IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, OUKO & MURGOR, JJ.A)

CIVIL APPEAL NO. 24 OF 2017

BETWEEN

RENTCO EAST AFRICA LIMITED, LANTECH AFRICA LIMITED,

TOSHIBA CORPORATION CONSORTIUM..... APPELLANT

AND

THE PUBLIC PROCUREMENT

ADMINISTRATIVE REVIEW BOARD .....1ST RESPONDENT

KENYA ELECTRICITY GENERATING

COMPANY LIMITED (KENGEN).....2ND RESPONDENT

(An appeal from the Judgment and Decree of the Hon. Justice G.V. Odunga delivered in the High Court of Kenya at Nairobi on 20th December 2016

in

High Court Civil Appl. No. 15 of 2016)

****

JUDGMENT OF THE COURT

The object of procurement laws enacted in the recent past in Kenya is to improve public financial management, promote efficient use of State resources in order to foster national development; enhance harmony with international procurement laws; foster competition, efficiency, transparency, integrity and accountability; facilitate ease procurement administration; and ensure value for money. **Article 227** of the Constitution enjoins State organs and other public entities that contract for the supply of goods or services, to do so in accordance with a procurement system that is fair, equitable, transparent, competitive and cost-effective. Similar values of maximization of economy and efficiency, promotion of integrity, competition, fairness, transparency, accountability, public confidence in the procurement procedures, equality and freedom from discrimination, run through the Public Procurement and Asset Disposal Act, 2015 as well as the repealed Public Procurement and Disposal Act, 2005.

But these values and principles will mean little, if the persons and institutions responsible for ensuring compliance are themselves in violation of the law. As a nation, our economic advancement will be hampered if grand projects that are intended to be the catalyst of growth are delayed due to controversies that can be avoided if the process set out in the law is faithfully followed. If the number of suits instituted in the courts in the recent past arising from disputes relating to procurement is any guide, it is real that very little progress will be made in achieving the economic goals within the set timelines, and aspirations like Kenya Vision 2030, Sustainable Development Goals will come a cropper.

This appeal is a perfect example. It has gone through the protracted and windy dispute resolution process for the last two years. What message does such a slow process send to investors?

The Kenya Electricity Generating Company (KENGEN) Limited (the 2nd respondent) initiated the project, the subject of this dispute in 2015 with a noble intention of increasing the installed capacity of power from approximately 2,900 MW to 50000 MW by 2016, now past. The project was also, as a corollary intended to generate revenue and profit for the 2nd respondent. But all that has been witnessed are battles by the procurement candidates fought from Public Procurement Administrative Review Board to the High Court, Parliament and now to this Court. Before we give the background and history of the dispute, the following technical knowledge, which we ourselves have gained through this appeal is interesting.

KenGen is the leading electric power generation company in Kenya. The company utilizes three main sources to generate electricity, hydro, thermal and geothermal. Geothermal electricity is generated through the use of technology to convert the geothermal energy to electricity. We have learned that, the traditional use of conventional power plants to generate geothermal electricity involves several months of drilling of the well, and years of central power plant construction. But in wellhead generation, which is what concerns this appeal, steam is extracted from the well and converted to electricity at the wellhead. The power generated can be fed to the local distribution network or stepped up and fed to the nearest transmission network.

In its grand plan to meet the energy needs of the country at the lowest cost to the economy with some benefits to the environment, in 2015 the 2nd respondent announced its intention to invest in various geothermal power projects to supply additional power to the national grid. To this end, through Tender Number KGN-GRD-09-2015, it sought proposals for leasing 50 MW Wellheads Power Generation units on a build, operate and maintain basis for a period of 15 years. The tender was designed to be implemented through the wellhead technology, as we have explained above.

Apart from the national economic benefit, the outcome of the tender was intended to enable the 2nd respondent to recoup its drilling costs and enable it earn revenue and profits from leasing of the wells.

Five of the shortlisted firms submitted their proposals and thereafter the 2nd respondent appointed a tender committee which undertook a Technical and Financial evaluation. At the end of that exercise a consortium of the appellant, comprising Rentco East Africa Limited, Lantech Africa Limited and Toshiba Corporation was ranked the highest and selected. The appellant was notified of the intention of the 2nd respondent to award the contract to it subject to successful contract negotiation.

After the letter of award was issued to the appellant, one of the firms that had also been shortlisted, OJSC Power Machines Limited, "OJSC" composed of a consortium of Transcentury Limited and Civicon Limited, filed a Request for Review before the Public Procurement Administrative Review Board, the 1st respondent, being Review Number 38 of 2015 seeking a review of the decision of the 2nd respondent's award of the tender to the appellant. The 1st respondent dismissed the application in a decision rendered on 21st August 2015.

Aggrieved by that dismissal, OJSC took out a motion in the High Court in H.C.J.R. No. 284 of 2015 for an order of *certiorari* to quash the decision of the 1st respondent, an order of prohibition to restrain the

2nd respondent from entering into any contract with the appellant over and/or concerning Tender No. KGN-GRD-09-2015 and an order of *mandamus* to compel the 2nd respondent to enter and execute a contract with OJSC. By an interim order, Mumbi Ngugi, J, in granting leave to OJSC to bring the motion for judicial review, directed that the leave would operate as a stay of the **implementation, enforcement and/or execution** of the 1st respondent's decision. As the determination of H.C.J.R. No. 284 of 2015 was pending, the 2nd respondent, by a letter dated 9th November, 2015 conveyed to the appellant its decision to terminate the award of tender for the reason that "**the financing plan and related supporting documents were inconsistent with the objectives of the project".**

In an immediate response, the appellant's advocates informed the 2nd respondent that it could not terminate the award as the 1st respondent had already determined the dispute in favour of the appellant in addition to the fact that there were judicial review proceedings that were also pending determination over the award.

In the meantime, the High Court dismissed H.C.J.R. No. 284 of 2015, the effect of which was to confirm the decision of the 1st respondent upholding the award of the tender to the appellant. That dismissal is the subject of Civil Appeal No. 28 of 2016, which was heard back to back with this appeal and whose judgment is also due for delivery today.

Following the dismissal, the appellant wrote to the 2nd respondent requesting that the contract be finalized. The 2nd respondent in response insisted that it had terminated the award of tender to the appellant.

Aggrieved by that decision, the appellant filed, before the 1st respondent, a Request for Review No.14 of 2016 challenging the termination. Responding to the Request for Review, the 2nd respondent raised a preliminary objection on the ground that the 1st respondent had no jurisdiction to hear the application for review because the application had been filed out of time. The objection was argued in the main application. The 2nd respondent also contended that the Public Investment Committee (PIC) of the National Assembly had summoned its Chief Executive Officer to explain how the appellant was awarded the tender yet it had been alleged that it had falsified its financial information in an earlier tender for Consultancy Services for the Re-development of Olkaria Geothermal Power Plant Project; that as a result of those concerns as well as the public attention that the tender had attracted, the 2nd respondent on its own motion through its Board of Directors reviewed the tender documents that had been submitted by the appellant and resolved to terminate the tender award, reiterating that the appellant's **"financing plan and related supporting documents were inconsistent with the objectives of the project".**

In its 39-page decision rendered on 24th March 2016, the 1st respondent overruled the objection and allowed the Request for Review, directing that;

> **"i. The decision of the procuring entity purporting to terminate to the Applicant of the Tender for KGN-GRD-09-2015 for Leasing of 50MW Wellheads Geothermal Power Generation Units at Olkaria Geothermal Field on a Build, Lease, Operate and Maintain Basis as contained in the minutes of the procuring entity held on 3rd November, 2015 and as communicated to the Applicant vide the procuring entity's letter dated 9th November, 2015 and 25th February, 2016 respectively be and are hereby declared null and void and the same be and are hereby set aside.**
>
> **ii. The procuring entity be and is hereby directed to complete the procurement process herein including forwarding the contract agreement executed by the procuring entity on 2/9/2015 for execution by the Applicant in line with the Board's decision in the Request for Review No. 38 of 2015 as affirmed by the High Court in Nairobi High Court Judicial Review Application No. 284 of 2015 within Seven (7) days from today's date.**
>
> **iii. The procuring entity shall furnish the Board with the evidence of compliance with order**

(c) above at the expiry of the said period of Seven (7) days form todays date.

iv. The Applicant is awarded the costs of this Request for Review to be agreed or taxed failing which the Applicant will be at liberty to file it's bill of costs before the Board for assessment".

The 2nd respondent moved to the High Court with H.C.J.R. No.154 of 2016 for an order of judicial review by way of *certiorari* to quash the aforesaid decision of the 1st respondent, an order of prohibition to stop the 1st respondent from taking any enforcement action against the 2nd respondent and an order of *mandamus* to compel the 1st respondent to issue to it a copy of the decision.

That application was brought on the grounds that the meeting between the 2nd respondent's Chief Executive Officer and members of the Public Investment Committee (PIC) of the National Assembly discussed issues relating to the award of the tender, and concerns were raised over an alleged falsification of the appellant's financial information submitted in an earlier tender for Consultancy Services for the Redevelopment of Olkaria Geothermal Power Plant Project; that the appellant's financing structure would go against the objectives of the tender as the 2nd respondent did not intend to take a loan; that as a result, the 2nd respondent reviewed and inspected the appellant's tender documents and came to the conclusion that the award to the appellant was in error; that the anomaly was inadvertently missed out during the tender evaluation.

It was these developments, according to the 2nd respondent that informed its decision to immediately terminate the procurement process. The 2nd respondent also averred that having communicated its decision on 9th November, 2015, the appellant's Request for Review was lodged on 4th March 2016 out of the 7 days period stipulated by the Regulations, and hence the 1st respondent had no jurisdiction to entertain the request.

The appellant and the 1st respondent in response maintained that the appellant's bid was found to be responsive in terms of **section 64** and **82** of the Public Procurement and Disposal Act, 2005; that before the award the appellant's tender had been subjected to protracted and profound contract negotiations involving legal, Geothermal Engineers and the finance team for a period of over two weeks, and after due consideration of all the contractual terms pertinent to the tender; the appellant and the 2nd respondent's Managing Director executed the Master Lease Agreement; that the only signature left out on the documents was that of the 2nd respondent's Company Secretary who had been restrained by an order of the court just before she executed it; that the appellant's bid was found to have employed the most efficient geothermal generation technology which would in turn yield the maximum net output at the lowest rental fee, the highest monthly revenue at USD.785, 273.25, thereby attaining the highest score on the technical, financial and cost-effectiveness in accordance with the criteria set by the 2nd respondent itself; that the 2nd respondent defended and supported the award throughout, before the 1st respondent during the hearing of the first Request for Review filed by OJSC Power Machine Limited and also before the High Court in H.C.J.R. No. 284 of 2015; that the change of mind by the 2nd respondent was in bad faith; that the decision of the 1st respondent having been confirmed by the High Court in H.C.J.R. No, 284 of 2015 it became final and binding on the parties under the provisions of **Section 100** of the Public Procurement and Assets Disposal Act, 2005. It was submitted further that through evaluation of the tenders, it was found that the appellant's financial proposal was responsive on the basis of Lantech Africa Limited's financial statements.

After setting out the facts of the controversy in some great detail comprised in 97 paragraphs and running into 54 pages, the learned Judge decided the dispute on a narrow point that had been raised by the 2nd respondent in its preliminary objection, that the 1st respondent lacked jurisdiction to entertain the Request for Review. He explained that he took that course **"not to prejudice and embarrass proceedings which may be commenced pursuant to section 99 of the Act of 2005**".

In determining the question of jurisdiction, the learned Judge found that since the letter terminating the

contract was dated 9th November, 2015 and the Request for Review by the appellant was brought on 4th March, 2016, then the Request was most certainly made outside the 7 days prescribed under Regulation 73(2) (c) (i) of the Public Procurement and Disposals Regulations, 2006. According to him, the application for review ought to have been filed on or before 17th November, 2015. That delay, he held divested the 1st respondent of the power to make any order in the dispute.

The learned Judge maintained that as at the time of the termination of the tender there were no restraining orders; that contrary to the view held by the appellant and the 1st respondent, the latter's decision of 21st August, 2015 did not compel the 2nd respondent to complete the tender process with the appellant, but in fact gave it the freedom to choose to either complete the process with the appellant or to start it afresh. Similarly the learned Judge was of the view that, the effect of the order of Mumbi Ngugi, J in H.C.J.R Misc. No. 284 of 2015 directing that leave to bring judicial review proceedings would operate as a stay of implementation enforcement and/or execution of the 2nd respondent's decision dated 21st August 2015, was that the 2nd respondent was restrained from entering into a contract with the appellant with respect to the subject tender and further that the implementation and or execution of any contract in respect of the said tender was similarly stayed. Therefore, that order could not be said to have the effect of staying the decision of the 2nd respondent terminating the tender. In the result, the Judge found that the 2nd respondent was at liberty to terminate the contract. In the end, the learned Judge concluded that:

> **"92. The applicant's** (2nd respondent's) **actions may well be frowned upon and may be, if properly moved, this Court may even find that its action was undeserving of any protection by way of equitable relief from either the tribunal or the Court, but equity follows the law and where there is an express provision of the law, equity cannot be invoked in order to subvert the law. See *Snell's Principles of Equity,* 24th Ed. page 22.**
>
> **9.3 It is therefore clear that the Respondent simply had no jurisdiction to entertain the request for the review in light of the statutory limitation".**

With that, he allowed the application, quashed by an order of *certiorari* the decision of the 1st respondent dated 24th March 2016. On costs, he said;

> **"Taking into account the *ex parte* applicant's conduct in the proceedings leading to the instant application, there will be no order as to costs".**

The appellant was aggrieved by the whole of that decision and has brought this appeal based on a whopping 28 grounds at the end of which it has asked the Court to allow the appeal, dismiss the 2nd respondent's motion dated 29th March, 2016 in H.C.J.R. No.154 of 2016, to set aside the judgment of the High Court delivered on 20th December, 2016 and to uphold the decision of the Public Procurement Review Board dated 24th March, 2016.

The appellant believes that the learned Judge erred in holding that time to lodge the review started to run from the date of issuance of the purported termination letter of 9th November 2015 and that in doing so, he disregarded the express provisions of **Section 100(3)** of the Public Procurement and Disposal Act, 2005; that **Section 100(3)** rendered the said letter null and void. It was contended further that the decision of the learned Judge had the effect of subordinating the decisions of the 1st respondent and those of the High Court to that of the 2nd respondent's Board of Directors. On the other grounds, it was stated that the 2nd respondent, having found on 21st August 2015 as a fact, that there were no irregularities in the evaluation and award of the tender and the decision having been upheld by the High Court, by the provisions of **Section 100** of the Public Procurement and Disposal Act, 2005, that decision was final and the 2nd respondent was therefore, by law required to give effect to that decision by completing the tender contract with the appellant. The orders of stay issued by **Mumbi Ngugi, J.** on September 2, 2015, it has been submitted, were misinterpreted; that the proceedings before the 1st respondent were enforcement proceedings under **sections 93** and **100** of the repealed Public Procurement and Disposal Act, 2005 and

section 167 of the Public Procurement and Asset Disposal Act, 2015 arising from the 2nd respondent's disobedience of the decision of 1st respondent and the judgment of the High Court, a fact ignored by learned Judge and he thereby arrived at a wrong decision.

The notice of motion from which the impugned judgment arose was specifically brought and solely anchored on **Order 53 Rule 3** of the Civil Procedure Rules and no other enabling provision of the law. It asked for three definite reliefs, *certiorari*, prohibition and *mandamus*, the only orders of judicial review provided for under **section 8** of Part V1 of the Law Reform Act. The parameters that define these orders and principles to be applied and considered, are as it were, old hat. But for their importance and relevance in this appeal they bear repeating.

It has been held in **Republic V. Kenya Revenue Authority *Ex parte* Yaya Towers Limited** (2008) Misc. Civil Appl. No. 374 of 2006, **Seventh Day Adventist Church (East Africa) Limited V. Permanent Secretary, Ministry of Nairobi Metropolitan Development & Another** Judicial Review Case No. 112 of 2011.

Republic V. Kenya Revenue Authority & another Ex-Parte Bear Africa (K) Limited Misc. Appl. No. 285 of 2013, **Republic V. Commissioner of Customs Services ex-parte Africa K-Link International Limited** Nairobi HC Misc. JR No. 157 of 2012, among others, that the purpose of judicial review is to ensure that a party receives fair treatment in the hands of public bodies; that it is not the purpose of judicial review to ensure that the public body, after according fair treatment to a party, reaches on a matter which it is authorized by law to decide for itself, a conclusion which is correct in the eyes of the court in a judicial review proceedings. Put another way, judicial review is concerned with the decision making process, not with the merits of the decision itself. In that regard, the court will concern itself with such issues as to 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.

Save for a limited scope, which we shall return to later, the court considering a judicial review application must never consider its role as an appellate court or tribunal and must avoid any temptation to go into the substance of the impugned decision itself or to ask questions, whether there was or there was not sufficient evidence to support the decision of the public body concerned. It is not for the court or individual judges to substitute their opinion for that of the public body constituted by law to decide the matter in question. See **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited** (supra). In judicial review proceedings, the mere fact that the public body's decision was based on insufficient evidence, or on misapplication of evidence, cannot be a ground for granting judicial review remedies. Whether that decision was right or not, the affected party ought to challenge it on appeal. In reaching its determination, it must however, be recognized that a tribunal or statutory body or authority has jurisdiction to err and the mere fact that in the course of its inquiry it errs on the merits is not a ground for quashing the decision by way of judicial review as opposed to an appeal. It is only an appellate tribunal which is empowered and in fact enjoined in cases of the first appeal to re-evaluate the evidence presented at the first instance and arrive at its own decision on facts, of course taking into account that it had no advantage of seeing the witnesses and hearing them testify. Whereas a decision may properly be overturned on an appeal, it does not necessarily qualify as a candidate for judicial review. See **East African Railways Corp. vs. Anthony Sefu Dar-Es-Salaam** HCCA No. 19 of 1971 [1973] EA 327.

The courts will also interfere with the decision of a public body if it is outside the band of reasonableness. Because all forms of power must be controlled, only those exercised usefully and reasonably will be approved by court. **Professor William Wade and Christopher Forsyth** in a passage in their text, **Administrative Law, 5th Edition** at page 362, explain the principle thus;

> **"The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it**

acts *ultra vires*. The court must therefore resist the temptation to draw the bounds too lightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended."

To justify interference with the decision of a public body, the court must be satisfied that that 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 it. See **Associated Provincial Picture Houses Ltd, V. Wednesbury Corporation** (1948)1 K.B. 223. This is what has come to be known as the Wednesbury principle in judicial review.

Finally, on the applicable principles, it is incumbent upon a party in a judicial review application who seeks the issuance of any of the orders to present proof of breach of any of the above criteria for that party to succeed in the claim. We emphasize that orders of judicial review are discretionary remedies.

These are the principles espoused in the decisions and authorities cited above.

To our chagrin, the learned Judge made no mention or reference to any of these well-known principles or the numerous authorities in this area of the law. To our chagrin because a month before he rendered the judgment impugned in this appeal, the learned Judge adopted a completely different but incisive and acceptable approach in **OJSC Power Machines Limited, Trancentury Limited & Another (Acting jointly as A Consortium/Joint Venture V. Public Procurement Administrative Review Board & 2 Others** H.C. Misc. Civil Application No. 284 of 2015, which was an offshoot of the same tender dispute, and also brought under **Order 53 Rules 3(1**) and **(4)** of the Civil Procedure Rules. He considered all the relevant principles, relied on several authorities and correctly applied them to that dispute and came to the conclusion that;

"In my view, it is not mere unreasonableness which would justify the interference with the decision of an inferior tribunal. It must be noted that unreasonableness is a subjective test and therefore to base a decision merely on unreasonableness places the Court at the risk of determination of a matter on merits rather than on the process……

Therefore, whereas that the Court is entitled to consider the decision in question with a view to finding whether or not the *Wednesbury* test of unreasonableness is met, it is only when the decision is so grossly unreasonable that it may be found to have met the test of irrationality for the purposes of Wednesbury unreasonableness.

75. The courts will only interfere with the decision of a public authority if it is outside the band of reasonableness."

He relied on his own earlier decision in **Republic V. Business Premises Rent Tribunal & 3 Others Ex-Parte Christine Wangari Gachege** Judicial Review Appl. No. 136 of 2013 to support the proposition that the court may only declare an inferior tribunal's decision a nullity if the tribunal did not follow the procedure laid down by a statute, or the inferior tribunal breached the principles of natural justice or if the actions were not done in good faith; that the court cannot substitute its judgment for that of the tribunal; and that the High Court's power to supervise inferior courts or tribunals is delimited and its jurisdiction is to see that the inferior courts and tribunals do not exceed their own powers. The learned Judge concluded, in dismissing that application, that the threshold of judicial review had not been attained as the applicant had not shown the existence of any of the grounds for the grant of the three judicial review orders.

In the appeal before us the learned Judge, as we have observed earlier, went into great detail considering all the aspects of the dispute, going against his own warning in **OJSC Power Machines Limited, Trancentury Limited & Another (Acting jointly as A Consortium/Joint Venture V Public Procurement Administrative Review Board & 2 others** (supra) and **Republic V. Business Premises Rent Tribunal & 3 Others Ex-Parte Christine Wangari Gachege** (supra), that a review of an administrative action does not confer on the court appellate powers; that in judicial review proceedings,

the court is concerned with the procedure and not the merit of the complaint; and that the applicant must establish that the public body acted without jurisdiction or in excess thereof or in breach of the rules of natural justice or that the decision was irrational. Even after taking the pain to outline all these things, the learned Judge understood his duty to be confined only to the question of "…..**whether the Request for Review was made within time. If the same was outside the time prescribed by the law, then the proceedings before the Respondent must fall by the wayside".**

That, with respect was a misdirection. The learned Judge was expected, indeed, required to consider the availability to the appellant of each of three orders sought in the application. This Court in **Kenya National Examinations Council V. Republic *Ex parte* Geoffrey Gathenji Njoroge & Others** Civil Appeal No. 266 of 1996 (CAK) outlined a detailed scope, efficacy and application of each of the three orders of judicial review. It was explained in that decision that an order of **prohibition** from the High Court is directed to an inferior tribunal or body forbidding that tribunal or body from continuing proceedings therein in excess of its jurisdiction or in contravention of the law; that it lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice; and that 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. On the other hand, an order of ***mandamus*** is a command issued from the High Court directed to any person, corporation or inferior tribunal, requiring 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 in all cases where there is a specific legal right and 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. But an order of ***certiorari*** is issued by the High Court to quash a decision already made, if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with. What is the jurisdiction of the 1st respondent?

The request for proposals and the letter terminating the procurement process were sent out in 2015 when the Public Procurement and Disposal Act, 2005 was in force. The Act was however repealed on 7th January, 2016 by the Public Procurement and Asset Disposal Act, No. 33 of 2015. The proceedings before the 1st respondent were themselves in 2016 upon coming into force of the Public Procurement and Asset Disposal Act, No. 33 of 2015. The decision was rendered on 24th March, 2016. The proceedings in the High Court ran from 31st March, 2016 to 20th December, 2016, when the decision impugned in this appeal was rendered.

It is noted, however, that the first Request for Review to the 1st respondent instituted by OJSC was in 2015 under the repealed 2005 Act and the decision of the 1st respondent rendered on 21st August, 2015, again under the repealed Act.

By **section 183** and the Third Schedule of the Public Procurement and Asset Disposal Act, No. 33 of 2015 Part XV of the Act, **"Administrative Review of Procurement and Disposal Proceedings"** are to apply, with necessary modifications to procurement and disposal proceedings commenced under the repealed Act. There will therefore be some overlap in the application of the two statutes in some aspects of the appeal.

Regarding the jurisdiction of the 1st respondent, by **section 28** of the Public Procurement and Asset Disposal Act, 2015 some of the functions of the 1st respondent include reviewing, hearing and determining tendering and asset disposal disputes and any other function conferred to it by the Act, Regulations or any other written law. It also has the powers to develop rules and procedures for the efficient performance of its functions. There is no doubt, as the learned Judge found in **OJSC Power Machine Limited, Trancentury Limited & another (Acting jointly as A Consortium/Joint Venture V Public Procurement Administrative Review Board & 2 others** (supra) that **section 173** of the Public Procurement and Asset Disposal Act, 2015 Act vests in the 1st respondent vast powers of review and that upon completing a review, the 1st respondent can do any of the following-

"(a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;

(b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;

(c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;

(d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and

(e) order termination of the procurement process and commencement of a new procurement process."

See also similar powers donated to the 1st respondent by the **Exchequer And Audit (Public Procurement) Regulations, 2001.** The regulations are made pursuant to **section 25** of the Public Procurement and Disposal Act, 2005.

Under Regulation 40, any candidate who claims to have suffered, or to be at of risk suffering loss or damage due to breach of a duty imposed on the procuring entity may seek administrative review of such action. However, the choice of a procurement procedure or the decision of the procuring entity to reject all tenders, proposals or quotations cannot be challenged by a review before the 1st respondent. Generally speaking, therefore, the 1st respondent has the jurisdiction to entertain any party alleging breach of duty by a procuring entity that is likely to lead to suffering, loss or damage.

Out of the five applying firms for the bids in question, OJSC Power Machine Limited was aggrieved by the outcome of the tender process which was awarded in favour the appellant. As a consequence, it lodged a Request for Review with the 1st respondent in which it requested for the nullification of the award and an order directing the 1st respondent to award the tender to it. The review application was rejected prompting OJSC Power Machine Limited to apply to the High Court to, among other things, quash that rejection by an order of *certiorari.* The application was likewise rejected and dismissed by Odunga, J, as we have pointed out elsewhere in the judgment. The dismissal precipitated Civil Appeal No. 28 of 2016, the subject of a separate judgment.

During the pendency of the Judicial Review application in the High Court, the 2nd respondent terminated the procurement process. It was the appellant's turn to approach the 1st respondent with a Request for Review. It is important to note at this point that this latest Request for Review was filed on 4th March, 2016 yet the letter conveying the decision of the 2nd respondent terminating the tender was dated 9th November, 2015. These, in our view are the two dates in contention. The 2nd respondent insisted that the appellant ought to have filed the Request for Review within 14 days from the date of the notification as required under **section 167** of the Public Procurement and Asset Disposal Act, 2015 or within 7 days of notification in terms of Regulation 73 of the Public Procurement and Disposal Regulations, 2006.

The issue was raised as a preliminary objection but, by consent, was argued in the main Request for Review. The 1st respondent was clear that there was no substance in the objection which it overruled, citing the admission by the 2nd respondent's counsel that there was no law permitting it to terminate the tender process in the circumstances it did. It came to the conclusion that, having found in the Request for Review presented by OJSC that the tender award was procedurally given to the appellant, the 2nd respondent itself had no powers to overrule that decision.

The learned Judge did not agree and in overturning the above conclusion by the 1st respondent, he was convinced that the Request for Review was brought out of time and held that the 1st respondent had no jurisdiction to entertain it.

In considering the propriety of this decision, we bear in mind two critical events. In the first Request for Review brought by OJSC the 1st respondent made an emphatic decision that the tender award to the appellant and the procedure leading thereto was regular. In a detailed (54- page) and well-reasoned determination, the 1st respondent considered all the aspects of the dispute, revisited the criteria for evaluation of the bids, the cost benefit analysis and the ranking of the short-listed biding firms on the basis of combined technical and financial evaluation. In all the criteria used, the appellant emerged the highest ranked firm, hence the award of the tender to it.

In dismissing all the three grounds of review raised by OJSC the 1st respondent, basing that decision on the technical evaluation committee's report, concluded that, save for a single factor, the appellant's bid had scored the highest on all other factors for qualification; that the appellant's proposal on the net output of 58.42 as opposed to that of OJSC at 50.55, was favoured over and above the former; that if the tender was to be awarded to OJSC there would be an electricity deficit which would translate to a daily costs of $ 37,610.50 (Kshs.3,761,049.60) or a monthly cost of $ 13,727,831.04 (Kshs. 1,372,783,104), that would in turn lead to a colossal loss to the public and a violation of the principles of procurement under **Article 227** of the Constitution and **Section 2** of the Public Procurement and Disposal Act, 2005; that the appellant offered the highest availability factor of 99% compared to OJSC's 96%; and that the appellant would generate and guarantee the 2nd respondent a monthly revenue of $785,273,0.25 as opposed to OJSC's $686,099.05**.** The 1st respondent was further persuaded that the 2nd respondent, in awarding the tender to the appellant did not violate the Constitution, statute or Regulations. In conclusion, the 1st respondent found that the Request for Review had no *prima facie* foundation. In the result, it ordered its dismissal and directed that;

> **"The procuring Entity is therefore at liberty to proceed with the procurement process herein to its logical conclusion in accordance with the law."**

We shall revert to this directive shortly as it is the basis of the contention by the 2nd respondent that the 1st respondent did not direct it to complete the tender transaction with the appellant; but that it was at "liberty" to decide what to do with it; that at its option it decided to terminate it.

