IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: OUKO (P), GATEMBU & KANTAI, JJA)

CIVIL APPEAL NO. 35 OF 2018

EDERMAN PROPERTY LIMITED ....APPELLANT

AND

LORDSHIP AFRICA LIMITED ....1ST RESPONDENT

PUBLIC PROCUREMENT ADMINISTRATIVE

REVIEW BOARD .... 2ND RESPONDENT

NAIROBI CITY COUNTY.......................................3RD RESPONDENT

(Being an Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (R.E. Aburili) delivered on 2nd February, 2018

In The High Court of Kenya (Judicial Review) Misc.Application No. 589 OF 2017)

****

JUDGMENT OF THE COURT

The 3rd respondent, **Nairobi City County** advertised tender No. **NCC/UR & H/T/514/2016-2017** which was a Request For Proposal For The Urban Renewal and Re-development, Phase 2–Ngong Road Estate through Joint Venture Partnership. There were various requirements in the tender documents and interested bidders were asked to obtain tender documents from the 3rd respondent's offices or download them from its website. Bids for the tender were to be submitted on or before **16th March, 2017** which period was extended to **21st April, 2017**. Various tender bids were made and opening of the same took place on **21stApril, 2017** at noon as required by the documents and this was in the presence of bidders or their representatives. According to the 1st respondent, Lordship Africa Limited, the 2nd respondent, Public Procurement & Administrative Review Board and the 3rd respondent breached various requirements of the tender and this is what led to proceedings being taken before the 2nd respondent and later to the litigation that was taken at the High Court.

The 1st respondent being aggrieved by a decision not to award it the tender filed at the Public Procurement & Administration Review Board Application **No. 78 of 2017** against the appellant and the 3rd respondent herein. In the request for review it was prayed that a decision taken by the 3rd respondent on **2nd day of August, 2017** be reviewed in whole on the grounds that the 3rd respondent had published the tender we have referred to; that interested bidders were directed to Request for Proposal documents from the 3rd respondent's office and to submit completed documents on or before **16th March, 2017** which deadline was extended to **21st April, 2017;** that the 1st respondent was a leading international real estate development and investment company in Kenya which had placed a bid in partnership with another foreign company; that the 1st respondent as required had provided a technical bid, a financial bid and a bid security of Kshs ten million (10,000,000/=) in full compliance with the tender bid; that opening of the tenders took place at noon on **21stApril, 2017;** that as required by the Request for Proposal documents, the 3rdrespondent was to undertake an evaluation of the bids and determine responses of the proposals which was to be done within a maximum of 21 days. It was further stated that upon submitting and opening its bid on **10th March, 2017,** the 1st respondent had not received any further communication from the 3rd respondent either within the bid validity period or at all but that sometime in July, 2017, the 1st respondent had become aware that the tender had been awarded to the appellant and that a provisional contract had been signed. Further, that by a letter of **28th July, 2017**, the 1st respondent had through its advocates written to the 3rd respondent seeking clarification whether the said tender had been awarded, the dates of notification of the award and signing of provisional contract, reasons why the 1st respondent as well as other bidders were not simultaneously notified that their tenders were not successful and the reasons why they were not successful; that a summary be availed of the proceedings of opening the tenders, evaluation and composition

of the tenders, proposal or quotations as required in law. The 3rd respondent was to confirm whether a contract had been concluded. It was further stated in the request for review that the 1st respondent's advocates had not received any correspondence from the 3rd respondent, save for a letter dated **2nd August 2017** which the 1st respondent received on **15th August, 2017** after receipt of notification by the post office dated **14th August, 2017** and that this is when the 1st respondent had been informed that its bid was unsuccessful where it was stated:

> ***"At preliminary stage, your bid did not meet completeness and responsive criteria".***

It was further stated that the advocates wrote another letter on **24th August 2017** to the 3rd respondent seeking a response to the earlier letter of **28th July, 2017** that had received no response. It was stated at paragraph 11 of the request for review that:

> ***"Failure to inform the applicant that its bid was unsuccessful simultaneously with other bidders constitutes a blatant disregard and breach of the RFP and the Act.*** In particular Section 126 (4) of the Act provides:

> ***"(4) When a person submitting the successful bid shall be notified, the accounting officer of the procuring entity shall at the same time notify in writing all other persons who had*** **submitted** ***bids that their bids were not successful and give reasons thereof."***

It was the case of the 1st respondent before the 2nd respondent that the 3rd respondent had as early as July 2017 completed the evaluation of all bids and had notified the appellant that it had been successful but the 1st respondent and other bidders had not received that notification; that the 1st respondent in its letters to the 3rd respondent raised concerns as to why the notice dated **2nd August 2017** had been sent via registered post yet the 1st respondent had supplied an email address. According to the 1st respondent, the mode of communication chosen by the 3rd respondent could only have been for the sole purpose of locking out the 1st respondent from pursuing remedies under Section 167 of the Public Procurement and Asset Disposal Act 2015 (the Act). It was therefore stated that the 3rd respondent had disregarded the law and had committed an offence prescribed in the said Act. It was further stated that by offering a contract to the appellant and by failing to notify the 1st respondent was an act contrary to Section 87(3) of the said Act which provides:

> ***"(3) When a person submitting the successful tender is notified under Subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.***

It was also contended that there was no notification of intention to contract with the appellant and that the 3rd respondent did not publicise the same on its website or public notice board as required by Section 126 (5) of the Act; stated that the 3rd respondent's stated breaches of the law were contrary to the guiding principles set out in the Act, the national values and principles and Article 10 of the Constitution of Kenya, 2010 and that the 3rd respondent was enjoined to be guided by principles of good governance, integrity, transparency and accountability as provided in Article 227 of the said Constitution.

The 1st respondent was therefore aggrieved by the decision of the 3rd respondent and requested the 2nd respondent to annul the decision of the 3rd respondent made on **2nd August 2017** and that the tender be awarded to the 1st respondent or in the alternative, that the procurement proceedings be annulled in their entirety and that the 3rd respondent be ordered to start new procurement process.

The Request for Review was supported by an affidavit of **Jonathan Jackson**, a director of the 1st respondent where the matters we have summarized in this judgment were deponed to and there were various annextures.

There was a replying affidavit sworn at Nairobi on **28th August, 2017** by **Patrick Mwangangi,** the Head of Supply Chain Management Services of the 3rd respondent. Issues relating to the tender and bids received were stated including opening of the same and it was further deponed that at the preliminary stage, the 1st respodnent's bid had not met the completeness and responsive criteria as required. And that for that reason by a letter dated **3rd August, 2017** the 3rd respondent had informed the 1st respondent through a notification of regret. It was also deponed that the 1st respondent had failed to meet the requirements as related to the form, standard and the requirement of the bid security and a clause of "***no alternative offers"***. Further, that during technical evaluation, the 1st respondent's bid security was found to be for a period less than the stipulated period; that the 1st respondent had attached an alternative offer which was not permitted and that the 1st respondent had indicated a mark-up fee which attached a condition contrary to what was required.

The 2nd respondent sat to consider the request for review and in a decision made on **11th November, 2017**, the request for review was struck out and it was ordered that the 3rd respondent was at liberty to proceed with the procurement process.

The 2nd respondent considered all the material before it and the submissions made on behalf of various parties and framed some issues for determination. The 1st issue was whether the 2nd respondent had jurisdiction to hear and determine the application for review; secondly, whether the 2nd respondent was precluded from hearing and determining the request for review; whether the evaluation of the subject tender was carried out within the prescribed evaluation period of 21 days in accordance with Section 126(3) of the Act; whether the evaluation and the award of the tender was done within the tender validity period; whether the 1st respondent was unfairly disqualified at the preliminary evaluation stage; whether the 1st respondent was notified of the outcome of its tender pursuant to the provisions of Section 126 (4) of the said Act; and lastly, who was to pay costs of the review.

On the issue of jurisdiction the 2nd respondent found that the 1st respondent had knowledge of the decision of the 3rd respondent and having not appealed within 14 days, the 2nd respondent had no jurisdiction in the matter. On whether the 2nd respondent had a mandate to review, the 2nd respondent found that it had no such mandate because a contract had already been entered. Having found that it had no jurisdiction, the 2nd respondent did not find it necessary to dwell on the other matters and as we have stated, the request for review was struck out.

After being granted leave to commence judicial review proceedings the 1st respondent by Notice of Motion in High Court Miscellaneous Application No. 589 of 2017 brought under various provisions of law prayed for an order of certiorari to remove into the High Court and quash the decision of the 2nd respondent dated **11th November, 2017;** an order of certiorari to remove into the High Court and quash the decision of the 3rd respondent dated **2ndAugust 2017** to award tender No. **NCC/UR &H/T/514/2016-2017** for Request Proposal For The Urban Renewal and Redevelopment, Phase 2 – Ngong Road Estate through Joint Venture Partnerships to the appellant; that the High Court to issue an order of certiorari to remove into that Court to quash the entire proceedings with respect to that tender; that the High Court be pleased to issue an order of mandamus to compel the 3rd respondent to commence afresh a procurement process of that procurement tender and that costs be provided for.

The history of the matter was restated in the documents in support of the motion.

The motion was resisted by the appellant, the 2nd and 3rd respondents. **Mr. Henock K. Kilungu** in a replying affidavit being the Secretary of the 2nd respondent also repeated the history of the matter stating in addition that the request for review filed by the 1st respondent at the 2nd respondent had been filed out of time; that a contract had already been entered into between the appellant and the 3rd respondent that and the 2nd respondent had therefore no mandate to entertain the review proceedings and that the motion should be dismissed.

Mr. Patrick Mwangangi, Head Supply Chain Management Services of the 3rd respondent also restated the history of the case in a replying affidavit stating further that the 1st respondent had breached various clauses of the tender.

The motion was heard by **Aburili, J,** who after consideration delivered a rather detailed judgment running into 87 pages and the motion was allowed. The Judge issued orders of certiorari removing into that court and quashing the decision of the 2nd respondent dated **11th November, 2017.** The Judge invoked Article 165 (6) and (7) of the Constitution and called into her court the entire procurement process which she found to have been irregularly conducted by the 3rd respondent and issued orders of certiorari removing into that court and quashing the proceedings leading to the decision of the 3rd respondent dated **2nd August, 2017** to award the said tender to the appellant. The Judge directed that the 3rd respondent do commence a fresh procurement process with regard to the said tender and to undertake a procurement process in accordance with the established law and procedure having too quashedthe decision of the 2nd respondent. The Judge invoked Section 175 (7) of the Act and ordered each party to bear their own costs of the judicial review proceedings.

It is those orders that provoked this appeal which is premised on the Memorandum of Appeal drawn by the appellant's advocates **M/s Mucheru-Oyatta** & **Associates** where thirty-one (31) grounds of appeal are set out. The grounds range from an attack on the decision of the Judge who is said to have exceeded jurisdiction by considering merits of the procurement process which should not be done in judicial review proceedings. It is said that the Judge erred in failing to distinguish between judicial review proceedings and what may be taken in a constitutional petition; that the Judge did not accord the appellant a fair hearing on the merits; it is also said that the Judge erred in law in failing to adhere to strict timelines of hearing and determining proceedings within a period of forty-five (45) days (an application by the 3rd respondent to strike out the proceedings on this ground was withdrawn at the hearing on **15th January, 2019**). It is said that the Judge erred in law in failing to consider whether the decision quashed was grossly unreasonable or tainted with illegality, irrationality and procedural impropriety; that the Judge erred in law in finding that the 1st respondent was denied a chance to challenge the award by not being served with the notification of regret in the same manner as the appellant; that the Judge erred in law in failing to consider that the orders sought by the 1st respondent could cause public inconvenience by delaying the 1st respondent's duty to supply low-income housing; there is a challenge on the finding on when a letter sent by registered post is deemed to be received, and the Judge is faulted on the finding on when request for review should have been filed; for failing to consider that the contract could not be executed after the expiry of the tender validity period and for promoting the private interests of the 1st respondent over the interests of the public. It is therefore prayed that we allow the appeal and the 1st respondent's Notice of Motion in the High Court be dismissed with costs.

When the appeal came up for hearing before us on **15th January, 2019**,**Miss Njeri Mucheru**, learned counsel appeared for the appellant, **Mr. W.A. Amoko,** learned counsel, appeared for the 1strespondent and learned counsel **Mr. Olitoro** appeared for the 3rd respondent. The Attorney General had been served with a hearing notice on behalf of the 2nd respondent but did not appear at the hearing.

On behalf of the appellant, **Miss Njeri Mucheru** relied entirely on written submissions filed on **11th of May, 2018** and did not wish to highlight the same. It is said that the Judge made findings on the merits of the decision of the 2nd respondent which it is said the Judge could not do in judicial review proceedings, it being stated that the Judge exceeded jurisdiction.After tracing the ambit of judicial review, the appellant quotes a passage from Professor **William Wade** and **Christopher Forsyth** in Administrative Law, 5th Edition at page 362 where the learned authors state:

> ***"The doctrine that powers must be exercised reasonably has to be reconciled with a 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 utra 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 leads to the deciding authority the full range of choices which the legislature is presumed to have intended."***

It is submitted further for the appellant that to justify interference in the decision of a public body the court must be satisfied that the decision is so grossly unreasonable, so outrageous in defiance of logic or acceptable moral standards that no reasonable authority or body addressing itself to the facts and the law would have arrived at.

On the grounds of appeal relating to limitation, the 2nd respondent had found that the request for review had been filed out of time as the notification that its award was unsuccessful was conveyed to the 1st respondent on **4thAugust 2017** and the request for review was filed on **28 August 2017** outside the fourteen (14) days prescribed period.The appellant submits that the 1st respondent did not produce before the High Court evidence from the Postal Corporation confirming the date on which the notification was delivered to its postal box. It is submitted that the High Court failed to consider that the 1st respondent was not diligent and that the Judge erred in believing the evidence tendered by the 1st respondent on when it received the notification by the 3rd respondent. It is also submitted for the appellant that the 1st respondent had admitted that it knew of breaches of the procurement process at least by **28thJuly 2017** but did not apply for review.

On the final set of grounds of appeal, the appellant submits that a contract was signed on **17th August 2017** between the appellant and the 3rd respondent and that by the time the 1st respondent filed the request for review, it was out of time. It is submitted that the learned Judge was wrong in holding that the contract was invalid for lack of clearance by the Attorney General, the appellant submitting that the relevant project being financed from outside public funds, the Attorney General's clearance was not necessary. The appellant submits that the clearance by the Attorney General could be sought and obtained after signing of the contract.

Mr. Olitoro for the 3rd respondent supported the appeal and also argued the cross-appeal dated **9th March, 2018.** In support of the appeal, it is stated in the cross-appeal that the Judge misdirected herself on the evidence and the relevant law on the matters before her and consequently made a wrong decision; that the Judge was wrong not to find that the tender process, the award to the appellant and the consequent contract was fair, transparent, equitable, competitive and cost effective as required by law; that the Judge erred in not finding that the 1st respondent had failed to meet mandatory provisions of the tender document; that the Judge erred in law and fact by not finding that the 1st respondent was notified of its failed bid within time; that the Judge erred in law and fact in findings as regarded a letter by the Attorney-General; that the Judge erred in the findings on the jurisdiction of the 2nd respondent after signing of a contract and also erred in finding the contract illegal; and there are other related complaints. It is prayed that the appeal be allowed, judgment of the High Court be set aside and be substituted by an order that the 1st respondent's motion in the High Court be dismissed with costs.

Counsel for the 3rd respondent had filed written submissions on **11th June, 2018** and in highlight of the same it was his view that the High Court erred in sitting as an appellate court. Counsel submitted that the High Court exceeded its jurisdiction in entertaining judicial review proceedings. According to counsel, the Judge had gone into the merits of the decision instead of dealing with the process undertaken by the 2nd respondent. According to counsel the request for review was filed out of time contrary to the provisions of the Act which requires an appeal or request for review to be filed within fourteen (14) days. Counsel concluded his submissions by stating that the High Court erred in relying on a privileged document by the Attorney General which was marked "without prejudice".

Mr. Amoko for the 1st respondent had filed written submissions on **11th January, 2019** and a List of Summary of the Authorities which he entirely relied on. In a highlight before us, it was counsel's view that the High Court had rightly reviewed a decision of the 2nd respondent. According to counsel, the High Court intervened because decisions of an inferior tribunal were illegal and there was an error of law. Counsel further submitted that it was within the mandate of the High Court to examine whether the actions of the 2nd respondent were within the law. Counsel further submitted that the Fair Administrative Action Act, 2015 has changed the purview of judicial review where grounds for review have been expanded where the High Court is now allowed to include a merit review in considerations of decisions of inferior tribunals. In that regard **Mr. Amoko** submitted that the High Court was entitled to ask and answer the question whether the contract signed between the appellant and the 3rd respondent was entered according to law. According to counsel on the issue of time for purposes of request for review, time could only run from the time a tenderer was notified of the decision of the procuring entity. Counsel supported the decision of the Judge that notification to the 1st respondent by the 3rd respondent or failure of it could only run from the date of receipt of that notification. Counsel faulted the actions of the appellant and the 3rd respondent in executing a contract when fourteen (14) days allowed by the Act for lodging of challenges had not lapsed. According to counsel, the letter by the Attorney General marked "without prejudice" was not privileged in the circumstances in which it was written.

In a brief reply **Mr. Olitoro** for the 3rd respondent submitted that the letter by the Attorney General which was marked "without prejudice" was privileged because the Attorney General had given another opinion. We observe in passing that that other opinion is not on record and counsel did not give us particulars of that other opinion at all.

We have considered the record of appeal in its entirety, submissions made and the law. The issues in this appeal are not complicated. There was a tender floated by the 3rd respondent to the public for construction of houses and the tender was to be undertaken through processes set out in the Public Procurement & Asset Disposal Act. If the 3rd respondent undertook the processes in accordance with that Act and other relevant laws, the High Court would have no reason to intervene in the matter. The Public Procurement & Asset Disposal Act has in built processes for floating of tenders, how bidders will bid, how awards are to be made to a successful bidder and how challenges by unsuccessful bidders are to be made including the timelines thereof. If all this is done within the law, the High Court would not intervene. If however, there is a breach in the way the process is undertaken the High Court then is entitled to intervene and to examine whether the process has been undertaken within the law.

It was the case of the 1st respondent before the High Court that it, amongst others including the appellant had placed bids when the 3rd respondent floated the tender. The bids were opened on **21stApril 2017** at 12 noon in the presence of respective bidders or their representatives. The 1strespondent's representative attended that meeting. The 3rd respondent was to undertake an evaluation of submitted bids and to make a determination on bid responsiveness within twenty one (21) days of opening of the bids. It was the 1st respondent's case that it did not receive any communication from the 3rd respondent after opening of the bids within the twenty one (21) days prescribed in the

bid documents and also in the Act, but that sometime in July, 2017, it became aware that the tender had been awarded to the appellant in circumstances then unknown to the 1st respondent. This caused the 1st respondent to write a letter to the 3rd respondent on **28th July, 2017,** seeking clarification on circumstances under which the tender had been awarded to the appellant; it was further the 1 strespondents case that that letter was not responded to; further that on **15th August, 2017**, it had received notification from the Postal Corporation of Kenya dated **14th August 2017,** that there was a registered mail in its postal address. Upon collecting and opening the letter, the 1strespondent found that it was a notice of regret from the 3rd respondent dated **2nd August 2017** informing the 1st respondent that its bid had been unsuccessful but that no reasons were stated. It was the 1st respondent's further case that failure by the 3rd respondent to inform the 1st respondent that its bid had been unsuccessful simultaneously with the appellant constituted a blatant disregard and breach of Section 126 (4) of the Act which required the 3rd respondent to notify the appellant at the same time as all other persons who submitted bids but whose bids had been unsuccessful. It was further stated by the 1st respondent that the 3rd respondent chose different modes of communicating to the bidders and that it had failed to publish the information on its website or post it on a public notice board. The 1st respondent being aggrieved filed a request for review with the 2nd respondent but the 2nd respondent found that the request was filed late outside the fourteen (14) days period and struck it out.

The learned Judge who heard the motion identified as an important question the determination of whether the 2nd respondent committed an error of law when it declined jurisdiction to entertain the application for review because a contract had already been entered into and the application was filed outside fourteen (14) days. The learned Judge considered the provisions of Section 167 of the Act which provides for the process to be undertaken by a tenderer who claims to have suffered or risks suffering loss or damage due to the breach of a duty imposed on a procuring entity by the Act or the regulations made there under and the procedure for seeking administrative review within fourteen(14) days of notification of award or date of occurrence of the alleged breach at any stage of the procuring process or disposal process as prescribed in the Act. It is also provided in the said section that a request for review must be accompanied by a refundable deposit as prescribed in the regulations which shall not be less than 10% of the cost of the contract. It is also provided that the request for review shall be heard and determined in open forum unless the matter would compromise national security. The review body is not allowed to consider a review where a contract has been signed in accordance with Section 135 of the Act. The learned Judge considered the manner in which the 2nd respondent on receiving the request for review had entertained it where it found that it had no jurisdiction to entertain the request for review in the face of a contract that had been signed between the appellant and the 3rd respondent. The Judge reviewed a number of decisions on the issue of jurisdiction which the 2nd respondent had found it lacked. The Judge distinguished the provisions of Section 167(4) (c) of the Act and Section 135 of the Act. Section 135 states that a contract shall be confirmed through the signature of a contract document incorporating all agreements between the parties and such contract shall be signed by the accounting officer or an officer authorized in writing by the accounting officer of the procuring entity of the successful tenderer. Section 135(3) provides that:

> ***"The written contract shall be entered into within the period specified in the notification but not before fourteen (14) days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period".***

It is further provided in Section 135 that no contract is formed between the person submitting the successful tender and the accounting officer of a procuring entity until the written contract is signed by the parties.

Having reviewed the provisions of the said Sections 135 and 167 of the Act, the Judge found at paragraph 73 of the judgment that:

> ***"In this case, the review board makes no reference to whether or not the contract allegedly signed was in accordance with Section 135 of the Act. From the above cited case law, it is clear that the review board should have first determined whether the contract in question was signed in accordance with Section 135 of the Act. This is so because 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 review board makes a determination that it has no jurisdiction to entertain the request by virtue of sect 167 (4) (c) of the Act, it has the duty to investigate whether the contract in question was signed in accordance with Section 135 of the Act and the failure to do so in my view would amount to improper deprivation of jurisdiction; in my further view improper deprivation of jurisdiction is as bad as action without or in excess of jurisdiction".***

The Judge further found that the 2nd respondent at the time of declining jurisdiction to entertain the review did not make any reference to or inquiry as to whether the subject contract was entered into in accordance with Section 135 of the Act and therefore the 2nd respondent acted in error by merely declining jurisdiction on account that the procurement contract had already been signed between the appellant and the 3rd respondent.

The learned Judge considered the important issue of when tenderers were notified on success or otherwise of their bids. It was not disputed that the 3rd respondent had authored letters on **2nd August 2017** notifying parties including the 1st respondent of the outcome of the evaluation process. The 1st respondent claimed to have received notification on **15th August, 2017** but the 3rd respondent contended that the date of notification was **4thAugust 2017** when the letters were posted. On this aspect and on analysis of the material placed before court, the learned Judge considered that an aggrieved party was entitled to fourteen(14) days to lodge a request for review and therefore even if the date of posting of **4th August 2017** was taken as the date of notification an aggrieved party would then have until at least to **18th August 2017** and therefore the contract signed on **17thAugust 2017** between the appellant and the 3rd respondent was executed before fourteen (14) days allowed of an aggrieved party to make a request for review. The Judge found that this went contrary to rules of natural justice and also contrary to the express provisions of Section 135 of the Act where the written contract should be entered into within the period specified in the notification but not before fourteen (14) days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period. The Judge found that the signing of a contract before fourteen(14) days elapsed from the date of notification was so grave that such a contract would be declared null and void as a procuring entity like the 3rd respondent would be undermining the law to sign the contract before the expiry of fourteen (14) days.

It is true to say that a contract entered in contravention of the law is against public policy, it is illegal and cannot be allowed to stand. The Judge found that the 2nd respondent failed to take into account relevant matters before declining jurisdiction on account that a contract had already been entered.

We fully agree with the conclusion reached by the Judge in this respect. It was the duty of the 2nd respondent to satisfy itself that the 3rd respondent had followed the law on procurement and rules of natural justice in awarding the tender to the appellant and finding that the 1st respondent's tender bid was unsuccessful. It was the 1st respondent's case which was not seriously contested either before the 2nd respondent or before the High Court that after reviewing the bids received, the 3rd respondent used different methods to notify the appellant on the one hand that its bid had succeeded while on the other using a different method to notify the 1st respondent and the other bidder of the lack of success of their bids. The appellant was notified directly through an efficient process but in respect of the 1st respondent, its letter dated **2nd August, 2017** was posted seemingly through registered mail on **4th August 2017,** that is to say that the 3rd respondent chose to use different methods to notify the appellant and the 1st respondent which the statute or principles of reasonableness did not allow. The 3rd responded acted in breach of the law and in breach of public policy and its actions could not be entertained. It is good law to say that when an issue of breach of a statute is brought to the attention of the court it is in the interest of justice that the court must investigate that issue because the court's fundamental role is to uphold the law.

This issue was considered by this court in the case of **Kenya Pipeline Company Limitedvrs. Glencore Energy (U.K) Limited [2015]eKLR** where the old English case of **Holman vs. Johnson (1775 – 1802) All ER 98** where **Chief Justice Mansfield** pronounced the words:

> ***"The principle of public policy is this: Ex dolomalo no ovitur action. No court will lend its aid to a man who found his cause on an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi cause, or the transgression of a positive law of this country, there the court says that he has no right to be assisted. It is on that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff."***

The other main ground taken in this appeal is that the High Court exceeded its jurisdiction by entertaining judicial review proceedings. It is true as correctly submitted by the appellant that the purpose of judicial review is to ensure that a party receives fair treatment in the hands of public bodies as judicial review is concerned with decision making process not with merits of the decisions. The High Court concerns itself with whether the public body in making the decision being challenged had the jurisdiction; whether the persons affected by the decision were heard before the decision was made and whether in making the decision the public body took into account irrelevant matters or did not take into account relevant matters. This statement of the law has been accepted in various pronouncements of our courts such as in the case of **Municipal Council of Mombasa v. Republic & Another [2002] eKLR** where it was held that judicial review is concerned with the decision-making process, not with the merits of the decision itself. (This position has changed since the promulgation of the Constitution of Kenya, 2010 and enactment of the Fair Administrative Action Act. See the holding in the cases: **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 Others, Civil Appeal No. 46 of 2012, Kenya Pipeline Co. Ltd vs. Hyosung Ebara Co. Ltd [2012] eKLR, Rentco East Africa Ltd, Lantech Africa Ltd, Toshiba Corporation Consortium vs. Public Procurement Administrative Review Board** & **Another [2017] eKLR, Civil Appeal No. 24 of 2017.** But even on merit, the Judge was still ri

The learned Judge who heard the motion considered the way the 2nd respondent had dealt with the request for review. As we have shown in this judgment the Judge found that the 2nd respondent had misapplied the law in finding that it had no jurisdiction. The 3rd respondent had acted contrary to law by flouting clear provisions of the Act and had breached rules of natural justice in treating the appellant in a different way from the way it treated the 1st respondent and another bidder. The appellant had been accorded what amounted to preferential treatment by being notified of success of its bid and a contract had been signed between the appellant and the 3rd respondent even before the period allowed for challenge had expired. The Judge found that the 2nd respondent was wrong not to examine the process employed in reaching the decision; that because a contract had been signed, the 2nd respondent lacked jurisdiction to deal with the request for review. The Judge correctly found in our view that the 2nd respondent was wrong to divest itself of jurisdiction when it had jurisdiction to examine whether the contract had properly been entered. That was a process issue and the law allowed the Judge in judicial review proceedings to examine the conduct of the 2nd and 3rd respondents and if they acted contrary to law, and it being a process issue, the High Court was entitled to interfere and correct the wrongs committed by the 2nd and 3rd respondents. The grounds of appeal in this respect must fail.

We have made findings on the main issues in this appeal. We find that the Judge who entertained the motion acted within her mandate in judicial review proceedings and there is no merit in this appeal. We accordingly dismiss it with costs to the 1st respondent.

DATED & Delivered in Nairobi this 5th day of April, 2019.

W. OUKO (P)

....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb.

....

JUDGE OF APPEAL

S. ole KANTAI

....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR