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| Case Class:  | Civil   |
| Court:   | High Court at Nairobi (Milimani Law Courts)   |
| Case Action:   | Judgment  |
| Judge:   | George Vincent Odunga   |
| Citation:  | Republic v Public Procurement Administrative Review Board & 2 others ex-parte Numerical Machining Complex Limited [2016] eKLR |
| Advocates:   | Mr. Osioma for Miss Awuor for the Applicant and Mr. Wandabwa for the interested party Miss Maina for the Respondent           |
| Case Summary:  | -   |
| Court Division:  | Judicial Review   |
| History Magistrates:   | -   |
| County:  | Nairobi   |
| Docket Number:   | -   |
| History Docket Number:   | -   |
| Case Outcome:  | -   |
| History County:  | -   |
| Representation By Advocates:   | Both Parties Represented  |
| Advocates For:   | -   |
| Advocates Against:   | -   |
| Sum Awarded:   | -   |
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**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**MISCELLANEOUS CIVIL APPL. NO. 261 OF 2015**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS  
OF CERTIORARI**

**AND**

**IN THE MATTER OF THE PUBLIC PROCUREMENT AND DISPOSAL ACT, 2005**

**AND**

**IN THE MATTER OF THE PUBLIC PROCUREMENT DISPOSAL REGULATIONS OF 2006**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE PUBLIC PROCUREMENT ADMINISTRATIVE**

**REVIEW BOARD..... 1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL..... 2<sup>ND</sup> RESPONDENT**

**DANIEL OUTLETS..... INTERESTED PARTY**

**AND**

**NUMERICAL MACHINING COMPLEX LIMITED.....EX-PARTE**

**JUDGEMENT**

**Introduction**

1. By a Notice of Motion dated 26<sup>th</sup> August, 2015, the *ex parte* applicant herein, **Numerical Machining Complex Limited**, seeks the following orders:

1. **THAT** this Honourable Court be pleased to grant an order of judicial review and an order of certiorari to remove into this Court and quash the decision of the 1st Respondent to set aside and annul the decision of the *ex parte* applicant herein to the interested party's tender number NMC/03/2014-2015 in Public Procurement Administrative Review Board Review No. 32 of 2015,

directing that the decision of the ex parte applicant herein declaring the interested party's bid as unsuccessful be substituted with an order directing that the interested party be awarded the said tender at its tender price and that the ex parte applicant herein to issue a letter of award and complete the entire procurement process therein including the signing of a contract with the interested party within 14 days from 27<sup>th</sup> July 2015 and supply the 1<sup>st</sup> Respondent with the evidence of compliance with the directions of the 1st Respondent after the expiry of fifteen (15) days from 27<sup>th</sup> July 2015.

2. **THAT** this Honourable Court be pleased to grant any other order that it deems fit and just to grant in the circumstances.

3. **THAT** the cost of this application be provided for.

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

2. According to the applicant (hereinafter referred to as "NMC") it advertised a National Open Tender ref. no. **NMC/03/2014-2015** for the supply, delivery and installation, testing, training and commissioning of 1 No. 250Kg Induction Furnace (hereinafter referred to as "the Tender"). According to the applicant, the equipment it sought to procure was necessary for its Foundry Workshop in melting steel and cast iron and was originated by a request by the applicant's production department to satisfy specific needs of the department.

3. It was averred that potential bidders sought clarifications from the applicant who issued an addendum addressing the same thus leading to extension of the tender date by one week to 26<sup>th</sup> May, 2015 from 19<sup>th</sup> May 2015. Pursuant to the said advertisement 9 bidders including the interested party herein, **Daniels Outlets**, submitted their bids and on 25<sup>th</sup> May 2015 the applicant appointed a Tender Opening Committee to open the tender. Thereafter evaluations were carried out in two stages; Preliminary and Technical. However all the said bids failed to meet both stages and the tenders were considered technically unresponsive by the Committee and were disqualified from proceeding to Financial Evaluation. The bidders were accordingly informed of the decision.

4. Aggrieved by the said decision the interested party applied to the 1<sup>st</sup> Respondent to have the decision set aside and nullified and sought that the tender be awarded to them. However, in a letter dated 21<sup>st</sup> July, 2015 the interested party through its advocates, **Wandabwa Advocates**, sought to have the application withdrawn in order to pave way for an amicable settlement.

5. It was contended by the applicant that in total disregard of this application, the 1st Respondent went ahead and delivered a ruling on 27<sup>th</sup> July, 2015 by which the 1st Respondent scuttled the efforts for amicable settlement as the interested party took advantage of the decision demand compliance therewith.

6. To the applicant, the ruling was unfair, incompetent, unconstitutional, harsh and unreasonable and placed the applicant in a terribly bad situation which was uncalled for. It was further contended that the said decision was an error apparent on the face of the record for failure to conform to the law relating to public procurement. In the applicant's view, complying with the said decision would lead to furtherance of an illegality, as the same is not consistent with the provisions of the **Public Procurement and Disposal Act of 2005** as amended via Legal Notice No. 106 of 2013 (hereinafter referred to as "the

Act"). It was contended further that the said decision was ultra vires the powers of the 1<sup>st</sup> Respondent.

7. To the applicant, the 1<sup>st</sup> Respondent acted without good reasons and unreasonably in awarding the tender to the interested party despite credible evidence that the said party did not comply with the law.

8. It was submitted on behalf of the applicant that the processes relating to the procurement ought to strictly comply with the provisions of Article 227 of the Constitution which provides 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.***

9. For the purposes of achieving the Constitutional objective, it was submitted that Parliament enacted the ***Public Procurement and Disposals Act*** which in view of **Nyamu, J** (as he then was) in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728** is:

**“...to maximize economy and efficiency as well as to increase public confidence in those procedures.....The intention of efficiency is noble and must be appreciated if the development agenda is to be achieved....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.”**

10. It was submitted that the Ex-Parte Applicant being a Government Corporation under the Ministry of Industrialization and a focal point for the Government of Kenya to set up an integrated Steel Mill in line with the economic pillar of the Government's vision 2030, to help drive industrialization in Kenya and achieve the 10% economic growth; it is imperative that its procurements meet the required threshold to not only give value for the money to the tax payers but also meet its development plans.

11. It was on this basis that Ex-parte Applicant made it a requirement of the Tender that the specifications of the Furnace to be supplied by the Bidder as set out in the Original Manufacturer's brochure satisfies the technical specifications of the Tender for the bid to be technically responsive as per clause **2.24.5 B** of the Tender Documents. The specifications of the equipment included an indication as to whether the 250kg induction Furnace to be supplied was manual or automated. The Interested Party herein only provided the original manufacturer's brochure/catalogue containing data and a photograph of the furnace but failed to supply detailed information in the Technical Data Sheet and thus failed to meet the Technical specifications of the Tender thus was technically non-responsive. According to the applicant, it discharged its statutory duty by informing all the bidders that the tender was unresponsive. It was thus very irrational, irresponsible and unreasonable for the 1<sup>st</sup> Respondent to find and hold that the interested Party met all the tender specifications and hence entitled to award of the same as the same had not been evaluated. To it, the issue as to whether the equipment was manual or automated was key in this tender and so it is to many tenders in government departments.

12. The applicant submitted that the tender was declared unresponsive at the 2<sup>nd</sup> stage, i. e. the technical stage and it is only after evaluations have been successfully conducted at this stage before another stage, i. e. the Financial Evaluation Stage is conducted. The 1<sup>st</sup> Respondent thus acted in excess of its jurisdiction by directing that the tender be awarded at the Interested Party's contractual price. The only order the 1<sup>st</sup> Respondent would have issued in the circumstances was to direct that the tender proceed to the Financial Evaluation Stage, if it was convinced that Interested Party passed the Technical Stage, which is denied.

13. The 1<sup>st</sup> Respondent's decision dated 27<sup>th</sup> July, 2015, it was submitted, is unreasonable, unlawful, *ultra vires*, an abuse of power and violates legitimate expectation. The 1<sup>st</sup> Respondent acted *ultra vires* by awarding the tender to the Interested Party whereas the PP&DA does not give it powers to award tenders and neither does it have powers to evaluate bids and determine a winning bidder. The Respondent did not take into consideration relevant factors that it ought to have taken into account hence the decision is unreasonable and contrary to the legitimate expectations of the parties.

14. It was the applicant's view that the 1<sup>st</sup> Respondent's actions equates to the 1<sup>st</sup> Respondent usurping the powers of the procuring entity and thereby purporting to evaluate the bids afresh and drawing the conclusion that the Interested Party was the successful bidder to the exclusion of other bidders. In support of this position the applicant relied on **Republic vs. Public Procurement Administrative Review Board & 3 others ExParte Olive Telecommunication PVT Limited [2014] eKLR** where it was stated that a public body has to exercise its powers within the four corners of the statute creating it.

15. It was further submitted that it was irrational and unreasonable for the 1<sup>st</sup> Respondent to make a determination on an application that had been withdrawn. In essence, the 1<sup>st</sup> Respondent made a determination on nothing. Clearly, it was submitted, the impugned decision was and still is outrageous in its defiance to logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. In support of its submissions the applicant relied on **JGH Marine A/S Western Marine Services Ltd CNPC Northeast Refining & Chemical Engineering Co.Ltd/Pride Enterprises vs. Public Procurement Administrative Review Board & 2 others [2015] eKLR** on what amounts to an error of law and in which it was held that:

**“There is a general presumption that a public decision making body has no jurisdiction or power to commit an error of law; thus where a body errs in law in reaching a decision or making an order, the court may quash that decision or order. The error of law must be relevant, that is to say it must be an error in the actual making of the decision which affects the decision itself. Even if the error of law is relevant, the court may exercise its discretion not to quash where the decision would have been no different had the error not been committed. Where a notice, order or other instrument made by a public body is unlawful only in part, the whole instrument will be invalid unless the unlawful part can be severed. In certain exceptional cases, the presumption that there is no power or jurisdiction to commit an error of law may be rebutted, in which case the court will not quash for an error of law made within jurisdiction in the narrow sense. The previous law which drew a distinction between errors of law on the face of the record and other errors of law is now obsolete. A public body will err in law if it acts in breach of fundamental human rights; misinterprets a statute, or any other legal document, or a rule of common law, takes a decision on the basis of secondary legislation, or any other act or order, which is itself *ultra vires*; takes legally irrelevant consideration into account, or fails to take relevant**

**considerations into account, admits inadmissible evidence, rejects admissible and relevant evidence, or takes a decision on no evidence, misdirects itself as to the burden of proof, fails to follow the proper procedure required by law; fails to fulfill an express or implied duty to give reasons or otherwise abuses its power...In order for an applicant to move the Court into giving orders on the ground that a tribunal has committed an error of law, the applicant must demonstrate that there is indeed a mistake that goes to the jurisdiction of the tribunal. Misinterpretation of the law is not sufficient to move a judicial review Court to action.”**

16. It was the applicant's position that it would be furthering an illegality if it was forced to sign an unresponsive contract with the Interested Party. The applicant relied on section 66(2) of the Act and Rule 16(5) (a) and (7) (a) of the Regulations, 2006 which demand strict compliance with a tender document. Rule 16(5) (a) and (b) of the Regulations, it was submitted provides that:

***the technical evaluation of the tenders or proposals received in strict adherence to the compliance and evaluation criteria set out in the tender documents***

17. The applicant interpreted this to mean that it was right to require adherence of the clause **2.24.5 B** of the Tender Documents which required that the brochures were to provide information in accordance with procuring entity requirements. According to it, as per clause **2.24.5 B** of the Tender Documents, the Interested Party did not meet the required technical specifications, hence its tender considered non-responsive by the Tender Processing Committee and therefore disqualified from proceeding to financial Evaluation. The applicant insisted that its decision was consistent with Regulation 49(2) of the **Regulations, 2006** which provides that:

***The evaluation committee shall reject tenders which do not satisfy the technical requirements under paragraph (1).***

18. To the applicant, the 1<sup>st</sup> Respondent even ought not to have considered the procurement procedure adopted by the Procurement Unit as this offends Section 93 (2) of the Act which provides that the choice of the procurement procedure pursuant to part IV of the Act is not subject to review. To the applicant, it was illegal for the Review Board to rewrite the evaluation criteria contrary to the criteria elected and applied by a procuring entity. In support of this position reliance was sought in **Republic vs. Public Procurement Administrative Review Board & another Ex-parte Uto Creations Studio Limited [2013] eKLR.**

19. According to the applicant, it was inevitable that the 250kg Induction Furnace be retendered since all the bidders did not meet the required technical specifications.

20. The applicant also relied on regulation 50(1) of the Regulations and submitted that it was incumbent that only the Evaluation Committee conduct the Financial Evaluation of the tender and not the 1<sup>st</sup> Respondent. By directing that the tender be awarded to the Interested Party at its tendered price the 1<sup>st</sup> Respondent acted in excess of its jurisdiction as the direction is not backed by law. To the applicant, the 1<sup>st</sup> Respondent had no powers to make orders that violate the express provisions of the law and conferred to itself powers of the evaluation committee. It was the Ex parte Applicant's case that the 1<sup>st</sup>

Respondent's acts are illegal, unlawful and exceeded its jurisdiction.

21. In support of its case, the applicant cited **PPRB vs. KRA Misc. Civil Application No. 540 of 2008, [2008] eKLR**, followed in **JGH Marine A/S Western Marine Services Ltd CNPC Northeast Refining & Chemical Engineering Co.Ltd/Pride Enterprises vs. Public Procurement Administrative Review Board & 2 others [2015] eKLR (supra)** that judicial review orders were available where the Review Board committed an error of law apparent on the face of its decision. Further, that the Review Board cannot disregard mandatory provisions of the PP&DA and where it does so, it amounts to a fundamental misdirection or failure to address the applicable law or a fundamental error of law thereby rendering the decision reached devoid of legality and therefore void.

22. It was submitted that the Application in Public Procurement Administrative Review Board Review no. 32 of 2015 was filed by the Interested Party herein before the 1<sup>st</sup> Respondent on 1<sup>st</sup> July 2015. However, the same was withdrawn in vide a letter dated 21<sup>st</sup> July 2015 from the Interested Party's counsel on record, Messrs. Wandabwa Advocates, and a copy served upon the Ex-Parte Applicant on 22<sup>nd</sup> July 2015. Therefore logically by 27<sup>th</sup> July 2015 when the 1<sup>st</sup> Respondent herein was delivering a Ruling therein, there was nothing to be decided upon.

23. It was therefore submitted that the 1<sup>st</sup> Respondent acted outside its jurisdiction and also acted unprocedurally by making a determination on an application that had been withdrawn.

24. In the foregoing premises the applicant prayed that the said Ruling be declared as delivered in breach of the Applicant's right under Article 47 the right to fair administrative action as guaranteed by the Kenyan Constitution, 2010.

### **1<sup>st</sup> Respondent's Case**

25. In opposition to the application, the 1<sup>st</sup> Respondent averred that the Request for Review was lodged by the interested party on 1<sup>st</sup> July 2015 against the decision of the Applicant herein in respect of the award of Tender Document for Tender No. NMC/03/2014-2015 for Supply, Delivery, Installation, Testing, Training and Commissioning of 1NO. 250KG induction Furnace on the 1<sup>st</sup> of July 2015 aptly filed as Application No. 32/2015 between Daniel Outlets and Numerical Machining Complex.

26. The Board in accordance with its establishing statute, the ***Public Procurement and Disposal of 2005*** as amended via Legal Notice No. 106 of 2013 and Regulations 2006 heard the parties, considered their submissions, determined the application for review and delivered its ruling on the 27<sup>th</sup> day of July, 2015 in which it accepted the Applicant's Request for Review on the ground of manifest violation and deliberate disregard of the provisions of the Act and the ***Public Procurement and Disposal Regulations*** (hereinafter referred to as "the Regulations").

27. According to the 1<sup>st</sup> Respondent, in its request for review the interested party sought from the Board the following orders on which the Board adjudicated:

1. That the Procuring Entity's decision to reject the applicant's tender at the preliminary stage to be annulled.
2. The Procuring Entity be ordered to proceed for a further evaluation of the Applicants bid.
3. The procuring Entity's tender committee to be directed to award the tender to the Applicant herein.
4. The costs of this appeal in any event.

28. According to the 1<sup>st</sup> Respondent, it adjudicated on following alleged grounds of breach as propounded in the Request for Review:

1. That the Procuring Entity erred in rejecting the Applicant's tender on the basis that the manufacture's brochure did not specify the exact type of Furnace as required by the Procuring Entity, contrary to Regulation 47,48 and 49 of the **Public Procurement and Disposal Regulations**.
2. That in rejecting the applicants bid on the aforementioned basis, the applicant used a criteria not specified in its tender document, thereby falling foul of the provisions of section 66 of the Act.
3. That the applicant was in breach of Section 2 of the Act.

29. It was disclosed by the 1<sup>st</sup> Respondent that upon hearing the application, on the day 16<sup>th</sup> of July 2015 found *inter alia* that:

1. That upon perusal of the documents submitted by both parties that nowhere in the Tender document was there a requirement to specify the exact type of furnace to be supplied. The awarding marks a criteria not contained in the tender document thus a contravention of the Act and accompanying Regulations .That the procuring entity was in breach of Section 66(2) of the Act as read with Regulation 47 of the Regulations.
2. That the Procuring Entity decision did not promote integrity and fairness in the procedures thus a manifest breach of Section 2 of the Public Procurement and Disposal Act of 2005 as amended via Legal Notice No. 106 of 2013 and the Public Procurement and Disposal Regulations.



30. In the 1<sup>st</sup> Respondent's view, in rendering the above decision, it diligently and fairly considered all relevant facts, submissions and postulations of evidentiary value invoked in the entirety of the hearing and on the basis of the above mentioned grounds allowed the Request for Review and found for the Bidder. It annulled the Applicant's decision and directed that the tender be awarded to the interested party within 14 days of the date of the ruling. According to it, its decision was rational, reasonable, logical impartial, lawful, and in line with public interest, policy and mandate conferred upon it under the Regulations. Further it arriving at its decision it acted within the fundamental principles of Natural Justice and with utmost adherence to the provisions and overall spirit of section 2 of the Act and the Constitution of Kenya 2010 including Article 47 on air administrative action.

31. The 1<sup>st</sup> Respondent asserted that its decision was delivered within the prescribed period of thirty (30) days as espoused under the Act and the Regulations. In its view, the Applicants construction of the Board's decision as being unreasonable is inaccurate and is a blatantly deliberate action to paint the Board in bad light and erode and extinguish the level of public confidence as it currently enjoys. Similarly, the Applicants allegation that the decision was made in a 'vacuum' is baseless and unwarranted and is a deliberate ploy by the Applicant to revive a matter that has been legitimately and lawfully heard, adjudicated and decided.

32. The 1<sup>st</sup> Respondent averred that it was not furnished with any document seeking the withdrawal or intention to withdraw material matter by any of the parties. It therefore contended that the Applicant is engaging in unethical and illegal conduct by stating that the bidder in the material Request for Review application filed with the Board any pleadings, notice or letter with nature or character as to suggest the Bidders intention to withdraw the matter before the Board. It was therefore its position that its decision was made within its mandate, and the specific sections of the law on which the Board's decision was pegged on have been expressly pronounced in the Board's decision.

33. It was contended that the bundle of documents submitted to the 1<sup>st</sup> Respondent contains documents of a dubious nature including a letter that the Applicant claims to be evidence of correspondence with the Board.

34. It was therefore the 1<sup>st</sup> Respondent's position that this application is a frivolous and poorly executed attempt at arm twisting the court and all parties herein into an innocuous legal battle. The same, according to it, is made in bad faith and taste, lacks merit and is only calculated to discredit the credibility of the 1<sup>st</sup> Respondent's mandate and function and to abrogate the provisions of Article 227 of the Constitution.

35. The Respondents submitted that the Review Board in granting the orders herein remained faithful to its powers and mandate and did not divert from the same contrary to what is alleged herein. To the contrary, the Review Board only acted as expressly authorized under section 98 of the Act. Accordingly, the respondent only discharged its mandate and had power to do so.

36. According to the Respondents, though the ex-parte applicant submitted that the interested party herein withdrew its own request for review it did not exhibit the notice of such withdrawal. The notice of withdrawal if any was not brought to the attention of the 1<sup>st</sup> respondent as is deposed by the in the replying affidavit. Consequently, the 1<sup>st</sup> respondent carried its mandate as provided for by the law and the allegation that the ruling was done in a vacuum is just an allegation and ought to be treated as such.

37. It was submitted that the purpose of judicial review is to ensure that a party receives fair treatment in the hands of public bodies. It is not the purpose of judicial review to ensure that the public body, after according fair treatment to a party, reaches on a matter which it is authorized by law to decide for itself, a conclusion which is correct in the eyes of the court. Therefore, this being a judicial review case (and not an appeal), this court is not empowered to venture into correcting the decision of the Review Board on the merits (whether wrong or correct). That is the work of the Review Board and not the Court exercising judicial review jurisdiction. In support of their position, the Respondents relied on **Re Bivac International SA (Bureau Veritas) (2005) 2 EA 43, Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300, Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR, Seventh Day Adventist Church (East Africa) Limited vs. Permanent Secretary, Ministry of Nairobi Metropolitan Development & another [2014] eKLR.**

38. This Court was urged to adopt the findings in **Republic vs. Kenya Revenue Authority & another Ex-Parte Bear Africa (K) Limited** where **Majanja J.** quoting with approval the decision of **Githua J** in **Republic vs. Commissioner of Customs Services ex-parte Africa K-Link International Limited Nairobi HC Misc. JR No. 157 of 2012 [2012] eKLR.**

39. To drive the point home, the Respondents cited the Court of Appeal decision in **Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 Others (2012) e KLR.**

40. According to the Respondents, in order for an applicant to move the Court into giving orders on the ground that a tribunal has committed an error of law, the applicant must demonstrate that there is indeed a mistake that goes to the jurisdiction of the tribunal. Misinterpretation of the law is not sufficient to move a judicial review application. Whereas, the applicant alleged that the decision of the 1<sup>st</sup> respondent was so unreasonable /irrational and therefore should be quashed on that ground, the Respondents submitted that a proper look out at its decision would lead to a totally different conclusion. To the Respondents, this Application is an appeal disguised as a Judicial Review Application and should not be entertained. In support of this position the Respondents relied on **Municipal Council of Mombasa vs. Republic & Another [2002] eKLR** and **Republic vs. Kenya Power & Lighting Company Limited & Another [2013] eKLR.**

41. It was the Respondents' case that it is important to appreciate that judicial review orders of certiorari, mandamus and prohibition are public law remedies and the court has the ultimate discretion to either grant or not to grant the remedies to the successful applicant. They urged the Court to decline the issuance of the orders sought in the circumstances of the present case. Courts while exercising their judicial review jurisdiction have been alive to considerations of public interests in declining the issuance of judicial review even where a party has made out a case of issuance of orders of judicial review. They relied on **Republic vs. Judicial Service Commission Ex-Parte Pareno [2004] KLR 203 at 219.**

42. In the Respondents' view, the applicant failed to demonstrate any breaches of the Law or procedure which would entitle this court to intervene in this matter and grant the orders sought. According to them, it had not been demonstrated that the Respondents were in breach of any statutory provision or that they acted in excess or without jurisdiction or breached rules of natural justice envisaged in a particular statute. Thus the application does not meet the basic tenets of judicial review application and should be dismissed and so they prayed.

### **Interested Party's Case**

43. In opposition to the application the Interested Party, Daniel's Outlets, filed two replying affidavits by its Managing Director and its advocate on record.

44. According to the interested party, the averments made by the applicant are false, conjured and meant to mislead the Court. According to it, its advocate did not write a letter seeking to withdraw the request and that the purported letter was not addressed to the 1st Respondent. According to the Interested Party, the 1st Respondent can only entertain the withdrawal of an application before it, only before or during the hearing of the Request and not after the hearing in which event it would lack the jurisdiction to do so.

45. It was therefore contended that the 1st Respondent's decision was not ultra vires as alleged.

46. On the part of the advocate, it was contended while reiterating the position taken by the interested party that the letter purporting to withdraw the request did not emanate from his office and is not on his letterhead. Contrary to the said letter, he is neither a Commissioner of Oaths nor a Notary Public and he exhibited his correct letterhead to prove this fact. He also disclosed that his staff denied having sent the said letter and averred that the said letter was neither addressed to nor was there any evidence that it was received by the 1<sup>st</sup> Respondent.

47. It was submitted on behalf of the interested party that the said letter being a forgery, the Court ought not to rely thereon. In support of this position, the interested party relied on **Mistry Amar Singh vs. Kulubya [1963] EA 408** where it was held that:

**“No Court ought to allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality.”**

48. To the interested party the Court ought to first investigate the issue of illegality and upon finding that the said letter was forged dismiss the application.

49. It was submitted that even if the said letter was genuine, the same was invalid for the reason that it was not addressed to the 1st Respondent; was not served on its Secretary; and the hearing had been concluded. Further the Review Board was not informed of its existence by the Secretary. Accordingly, it could not be effective for the purposes of withdrawal under Regulation 83 of the Regulations.

50. According to the interested the orders which were granted by the 1st Respondent were within its powers donated under section 98 of the Act.

51. In the interested party's view the grounds relied upon by the applicant do not meet the threshold required for the grant of judicial review reliefs.

## **Determinations**

52. I have considered the Notice of Motion, affidavits, the written submissions and judicial authorities herein and this is the view I form of the matter.

53. Regulation 83 of the Regulations provides as follows:

***83. (1) A request for review may be withdrawn at any time before or during the hearing by notice in writing to the Secretary signed by the applicant and upon such notice being received the request for review shall be deemed to have been withdrawn.***

***(2) When a request for review is withdrawn, the Secretary shall forthwith inform the Review Board and all parties to the review of the withdrawal.***

54. From the foregoing it is clear that under the aforesaid provisions for a request for review to be deemed to have been withdrawn certain conditions must be met. The request must be made before or during the hearing of the request; the notice must be in writing to the Secretary and must be signed by the applicant (or the applicant's legal representative). Upon receipt of the notice the Secretary is required to forthwith inform the Review Board. It is however clear that the notice is effective on receipt by the Secretary and therefore the consequent information by the Secretary to the Board does not affect the validity of an otherwise valid notice.

55. In this case the letter alleged to have withdrawn the request was dated 21<sup>st</sup> July, 2015. The Board's decision was delivered on 27<sup>th</sup> July, 2015. None of the parties deemed it fit to exhibit copies of the proceedings in order for the Court to determine the point in the proceedings at which the letter was written and received. However, section 109 of the ***Evidence Act*** provides:

***The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.***

56. In this case, the fact of the request having been validly withdrawn was being asserted by the applicant. It was therefore upon it not just to prove that it received the letter but also that the letter in question met all the conditions necessary for a valid withdrawal to be inferred.

57. In this case, the letter itself, on the face of it, was addressed to the –Public Procurement Oversight Authority as opposed to the Secretary of the 1<sup>st</sup> Respondent. In my view, it cannot be seriously contended that an advocate of the standing of the interested party's advocate on record did not know the distinction between the 1<sup>st</sup> Respondent Board and the Public Procurement Oversight Authority. Apart from that the said advocate has deposed on oath that the letterhead in question contained manifestly erroneous information and did not emanate from his firm. A look at the signature on the said letter and the signature appearing in the affidavit sworn by the said advocate *prima facie* show that the one appearing in the letter is a poor imitation of the advocate's signature. Whereas this Court has no expertise in conclusively determining whether a particular signature was appended by a particular

person, in **National Industrial Credit Bank Ltd vs. Patrick Mwaniki Karanja Nairobi HCCC No. 1709 of 2001**, the Court held that a court is entitled to compare signatures under section 76 of the ***Evidence Act***.

58. Having considered the letter which purported to have withdrawn the Request it is my view and I so hold that the said letter did not meet the threshold of a valid notice of withdrawal contemplated under Regulation 83 of the Regulations. Accordingly the Request for Review was not deemed to have been withdrawn and there was nothing barring the 1<sup>st</sup> Respondent from proceeding with hearing the Request for Review.

59. It was further contended that the impugned ruling entails the violation of the mandatory provisions of the law by the applicant. In this respect, it was contended that by compelling the applicant to enter into a contract with the interested party, the 1<sup>st</sup> Respondent was short-circuiting the procurement procedure. On the other hand the Respondents contended that their decision was within their powers under section 98 of the Act.

60. The Board's power in the exercise of its review jurisdiction was explained by the Court of Appeal decision in **Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 Others** (supra) where the Court expressed itself as follows:

**“The Review Board is a specialized statutory tribunal established to deal with all complaints of breach of duty by the procuring entity...S.98 of the Act confers very wide powers on the Review Board. It is clear from the nature of powers given to the Review Board including annulling, anything done by the procuring 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 of the procuring entity. It follows that its decision in matters within its jurisdiction should not be lightly interfered with. Having regard to the wide powers of the Review Board we are satisfied that the High court erred in holding that the Review Board was not competent to decide whether or not the 1<sup>st</sup> respondent's tender had met the mandatory conditions. The issue whether or not the 1<sup>st</sup> Respondent's tender was rightly rejected as unresponsive was directly before the Review Board and the Board had jurisdiction to deal with it. In conclusion, it is manifest that the application for Judicial Review was not well founded. The 1<sup>st</sup> Respondent did not establish that the Review Board had acted without jurisdiction or in excess of jurisdiction or in breach of natural justice or that the decision was irrational. The Judicial review was not confined to the decision making process but rather with the correctness of the decision on matters of both law and fact. So long as the proceedings of the Review Board were regular 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. The High Court erred in essence in treating the Judicial Review Application as an appeal and in granting review orders on the grounds which were outside the scope of Judicial Review jurisdiction”.**

61. However as was appreciated in **Republic vs. Public Procurement Administrative Review Board & 3 others ExParte Olive Telecommunication PVT Limited** (supra):

**“Whereas we appreciate that the Board’s latitude in applications for review is wide, such latitude ought not to be expanded to such an extent that it renders the idea conceived by the PE totally useless. In providing its own definition of what an OEM is the Board in essence altered the bid documents which can only be done as provided by the Act and by the PE.”**

62. Section 98 of the Act provides:

***Upon completing a review the Review Board may do any one or more of the following—***

***(a) annul anything the procuring entity has done in the procurement proceedings, including annulling the procurement proceedings in their entirety;***

***(b) give directions to the procuring entity with respect to anything to be done or redone in the procurement proceedings;***

***(c) substitute the decision of the Review Board for any decision of the procuring entity in the procurement proceedings; and***

***(d) order the payment of costs as between parties to the review.***

63. If I understand the Respondents correctly they seem to be relying on the provision of section 98(c) which donated to the 1<sup>st</sup> Respondent the power to substitute its decision for that of the procuring entity. However, this provision cannot be read in isolation to the other provisions. In my view the power to substitute the decision of the procuring entity cannot be unlimited. It must be exercised lawfully. That power can only be exercised with respect to what the procuring entity was lawfully permitted to undertake both substantively and procedurally. Section 66(2) of the Act made it mandatory for evaluation and comparison of bids using procedures and criteria set out in the Tender Document. This is reiterated under Regulation 16 of the Regulations. As was held in **JGH Marine A/S Western Marine Services Ltd CNPC Northeast Refining & Chemical Engineering Co.Ltd/Pride Enterprises vs. Public Procurement Administrative Review Board & 2 Others** (supra):

**“The PP&DA and the Regulations bequeath the onus of amending a Tender Document on a procuring entity. When the Review Board decides that it can ignore the express provisions of a tender document and goes ahead to award the tender to another bidder, it crosses its statutory boundaries and in such circumstances it is said that it has acted outside jurisdiction. Those who approach the Review Board must be sure of its parameters. The power bestowed upon the Review Board does not include authority to act outside the law. Such power can only be valid if it is exercised for legitimate purposes. In the instant case, the Review Board exceeded its authority by purporting to read its own words in the Tender Document.”**

64. In this case the impugned decision was taken before the Financial Evaluation was undertaken. Regulation 50(1) of the Regulations provides that:

***Upon completion of the technical evaluation under Regulation 49, the evaluation committee shall conduct a financial evaluation and comparison to determine the evaluated price of each tender.***

65. The effect of compelling the Applicant to award the tender to the interested party was to compel the Applicant to ignore the aforesaid provision. The 1<sup>st</sup> Respondent in my view had no power to compel the Applicant to act unlawfully. By so doing it clearly exceeded its jurisdiction. It could only issue such directions and make decisions that the Applicant itself was lawfully permitted to issue or make.

66. Therefore where the law exhaustively provides for the jurisdiction of a body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation. The courts would be no rubber stamp of the decisions of administrative bodies. However, if Parliament gives great powers to them, the courts must allow them to it. The Courts must nevertheless be vigilant to see that the said bodies exercise those powers in accordance with the law. The administrative bodies and tribunals or boards must act within their lawful authority and an act, whether it be of a judicial, quasi-judicial or administrative nature, is subject to the review of the courts on certain grounds. The tribunals or boards must act in good faith; extraneous considerations ought not to influence its actions; and it must not misdirect itself in fact or law. See **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090.**

67. Whereas the powers of the 1<sup>st</sup> Respondent in exercising its powers of review are wide, the same can only be exercised within the framework of an existing request for review. Any attempt to exercise powers outside that ambit would in my view amount to assuming jurisdiction which it does not possess.

68. I have however considered the other issues raised and I am satisfied that the same go to the merits of the 1<sup>st</sup> Respondent's decision. I associate myself with the findings in **Republic vs. Kenya Revenue Authority & another Ex-Parte Bear Africa (K) Limited** where **Majanja J.** quoting with approval the decision of **Githua J** in **Republic vs. Commissioner of Customs Services ex-parte Africa K-Link International Limited Nairobi HC Misc. JR No. 157 of 2012 [2012] eKLR** as follows;

**“It must always be remembered that judicial review is concerned with the process a statutory body employs to reach its decision and not the merits of the decision itself. Once it has been established that a statutory body has made its decision within its jurisdiction following all the statutory procedures, unless the said decision is shown to be so unreasonable that it defies logic, the court cannot intervene to quash such a decision or to issue an order prohibiting its implementation since a judicial review court does not function as an appellate court. The court cannot substitute its own decision with that of the Respondent. Besides, the purpose of judicial review is to prevent statutory bodies from injuring the rights of citizens by either abusing their powers in the execution of their statutory duties and function or acting outside of their jurisdiction. Judicial review cannot be used to curtail or stop statutory bodies or public officers from the lawful exercise of power within their statutory mandates.”**

69. In any case the same were not expressly stated as grounds upon which the orders herein were sought. Order 53 rule 4(1) of the ***Civil Procedure Rules*** provides:

***Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.***

70. It follows that even if the said grounds could warrant the orders sought herein, this Court cannot rely on the same as the basis for the grant of the reliefs sought herein.

71. Therefore to the extent that the 1<sup>st</sup> Respondent directed the Applicant to award the tender to the interested party it exceeded its jurisdiction and its decision was unlawful.

### **Order**

72. In the result, an order of certiorari is hereby issued bringing into this Court for the purposes of being quashed the Respondent's decision in Public Procurement Administrative Review Board Review No. 32 of 2015, directing that the interested party be awarded tender number NMC/03/2014-2015 and consequential directions, which decision and directions are hereby quashed.

73. For avoidance of doubt the Applicant is to proceed from the point the tendering process was before it terminated the tender process.

74. In the circumstances of this case, each party will bear own costs of these proceedings.

75. Orders accordingly.

**Dated at Nairobi this 14<sup>th</sup> March, 2016**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mr. Osioma for Miss Awuor for the Applicant and Mr. Wandabwa for the interested party**

**Miss Maina for the Respondent**

**Cc Florence**



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