices provided in his Request for Quotation. Under section 98(c) of the Act, the 1st respondent was empowered to “substitute the decision of the Review Board for any decision of the procuring entity in the procurement proceedings” and this seems to be what the 1st Respondent did.
67. Therefore whereas I agree that the 1st Respondent erred in importing the provisions of section 66 to the procurement procedure in question, it is my view and I so find that its final decision cannot be faulted. Its decision was neither illegal nor irrational. Further it was not tainted with procedural impropriety to justify interference by this Court.
68. In the premises, the Notice of Motion dated 19th February, 2014 fails and is dismissed. However taking into account the relationship between the parties and the fact that this Court is under Article 159(2)(c) of the Constitution enjoined to promote alternative dispute resolution mechanisms including reconciliation, there will be no order as to costs.

Dated at Nairobi this 14th day of July 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Chelagat for the Applicant

Miss Maina for the Respondent

Cc Kevin