Case Number:	Miscellaneous Application 250 of 2015
Date Delivered:	22 Dec 2015
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	George Vincent Odunga
Citation:	Republic v Kenya Revenue Authority Ex Parte Webb Fontaine Group FZ-LLC & 3 others [2015] eKLR
Advocates:	Mr Marete for the Applicant Miss Wambugu for the 1st interested party Mr Wanga for Mr Gatonye for the 2nd interested party Miss Odari for the 3rd interested party
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application dismissed
History County:	-
Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NUMBER 250 OF 2015

REPUBLIC...APPLICANT

VERSUS

THE PUBLIC PROCUREMENT AND ADMINISTRATIVE REVIEW BOARD…......RESPONDENT

AND

KENYA REVENUE AUTHORITY….…...…..1ST INTERESTED PARTY

TRADE MARK EAST AFRICA...…....2ND INTERESTED PARTY

BULL SAS LIMITED ……………....…...….…3RD INTERESTED PARTY

***EX PARTE:* WEBB FONTAINE GROUP FZ-LLC**

JUDGEMENT

Introduction

1. By a Notice of Motion dated 7th August, 2015, the *ex parte* applicant herein, **Webb Fontaine Group FZ-LLC**, seeks the following orders:

1. **An order of certiorari to remove into the High Court and quash the decision made by the Public Procurement Administrative Review Board ("the Review Board") on the 14th day of July, 2015 by which it dismissed the ex parte applicant's Request for Review against the decision of the Kenya Revenue Authority (the "Procuring Entity") and its Agent M/s Trade Mark East Africa to award the tender for the Supply, Installation And Commissioning of an integrated Customs Management System (ICMS) and related modernisation services at Kenya Revenue Authority (KRA) (PO/20130221) to M/s Bull SAS Ltd and directed that the tender process may proceed.**

2. **An order of prohibition directed to the Kenya Revenue Authority and its agent M/s Trade Mark East Africa prohibiting them from negotiating, entering into, applying, enforcing, implementing or continued implementation, in any manner whatsoever, a contract with M/s Bull SAS Ltd, arising from the Tender for the Supply, Installation and Commissioning of an Integrated**

Customs Management System (ICMS) and related modernisation services at Kenya Revenue Authority (KRA) (PO/20130221).

3. **An order of mandamus directed to the Public Procurement Administrative Review Board compelling it to proceed with the consideration and adjudication of the issues raised in the Request for Review filed before it by the ex parte Applicant on 15th June, 2015.**

4. **An order that the costs of this Application be awarded to the Applicant.**

***Ex Parte* Applicant's Case**

2. According to the applicant, these proceedings relate to a Tender for the Supply, Installation and Commissioning of an Integrated Customs Management System (ICMS) and related modernisation services at Kenya Revenue Authority (KRA) (PO/20130221) (hereinafter referred to as "the Tender"), tender which was worth over $ 10,000,000 and which was aimed at rejuvenating the customs revenue collection system in Kenya by increasing its efficiency and substantially increasing the revenue collected thereby.

3. It was disclosed that in the said tender the Procuring Entity was the Kenya Revenue Authority (hereinafter referred to as "KRA"), the 1st interested party herein while the same tender was conducted on its behalf by its agent M/s Trade Mark East Africa (hereinafter referred to as "TMEA"), the 2nd interested party herein pursuant to a memorandum of Understanding and Financing Agreement between the said parties (hereinafter referred to as "the MOU"). The said tender was by way of a Request for Proposals after which the ex parte applicant's bid was responsive and it was invited for the opening of its Financial Bid together with M/s Bull SAS Ltd, the 3rd interested party herein.

4. It was however contended that the ex parte applicant was unaware of the technical scores awarded to itself or the 3rd interested party whose financial bid was also opened. Eventually the applicant received a letter from the 2nd interested party dated 30th April, 2015, informing it that its proposal was "unsuccessful" but that in light of its "unsuccessful bid", it was at liberty to submit a complaint on the subject tender within 14 days in line with TMEA policy, Section 4.8.1.

5. It was the applicant's position that in terms of the said letter, the procurement process was not concluded as there was room for the consideration of a complaint which if successful would result in the Applicant being awarded the tender especially considering that as matters stood, there was only one other "eligible" bidder. According to the applicant, a reading of the said letter implied without more that the successful bidder was the 3rd interested party and indeed by its email of 17th May 2015, the 2nd interested party informed the applicant that the preferred bidder was the 3rd interested party.

6. However after considering the information provided vide the letter dated 30th April, 2015, the applicant filed complaint with the 2nd interested party in whi9ch it contended that the 3rd interested party was not technically complaint and did not meet the threshold set out in the tender documents hence their bid was unresponsive. It was averred that the 2nd interested party received the said complaint and vide its letter of acknowledgement dated 19th May, 2015 formed a panel to interrogate the complaint raised. However by its letter of 8th June, 2015 the 2nd interested party, without quashing the letter of 30th April, 2015, informed the applicant that its complaint was unmerited. In the applicant's view, the letter of 8th June, 2015 crystallised notice of failure of its bid and hence the applicant filed a Request for Review

(hereinafter referred to as "the Request") before the 2nd Respondent on 15th June, 2015.

7. When the said Request came up for hearing before the Respondent it emerged that both the 1st and 2nd interested parties had both filed preliminary objections to the Request Respondent. After hearing the objections, the Respondent dismissed all the objections save for the one that challenged its jurisdiction on the basis that the Request was filed out of time as the apparent invitation to lodge the complaint was under the provisions of the Trade Mark East Africa procurement guidelines which guidelines were not incorporated in the Request for Proposals and hence was not part of the tender document or the evaluation criteria in the tender document.

8. It was this decision which the applicant was aggrieved with and hence these proceedings were provoked. According to the applicant, reference to the said guidelines was a matter determined by the 1st interested party and communicated to the bidders vide its letter dated 30th April, 2015 and it was not open to the bidders to question the same. Further it was the legitimate expectation of the bidders that the 2nd interested party was acting on the authority and that a reading of the documents relied upon by the 1st and 2nd interested parties makes it clear that the 2nd interested party was at liberty to apply its own procedures as it did. In any case the guidelines did not prejudice ant party to the procurement process. To the applicant the letter dated 30th April, 2015 was not a clear cut notification of an unsuccessful bid as contemplated in section 83 of the ***Public Procurement and Disposals Act*** (hereinafter referred to as "the Act") but rather a qualified notification and invitation to pursue a complaint. It was therefore its position that the only notice as contemplated under section 83 of the Act was the letter of 8th June, 2015 which rendered the Request for Review filed on 15th June, 2015 valid and deserving of consideration.

9. It was therefore the applicant's contention that in declining to consider the Request for Review before it the Respondent breached the law. It was contended that the Respondent breached the applicant's legitimate expectation and arrived at an irrational and unreasonable finding that the Request was filed out of time thereby striking out the same without considering its merits.

10. It was submitted on behalf of the applicant by its learned counsel, **Mr Marete**, while reiterating the foregoing that the letter of 30th April, 2015 being equivocal was not the notice contemplated under section 83 of the Act which ought to be unequivocal. It was therefore contended that the Respondent ought to have considered the provisions of the TMEA policy Section 4.8.1 cited in the said letter which Policy was relied upon by the 2nd interested party in these proceedings. The said policy it was submitted provided for a standstill period of 14 days whose purpose is to provide unsuccessful tenderers with feedback on their submissions and provide an opportunity to challenge the award decision. To the applicant, the Applicant may well have overturned the award and been deemed the successful bidder if its complaint was successful. Had the full meaning and tenor of the said letter been considered, the applicant submitted that it would have been clear that the letter of 30th April, 2015 did not bear the finality contemplated under section 83 of the Act and therefore the 7 days period for filing a Request for Review did not begin to run.

11. It was further submitted that the Respondent did not consider the fact that the procurement in question was conducted in accordance with inter alia the provisions of Trade Mark East Africa Procurement Guidelines as stated in TMEA letter dated 19th May, 2014 acknowledging the complaint. This letter, it was submitted was relevant to the consideration of the time for filing the Request for Review which could not betide to the letter of 30th April, 2015. Based on ***Judicial Review in Kenya*** 2nd Edition by **PLO Lumumba** in which the learned author cited **Secretary of State for Education and Science vs. Tameside Metropolitan Borough Council [1977] AC 1014 at 1064** H, it was submitted that they failure to consider relevant matters is a ground for granting judicial review orders.

12. According to the applicant, it was by the letter dated 8th June, 2015 that its bid was rendered unsuccessful hence this was the letter contemplated as a notice under section 83 of the Act and it was open to the applicant to file Request for Review within 7 days to the Respondent in compliance with Regulation 73 of the Regulations. Having filed the same on 15th June, 2015, it was submitted that the Respondent's jurisdiction was properly invoked. Therefore by declining to exercise its jurisdiction, the Respondent, it was contended, made a serious jurisdictional error which is amenable to judicial review. In support of this position the applicant relied on **Anisminic Limited vs. Foreign Compensation Commission [1969] 2 AC 147**.

13. It was submitted based on ***Judicial Review in Kenya***, page 23 that where a body concerned fails to exercise jurisdiction, it may be compelled by an order of mandamus.

14. It was further submitted that it was the Applicant's legitimate expectation that the procedure it had been informed to be applicable to its bid would be followed to the letter both by the procuring entity and the Review Board and that at no time would the procedures disclosed to the applicant be construed against it. Accordingly, the applicant conducted itself in accordance with the same procedure and thereafter invoked the provisions of the Act to move to the Respondent. In support of this position the applicant relied on **Keroche Industries Ltd vs. Kenya Revenue Authority & Ors [2007] eKLR** and **R vs. Kenya Revenue Authority and Anor exp Tradewise Agencies JR Civil Appl. 350 of 2012**.

15. It was therefore submitted that the Respondent's decision was irrational and unreasonable and that the same was disproportionate and unfair to the ex parte applicant contrary to the intention of the law that in the process of procurement, all bidders are equal and subject to the same application of the law. Based on **R vs. Judicial Service Commission exp Peter Nyakundi Morigori [2015] eKLR**, it was submitted that the threshold for the grant of the orders sought has been demonstrated and met and in the interest of Constitutionalism and the Rule of Law and the reliefs sought ought to be granted as prayed.

Respondent's Case

16. On behalf of the Respondent it was contended that the Respondent received the Applicant's request for review on the award of the Tender, heard the parties, considered the submissions and determined the application for review vide its decision dated 14th July, 2015 striking out the said Request on the ground that it was filed out of time after overruling two other grounds of objection.

17. It was the Respondent's view that it considered all relevant facts in arriving at its decision which was within its mandate under the Act. In its view the applicant's application was based on bad faith and was unmerited.

18. In its submissions through its learned counsel, **Miss Odhiambo**, it was contended by the Respondent, based on **Republic vs. Public Procurement Administrative Board [2013] KLR** and **Francis Chachu Ganya & 4 Others vs. Attorney General & Another [2013] eKLR,** that judicial review deals with decision making process and not merits and is not an alternative to an appeal. Further reliance was placed on **Kenya Pipeline Company Ltd** **vs.** **Hyosung Ebara Company Ltd & 2 Others [2012] eKLR** with respect to the need to respect specialised Tribunals such as the Respondent. To the Respondent these proceedings are an attempt to appeal against the decision of the Respondent. It was submitted that since the grant of judicial review is discretionary the Court ought to consider the fact that

individual interests ought not to override public interests hence the application is an abuse of the process.

1st Interested Party's Case

19. According to the 1st Interested party, this Notice of Motion has abated by operation of law in light of the provisions of section 100(4) of the Act and there is no provision for extension of time thereof hence this Court has no jurisdiction to hear the Motion. In the premises, it was contended that the orders of the Respondent have taken effect hence these proceedings are a nullity.

20. It was averred that on 24th November 2010 the Government of Kenya (hereinafter referred to as "GOK") through the Ministry of East African Community and the Ministry of Finance entered into a Memorandum of Understanding with the 2nd interested party, an autonomous non-profit organisation funded by a range of Development Agencies including DFID, UKAID, DANIDA, CIDA, World Bank among others, with the aim of growing prosperity in East Africa. The said MOU was aimed at offering financial, technical, capacity building and logistical support to EAC partner states individually in the integration process. Accordingly, the 1st interested party approached the 2nd interested party with a request to extend support to the ongoing reforms within the 1st interested party which request the 2nd interested party accepted and the arrangement was formalised through a Financing Agreement dated 19th September, 2013 between the GOK and the 2nd interested party in which the 2nd interested party was to provide financial assistance to the 2nd interested party to the tune of US$ 13,020,000.

21. It was averred that the proceedings leading to the award the subject of these proceedings which was made on 14th July, 2015 concerned a Tender for the Supply, Installation and Commissioning of an integrated Customs Management System (ICMS) and related modernisation services at Kenya Revenue Authority.

22. Having been an unsuccessful tenderer, the applicant herein filed a Request for Review to the Respondent being Review No. 27 of 15th July, 2015 to which preliminary objections were raised inter alia that the said request was filed out of time and the Respondent had no jurisdiction to hear the matter which objection was upheld and the request was struck out.

23. According to the 1st interested party, a notification of award was issued to the successful bidder, the 3rd interested party on 30th April, 2015 and at the same time a notification was also sent to the unsuccessful bidders the same day. The said letter provided for a fourteen (14) days stand still period, which was meant to allow the unsuccessful bidders to "seek feedback" on their proposal or to submit "any queries" though the letter was clear that the Bids had been both technically and financially evaluated. To the interested party, section 83 of the Act contemplates one notification and does not contemplate any appeal as it becomes functus officio after the notification.

24. It was therefore the 1st interested party's case that the Request having been filed out of time, the Respondent had no jurisdiction to proceed with the same hence it did not go into the merits thereof. According to it, since it did not undertake the procurement which was undertaken by the 2nd interested party it was inhibited from providing the documents to the Respondent as it was not in possession thereof. However at the request of the Respondent, the 2nd interested did supply the same. The 1st interested party disclosed that it has filed an appeal to the High Court being Civil Appeal No. 356 of 2015: **Kenya Revenue Authority vs. Webb Fontaine LLC** in respect of the first two preliminary

objections it raised before the Respondent which were disallowed. In its view the Respondent acted in accordance with the law in arriving at its decision and that issues of time and jurisdiction are not technicalities and cannot be cured under Article 159(2)(d) of the Constitution.

25. It was averred that the Memorandum of Understanding and the Financing Agreements referred to herein were not part of the bid documents and could not be relied on as part of the bid evaluation documents in adjudicating the preliminary objections.

26. It was further averred that the verifying affidavit was defective as no Power of Attorney was attached to it granting authority to institute these proceedings.

27. It was submitted on behalf of the 1st interested party by its learned counsel, **Miss Mwaniki**, that the substantive application having been filed on 10th August, 2015, pursuant to section 100(4) of the Act, these proceedings ought ton have been finalised and order thereto given by 9th September, 2015, failing which the decision of the Respondent took effect. Since the requirement is mandatory it was contended that the Respondent's decision is now engaged and in full force by the operation of the said provision since the said period cannot be extended and reliance was placed on section 59 of the ***Interpretation and General Provisions Act***, Cap 2 Laws of Kenya. Although the 1st interested party appreciated that section 100(4) of the Act had been declared unconstitutional, it still contended that section 100 of the Act together with the subsections must be interpreted to give effect to their meaning. To it the Court's interpretation of section 100(4) in the authorities relied on by the applicant is erroneous and that the proper interpretation ought to be the one propounded in **Judges & Magistrates Vetting Board & 2 Others vs. Centre for Human Rights & Democracy & 11 Others [2014] eKLR**.

28. While citing the Australian case of **Plaintiffs 157 of 2002 vs. The Commonwealth of Australia [2003] HCA 2**, the Indian case of **State of A P vs. Manjeti Laxmi Kantu Rao**, House of Lords case of **Smith vs. East Elloe Rural District Council**, **R vs. Secretary of State for the Environment, exp Ostler [1976]**, **R vs. Cornwall County Council, exp Huntington [1992]**, the 1st interested party submitted that a distinction ought to be drawn between total ouster clause and partial ouster (such as the one in section 100(4) of the Act).

29. According to the 1st interested party, procurement proceedings are a special jurisdiction and the statutory timelines set by the Act are not intended to be extended, instead they should be strictly adhered to. In support of this position the 1st interested party relied on **Raila Odinga & 5 Others vs. Independent Electoral and Boundaries Commission & 3 Others [2013] eKLR** and **Ferdinand Ndungu Waititu vs. IEBC & Others [2013] KLR**.

30. It was therefore submitted that pursuant to section 100(4) of the Act, the decision of the Review Board has already taken effect and therefore the situation cannot be ignored or cured by merely proceeding with these proceedings. To continue stalling the proceedings beyond the stipulated 30 days, it was submitted would be prejudicial to the 1st interested party with respect to the implementation of the project.

31. It was submitted that from the wording of the letter dated 30th April, 2015, it was clear that the tender was no longer open and had been evaluated with finality. To the 1st interested party the standstill period of 30 days was only meant to give the unsuccessful bidders feedback on their bid and answer any queries they had. If the applicant was aggrieved, it was submitted it ought to have filed a Request for Review within 7 Days of 30th April, 2015 which ought to have been by 7th May, 2015 but having opted to exercise the option in the letter of 30th April, 2015, by the time it made a Request for Review it was late by 37 days. It was submitted hat the letter of 8th June, 2015 only gave the applicant feedback on the

various issues raised in the applicant's complaint but the said letter was not intended to be a notification of the award contemplated under section 83 of the Act. The said letter of 30th April, 2015 was considered by the Board which found that the appeal procedure was not incorporated in the tender documents. It was therefore submitted that the Board acted within its mandate. Although there was a Financing Agreement signed between the GOK and the 2nd interested party, it was submitted that it was neither part of the bidding documents nor one of the documents purchased by the interested bidders and was therefore irrelevant to the procurement process. Based on **Coastal Bottlers vs. The Commissioner of Domestic Taxes High Court Miscellaneous Application No. 1756 of 2005**, it was submitted that the judicial review jurisdiction only deals with the process and not the merits of the decision.

32. Since the Board considered all relevant matters, it was submitted that there was no jurisdictional error. To the contrary the Respondent exercised the powers donated to it by Regulations 73 and 77 of the ***Public Procurement and Disposal Regulations*** in determining the matter based on the preliminary objection without going into the merits and reliance was placed on **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & Others [2012] KLR** and **Owners and Masters of the Moro Vessel "Joey" vs. Owners and Masters of The Motor Tugs 'Barbara" and "Steve B" [2008] 1 EA 367**.

33. To the 1st interested party, the doctrine of legitimate expectation as propounded by the applicant was erroneous as the Respondent did not make any representation to the applicant that the preliminary objections would be dismissed. In support of this submission the 1st interested party relied on **Republic vs. Kenya Revenue Authority exp Shake Distributors Limited [2012] eKLR**.

34. It was further submitted that the Respondent's decision was neither lacking jurisdiction nor strayed outside its jurisdiction in order to be labelled ultra vires. Similarly, it was Wednesbury unreasonable but was rational, reasonable, logical, lawful, just and in line with the rules of natural justice. In support the 1st interested party relied on **Associated Provincial Picture Houses Ltd vs. Wednesbury Corporation [1948] 1 KB 223 and Civil Servants Union (CCU) vs. Minister for Civil Service [1985] AC 374 HL.**

35. It was submitted that the ex parte applicant failed to meet the threshold required in order for the judicial review orders sought to be granted and reliance was placed on **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**.

2nd Interested Party's Case

36. The 2nd interested party's case on the other hand, apart from raising similar objection with respect to the jurisdiction reiterated the averments made by the 1st interested on the origin of the tender the subject of these proceedings. The 2nd interested party also reiterated the factual position leading to these proceedings which was not substantially different from that reproduced by the Respondent and the 1st interested party.

37. According to the 2nd interested party, the issue of jurisdiction is not a technicality and cannot be cured under Article 159(2)(d) of the Constitution. In its view, despite the Respondent having not made a decision on the merits of the Request, the applicant has nevertheless proceeded to state some matters that are not the subject of the Respondent's decision hence rendering the application defective. It was further contended that judicial review proceedings cannot look into the merit of the decision as judicial review only looks into the procedure followed in arriving at the decision. To the 2nd interested party, the

evaluation of the proposals was carried out in compliance with the requirements set out in the bid document and the Respondent found that the Guidelines had not been incorporated in the bid document and could therefore not be relied upon by a party as an explanation as to why it filed its Request for Review out of time.

38. It was the 2nd interested party's case that the fact that it attempted to resolve tendering disputes in the manner not contemplated by the bid document by applying the Guidelines cannot act as estoppel as there cannot be estoppel against the law. To the 2nd interested party the right to file a Request against the decision of the Procuring Entity accrues after an unsuccessful bidder is notified that its bid was unsuccessful. Accordingly the applicant having been notified that its bid was unsuccessful, the applicant had, pursuant to Regulation 73 of the ***Public Procurement and Disposal Regulations,*** 7 days within which to file its Request, otherwise it became time barred and the Respondent would have no jurisdiction to hear and determine such a request. It was submitted, through learned counsel, **Mr Gatonye, SC**, that section 83 of the Act contemplates one notification and does not contemplate the procuring entity to entertain any complaint from any unsuccessful bidder as it becomes functus officio after such notification. It was therefore submitted that the Respondent in finding as it did since the MOU and Financing Agreements referred to y the applicant were not part of the bid documents and cannot be used as bid guidelines.

39. It was the 2nd interested party's case that legitimate expectation cannot be founded on a process that can lead to illegality i.e. using TMEA guidelines contrary to section 82 of the Act. It was therefore contended that the allegation of denial of the right to be heard does not arise since the Respondent could not hear a matter over which it had no jurisdiction.

40. It was further submitted that the verifying affidavit filed herein to the extent that it was sworn by a person purporting to be an agent of the applicant without attaching a power of attorney rendered the application incurably defective. In any case the Special Power of Attorney given to the deponent was restricted to executing documents before the Respondent and not before this Court.

41. It was the 2nd interested party's submissions that section 100(4) of the Act requires judicial review proceedings filed pursuant to the Act be heard and determined within 30 days of their filing. To the 2nd interested party, this provision serves to ensure that procurement matters are dealt with expeditiously due to their centrality in growth and development of economy in order to promote the objectives of the Act of maximising economy and efficiency as captured in section 2 thereof. Based on **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & Others** (supra) and **Ferdinand Ndungu Waititu vs. IEBC & Others** (supra) it was submitted that this Court was enjoined to consider the aforesaid section in resolving the dispute herein. It was therefore submitted that in light of Article 227 of the Constitution, the decisions in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728** and **Republic vs. Public Procurement Administrative Review Board & Another exp Hyosung Ebara Company Limited [2011] KLR** which declared section 100(4) unconstitutional are distinguishable.

42. It was submitted that just as the Courts have held that in election petitions, Courts are exercising special jurisdiction as per the Constitution and the related legislation, public procurement litigation is a special jurisdiction particularly having regard to the scheme of the Act, the strict deadlines set therein and the preamble to the Act. In any case this Court was reminded that it is not bound to follow the above cases in circumstances justifying departure.

43. On the basis of the foregoing the Court was urged to strike out these proceedings with costs.

44. It was submitted that from the record of the proceedings, the Respondent acted rationally, reasonably and lawfully in holding that the Request for Review was filed out of time and hence it had no jurisdiction to assess the merits of the same. It was submitted that the applicant was bound to file its Request within 7 days from 30th April, 2015 when it was notified that its bid was unsuccessful. It was averred that the notification letter dated 30th April 2015 sent to the applicant was equally notified to the other bidders. There was no representation in the said letter that the applicant would be awarded the tender if its complaint was successful. According to the 2nd interested party under section 113 of the Act, the right to request a review is in addition to any other remedy a person may have. Therefore the complaint mechanism stated in the letter could only be understood to be one additional remedy within section 113 of the Act.

45. It was submitted that a person who fails to submit itself within statutory requirements meant to ensure that its constitutional right of fair hearing is safeguarded cannot complain that its right to be heard has been taken away and in support of the submission that the Request was filed out of time, the 2nd interested party relied on **Republic vs. Public Procurement Administrative Review Board & 2 Others [2015] eKLR**.

46. On legitimate expectation it was submitted based on **Republic vs. Kenya Revenue Authority ex parte Aberdare Freight Services Ltd [2004] 2 EA eKLR**, that the same cannot be used to defeat an express provision of the law. It was submitted that the applicant had not laid any grounds that would justify the finding that the Respondent's decision was irrational within the meaning of **Pastoli vs. Kabale District Local Government Council [2008] 2 EA 300**. Based on **Centre for Rights Education and Awareness (CREAW) & 8 Others vs. Attorney General & Another [2012] KLR**, it was submitted that an issue of jurisdiction is not a technicality.

47. To the 2nd interested party the decision was arrived at after hearing the parties hence the Respondent acted fairly, reasonably and within its legal powers hence the application is devoid of merit and should be dismissed with costs.

48. It was the 2nd interested party's case that the applicant took a wrong legal trajectory by purporting to challenge the merits of the Respondent's decision through judicial review proceedings. It was contended that under section 82 of the Act the only document that the procuring entity ought to rely on is the Request for Proposal and any other document must be incorporated by reference in the Request for Proposal. The Respondent having found that the TMEA Guidelines were not part of the Request for Proposal, it was submitted that to revisit the same issue would amount to determining the merits of the decision yet it is not for a judicial review court to determine the correctness or otherwise of the decision of the tribunal. Such challenge can only be by an appeal under section 112 of the Act. It was further submitted that this Court has no jurisdiction to deal with maters which were not the subject of the decision of the Respondent such as evaluation of tenders whether preliminary or otherwise since a determination was not made by the Respondent on the technical evaluation of the tender on account of lack of jurisdiction. In support of this position the 2nd interested party relied on **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd** (supra) and **Republic vs. Kenya Revenue Authority *Ex parte* Yaya Towers Limited [2008] eKLR.**

3rd Interested Party's Case

49. After narrating the events leading to the decision of the Procuring Entity, it was the 3rd interested

party's case that by a letter dated 30th April, 2015, the 2nd interested party notified the 3rd interested party that its bid was successful and the 3rd interested party later learnt that simultaneously with the said notification, by a letter of even date the 2nd interested party notified the ex parte applicant that its bid was unsuccessful. On 15th June, 2015, the ex parte applicant lodged a Request for Review with the Respondent seeking to set aside the award of the tender to the 3rd interested party. The 3rd party respondent inter alia by raising preliminary objections on inter alia grounds that the Request was filed out of time which ground was upheld and the Respondent held that the Request was filed out of time and was hence time barred.

50. According to the 3rd interested party Regulation 73 of the Regulations as read with Legal Notice No. 106 of 18th June, 2013 provide that a Request for Review be made within 7 days of notification under section 67 of the Act. In this case, it was contended the notification was on 30th April, 2015 hence the applicant ought to have filed its Request for Review by latest 7th May, 2015 but instead lodged the Request on 15th June, 2015 about 39 days out of time. According to the 3rd interested party the Respondent's decision declining to entertain the Request cannot be successfully challenged. In its view there was no representation in the letter dated 30th April, 2015 that the applicant would be awarded the tender if its complaint was upheld. In addition, at no time did the 2nd interested party prohibit the applicant from filing its Request for Review pending the determination of its Request.

51. To the 3rd interested party the standstill period provided in clause 4.8.1 and 4.8.2 of the 2nd interested party's Procurement and Grant's Manual was merely meant to delay the commencement of the contract while an aggrieved party challenges the award but was not meant to expand the time for filing the Request. Since under section 99 of the Act a right to Request for Review is in addition to any other legal remedy available to the person and therefore if the ex parte applicant had a genuine grievance, it was submitted that it ought to have filed both the Request for Review and the complaint simultaneously.

52. It was contended that the 7 day period for filing the Request being a statutory period could not be varied by the 2nd interested party's Procurement and Grant's Manual. Since the applicant's position is that tender was governed by the Act, by seeking to rely on the 2nd interested party's Procurement and Grant's Manual the applicant was approbating and reprobating at the same time.

53. It was contended that some of the allegations made by the applicant go to the merit of the Request for Review which was not determined by the Respondent, this Court cannot delve into the said matters. To the 3rd interested party, the applicant is asking the Court to sit on appeal over the decision of the Respondent, a jurisdiction this Court does not have since even if this Court was to find that the Respondent was wrong that would not be a basis for interference. In any case even on the merit, it was submitted that the applicant's contentions were baseless. To the 3rd interested party, the Respondent considered all pertinent matters before arriving at its decision.

54. To the 3rd interested party, the applicant failed to prove that there existed grounds which would warrant the grant of the orders sought herein and that these proceedings were instituted for the sole basis of delaying and/or derailing the order made by the Respondent.

55. It was submitted by **Miss Odari**, learned counsel for the 3rd interested party, based on **Republic vs. Kenya Revenue Authority *Ex parte* Yaya Towers Limited** (supra) and **R vs. Public Procurement Administrative Review Board, Catering & Tourism Development Levy Trustees & Anor. [2013] KLR** that this Court is precluded from enquiring into the merits of the Respondent's merits by interfering with the factual findings of the Respondent. Based on **Kenya Pipeline Company Ltd vs. Hyosung Ebara Company Ltd & 2 Others** (supra) it was submitted that the administrative review envisaged

under section 98 of the Act is indeed an appeal hence the Respondent was entitled to review the process undertaken by the Procuring Entity for the purposes of satisfying itself that the said Entity had complied with the provisions of the Statute and the Constitution. It was contended that since the tender was governed by the Request for Proposals and the World Bank's Guidelines/BRD Loans and IDA Credits, it was not available for the 2nd interested party to apply its Guidelines in the evaluation of the tender since the said Regulations were not part of the tender documents. It was therefore submitted that before arriving at its decision the Respondent considered the letter of 30th April, 2015 vis-à-vis the tender documents and found that the Guidelines were not incorporated in the tender documents and further that the appeal process was not contemplated in the evaluation of bids since the evaluation and award of tenders was a duty placed solely on the Tender Evaluation Committee and did not allow the participation of strangers. To the 3rd interested party, the applicant did not establish to the required standards or at all that the Respondent failed to take into account relevant matters or that it considered irrelevant ones and the mere fact that the applicant does not agree with the Respondent does not and cannot amount to relevance or irrelevance as a ground for the grant of judicial review.

56. It was averred that under section 83 of the Act the notification is required to be simultaneous to both the successful and unsuccessful bidder. In this case the only notification that complied with the provision was that of 30th April, 2015 since the letter of 8th June, 2015 was not notified to all the parties and was not therefore the notification envisaged under section 83. In support of this submission the 3rd interested party relied on **R vs. Public Procurement Administrative Review Board ex parte Noble Gases International Limited & 2 Others [2013] KLR**.

57. Since according to the applicant the first time it was notified of the applicability of TMEA Guidelines was in the letter dated 30th April, 2015, the Respondent rightly found that the said information was not contained in the tender documents yet under section 82(2) if the Act proposals must be evaluated in accordance with the criteria specified in the Request for Proposals hence the said Guidelines were of no legal effect. Based on **R vs. Administrative Review Board ex parte Hoggers Limited [2015] eKLR**, it was submitted that the allegation of misconstruing the import of section 83 of the Act and Regulation 77 are issues which go to the merit of the impugned finding.

58. With respect to legitimate expectation, it was submitted based on **R vs. Nairobi City Council & Anor. Ex parte Wainaina Kigathi Mungai [2014] eKLR** that in order to succeed on this ground, the applicant must demonstrate that the 2nd interested party or the Respondent failed to apply or departed from the procedure which it had been told, prior to submitting its bid, would apply in the evaluation and/or consideration of the tenders. It was however conceded that the 1st time the applicant was advised that the TMEA Guidelines would apply to the tender was on 30th April, 2015 long after the bids had been evaluated hence the applicant had no expectation that the TMEA Guidelines were applicable to the evaluation prior to 30th April, 2015. The tender documents were clear that the bids would be evaluated in accordance with the International Competitive procedures specified in the World Bank Guidelines and by the time the applicant was being informed of the right to lodge a complaint under TMEA Guidelines, the tenders had already been evaluated hence there cannot be an expectation created prior to that communication.

59. On the allegation of the failure to consider the Request for Review, it was submitted that once the Respondent determined that it had no jurisdiction, it had no jurisdiction to pronounce itself on the merits of the applicant's claim hence there was no expectation that the Respondent would still pronounce itself on the merits of the claim. To the 3rd interested party in keeping with Regulation 77, where a preliminary objection is filed in a Request for Review, the Respondent is required to hear it and make a determination whether to uphold or dismiss the same and it is only where it dismisses the same that it can proceed to hear the Request hence the issue of denial of the rules of natural justice does not arise.

60. It was therefore submitted that the applicant had not proved the grounds for grant of the prayers sought in this application and the same ought to be dismissed with costs.

Determinations

61. Having considered the foregoing, this is the view I form of the matter.

62. The Respondents and interested parties have raised the issue of this Court's jurisdiction to determine these proceedings. In **Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1** **Nyarangi, JA** expressed himself as follows:

"By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given....Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".

63. Similarly the Supreme Court in **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others [2012] eKLR** expressed itself as follows:

"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission* (Applicant), *Constitutional Application Number 2 of 2011*. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction

through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

64. The issue of jurisdiction was grounded on the provisions of section 100(4) of the ***Public Procurement and Disposal Act***. The said provision provides as follows:

If judicial review is not declared by the High Court within thirty days from the date of filing, the decision of the Review Board shall take effect.

65. It is this provision that the Respondents and interested parties contend deprive this Court of the jurisdiction to determine these proceedings, since in their view, the Respondent's decision has taken effect. That a period of more thirty days has lapsed since these proceedings were filed is not in doubt. The question however is when are judicial review deemed to have been commenced" The Court of Appeal clarified the position in **R vs. Communications Commission Of Kenya & 2 Others Ex Parte East Africa Televisions Network Ltd. Civil Appeal No. 175 of 2000 [2001] KLR 82; [2001] 1 EA 199** where it held that:

"The proceedings under Order 53 can only start after leave has been obtained and the proceedings are then originated by the notice of motion filed pursuant to the leave granted.

66. Similarly, in **Mike J. C. Mills & Another vs. The Posts & Telecommunications Nairobi HCMA No. 1013 of 1996,** it was held *inter alia* that the application for leave does not commence judicial review until such permission is granted to institute appropriate Judicial Review application.

67. That the Court's jurisdiction can be restricted or ousted by legislation is not in doubt. However over time there are principles which have been developed by the Courts in determining when the ouster clauses ought to be applied. The starting point in my view in the decision of **Mulenga, JSC** in the Supreme Court of Uganda case in **Habre International Co. Ltd vs. Kassam and Others [1999] 1 EA 125** in which the learned Judge expressed himself as follows:

"The tendency to interpret the law in a manner that would divest courts of law of jurisdiction too readily unless the legal provision in question is straightforward and clear is to be discouraged since it would be better to err in favour of upholding jurisdiction than to turn a litigant away from the seat of justice without being heard; the jurisdiction of courts of law must be guarded jealously and should not be dispensed with too lightly and the interests of justice and the rule of law demand this."

68. It was in the same spirit that **Biron, J** in **Mtenga vs. University of Dar-Es-Salaam, Dar-Es-Salaam HCCC No. 39 of 1971** opined that:

"It is trite to observe that a court is, and to has to be for the protection of the public, jealous of its jurisdiction, and will not lightly find its jurisdiction ousted. The legislature may, and often does, far too often, oust the jurisdiction of the Court in certain matters, but for the court to find that the Legislature has ousted its jurisdiction, the Legislature must so state in no uncertain and in most unequivocal terms."

69. In **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728**, **Nyamu, J** (as he then was) recognised the public interest in the enactment of the Act when he stated as follows:

"Section 2 of the Public Procurement and Disposal Act, 2005 is elaborate on the purpose of the Act and top on the list, is to maximize economy and efficiency as well as to increase public confidence in those procedures. The Act was legislated to hasten or expedite the Procurement Procedures for the benefit of the public. Indeed, sections 36(6) and 100(4) of the Act which are ouster clauses, were tailored to accelerate finality of Public Projects. The intention of efficiency is noble and must be appreciated if the development agenda is to be achieved. The Court cannot ignore that objective because it is meant for a wider public good as opposed to an individual who may be dissatisfied with the procuring entity. However the Court must put all public interest considerations in the scales and not only the finality consideration. The said Act also has other objectives namely to promote the integrity and fairness of the procurement procedures and to increase transparency and accountability. Fairness, transparency and accountability are core values of a modern society like Kenya. They are equally important and may not be sacrificed at the altar of finality. The Court must look into each and every case and its circumstances and balance the public interest with that of a dissatisfied applicant. Adjudication of disputes is a constitutional mandate of the Courts and the Court cannot abdicate from it."

70. In the above case, it was held that ouster clauses are effective as long as they are not unconstitutional, consistent with the main objectives of the Act and pass the test of reasonableness and proportionality. The learned Judge recognised that the Court's jurisdiction may be precluded or restricted by either legislative mandate or certain special texts. However, where the ouster clause leaves an aggrieved party with no effective remedy or at all, it is my view that such ouster clause will be struck down as being unreasonable.

71. This position was appreciated by the East African Court of Appeal in **The District Commissioner Kiambu, vs. R and Others Ex Parte Ethan Njau [1960] EA 109** where it pronounced itself as follows:

"Anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the court, whether in order that the subject may be deprived altogether of remedy or in order that his grievance may be remitted to some other tribunal. But it is the court's plain duty to give the words of an Act their proper meaning."

72. Under Article 48 of the Constitution the State is enjoined to ensure access to justice for all persons. Under Article 20(3) and (4) of the Constitution this Court in applying any provision of the Bill of Rights under which Article 48 falls, is enjoined to develop the law to the extent that it does not give effect to a right or fundamental freedom and to adopt the interpretation that most favours the enforcement of a right or fundamental freedom. In so doing the Court is constitutionally obliged to promote the spirit, purport and objects of the Bill of Rights. Under Article 259 of the Constitution, some of the tools of the interpretation of the Constitution are that it must be interpreted in a manner that advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights and permits the development of the law.

73. It was accordingly held by **Rawal, J** (as she then was) in **Charles Lukeyen Nabori & 9 Others vs. The Hon. Attorney General & 3 Others Nairobi HCCP No. 466 of 2006 [2007] 2 KLR 331** that:

"Whereas the court is mindful of the principle that the Legislature has the power to legislate and Judges shall give due deference to those words by keeping the balances and proportionality in the context of fast progressing issues of human rights which have given birth to the enshrinement of fundamental rights in the Constitution, the Constitution should not represent a mere body or skeleton without a soul or spirit of its own. The Constitution being a living tree with roots, whose branches are expanding in natural surroundings, must have natural and robust roots to ensure the growth of its branches, stems, flowers and fruits."

74. In **Chege Kimotho & Others vs. Vesters & Another [1988] KLR 48; Vol. 1 KAR 1192; [1986-1989] EA 57** the Court of Appeal expressed itself as follows:

"The law is a living thing: it adopts and develops to fulfil the needs of living people whom it both governs and serves. Like clothes it should be made to fit people. It must never be strangled by the dead hands of long discarded custom, belief, doctrine or principle."

See **Midland Bank Trust Co. vs. Green [1982] 2 WLR 130.**

75. The law being a living thing, a court would be shirking its responsibility were it to say, assuming that there be no existing recognised remedy covering the facts of a particular case, "Why then, this must be an end to it". The law may be thought to have failed if it can offer no remedy for the deliberate acts of one person which injures another. See **Bollinger vs. Costa Brava Wine Co. Ltd [1960] 1 Ch. 262 at 238.**

76. That the law must of necessity, adapt itself to the changing social conditions and not lay still was similarly appreciated in **Kimani vs. Attorney General [1969] EA 29**.

77. Therefore where a remedy provided under the Act is made illusory with the result that it is practically a mirage, the Court will not shirk from its Constitutional mandate to ensure that the provisions of Article 50(1) are attained with respect to ensuring that a person's right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body is achieved. As was rightly stated in **Republic vs.**

Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya HCMCA No. 13 of 2008 it is the responsibility of the Court to ensure that executive action is exercised; that Parliament intended and that the High Court has the responsibility for the maintenance of the rule of law; that there cannot be a gap in the application of the rule of law; that the Court must at all times embrace a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law. Therefore where there is a lacuna with respect to enforcement of remedies provided under the Constitution or an Act of Parliament, or if, through the procedure provided under an Act of Parliament, an aggrieved party is left with no alternative but to invoke the jurisdiction of the Court and the Court is perfectly within its rights to investigate the allegations. To fail to do so would be to engender and abet an injustice and as has been held before, a court of justice has no jurisdiction to do injustice. See **M Mwenesi vs. Shirley Luckhurst & Another Civil Application No. Nai. 170 of 2000** and **Kenya Industrial Estates Ltd vs. Transland Shoe Manufacturers Ltd. & 2 Others Civil Application No. Nai. 364 of 1999.**

78. The ***Public Procurement and Disposal Act*** was assented to on 26th October, 2005 and commenced on 1st January, 2007. Pursuant to section 7 of the Sixth Schedule to the Constitution, "all law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution." Accordingly, section 100(4) must be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with Article 48 of the Constitution which decrees that the State must ensure access to justice for all persons. In my view access to justice must be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. In other words Parliament ought not to enact legislation whose effect would be to render the provisions of the Constitution a mirage.

79. In enacting legislation Parliament ought to take into account the prevailing legal conditions since access to justice can only be realized in an atmosphere there is in place efficient infrastructures conducive to the realization of the right. To enact legislation without taking into account the realities under which the judicial system operates may well hinder access to justice. Such legislation may well fall foul of the spirit of the Constitution and may well be struck down as being unconstitutional. As appreciated by **Nyamu, J** in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati** (supra):

"In the exercise of judicial review jurisdiction the Courts have tried to cope and give rulings and judgments within a reasonable time. However due to the disproportionate ratio of judges *vis a vis* the population, to achieve the ideal of a timed determination of sometimes complex procurement matters whose documents are invariably voluminous and also accompanied by complex technical data giving, a determination within 30 days, could have been achieved at the expense of other matters before the Court. In the long run in the interest of the overriding objectives of case management, no group of litigants no matter how privileged are entitled to more judicial time than any other. Judicial time is an expensive resource which must be apportioned fairly to the entire spectrum of the work in the Court. Every file is important. For Courts to continually inspire confidence of the Court users and litigants, they must have a very sharp sense of proportionality, fairness and equity in the allocation of judicial time. The ouster clauses fly in the face of the above principles. It must in addition, not be forgotten that the ouster clause in question, has been imposed in the face of a backlog in the courts (which although being tackled with vigour and determination) still averages between 3 to 10 years. This Court is

of course not oblivious to the fact that procurement matters demand efficiency, speed and finality in their determination because of the very nature of procurements. But the answer to this is to leave the matter in to the individual discretion of a judge. On my part, I have severally held that speed and expedition are the hallmarks of judicial review given the Courts have no right to hold to ransom, decision makers unless they can do so within a reasonable time."

80. Therefore in interpreting the legislation the Court must be alive to the fact that a strict interpretation of legislation may lead to results which may not advance the constitutional principles. It was in appreciation of this fact that in ***Selex Sistemi Case*** (supra) **Nyamu, J** expressed himself as follows:

"It [literal interpretation] is the voice of strict constructionists. It is the voice of those who go by the letter. It is the voice of those who adopt the strict literal grammatical construction of words, heedless of the consequences. Faced with staring injustice, the judges are, it is said, impotent, incapable and sterile. Not with us in this Court. The literal method is now completely out of date. It has been replaced by the approach which Lord Diplock described as the "purposive approach." In all cases now in the interpretation of statutes we adopt such a construction as will "promote the general legislative purpose" underlying the provision .... It is no longer necessary for the judges to wring their hands and say: "There is nothing we can do about it". Whatever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy .... by reading words in, if necessary - so as to do what Parliament would have done, had they the situation in mind.... defect that appears in a statute cannot be ignored by the judge, he must set out to work on the constructive task of finding the intention of the Parliament. The judge should not only consider the language of the statute but also the social conditions which gave rise to it, and supplement the written word so as to give "force and life" to the intention of the Legislature."

81. In my view to adopt the literal interpretation of section 100(4) as proposed by the Respondent and the interested parties, under the current judicial set up, would amount to punishing persons who come to Court to seek justice for reasons beyond their control. To do so would in my view abet impunity. The Constitution having placed the duty of exercising judicial authority on the Judiciary on behalf of the people, the Courts ought to be permitted in an atmosphere that is conducive to the realization of its mandate without being seen to be at the sufferance of the Legislature, to carry out its judicial mandate. As stated in ***Selex Sistemi*** (supra):

"**To exempt a public authority from the jurisdiction of the Courts of law is, to that extent, to grant doctorial power. It is no exaggeration, therefore, to describe this as an abuse of power of Parliament speaking constitutionally. This is the justification for the strong, it might even be rebellious, stand which the courts have made against allowing Acts of Parliament to create pockets of uncontrollable power in violation of the rule of law. Parliament is unduly addicted to this practice giving too much weight to temporary convenience and too little to constitutional principle. The law's delay together with its uncertainty and expense, tempts governments to take short cuts by elimination of the Courts. But if the courts are prevented from enforcing the law, the remedy becomes worse than the disease" (Wade 1980 pp 65-6)."**

82. **Professor Sir William Wade** in his authoritative work, ***Administrative Law***, 8th Edition at page 708 properly captured the failure of Parliamentary draughtsman as hereunder:

"Parliament is mostly concerned with short term considerations and is strangely indifferent to the paradox of enacting law and then preventing courts from enforcing it. The Judges, with their eye on the long term and the rule of law, have made it their business to preserve a deeper constitutional logic, based on their repugnance to allowing any subordinate authority to obtain uncontrollable power."

83. **Nyamu, J** in ***Selex Sistemi Case*** (supra) did not mince his words when he stated:

"The 2nd respondent also seems not to appreciate the ordinary procedure in judicial review applications. It is a misconception that time starts to run as purported by the 2nd respondent when a chamber summons seeking leave is filed. Once leave is granted to apply for judicial review orders, the applicant is granted 21 days within which to file the notice of motion seeking substantive orders. The notice of motion unless the Judge otherwise directs at the time of granting leave is to be heard at least eight clear days between the service of the same and the day named therein for hearing. Considering the Christmas vacation, this case would have been determined on 18th of January 2008 if the said Act is to be applicable… The Procedure for judicial review set out by the Public Procurement and Disposal Act 2005 is in conflict with that laid down by the Law Reform Act and order LIII of the Civil Procedure Rules. According to section A 100(1) of the said Act, judicial review must be commenced within fourteen days from the date of the Review Board while under order LIII, the applicant must file the same within 21 days after leave is granted. It is arguable that the novel procedure introduced by the Public Procurement and Disposal Act, 2005 is impractical and may lead to miscarriage of justice. Sometimes it is very difficult to deal with judicial review applications expeditiously because of the weighty issues that need to be determined. Most of the applications even in the area are bulky and complex and the Court cannot pay lip service to serious issues that come before it for determination merely to beat a deadline set by a stranger to the Court process."

84. Under Article 227(1) of the Constitution it is required that when a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. To put in place a system by which the Court's ability to determine whether public procurement complies with the constitutional dictates would be to render the Constitutional provisions ineffective and would defeat the very principles of procurement decreed under the Constitution. It behoves the Court to investigate whether the principles of the Constitution have been adhered to in a particular process of public procurement and this duty cannot be taken away by Parliament placing roadblocks in the path of the Court by prescribing timelines within which such disputes are to be determined in default of which a process which may well violate the constitutional principles would be sanitized and permited to stand.

85. As rightly pointed out in the ***Selex Sistemi Case*** (supra):

"As observed from the Constitution, any law that is in conflict with it is void to the extent of the inconsistency. However, it is interesting to note that section 100 of the Public Procurement and Disposal Act, 2005 again submits the decisions of the Review Board to judicial review by the High Court but imposes a time bar. The Courts guard their jurisdiction jealously, but recognize that it may be precluded or restricted by either legislative mandate or certain special contexts. Legislative provisions which suggest a curtailment of the Courts' power of review give rise to a tension between the principle of legislative mandate and the judicial fundamental of access to courts. Judges must search for critical balance and deploy various techniques in trying to find it. The Court has to look into the ouster clause as well as the challenged decision to ensure that justice is not defeated. In our jurisdiction, the principle of proportionality is now part of our jurisprudence. Anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the Court, whether in order that the subject may be deprived altogether of remedy or in order that his grievance may be remitted to some other tribunal.... It is a well settled principle of law that statutory provisions tending to oust the jurisdiction of the Court should be construed strictly and narrowly. It is a well established principle that a provision ousting the ordinary jurisdiction of the Court must be construed strictly meaning, I think, that, if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the Court.

86. This Court is aware of the principle under Article 159 of the Constitution that justice ought not to be delayed. However, it is in the interest of justice that litigation must be got on with at reasonable speed – reasonable expedition, the wise say: not too quickly; not too slowly. In the administration of justice proceeding at break-neck speed may work injustice in some cases; so may tardiness. Unreasonable haste aborts justice. Proceeding sluggishly fossilizes it. See **Savanna Development Company Ltd. vs. Mercantile Finance Company Ltd Nairobi HCCC No. 2113 of 1989 [1992] KLR 463.**

87. As held in the ***Selex Sistemi Case*** (supra)::

Section 2 of the Public Procurement and Disposal Act, 2005 is elaborate on the purpose of the Act and top on the list, is to maximize economy and efficiency as well as to increase public confidence in those procedures. The Act was legislated to hasten or expedite the Procurement Procedures for the benefit of the public. Indeed, sections 36(6) and 100(4) of the Act which are ouster clauses, were tailored to accelerate finality of Public Projects. The intention of efficiency is noble and must be appreciated if the development agenda is to be achieved. The Court cannot ignore that objective because it is meant for a wider public good as opposed to an individual who may be dissatisfied with the procuring entity. However the Court must put all public interest considerations in the scales and not only the finality consideration. The said Act also has other objectives namely to promote the integrity and fairness of the procurement procedures and to increase transparency and accountability. Fairness, transparency and accountability are core values of a modern society like Kenya. They are equally important and may not be sacrificed at the altar of finality. The Court must look into each and every case and its circumstances and balance the public interest with that of a dissatisfied applicant. Adjudication of disputes is a constitutional mandate of the Courts and the Court cannot abdicate from it....Speed is the hallmark of judicial review and even an application for leave is filed under certificate of urgency. The law also sets out the period within which to file the application for substantive orders, failure of which the orders granted at leave stage automatically lapse. It is therefore arguable that finality is the very nature of judicial review. It is also arguable that whenever, a party comes to

court for redress in public procurement cases, finality cannot outweigh judicial adjudication as there may be other issues such as integrity, transparency and accountability which are also in public interest and if adjudicated upon by the court, may maximize economy and increase public confidence in the procurement procedures. Perhaps, if finality is overemphasized at the expense of other equally important core values in the said Act, the very intention of the Parliament captured by section 2 will substantially fail....It is clear that the Constitution envisages hearing of a case within a reasonable time with due regard to practicality. A reasonable time is not defined but it is an issue of construction by the judge who presides over a case. A reasonable time would depend on the circumstances of the case and other relevant factors that the Court must consider. Perhaps thirty days may be reasonable to the 1st respondent but due to lack of information on the reality on the ground and the Courts' calendar, the period may be unreasonable and impracticable. The reasonable period for the hearing and determination of a judicial review case where there is a proper judge/population, ratio eg in the United Kingdom, is three months (3)....The Court appreciates that one of the objects of the said Act in section 2(a) is to maximize economy and efficiency. However, while time is of essence in carrying out projects, speed cannot override justice and an illegality cannot be countenanced by the court merely because the offending party is overzealous to complete a project. It is also one of the objects of the said Act, to promote integrity and fairness of procurement and disposal procedures. The law acknowledges the need for speedy certainty as to the legitimacy of target activities and requires applicants for judicial review to act promptly to avoid frustrating a public body whose decision is challenged, particularly because of public interest. However, limiting or specifying that the Court must deal with judicial review within thirty days may be impractical and may lead to denying justice to deserving applicants. It is arguable if or not section 100(4) of the Public Procurement and Disposal Act, 2005 offends section 77(9) of the Constitution. Further, the Legislature and the Executive have failed to appreciate the constitutional doctrine of separation of powers. The Legislature by providing that the Court must hear and determine a judicial review case within 30 days and the enthusiastic implementation of the same by the 2nd respondent which is part of the Executive, is a deliberate encroachment to the strictly operational independence of the Judiciary which is an independent arm of the government....Finally, the fourth issue is whether section 100(4) of the Public Procurement and Disposal Act, 2005 is the applicable law as regards the procedure in judicial review proceedings" Applications filed in court for judicial review are brought under sections 8 and 9 of the Law Reform Act cap 26 Laws of Kenya and order LIII of the Civil Procedure Rules. The applicant strongly argues that any other procedure apart from the abovementioned has no force of law and would amount to a fatal defect and incompetence. According to the applicant, the Public Procurement and Disposal Act, 2005 cannot purport to introduce any other procedure apart from what is known in law and practice. Ordinarily, the law can limit the period of filing a suit but the period within which the case must be determined before courts should be a preserve of the Courts due to different circumstances such as case backlog, vacation among others where an applicant may have no control."

88. The Court therefore held:

"In a way, the allocation of judicial time in advance by other organs of government, constitute usurpation of judicial function and power and/or amount to sharing of judicial function, and this is therefore clearly unconstitutional.... I hold that the Court must be left to allocate sufficient time to do justice in every case including procurement cases before the Court. As acknowledged by the objector, the courts have given top priority, and in some cases fast tracked procurement

matters both before the time limitation provision was imposed and after the time limitation provision. The balance which the Court must be allowed to strike or achieve was very well put *Gravells '978 pp 383-4* as follows: It is arguable that (this) is a fundamental issue underlying much modern administrative law ....Ultimately every challenge to administrative action can be seen to represent a conflict between, on the one hand, the constitutional priorities of fairness and the rule of law, and on the other hand, the administrators' priorities of expediency and finality. Since however there is in reality no typical administrator, it follows that the resolution of those conflicting priorities will tend to vary with the particular process in question; different considerations will apply in different contexts and the reliance of the same considerations will apply in different contexts and the relevance of the same consideration will vary according to circumstances. In other words there can be no such thing as a general solution: rather there must be a series of particular solutions."…There are situations in which the Court must of necessity allow expediency and principles of good administration to apply such as in the *Ostler* case, but I must find that the decision has to be made by the Court, on the facts before the Court, and this cannot be substituted by a 30 days rule of thumbimposed without consultations whatsoever and without regard whatsoever, to the current law requirements on Judicial review proceedings or to the principles of constitutional balance. Allowing decisions of the Procurement Board to automatically apply after 30 days, does not make the decisions correct even on matters as fundamental as on jurisdiction for example. This cannot possibly be right. The way to get things right, is to hold that no court or tribunal has any jurisdiction to make an error of law on which the decision of the case depends. If it makes such an error, touching on jurisdiction and it goes outside its jurisdiction then *certiorari* will lie from the Court to correct it even after the 30 days, whether or not the matter before the Court is a procurement matter. In the case of Kenya there is no such thing as Parliamentary supremacy and every legislation is subject to the Constitution. The Courts are the guardians of the Constitution. There cannot therefore be any allegation of the Courts disobedience of Parliament. Where Parliament itself, purports to restrict or curtail the powers allocated to the Court by the Constitution the Court must promptly intervene. Constitutional power once allocated cannot be shifted by either by the Legislature or the Executive under the banner of policy. Prof Wade's defence in the Constitutional Fundamentals 1980 of *Anisminic* brings out the constitutional fundamentals which are relevant to the English position without a written Constitution in these words:- "...... For judicial control particularly over discretionary power, is a constitutional fundamental. In their self defensive campaign the Judges have almost given us a Constitution, establishing a kind of entrenched provision to the effect that even Parliament cannot deprive them of their proper function. They may be discovering a deeper constitutional logic than the crude absolute of statutory omnipotence!....It is wrong for the executive to literally allocate themselves administrative finality in matters that are at the core business of the Courts - namely the judicial function of adjudication. Operational independence, of the Courts is part of the wider principle of the independence of the courts. They should be stopped in their tracks as I have here."

89. The learned Judge concluded, a conclusion which I adopt that:

"....the preliminary objection cannot be upheld for the following reasons:- (1) The ouster clause section 100(4) of the Procurement Act is not entirely clear and the Court must therefore resolve the dispute by upholding its jurisdiction instead of its ouster. (2) The ouster section is not in tandem with the other laws on judicial review namely the Law Reform Act and order 53 and the section was inserted in obvious ignorance of the Judicial review laws. (3) An ouster section

cannot be effective where it is inconsistent with the main objectives of the Act. (4) An ouster section is void where it violates provisions of the constitution. (5) Ouster clauses are usually grounded on public interests consideration and good administration, and there cannot be greater public interest than that expressed in the constitution. In this regard ouster clauses will be ineffective unless they pass the test of reasonableness and proportionality. (6) Ouster sections or clauses are ineffective in the face of jurisdictional issues. With the above analysis in view, I have no hesitation whatsoever in dismissing the objection with costs to be paid by the interested party objector."

90. This Court was urged to adopt and apply to these proceedings the reasoning of this Court, the Court of Appeal and the Supreme Court in determining election petitions. It must be appreciated that election petitions are exceptionally special proceedings. They are special in the sense that such disputes do necessarily come with election cycles hence they are as opposed to procurement disputes not everyday disputes. They must of necessity be determined before the next election cycle in order to promote democratic principles. Accordingly, they are disputes which are capable of being determined within the statutory timelines by reorganizing the judiciary for the limited period of the petitions. The same cannot be said of procurement disputes which arise on a daily basis and which have become the bulk of the litigation in this High Court Division. Accordingly, I find that the decisions arising from election petitions though express the law in that field are not necessarily applicable to procurement disputes and I am reluctant to adopt them line, hook and sinker.

91. My decision is further informed by the fact that Article 87(1) of the Constitution specifically mandates Parliament to enact legislation to establish mechanisms for timely settling of electoral disputes. Parliament is therefore expressly mandated to set timelines for the settling of electoral disputes. Contrast this with Article 227 of the Constitution which provides:

(1) When a State organ or any other public entity contracts

for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

(2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following—

a. ***categories of preference in the allocation of contracts;***

b. ***the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination;***

c. ***sanctions against contractors that have not performed according to professionally regulated procedures, contractual agreements or legislation; and***

d. ***sanctions against persons who have defaulted on their tax obligations, or have been guilty of corrupt practices or serious violations of fair employment laws and practices.***

92. It is therefore clear that the Constitution itself imposed an obligation on Parliament to enact legislation to ensure that election disputes are settled timely. This position is traceable to our past history where it was not unheard of for election disputes to spill over to the next cycle of elections thus defeating the whole purpose of filing election petitions. The timelines enacted under the Constitution and the ***Elections Act*** relating to electoral disputes settlement are therefore justified by our history and experience, which led the people of Kenya to deem it fit that specific timelines be set for the determination of electoral disputes. Accordingly the timelines in settling election petitions ought to be seen in light of the historical context. As was held in **Commissioner of Income Tax vs. Menon [1985] KLR 104; [1976-1985] EA 67,** it is one of the canons of statutory construction that a court may look into the historical setting of an Act, to ascertain the problem with which the Act in question has been designed to deal. In the result I have no hesitation in reaffirming the decisions in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728** and **Republic vs. Public Procurement Administrative Review Board & Another exp Hyosung Ebara Company Limited [2011] KLR** and whereas **Nyamu, J** and **Musinga, J** in the above cases did not expressly carry out their opinions to their logical conclusion based on what **Nyamu, J** deemed the inability to make declaratory orders in the matter before him, on my part I have no hesitation in declaring which I hereby do that section 100(4) of the ***Public Procurement and Disposals Act***, is unconstitutional and is therefore inconsequential. Since the enactment of the ***Fair Administrative Action Act, 2015***, a piece of legislation which I must observe in passing suffers from a similar malady in its section 8, this Court now has the power, thanks to section 11 thereof, to make declaratory orders. It must also be noted that under Article 23 of the Constitution this Court has jurisdiction to issue declaratory orders.

93. Consequently, I hold that this Court has the jurisdiction to entertain these proceedings and that the decision of the Respondent has not, by operation of law, taken effect.

94. Having removed the obstacle of jurisdiction I now wish to deal with the merits of the case before me.

95. In my view the matter which is central to this application is when the applicant was notified that its proposal was unsuccessful under section 83(2) of the Act because it is that notification that triggers the process of Request for Review under Regulation 73 of the ***Public Procurement and Disposal Regulations***. By a letter dated 30th April, 2015, the 1st interested party, the Procuring Entity, informed the applicant that it had assessed the applicant's proposal and regretted to inform the applicant that it was unsuccessful since the applicant's combined technical and financial score was not the most economically advantageous tender. The 3rd interested party has averred that it was similarly notified on the same date that its proposal was successful. Section 83 of the Act provides:

(1) The procuring entity shall notify the person who submitted the successful proposal that his proposal was successful.

(2) At the same time as the person who submitted the successful proposal is notified, the procuring entity shall notify all other persons who submitted proposals that their proposals were not successful.

96. One can therefore say that the letter dated 30th April, 2015 was in compliance with section 83 aforesaid. The letter however did not stop there but proceeded to inform the applicant that it was at liberty to seek feedback on its proposal or submit any queries that the applicant may have in line with TMEA policy section 4.8.1 within 14 days. It is this part of the letter that made the applicant believe that the letter dated 30th April, 2015 was not the notification contemplated under section 83 of the Act. Following the applicant's decision to seek the said feedback, the 1st interested party vide its letter dated 8th June, 2015 disallowed the applicant's complaint. From the contents of the letter dated 19th May, 2015, it would seem that the complaint process was a confidential process that was restricted to the applicant and the Trade Mark East Africa, the 2nd interested party. None of the parties seem to have been involved in the process. Under Article 227 of the Constitution, where a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. Under section 2 of the Act, the objectives of public procurement are indicated as:

(a) to maximise economy and efficiency;

(b) to promote competition and ensure that competitors are treated fairly;

(c) to promote the integrity and fairness of those procedures;

(d) to increase transparency and accountability in those procedures; and

(e) to increase public confidence in those procedures;

(f) to facilitate the promotion of local industry and economic development.

97. Having informed the 3rd interested party that its proposal was successful was the 2nd interested party in order to embark on a clandestine process with the applicant by which the said decision could be reversed" First and foremost there is no provision which permits the Procuring Entity to revisit its decision with respect to the successful parties save where it exercises its option pursuant to section 36(1) of the Act.

98. The 3rd interested party has averred that it was unaware of the letter dated 8th June, 2015 as the same was not copied to it. It is not in doubt that under Regulation 73(2)(c)(ii) of the Regulations a request for review is required to be filed within 7 days from the date of occurrence of a breach or date of notification. That notification clearly must be the notification contemplated under section 83(2) of the Act and for the said notification to be complete, all the parties ought to be notified at the same time. In this case the applicant relies on the letter dated 8th June, 2015 as the notification contemplated under the said provision. However, in proceedings of this nature it is upon the ex parte applicant to satisfy the Court that the decision of the Tribunal ought to be interfered with. In **East African Community vs. Railways African Union (Kenya) And Others (No. 2) Civil Appeal No. 41 of 1974 [1974] EA 425**, it was held by the East African Court of Appeal that the onus lies on a person seeking the grant of a prerogative order to establish that it is essential for it to issue since these are not orders that are lightly made. Judicial review or prerogative writs as they were known in the past, it has been held are orders of serious nature and cannot and should not be granted lightly. They should only be granted where there are concrete grounds for their issuance. It is not enough to simply state that grounds for their issuance exist; there is a need to lay basis for alleging that there exist grounds which justify the grant of the said

orders. This was the position in **Republic vs. Kenya Power & Lighting Company Limited & Another [2013] eKLR** in which it was held that:

“It is not enough for an applicant in judicial review proceedings to claim that a tribunal has acted illegally, unreasonably or in breach of rules of natural justice. The actual sins of a tribunal must be exhibited for judicial review remedies to be granted.”

99. The applicant therefore ought to have satisfactorily shown that the letter dated 8th June, 2015 was the notification contemplated under section 83(2) of the Act and that it met all the ingredients under Regulation 73(2)(c)(ii) of the Regulations with respect to notification to both the successful and unsuccessful parties at the same time. As this Court held in **R vs. Public Procurement Administrative Review Board ex parte Noble Gases International Limited & 2 Others** (supra):

“It is not in dispute that the letter dated 22nd August 2013 did not expressly notify any of the parties that its bid in respect of any items were unsuccessful. It is noteworthy that each of the bidders was notified via a separate letter. The letters did not mention which bids had been given to the opposite party in order for the particular bidder to deduce that its bid in respect of the other items were unsuccessful. Could the 2nd interested party reading the letter dated 22nd August 2013 necessarily deduce that its bid in respect of the other items was unsuccessful" I am not prepared to say so. It may be that the other items were still under consideration and had the 2nd interested party made a request for review without getting a clear picture of the fate of the other items, its request for review may well have been found to be premature if it turned out that no decision had as yet been made with respect to the other items. It was therefore only reasonable that the 2nd interested party seeks clarification as what was the fate of the other items for which there was no express indication that it had succeeded in bidding. Therefore the failure to expressly notify the parties that their bids were unsuccessful was an error on the part of the 1st interested party. That error in my view did not take away the bidders’ right to request for review. In my view with respect to the unsuccessful bids, the 2nd respondent’s time for making a request to the Respondent started running from the date that it was communicated to it either impliedly or expressly that its bid was unsuccessful. I have already held that there was no implied notification in the letter dated 22nd August 2013 that the 2nd interested party’s bids in respect of the other 8 items were unsuccessful since the letter did not indicate that the applicant was the successful bidder in respect thereof. May be if there had been such an indication or if the letters to the bidders were copied to the other bidder, the situation might have been different.”

100. Therefore even if the Court was to find that the letter dated 30th April, 2015 did not constitute a valid notification under the Act for the purposes of the Request for Review, the fact that there is no evidence that the letter dated 8th June, 2015 complied with Regulation 73(2)(c)(ii) of the Regulations with respect to notification to both the successful and unsuccessful parties at the same would have rendered the Request purportedly made pursuant thereto premature and hence the Respondent would similarly have lacked the jurisdiction to entertain the Request. So either way the applicant’s request for review would most probably have suffered similar fate.

101. In the premises the Respondent’s decision that it had no jurisdiction to hear and determine the

Request for Review due to the statutorily prescribed limitation was correct and cannot be faulted.

102. It was contended by the applicant that the letter dated 30th April, 2015 created a legitimate expectation on the applicant that the time for making a Request for Review would only begin to run from the date of the determination of its complaint. In **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240** it was held that:

"Stated simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way...."

103. In the letter dated 8th April, 2015, the 2nd interested party did not represent to the applicant that the time for making a Request for Review was frozen. In my view the 2nd interested party in any case had no power to freeze the time expressly prescribed under a statute.

104. In **Republic vs. Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530** it was held:

"The general principle remains however, that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others. Judicial resort to estoppel in these circumstances may prejudice the interests of third parties. Purported authorisation, waiver, acquiescence and delay do not preclude a public body from reasserting its legal rights or powers against another party if it has no power to sanction the conduct in question or to endow that party with the legal right or inventory that he claims…Legitimate expectation is founded upon a basic principle of fairness that legitimate expectation ought not be thwarted – that in judging a case a judge should achieve justice, weigh the relative "strength of expectation" of the parties. For a legitimate expectation to arise the decision must affect the other person by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment or (ii) he has received assurance from the decision maker not to be withdrawn without giving him first an opportunity of advancing reasons for contending that they should be withdrawn…A representation giving rise to legitimate expectation must however be based on full disclosure by the applicant. Thus where he does not put all his cards face up on the table it would not be entitled to rely on the representation. In this case any legitimate expectation has clearly been taken away firstly by the conduct of the applicant and the provisions of the Statute Act and therefore there is no discretion."

105. It follows that the concept of legitimate expectation cannot operate against the law. Legitimate expectation as the phrase indicates must be legitimate and cannot be based on actions which are patently illegal. As was held in **Republic vs. Kenya Revenue Authority & Another ex parte Krones LCS Centre East Africa Limited [2012] eKLR:**

"Legitimate expectation can only operate inside and not outside the law. One can only rely on legitimate expectation when the law has been complied with. Where taxes have not been paid then the Applicant cannot rely on the principle of legitimate expectation to avoid payment of taxes."

106. It is therefore a requirement that for the doctrine of legitimate expectation to be successfully invoked, the expectation must in the first place be legitimate "in the sense of an expectation which will be protected by law". See **R vs. Department for Education and Employment, ex p Begbie [2000] 1 WLR 1115, 1125C-D**. In other words the doctrine of legitimate expectation based on considerations of fairness, even where benefit claimed not procedural, should not be invoked to confer an unmerited or improper benefit. See **R vs. Gaming Board of Great Britain, ex p Kingsley [1996] COD 178 at 241**.

107. As was held in **Republic vs. Kenya Revenue Authority ex parte Shake Distributors Limited HCMisc. Civil Application No. 359 of 2012**:

"…the cornerstone of legitimate expectation is a promise made to a party by a public body that it will act or not act in a particular manner. For the promise to hold, the same must be made within the confines of the law. A public body cannot make a promise which goes against the express letter of the law."

108. In my view the avenue for complaint, if it existed lawfully, would have been "any other legal remedy a person may have" additional to the right to request a review under the Act as provided in sections 99 and 113 of the Act. That right could not in my view be an alternative to the right to Request for Review hence the mere fact that the applicant opted for that route did not preclude him from seeking the statutory remedy hence there is no justifiable basis for not requesting for the review as contemplated under the Act.

109. In its decision the Respondent found that the TMEA Guidelines were not part of the Request for Proposal. That was a finding of fact and this Court is not entitled to interfere therewith unless such a finding is not supported by any evidence and merely because such a finding on re-consideration of the evidence is erroneous. Under section 82 of the Act the procuring entity is obliged to examine the proposals received in accordance with the request for proposals. Accordingly it is not permitted to go out of the Request for Proposals and rely on some other material not part of the same Request. Therefore if the TMEA Guidelines were not part of the Request for Proposals and only emerged after the evaluation, they could not be relied upon in order to confer legitimate expectation on the applicant.

110. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through taking into

account an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence. See **Reid vs. Secretary of State for Scotland [1999] 2 AC 512.**

111. Courts do recognize that Tribunals are specialised and in most cases have the technical knowledge of all the matters concerning the dispute between the parties before them hence the Courts ought not to interfere with their decisions on matters of merits. The Respondent, it ought to be appreciated is a specialised Tribunal clothed with the powers to hear and determine disputes arising from a specialised area and hence ought to be given the necessary latitude as to operate and manoeuvre as long as it operates within the lawful bounds to hear and determine the disputes falling within its jurisdiction. This was appreciated in **Kenya Pipeline Company Ltd vs. Hyosung Ebara Company Ltd & 2 Others [2012] eKLR** where it was held:

"The Review Board is a specialised tribunal established to deal with all complaints of breach of duty by the procuring entity. By Reg. 89, it has power to engage an expert to assist in the proceedings in which it feels that it lacks the necessary experience. S. 98 of the Act confers very wide powers on the Review Board. It is clear from the nature of the powers given to the Review Board including annulling, anything done by the procurement entity and substituting its decision for that of the procuring entity that the administrative review envisaged by the Act is indeed an appeal. From its nature the Review Board is obviously better equipped than the High Court to handle disputes relating to breach of duty by procurement entity. It follows that its decision in matters within its jurisdiction should not be lightly interfered with."

112. I am also mindful of the decision of this Court in **Constitutional Petition Number 359 of 2013 Diana Kethi Kilonzo vs. IEBC and 2 Others** in which it was held that:

"**We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities."**

113. The courts will only interfere with the decision of a public authority if it is outside the band of reasonableness. It was well put by **Professor Wade** in a passage in his treatise on ***Administrative Law***, 5th Edition at page 362 and approved by in the case of the **Boundary Commission [1983] 2 WLR 458, 475**:

"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."

114. Therefore so long as the proceedings of the Review Board were regular (as is the case herein) and it had jurisdiction to adjudicate upon the matters raised in the Request for Review, it was as much entitled to decide those matters wrongly as it was to decide them rightly and this Court exercising its judicial review jurisdiction as opposed to an appellate jurisdiction pursuant to section 112 of the Act is not entitled to interfere simply because it would have arrived at a different decision.

115. The parameters of judicial review were set out by the Court of Appeal in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** in which it was held that:

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

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

117. Therefore to quash the Respondent's decision on that ground that the Respondent was wrong in its finding that the TMEA Guidelines were not part of the Request for Proposals would amount to this Court sitting on appeal against the decision of the Respondent and that is not the object of judicial review proceedings.

118. The applicant contended that by the Respondent not determining its request on merit the Respondent violated the rules of natural justice. To the applicant the Respondent ought to have considered its case on merit instead of determining the same on a preliminary objection based on the jurisdictional challenges. This argument with respect flies in the face of the decision in **Owners and Masters of The Motor Vessel "Joey" vs. Owners and Masters of The Motor Tugs "Barbara" and "Steve B" [2008] 1 EA 367** in which the Court of Appeal expressed itself as follows:

"The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. There is no reason why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado."

119. An issue of jurisdiction therefore ought to be raised before the Tribunal seised of the matter for its determination before the matter is delved into in details. That the Respondent had the jurisdiction to hear and determine the preliminary objection is expressly provided for in Regulation 77(4) of the ***Public Procurement and Disposal Regulations*** which provides that:

The Review Board shall hear the preliminary objection and make a determination whether to uphold or dismiss the same and shall record the reasons for the determination.

120. What then happens when the objection as to jurisdiction is upheld as was the case herein" On authorities, in that event the Tribunal would have no jurisdiction to take one more step. It must terminate the proceedings in question and down its tools. Accordingly, the Respondent cannot be faulted for declining to hear the Request on merits after determining that it had no jurisdiction a decision which this Courts agrees with.

121. In the submissions filed on behalf of the applicant this Court was invited to consider the merits of the various cases presented before the Tribunal. The Tribunal, having downed its tools however did not dwell on and make a decision on the merits of the parties that tendered for the project. Whereas this Court may in considering whether the decision of a Tribunal was reasonable may be justified in dealing with the merits of the decision to a limited extent, in this case where the Tribunal itself did not deal with the merits of the parties' cases, this Court in these proceedings would have no basis for straying into that arena as the Respondent had as yet not crossed that bridge.

122. I have said enough to show that the Notice of Motion dated 7th August, 2015 is unmerited.

Orders

123. In the result the Notice of Motion dated 7th August, 2015 fails and is dismissed with costs to the Respondent and the interested parties.

124. Orders accordingly.

Dated at Nairobi this 22nd day of December, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Marete for the Applicant

Miss Wambugu for the 1st interested party

Mr Wanga for Mr Gatonye for the 2nd interested party

Miss Odari for the 3rd interested party

Cc Muriuki

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