



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT KENYA AT NAIROBI**  
**JUDICIAL REVIEW DIVISION**  
**MISCELLANEOUS CIVIL APPLICATION NUMBER 154 OF 2016**  
**REPUBLIC.....APPLICANT**  
**VERSUS**  
**THE PUBLIC PROCUREMENT**  
**ADMINISTRATIVE REVIEW BOARD.....RESPONDENT**  
**AND**  
**RENTCO EAST AFRICA LIMITED, LANTECH**  
**AFRICA LIMITED, TOSHIBA**  
**CORPORATION CONSORTIUM.....INTERESTED PARTY**  
**EX-PARTE:**  
**KENYA ELECTRICITY GENERATING**  
**COMPANY LIMITED (KENGEN).....APPLICANT**

**JUDGEMENT**

**Introduction**

1. By a Notice of Motion dated 7<sup>th</sup> April, 2016, the ex parte applicant herein, **Kenya Electricity Generating Company Limited**, (hereinafter referred to as “KENGEN” seeks the following orders:

1. An order for judicial review by way of certiorari to remove to this court and quash the decision of the Respondent dated 24<sup>th</sup> March 2016 in Request for Review Application Number 14 of 2016 with regard to Tender No. KGN-GRD-09-2015 for the Leasing of 50MW Wellheads Geothermal Power Generation Units at Olkaria Geothermal Field on Build Lease, Operate and Maintain basis.
2. An order for judicial review by way of prohibition to prohibit the Respondent from taking any enforcement action against the Applicant. In particular, the Respondent be stopped from making a report on the Applicant’s failure to complete the execution of the contract to the

**Interested Party, to any public body including the Public Procurement Regulatory Authority, Director of Public Prosecutions or any other public body mandated by law to carry out enforcement action in such circumstances.**

**3. An order for judicial review by way of mandamus to compel the Respondent to issue the typed ruling delivered on 24<sup>th</sup> March 2016 in Request for Review Application Number 14 of 2016 with regard to Tender No. KGN-GRD-09-2015 for the Leasing of 50MW Wellheads Geothermal Power Generation Units at Olkaria Geothermal Field on Build Lease, Operate and Maintain basis.**

**4. An order for costs of this application.**

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

2. According to the applicant, the Respondent herein, the Public Procurement Administrative Review Board (hereinafter referred to as "the Board") delivered its decision in Application Number 14 of 2016 on 24<sup>th</sup> March 2016 at about 5 pm after which the Chairman of the Board indicated that the typed decision would be ready at 2 pm on 29<sup>th</sup> March 2016 which was the next working day. By the said decision, the Board annulled the decision of the Applicant to terminate the tender award and ordered *inter alia* the Applicant –

- a. To complete the procurement process by forwarding the contract to the interested party for execution;
- b. To furnish the Board with evidence of compliance of (b) above within 7 days from the date of the decision.

3. It was therefore the applicant's case that the Board would not take it lightly if its orders were not obeyed and might refer the non-compliance of the order to relevant authorities such as the Director of Public Prosecutions and the Ethics and Anti-Corruption Commission. It was averred that upon the decision being communicated to the Applicant, the Applicant instructed its advocates to challenge the same by way of judicial review. Pursuant thereto by a letter dated 29<sup>th</sup> March 2016 the firm requested the Board's Secretary to furnish the Applicant with a copy of the decision and an advance copy of this letter was sent to the Board by e-mail. Similarly by a letter dated 30<sup>th</sup> March 2016 the firm requested the Board's Secretary to furnish the Applicant with a copy of the said decision.

4. It was further deposed **Mr. Duncan Munyao**, an employee of the firm–

- a. Visited Board's offices on 29<sup>th</sup> March 2016 at about 10.30 am to collect the decision of the Board but he was informed that the decision was not ready.
- b. Called one **Joel**, an employee of the Board at about 3 pm on 29<sup>th</sup> March 2016 who informed him that the decision of the Board was not ready.
- c. On 30<sup>th</sup> March 2016 delivered a copy of the letter dated 30<sup>th</sup> March 2016 and was informed that the decision was not ready for collection as the Board's Chairman who has to release the decision to the Board's registry for collection was out of office.
- d. Went back to the Board at around 4 pm on 30<sup>th</sup> March 2016 and was informed that the decision would not be ready until noon on 31<sup>st</sup> March 2016.

5. It was therefore the applicant's case that the delay on the part of the Board to furnish the Applicant with a copy of the decision was prejudicial to the Applicant considering that –

- a. The Applicant had until 31<sup>st</sup> March 2016 to furnish the Board with evidence of compliance with the impugned decision.
- b. The Board required the Applicant to implement the impugned decision within 7 days from 24<sup>th</sup> March 2016 and the period between 25<sup>th</sup> and 28 March 2016 were not working days on account of the Easter holidays.
- c. The Applicant stood to suffer criminal law sanctions on account of failing to comply with the orders of the Board which were given in excess of its jurisdiction.

6. It was averred that by a letter dated 30<sup>th</sup> March 2016 sent at 5.55 pm the firm requested the return of the contract submitted to the Board on 23<sup>rd</sup> March 2016 and renewed its request for the release of the decision given on 24<sup>th</sup> March 2016.

7. It was therefore contended by the applicant that the failure on the part of the Board to supply the Applicant with the impugned decision is a satisfactory reason and justifies the grant of the reliefs sought in the application filed herein without the decision being annexed pursuant to the provisions of Order 53 rule 7 of the **Civil Procedure Rules**, 2010.

8. According to the applicant, it sought proposals for leasing 50 MW Wellheads Power Generation units on a build, operate and maintain basis for a period of 15 years in 2015 via Tender Number KGN-GRD-09-2015 (the Tender) which tender the applicant designed to be implemented through the wellhead technology which is part of the Governments' Least Cost Power Development Plan (the Least Cost Plan). The Least Cost Plan guides relevant actors in the energy sector including the Applicant on how to meet energy needs of the country at the lowest cost to the economy and the environment. It was explained that as part of the Least Cost Plan, the well head technology is attractive in that low costs are involved as the technology utilizes existing wells which would otherwise not be utilized some of which have been idle for periods of over 20 years and further that the periods taken to generate power is considerably lower than the other ways of generating power. In addition, the Applicant also designed the Tender to be implemented under a lease arrangement such that its balance sheet is not affected.

9. To the applicant, it expected to achieve the following objectives from the leasing agreement:

- a. Generate revenue and profit from the difference in the cost of leasing and the revenue from the electricity generated from the leased wellheads at the Feed- in-Tariff of 8.8 US Cents per KWHr.
- b. Recoup the cost of drilling the geothermal wells.
- c. Generate additional megawatts to meet the 5000 + 40 month challenge.

10. The applicant averred that it specifically wanted a bidder who would enable it recoup its drilling costs and enable it earn revenue from the leasing of the wells. It was therefore averred that:

- a. The Applicant approved Expressions of Interest (EOI) for the project and after considering responses to the Expression of Interest submitted by various firms, it sent out the Request for Proposals (RFP) to the shortlisted firms on 4<sup>th</sup> February 2015 with a closing date of 20<sup>th</sup> April 2015.
- b. Five of the shortlisted firms submitted their proposals by the closing date of 20<sup>th</sup> May 2015 after which the Applicant appointed a tender committee which undertook a Technical and Financial evaluation and the Interested Party, Rentco East Africa Limited/Lantech Africa Limited, Toshiba Corporation Consortium emerged as the highest ranked firm. However, it has since come to light that Toshiba Corporation did not agree to be a part of this consortium.
- c. The Applicant notified the Interested Party of its intention to award the contract subject to

successful contract negotiation.

d. Subsequent to the issuance of the letter of award, one of the firms that had been shortlisted, OJSC Power Machines Limited, Transcentury Limited and Civicon Limited (OJSC Power Machine Limited) filed Request for Review Application Number 38 of 2015 on 22<sup>nd</sup> July 2015.

e. The Public Procurement Administrative Review Board delivered its decision on 21<sup>st</sup> August 2015 dismissing OJSC Power Machine Limited's request for review.

f. OJSC Power Machine Limited instituted High Court Judicial Review Application Number 284 of 2015 seeking judicial review orders challenging the decision of the Board and to restrain the Applicant from entering into a contract with the Interested Party pending the hearing and determination of the Application.

11. It was averred that on 6<sup>th</sup> October 2015, the Chief Executive Officer of the Applicant was summoned by the Public Investment Committee (PIC) of the National Assembly to discuss the Tender with the key issue being that Rentco East Africa Limited (Rentco), indicated as the financial and leasing partner in the Interested Party's consortium for the Tender herein, had falsified its financial information while submitting another tender for Consultancy Services for the Redevelopment of Olkaria Geothermal Power Plant Project.

12. According to the applicant, it Applicant reviewed and inspected the tender documents that had been submitted by the Interested Party in view of the inquiries by the PIC and the public attention that the Tender had attracted which inspection and review of the documents made it clear that the Interested Party's financial documents in its EOI and the financial proposals given at the RFP stage listed Applicant as the borrower in Interested Party's proposed financing structure. This was not picked up in the EOI and the Financial Proposal Stage due to an inadvertent error. To the applicant, the Interested Party's financing structure would go against the objectives of the Tender as the Applicant did not intend to take a loan.

13. It was further disclosed that the inspection also revealed that the audited accounts submitted by Interested Party as part of its financial proposal included audited account for the years ending 31<sup>st</sup> March 2013 in spite of the fact that the Interested Party was incorporated in June 2012. The Applicant concluded that the Interested Party's financial plan and supporting documents were inconsistent with the objective of the project and that it therefore became clear that the Interested Party should not have passed the EOI stage and ought not to have been invited to the RFP stage.

14. It was this development, according to the applicant that informed its decision to immediately terminate the procurement process and this was done by the letter dated 9<sup>th</sup> November 2015 after a tender committee was constituted on 3<sup>rd</sup> November in which the Board of Directors decision was executed.

15. However, the Interested Party filed Request for Review Number 14 of 2016 on 4<sup>th</sup> March 2016 before the Respondent Board to review the Applicant's decision to cancel the Tender. Based on legal advice, the applicant contended that it filed a Notice of Preliminary Objection on *inter alia* the grounds that the Respondent had no jurisdiction to hear the Interested Party's request for review which had been filed out of time and this was based on the fact that the Interested Party had been notified of the termination on 9<sup>th</sup> November 2015 and filed the request for review almost four (4) months later. Apart from the objection the Applicant also filed a substantive response to the application which was heard at the same time as the Preliminary Objection on 23<sup>rd</sup> March 2016 due to time constraints as the Respondent has to render its decisions within 21 days.

16. In its decision delivered on 24<sup>th</sup> March 2016 at 4.30 pm the Respondent held *inter alia* as follows-

a. The Preliminary Objection is overruled.

- b. The decision to terminate the award of the Tender to the Interested Party was null and void and therefore set aside;
- c. The Applicant should complete the procurement process by forwarding the contract to the Interested Party for execution.
- d. The Applicant should furnish the Board with evidence of compliance of (b) above within 7 days; and

17. It was however the applicant's case, based on legal that the Respondent:-

- a. acted ultra vires and outside its mandate in entertaining the request for review.
- b. Considered irrelevant facts and also failed to consider relevant facts
- c. Acted unreasonably, irrationally and illegally.
- d. Breached the Applicant's fundamental right to fair administration action guaranteed by Article 47 of the Constitution of Kenya, 2010.
- e. Failed to give effect to section 2 of the 2005 Act, section 3 of the 2015 Act and Article 227 of the Constitution.

18. The applicant disclosed that it was aware that on 24<sup>th</sup> March 2015, Toshiba Corporation (herein after Toshiba) wrote to the Respondent informing it that it recently learnt of the Request for Review filed by the Interested Party and clarified that it was not a member of the Interested Party's consortium as represented by the Interested Party but clarified that it was merely a sub-contractor. Toshiba also wrote to the Applicant and the Interested Party, on the issue. Based on legal advice, the applicant contended that the Board did not take into account this letter and it made no determination or finding or any reference to the same. To the applicant the Board made factual and glaring errors in its decision of 24<sup>th</sup> March 2016 in that -

- a. There was numerous documentations placed before it in which the Applicant was listed as the borrower yet the Board denied knowledge of such evidence.
- b. The Board incorrectly held that on the date the Applicant terminated the Tender, there was a stay order in force restraining the parties from dealing with the Tender in any way yet this was erroneous considering that the order of **Mumbi Ngugi, J** of 2<sup>nd</sup> September 2015 in Judicial Review 284 of 2015 did not stop the Applicant from terminating the Tender.
- c. The Board held that the letter dated 25<sup>th</sup> February 2016 was the letter terminating the Tender award yet this letter merely affirmed what had been communicated to the Interested Party by the letter dated 9<sup>th</sup> November 2015.

19. It was therefore the applicant's position that the Board failed to exercise its mandate, abdicated its responsibility and refused to discharge its statutory duty as set out in the Public Procurement and Disposal Act, 2005 and 2015.

### **Respondent's Case**

20. In response to the application, the Respondent averred that on 4<sup>th</sup> March, 2016, the Interested Party filed a Request for Review before the Respondent challenging the award of the Tender No. KGN-GRD-09-2015 for the Request for Proposals (RFP) for leasing of 50MW wellheads geothermal power generation units at Olkaria geothermal field on a build, lease, operate and maintain basis. Immediately after receiving the said Request, the Respondent served a copy on the Applicant and notified it of the

pending Review and the suspension of the procurement process in accordance with Regulation 74 (1) and 74(2) of the **Public Procurement and Disposal Regulations, 2006**, hereinafter referred to as “the Regulations”.

21. It was averred that the Respondent heard the parties on 21<sup>st</sup> March, 2016, considered their pleadings and submissions, determined the application for review and delivered its ruling on 24<sup>th</sup> March, 2016. According to the Respondent, upon considering the submissions of the parties and the documents before it, it identified three issues for determination, namely:

1. Whether the Board has jurisdiction to hear and determine the Request for Review as framed since the Application is seeking for mandatory orders.
2. Whether the Applicant’s Request for Review was filed out of time thereby depriving the Board of the jurisdiction to hear and determine the same.
3. If the answer to (i) and (ii) above are in the negative, whether the Procuring Entity lawfully terminated the procurement process the subject of this Request for Review.

22. According to the Respondent, it only took into consideration facts that were presented before it and were relevant in deciding the above issues and its decision was based on its findings that:

- a. That the only provisions under which a procuring entity can terminate a procurement process is under the provisions of section 36 of the **Public Procurement and Disposal Act, 2005**, and or section 63 of the **Public Procurement and Asset Disposal Act, 2015**. However, it is only the Procurement Committee that can terminate before signature of the Contract and in this case the committee is *functus officio*.
- b. That the Procuring Entity’s argument that its action was anchored on the provisions of section 2 of the **Public Procurement and Disposal Act, 2005** and Article 227 of the Constitution cannot stand since the law expressly provided for the manner in which a Procuring Entity can terminate a procurement process;
- c. That as a matter of general law, the High Court and the Board have severally held that the Board has the jurisdiction to inquire into whether any purported termination of a procurement process was undertaken in accordance with the law;
- d. That on the dates when the Procuring Entity issued the first letter notifying the Applicant that its tender had been terminated on 9<sup>th</sup> November, 2016, and the second letter on 25<sup>th</sup> February, 2016 there was in force a decision dated 21<sup>st</sup> August, 2015 by the Board where it had found that the procurement process was proper and directed that it proceeds;
- e. That in its response to the Application dated 28<sup>th</sup> July, 2015 and in its submissions before the Board, the Procuring Entity affirmed that the tender had been properly evaluated and urged the Board to allow the process to be concluded;
- f. That the Decision of the Board was affirmed by the High Court in judicial review application No, 284 of 2015 and therefore become final and binding on the parties under the provisions of Section 100 of the Act;
- g. That the letters by the Procuring Entity purporting to terminate the award of the tender were null and void by operation of law;
- h. That this is a peculiar case of a party which is willing to go to any length including ignoring a binding decision of the Board which has been upheld by the High Court in order to ensure that the successful bidder does not enjoy the fruits of its success;

i. That in order to prevent mischief and in order to uphold the sanctity of the Procurement Process and the decisions given in procurement matters, The Board found that the Applicant's application dated 3<sup>rd</sup> March, 2016 which was filed on 4<sup>th</sup> March, 2016 has merit and the same was allowed.

23. It was averred that the Respondent, in its decision made on 24<sup>th</sup> March, 2016 and gave the following orders:-

a. The Applicant's Request for Review dated 3<sup>rd</sup> March, 2016 and which was filed with the Board on 4<sup>th</sup> March, 2016 be is hereby allowed in the following terms:-

i. The decision of the procuring entity purporting to terminate to the Applicant of the Tender for KGN-GRD-09-2015 for Leasing of 50MW Wellbeads Geothermal Power Generation Units at Olkaria Geothermal Field on a Build, Lease, Operate and Maintain Basis as contained in the minutes of the procuring entity held on 3<sup>rd</sup> November, 2015 and as communicated to the Applicant vide the procuring entity's letter dated 9<sup>th</sup> November, 2015 and 25<sup>th</sup> February, 2016 respectively be and are hereby declared null and void and the same be and are hereby set aside.

ii. The procuring entity be and is hereby directed to complete the procurement process herein including forwarding the contract agreement executed by the procuring entity on 2/9/2015 for execution by the Applicant in line with the Board's decision in the Request for Review No. 38 of 2015 as affirmed by the High Court in Nairobi High Court Judicial Review Application No. 284 of 2015 within Seven (7) days from today's date.

iii. The procuring entity shall furnish the Board with the evidence of compliance with order (c) above at the expiry of the said period of Seven (7) days form todays date.

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

24. It was the Respondent's case that in making its decision, it considered considering all documents of evidentiary value placed before it by the parties and the submissions of the parties on each of the issues raised in the Request for Review, In its view, the Board's decision was a decision made within its mandate, and the specific sections of the law in specific Section 98 of the **Public Procurement and Disposal Act 2005**, on which the Board's decision was pegged have been expressly pronounced in the Board's decision. To the Respondent, the Applicant has not demonstrated in any way that the decision of the Board was outside the scope of the law governing the Board. Further it has not demonstrated that the Board took into account irrelevant consideration, or failed to accord the Applicant a right to be heard in breach of Article 50 of the Constitution. The Board expressly considered all the documents and submissions filed by the Applicant and all other parties to the Review in arriving at its decision in upholding the principle of natural justice.

25. According to the Respondent, the Applicant has not demonstrated by an iota of truth that the Board was unreasonable in arriving at its decision or that the Board was guilty of unreasonable exercise of power and irrationality in arriving at its decision. To the contrary, it was contended that the decision by the Board is grounded in law after review of all material conditions placed before it and importantly in line with its mandate to uphold public procurement process.

26. It was asserted that the Applicant has not demonstrated that the Board in arriving at its decision was guilty of any illegality, impropriety of procedure and irrationality to warrant the variance of the order of the Board while on the allegation that the Board lacked jurisdiction to hear the Request for Review, it was contended that at the time when the procuring entity through a letter dated 9<sup>th</sup> November, 2015 purporting to terminate the tender, there was and an order by **Lady Justice M. Ngugi** staying the implementation and or executing any contract whatsoever dealing with the tender. This means that nothing happened thereafter until 19<sup>th</sup> January 2016 when this Court dismissed judicial review 284 of 2015 thereby re-affirming the Board's Decision which allowed the procurement Process to proceed.

27. It was however contended that the letter dated 9<sup>th</sup> November 2015 was issued during the pendency of Judicial Review proceedings this Court when a stay order was already in Place. The second letter was issued by counsel for the procuring entity after the procuring entity was fully aware that the court had dismissed the Judicial review application and affirmed the Board's decision. The Respondent relied on section 100 of the Act, once the Board has given a decision which is binding as is the case herein; a procuring entity cannot purport to terminate the procurement process. It was therefore contended that the Applicant's application is made in bad faith, has no merit and is only calculated to discredit the credibility of the Respondent's mandate and function, while ultimately eroding the public's confidence in procurement procedures and processes and the Court was urged to dismiss the Applicant's Application for Judicial Review as it lacks merit.

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

28. The Application was also opposed by the interested party herein, Rentco East Africa Limited.

29. According to Rentco, it was the successful bidder in a tender advertised by the Ex-Parte Applicant after which ***OJSC Power Machines Limited, Transcentury Limited and Civicon Limited*** an unsuccessful bidder filed a Request for Review at the Public Procurement Administrative Board but the Request was dismissed. A further judicial review application by the same before the High Court was similarly dismissed.

30. It was therefore averred that section 100 of the ***Public Procurement and Assets Disposal Act, 2005*** by operation of law became binding to all parties being the Interested Party and the Ex-Parte Applicant herein as well as all participants in the proceedings before the Board and the High Court. However, the Ex-Parte Applicant purported to terminate the award of tender to the Interested Party which by virtue of section 100 is an illegality and such illegality cannot found a cause action. This Court therefore has no legs to stand on and it cannot entertain these proceedings.

31. According to the interested party, it submitted its expression of interest in a consortium of RentCo East Africa Limited/ LANTech (Africa) Limited and with Toshiba Corporation as the technology subcontractor and was duly qualified and invited to submit a bid as per Request for Proposal (RFP KGN-GRD-09-2015) and its bid was found to be responsive as per section 64 and 82 of the ***Public Procurement and Disposal Act, 2005*** ("hereinafter referred to as the Repealed Act") by the Evaluation Committee of the Ex-Parte Applicant as it had met all the criterion as set in the Tender Document and Request for Proposal (RFP).

32. It was averred that the Ex-Parte Applicant evaluated the bid by the Interested Party and held that it was using the most efficient geothermal generation technology which would yield the maximum net output at the lowest rental fee as the Interested Party yielded the highest Monthly Revenue at USD.785, 273.25 and after due evaluation by the Ex-Parte Applicant the Interested Party was determined as the successful bidder based on its attained highest score on the technical, financial and cost effective factor in accordance with the procedures and criteria in the Request For Proposal, and the Act with highest guaranteed returns to the Ex-Parte Applicant.

33. It was averred that when the decision was challenged before the Board, the Ex-Parte Applicant was unequivocal that the evaluation was as per the RFP and the Repealed Act and this position was confirmed by the submissions of counsel for the ex parte applicant to the effect that the interested party's tender had been properly evaluated and who urged the Respondent to allow the process to be concluded. Consequently, the Ex-Parte Applicant by its letter dated 16<sup>th</sup> July 2015 notified the Interested Party of the award of tender under Section 67 of the Repealed Act and the Ex-Parte Applicant by its letter dated 25<sup>th</sup> August 2015 invited the Interested Party to contract negotiations which commenced in earnest soon after, culminating in successful contract agreement. It was disclosed that the Ex-Parte Applicant's legal and geothermal energy team was present as well as its engineers and that it was the Ex-Parte Applicant who set the Agenda of the said meeting. It was averred that the contract was entered into by the Ex-Parte Applicant and the Interested Party as per the provisions of section 68 of the Repealed Act which provides that the procuring entity shall enter into a written contract based on the tender documents, the successful

tender, any clarifications under sections 62 and any corrections under Section 63.

34. It was further contended that after serious contract negotiations involving the Interested Party and the Ex Parte Applicant's legal, Geothermal Engineers and the Finance team spanning over two weeks, and after due consideration of all the pertinent contractual terms pertinent to the tender, and on satisfaction and common understanding between the parties that the spirit of the Contract in line with the tender specifications and requirements had been met including pertinent contractual agreements and importantly, the Master Lease Agreement, both the Interested Party and the Ex-Parte Applicant's Managing Director executed the Master Lease Agreement. It was disclosed that the only party that did not sign the agreement was the Ex-parte Applicant's Company Secretary who was stopped by a Court Order served upon her minutes before she executed the same.

35. The interested party also associated itself with the Respondent's position that the challenged to the interested party's award of the tender was disallowed and averred that immediately upon filing the Judicial Review No. 284 of 2015 in the High Court and more particularly on 2<sup>nd</sup> September, 2015 the **Honourable Lady Justice M. Ngugi** issued an order of stay stopping the Ex-Parte Applicant from entering into any contract with the Interested Party or implementing and/or executing any contract whatsoever and/or dealing with any issue concerning the tender. The said Judicial Review Application was ultimately successfully opposed by the Ex-Parte Applicant and the Interested Party herein which culminated in the judgment of this Court of 19<sup>th</sup> January 2016 which dismissed the Application with Costs. In opposing the application, the ex parte applicant sought that the application be dismissed in order for the project to move forward stating that there was an overwhelming demand for electricity in the country which exceeds the supply and the project seeks to address the deficiency in the supply of electricity in the Country. In was the interested party's case that it was instructive to note that at all times during the hearing of Review No. 38 of 2015 and JR Misc Application 284 of 2015, the Ex-Parte Applicant maintained that there was no irregularity in the decision making process that had been identified. In this Court's judgement, it was averred that the Court found that there was neither breach of the Constitution nor the statute hence the application lacked merit and was dismissed with costs. Accordingly, all the orders subsisting that had been granted were discharged.

36. Based on legal advice, it was contended that this Court's decision sanctified the decision of the Respondent in Review No. 38 of 2015 and it became final and binding pursuant to Section 100 (3) of the Repealed Act on all the parties that were participants in the proceedings before the Respondent and the High Court including the Ex-Parte Applicant. However, the Applicant without any justification purported to terminate the procurement process invoking a letter dated November 9, 2015 by the Ex-Parte Applicant's Director for supplies purporting that the Interested Party's Financial Plan and related supporting documents were inconsistent with the objectives of the project and as such the Interested Party should not have passed the Expression of Interest Stage. The said letter did not invoke any known law and none exists and it was only written to the Interested Party and not copied to the Respondent and other interested parties.

37. The interested party claimed that the ex parte applicant failed to respond to its letters dated November 13, 2015 and December 4, 2015, objecting to the purported termination and highlighting that the proceedings had since determined and the same was subject of a judicial process in the Judicial Review Court as such not open to any dealing as orders expressly stayed any dealing on the same. It was disclosed that despite having authored the said letter on November 9, 2015 in the pendency of the judgment, they did not bring it to the attention of the Court seized with the matter despite the fact that it was lodged in court on November 18, 2015, when the **OJSC Power Machines Limited, Transcentury Limited and Civicon Limited Consortium** somehow got the same and filed the same in court vide an Affidavit sworn on November 18, 2015. Despite being fully aware of the letter, the ex parte applicant still sought for dismissal of the application. It was reiterated that on December 19, 2015, despite having issued the said letter the Ex-Parte Applicant's advocates attended court when the judgment was not ready yet remained mute on the terms of their purported letter terminating the contract, nothing would have been easier than to inform the court, they are now estopped as they cannot purport to invoke what the court has made an express order that the contract proceeds.

38. It was noted that during the evaluation of the Interested Party's financial proposal, the Ex-Parte Applicant found the Interested Party to be responsive on the basis of Lantech Africa Limited's financial statements and found the Consortium to be responsive based on Lantech's financial position though it cannot now turn around and claims that it was not aware that RentCo East Africa Limited did not submit audited accounts for three years, an indication of a party acting in utmost bad faith and a party that is willing to lie to this court to further an illegality.

39. In the interested party's view, it was untrue that the Ex-Parte Applicant was unaware of the above information until after the Parliamentary Public Investment Committee summoned the Chief Executive Officer of the Ex-Parte Applicant in October, 2015 as the Ex-Parte Applicant was represented by its Legal and Finance personnel as well its Geothermal Engineers and it participated actively in the contract negotiations between themselves and the Interested Party. The intent and the spirit of the Tender was captured and all material disclosure was made and therefore the Ex-Parte Applicant is estopped from claiming ignorance now. Furthermore, majority of the documents though indicative and subject to contract indicate the Ex-Parte Applicant as the Lessor.

40. It was asserted that section 36 of the Repealed Act provided for termination of procurement proceedings by the procuring entity at any time before entering into a contract. Subsection 2 of section 36 provided that the procuring entity shall give notice of such termination to each of the people who submitted a tender, proposal or quotation or, if direct procurement was being used, to each person with whom the procuring entity was negotiating. The procuring entity was also required to give the notice to the Public Procurement Oversight Authority which was to include the reasons for the termination and was to be made in accordance with any directions of the Authority with respect to the contents of the report and when it was due. It was therefore contended that there was only one way to terminate the procuring process expressly provided for in the Repealed Act and the Ex-Parte Applicant was bound by the above provision.

41. However, after an award of tender, the only other way the tendering process could be terminated was after a review was filed before the Respondent and it annuls the procuring process or something done in the procuring process by the Ex-Parte Applicant which did not happen in this instant case.

42. According to the interested party, since the effect of section 100 of the **Public Procurement and Disposal Act, 2005** (Repealed) as read with Section 175 of the 2015 Act is that the decision of the High Court on appeal is final, section 100 (3) of the Repealed Act and Section 175 (6) of the Act of 2015 provide that a party who disobeys the orders of the Respondent, the High Court and now the Court of Appeal shall be in breach of the Acts and any action of such party contrary to all these decisions shall be null and void. From the plain reading of this Section, the Ex-Parte Applicant through its purported termination of the tendering process is in disobedience of the outcome of Review 38 of 2015 before the Respondent and JR Misc. 284 of 2015 before the High Court and this Court should not condone such disobedience the same way the Respondent failed to.

43. It was disclosed that counsel for the Applicant conceded before the Respondent that the termination of the award of tender to the Interested Party was not based on any particular provisions of the Repealed Act and the 2015 Act. In any event no known procedure was used or is available as the law expressly provides how to terminate and when, any such action by the Applicant is illegal, ultra vires the Act, lacks any foundation in law and is an indictment to the procurement process and the rule of law that expressly provide that the decision of the Board and Court are final, the Applicant is not superior to the Board or Court and cannot invite this court to render a contrary decision when the previous ruling has not been set aside or dismissed by the Court of Appeal.

44. In the interested party's view, the actions of the Ex-Parte Applicant ignore and undermine the intent of the drafters of the **Public Procurement and Assets Disposal Act**, the sanctity of the procurement process, are an abuse of the court process and are in contempt of the orders of Court. Further, the Tender Review Committee is *functus officio* and any actions purportedly executed by the Committee or the Review Board save for compliance as per section 68 are null. The same is cemented by the fact that the Tender was subject of review as submitted above and the Orders issued by the Board and the Court are

still in force. Therefore the purported termination of the contract by the Applicant is illegal and ultra vires as the Tender Committee was rendered *functus officio* upon signature of the contract by the Applicant and Interested Party. The Applicant's Board does not have power to terminate the contract and the purported termination was done irregularly. The power alleged to be exercised is unknown in law hence illegal. To the interested party, the Ex-Parte Applicant lacks power to interfere in a process determined by the Respondent and the High Court as they are only clothed with jurisdiction before an award of tender and during tender proceedings.

45. It was therefore averred that the Ex-Parte Applicant's actions were illegal because they are outside the parameters of the law and what the Ex-Parte Applicant is doing is trying to convince this Court to endorse its illegalities which is what the Respondent refused to do. It was averred that despite not having powers to terminate the procurement process and despite the Court's direction that the matter proceeds, the Ex – Parte Applicant through its firm of Advocates on 25<sup>th</sup> February, 2016 responded to a letter by the Interested Party 9<sup>th</sup> February 2016, asking for its counterpart contract agreement which it had already previously executed following rigorous contract negotiations with the Ex-Parte and a meeting to plan for the commencing of the works on the site. The Ex-parte Applicant's Advocates reiterated its illegal position of 9<sup>th</sup> November, 2015 claiming that it had terminated the award of tender.

46. The Interested Party averred that its review was premised on section 93(1) of Repealed Act, Section 167 of the 2015 Act and Section 100 of the Repealed Act. Importantly the review was not a normal review because it was seeking the enforcement of the terms of the Act and especially disobedience of the Orders of the Board pursuant to mandatory terms as donated to it in the Act under the sections under reference.

47. It was contended that during the hearing of the Interested Party's Request for Review (Review No. 14 of 2016) before the Respondent, the Ex-Parte Applicant's Advocates tried to casually dismiss the letter of 25<sup>th</sup> February, 2016 as communication between one advocate to another and that it could not be deemed as valid for purposes of terminating a procurement process. However, an advocate is an agent of his client and his actions bind his client. In its view, the Respondent did not act *ultra vires* and outside its mandate in entertaining the Review by the Interested Party because as a matter of general law, the High Court and the Respondent have severally held that the Respondent has the jurisdiction to inquire into whether any purported termination of a procurement process was undertaken in accordance with the law. In addition, the provisions of section 36 (6) of the Repealed Act do not oust the jurisdiction of the Respondent or the Court to hear any grievance arising under the Provisions of Section 36. Furthermore the decision of the Board was affirmed by the High Court in Judicial Review Application No. 284 of 2015 and therefore became final and binding on the parties under the provisions of Section 100 of the Act. As at the date when the first letter of termination was issued by the Ex-Parte Applicant on 9<sup>th</sup> November, 2015 and the second letter by Counsel for the Ex-Parte Applicant on 25<sup>th</sup> February, 2016, the decision of the Respondent and the High Court still stood and under provisions of Section 100 (3) and Section 175 (6) of the Repealed Act and the 2015 Act respectively. The letters by the Ex-Parte Applicant purporting to terminate the award of the tender to the Ex-Parte Applicant were null by operation of law and the same could not have prevented the Interested Party from challenging the purported termination particularly coming on the face of 2 decisions one from the Respondent and the other from the High Court. However, the Ex-Parte Applicant having issued second letter of notification of the purported termination of the tender on 25<sup>th</sup> February, 2016, the Interested Party was well within its rights to seek to challenge the contents of that letter within a period of 14 days under Section 167 of the 2015 Act.

48. It was emphasized that the parties had negotiated the terms of the contract and actually the Interested Party and the Ex-Parte Applicant's Managing Director executed the same in terms of the express terms of the tender which captured the objectives of the Tender as such consideration had passed. It is therefore not open to the Ex-Parte Applicant or any of its component teams/bodies to purport to review the decision of the Tender Review Committee and the Respondent as such power is not provided for in the Tender Documents neither is it provided for in the Act and any purported action by the Ex-Parte Applicant through its Board or through the Committee finds no power as the same is in breach of the Regulations 10 and 11.

49. It was asserted that the Respondent is bound by Article 227 of the Constitution as read with Sec 2 of the Act to promote integrity and fairness in the procurement procedures. In such exercise, once a tender is evaluated and an award issued and the same is subjected to Review before the Respondent, the Procuring Entity has no power whatsoever in law to interfere with the process especially wherein a directive had been issued by this in terms of Section 98, 93 and 100 of the Act. It is hypocritical for the Ex-Parte Applicant to claim that the Respondent has breached Section 2 and 3 of the Repealed Act and the 2015 Act respectively as well as Article 227 of the Constitution whilst it has also breached the same provisions by arbitrarily and without lawful justification terminating the award of tender to the Interested Party.

50. As regards the issue of a letter by Toshiba Corporation dated 24<sup>th</sup> March, 2015 which states that Toshiba Corporation is not a member of the Interested Party's consortium, the interested averred that it was instructive to note that:

- a. The Respondent was delivering its determination on the same day the letter is dated.
- b. The Ex-Parte has not produced any evidence to prove that the letter was before the Respondent or that the Respondent was aware of the letter.
- c. The said letter was not among the documents produced as evidence by the Ex-Parte Applicant during the hearing of the Review and the same is a fresh issue yet this is judicial review and not an appeal.
- d. In any event, Toshiba is not withdrawing from any Consortium. In its letter Toshiba only clarifies its role in the Consortium's role as a subcontractor and technology equipment supplier.

51. The Interested Party took the view, based of legal advice, that in any suit or action a party must plead his entire case for effective determination by the respective court or Tribunal and that a party is bound by its pleadings and having failed to do that in its request for review it will be foolhardy to expect determination from the board on an issue that was never placed before it. Therefore the Respondent did not act illegally in determining only the matters raised in the Request for Review. It is not the mandate of the Respondent to frame issues for determination for parties and it will be acting outside its jurisdiction to render a decision on an issue not raised *ab initio* as it would prejudice the other parties. In its view, Judicial Review is concerned with the decision making process and not the merits of the decision. The Applicant has not demonstrated that the decision making process was flawed to warrant issuance of the orders of judicial review it has sought in the motion. The Respondent exercised its powers and conducted the review properly within the confines of the law. In this case it was contended that the Ex-Parte Applicant is questioning the merits and demerits of the decision which queries cannot be entertained in an application for judicial review. I am advised, which advise I verily believe to be correct that those are issues that can only be heard and determined in an appeal. The Applicant had the time and opportunity to lodge an appeal to challenge the Respondent's decision on merit now and after Review No. 38 of 2015 but chose not to and this application must fail.

52. To the interested party, this application is devoid of merit and it should be rejected summarily.

### **Applicant's Rejoinder**

53. In its rejoinder, the applicant noted that that though there was an affidavit allegedly sworn on behalf of the interested party, on 24<sup>th</sup> March 2015, Toshiba Corporation ("Toshiba") wrote to the Respondent and clarified that it was not a member of the Interested Party's consortium and was not involved in the filing of *Request for Review No 14 of 2016* (see page 503 of the Applicant's Exhibit). It is therefore doubtful that the deponent duly authorised to swear this affidavit on behalf of all the parties to the consortium, specifically Toshiba.

54. To the applicant, the said affidavit consists largely of arguments and contravenes the rules on the contents of affidavits as set out in Order 19 of the **Civil Procedure Rules** hence substantial portions of the affidavit ought to be struck out. Further, a large part of the affidavit has delved into the merits of the

Respondent's decision dated 24<sup>th</sup> March 2016 which does not fall within the ambit of this Court hence it is not open to the Court to revisit the merits of the decision as these are not issues for determination in this litigation.

55. The applicant averred that the Applicant (OJSC Power Machines Limited) in *Judicial Review No 284 of 2015* fixed the matter for mention on 19<sup>th</sup> November 2015 for the purpose of bringing the termination of the tender to the attention of the court but Court declined to make any order on the issue and directed that it would proceed to write the judgment and when the decision was delivered on 19<sup>th</sup> January, 2016 dismissing the application, the decision by the Review Board that had for all intents and purposes been overtaken by events and could therefore not be binding on the parties hence section 100 of the 2005 Act is not applicable. The applicant however refuted the allegation that the Respondent in its Ruling dated 21<sup>st</sup> August 2015 ordered that the contract proceeds but simply ordered as follows:

***“The Procuring Entity is therefore at liberty to proceed with the procurement process herein to its logical conclusion in accordance with the law”***

56. The applicant contended that the issues relating to the inconsistency of the Applicant's financial plan and related supporting documentation were not in the Applicant's knowledge and had not been picked up during this period and that the tender had not been cancelled when the parties filed their pleadings and made their submissions in *Request for Review No 38 of 2015*. The applicant reiterated that the inconsistency in the financial documentation submitted by the Interested Party was inadvertently not picked up during the negotiations. The Tender was designed in the model of a lease arrangement because it would have minimum financial input from the Applicant. The Applicant was not in a position to take up any loan and a lease arrangement would not affect its balance sheet.

57. To the applicant, the Respondent in its Ruling dated 24<sup>th</sup> March 2016 made a fundamental error when it found that the contract agreement was executed by the Applicant on 2<sup>nd</sup> September 2015 and ordered that the agreement should be forwarded to the Interested Party for execution. As the contract was wholly executed by the Interested Party and partially executed by the Applicant, the Respondent's order to forward the agreement to the Interested Party for execution is erroneous.

58. To the applicant it was not true that the order of **Lady Justice Mumbi Ngugi** restrained the Applicant from cancelling the tender award and/or dealing with any issue concerning the tender. There was no order restraining the Applicant from terminating the tender as the order provided in part as follows:

***“5. That the leave so granted does operate as a stay of complementation, enforcement and/or execution of the Respondent's decision dated 21<sup>st</sup> August 2015 in Review Application No 38 of 2015 of 22<sup>nd</sup> July 2015 in regard to Tender No. KGN-GRD-09-2015 for Leasing of 50MW Wellheads Geothermal Power Generations Units at Olkaria Geothermal Field on Build, Lease Operate and Maintain Basis and specifically;***

***a. Restraining the 1<sup>st</sup> Interested Party by themselves, their servants or otherwise howsoever from entering into a contract with the 2<sup>nd</sup> Interested Party over and or concerning Tender No. KGN-GRD-09-2015 for Leasing of 50 MW Wellheads Geothermal Power Generation Units at Olkaria Geothermal Field on Build, Lease, Operate and Maintain Basis.***

***b. Staying the implementation and /or execution of any contract whatsoever over and/or concerning Tender No. KGN-GRD-09-2015 for Leasing of 50MW Wellheads Geothermal Power Generation Units at Olkaria Geothermal Field on Build, Lease and Maintain Basis***

59. It was therefore averred that after it came to light that the Interested Party did not comply with the vital components of the Expression of Interest (“EOI”) and the Request for Proposals (“RFP”), the Applicant terminated the procurement process on 9<sup>th</sup> November 2015. The Interested Party confirms this

in paragraph 20 of the Replying Affidavit. The Interested Party also admits in paragraph 40 of the Replying Affidavit that the letter dated 25<sup>th</sup> February 2016 from the Applicant's advocates reiterated the contents of the Applicant's letter of 9<sup>th</sup> November 2015, thereby confirming that the letter of 25<sup>th</sup> February 2016 did not constitute the termination of the tender but merely reiterated the fact of the termination which happened in November 2015.

60. In light of this, the request for review filed before the Respondent on 3<sup>rd</sup> March 2016 was time barred as it ought to have been filed within 7 days as provided for in Regulation 73 of the Public Procurement and Disposal Regulations 2006 ("the 2006 Regulations"). The 7 day period within which the Interested Party should have filed the Request for Review lapsed on 17<sup>th</sup> November 2015 as the termination was effected on 9<sup>th</sup> November 2015. The Respondent did not therefore have jurisdiction to hear and determine the Request for Review.

61. In the applicant's view, the High Court did not make an order that the contract proceeds but only set out the guiding principles of law in as far as 'public interest' are concerned. According to it, the termination was carried out under the provisions of Article 227 of the Constitution, the objectives set out in section 2 of the 2005 Act and the guiding principles set out in section 3 the 2015 Act. The Board of Directors could not turn a blind eye to the financial documentation submitted by the Interested Party as this would be a clear breach of their responsibilities as directors of the Applicant.

62. The applicant however denied that it expressly sought for dismissal of the application and enforcement of the contract after issuing the termination letter of 9<sup>th</sup> November 2015. The parties made their submissions on 3<sup>rd</sup> November 2015 before the High Court and the procurement proceedings were cancelled on 9<sup>th</sup> November 2015, after the Court had already retired to write the Judgment. To the applicant, it did not appeal the High Court's decision as it had been overtaken by events as the procurement proceedings had already been terminated and there was nothing for the Applicant to appeal. The applicant asserted that the Respondent ought to have dismissed the Interested Party's request for review at inception for the following reasons:

a. The termination letter of 9<sup>th</sup> November 2015 was issued during the pendency of the judicial review proceedings. There were no stay orders in force and the termination letter was valid.

b. The letter of 25<sup>th</sup> February 2016 was an affirmation of the termination letter of 9<sup>th</sup> November 2015. It was not the actual termination letter.

c. As the letter informing the applicant of the cancellation was received by the interested party on 10<sup>th</sup> November 2015, the interested party had 7 days from this date to file the request for review if one is to apply the provisions of the 2006 Regulations. This did not happen and the request for review filed on 3<sup>rd</sup> March 2016 was therefore time barred.

63. It was contended that in the email, Toshiba clarifies that it was never a consortium partner from the beginning. This is a fundamental issue that goes to the root of the request for review but the Respondent did consider it.

