REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC APPLICATION NO. 705 OF 2012

IN THE MATTER OF MINISTRY OF STATE FOR DEFENCE

AND

IN THE MATTER OF PUBLIC PROCUREMENT AND DISPOSAL ACT

AND

TENDER NO. MOSD/423(060)2012/2013

AND

IN ACCORDANCE WITH ORDER 53 OF THE CIVIL PROCEDURE RULES

BETWEEN

REPUBLIC .....APPLICANT

VERSUS

THE PERMANENT SECRETARY

MINISTRY OF STATE FOR DEFENCE.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

AND

PESTLAB CLEANING SERVICES .....INTERESTED PARTY

EX-PARTE: BENKEN HYGIENE SERVICES LIMITED

JUDGEMENT

1. By a Notice of Motion dated 20th December, 2012, the *ex parte* applicant herein, **Benken Hygiene Services Limited,** seeks the following orders:

1. **That this Honourable Court do grant orders of mandamus to compel the 1st Respondents herein to perform their duty under Section 68(1) and (2) of the Public Procurement and**

disposal Act 2005.

2. **That this Honourable court do grant orders of certiorari to quash the Respondents decision to unlawfully extend the interested Party's contract.**
3. **That this Honourable court do grant orders of certiorari to quash the Respondents decision to unlawfully terminate the applicants tender.**
4. **That costs be in the cause.**

EX PARTE APPLICANT'S CASE

2. The same application is based on a Statement filed on 7th December 2012 and what was described as supporting affidavit sworn by **Benson Mbeni Kibetu**, the *ex parte* Applicant's Managing Director on the same day.
3. According to the deponent, through a tender, being TENDER NO. MOSD/423(60)2012-2013, he applied for the tender to supply Sanitac Services to the defence forces and on the 29th day of August, 2012, he received a call from a **Major Githinji** informing him that the Applicant had been awarded the tender and that the letter indicating so ought to be collected ASAP. He avers that he formally accepted the notification of tender results vide a letter dated 29th August, 2012. According to him the said Major Githinji informed him that the previous service provider, the interested party, had already pulled out his bins, hence the applicant was to start supplying and servicing the bins immediately. The deponent requested for the contract before starting provision of the services based on the tender but was informed to proceed with the service and that the 1st Respondent's office would communicate to the applicant the date of signing of the contract. Seeing the urgency in provision of the crucial hygiene bins, he deposes that the Applicant immediately started supplying and servicing the bins at various stations based on orders given by the said stations. Despite having started providing the services based on the tender and **Major Githinji's** advise, the Applicant was never invited to formally sign a contract. Several calls were made but almost three months later, there was no communication regarding the contract from the 1st Respondent necessitating the writing of a letter to that effect which letter however elicited no response. Instead the deponent was furnished with a copy of a letter addressed to the interested party, dated 15th November, 2012 purportedly extending a contract that expired before he was awarded the tender. It is the deponent's case that the applicant has never been served with a letter formally terminating the tender, rather when the Applicant's officials go to service bins, they are turned away on the basis that the tender was cancelled and that the interested party is now the service provider. Despite alerting the 1st Respondent of the turn of events no action has been taken as the letter written to them has remained unanswered.
4. According to the applicant's Advocates on record, under Section 68(1) of the ***Public Procurement and Disposal Act 2005***, (hereinafter referred to as the Act) the procuring entity shall enter into a written contract based on the tender documents. However, it is deposed that the Applicant has been providing services for three months and the 1st Respondent has failed, refused and/or neglected to ensure that a contract is signed as envisioned in the Act. According to legal advice received from the applicant's advocates on record in inserting this clause, parliament hoped to heal the mischief that the applicant is now suffering, thereby protecting successful tenders, such as the Applicant's from being abused.
5. It is applicant's case that the 1st Respondent ought to be compelled to perform his duty of ensuring that the contract has been signed as between the Ministry of State for Defence and the Applicant, to avoid any mischief hence the 1st Respondent ought to be compelled to cause an investigation to be done to ascertain under what circumstances the interested party's expired tender was unlawfully renewed/extended.

INTERESTED PARTY'S CASE

6. In opposition to the application the interested party filed a replying affidavit sworn by **Hannington Mbai Mbithi**, its Managing Director on 18th December 2012.
7. According to the deponent, this matter concerns the Applicant and the 1st Respondent hence it is not clear why the Interested Party has been dragged into the same. It is deposed that the interested party had been having a running Sanitac contract with the Ministry of State for Defence which

was due to expire. Thereafter the 1st Respondent invited fresh tenders and the Interested Party was not a successful bidder and the tender was awarded to the Applicant. In October 2012 the 1st Respondent informed the deponent that it had been discovered that the Applicant has no capacity to service the tender and it had therefore declined to enter into a contract with the Applicant. The deponent was informed that the tendering process had to commence afresh in compliance with the law but since the service had to continue on emergency basis until the tendering process is completed the Interested Party was requested to step in to fill the gap a request which the deponent on behalf of the Interested Party agreed to and on that basis on 15th November 2012 the contract was extended for a year on temporary basis purely to enable the procurement process to recommence lawfully. According to the deponent, this is a contract extension and it was not the subject of the tender complained of by the Applicant hence the Applicant should pursue its alleged tender with the 1st Respondent without involving the Interested Party in the said dispute. To the deponent, the Applicant's affidavit does not disclose or allege any wrongdoing breach or other illegality on the part of the Interested Party and based on advice received from legal counsel, the applicant's proceedings herein are premature and misconceived as it lacks *locus standi* because it has no valid contract with the Respondents. It is further deposed that the applicant having extracted an order which was never granted, it has engaged in disgraceful conduct and flagrant abuse of the court process hence the court has the discretion to vacate the orders, to dismiss the entire proceedings and to punish the Applicant and his Advocates for contempt of court. It is deposed that the Interested Party is suffering by the stoppage of its contract when there are no proper proceedings on record against itself and because of the applicant's illegal activities of tampering with court orders.

8. There was another replying affidavit sworn by the same person on 29th February 2013 in which apart from reiterating the contents of the earlier affidavit it was deposed that the applicant's proceedings are improperly before this court as this is a dispute which ought to have been instituted before the Public Procurement Administrative Review Board and that having not exhausted this avenue the Applicant's application is misconceived and an abuse of court process.

1ST RESPONDENT'S CASE

9. In opposing the application the 1st respondent filed an affidavit sworn by **Amb. Nancy Kirui**, Permanent Secretary in the Ministry of State for Defence on 11th March 2013.
10. According to the deponent, the Applicant was a tender (sic) at the Ministry's open tender MOSD/423(060) 12/13 for provision of Sanitac services and in the course of evaluation and adjudication of the tender the Applicant's capacity to perform the contract was in doubt even though it was the lowest tenderer. However, the Ministry's Tender Committee notwithstanding its reservations awarded the tender to the Applicant. However, subsequent to the award of the tender and before finalization of the contract, it became apparent that the Applicant lacked the capacity to supply the services and had subcontracted M/s Pest Lab Cleaning services, the interested party. According to the deponent, the contract was awarded to the Applicant at a Maximum price of Kshs 350 per bin while the Applicant had sub contracted the same services at a maximum of Kshs 400 per bin hence it was apparent that there was a likelihood of corruption of the key service by the Applicant. It is deposed that the Applicant's tender was terminated in accordance with section 36(1) of the Act and that the Applicant and the Director General of the Public Procurement Oversight authority were duly informed. It is deposed that the interested parties' contract was extended to permit the provisions of the services pending the conclusion of a new tendering process.
11. According to the deponent, the termination of the Applicant's award was done strictly in accordance with the provisions of the Act and based on legal advice the Applicant is challenging the Ministry's decision to terminate the tender award on subcontract whereas judicial review considers the procedure of making the decision hence the application ought to be dismissed with costs.

APPLICANT'S FURTHER AFFIDAVIT

12. The applicant on 18th March 2013 filed a further affidavit sworn by the said **Benson Mbeni Kibetu** in which he deposed that based on legal advice the sole criteria prior to being awarded a tender is not being the lowest tenderer, but that section 52(1) of the Public Procurement and Disposal Regulations (sic) states that prior to awarding a tender, a procuring entity has to confirm the qualifications of the tenderer who submitted the lowest evaluated responsive tender to determine whether the tenderer is qualified to be awarded the contract in accordance with Section 31(1) of the Act which provides for the criteria to be satisfied for a person to qualify to be awarded a tender, which includes; Qualification, capability, experience, resources, equipment and facilities to provide hat is being procured.
13. It is deposed that after the tender evaluation process, one **Major Otieno** and other officers attached to the procurement committee visited the applicant's premises to inspect and confirm that the Applicant was in a position to service the tender and to further confirm that the Applicant was not a brief case Supplier and that after their inspection of the applicant's premises and confirming that the Applicant had the necessary permits, VAT, PIN certificate and enough vehicles, the deponent was informed by **Major Omondi's** team that their report would be given to the tender committee who would in turn get back to the Applicant. Subsequently, on the 29th day of August, 2012, the deponent received a call from a **Major Githinji**, informing me that the applicant had been awarded the tender and that services were required to commence from the 28th day of August, 2012. When major Omondi inspected the applicants premises and subsequently the applicant was awarded the Tender, it is deposed that it is clear proof that the Applicant, in the absence of any other evidence, was capable of servicing the tender as provide under the Act, the only criteria not being the lowest tender and that in view of the above, the allegations made by the Respondents that the Applicant was reluctantly awarded the tender or that the Applicant corrupted the Respondents' officials is untrue, as a rigorous process is followed prior to awarding a tender. To him, the 1st Respondent alluded to corruption but has not only not proven the allegation, but she has also not informed the court what action was taken as against the corrupt officers. It is his position that the applicant has its own bins and the interested party has on previous occasion hired the bins from the Applicant, which is general practice in any business where equipment can be outsourced from other business to render better service to clients. It is deposed that never at one time did the Applicant subcontract the interested party, rather all the Applicant did was hire Bins which were later returned to the interested part, as is evidence by letters and receipts from the interested party which clearly state lease of sanitary bins. It is deposed that the Applicant's main business is providing hygiene services, and other than the 1st Respondent, the Applicant has other clients. To serve its clients better, the Applicant ordered, in the month of June 2012, for more Bins from Malaysia to serve its clients better hence the 1st Respondent's decision to terminate the Applicants tender is contrary to the Rules of natural justice as the 1st Respondent condemned the Applicant unheard on flimsy grounds. Had the 1st Respondent taken the time to give the Applicant a fair hearing, it is deposed she would have found out that all the allegations and misgivings leading to the termination of the Applicants' tender were unfounded. It is the applicant's position that the Respondents have attempted to claim that the Applicant was served with the letter marked as Annexture NK3, which the Applicant denies having been served with, even if had been served to the Applicant, the decision had already been made without the Applicant being heard.

APPLICANT'S SUBMISSIONS

14. On behalf of the applicant, it was submitted that section 31 of the Act lays down qualifications required to be awarded a contract and that by awarding the applicant the contract, it means that the qualifications were met hence the interested party cannot allege that the 1st respondent suddenly realized, three months into being provided with sanitary services by the applicant without any complaints being raised, that the applicant had no capacity to service the tender awarded to it. In accepting the applicant's services it is submitted that the 1st respondent had entered into an implied contract with the applicant, based on the tender documents and as such are under an obligation to not only pay for the benefits received but also to apply the provisions of section IV paragraph 4.2(3) of the tender documents before terminating the tender. Further, section 68(1) of

the Act provides that the procuring entity shall enter into a written contract based on the tender documents and the applicants having provided services for three months and the respondent having failed, refused and/or neglected to ensure the contract is signed as envisioned in the Act, this clause was meant to heal the mischief that the applicant is now suffering thereby protecting successful tenders such as the applicant's from being abused.

15. It is submitted that the interested party's contract having expired and the applicant having been awarded the new tender, an expired tender could not be extended save for entry into a new tender and the only way in which the respondent could enter into a contract with the interested party was by notifying the applicant of the breach and in cases where the interested party's submission could have been successful
16. It is further submitted that the action of the respondent was in breach of the rules of natural justice since the dissatisfaction of the respondent was not raised with the applicant and no reasons were given to the applicant. The applicant's case is that the principles of natural justice demand that a decision maker must give an opportunity to a person whose interests may be adversely affected by their decision the opportunity to be heard hence the applicant ought to have been provided with as much details as possible about the allegations against it and the factual basis for those allegations and be afforded an opportunity to respond.
17. It is further submitted that despite a court order issued herein staying the 1st respondent's decision to unlawfully extend the interested party's contract and to terminate the applicant's tender, the interested party and the 1st respondent have ignored and continue to ignore the said court order to the applicant's detriment and based on **Hadkinson vs. Hadkinson [1952] PD 285 [9720]**, the interested party and the 1st respondent ought not to be given audience by the court unless the contempt is purged. In the premises the applicant prays that the orders sought herein should be granted.

RESPONDENTS' SUBMISSIONS

18. On behalf of the respondents it was submitted that by subcontracting the tender contrary to the terms of the contract, it was apparent that there was likelihood of corruption of the key service by the applicant. According to the respondents they were entitled to terminate the tender in accordance with the provisions of section 36(1) of the Act at any time without entering into a contract and that it would not be liable to any person for a termination under the section hence the termination was done strictly in accordance with the provisions of the Act. It is further submitted that under section 68(3) of the Act no contract is formed between the person submitting the successful tender and the procuring entity until the written contract is entered into. It is therefore submitted that the 1st respondent was well within its rights and jurisdiction as spelt out in the statute and the instructions given to the tenderers to refuse to enter into a contract with the applicant
19. On the issue of contempt it is submitted that that is not the issue before the court as no leave has been given to file an application for contempt and no contempt has been proved and reliance is placed on **Republic vs. County Council of Nakuru ex parte Edward Alera t/a Genesis Reliable Equipment & 3 Others [2011] eKLR**.

INTERESTED PARTY'S SUBMISSIONS

20. On behalf of the interested party it is submitted that the extension of the interested party's contract was a temporary contract extension by the 1st respondent to the interested party and was not subject of the tender complained of by the applicant. It is therefore submitted that the applicant's application is misconceived and an abuse of the court ptocess because the applicant's application and supporting affidavit does not disclose or allege any wrongdoing, breach or other illegality on the part of the interested party; the applicant's application lacks locus standi because the applicant has no valid contract with the 1st respondent; and that in the absence of a valid contract and given that the applicant had already won the tender this is a matter which ought to have been instituted before the Public Procurement Administrative Review Board.
21. It is further submitted that the orders sought cannot issue and the applicant ought to sue for breach

of contract since judicial review is concerned with the process upon which a decision is reached yet the applicant is not complaining about the process which was in fact in his favour but a subsequent breakdown of relationship with the 1st respondent. Since breach of contract is addressed by an award of damages, and specific performance, it is submitted that it cannot be a basis for judicial review hence the application is incompetent, bad in law, misconceived and a blatant abuse of the court process.

DETERMINATIONS

22. Having considered the application, the affidavits both in support of and in opposition to the application and the submissions of the parties, this is the view I form of the matter.
23. The scope of the judicial review remedies of *Certiorari*, *Mandamus* and Prohibition was the subject of the Court of Appeal decision in **Kenya National Examinations Council vs. Republic *Ex parte* Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996** in which the said Court held *inter alia* as follows:

"Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision…Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings…The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way… These principles mean that an order of *mandamus* compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done…Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter."

24. However judicial review proceedings do not deal with the merits of the decision but by the

decision making process. In **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** the Court of Appeal 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."

25. 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.***
26. It must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. *See* R vs. Secretary of State for Education and Science *ex parte* Avon County Council (1991) 1 All ER 282, at P. 285.
27. The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court. See Chief Constable of the North Wales Police vs. Evans (1982) I WLR 1155.
28. It is correct that Article 47 of the Constitution provides:
29. Article 47 of the same Constitution which provides:

> ***(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.***
>
> ***(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.***

30. Therefore where an administrative authority takes an action which is unlawful, unreasonable and procedurally unfair the court would be entitled to invoke its supervisory jurisdiction under Article 165(6) of the Constitution and grant appropriate remedies.
31. In this case, however, the complaint is that the 1st respondent has declined to enter into a written contract with the applicant despite the applicant having won a tender advertised by the 1st respondent and having commenced the provision of services the subject of the tender. Section 36(1) of the Act, however, entitles a procuring entity to terminate a tender at any time before entering into a contract. How then is a contract under the Act to be entered into? Section 68(3) of the Act expressly requires that a contract the subject of the Act be in writing. It is not claimed that the alleged contract between the 1st respondent and the applicant was in writing. In fact what is sought by this application is inter alia an order compelling the 1st respondent to perform its duty under section 68(1) and (2) of the Act and enter into the said contract.
32. It must be emphasized, however that the purpose of an order of mandamus is to remedy the defects of justice and will issue where there is a specific legal right or no specific legal remedy for

enforcing that right. It does not issue to compel an exercise of discretion nor does it issue to compel the exercise of a duty in a specific way where a statute imposes a duty but leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid. In this case, the law does not impose a duty on a procuring entity to enter into a contract. To the contract the decision whether or not the entity ought to enter into a contract is left to the entity as it has a discretion to terminate the tender at any time before entering into the contract. Whereas section 36(2) enjoins the procuring entity to give notice of termination of a tender, it is my view that the failure to give notification may give rise to an action for mandamus to compel the entity to comply with the section but does not give rise to an action compelling the entity to enter into a contract as that would amount to compelling the entity to act in a particular way.

33. Although the applicant relies on section 68(1) of the Act to support its case for the remedy sought, that section in my view does not enjoin an entity to enter into a contract. The section in my view only provides that the contract must be entered into based on the tender documents, the successful tender, any clarifications under section 62 and any corrections under section 63. It is instructive that subsection (3) of the same section emphasizes that no contract is formed between the person submitting the successful tender and the procuring entity until the written contract is entered into.

34. It is therefore clear that the applicant's case is not based on the process followed in the award of the tender but on the failure by the 1st respondent to enter into a written contract. If as the applicant alleges it has commenced the provision of services to the 1st respondent before entry into a written contract, that in my view would give rise to breach of a contract and not a breach of the provisions of the Act in which event the applicant would if successful be entitled to remedies relating to breach of contract rather than to judicial review remedies. If the applicant were to succeed in showing that it was lulled into a false sense of security by the 1st respondent and based on the same it did supply the services the doctrine of estoppel would apply to bar the 1st respondent from resiling from meeting its obligation under the contract. Similarly the equitable doctrine of unjust enrichment could be invoked. However, that would not be a ground for seeking judicial review remedies. In **Zakhem Construction (Kenya) Limited vs. Permanent Secretary, Ministry of Roads & Public Works & Another Civil Appeal No. 244 of 2006**, the Court of Appeal held:

"By their contract the parties had made all the provisions they thought sufficiently covered the interest of each of them and if the appellant thought the respondent was in breach of the contract by issuing the notice of intention to terminate, the Appellant's remedy lay in private law where the appellant could be awarded damages if it proved that the contract was unlawfully terminated and not in the process of judicial review……If parties to a contract want to have the process of judicial review applicable to their contract there is nothing to stop them from expressly providing in the written contract."

35. If on the other hand it is contended that the 1st respondent's action did not fall under section 36 in that the said action was not a termination of the tendering proceedings but merely a failure to enter into a contract in respect of a successful tender, then the applicant had remedy under section 93(1) of the Act and unless the applicant shows that the remedy thereunder is less convenient, beneficial and effectual mandamus being a discretionary remedy would not go.

36. On the issue of contempt the law as I understand it is that it is not that a party who is alleged to have disobeyed an order of the court must not be heard. The decision whether or not the party should be heard is an exercise of discretion on the part of the Court. In the celebrated case of **Hadkinson vs. Hadkinson** (supra) the Court stated that the fact that a party to a cause has disobeyed an order of the Court is not of itself a bar to his being heard but if his disobedience is such that, so long as it continues, it impedes the cause of justice, in the cause by making it more difficult for the Court to ascertain the truth or to enforce the orders which it might make, then the Court might in his discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed. See also **Mawani vs. Mawani [1977] KLR 159; [1976-80] 1 KLR 607.**

37. The Court of Appeal in **Rose Detho vs. Ratilal Automobiles & 6 Others Civil Application No. Nai. 304 of 2006** was of the view that:

"The general rule that a party in contempt could not be heard or take part in the proceedings in the same case until he has purged his contempt applies to proceedings voluntarily instituted by himself in which he has made some claim and not a case where all he seeks is to be heard in respect of some matter of defence or where he has appealed against an order which he alleges to be illegal having been made without jurisdiction...The Court has a discretion whether to hear a contemnor who has not purged his contempt and in deciding whether to bar a litigant, the court should adopt a flexible approach...Thus there is no absolute legal bar to hear a contemnor who has not purged the contempt to be heard and whether the court will hear the contemnor is a matter for the discretion of the court dependent on the circumstances of each case. The question which arises in this case is whether it would be a proper exercise of the court's discretion to decline to hear the applicant on the application for stay of orders of the superior court pending appeal. Firstly, the order of stay of execution sought in the application the subject matter of the preliminary objection is a discretionary order and therefore what the applicant seeks is the exercise of judicial discretion. A preliminary objection cannot be raised where, among other things, if what is sought is the exercise of judicial discretion. Secondly, the applicant intends to appeal against the orders of the superior court granting both leave to apply for judicial review and stay and has filed the application for stay of execution of the orders pending appeal. The applicant intends to challenge the jurisdiction of the superior court to grant both leave and stay on the grounds which ex facie cannot be said to be frivolous in that the applicant intends challenge by way of appeal to the Court of Appeal the very foundation and the legality of the orders she was found to have disobeyed. Thirdly, the applicant, in addition, intends to appeal against the order of the superior court finding her guilty of contempt on the grounds of both facts and law and she denies that she, as a matter of fact disobeyed the court orders".

38. In this case I do not have sufficient material upon which I can find that the respondents ought not to granted audience.

ORDER

39. In the premises I find no merit in the Motion dated 20th December 2012 which I hereby dismiss. However, in light of the conduct of the 1st respondent in extending the contract with the interested party which contract had expired instead of commencing fresh tender proceedings there will be no order as to costs.

Dated at Nairobi this 5th day of July 2013

G V ODUNGA

JUDGE

Delivered in the presence of Ms Chege for Ms Kenyani for the Respondent