The second event relates to chamber summons for leave of court to commence judicial review proceedings and for such leave to operate as a stay of execution. The application was placed before Mumbi Ngugi, J. who, in allowing it granted interlocutory order of stay of execution that;

> **"…..the leave so granted does operate as a stay of complementation, enforcement and/or execution of the Respondent's decision dated 21st August 2015 in Review Application No 38 of 2015 of 22nd July 2015 in regard to Tender No. KGN-GRD-09-2015 for Leasing of 50MW Wellheads Geothermal Power Generations Units at Olkaria Geothermal Field on Build, Lease Operate and Maintain Basis and specifically;**
>
> **a. Restraining the 1st Interested Party** (the 2nd respondent) **by themselves, their servants or otherwise howsoever from entering into a contract with the 2nd Interested Party** (the appellant) **over and or concerning Tender No. KGN-GRD-09-2015 for Leasing of 50 MW Wellheads Geothermal Power Generation Units at Olkaria Geothermal Field on Build, Lease, Operate and Maintain Basis.**
>
> **b. <u>Staying the implementation and /or execution of any contract whatsoever over and/or concerning Tender No. KGN-GRD-09-2015</u> for Leasing of 50MW Wellheads Geothermal Power Generation Units at Olkaria Geothermal Field on Build, Lease and Maintain Basis**" (Our emphasis).

With respect, we cannot agree with the holding of the learned Judge that these two events did not stop the 2nd respondent from going ahead to terminate the tender process and even awarding it to some other firm. The conclusion by the 1st respondent that the 2nd respondent was **"…. at liberty to proceed with the**

procurement process herein to its logical conclusion in accordance with the law" must be read in the context it was reached. The dispute pitted the appellant and the 2nd respondent on one hand and OJSC and two unsuccessful bidders on the other hand. The 1st respondent found in nearly all aspects against OJSC and in favour of the appellant. Not a single transgression was found against the appellant. No flaws were found in the procurement process and procedure for the ultimate award of the tender to warrant the cancellation of the entire process as suggested by the 2nd respondent. The phrase **"…. at liberty to proceed with the procurement process herein to its logical conclusion in accordance with the law"** must be read to mean a directive to the 2nd respondent to conclude the transaction with the appellant. The 1st respondent participated in the High Court and before us, and has maintained its decision that the 2nd respondent ought to have finalized the tender process with the only bidder left after the failed attempt by OJSC to nullify the award.

To the second issue. Under **order 53 rule 1(4),** whether leave ought to operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise is an exercise of judicial discretion. Normal principles for the grant of stay of execution under **order 42** of the Civil Procedure Rules apply, namely, there must be a serious issue to be tried; the party applying will suffer irreparable harm if the stay is not granted; and that the application for stay has been made without unreasonable delay. If there are serious, arguable and triable issues involved in a dispute and one party stands to suffer irreparable harm or loss, then, it is only mete and fair that before the decision challenged in the review application is implemented and to obviate the rendering the subject matter otiose, that there be an order suspending the decision until the controversy is resolved.

As one of the conservatory reliefs under **Article 23(3) (c)** of the Constitution, an order of stay is today a constitutional remedy. Being conservatory in nature an order of stay is not only a remedy *in personam,* between the parties themselves but also a remedy in *rem* as it is meant to keep the subject matter of the dispute in *situ* pending a final decision.

With respect, it was erroneous for the learned Judge to hold the view that the interim orders of Mumbi Ngugi, J. staying the implementation and/or execution of the tender process affected only the contract between the appellant and the 2nd respondent. By the order granted by Mumbi Ngugi, J under paragraph (b) which we have highlighted above, namely, "**Staying the implementation and/or execution of <u>any contract whatsoever</u> over and/or concerning Tender No. KGN-GRD-09- 2015** was an order generally to suspend the entire process, from the highlighted part.

It should follow from this analysis that when the 2nd respondent purported to terminate the tender, not only had the 1st respondent ruled that the award of tender to the appellant was proper and procedurally done, but there was also an interim order of stay of execution that bound not only the parties to the review, but the world at large. Ultimately, Odunga, J himself found no substance in the complaint by OJSC regarding the award and dismissed its application thus paving the way for the conclusion of the contract. As a consequence, the termination was of no legal or any effect. It was without jurisdiction as admitted before the 1st respondent by counsel representing the 2nd respondent. If an act is done without jurisdiction, it is a nullity. As they would say in Latin in the days of old, *nihil fit ex nihilo* (out of nothing, nothing comes), famously captured in the words of Lord Denning, MR in the following passages in **<u>Macfoy V United Africa Co. Ltd</u>** [1961] 3 All E.R. 1169; that;

> **"…if an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."**

Because the 2nd respondent, in the circumstances explained could not terminate the tender, the 1st respondent had jurisdiction to entertain a complaint arising from that termination irrespective of when the Request for Review was brought because no timeline could attach to an act done without jurisdiction; an act that is non-existent in law.

The learned Judge appreciated the fact that the actions of the 2nd respondent were capricious when he opined that;

> **"The applicant's actions may well be frowned upon and may be if properly moved this Court may even find that its action was undeserving of any protection by way of equitable relief from either the tribunal or the Court but equity follows the law and where there is an express provision of the law, equity cannot be invoked in order to subvert the law. See *Snell's Principles of Equity,* 24th Ed. page 22".**

Regarding the costs of the application he added that;

> **"96. Taking into account the *ex parte* applicant's conduct in the proceedings leading to the instant application, there will be no order as to costs."**

With a clear understanding of the law and in full appreciation of the facts in controversy, it is difficult to comprehend how the learned Judge could possibly come to the conclusion that he did.

We alluded earlier to the permitted limit for consideration in a judicial review application of the merit of a decision of a public body. While the traditional parameters that we have considered in the previous paragraphs still apply, with the promulgation of the Constitution of Kenya, 2010 and enactment of Fair Administrative Action Act, there have been a shift in those considerations.

This Court (Koome, Sichale & Odek, JJ.A) has recently dealt with the new scope of judicial review in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others** (2016) KLR, Civil Appeal No. 46 of 2012 where

it explained, in part that;

> **"An issue that was strenuously urged by the respondents is that the appellant's appeal is bad in law to the extent that it seeks to review the merits of the Minister's decision while judicial review is not concerned with merits but propriety of the process and procedure in arriving at the decision. Traditionally, judicial review is not concerned with the merits of the case. However, Section 7 (2) (l) of the Fair Administrative Action Act provides proportionality as a ground for statutory judicial review. …..Proportionality invites the**
>
> **court to evaluate the merits of the decision; first, proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions; secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations; thirdly, the intensity of the review is guaranteed by the twin requirements in Article 24 (1) (b) and (e) of the Constitution, to wit that the limitation of the right is necessary in an open and democratic society, in the sense of meeting a pressing social need and whether interference vide administrative action is proportionate to the legitimate aim being pursued. In our view, consideration of proportionality is an indication of the shift towards merit consideration in statutory judicial review applications. Analysis of Article 47 of the Constitution as read with the Fair Administrative Action Act reveals the implicit shift of judicial review to include aspects of merit review of administrative action. Section 7 (2) (f) of the Act identifies one of the grounds for review**
>
> **to be a determination if relevant considerations were not taken into account in making the administrative decision; Section 7 (2) (j) identifies abuse of discretion as a ground for review while Section 7 (2) (k) stipulates that an administrative action can be reviewed if the impugned decision is unreasonable. Section 7 (2) (k) subsumes the dicta and principles in the case of Associated Provincial Picture Houses Ltd v Wednesbury Corp. [1948] 1 KB 223 on reasonableness as a ground for judicial review. Section 7 (2) (i) and**

(iv) deals with rationality of the decision as a ground for review. In our view, whether relevant considerations were taken into account in making the impugned decision invites aspects of merit review. The grounds for review in Section 7 (2) (i) that require consideration if the administrative action was authorized by the empowering provision or not connected with the purpose for which it was taken and the evaluation of the reasons given for the decision implicitly require assessment of facts and to that extent merits of the decision. It must be noted that even if the merits of the decision is undertaken pursuant to the grounds in Section 7 (2) of the Act, the reviewing court has no mandate to substitute its own decision for that of the administrator."

See also **Kenya Pipeline Company Limited V. Hyosung Ebara Company Limited & 2 Others** Civil Appeal No. 145 of 2011.

Even if the learned Judge had considered the merit of the dispute, the obvious conclusion would have been that none of the reasons advanced for the termination of the tender process had been raised either before the 2nd respondent in the first Request for Review or in the judicial review application in the High Court. All there was before the two forums were complaints as to whose bid, among the candidates, was responsive, cost-effective and the manner technical and financial criteria were framed. The tender being a Request for Proposals, the only complaint raised on evaluation under **sections 82** of the Public Procurement and Disposal Act was dismissed by the 1st respondent as misguided because it failed to consider the whole spectrum of evaluation. In his merit consideration in OJSC the learned Judge correctly observed that courts will only interfere with the decision of a public authority if it is outside the band of reasonableness; that the 1st respondent was under both constitutional and statutory obligations to ensure that the procurement complied with the principles of promoting economy and the other principles set out in **Article 227** of the Constitution and in **section 2** of the Public Procurement and Disposal Act 2005; that the 1st respondent had the requisite jurisdiction to consider questions of the legality and constitutionality of the decision made by the 2nd respondent to terminate the tender and to make appropriate orders in terms of **section 98** of the Act, under which it could annul anything done by the 2nd respondent in the procurement proceedings, give directions, or substitute its decision for that of the procuring entity.

Consequently, he found that the 1st respondent properly considered and applied the three components of the criteria for evaluation at the financial stage namely, availability factor, Output MW and low cost, and agreed with the 2nd respondent that OJSC's bid was unresponsive and that the most responsive bid was that of the appellant. He agreed that that was a finding of fact based on the construction of the bid documents which he could not overturn.

On the question whether the appellant qualified to participate in the bid in terms of the requirement that participating firms ought to have been incorporated in Kenya for 3 years, a matter related to the question of evidence of financial capability, the learned Judge formed the view, upon perusal of the Request for Review, that the issue was not one of the grounds for the Request; that it was never dealt with by the 1st respondent; and that to deal with it would flout the provisions of the Public Procurement and Disposals Act. He summarized his consideration on the issue stating that;

"In my view the applicant cannot under the guise of challenging the decision of the Respondent (the 1st respondent) attack the decision of the Procuring Entity (the 2nd respondent) when the same was not the subject of the proceedings before the Respondent (the 1st respondent). In any case, for this court to find that the 2nd interested party (the appellant) was incorporated in Kenya on 6th June 2012 thus turned 3 years only 18 days to the closing date for the EOI hence would not have been in a position to demonstrate "Evidence of financial capability to lease the Wellheads-attach most recent three (3) year audited financial statements", would necessitate making findings of fact in light of the Respondent (1st respondent) and 1st Interested Party's (the 2nd respondent's) positions that the 2nd interested (the appellant) was a consortium hence met the necessary conditions. That discourse is however outside the scope of this investigation…..the issues raised

……ought to have been the subject of an appeal as opposed to judicial review".

In the matter, the subject of this appeal, the learned Judge did not attempt to adopt this approach and took the easier way out by considering the simple question of time, whether the Request for Review was taken out within the time prescribed by statute and regulations.

Equally, it is as perplexing as it is confounding that the 2nd respondent, having all through vehemently defended the award of the tender to the appellant and stood together with the appellant on one side, all of a sudden, for reasons itself can explain, took an about turn to trash its own decision. For example, in their memorandum of response in OJSC **Power Machine Limited V. Public Procurement Administrative Review Board & 2 Others** (supra) as well as submissions by their counsel, the same person in this appeal, it was emphatic that OJSC did not meet the three objectives set out in the tender documents; that the appellant had, on the other hand met all the qualifications and evaluation criteria, namely, the highest availability factor and output megawatts at the lowest cost, together with the revenue to be generated for the benefit of the 2nd respondent and the leasing costs. According to those submissions, affidavit and the response, an annual cost would escalate to $ 13,727,831.04 (Kshs. 1,372,783,104) if the tender was awarded to OJSC. It was contended in this regard that there would be a yearly loss to country of Kshs. 1.36 Billion. Nothing demonstrates the resolve and determination of the 2nd respondent to defend its decision to award the tender to the appellant than the 66 paragraph affidavit in reply sworn by **Rono Kibet,** the 2nd respondent's Geothermal Project Engineer in which he set out systematically analysis to demonstrate that the appellant's selection for the award of the tender was on merit. He stressed that the appellant was expected to install and have commissioned the Wellhead power plants in 14 months from the date of the contract; that any delay in the implementation of the project would affect the projections of additional power generation and aggravate the ever rising demand of the scarce energy in the country. He continued stating that:

> **"34. The 2nd Interested party (successful bidder) is a consortium comprising of three companies, namely: Rentco East Africa Limited, Lantech & Toshiba.**
>
> **35. The 2nd Interested Party as a consortium met the requirement set out above.**
>
> **……**
>
> **60. The 1st Interested Party and the 2nd Interested Party had already entered into a contractual agreement and parties obligation have commenced prior to the order made herein on 2nd September 2015.** (Our emphasis).
>
> **61. it will be in the public interest that this project to move forward as soon as possible as the electricity generated in Kenya is insufficient to meet the current and projected energy requirements of the country."**

We restate, in closing, the 2nd respondent relied on the report of technical people who conducted the evaluation of the bids along the criteria it had itself set; the bids were subjected to protracted and profound contract negotiations involving legal, geothermal Engineers, procurement officers and finance team for a period of over two weeks, and after due consideration of all the contractual terms pertinent to the tender came to the conclusion that the appellant presented what they were interested in. We cannot help but agree with the 1st respondent's observation in the second Request for Review that;

> **"The Board is of the view that even if this reason was valid, the procuring entity ought to have raised the issue at the hearing of the Request for Review No. 38 of 2015 which the procuring entity fully participated in. It fully supported the tender evaluation process and the eventual award. The procuring entity insisted both before the Board in Review No. 38 of 2015 and in Judicial Review No. 284 of 2015 in the High Court that the evaluation process leading upto the award of the tender to the applicant was proper and all the documents filed and the oral submissions made in those proceedings supported that view. The Board cannot therefore**

now allow the applicant to change that position as such an attempt would amount to an abuse of the court process and the process of the Board. A party to any proceedings cannot be allowed to make particular submissions at one point aimed at achieving a particular result and once that result has been achieved then seek to change its position after that result has been achieved and the matter concluded.

The Board finds this to be a peculiar case of party which is willing to go to any length including ignoring a binding decision of the Board which has been upheld by the High Court in order to ensure that a successful bidder does not enjoy the fruits of its success. The inevitable consequence of such an action is to invite the Board to intervene since allowing such an action to stand will not only undermine the authority of the Board and the Court, but will promote what appears to be a clear case of impunity and will end up creating confusion and uncertainty in the procurement process."

Secondly, this Court confirmed in **Kenya Pipeline Company Limited V. Hyosung Ebara Company Limited & 2 Others** Civil Appeal No. 145 of 2011 that the 1st respondent is a specialized statutory tribunal with very wide powers, which, by their very nature, can be said to be appellate. Because of its specialized jurisdiction, it is better equipped than the High Court to handle disputes relating to breach of duty by procuring entities and technical procurement details. It is for this reason that its decisions in matters within its jurisdiction should not be lightly interfered with. If indeed the 2nd respondent had genuine concerns regarding its award of the tender to the appellant after reviewing the documents, it had submitted, and if indeed the award was in error as it alleged, it was not for it, as it were, to take the law into its own hands. In compliance with the law, the 2nd respondent ought to have resorted to Public Procurement and Asset Disposal Act to deal with the issue.

The letter by the 2nd respondent purporting to terminate the award of the tender to the appellant was, for the reasons we have given, a nullity, without legal effect, having been written in breach of decisions of the 1st respondent and that of the High Court. It was not only *ultra vires* the Public Procurement and Disposal Act, but also illegal.

In terms of **Section 100** of the Public Procurement and Disposal Act, 2005 and **Section 175** of the Public Procurement and Asset Disposal Act, 2015, the decision of the 1st respondent, in the absence of an appeal or review was final. That decision received support of the High Court when it was affirmed. During the pendency of the two decisions, and in an act of utter contempt, the 2nd respondent pulled the rug from under the feet of the 1st respondent, the High Court and the appellant. Its action undermined the administration of justice and amounted to an abuse of the court process. **Section 175(6)** of the Public Procurement and Asset Disposal Act, 2015 cautions that;

"(6) A party to the review which disobeys the decision of the Review Board or the High Court or the Court of Appeal shall be in breach of this Act and any action by such party contrary to the decision of the Review Board or the High Court or the Court of Appeal shall be null and void".

The purported termination of the tender by the 2nd respondent was therefore was null and void.

In the end, the learned Judge erred in his determination that the 1st respondent had no authority to make the decision impugned in the judgment, the subject of this appeal. He failed to answer the question, whether the parameters of the orders of judicial review of *certiorari,* prohibition and *mandamus* were met. In short, the court could only have interfered with the 1st respondent's decision if that decision was found be illegal, unreasonable, irrational or disproportionate. There was no allegation that the 1st respondent had violated any law or rules of natural justice. Accordingly, we find considerable merit in this appeal. We allow it, set aside the judgment of Odunga, J. of 20th December, 2016 with the result that the quashed decision of the 1st respondent made on 24th March 2016 is reinstated and upheld pursuant to **section 173 (b)** of the Public Procurement and Asset Disposal Act.

We also award costs of this appeal and those before the High Court to the appellant to be paid by the 2nd respondent.

Dated and delivered at Nairobi this 28th day of July, 2017.

ASIKE – MAKHANDIA

……

JUDGE OF APPEAL

W. OUKO

……

JUDGE OF APPEAL

A.K. MURGOR

…….

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR