



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW (MISC) APPLICATION NO. 32 OF 2013

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

AND

**IN THE MATTER OF: THE PUBLIC PROCUREMENT AND DISPOSAL ACT, 2005 AND
PUBLIC**

PROCUREMENT AND DISPOSAL REGULATIONS, 2006

AND

**IN THE MATTER OF: TENDER NO. NA/018/2011-2012, PROPOSED MULTI-STOREY
OFFICE**

**BLOCK FOR THE PARLIAMENTARY SERVICE COMMISSION W.P. ITEM NO. D29 NB/NB
901-JOB NO. 7753C**

AND

**IN THE MATTER OF: A DECISION BY THE PUBLIC PROCUREMENT
ADMINISTRATIVE**

REVIEW BOARD FOR REVIEW NO. 71/2012 OF 18TH DECEMBER, 2012.

AND

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF
*CERTIORARI***

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

PUBLIC PROCUREMENT ADMINISTRATIVE

REVIEW BOARD.....RESPONDENT

AND

CHINA JIANGXI INTERNATIONAL KENYA.....INTERESTED PARTY

EX-PARTE

PARLIAMENTARY SERVICE COMMISSION

JUDGEMENT

1. By a Notice of Motion dated 31st January, 2013, the *ex parte* applicant herein, **Parliamentary Service Commission**, seeks the following orders:

1. That the Honourable Court be pleased to issue an Order of Certiorari to remove into the High Court and quash that part of the decision of the Respondent delivered on 17th January, 2013 directing the Procuring entity in respect of tender No. Na/018/2011-2012, proposed Multi-Storey Office Block for the Parliamentary Service Commission W.P. Item No. D29 NB/NB 901-JOB No. 7753C to proceed to award the tender to the bidder whose bid was declared to be the lowest evaluated in accordance with the recommendation of the Evaluation Committee and the Provisions of the Public Procurement and Disposal Act, 2005.
2. The Cost of this Application be borne by the Respondent in any event.

EX PARTE APPLICANT'S CASE

2. The application is based on the following grounds:

- a. The Applicant's Tender Committee had on 13th December, 2012 decided to terminate the procurement process in respect of Tender No. NA/18/2011-2012, proposed Multi-Storey Office Block, W.P. Item No.D29 NB/NB 901-JOB No. 7753C, pursuant to the provisions of section 36(1) of the *Public Procurement and Disposal Act*, 2005 on the grounds that none of the bidders met all the mandatory requirements.
- b. The Applicant having terminated the procurement process in respect of Tender No. NA/18/2011-2012, proposed Multi-Storey Office Block, W.P. Item No.D29 NB/NB 901-JOB No. 7753C on 13th December, 2012 then the Respondent had, in view of the provisions of section 93(2)(b) of the *Public Procurement and Disposal Act*, 2005 no jurisdiction to consider the application for review filed before it since that provision of law expressly excludes the jurisdiction of the Respondent on such matters.
- c. The Respondent in considering the issue that though the tender validity period in respect of Tender No. NA/18/2011-2012, proposed Multi-Storey Office Block, W.P. Item No.D29 NB/NB 901-JOB No. 7753C had lapsed the bidders bid bond were still valid as at the time of filing of the application for review and therefore the procurement process was still valid went against the provisions of section 61 of the *Public Procurement and Disposal Act*, 2005 as read with regulations 41(4),(5) and 42 of the Public Procurement and Disposal Regulations, 2006.
- d. The Respondent in directing the procuring entity to proceed to award the tender in respect of Tender No. NA/18/2011-2012, proposed Multi-Storey Office Block, W.P. Item No.D29 NB/NB 901-JOB No. 7753C to the bidder whose bid was declared to be the lowest evaluated abused its discretion in that the Respondent has time and again in its previous decisions held that once the validity of a tender has expired the tender dies a natural death.
- e. The Respondent in considering the issue of validity of tender in the foregoing circumstances took into account facts, considerations and circumstances that were irrelevant to the matters before it.
- f. The Respondent acted unreasonably within the Wednesbury's principle in directing the Ex

parte Applicant to proceed to award the tender in respect of Tender No. NA/18/2011-2012, proposed Multi-Storey Office Block, W.P. Item No.D29 NB/NB 901-JOB No. 7753C to the bidder whose bid was declared to be the lowest and quashing the decision of the procuring entity to terminate the entire procurement.

- g. The Respondent erred in failing to make any determination on what amounts to a prompt notification of the termination notices under section 36(2) of the Act.
- h. The Respondent dealt with the issue of litigation history in a self-contradictory manner and at the end it failed to make any finding as to whether an appeal for review to the High Court from its decision amounts into a litigation history and hence made an apparent error on the face of the record.
- i. The Respondent made an apparent error on the face of the record in failing to find that all the tenders had been rejected by the Ex parte Applicant pursuant to section 36 of the Act and hence relied on irrelevant and erroneous considerations.
- j. The Ex parte Applicant had the legitimate expectation that the Respondent applying its mind to the relevant law and facts would have upon careful consideration of the requests for review directed agreed with the decision reached by the Ex parte Applicant to terminate the entire procurement process in that one of the bidders found non-responsive on account of litigation history had bid Kshs. 200,000,000/- lower than the bidder recommended for award of tender by the Evaluation Committee. Consequently, it is apparent that the Evaluation Committee erred in arriving at its recommendations and therefore making an erroneous report.
- k. The decision of the Respondent in as far as it directs the procuring entity to proceed to award the tender in respect of Tender No. NA/18/2011-2012, proposed Multi-Storey Office Block, W.P. Item No.D29 NB/NB 901-JOB No. 7753C to the bidder whose bid was declared to be the lowest evaluated having been arrived at without jurisdiction, capriciously, unreasonably and after taking into account irrelevant considerations, the same is unlawful and amenable to judicial review and ought to be quashed.

3. The same application is based on a Statutory Statement filed on 30th January, 2013 and the verifying affidavit sworn by **Mary G. Kanyiha**, the *ex parte* Applicant's Chief Procurement Officer on the same day. According to the *ex parte* Applicant, by a ruling dated 17th January, 2013, the Respondent made an order that the Applicant award Tender No. NA/18/2011-2012, proposed Multi-Storey Office Block, W.P. Item No.D29 NB/NB 901-JOB No. 7753C (hereinafter referred to as the Tender) to the bidder whose bid was declared to be the lowest evaluated, in accordance with the Report of the Technical Evaluation Committee that is **M/S China Jiangxi International (K) Ltd.** The Ex parte Applicant contends that the Respondent in so ordering acted unprocedurally and in contravention of Section 36 and 93(2) of the **Public Procurement and Disposal Act** (hereinafter referred to as the Act), the **Public Procurement and Disposal Regulations** (hereinafter referred to as the Regulations) which allows it to terminate tender proceedings at any time before contract and such a decision is not subject to review by the Public Procurement Review Board (hereinafter referred to as the Board) the Respondent herein. According to the Applicant, the actions of the Board are *ultravires* the Act, unreasonable and against the Wednesbury principles.

4. While reiterating the contents of the Motion, the Statement and the affidavit, the *ex parte* applicant submitted that despite being aware of the provisions of Sections 36 and 93(2)(b) of the Act and the Regulations thereof, the Board without jurisdiction acceded to the Interested Party's application to review the decision of the Applicant to terminate the tender proceedings in respect of the said tender. It submits that the said decision of the Board was irrational, Wednesbury unreasonable and without or in excess of jurisdiction and ought to be quashed. Reliance was placed on the Court of Appeal decision in **Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd (1989) KLR 1**, to the effect that the Respondent should have downed its tools after finding that it had no jurisdiction to review the Applicant's decision made under section 36 of the Act.

5. The Applicant further submits that the Board in finding that although the tender validity period in respect of the tender herein had lapsed, the bidders bid bond were still valid as at the time of filing of the application for review by the Interested Party and therefore the procurement process was still valid went

against the provisions of section 61 of the Act and sections 41(4), (5) and 42 of the Regulations therefore contradicting the principle it laid down in Review No. 8/2012 between **Gilleys Security & Investigation Services Ltd vs. Kenya Power & Lighting Company Ltd.** in which it was stated that once tender validity expires, the tender dies a natural death.

6. It is also submitted that the Applicant has in the past conceded lack of jurisdiction in similar situations where an application was filed one day after the expiry of the time within which it ought to have been lodged. The decision of Review No. 2/2010 between **Zhongman Petroleum & Natural Gas Group Company Ltd** is relied on.

7. The Applicant further submits that the only obligation imposed on the procuring entity under Section 36 is that it should give prompt notice of the decision to terminate tender to each person who had submitted a tender. The procuring entity is also obligated to give the reasons for terminating the tender but only if requested by any of the bidders. The same section also requires the procuring entity to submit a written report to the Public Procurement Oversight of Authority. The Applicant avers that it submitted the report to the Public Procurement Oversight of Authority however the Interested Party did not request for the reasons of its decision.

8. It is also submitted on behalf of the ex parte Applicant that although the decision regarding the termination of the tender was made on 13th December, 2012 it was confirmed and communicated to all the bidders on 19th December, 2012. The slight delay it explains was caused by the changes in the office of the clerk of the National Assembly. The ex parte Applicant therefore contends that the Board failed to address itself properly to the issue of promptness of the notice it issued to the bidders in the circumstances in compliance with Section 36 of the Act. It states that the lapse of time between the date of decision and the date of communication was reasonable and therefore the decision of the Board to declare that the duty to notify the bidders promptly was not complied with and therefore unreasonable should be quashed. It relied on **Stonewall Ins. Co. v. Modern Exploration Inc., 757 S.W.2d 432** which stated that ‘the terms “as soon as practicable”, “prompt” and “immediate” in liability policies generally require only that notice be given within a “reasonable time.”’

9. The ex parte Applicant submits that the Interested Party filed an *Administrative Review No. 71 of 2012 on 18th December, 2012* one day before the notice of the termination could be communicated to it. As such it accuses the Interested Party of irregularly obtaining a leakage of its decision, *an offence under section 44 of the Act* and if the Interested Party benefitted from this leakage, it is clearly unreasonable and contrary to equity that the Interested Party should benefit from this illegality. As such it argues this court to quash the decision of the Board in view of the Interested Party’s “uncleanliness” contrary to the principle of equity ‘one who comes to equity must come with clean hands.’ (**Riggs v. Palmer (1889) 115 N.Y. 506**).

10. In respect to the Wednesbury’s Principle of Unreasonableness, the ex parte Applicant relies on: **Associated Provincial Picture Houses Ltd, v. Wednesbury Corporation [1948] 1 K.B. 223**; the **Republic v the Public Procurement Review Board & the National Social Security Fund, Misc. Civil Application No. JR 134 of 2011**; **Republic v the Public Procurement Review Board & the National Social Security Fund, Misc. Civil Application No. JR 134 of 2011**.

11. The ex parte Applicant further argues that if the orders granted by the Board are executed, it would result in the loss of tax payer money Kshs. 200,000,000/=. It states that this money or even more would definitely be saved if there was a re-tender as the Interested Party’s bid was above the lowest bidder by the said amount. Reliance is placed on **Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374**. The Applicant also relies on **Mary Osundwa vs. Nzoia Sugar Company (Civil Appeal No. 244 of 2000)**; **Republic vs. Permanent Secretary/Secretary to the Cabinet and Head of Public Service Office of the President & 2 Others ex-parte Stanley Kamanga Nganga [2006] eKLR**; and **Republic vs. Judicial Service Commission, Misc. Civil Application No. 1025**.

RESPONDENT’S CASE

12. The Respondent filed a Replying Affidavit sworn on 13th February, 2013 by **Pauline O. Opiyo**, its acting Secretary. **Ms. Opiyo** deposed that a request for Review of Tender No. NA/018/2011-2012 for proposed Multi-Storey Office Block for the Kenya National Assembly was filled by **China Jiangxi International Kenya Limited** the Interested Party herein on 18th December, 2012. Subsequently, the Respondent heard the submission of all the parties to the Review and made a decision on 17th January, 2013. She avers that the Respondent in reaching its decision was guided by the submissions of all the parties to the Review and the law and that it established that the purported termination of the subject tender by the Applicant was done in abuse of Section 36 of the **Public Procurement and Disposal Act, 2005**.

13. She contends that the allegations by the Ex-parte Applicant that the Respondent acted erroneously in deliberating upon a matter for which it had no jurisdiction are misplaced as the Respondent was at the time of making its decision alive to the fact that even though the law allows the ex parte applicant to terminate the tender, such termination is supposed to be based strictly on the law. As such, she further contends that since the Board found that the ex-parte Applicant had not terminated the tender process under Section 36 of the Act, as such the *ex-parte* Applicant could not justifiably invoke Section 93(2)(b) to deny the Board jurisdiction entertain the Review. In this regard **Ms. Opiyo** avers that the Respondent established that the applicant failed to submit a report of the purported termination to the Public Procurement Oversight Authority and did not issue prompt notifications of the purported termination to the bidders who participated in the subject tender knowing that these are very critical steps that the law expect of the ex parte applicant.

14. To **Ms Opiyo**, the *ex parte* applicant's allegations contained in paragraphs f and k (unreasonableness and prompt notice) are pretentious as the respondent while making its determination was convinced beyond reasonable doubt, by perusing all the documents submitted before it, that the evaluation committee of the ex-parte applicant upon discharging its duty legally found the Interested Party to be the lowest evaluated and in fact made a recommendation that it be awarded the tender. However, the ex parte applicant's Tender Committee was dissatisfied by the recommendations of the evaluation committee and decided to act beyond its power to illegally constitute another 3 member evaluation committee to re-evaluate the tenders. As such, she deposed that the application by the ex parte applicant is therefore vexatious, malicious, false and only meant to delay the procurement process and also discredit the otherwise good name of the Respondent before the right thinking members of the public. She urged the court to find the application by the ex parte applicant as lacking in merit and dismiss it with costs.

INTERESTED PARTY'S CASE

15. The Interested Party filed an Affidavit sworn on 25th February, 2013 by **Tan Yong**, its managing director of the. The Interested Party also filed detailed written submissions. The Interested Party contends that the Respondent's decision at the center of contention in this matter was delivered and read to the parties on 14th January 2012 hence the Applicant ought to have moved the court latest by 29th January 2013 in compliance with the provisions of section 100 (1) of the Act. It therefore argues that this court has no jurisdiction to entertain Grounds (a), (b), (g), (i), (j) and (k) of the application.

16. Further, the Interested Party argues that the Applicant is stopped from canvassing Grounds (a), (b), (g) (i) (j) and (k) of the application in view of the fact that it filed a sworn declaration with the Respondent indicating that it had not terminated the Tender. It is also argues that the Interested Party was constrained to lodge a request for Review with the Respondent because: the applicant had failed to notify bidders of the outcome of the Tender within the tender validity period contrary to section 67 (1) of the Act; the applicant had failed to complete the evaluation of tenders within thirty days of the opening of tenders contrary to section 66 (6) of the Act as read with Regulation 46 and the Interested party could not contact the Applicant on the latter's inordinate delay in the communication of the outcome of the tender in view of the provisions of section 38 (1) (a) of the Act.

17. In view of the foregoing, the Interested Party opines that the Applicant is precluded either by law or by equity from canvassing the matters set out in Ground (c) of the Application as it cannot invoke its own

failure to comply with the provisions of the Act relating to tender validity period as a basis for seeking relief from the court. The Interested party further contends that entertaining the Applicant's complaints on tender validity period would vitiate legislative intent as set out in section 2 of the Act and create a very dangerous precedent. In particular it would allow public entities to withhold their decisions until the expiry of the tender validity whenever they wish to avoid awarding a tender to an otherwise successful candidate contrary to the letter and spirit of section 2 of the Act. It is also the Interested Party's contention that the Applicant is stopped from canvassing Grounds (c), (d) (e) and (f) of the application to the extent that by its own pleadings, it continued to evaluate and even considered awarding the Tender even after the alleged expiry of the tender validity period.

18. Regarding the Interested Party's litigation history, it was submitted that the Interested Party was not involved in any litigation when it submitted its bid and thus it had no litigation history to disclose. It argues that the Applicant did not place before the Respondent any pleadings or other evidence to validate its claim that the Interested Party had failed to disclose 'litigation' history but instead, the applicant advanced the spurious argument that administrative review proceedings before the Respondent were 'litigation' notwithstanding the indisputable fact that the Respondent is not a court of law. Relying on the ***Oxford Advanced Learners Dictionary (9th edition)*** definition of 'litigation' as "the process of making or defending a claim in court" and ***Black's Law Dictionary (9th Edition)*** which defines 'litigation' as the process of carrying on a law suit." The Interested party contends the proceedings filed before the Respondent are not 'litigation' and hence the issue of 'litigation' history as raised by the Applicant is misconceived.

19. It was also submitted on behalf of the Interested Party that the Applicant has not demonstrated any illegality, irrationality or procedural impropriety on the part of the Respondent that would warrant the intervention by a judicial review court. The Interested Party also denied having breached the Act by obtaining the tender outcomes before official communication from the applicant and stated that it could not have contacted the Applicant on the outcome of the Tender in view of the express provisions of section 38 (1)(a) of the Act. Reliance was placed on **Kenya Pipeline Company Ltd vs. Hyosung Ebara Company Ltd & 2 Others [2012] eKLR** and **Kenya National Examinations Council vs. Republic ex parte Geoffrey Gathenji Njoroge & Others, Civil Appeal No. 266 of 1996.**

DETERMINATIONS

20. I have considered the Notice of Motion, affidavits, the written submissions and judicial authorities herein and this is the view I form of the matter.

21. The purview of judicial review was clearly set by **Lord Diplock** in the case of **Council for Civil Service Unions vs. Minister for Civil Service [1985] A.C. 374, at 401D** when he stated that:-

"Judicial review has I think developed to a stage today when.....one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'.....By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to itBy 'irrationality' I mean what can now be succinctly referred to as "Wednesbury unreasonableness'.....it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at itI have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision."

22. As was held by Nyarangi JA in **The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited** (supra):

"Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other

evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.

23. Since an issue of this Court’s jurisdiction has been raised with respect to certain prayers sought in the instant Motion. The Court is enjoined to deal with the issue in *limine*. It is contended that the Respondent’s decision at the center of contention in this matter was delivered and read to the parties on 14th January 2013 hence the Applicant ought to have moved the court latest by 29th January 2013 in compliance with the provisions of section 100 (1) of the Act. It is therefore argued that this court has no jurisdiction to entertain Grounds (a), (b), (g), (i), (j) and (k) of the application.

24. Section 100 (1) **Public Procurement and Disposal Act** provides:

A decision made by the Review Board shall, be final and binding on the parties unless judicial review thereof commences within fourteen days from the date of the Review Board’s decision.

25. From the proceedings filed herein, it is clear that there was a decision made by the Respondent arising from a preliminary objection raised by the ex parte applicant herein. That preliminary objection was based on the Respondent’s jurisdiction to entertain the matter which was before it. According to the documents on record herein that objection was disallowed on 14th January 2013 and the Respondent directed the hearing to proceed. The question that arises is whether an objection arising from the said decision ought to have been challenged within fourteen days of the decision as provided under section 100(1) aforesaid.

26. Section 100(1) does not distinguish between a decision made on a preliminary objection and one taken at the conclusion of the hearing. The words employed under the said section are “a decision”. It is not contested that a decision arising from a preliminary objection is “a decision”. Although the provisions of the **Civil Procedure Act** are not imported into the proceedings under the Act, by parity of reasoning under section 68 of the **Civil Procedure Act**, a party who raises a preliminary objection before the Review Board raises the same at the risk that if the objection is not upheld he may thereby be precluded from raising the issue in judicial review proceedings commenced at the conclusion of the trial.

27. It may be argued that the issue being raised is an issue of jurisdiction which may be raised at any stage of the proceedings. That proposition may be true where the matter before the Court is an appeal under section 100(2) of the Act. However, section 9(3) of the **Law Reform Act** Cap 26, Laws of Kenya provides:

In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

28. Therefore for the purposes of judicial review, an enactment may perfectly provide the time within which challenge to a decision of the Review may be taken and if not taken that decision would be final.

29. Therefore for the Court to be asked to revisit the issue of the Respondent’s jurisdiction to entertain the proceedings before it when the challenge thereto was not taken within 14 days from 14th January 2013 when the preliminary objection thereto was raised would amount to disregarding the mandatory provisions of section 100(1) of the Act as read with section 9(3) of the **Law Reform Act**.

30. It is not in doubt that these proceedings were commenced on 30th January 2013 which was outside the 14 days from the 14th January 2013 provided in section 100(1) of the Act. Accordingly, this Court has no jurisdiction to entertain the orders sought herein in so far as they relate to the jurisdiction of the

Respondent to determine the issues which were before it.

31. On the other issues raised the scope of judicial review was dealt with by the Court of Appeal in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** in which the Court held:

“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”

32. In **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See ***Halsbury’s Laws of England 4th Edition Vol (1)(1) Para 60.***

33. In **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300** the Court citing **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** 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.”

34. In this case it is not contended that the applicant was not heard. On the issue of illegality that has been dealt with hereinabove. The issue of reasonableness would arise where it is alleged that the decision arrived at was in defiance of logic and acceptable moral standards. I am not satisfied that any of these grounds exist in the circumstances of this case. Whereas an appellate court after re-evaluation of the evidence before the Board may well arrive at a different decision from that arrived at by the Board, in judicial review proceedings the Court is not concerned with the merits of the decision but only with the process. Accordingly the mere fact that this court would have arrived at a decision different from that of the Respondent if the matter was being heard by this Court is not a reason to interfere.

35. Accordingly, it is my view and I so hold that the ex parte applicant has failed to satisfy me that the Respondent’s decision was tainted with illegality, irrationality or procedural impropriety.

36. Accordingly, it follows that the Notice of Motion dated 31st January 2013 lacks merit and the same is dismissed with costs to the Respondent and the Interested Party.

Dated at Nairobi this 3rd day of June 2013

G V ODUNGA

JUDGE

In the presence of **Mr Mwenda** for the applicant and **Ms Sirai** for the Respondent.