IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, G.B.M. KARIUKI & M'INOTI & JJ.A)

CIVIL APPEAL NO. 129 OF 2013

BETWEEN

BLUESEA SHOPPING MALL LIMITED.....APPELLANT

AND

THE CITY COUNCIL OF NAIROBI .....1ST RESPONDENT

GOLDEN LIME INTERNATIONAL LIMITED .....2ND RESPONDENT

FARAH MOHAMMED BARROW .....3RD RESPONDENT

ALI SHEIKH MOHAMED .....4TH RESPONDENT

(Being an Appeal from the Judgment and Order of the High Court of Kenya at Nairobi (Nyamu, J.) delivered on 24th April 2009

in

H.C.MISC C.C. NO.808 OF 2008)

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JUDGMENT OF THE COURT

1. This is an appeal by **Bluesea Shipping Mall Limited, (the appellant)** against the judgment of the High Court (Nyamu J, as he then was) delivered on 24th April 2009 in Judicial Review proceedings (in Misc Civil Application No.808 of 2008) at Milimani, Nairobi, instituted by the appellant as the ex parte applicant against the **City Council of Nairobi** (now Nairobi City County) and **Golden Lime International Limited**, the 1st and 2nd respondents respectively in this appeal. **Messrs. Farah Mohamed Barrow** and **Ali Sheikh Mohamed**, the 3rd and 4th respondent, respectively, were the interested parties in the High Court judicial review proceedings from which the appeal springs.

2. In the said judicial review proceedings, the appellant sought an order of certiorari to quash the decision dated 18th November 2008 made by the 1st respondent awarding a contract to the 2nd respondent to redevelop Eastleigh Market on Plot No.LR NO.36/VII/1037 and an order of mandamus to compel the 1st respondent to undertake afresh the tendering and award of the Partnership Contract in compliance with the Public Procurement and Disposal Act 2005 and The Public Procurement and Disposal Regulations 2006.

3. The High Court (Nyamu, J.) found merit in the appellant's judicial review application but declined to grant the orders prayed for as the Court held there were factors which militated against the grant of the said orders. That decision aggrieved the appellant, hence this appeal.

4. The background to the litigation leading to this judgment is not complicated. The 1st respondent, by an advertisement in a local daily, invited the private sector including corporate entities and private investors and persons and organisations of good-will to partner with it in the development of markets at various locations in the City of Nairobi. The object of the invitation was stated in the advertisement to be mobilization of resources and access to skills for use by the informal business owners in nurturing their businesses to grow. Eleven sites in the City of Nairobi were named in the advertisement for the purpose of the markets and preliminary designs were said to have been completed by the 1st respondent. The advertisement indicated that *"details of any or all the market sites and design including the documentation thereof could be obtained from the City Engineer, City Hall,..."*.

5. Eastleigh Market on Plot No.L.R.36/VII/1037 belonging to the appellant was not one of the earmarked markets for the said initiative. However the appellant prepared its detailed proposal on 23rd September 2008 and submitted the same to the 1st respondent.

6. On 18th November 2008, the 1st respondent awarded the tender to the 2nd respondent and resolved that it would partner with the 2nd respondent in developing a commercial complex at the Eastleigh market. The appellant was not notified and did not know of this decision.

7. The appellant alleged that it became aware of the decision on 3rd December 2008 after making enquiries.

8. The award of the tender by the 1st respondent to the 2nd respondent, was in the appellant's view, unlawful, irregular, and in contravention of the **Public Procurement and Disposal Act, 2005**.

9. As the appellant was aggrieved by the award of the said Tender, it sought and obtained on 17th December 2008 leave to institute judicial review proceedings in the High Court (which it did on 5th January 2009 in Judicial Review Application No.808 of 2008) seeking the orders of Certiorari and mandamus as aforestated. In the interim, the grant of leave to the appellant to commence the judicial review proceedings was *"to operate as a stay of the award and implementation of the Public Partnership Contract to the 2nd respondent for development of Eastleigh Market on Plot No.LR No. 36/VII/1037 for an initial period of 30 days and"* parties were at liberty to contest it. Stay was subsequently extended pending the outcome of the matter.

10. The judicial review application was heard and determined by Nyamu J, as he then was, who declined to grant the orders of certiorari and mandamus. The Court expressed itself thus –

> ***"(i) The Statement is silent on the issue of the signed contract and only attacks or impugns the award of the tender. A party is not under the rules allowed to rely on grounds other than those set out in the statement.***
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> ***Moreover the validity and enforceability of the unchallenged contract could be the subject matter of litigation between the parties in private law courts if it is not already the subject matter of litigation before competent courts just as they are currently seized of the issue of ownership. It follows therefore the grant of certiorari even if otherwise properly merited might not be effective as against the signed contract and my court as a public law court might unnecessarily bind other competent courts dealing with the validity or enforceability of the contract. For this reason I consider it safe, not to touch on the issue of the signed contract.***

11. As regards the prayer for mandamus, the learned Judge held –

> ***"as regards the grant of an order of mandamus, the same cannot issue in the circumstances because it would result in the Court making the actual decision for the parties and perhaps directing the rewriting of the unchallenged contract. I find and hold that any aggrieved party can seek appropriate reliefs pursuant to contract law and in private law courts.***

12. The appellant challenged the High Court decision in its appeal lodged on 18th June 2013 in this Court. The thrust of the appeal is that the learned Judge did not exercise his discretion properly in declining to grant the orders. The following seven grounds of appeal were proffered –

> ***1. That the learned Judge erred and misdirected himself in law in declining to grant the orders of certiorari and mandamus as prayed for by the applicant and by sanctioning the implementation of an unlawful tender award;***
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> ***2. That the learned Judge erred in law in exercising his discretion to decline to award the prayers sought by the Applicant having made a finding that the award of tender by the 1st respondent to the 2nd respondent was void in law and had been made without jurisdiction.***
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> ***3. That the learned Judge erred in law and misdirected himself by failing to consider that as a matter of law judicial review proceedings are concerned with the decision making process and therefore the applicant's application was sound in law in questioning the process resulting in the award of tender;***
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> ***4. That the learned Judge erred in law and misdirected himself in principle in holding that the applicant's statutory statement did not challenge the contract signed between the 1st and 2nd respondent when the evidence adduced confirmed that the signing of the contract was not a fact within the knowledge of the applicant's directors;***
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> ***5. That the learned Judge erred and misdirected himself in fact and in law in failing to exercise his discretion on the ground that there was delay in filing the judicial review application;***
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> ***6. That the learned Judge erred in law in failing to exercise his discretion on the ground that the 2nd respondent had taken possession when the issue of ownership was contested by the interested parties and possession was taken unlawfully;***
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> ***7. That the learned Judge erred and misdirected himself in the application of the principles of law applicable in all the circumstances of the case and thereby failed to exercise his discretion judiciously;***

13. This is a first appeal from the High Court acting in the exercise of its original jurisdiction. This Court has power and is enjoined under Rule 29(1) to, inter alia, re-appraise the evidence. It has power under Rule 31 of the Rules of this Court, so far as its jurisdiction permits, to confirm, reverse or vary the decision of the High Court.

14. As all the counsel on record consented to have the appeal determined on the basis of their written submissions, an order to this effect was recorded following which written submissions were filed as follows; the appellant's advocates, **Issa & Company** filed their submissions on 28th November 2014; the 1st respondent's advocates, **Messrs Momanyi & Associates** filed their submissions on 28th November 2014; the

2nd respondent's advocates, **Messrs Gitau Gikonyo & Company** filed their written submissions on 8th December 2014; **Messrs Ahmednasir, Abdikadir & Company** on behalf of the interested parties, namely Farah Mohamed Barrow and Ali Sheikh Mohamed filed submissions on 2nd December 2014.

15. The appellant filed its list of authorities on 17th June 2014 while the 1st respondent filed its list of authorities on 28th November 2014. The 1st and 2nd interested parties did not file a list of authorities but they supported the appeal.

16. The grounds of appeal challenged the impugned judgment on three fronts. **First**, the appellant contended in grounds 1 and 2 that the process leading to the tender and the tender itself were unlawful due to non-compliance with the law. **Secondly**, the appellant contended in grounds 3, 4, and 7 that the learned Judge erred in declining to grant the orders prayed for in the judicial review proceedings despite the unequivocal findings on the issues framed by him and in doing so disregarded settled law on the scope and remit of judicial review. **Thirdly**, the appellant contended that the learned trial Judge improperly exercised his discretion in declining to allow the appellant's application for judicial review. The appellant contended on the authority of **Shah v. Mbogo** [1968] EA 93 that this was a fitting case for interference with the exercise of discretion by the learned Judge.

17. On the issue of unlawfulness of the process leading to the tender and the tender itself, the appellant alluded to the three issues framed by the trial Judge namely:

> ***(1) Whether public private partnerships are subject to the application of the Public Procurement and Disposal Act, 2005 as well as the regulations thereunder***
>
> ***(2) Whether the 1st respondent complied with the relevant law in awarding the tender to the 2nd respondent***
>
> ***(3) Whether the decision of the 1st respondent is amenable to judicial review.***

18. The appellant submitted that specially permitted procurement referred to in Section 92 of the **Public Procurement and Disposal Act**, **2005 (PPD Act)** was either a concessioning or a public private partnership referred to in Regulation 64 of the **Public Procurement and Disposal Regulations 2006 (PPD Regulations)**. The appellant accepted that the learned Judge was correct in holding that public private partnership agreements have to be in conformity with the PPD Act and also in dismissing the 1st respondent's contention that the PPD Act and the PPD Regulations did not apply to private partnerships. The Judge correctly held that the mere fact that the name *"public private partnership"* did not appear anywhere in the PPD Act *"is just an issue of semantics."*

19. The appellant further submitted that the learned trial Judge also correctly held that the PPD Act and the PPD Regulations made thereunder must be construed together and that the learned Judge correctly rejected the 1st respondent's submission that Public Private Partnerships are only regulated by Regulation 64 (4) of the PPD Act and not by the provisions of the PPD Act. Further, the appellant submitted that the learned trial Judge was correct in holding that the 1st respondent breached PP & D Act and the Regulations and consequently should have allowed the judicial review application and granted the orders.

20. As the learned trial Judge determined in the affirmative issues Nos. 1 and 2 and in the negative issue No.3 which he had framed and on which the judicial review application should have turned, the appellant was puzzled by the decision of the learned Judge declining to grant the judicial review application and the orders sought.

21. In the appellant's view, the reasons given by the learned Judge for refusing to grant the orders were not sound. First, the learned Judge's finding that the failure by the appellant to challenge the contract signed on 24th November 2008 after the award of tender militated against the exercise of the Judge's discretion to grant the orders was faulted as was also the finding that the grant of certiorari might not be effective as against the signed contract. So too was the learned Judge's further holding that as other courts might deal with the issue of validity or enforceability of the contract, the Court would not grant the order for fear of binding such courts.

22. The appellant found fault with the learned Judge's further finding that he could not grant the orders sought in the judicial review application as the Oversight Board had not published the guidelines and as the 1st respondent could not be bound by such unpublished guidelines which did not apply retrospectively. The appellant also challenged the learned Judge's holding that the appellant went to court after the award of the tender and the signing of the contract. The Judge observed in his decision that:

> that... ***"in turn meant that further steps could have been taken pursuant to the contract."***

23. As far as the appellant was concerned, the Court was under a duty to declare unlawful and quash the process of tendering which led to an unlawful contract. In the appellant's view the learned Judge in his decision erred in that he implemented the unlawful award of tender. To buttress that proposition the appellant cited the case of **St. John Shipping Corporation v. Joseph Rank** [1957] 1 QB 267 at pg 283 where Lord Devlin stated

> ***"... the Court will not enforce a contract which is expressly or impliedly prohibited by statute. If the contract is of this class it does not matter what the intent of the parties is, if the statute prohibits the contract, it is unenforceable whether the parties meant to break the law or not."***

24. The appellant took issue with the finding of the learned Judge that the appellant's statement of fact in the judicial review proceedings in the High Court did not challenge the contract signed after the award of the tender. In its submission, the appellant contended that the law required an ex parte applicant to challenge only the process which, if found legally improper, would render the decision taken in it null and void. For these reasons, the appellant contended that the learned Judge exercised his discretion improperly in denying the appellant the orders of certiorari and mandamus prayed for in the judicial review application.

25. **In reply** to the appellant's submissions, the 1st respondent submitted that the decision of the learned trial Judge was correct because there were circumstances that militated against the grant of the orders prayed for in the judicial review and contended that the issue of ownership of the land on which the Public Private Partnership project was in contention *"is currently the subject matter in other courts and the final determination regarding ownership is in the hands of other competent courts"* which the learned Judge could not bind. In addition, the 2nd respondent had taken possession of the land which the appellant claimed to be its property. Moreover, contended the 1st respondent, the appellant had not challenged the contract and there was absence of detailed guidelines for Public Private Partnership (PPP). It was the 1st respondent's further submission that the trial Judge exercised his discretion properly and that judicial review being a discretionary remedy, the Court could refuse to grant the orders even where the requisite grounds for it exist, for example, where the remedy is not the most efficacious. The 1st respondent referred the Court to the authority of **Sanghani Investment Limited v. Officer in charge Nairobi Remand and Allocation Prison** [2007] 1 EA 354 in support of this proposition where the Court stated in this regard –

> ***"... it may indeed be true that the notice that is impugned is irregular or unlawful and an order of certiorari would be deserved, but it is not in every case that the court will grant an order of judicial review even though it is deserved. Judicial review being a discretionary remedy will only issue if it will serve some purpose. Certiorari is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the Court being a judicial one must be exercised on the basis of evidence and sound legal principles... so that in this case, even though this application were properly before this Court and the application had merit, the court may not have granted an order of certiorari because it would not be the most efficacious remedy in the circumstances."***

26. It was the 1st respondent's further submission that the learned trial Judge exercised his discretion properly after taking into account relevant factors including what the 1st respondent termed *"some conceded facts"* which in the 1st respondent's view included fraudulent incorporation prior to November 26, 2008 *"by the appellant's directors"* of a company with a name almost similar to that of the 2nd respondent ostensibly to pass it as the recipient of the tender. But it was conceded by the 1st respondent that the appellant's proposal to the 1st respondent was not in the name of *"Golden Lime International Limited,"* but rather in its (appellant's) own name. It was the 1st respondent's submission that the appellant was guilty of fraudulent acts in that the directors of the appellant feigned that Golden lime International Limited incorporated in 2008 *"...was awarded a public private partnership agreement ..."* when it was not. The 1st respondent also attacked the appellant and the interested parties because the latter supported the appellant's case, a fact that is said by the 1st respondent to be "a choreographed scheme."

27. It was the 1st respondent's further submission that although the interested parties claim ownership of the land on which the PPP project is to be launched, the interested parties furnished no evidence to prove that they own it. In addition, contended the 1st respondent in its written submissions, the contract sought to be quashed following the tender given to the 2nd respondent was not filed in Court and the appellant's failure to frame its application properly and to include appropriate prayer in its statutory statement was fatal. It was contended by the 1st respondent that the learned trial Judge exercised his discretion properly after weighing all the relevant circumstances.

28. In its written submissions, the 2nd respondent supported the decision of the learned trial Judge and took the position taken by the 1st respondent whose submissions it supported both on law and on facts. We find it unnecessary to repeat them.

29. The interested parties on their part supported the submissions of the appellant and faulted the decision of the learned trial Judge. We do not find it necessary to reiterate these either.

30. For starters, the parties are in agreement that the learned trial Judge properly analysed the law and came to the conclusion that the judicial review application had merit and that the orders sought could be granted save that there were factors that militated against the grant of the orders. The appellant and the interested parties contend that the learned Judge went astray in his refusal to grant the orders sought after finding the application to be meritorious while the respondents contend that the trial Judge was spot on in refusing to grant the orders.

31. The issues for our consideration in this appeal are two; whether there were circumstances that militated against the grant of the orders of certiorari and mandamus; whether the learned Judge exercised his discretion properly in declining to grant the orders.

32. The circumstances that the learned Judge took into consideration in declining to grant the judicial review orders were that the appellants did not challenge the contract signed on 24th November 2008 subsequent to the award of the tender by the 1st respondent to the 2nd respondent to redevelop Eastleigh Market on LR36/VII/1037; the Statement in the judicial review proceedings was silent on the issue of the signed contract and only attacked or impugned the award of the tender and a party was not allowed under the judicial review rules to rely on grounds other than those set out in the statement; validity and enforceability of the contract could be the subject matter of litigation between the parties in private law courts if it is not already the subject matter of litigation before competent courts as they are currently seized of the issue of ownership; that the grant of certiorari, even if properly merited might not be effective as against the signed contract; that the learned Judge might unnecessarily bind other competent Courts dealing with the validity or enforceability of the contract; that the order of mandamus could not be granted as it would result in the Court making the actual decision for the parties and perhaps directing the rewriting of the unchallenged contract; that any aggrieved party could seek appropriate reliefs pursuant to contract in private law courts; that the appellants went to court after the award of the tender and the signing of the contract and that *"this in turn means that further steps could have been taken pursuant to the contract,";* that for this reason there was concern with the effectiveness or efficacy of any orders and that it was appropriate to deny the grant of certiorari and mandamus so as to avoid giving orders in vain *"... which might adversely impact on third parties"*.

33. The appellant contends in its appeal that the trial Judge should have allowed the judicial review application and granted the orders of certiorari and mandamus after making a finding that the application had merit and that the tender process did not comply with the law.

34. In light of this, were there circumstances that militated against the grant of the judicial review application and the orders of certiorari and mandamus despite the application being found to be meritorious?

35. In administrative law matters, courts have discretion to withhold a remedy of judicial review even where a substantive foundation has been laid because administrative law remedies are inherently discretionary. But courts are slow to deny the remedy. The discretion to refuse to grant judicial review orders where they are merited must be very sparingly exercised. In normal circumstances, a decision that has been found to be ultra vires must be quashed. Public policy considerations demand that public bodies must not be encouraged to breach the law and courts should not give the perception that breach of law will not attract sanctions and for this reason the discretion not to grant the remedy of judicial review where the application is merited ought to be exercised very sparingly so as to discourage unlawfulness. Where a public body under a duty to act fairly has failed to do so, an aggrieved party with a right to be heard cannot be denied his rights lightly. Judicial review is intended to enforce the rule of law. It should ensure that administrative decisions are taken in accordance with the powers conferred by Parliament. Administrative inconvenience cannot justify unfairness "even if chaos should result" see Lord Woolf M R in R. v. Secretary of State for Home Department; ex parte Fayed [1998] 1 WLR 763 at pg 777 B and Lord Denning in R v. Secretary of State for Education & Science, ex parte Parveen Malik [1994] ELR 121 at pg 130 B-E.

36. The Judiciary in Kenya as the guardian of the rule of law and human rights is placed in that an unenviable position by the Constitution. It must use its discretionary power to determine whether an action is lawful or not and in doing so must ensure observance of objective legal standards of the conduct of public bodies. No public body or government organ has the licence to exercise arbitrariness over any person and it is precisely the unpopular litigating claimant for whom the safeguards of due process are most relevant in a society such as ours which acknowledges the supremacy of the rule of law. No public body should be excused from compliance with the law or to exceed its powers.

37. The issue of the appellant's failure to challenge the contract that ensued from the tender by the 1st respondent to the 2nd respondent must be viewed in the context of the invalidity of the decision to award the tender in contravention of the Public Procurement and Disposal Act, 2005. The learned Judge correctly held that the 1st respondent acted in complete disregard to the provisions of the PPD Act. The effect of the 1st respondent's failure to comply with the said (statute) was to render not only the decision in the award of the tender but also the process of tender null and void (**see St. John Shipping Corporation V. Joseph Rank**) (supra). In the premises, the contract that ensued therefrom could not receive the seal of legitimacy as it arose from a process and an award that lacked legality. As the Court did rightly find that the process of tendering and the tender itself were not in compliance with the provisions of PPD Act, it followed that the award of tender was illegal and therefore the 24th November 2008 contract that was pegged to and was founded on the tender could not have legitimacy that the tender itself did not have. In short, the contract was not any more valid than the tender was and therefore it did not matter that the appellant had not challenged it directly because there was neither a valid process of tender nor a valid tender made by the 1st respondent to the 2nd respondent. The discretion by the learned Judge to decline to allow the appellant's judicial review application after finding that the provisions of PPD Act 2005 were not complied with was not, in this context, properly exercised as clearly the 24th November 2008 contract could not be said to be valid. In **Berkely v. Environment Secretary in Berkely v. Secretary of State for Environment [2001] 2 AC 603** the House of Lords allowed an appeal because the Court of Appeal ought not to have exercised its discretion under the cited statutory provisions to uphold a planning permission granted contrary to the provisions of the Council directive since to do so would be inconsistent with the court's obligations under the European law to enforce community rights. In his judgment, Lord Bingham of Cornhill stated –

> ***" ...Even in a purely domestic context, the discretion of the Court to do other than quash the relevant order or action where such excessive exercise of power is shown is very narrow. In the Community context, unless a violation is so negligible as to be truly de minimis and the prescribed procedure has in all essentials been followed, the discretion (if any exists) is narrower still...***
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> ***... the strict conditions attached by article 2(3) of the Directive to exercise of the power to exempt and the absence of any power in the Secretary of State to waive compliance (otherwise than by way of exemption) with the requirements of the Regulations in the case of any urban development project which in his opinion would be likely to have significant effects on the environment by virtue of the factors mentioned, all point towards an order to quash as the virtue of the factors mentioned, all point towards an order to quash as the proper response to a contravention such as admittedly occurred in this case.***

38. In the case, Lord Hoffman (at page 616 para F) stated-

> ***It is exceptional even in domestic law for a court to exercise its discretion not to quash a decision which has been found to be ultra vires; see Glidewell LJ in Bolton Metropolitan Borough Council v Secretary of State for the Environment [1990] 61 P & CR 343, 353."***

39. In **Shaghani Investments Limited v Officer in Charge Nairobi Remand Prison and Allocation Prison** (supra) which was referred to us by the counsel for the respondents, the Court pointed out that judicial review must serve some purpose and a Court may refuse to grant judicial review orders if they are not the most efficacious remedy in the circumstances. In the instant appeal, the tender and the process resulting from it were in fragrant breach of the law. They were null and void. The contract ensuing from the tender was clearly founded on illegality. It cannot claim legitimacy which neither the tendering process nor the tender itself did not have. In short, such void contract cannot be a basis for exercising discretion to refuse to grant the remedy of judicial review.

40. It was contended by the respondents that the appellant is guilty of material non-disclosure and the formation of a company with a name almost identical to that of the second respondent (Goldenline International Limited) was alluded to as a ploy to defraud the 2nd respondent. But it was conceded that when it submitted its proposal the appellant did not use the name and clearly if the name was not being used in the tender it would be stretching the imagination a tad too far to say that there was a scheme to defraud. We accept that an applicant for orders for judicial review must possess candour as a necessary virtue and discharge the duty to make full and frank disclosure to the Court of all material facts. In this case, the alleged non-disclosure of the formation by the 1st interested party (who was a director of the appellant) of a company with a name almost similar to that of the 2nd respondent conferred no advantage to and none was obtained by the appellant. In **R. v. Wirral Metropolitan Borough Council, exp Bell** [1995] 27 HLR 234, 238-239)| the Court refused to dismiss an application for permission on grounds of non-disclosure as *"no advantage was obtained by the claimant and in the end there was no prejudice to the defendants."* The record of appeal shows that only one director (Farah Mohamed) in the appellant company was a director of the company bearing the name almost identical to that of the 2nd respondent. The evidence placed before the superior court did not prove *"fraudulent actions and improper conduct of the appellant"* contrary to the submissions of the respondents.

41. The respondents made heavy weather of the fact that a company bearing almost the same name as that of the second respondent had been

formed and the respondent's saw this as a *"well-choreographed illegal scheme by the appellant, its directors and interested parties."* In addition, the respondents submitted that there was a "fraudulent twist" because the appellant had submitted a proposal in its own name and not as Golden Lime International Limited and for this reason the High Court was presented with "fraudulent actions." It was glaringly patent that no evidence was tendered to establish what the respondents regarded as fraudulent. From the evidence on record, incorporation of the company with a name almost similar to that of the 2nd respondent was not a clandestine activity and nothing really turns on the fact, given that the appellant did not seek to use it, and further, there is no evidence to show any fraud in relation to the antecedents heralding the judicial review proceedings that gave rise to this appeal. A distinction must be made between the company as a legal entity and the first interested party as a human being and in the absence of evidence that the latter engaged in fraud, it cannot be assumed on the facts that there was fraud.

42. The appellant complained that the 1st respondent did not notify the applicant that its proposal was not successful as required by Section 83 of the PPD Act and it was not until the appellant madeenquiries at the 1st respondent's offices that it became aware of the outcome of the application for the public private partnership contract. The allegation that these facts constituted evidence of deliberate suppression and/or concealment of material facts and/or distortion of the factual position in the proceedings are unsubstantiated by evidence and are far-fetched. **Golden Lime International Ltd** whose advocates wrote to the 1st respondent purporting to have been awarded a private partnership agreement is not the applicant and the fact that the 1st interested party was one of its directors as well as a director of the appellant does not show any impropriety on the part of the appellant as there is no evidence that the 1st interested party and not the company itself had purported to have been awarded the tender. And there is no law against a person holding more than one directorship! The documents exhibited as evidence show that it was not the appellant company but rather the company with a name almost similar to that of the 2nd respondent that wrote regarding the award. The respondents' allegations of non-disclosure of material facts or information by the appellant do not hold good or true as there was no evidence to buttress them.

43. The premises on which the public private partnership project was intended being LR NO.36/VII/1037 and/or LR No.36/VII/48 at Eastleigh are said to be a leasehold and the 1st respondent is the lessor. The premises are the subject of legal proceedings in ELC Civil Suit No.24 of 2007 between the interested parties and third parties. The 1st respondent had threatened to cancel the lease in December of 2008 but the interested parties moved to court and obtained orders in judicial review application 37/2009 restraining 1st respondent from terminating or cancelling the lease. Those proceedings seem to be still ongoing. A suit No. H.C. ELC Civil Suit No.24 of 2007 seems to have been instituted earlier (in the year 2007) by third parties against the interested parties. It is still pending and the issue for determination in it is ownership of the same premises LR No.36/VII/48 at Eastleigh, Nairobi. On their part the interested parties sued the 1st respondent in 2008 seeking permanent injunction to restrain the 1st respondent from alienating or wasting or developing the said premises and for a declaration that the interested parties are the lawful owners of the said property.

44. The germane issue for consideration is whether the ongoing litigation on the ownership of the subject property, prejudiced the appellant's right to the reliefs of certiorari and mandamus or constituted a good reason for refusing to grant the judicial review orders sought by the appellant. Courts will decline to exercise their discretion to grant the orders where satisfied that the remedy would serve no useful purpose. This is because the Court does not act or issue orders in vain. In the instant case, no case is made out that the appellant has no valid claim over the property nor is it clear that it will not eventually prevail in obtaining the title. But it is not for this Court to engage in imagination to postulate facts which might or might not succeed. Fairness is the yardstick that ought to be employed as it leads to and results in justice. Once the award of tender is quashed, the process would have to start *de novo.*

45. The issue of the statement being silent on the signed contract was one of the factors had regard to by the learned Judge in refusing to grant the orders. As stated above, the contract lacked validity as it sprung from a void transaction. Even without a specific order to quash it, it was obvious in the circumstances that it could not stand in absence of a valid tender. A challenge on the process of tendering and on the award of tender of necessity meant that nothing legitimate could ensue from either. Although a contract document was signed, it had no validity.

46. As regards published guidelines, Regulation 64 (4) of the Public Procurement and Disposal Regulations 2006 (PPDR 2006) stipulated that *"the Authority shall issue detailed guidelines for concessioning or public private partnership."* The learned Judge found that the 1st respondent was not in a position to direct its mind on any certain guidelines at the time of the award and he saw this as yet another factor why the orders should be refused. The PPD Regulations 2006 were published under Legal Notice No.174 of 29th December 2006. They came into operation on 1st January 2007. At the time of the award of the tender, the Oversight Board had not published the guidelines. They were published after the hearing of the judicial review application but before the High Court had determined the judicial review application. As Section 92 (3) of the PPD Act 2005 required the procedure for specially permitted procurement to be as prescribed, and as the PPD Regulations 2006 had not come into operation as they were yet to be published and could not therefore be applied retrospectively, there was no basis for refusing to grant the orders because to do so meant that the appellant would have to bear the brunt of the failure by the Public Procurement Oversight Advisory Board to carry out its function. Neither the appellant nor any of the other parties was to blame for the absence of the guidelines. In a situation such as this, justice required that all the parties be given equal treatment in relation to the failure by the advisory Board to have the guildelines in place, and the only way this could be achieved was to quash the purported tender and the contract ensuring from it so as to return the improper process to square one and thus attain the object of the PPD Act which is, inter alia, to promote competition and ensure that competitors are treated fairly. Unless the tendering process is quashed and the appellant given an opportunity to participate in it, the object of the Act would be defeated. As the guidelines by the Advisory Board are now in place, one expects that the integrity and fairness of the process and its procedures will be observed.

47. The Appellate Jurisdiction Act, Cap 9, confers on this court jurisdiction to hear appeals from the High Court and power, authority and jurisdiction vested in the High Court in determining appeals. Pursuant to Section 3A (1) overriding objective of the Act is to facilitate the just, expeditions, proportionate and affordable resolution of the appeals governed by the Act. In exercising its judicial power under the Act, this Court is required to give effect to the overriding objective and to handle all matters presented before it for the purpose of attaining the just determination of the proceedings. This Court is guided by the principles enshrined in Article 159 of the Constitution which include the principle that justice shall be administered without undue regard to procedural technicalities. The policy of the Court is to hear and determine appeals on their merits and to eschew very rigid application of rules of procedure where such application will result in miscarriage or subversion of justice. The philosophy informing this policy is that rules of procedure, as hand-maidens of justice, are designed to help secure justice not to override it. Technical lapses therefore will in appropriate circumstances be excused to obviate injustice that may ensue therefrom.

48. It must be realized that courts exist for the purpose of dispensing justice. Judicial officers derive their judicial power from the people or, as we are wont to say in Kenya, from Wanjiku, by dint of Article 159 (1) of the Constitution which succinctly states that *"judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under this Constitution."* Article 159 (2) makes it clear that in exercising judicial authority, the courts and tribunals shall be guided by the principles stated in Article which include in Article 159 (2) (d) the requirement that *"justice shall be administered without undue regard to procedural technicalities."* As Judicial Officers are also State officers, they are enjoined by Article 10 of the Constitution to adhere to national values and principles of governance which require them whenever applying or interpreting the law of the Constitution to ensure, inter alia, that the rule of law, and equity are upheld. For these reasons, decision of the courts must be redolent of fairness and reflect the best interest of the people whom the law is intended to serve. Such decisions may involve the rights and obligations of the parties to the litigation and therefore relate to the interests of such parties inter se, while others may transcend the interest of the litigants and encompass public interest.

In all these cases, it is incumbent upon the Court in exercising its judicial authority to ensure attainment of fairness.

49. In sum, the factors considered by the court in its decision not to grant the orders sought in the judicial review application did not justify refusal of the orders or the application which admittedly had merit. The learned Judge misdirected himself in his consideration of those *"factors"* and as a result arrived at a wrong decision. It is manifest from the circumstances of the case that the error by the Judge in the exercise of his discretion resulted in injustice to the appellant (see **Mbogo and Another v. Shah** [1968] EA 93.

50. In the result, we find merit in the appeal which we hereby allow and grant the orders sought.

Dated and made at Nairobi this 22nd day of May 2015.

W. KARANJA

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JUDGE OF APPEAL

G.B.M. KARIUKI SC

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JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR