REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APPLICATION NO. 267 OF 2014

REPUBLIC.....APPLICANT

VERSUS

PUBLIC PROCUREMENT

ADMINISTRATIVE REVIEW BOARD……..…….....RESPONDENT

KENYA RAILWAYS CORPORATION.....1ST INTERESTED PARTY

TSDI/APEC/EDON…….…….....2ND INTERESTED PARTY

TEAM ENGINEERING SPA……..…….……EX PARTE APPLICANT

JUDGEMENT

1. By a Notice of Motion dated 9th July, 2014, the *ex parte* applicant herein, **Team Engineering Spa**, seeks the following orders:

a. **An order of certiorari to issue removing to the High Court for the purposes of being quashed the decision of the Respondent delivered on the 24th June, 2014 in Review No. 12 of 2014 and in particular the following orders:**

i. **The Request for Review filed by the Applicant herein on 16th June, 2014 be and is hereby struck out.**
ii. **The order of stay issued by the Board on 6th June, 2014 is hereby discharged and the Procuring Entity is therefore at liberty to proceed with the procurement process.**

b. **Order of mandamus to issue directing the Respondent to hear and determine the Applicant's Request to hear and determine the Applicant's Request for Review on merit being Public Procurement Administrative Board Application No 12/2014 of 6th June, 2014.**
c. **Costs of and incidental to the Application and such further or other reliefs as this Honourable Court may deem just and expedient to grant.**

Ex Parte Applicant's Case

2. The cause of action herein arose from a tender advertised by the 1st interested party herein

(hereinafter referred to as the Procuring Entity) inviting bidders for consultancy services for design, review and supervision of the construction of the Standard Gauge Railway from Mombasa to Nairobi and for the procurement and installation of facilities locomotives and Rolling Stock (hereinafter referred to as the Tender).

3. Though 9 bids were received, only the bids made by the applicant herein, the 2nd interested party and Korea Rail Network Authority proceeded to the final stage of the evaluation.
4. However, according to the applicant, it was only on 4th June, 2014 when a visit was made on behalf of the applicant to the Procuring Entity's offices to inquire about the outcome of the tender process that hey received an email alleging that the Procuring Entity notified the applicant of twin requests to extend its bid validity and security and the outcome of the procurement process.
5. According to the applicant, the Procurement Entity forwarded an email dated 5th June, 2014 notifying the applicant of the outcome of the tender process. The said forwarded email was however not received by the applicant hence it was its case that it formally received the notification from the Procuring Entity on 4th June, 2014 and filed its request for review two days later on6th June, 2014 before the Respondent Board
6. However on 9th June, 2014 a Notice of Preliminary Objection was filed on behalf of the Procuring Entity before the Board in which it was contended that the Review, as filed was time barred and the Board lacked the requisite jurisdiction to entertain the Review in light of the fact that the contract had been signed between the Procuring Entity and the 2nd Interested Party.
7. On 24th June, 2014, the Board upheld the said preliminary objections and dismissed the review on the grounds that it lacked jurisdiction to entertain the review and further held that the applicant was duly notified of the outcome and as such, the Review was time barred.
8. This is the decision which provoked these proceedings.
9. It was the applicant's case that the evidence relied upon by the Procuring Entity was contradictory in that the time indicated as the time when the email was received was earlier than the time it was sent. According to the applicant, whereas in AKM-5, it is indicated that the message was sent at 15:17, in AKM-4, it is indicated that the message was received 8:19 AM. In the applicant's view this course of events was irrational and defeats logic as there is no way a message could have been received before it was sent.
10. It was further contended that whereas the Procurement Entity alleged that it sent a letter of notification of the outcome of the tender by post, no such letter was ever sent or received and there was no attempt to dispute lack of service.
11. To the applicant the decision of the Respondent is irrational, contrary to public policy, meant to frustrate legislative purpose and or is illegal. The applicant's basis for so contending are that it is outrageous and in defiance of any logic that an email would be received 6 hours 58 minutes before it was sent; that a contract signed 14 days after notification of the award to the successful bidders were not simultaneously notified in accordance to section 67(2) of the ***Public Procurement and Disposal Act, 2005*** (hereinafter referred to as the Act); the decision entertains mischief by any procurement entity to oust the jurisdiction of the Public Procurement Administrative Review Board by illegally failing or delaying notification of the award to unsuccessful bidders until signing of the contract between the procurement entity and the successful bidder; that the decision failed to take into account the guiding principles and interpretation of ouster clauses and failed to preserve the jurisdiction and powers given to it by the Constitution, the Act and the Regulations; and that the Respondent failed to appreciate a trite Company Law principle that a Company is a separate legal entity from its owners and therefore any correspondence to the applicant email is correspondence to the company itself and therefore any of the company's directors can swear an affidavit on behalf of the Applicant to confirm the said email was not received by it.
12. It was further contended that the Respondent's decision was vitiated by bias on its part and breach of the rules of natural justice.
13. Based on *inter alia* **Republic vs. Public Procurement and Administrative Review Board ex parte Zhongman Petroleum & Natural Gas Group Company Limited [2010] eKLR** and section 107 of the ***Evidence Act***, it was contended that the burden of proof on the issue of notification lies on the Procuring Entity which has a duty under section 67 of the Act, to notify.
14. It was reiterated that having received a formal communication from the Procuring Entity on the outcome of the procurement process through an email dated 4th June, 2014, time started running

on 5th June, 2014 and reliance was placed on section 57 of the ***Interpretation and General Provisions Act***, Cap 2 Laws of Kenya. It was therefore contended that the Request for Review as filed on 6th June, 2014 was not time barred since the time for the appeal window begins to run upon communication of an award or communication of failure to be awarded hence it was absurd that the Board opted to dismiss the Review when the issue of notification was a vexed question. It was the applicant's position that since a party cannot be allowed to benefit from its omissions, the Procuring Entity should not be allowed to benefit its failure to notify the Applicant of the outcome of the procurement process otherwise this will set a dangerous precedent where a Procuring Entity opts to clandestinely enter into a contract with a competitor, fails to notify the other bidders and pleads section 93 of the Act yet clearly this was not the intention of Parliament as espoused in the preamble to the Act. The applicant relied on **Council of Civil Service Unions vs. Minister for the Civil Service [1984] 3 All ER 935**.

15. It was further contended that the Respondent's decision to deprive itself of the requisite jurisdiction to hear the Review was a fundamental error of law since it failed to take into account the guiding principles in interpreting ouster clauses and frustrates the legislative purpose by giving the Procuring Entity arbitrary discretion and power to oust the Respondent's jurisdiction. Further the said decision is unlawful as it vindicates mischievous acts of procuring entity that ousts the Respondents jurisdiction and is hence an arbitrary exercise of statutory power, capricious and in bad faith. Such ouster clauses, it was contended ought to be construed strictly and where the clause is reasonably capable of two meanings, the meaning which preserves the jurisdiction ought to be adopted. Based on **Anisminic Limited vs. Foreign Compensation Commission and Another [1969] 1 All ER 208** at 213, it was submitted that the provisions of section 93 of the Act are not absolute but are pegged on the happening of the event of notification.
16. On the authorities of **Mistry Amar Singh vs. Serwano Wofunira Kulubya [1963] EA 408** and **Republic vs. Public Procurement and Administrative Review Board ex parte Zhongman Petroleum & Natural Gas Group Company Limited [2010] eKLR** it was contended that a contract signed prematurely is not an invalid contract and the Court cannot sanction what was illegal or enforce obligations arising out of an illegal contract or transaction since such acts defeat the very foundation within which the procurement law in Kenya is predicated.
17. According to the applicant this Court is entitled to interrogate the decision of the Board if it is Wednesbury unreasonable.

Respondent's Case

18. The Respondent, on the other hand opposed the application. It was contended that pursuant to the preliminary objection filed by the 1st interested party, the Respondent identified two issues for determination namely whether the application for review was filed out of time and consequently whether the Respondent had jurisdiction to hear the application for review on merits. Secondly, whether the Board's jurisdiction to hear any dispute arising from the procurement process has been ousted by the provisions of Section 93(2)(c) of the Act in view of the contract signed between the procuring entity and the successful bidder on 3rd June, 2014.
19. The Board based on its finding that the letter of notification of tender outcome was forwarded to the Applicant by the procuring entity via email on 19th June 2014 which was the mode of communication established for use by the parties and also pursuant to section 83(G) of the ***Kenya Information and Communication Act*** Cap 411 Laws of Kenya; that the applicant filed its Request for Review 17 days out of time; that in compliance with section 67 of the Act, the Procuring Entity entered into a contract with the successful bidder after the last of 14 days from the date of notification of the award under section 67(1) of the Act; and that under section 93(1)(c) of the Act the Board's jurisdiction to review a matter where a Contract has been signed in accordance with Section 68 of the Act is ousted.
20. To the Respondent, its decision was arrived at after considering all documents of evidentiary value and submissions placed before it by the parties hence its decision was rational, reasonable, logical, lawful, impartial and in tandem with public policy and interest and the intention of enacting the Act and urged the Court to dismiss the application.
21. In support of its position the Respondent relied on **Owners of Motor Vessel Lilian 'S' vs. Caltex Kenya Limited [1989] KLR** to the effect that jurisdiction is everything without which a Court

has no power to make one more step hence it would have no basis for continuation of proceedings pending the taking of other evidence but must down its tools. Accordingly the Respondent's decision not to hear the matter on merit was proper because it could not move a step further for want of jurisdiction.

22. In the Respondent's view, Regulation 73(2)(c) of the Public Procurement and Disposal Regulation, 2006 as amended by legal notice 106 of 18th June, 2013 requires any candidate who claims to have suffered or risk suffering loss to file the review within seven days which lapsed on 26th May, 2014 yet the applicant filed the review outside the said period which was seventeen days thereafter.
23. In the Respondent's opinion the application lacks merit and ought to be dismissed with costs.

1st Interested Party's Case

24. While admitting having advertised the tender and the necessity therefor and while contending that it complied with the relevant laws and regulations, the Procuring Entity.
25. After successfully defending itself against an objection raised by one of the bidders, the Procuring Entity proceeded with the process and invited parties to the opening of the Financial Bids which invitation was carried out through emails which was the normal means of communication with the bidders and this included the applicant herein.
26. At all the stages of technical scores, and bid prices, the applicant was third and at the final stage the applicant failed to win the tender for being less competitive. Although the financial evaluation process was concluded in December, 2013, the award was only made in May 2014 due to negotiations on financing agreement for the construction after which the tender was awarded to the successful bidder by a letter dated 15th May 2014 and the unsuccessful bidders notified of the outcome of their bids in the manner agreed between the parties. To the applicants the notification was delivered on 19th May, 2014 which delivery was confirmed.
27. Following the said award and notification, the Procuring Entity waited for 14 days as required by law before proceeding with contract execution which contract was signed between the PE and Successful Bidder on 3rd June 2014 after which the procurement process terminated and the Procuring Entity and the Successful Bidder assumed their responsibilities and obligations' under the Contract.
28. However, the Applicant who had been duly notified of the outcome of the tender waited until 6th of June 2014 and then purported to lodge this Request for Review on the singular ground that it was not notified of the outcome yet the same Applicant was present at the opening of the Financial Proposals and have always received notices sent to it vide e-mail which was the accepted means of communication in the tender process herein. According to the Procuring Entity, not only did the applicant file the subject Review Application on 6th June 2014 long after the expiry of the 7 days required in law for filing such a Review Application but the same was filed in contravention of Section 93 of the Act which expressly deprived the Board the requisite jurisdiction to hear matters in which contracts had been regularly executed.
29. The 1st Respondent which is a creature of statute considered the above issues on merit and based on the factual evidence tendered before it by all parties and lawful found and held that the Applicant was served with a notification of the outcome of the tender on 19th May, 2014 and the Request for Review having been filed on 6th June, 2014 it was accordingly filed 17 days out of time and the Board did not therefore have jurisdiction to hear and determine the Applicant's application as the contract dated 3rd June, 2014 was signed in accordance with the Provisions of Section 68(2) of the Act as read together with the Provisions of Section 67(1) of the Act.
30. To the Procuring Entity, the Applicant is aggrieved by the subject decision of the Board on its merit and now wishes to challenge the merits of Board's findings through this Application for Judicial Review. The Board having heard parties on the above issues and made the above findings on facts and the determination which is well within the law, the Applicant ought to Appeal in case it is aggrieved by the said decision made on the merits of the above two issues considered by the Board as expressly provided for under Section 100 of the Act.
31. Further the grounds for the Applicant's substantive motion as set out in the filed Statutory

Statement of facts are based on misconstruction and misapplication of the relevant facts and the procurement laws in so far as they relate to the Application herein. The Applicant has attempted to mislead the Court by misrepresenting and suppressing material facts relevant to the dispute herein and relying on misconstrued facts as by falsely alleging that the Applicant received the notification of award on email 6 hours 58 minutes before the 1st Interested Party purported to have sent to it, yet the Applicant is fully aware that the evidence before the Board clearly demonstrated that the e-mail containing the notification letter was regularly delivered from Kenya to the Applicant in Italy on 19th May 2014 at 15:17:07hrs and received by the Applicant in Italy on the same 19th May 2014 at 14:57:26 hrs and that the above time difference is due to the deference in time zones between Kenya and Italy and that the same demonstrates that the e-mail was received 30 Minutes later after it was sent.

32. Therefore based on the facts and the evidence before it, the Respondent Board was right in finding and holding that it lacked the requisite jurisdiction to hear and determine the Request for Review as filed by the Applicant by virtue of the express provisions of Sections 68 and 93(c) of the Act and as lawfully and procedurally held by the Board, the subject procurement process herein is complete and the contract has since been executed between the Respondent and the successful bidder.
33. The Procuring Entity further invited t Court to take into consideration the public interest of the project in issue, its value to the Kenyan citizens and the efforts the Corporation has put in place to carry out the procurement process strictly in accordance with the law and the fact that the Applicants main intention and objective is to delay the supervision of the project herein which is already ongoing. Having lawfully executed the contract herein on 3rd June 2014, parties have substantially implemented the same contract and the Corporation together with the Government of Kenya will be exposed to great financial loss should the Court grant the unmerited orders sought by the Applicant herein. Since the Procuring Entity has carried out the procurement process herein lawfully and procedurally, in strict compliance with the relevant laws, the Court should resist the Applicants' baseless allegations herein and allow this procurement process to be concluded.
34. To the Procuring Entity, the Application herein lacks in merit and the same should be dismissed with costs to it.
35. According to the Procuring Entity, a court exercising a judicial review mandate has no jurisdiction to sit on appeal against factual findings made by an inferior tribunal. Indeed the ***Public Procurement and Disposal Act*** was conscious of the specific jurisdiction of the court under judicial review when at section 100 it provides two alternative remedies to an aggrieved applicant and based on **Kenya Pipeline Company Ltd vs. Hyosung Ebara Company Ltd & 2 Others [2012] eKLR,** it was asserted that Court of Appeal overturned a decision by the High Court on the basis that the judicial review was not confined to the decision making process but rather with the correctness of the decision on matters of both law and fact and expressed itself as follows:

"Where 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 on the dispute) and does not commit any errors which go to jurisdiction in the wider sense, the quashing order will not ordinarily be 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 manner."

36. It was therefore contended that the Applicant ought not to be allowed to turn these proceedings into an appeal against the findings of fact of the Respondent, findings which were made after an inter partes hearing of all the parties and in which exactly the same issues were canvassed.
37. It was contended that the averment that the email communication was received 6 hours and 58 minutes after it was supposed to have been sent is misconceived and lacks factual foundation since the covering letter shows a time of 8.19 AM, the extract from the hard disk of the Interested Party's computer server for that day shows that an email addressed to the ex parte applicant whose delivery status reads "transferred" was sent with a disposition time of 15.17.07 and a message arrival time of 14.57.22 and the 1st interested Party explained the time difference between 15.17 hours and 14.57 hours to be due to the time difference between Italy and Kenya. While

acknowledging that this issue – which is an issue that can only be resolved by producing factual evidence - forms "*the crux*" of its case, the ex parte Applicant has not itself produced an extract from the messages received by its computer to demonstrate that none of them originated from the 1st Interested Party, choosing itself to rely entirely on the documents produced by the 1st Interested Party. In any case this issue was heard and determined by the Respondent Board and a finding made that the Ex-parte Applicant was notified of the outcome of the subject tender herein. The Applicant has not appealed this finding.

38. The Respondent also took into account other factors among them, that previously email communication had been the mode of communication between the parties and the same email address had been used successfully to communicate to the ex parte applicant and that the other two bidders – ranked number 1 and number 2 –confirmed receipt of the email communications which was sent using the same medium and that there was no apparent reason not to send communication to the Ex-parte Applicant herein being the third ranked bidder.

39. According to the 1st interested party, in light of all this evidence it is not correct to describe the factual findings of the respondent on this issue as irrational and unreasonable in the Wednesbury sense of that term. Certainly it cannot be the basis for judicial review of the decision of the Respondent and in supporting of this submission the 1st interested party relied on **Kenya Pipeline Company Ltd vs. Hyosung Ebara Company Ltd & 2 Others [2012] eKLR** where it was held as follows:-

> **"The Review Board is a specialised 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 the 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."**

40. Therefore so long as the proceedings of the Review Board were regular (as is the case herein) and it had jurisdiction to adjudicate upon the matters raised in the Request for Review, it was as much entitled to decide those matters wrongly as it was to decide them rightly.

41. According to the 1st interested party section 93(2)(c) of the Act ousts the jurisdiction of the respondent in circumstances where a contract is signed in accordance with section 68 and the factors that determine whether the Board has jurisdiction in a situation such as this in which a contract has been signed are that *the successful bidder* has been notified that his tender has been accepted; and 14 days have elapsed since that notification was given. In this case the Respondent was given evidence to show that a contract had been signed between the Procuring Entity and the successful bidder; the procuring entity had notified the successful bidder that his tender had been accepted; and fourteen days had elapsed following that notification. Therefore the respondent had no jurisdiction to hear the Review application on its merits and a preliminary objection having been raised, on the authority of **Owners of Motor Vessel Lillian S v Caltex Kenya Ltd (1989) KLR 1**, the respondent was duty bound to consider it and make a determination on it before it could go into the merits of the review Application since as was held in **R vs. The National Environment Tribunal ex parte Ol Keju Ronkai Ltd** "a creature of statue can only do that which its creator (the Act) and the Rules made thereunder permit it to do."

42. To the 1st interested party, the applicant's argument that for a contract to be validly signed between the 1st interested party and the successful bidder all the bidders ought to have received notification of the outcome of the tender, and since it has alleged that it did not receive the notification, the Respondent ought to have assumed jurisdiction to determine the Review Application under the general principle that a court ought not to enforce an illegal contract is misconceived as the Act does not stipulate that a contract may only be validly signed once all the bidders have been notified of the outcome of the tender since the notification to other bidders, in

addition to the successful bidder is a matter for Section 67(2) not section 67(1) under which the Respondent's jurisdiction arises. Since the Respondent was not being asked to enforce the contract, the question of its validity was not in issue and reliance was placed view Board in **Kobil Petroleum Ltd v Kenya Ports Authority** (supra) that "once the jurisdiction of the Review Board is ousted it cannot inquire as to whether the contract is void or a nullity." Since nullification of a contract is not one of the remedies prescribed in section 98 of the Act, the decision of the Res and in any case there was sufficient evidence before the Board and before this Court confirming that indeed the other two bidders were notified at the time of notifying the Successful Bidder on the outcome of the tender process as provided under Section 67 of the Act.

43. To the 1st interested party, judicial review remedies being discretionary, a court may refuse to grant even where the requisite grounds exist since the court has to weight one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining and relied on **Republic vs. Judicial Service Commission *ex parte* Pareno [2004] 1 KLR 203-209**.
44. Its position was that this is not an appropriate case for the exercise of the court's discretion in favour of the Applicant as the uncontested evidence shows that the ex parte applicant was the third ranked bidder because it scored the lowest marks on the technical evaluation and was the most expensive on the financial bid hence is not a bidder whose bid has any chances of success as the same was least competitive compared to the other bids. As he review application itself did not in any way challenge the evaluation and therefore the only issue in contention is whether the email notification was received, this does not justify the quashing of the lawful and valid decision of the Review Board. According to the said decision:

"where it is clear that the reasons given for a particular decision are contestable either way and the parties have arguable points and the court has not been presented with sufficient evidence to enable it conclusively determine the point in a judicial review application on the basis of affidavits , this is clear signal that the relief sought is not suitable for judicial review and is perhaps between dealt with in an action where for instance damages could be awarded as a matter of right and not discretion in which case the court should decline to give a judicial order."

45. In the 1st interest's view the application is devoid of merits and ought to be dismissed

2nd Interested Party's Case

46. In opposing the application, the 2nd interested party filed grounds of opposition and a preliminary objection.
47. According to the 2nd interested party, the applicant's prayer before the Respondent was for the annulment of the whole decision of the tender committee of the procuring entity and for costs hence leaving the issue of what was to follow next. It was contended that the grant of the orders as sought herein would leave the whole procuring process in limbo and would not be in the interest of facilitating the fair and competitive processes envisaged under the statute regulating the Public Procurement. Instead, it would put to waste and jeopardise the entire procurement and the construction of the Standard Gauge Railway.
48. It was the 2nd interested party's case that though all bidders were invited to extend their tender validity period and bid security, the applicant did not do so. Similarly the applicant has not addressed the issue of time differences as well as other issues.

Determinations

49. I have considered the foregoing.
50. In my view the main issues for determination in this application are as follows:

1. **Whether the Respondent's decision that the applicant was notified of the decision of the award of the tender by the 1st interested party was unreasonable in the circumstances.**
2. **Whether the Respondent lacked the jurisdiction to entertain the request for review.**
3. **Whether in the circumstances of the case, the grant of the orders sought is efficacious.**

51. On the first issue, the applicant's case was that it was never notified of the decision by the 1st interested party to award the tender and that the evidence relied upon by the 1st interested party could not make sense hence rendering the Respondent's decision that the applicant was made aware of the 1st interested party's decision unreasonable. The broad grounds on which the Court exercises its judicial review jurisdiction were restated in the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300.** In that case the Court cited with approval **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478** at **479** and held:

"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 ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.....Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."

52. It is therefore clear that it is not mere unreasonableness which would justify the interference with the decision of an inferior tribunal. It must be noted that unreasonableness is a subjective test and therefore to base a decision merely on unreasonableness places the Court at the risk of determination of a matter on merits rather than on the process. In my view, to justify interference the decision in question must be so grossly unreasonable that no reasonable authority, addressing itself to the facts and the law would have arrived at such a decision. In other words such a decision must be deemed to be so outrageous in defiance of logic or acceptable moral standards that no sensible person applying his mind to the question to be decided would have arrived at it. To that extent I agree with the decisions by **Wendoh, J** in **Republic vs. Public Procurement and Administrative Review Board ex parte Zhongman Petroleum & Natural Gas Group Company Limited** and **Korir, J's** decision in **Republic vs. Kenya Power & Lighting Company Ltd & Another [2013] eKLR**, that the Court is entitled to consider the decision in question with a view to finding whether or not the Wednesbury test of unreasonableness is met. It is only when the decision is so grossly unreasonable that it may be found to have met the test of irrationality.
53. Time after time the courts, in seeing whether they should interfere with the decision of a public authority, say that they will only do so if the decision is "so unreasonable that no reasonable man could come to it. This is just an emphatic way of saying, as **Lord Hailsham** (Lord Chancellor) said in **Re W (An Infant) [1971] AC 682, 700**:

"Two reasonable parents can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable. The question in any given case is whether a parental veto comes within the band of possible reasonable exercise of judgement is right, and not every mistaken exercise of judgement is unreasonable. There is a band of decisions within which no court should seek to replace the individual's

judgement with his own."

54. The courts will only interfere with the decision of a public authority if it is outside the band of reasonableness. It was well put by **Professor Wade** in a passage in his treatise on ***Administrative Law***. 5th Edition at page 362 and approved by in the case of the **Boundary Commission [1983] 2 WLR 458, 475**:

"The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too lightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended."

55. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through taking into account an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence. See **Reid vs. Secretary of State for Scotland [1999] 2 AC 512.**
56. Therefore what this Court has to decide is whether the decision by the Respondent to the effect that based on the email communication, the decision by the Respondent that the applicant was notified of the award of the tender was so grossly unreasonable and outrageous in defiance of logic that there is no way a reasonable person considering the facts and the law would have arrived at it. I have no hesitation in holding that where a notification is held to have been received before the time the same was sent is a decision that fall within that category since in the normal course of events a notification cannot be received before the same is sent unless the Court decides to operate on telepathy. However, telepathy is not an empirically legal way of arriving at a decision in this era.
57. In this case, however, the apparent difference has been explained on the basis of time difference between Kenya and Italy. Such an explanation taking into account the global timelines which in some cases have as long as 24 hours disparity is, if proved, a reasonable one and any Tribunal which arrives at such a decision after considering the disparity in the global timelines cannot be said to have made a decision which is so grossly unreasonable as to be irrational.
58. It is my view, however, that the issue of timelines was an issue of fact that ought to have been subjected to a hearing on merits taking into account as admitted by the Procuring Entity that this issue could only be resolved by production of evidence and that the issue formed the crux of the matter. However the position taken by the Procuring Entity was that since the ex parte Applicant had not itself produced an extract from the messages received by its computer to demonstrate that none of them originated from the 1st Interested Party, the decision was justified.
59. This submission in my view seems not to have recognized the applicant's core complaint being that it never received the notification. As was held in **Republic vs. Public Procurement and Administrative Review Board ex parte Zhongman Petroleum & Natural Gas Group Company Limited [2010] eKLR**, the burden of proof on the issue of notification lies on the Procuring Entity. The applicant having denied notification, it was upon the Procuring Entity to

prove on the standard of balance of probability that the applicant was duly notified of the decision of the Procuring Entity. To contend that the applicant ought to have adduced evidence from its computer that it did not receive the notification would not only amount to shifting the onus of proof but to compel the applicant to prove a negative. I appreciate that under Section 107(1) of the ***Evidence Act***, Cap 80 Laws of Kenya, "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." I also appreciate the legal maxim that *omnia praesumuntur legitime facta donec probetur in contrarium* (all things are presumed to have been legitimately done, until the contrary is proved). However, as was held by **Seaton, JSC** in the Uganda Case of **J K Patel vs. Spear Motors Ltd SCCA No. 4 of 1991:**

"The proving of a negative task is always difficult and often impossible, and would be a most exceptional burden to impose upon a litigant. The burden of proof in any particular case depends on circumstances in which the claim arises. In general the rule which applies is *ei qui affirmat not ei qui negat incumbit probatio.* It is an ancient rule founded on considerations of good sense and it should not be departed from without strong reasons..... As applied to judicial proceedings the phrase "burden of proof" has two distinct and frequently confused meanings, (1) the burden of proof as a matter of law and pleading – the burden, as it has been called, of establishing a case, whether by preponderance of evidence, or beyond reasonable doubt; and (2) the burden of proof in the sense of adducing evidence.... The *onus probandi* rests, before evidence is gone into, upon the party asserting the affirmative of the issue; and it rests, after evidence is gone into, upon the party against whom the tribunal, at the time the question arises, would give judgement if no further evidence were adduced." See **Constantine Steamship Line Ltd vs. Imperial Smelting Corp [1914] 2 All ER 165 (H.L); Trevor Price vs. Kelsall [1975] EA 752 at 761; *Phippson on Evidence* 12th Ed Para 91; Phippson At Para 95.**

60. Similarly, the Supreme Court of Uganda in **Sheikh Ali Senyonga & 7 Others vs. Shaikh Hussein Rajab Kakooza and 6 Others SCCA NO. 9 of 1990** was of the view that the general rule that he who alleges must prove applies and since it was the appellants who were alleging that the fifth appellant was qualified, to hold that the negative must be proved by the respondents would be to impose an unnecessary burden on them.
61. The law with respect to the circumstances in which to raise a preliminary objection were considered in the celebrated case of **Mukisa Biscuits Manufacturing Ltd. vs. West End Distributors Ltd. Civil Appeal No. 9 of 1969 [1969] EA 696,** in which **Law, JA** was of the following view:

"A preliminary objection consists of a point of law which has been pleaded, or which arises from a clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration".

62. As for **Newbold, P**:

"A preliminary objection is in the nature of what used to be called a *demurrer.* It raises a pure point of law, which is argued on the assumption that all the facts pleaded are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop".

63. The question here would be whether the preliminary objection was argued on the basis that the factual issue of time difference was correct. From the record, I am not satisfied that this issue was sufficiently gone into by the Respondent. It therefore made a determination based of factual issues which were not agreed. The issue in my view ought to have been canvassed by the parties at the

hearing of the request for the review.

64. With respect to the second issue it was the applicant's case that the finding by the Respondent that it had no jurisdiction was irrational, contrary to public policy, meant to frustrate legislative purpose and or is illegal. Section 93 of the Act provides:

(1) Subject to the provisions of this Part, any candidate who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the regulations, may seek administrative review as in such manner as may be prescribed.

(2) The following matters shall not be subject to the review under subsection (1)—

(a) the choice of a procurement procedure pursuant to Part IV;

(b) a decision by the procuring entity under section 36 to reject all tenders, proposals or quotations;

(c) where a contract is signed in accordance to section 68; and

(d) where an appeal is frivolous.

40. The decision of the Respondent not to entertain the request for review seems to have been based on section 93(2)(c) of the Act. As rightly submitted by the applicant, for the Respondent to be said to have been deprived of jurisdiction, the contract must have been signed in accordance with section 68 of the Act. **Madan, J** (as he then was) in **Choitram and Others vs. Mystery Model Hair Saloon Nairobi HCCC No. 1546 of 1971 (HCK) [1972] EA 525** held:

"Lack of jurisdiction may arise in various ways. There may be an absence of these formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage while engaged on a proper inquiry the tribunal may depart from the rules of natural justice thereby it would step outside its jurisdiction. What is forbidden is to question the correctness of a decision or determination which it was within the area of their jurisdiction to make…….The phrase "to make such order thereon as it deemed fit" giving powers to a statutory tribunal must be strictly construed. Powers must be expressly conferred; they cannot be a matter of implication."

41. Similarly, in **Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1** it was held that a limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics and that if the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction.

42. It is therefore important to determine whether the contract in question was signed in accordance with section 68 as the mere fact that a contract has been signed does not necessarily deprive the Respondent of the jurisdiction to entertain the request for review. In other words before the Respondents makes a determination that it has no jurisdiction to entertain the request by virtue of section 93(2)(c) of the Act, it has the duty to investigate whether the contract in question was signed in accordance with section 68 of the Act and the failure to do so in my view will amount to improper deprivation of jurisdiction and in my view improper deprivation of jurisdiction is as bad as action without or in excess of jurisdiction. To this extent I agree with the decision in **Anisminic Limited vs. Foreign Compensation Commission and Another Case** (supra) to the effect that:

"It is well-established principle that a provision ousting the ordinary jurisdiction of the court must be construed strictly meaning, I think that if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the court."

43. I further associate myself with the decision in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728**, to the effect that ouster clauses are effective as long as they are not unconstitutional, consistent with the main objectives of the Act and pass the test of reasonableness and proportionality. In the said case the learned Judge recognised that the Court's jurisdiction may be precluded or restricted by either legislative mandate or certain special texts. Where therefore an ouster clause leaves an aggrieved party with no effective remedy or at all, it is my view that such ouster clause will be struck down as being unreasonable.
44. Section 68 of the Act provides as follows:

(1) The person submitting the successful tender and the procuring entity shall enter into a written contract based on the tender documents, the successful tender, any clarifications under section 62 and any corrections under section 63.

(2) The written contract shall be entered into within the period specified in the notification under section 67(1) but not until at least fourteen days have elapsed following the giving of that notification.

(3) No contract is formed between the person submitting the successful tender and the procuring entity until the written contract is entered into.

45. Therefore a contract can only be entered into within the period provided for in the notification under section 67(1) of the Act. However, whatever period of notification specified, the same can only be valid if the period stipulated is at least fourteen days from the date of giving of that notification. That notification necessarily refers to the notification in section 67(1) of the Act and that provision provides:

Before the expiry of the period during which tenders must remain valid, the procuring entity shall notify the person submitting the successful tender that his tender has been accepted.

46. A plain reading of the said provision clearly shows that the only notification that is required for the purposes of the application of section 68(2)(c) of the Act is that to the successful tenderer. However, this interpretation is objected on the ground that it would frustrate legislative purpose since the procuring entities would simply fail to notify the unsuccessful tenderers and enter into contracts after the fourteen days of notification to the successful tenderer and hence deprive the Board of the jurisdiction to entertain the review.
47. The general law of interpretation is that where the words of statute are plain there can be no more than one construction. With respect to past enactments it has always been a principle of interpretation that considerations stemming from legislative history must not override the plain words of a statute. Therefore where it is evident that a different and wider intention inspired a later Act, the intention of the Legislature as manifested in an earlier one will be of little assistance. The law as I understand it is that for the Court to find that a literal interpretation of an enactment would lead to absurdity, the absurdity must be so plain as not to require detailed analysis in arriving thereat. For the Court to engage in an extensive analysis of the enactment in order to find whether or not the same is absurd would amount to the Court usurping the legislative powers of the authority entrusted therewith and that is not the role of the Courts. The law in my view is that a law must not be interpreted in a manner that would render it meaningless or scandalous and that it must be interpreted to give meaning to the intention of the Legislature. However where the words clearly express the intention of the Legislature there is no room for any other interpretation.
48. Nevertheless where a remedy provided under the Act is made illusory with the result that it is practically a mirage, the Court will not shirk from its Constitutional mandate to ensure that the provisions of Article 50(1) are attained with respect to ensuring that a person's right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body is achieved. As was rightly stated in **Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya HCMCA No. 13 of 2008** it is the responsibility of the Court to ensure that

executive action is exercised; that Parliament intended and that the High Court has the responsibility for the maintenance of the rule of law; that there cannot be a gap in the application of the rule of law; that the Court must at all times embrace a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law. Therefore where there is a lacuna with respect to enforcement of remedies provided under the Constitution or an Act of Parliament, or if, through the procedure provided under an Act of Parliament, an aggrieved party is left with no alternative but to invoke the jurisdiction of the Court and the Court is perfectly within its rights to investigate the allegations. To fail to do so would be to engender and abet an injustice and as has been held before, a court of justice has no jurisdiction to do injustice. See **M Mwenesi vs. Shirley Luckhurst & Another Civil Application No. Nai. 170 of 2000** and **Kenya Industrial Estates Ltd vs. Transland Shoe Manufacturers Ltd. & 2 Others Civil Application No. Nai. 364 of 1999.**

49. The law being a living thing, a court would be shirking its responsibility were it to say, assuming that there be no existing recognised remedy covering the facts of a particular case, "Why then, this must be an end to it". The law may be thought to have failed if it can offer no remedy for the deliberate acts of one person which injures another. See **Bollinger vs. Costa Brava Wine Co. Ltd [1960] 1 Ch. 262 at 238.**

50. Whereas going by the manner in which the aforesaid provisions are drafted the apprehensions of the applicant are not totally far fetched, the matter before me is not seeking to strike out the offending provisions on the ground of unreasonableness. In order for this Court to strike out provisions of the Act on that ground, however, the provision must be such that its strict interpretation would leave a party aggrieved with no remedy at all. Section 99 of the Act provides:

The right to request a review under this Part is in addition to any other legal remedy a person may have.

51. The remedy of judicial review is now not only a statutory remedy but is a constitutional remedy underpinned under Article 165(6) of the Constitution. That remedy, it is my view is one of the additional legal remedies contemplated under section 99 aforesaid. It is therefore my view that if a procuring entity mischievously decides to sign a contract with the successful tenderer before notifying the unsuccessful tenderers of the results of the procurement process with a view to depriving the unsuccessful tenderers of the remedy under section 93 of the Act, there would be nothing to bar the aggrieved parties from applying for judicial review remedies against the decision of the procuring entity. In other words judicial review remedies are available in certain instances against the decisions of the Procuring Entity and therefore the strict interpretation of section 68 as read with section 67(2) of the Act does not render aggrieved parties remediless. A not too dissimilar view was expressed by **Ojwang', J** (as he then was) in **Kenya Transport Association vs. Municipal Council of Mombasa & Another [2011] eKLR,** in which he expressed himself as follows:

"As against these members of the petitioner, their fundamental rights and freedoms under Article 27 of the Constitution had been infringed, and their rights to fair administrative action, under Article 47, had been contravened. Although counsel for the respondents urged that the petitioners should have sought a redress by invoking the administrative processes provided for under the Public Procurement and Disposal Act, such a position is not to be upheld, where constitutional rights have been, as in this case, infringed, and the aggrieved persons have opted for enforcement by Court process."

52. 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."

65. Since the decision to enter into a contract by the Procuring Entity is not the subject of this application, it is my finding and I so hold that to grant the orders sought herein would not be efficacious. As was held in **Republic vs. Judicial Service Commission *ex parte* Pareno**, (supra) judicial review orders are discretionary and are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders. Since the court exercises a discretionary jurisdiction in granting judicial review orders, it can withhold the gravity of the order where among other reasons there has been delay and where the a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realised. See **Anthony John Dickson & Others vs. Municipal Council of Mombasa Mombasa HCMA No. 96 of 2000.**
66. To grant the orders in the manner sought herein would not in my view achieve what the applicant intended to achieve when it embarked on the process of bidding for the contract since it would not necessarily lead to the nullification of the decision by the Procuring Entity to enter into a contract with the 2nd interested party.
67. There was an allegation made against the Respondent that its decision manifested bias against the applicant. In my view the language of the Respondent with due respect was unnecessarily strained. On this aspect the oft-repeated saying of **Lord Hewart CJ** in **R vs. Sussex Justices, ex parte McCarthy** comes to mind: "It is not merely of some importance, but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."
68. In considering whether there was a real likelihood of bias, the court does not look at the mind of the decision making authority. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand.
69. Nethertheless there must appear to be a real likelihood of bias. Surmise or conjectures is not enough. There must be circumstances from which a reasonable man would think it likely or probable that the body or authority would or did favour one side unfairly at the expense of the other and once there is such evidence, the Court will not inquire whether he did in fact favour one side unfairly. The reason is plain enough. Justice must be rooted in confidence and confidence is destroyed when right-minded people go away thinking that the Judge was biased. See **Republic vs. Honourable Jackson Mwalulu & Others Civil Application No. Nai. 310 of 2004 [2005] 1 KLR 1.**
70. In purely judicial proceedings however, mere strong language by a judge does not establish bias since dialogue between the bench and the bar is commonplace and the views expressed therein do

not necessarily amount to a predetermination of issues. See **Ogang vs. Eastern and Southern African Trade and Development Bank (PTA BANK) [2003] 1 EA 217.**

71. In this case whereas I agree that the Respondent's language was unnecessarily strong. I am not prepared to find that such a strong language was necessarily a manifestation of bias since it is not in doubt that the procuring entity placed the applicant in the third position. However, the decision of the Respondent was not necessarily determined by the applicant's position. As held in **Devji Ladha Patel vs. Nathabhai Vashram Patel Civil Appeal No. 16 of 1943 ([1944] 11 EACA 15:**

"Though the letters were couched in strong language, when it is agreed by the parties that the arbitrators shall send their remarks it must be in contemplation that such remarks will include comments on the evidence and reasons for believing or disbelieving the evidence…If one arbitrator is assiduous in the performance of his duties and the other is not that is no ground for setting aside the award of the umpire. Much less could it be regarded as proof of misconduct on the part of the umpire."

72. As was held by **Apaloo, JA** (as he then was) in **Haji Mohammed Sheikh T/A Hasa Hauliers vs. Highway Carriers Ltd. [1988] KLR 806; Vol. 1 KAR 1184; [1986-1989] EA 524:**

"If the Judge introduced into his consideration of the application extraneous matters and founded his decision either partly or wholly on them, then the exercise of his discretion can properly be faulted. But if there is evidence on record to justify the Judge's feeling that the genuineness of the defence was open to suspicion, there is nothing extraneous in the observation... One's experience teaches one that charges of bias or ill-will against a Judge or adjudicator are usually made by defeated litigants often motivated by disappointment at adverse verdicts. Where a party or his advocate's conduct is deserving of judicial censure, strong language by the Judge in condemnation of that conduct cannot properly be stigmatised as bias or judicial hatred. Nor does it justify an appellate Court in substituting its discretion for that of the trial court regardless of the facts, or provide such Court a warrant for exercising that discretion in favour of a party, who, on the facts, is entirely undeserving of it."

73. I, however do not associate myself with the line of argument adopted on behalf of the 1st interested party that where the Court finds that the inferior body is likely to arrive at the same decision, the Court ought not to disturb the decision. It is therefore clear that it is not the perceived hopelessness of a person's case that determines whether or not he ought to be heard in a decision likely to adversely affect him. The right to be heard is a fundamental human right that is not given by the State since human rights are generally universal and inalienable rights of human beings. A Constitution simply recognises the natural and original human rights of mankind which any and every human being should have in order to lead a dignified life till his natural death. As was held by **Nyamu, J** (as he then was) in **Kenya Bus Services Ltd & 2 Others vs. Attorney General [2005] 1 KLR 787.**

"The only difference between rights and the restrictions are that the restrictions can be challenged on the grounds of reasonableness, democratic practice, proportionality and the society's values and morals including economic and social conditions etc. whereas rights are to the spiritual, God given, and inalienable and to the non-believers changeless and the eighth wonder of the World."

74. As was held in **Onyango Oloo vs. Attorney General [1986-1989] EA 456**:

"The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...A decision in breach of the rules of natural justice is not cured by holding that the decision would

otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at..... Denial of the right to be heard renders any decision made null and void ab initio."

75. Having considered the application, whereas I find that in the circumstances of this case, the Respondent ought not to have determined the issue of notification of the decision by the Procuring Entity in a preliminary objection, pursuant to sections 93, 68(2)(c) and 67(1) of the Act, the Respondent's decision to abstain from exercising jurisdiction in the matter before it cannot be faulted in these proceedings.

Order

76. In the premises the Notice of Motion dated 9th July, 2014 fails but in light of my finding on the preliminary determination of notification each party will bear own costs.

Dated at Nairobi this 1st day of September, 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Munje for Mr Sagana for the Applicant

Mr Ojwang for the Respondent

Mr Agwara for Prof. Muma for the 1st interested party

Mr C N Kihara for the 2nd interested party

Cc Richard