64. According to the applicant, the Respondent's order directing the Applicant to complete the procurement process by forwarding the contract to the Interested Party for execution is in the nature of specific performance or mandatory injunction which the Respondent has no power to issue.

### **Determinations**

65. Having considered the application, the affidavit in support of and in opposition to the application and the submissions filed herein, this is the view I form of the matter.

66. The first issue for determination by this Court is whether the Request for Review was made within

time. If the same was outside the time prescribed by the law, then the proceedings before the Respondent must fall by the wayside.

67. It is trite that a judicial or quasi-judicial tribunal, such as the Board herein has no inherent powers. In **Choitram vs. Mystery Model Hair Salon [1972] EA 525, Madan, J** (as he then was) was of the view that powers must be expressly conferred; they cannot be a matter of implication. Similarly, in **Gullamhussein Sunderji Virji vs. Punja Lila and Another HCMCA No. 9 of 1959 [1959] EA 734**, it was held that Rent Restriction Board is the creation of statute and neither the Board nor its chairman has any inherent powers but only those expressly conferred on them.

68. It was in appreciation of the foregoing position that the Court in **Ex Parte Mayfair Bakeries Limited vs. Rent Restriction Tribunal and Kirit R (Kirti) Raval Nairobi HCMCC No. 246 of 1981** held that in testing whether a statute has conferred jurisdiction on an inferior court or a tribunal the wording must be strictly construed: it must in fact be an express conferment and not a matter of implication since a Tribunal being a creature of statute has only such jurisdiction as has been specifically conferred upon it by the statute. Therefore where the language of an Act is clear and explicit the court must give effect to it whatever may be the consequences for in that case the words of the statute speak the intention of the legislature. Further, each statute has to be interpreted on the basis of its own language for words derive their colour and content from their context and secondly, the object of the legislation is a paramount consideration. See **Chogley vs. The East African Bakery [1953] 26 KLR 31 at 33 and 34; Re: Hebtulla Properties Ltd. [1979] KLR 96; [1976-80] 1 KLR 1195; Choitram vs. Mystery Model Hair Salon (supra); Warburton vs. Loveland [1831] 2 DOW & CL. (HL) at 489; Lall vs. Jeypee Investments Ltd [1972] EA 512 at 516; Attorney General vs. Prince Augustus of Hanover [1957] AC 436 AT 461.**

69. It is therefore clear that a Tribunal's power must be conferred by the Statute establishing it which statute must necessarily set out its powers expressly since such Tribunals have no inherent powers. Unless its powers are expressly donated by the parent statute, it cannot purport to exercise any powers not conferred on it expressly. As has been held time without a number, where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute under which it purports to exercise its authority. In **Republic vs. Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530** it was held that 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.

70. Therefore where the law exhaustively provides for the jurisdiction of an executive 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. Whereas, 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 their actions; and they must not misdirect themselves in fact or law. Most importantly they must operate within the law and exercise only those powers which are donated to them by the law or the legal instrument creating them. See **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090.**

71. Where a Tribunal has no jurisdiction, the law is that it must down its tools immediately upon realizing that there is want of jurisdiction on its part. It cannot proceed with the matter in the hope that it may unearth certain facts which may clothe it with jurisdiction. See **Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1** and **Owners and Masters of The Motor Vessel "Joey" vs. Owners and Masters of The Motor Tugs "Barbara" and "Steve B" [2008] 1 EA 367.**

72. Section 36 of the Act (now repealed) provided as follows:

*(1) A procuring entity may, at any time, terminate procurement proceedings without entering into a contract.*

*(2) The procuring entity shall give prompt notice of a termination to each person who submitted a tender, proposal or quotation or, if direct procurement was being used, to each person with whom the procuring entity was negotiating.*

*(3) On the request of a person described in subsection (2), the procuring entity shall give its reasons for terminating the procurement proceedings within fourteen days of the request.*

*(4) If the procurement proceedings involved tenders and the proceedings are terminated before the tenders are opened, the procuring entity shall return the tenders unopened.*

*(5) The procuring entity shall not be liable to any person for a termination under this section.*

*(6) A termination under this section shall not be reviewed by the Review Board or a court.*

*(7) A public entity that terminates procurement proceedings shall give the Authority a written report on the termination.*

*(8) A report under subsection (7) shall include the reasons for the termination and shall be made in accordance with any directions of the Authority with respect to the contents of the report and when it is due.*

73. This provision was dealt with in Republic vs. National Social Security Fund Board of Trustees [2015] eKLR where this Court expressed itself as follows:

**“It is clear that the above provision does not require that the notification of the termination of the tender precedes the termination itself. What the section requires is that each person who submitted a tender, proposal or quotation be notified of the termination thereof and on request by such a person furnish the reasons therefor. However it is expressly stated that in the event of such termination the procuring entity shall not be liable therefor. It is therefore clear that the applicant cannot question the decision by the Respondent to terminate the tender. Whereas the Respondent was under a statutory obligation to furnish the applicant with the reasons for the termination of the Tender, the consequences for the failure to do so, in my view, do not encompass the quashing of the decision to terminate the tender under the aforesaid provision. This however, does not mean that the applicant may not have recourse in law for the omission by the Respondent to be notified of the same. My view, however, is that such recourse cannot be by way of an application for *certiorari* as the applicant seeks in this application. Whereas it was alleged that the Respondent did not afford the applicant an opportunity of being heard before terminating the tender, as I have said no legal provision has been cited in support of the contention that a notice was a prerequisite to such termination. The provision simply says that the notice of termination be given *promptly*. That the Respondent is empowered by the Act to terminate the tender at any time without entering into the contract is not in doubt. There is no material placed before me to show that the decision to terminate the said tender was irrational. In the premises the orders sought herein cannot issue since the applicant has not shown that the decision to terminate the said Tender violated any of the principles warranting the grant of judicial review orders.”**

74. Section 37(1) of the Act is however clear that:

***If the procurement procedure used is open or restricted tendering or a request for proposals, communications between the procuring entity and a person seeking a contract for the procurement shall be in writing.***

75. In my view a reading of section 36 together with section 37(1) shows that after a tender has been

terminated, the Procuring Entity is under a legal obligation to promptly notify each person who submitted a tender, proposal or quotation of that fact and the notice is required to be in writing.

76. Before the Board, the interested party herein averred that the procuring entity (read applicant herein) purported to terminate the contract based on the letter dated 9<sup>th</sup> November, 2015. This Request was received by the Respondent on 4<sup>th</sup> March, 2016. Therefore if the notice is deemed to be the decision under challenge, then the Request would most certainly have been made outside the 7 days prescribed under the applicable Regulation 73(2)(c)(i) of the **Public Procurement and Disposals Act, 2005**.

77. According to the replying affidavit sworn in these proceedings, the said letter of termination was only written to the interested party herein Rentco, and not to the Respondent or the other interested parties. It would however seem that the said letter was received by the interested party by latest 13<sup>th</sup> November, 2015 because the interested party deposed that by its letters dated 13<sup>th</sup> November, 2015 and December, 2015, it objected to the purported termination.

78. The issue of the Request having been made outside the prescribed period was taken up before the Respondent. However, in its determination, the Respondent held that as at the time of the said termination there was in force a decision of 21<sup>st</sup> August, 2015 in which the Board directed the procurement process to proceed. What the Board however directed was that:

**“The procuring Entity is therefore at liberty to proceed with the Procurement process herein to its logical conclusion in accordance with the law.”**

79. The word “liberty” is defined by **Black’s Law Dictionary** 9<sup>th</sup> Ed. At page 1001 as “freedom from arbitrary or undue external restraint; the absence of a legal duty imposed on a person”. It is therefore clear that what the Board intended was that the ex parte applicant was free to enter into the contract but there was no compulsion placed on it to do so. It is therefore a misconception of the decision of 21<sup>st</sup> August, 2015 to state that the applicant was directed to proceed with the contract.

80. With respect to the decision of **Mumbi Ngugi, J** the orders of the learned Judge as extracted and as relating to the stay were as follows:

***“5. That the leave so granted does operate as a stay of complementation, enforcement and/or execution of the Respondent’s decision dated 21<sup>st</sup> August 2015 in Review Application No 38 of 2015 of 22<sup>nd</sup> July 2015 in regard to Tender No. KGN-GRD-09-2015 for Leasing of 50MW Wellheads Geothermal Power Generations Units at Olkaria Geothermal Field on Build, Lease Operate and Maintain Basis and specifically;***

***a. Restraining the 1<sup>st</sup> Interested Party by themselves, their servants or otherwise howsoever from entering into a contract with the 2<sup>nd</sup> Interested Party over and or concerning Tender No. KGN-GRD-09-2015 for Leasing of 50 MW Wellheads Geothermal Power Generation Units at Olkaria Geothermal Field on Build, Lease, Operate and Maintain Basis.***

***b. Staying the implementation and /or execution of any contract whatsoever over and/or concerning Tender No. KGN-GRD-09-2015 for Leasing of 50MW Wellheads Geothermal Power Generation Units at Olkaria Geothermal Field on Build, Lease and Maintain Basis”***

81. In my view the order was two-fold. Firstly, it restrained the 1<sup>st</sup> interested party, the applicant herein from entering into a contract with the 2<sup>nd</sup> interested party, Rentco with respect to the subject tender. In other words what was restrained was the taking of a positive action that would result into a contract in respect of the said tender. Secondly, the implementation and or execution of any contract in respect of the said tender was similarly stayed. In my view this order cannot be deemed to have stayed the termination of the tender. It is therefore my view that the order ought not to have been a basis for holding that the

letter terminating the tender was inconsequential.

82. In my judgement in Miscellaneous Application No. 284 of 2015 dated 19<sup>th</sup> January, 2016, this Court found the application unmerited and dismissed the same. Consequently, the Respondent's decision of 21<sup>st</sup> August, 2015 stood with the result that the procuring Entity was once more at liberty to proceed with the procurement process to its logical conclusion in accordance with the law. Again I must reiterate that that determination did not expressly direct the applicant to enter into the contract.

83. Section 100(1) of the **Public Procurement and Disposals Act**, 2006 is in the following terms.

***A decision made by the Review Board shall, be final and binding on the parties unless judicial review thereof commences within fourteen days from the date of the Review Board's decision.***

84. In this case, the finality of the Board's decision as affirmed by this Court was that the procuring Entity was at liberty to proceed with the procurement process to its logical conclusion in accordance with the law. If in the course of purporting to proceed with the procurement the applicant made a decision which was contrary to the law, an aggrieved party was of course at liberty to challenge the same as the interested party did in this matter. However that challenge had to be in accordance with the law and the challenge had to be initiated within 7 days of the decision under the repealed statute and within 14 days under the current statute.

85. In my view if the interested party intended to challenge the decision terminating the tender, it had to do so within 7 days from 9<sup>th</sup> November, 2015 and not 25<sup>th</sup> February, 2016 when the interested party's attention was drawn to the earlier decision. A decision, it is stated is a deliberate act that generates commitment on the part of the decision maker toward an envisaged course of action of some specificity. See **Public Administration, a Journal of the Royal Institute of Public Administration, By P H Levin**, at page 25. It is my view and I so hold that the letter of 25<sup>th</sup> February, 2016 did not amount to a decision in order to trigger the process of the review under the Act. If there was any decision it had to be the one of 9<sup>th</sup> November, 2015 and if neither of the two constituted a decision then the process of review could not take off as contemplated under the Act.

86. This does not mean that a party aggrieved by the action of the Procuring Entity, in such circumstances is left without a remedy. In my view, the remedy in such circumstances is to be found in section 99 of the Act which provided as follows:

***The right to request a review under this Part is in addition to any other legal remedy a person may have.***

87. In my view a person who would otherwise be locked out from invoking the provisions of the Act is not barred from seeking alternative remedy under other provision of the law. This was the position adopted by this Court in **Elias Mwangi Mugwe vs. Public Procurement Administrative Review Board & 5 Others [2016] eKLR** where the Court expressed itself as hereunder:

***“...any person who has no automatic right to participate in the review proceedings may properly resort to other available modes of ventilating his rights. In my view, 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 is 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, 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.*”

88. 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.*

89. As was held in *Chege Kimotho & Others vs. Vesters & Another [1988] KLR 48; VOL. 1 KAR 1192; [1986-1989] EA 57* citing *Midland Bank Trust Co. vs. Green [1982] 2 WLR 130:*

**“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.”**

90. The law must, of necessity, adapt itself; it cannot lay still. It must adapt to the changing social conditions. The court in the modern society in which we live cannot deny them a remedy. The courts have recognised that unlawful interference with a citizen’s rights give rise to a right to claim redress and if the ex parte applicant has a right he must of necessity have the means to vindicate it and a remedy if they are injured in the enjoyment or exercise of it: and indeed, it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal. Whether or not they will be able to prove that their rights have been contravened or infringed is another matter altogether. See *Rookes vs. Barnard [1964] AC 1129* and *Ashby vs. White [1703] 2 Ld Raym.938; 92 ER 126.*

91. In *Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya* (supra) it was held that just as nature abhors a vacuum, even the enforcement of the rule of law abhors a vacuum or a gap in its enforcement and proceeded to uphold the jurisprudence that helps to “illuminate the dark spots and shadows in all circumstances, so that justice as a beacon of light and democratic ideals are practiced and hailed at all times over the hills, valleys, towns and homes in this beautiful land of Kenya. The mantle of justice and the rule of law must cover all corners of Kenya in all stations. Courts have a continuing obligation to be the foremost protectors of the rule of law”.

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

93. It is therefore clear that the Respondent simply had no jurisdiction entertain the request for the review in light of the statutory limitation.

94. Having so determined, I will refrain from dealing with the other matters in order not to prejudice and embarrass proceedings which may be commenced pursuant to section 99 of the Act of 2005.

### **Order**

95. It follows that this application succeeds, the Notice of Motion dated 7<sup>th</sup> April, 2016, is merited and I grant the following reliefs:

**1. An order for judicial review by way of certiorari removing into this court and quashing the decision of the Respondent dated 24<sup>th</sup> March 2016 in Request for Review Application Number 14 of 2016 with regard to Tender No. KGN-GRD-09-2015 for the Leasing of 50MW Wellheads Geothermal Power Generation Units at Olkaria Geothermal Field on Build Lease, Operate and Maintain basis and the consequential orders.**

**2. Having granted the above relief, it is no longer necessary to grant the other two substantive reliefs.**

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

97. Orders accordingly.

**Dated at Nairobi this 20<sup>th</sup> day of December, 2016**

**G V ODUNGA**

**JUDGE**

***Delivered in the presence of:***

***Miss Aluvale for the applicant***

***Mr Munene for the Respondent***

***Mr Muganda for interested party***

***CA Mwangi***