



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW CASE NO. E002 OF 2021

IN THE MATTER OF: THE LAW REFORM ACT CAP 26

AND

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

IN THE MATTER OF: THE PUBLIC PROCUREMENT and ASSETS DISPOSAL Act NO.33 OF 2015

AN APPLICATION FOR JUDICIAL REVIEW ORDER OF CERTIORARI

- BETWEEN-

REPUBLIC.....APPLICANT

AND

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD.....RESPONDENT

AND

RHOMBUS CONSTRUCTION COMPANY LIMITED.....INTERESTED PARTY

AND

THE KENYA PORTS AUTHORITY.....1ST EXPARTE APPLICANT

ACCOUNTING OFFICER-KENYA PORTS AUTHORITY....2NDEPARTE APPLICANT

RULING

Factual background

1. Pursuant to a chamber summons dated 19/01/2021 filed the same day, leave to institute Judicial Review proceedings in the nature of certiorari seeking to remove to this court for purposes of quashing the decision and order of the Public Procurement Administrative Review Board made on 6/01/2021 in Review Application 150/2021 was granted against the respondent on 20/1/2021. It was further directed that the said leave was to operate as stay of implementation of the said decision. Consequently, the ex-parte applicant filed a Notice of Motion dated 26/1/2021 seeking orders as follows:

a. Spent;

b. An order of Certiorari to remove into this Honourable Court for the purposes of being quashed the entire Decision and Orders of the Public Procurement Administrative Review Board, the Respondent herein, made on 6th January, 2021 under the Request for Review Application No. 150 of 2020-Rhombus Construction Company Limited vs the Accounting Officer Kenya Ports Authority & Kenya Ports Authority regarding the Tender No. KPA/073/2019-20/TE for the supply and

Commissioning of 12 No. New Stackers.

c. Costs of and incidental to this Application be provided for.

d. Such further or other relief that this honourable Court may deem just and fit to grant.

Ex-parte Applicant's case

2. The application is premised upon grounds set out in the statutory statement and the accompanying Verifying Affidavit sworn on 2.12.2019o by Mr. Cosmas Makori who is the Exparte Applicant's Ag. Head of Procurement and supplies.
3. The 1st *Ex parte* Applicant's case is that, on 15/1/2020, it invited sealed bids from eligible tenderers for Tender No. KPA /073/2019-20/TE for the supply and commissioning of 12 new Reach Stackers vide an advertisement published on MyGov Publication website and Lloyd list. That a total of Nine (9) bids among them the interested party were received by 7.5.2020, which was the deadline of submission of bids.
4. It was averred that, the said bids were subjected to three (3) stages of the 1st Applicant's Evaluation process. At the preliminary stage, only four (4) Bids were found to have qualified to proceed to the next stage, which was the Technical Evaluation stage. At that Stage, only two bidders met the minimum requirement of technical score of 75%. At the final stage which was the Financial Evaluation Stage, the 1st Applicant's Evaluation Committee made a finding that the Interested Party was the lowest evaluated bidder for the subject tender at the price of USD 5,628,207.01/= on the basis of CIF.
5. That based on that ground alone, a recommendation that the subject tender be awarded to the Interested Party was made. Findings and recommendations of the Evaluation Committee were subsequently reduced into a report which was received by the Ag. Head of procurement and supplies on 10/6/2020 who also by way of a Letter of Professional Opinion dated 29/7/2020, recommended to the Accounting Officer that the subject tender be cancelled on account of inadequate budgetary provision pursuant to Section 63 (1) (b) of the Public Procurement and Assets Disposal Act, 2015(hereinafter referred to as the "Act")
6. The Ex-parte Applicants state that on 6/8/2020, their acting Managing Director approved the professional Opinion and the recommendation by the Ag. Head of Procurement and Supplies for the cancellation of the subject tender. Vide a letter dated 10/8/2020, all tenderers were notified of the cancellation of the subject tender due to inadequate budgetary provision.
7. The Ex-parte applicants state that the Interested Party challenged their decision on cancellation of the tendering process vide Request for Review filed with the Respondent herein being **PPARB Review Number 119 of 2020- Rhombus Construction Company Limited vs. Accounting Officer Kenya Ports Authority and Kenya Port Authority. That** upon hearing the review, the Respondent(Board) rendered its decision on 7/9/2020 thus setting aside the letter of cancellation of the subject tender dated 10/8/2020.
8. That the Board further directed the Exparte Applicant(Authority) to proceed with the procurement process and conclude the same within a period of 14 days from the date of the decision. A finding was also made that the authority ought to have engaged the Interested Party on a competitive negotiation process under the hospices of Section 131 of the Act, and that the authority failed to terminate the subject procurement as per the letter dated 10/8/2020 in accordance with Section 63 of the Act.
9. Vide a Letter of Professional Opinion dated 17/9/2020, the Ag. Head of Procurement and Supplies made a recommendation to the Authority's Accounting officer highlighting the issues of competitive negotiation, cancellation of the subject tender in accordance with Section 63 (1) (b) of the Act by dint of inadequate budgetary allocation and approval of re-tender subject to budget availability. The accounting officer having received and approved the Letter of Professional Opinion, vide his letter dated 21/9/2020, notified all the tenderers of cancellation of the subject tender due to inadequate budgetary allocation.
10. The Ex-parte Applicants state that the Interested Party being dissatisfied with the decision of the accounting officer of cancelling the tendering process challenged the said action vide PPARB Review Number 131 of 2020. The Respondent once again heard the parties in the review and rendered its decision on 23/10/2020. In the said decision, it was held that the reason employed by the authority to cancel the subject tender lacked Justifiable basis and the orders issued by the Respondent on 7/9/2020 in PPARB Review 119 of 2019 were not complied with.
11. Consequently, the letter of cancellation dated 21/9/2020 was quashed and the authority ordered to comply with the Respondent's orders in PPARB Review 119 of 2020. Consequently, the subject tender validity period was extended for a further period of 30 days from the date of expiry.
12. In a bid to comply with the Respondent's orders issued in PPARB Review 131/20, the Ex-parte Applicants via a letter dated 5/11/2020 opted to engage in competitive negotiation by requesting the Interested Party and M/S Kalmar Reachstacker the second lowest bidder to submit their best possible bid for the subject tender bearing in mind the budgetary provision. The Interested Party emerged as the lowest bidder and a recommendation was made that the subject tender be awarded to it at USD 4,982,345.19/- inclusive of VAT. However, through a letter dated 10/12/2020, the Public Procurement Regulatory Authority among others informed the authority that they had received many complaints regarding the tendering process and that the documents lodged by the Interested Party were alleged to have been forged.
13. The Ex-parte Applicant states that because of the issues raised by the Public Procurement Regulatory Authority and subject to Section 9 of the Act and Article 227 of the Constitution, a decision to terminate the subject tender under Section 63(1) (e) of the Act was arrived at. However, before the authority could terminate the subject tender under the provisions of Section 63(10) (e) of the Act on grounds of material governance issues, the Interested Party moved the Respondent in PPARB Review 150 of 2020. The grounds cited were that, the authority had failed to notify it of the award of the subject tender despite the fact that only one day had remained prior to expiry of the tender validity

period.

14. The PPARB Review Number 150 of 2020 was heard and a decision rendered on 6/1/2021 whereby the Ex-parte Applicant was ordered to comply with orders issued on 23/10/20 by the Respondent. The 1st Ex-parte Applicant was also ordered to furnish the Respondent with a status report confirming compliance of the orders issued on the 23/10/2020 and further, the tender validity period was extended for a further period of 30 days from 7/1/2021.

15. The Ex-parte Applicants state that they have been aggrieved and prejudiced with the entire decision and orders issued by the Respondent on 6/1/2021 on grounds that; the substantive reason why the authority failed to issue a notification of award of the subject tender to the Interested Party is because of the complaint from the Public Procurement Regulatory Authority relating to forgery of documents by the Interested Party; that the issue of forgery had raised governance issues within the meaning of Section 63(1)(e) of the Act and; that the said complaint had already been forwarded to the Directorate of Criminal Investigations.

16. It is the Ex-parte Applicant's case that the Respondent acted ultra vires by ordering an extension of the tender validity period of the subject tender for a further 30 days contrary to the provisions of Section 88(3) of the Act. In the Ex-parte Applicant's view, the Tender validity period having been previously extended on 23/10/2020 for a period of 30 days, it was erroneous for the Respondent to have arrived at a decision to extend it further. That in any event, the complaint from the Regulatory Authority came after the Authority had complied with the Respondent's orders of 23/10/2020 and therefore disobedience to the impugned orders does not arise.

17. They further averred that the unlawful, ultravires and unreasonable decision of the Board if implemented will highly prejudice prudent utilization of tax payer's money. They further contend that under section 9 of the Act, the Regulatory Authority has powers to monitor, assess, and review the public procurement and Asset Disposal system by ensuring that they respect values of the Constitution.

Response

18. From the record, the Respondent did not file any response to the Application.

19. On their part, the Interested Party in response to the *ex-parte* Applicants' application filed a Replying Affidavit sworn on the 15/2/2021 by **Evanson Githinji Kinyanjui** it's Director and Chief Executive Officer. He avers that the Ex-parte applicants herein are guilty of non – disclosure and concealment of material facts relevant for just determination of the Application herein which non –disclosure warrants dismissal of the instant Application. Basically, the Interested party is in agreement with the historical and factual analysis of the tendering process and eventual Review Board's decisions espoused by the Ex-parte applicants.

20. It is the Interested Party's case that the Respondent's decision in Review No.131/2020 rendered on 23/10/2020 was not challenged by any party and therefore binding upon the parties by dint of Section 175 of the Act. That any action by the parties to the review, which is contrary to the binding decision of the Respondent, is null and void.

21. The Interested Party avers that in partial compliance of the decision of the Respondent delivered on the 23/10/2020, the Ex-parte Applicants vide a letter dated 5/11/2020(A annexure EGK) requested the Interested Party to extend its tender validity by a period of 30 days from the initial date of expiry. That via its letter dated 6/11/2020 (Annexure- EGK-9), the Interested Party extended its tender validity period consequences whereof the Interested Party was invited to participate in a competitive negotiation as ordered by the Respondent. Subsequently, a best and final offer was submitted on 12/11/2020 and the Interested Party emerged as the lowest bidder. That it was the Ex-parte Applicants' failure to conclude the evaluation process that prompted the Interested Party to exercise its rights guaranteed under Section 167 of the Act vide PPARB Review 150 of 2020 the outcome of which was rendered on 6/1/21 thus directing the Ex-parte applicant; to comply with the orders of 23/10/2020; to submit a status report on compliance and, to extend the validity period up to 7/01/21(Annexure EGK-10).

22. The Interested Party states that the Ex-parte Applicants having moved to this Court under Section 175 of the Act, have failed to demonstrate the manner in which they have been aggrieved by the Respondent's decision which was lawful and procedural on grounds that; the request for review was heard and determined within the statutory period of 21days; the respondent afforded all parties a reasonable opportunity to present their respective cases; the respondent acted fairly and duly considered all respective submissions made on behalf of the parties to the request for review; the Respondent (Review Board) duly considered all the issues raised by the parties and a decision made according to the law and relevant facts; the ex-parte applicant failed to demonstrate any illegality or unreasonableness in the decision of the Review Board and; the Review Board considered the request and determined it within their mandate under section 173 of the Act.

23. It is the Interested Party's case that the Ex-parte Applicants are guilty of non-disclosure of material facts which are necessary for just determination of the instant Application as follows:

a. The evaluation was conducted on 12/11/2020 and the evaluation committee recommended award of the tender to the Interested Party

b. The Ag. Head of Procurement and supplies to the 1st Ex-parte Applicant prepared a professional opinion on 19/11/2020 recommending the award of the subject tender as per the recommendation of the evaluation committee

c. The 2nd Ex-parte Applicant on 26/11/2020 purportedly relying on a letter from the PPRA which had not been received by the 1st Ex-parte Applicants until the 14/12/2020 endorsed the professional opinion with the words "deferred action considers due diligence on governance issues raised and/or acknowledged by PPRA. Not approved as recommended"

d. The decision to terminate the subject tender under Section 63(1) (e) of the Act on grounds of alleged "material governance

issues” took into account irrelevant issues not placed before the Ex-parte Applicants as at 26/11/2020 when the purported decision was made.

24. In response to the cited letter from PPRA, the Interested Party avers as follows:

a. That the purported letters from benedict Kabugi Ndungu dated 9/11/2020 and letter dated 30/11/2020 from Sales Port Equipment dated 30/11/2020 have never been availed to it to enable it to adequately respond to the contents and exercise its rights to procedurally fair administrative action under Article 47 of the Constitution as well as the procedural safeguards under Section 4(3) of the Fair Administrative Action Act.

b. That the purported complainants mentioned in the letters to the PPRA are strangers to the tendering process and their purported access to the contents of the Interested Party’s tender is unlawful and offends the provisions of Section 67 of the Act.

c. That the letter from the PPRA was received by the 2nd Ex-parte Applicant on 14/12/2020 but was ostensibly relied upon by the 2nd Ex-parte Applicant on 26/11/2020 when taking a decision to defer the tender award.

d. That the Respondent had been seized of the matters outlined in PPRA’s letter dated 10/12/2020 and received on 14/12/2020, hence PPRA lacked statutory mandate under Section 40 of the Act to commence and/or continue any investigations into the matters, which have been subject of review proceedings before the Respondent.

e. That no “material Governance issues have been specifically disclosed and proven by the Ex-parte Applicant. Instead, what has been relied on is mere conjecture and speculations, which have never been specifically disclosed and proven.

f. That purported letter from PPRA is tantamount to inappropriate influence on evaluation contrary to Section 65(1) (b) of the Act and the 2nd Ex-parte Applicant should be subjected to disciplinary action in accordance with Section 65 of the Act.

25. In conclusion, the applicant stated that; the application is a mere stratagem intended to circumvent compliance with a statutory obligation by the Exparte Applicant; Application is bare and defective; application raises issues of merit which is not the subject of JR; exparte applicant concealed material facts which are crucial to the just determination of the matter.

Submissions

26. Parties did file submissions pursuant to the Court’s directions. The ex-parte Applicant and the Interested Party’s submissions are both dated 23/2/2020.

27. **Mr. Ngoya** learned counsel for the ex-parte applicant submitted on the issue of quashing the Respondent’s decision arguing that the said decision was arrived at unreasonably considering that the Respondent ordered the Ex-parte Applicants to comply with its decision in PPARB Review 131 of 2020 despite the existence of material governance issues raised by the Ex-parte Applicant. Further, Counsel submitted that it was unreasonable for the Respondent to expect the Ex-parte Applicant to proceed to award a tender that was outside its budgetary allocation.

28. Regarding the argument that the decision was illegal and ultra vires, Counsel for the Ex-parte applicants submitted that the extension of validity of the tender period by a further 30 days notwithstanding that the tender period had been extended for a further period of 30 days was contrary to the provisions of Section 88(3) of the Act. In support of his submissions, Counsel cited the case of **Republic v Public Procurement Administrative Review Board & 2 others Ex-parte Higawa Enterprises Limited (2017) eKLR** where the Court held that; the tender was vitiated by the opaque manner it was undertaken without a tender validity period as the law requires and, that a high court seized of supervisory power over a tribunal cannot be used as a rubberstamp to countenance and a bet an illegality.

Learned counsel emphasized on the argument that a decision compelling the exparte Applicants to award a tender outside the budgetary allocation is unreasonable and irrational. In support of this proposition, counsel placed reliance on the holding in the case of **Pastoli vs Kabale District local Government council and others(2008)2 EA 300** where irrationality was defined as a decision made in defiance of logic and acceptable moral standards. Concerning the ground that the decision was ultravires, counsel submitted that the extension of validity period more than once was contrary to the law and that the Board cannot purport to assume powers or exercise authority conferred upon an accounting officer by statute. In support of this proposition counsel made reference to the case of **Republic v Public Procurement Administrative Review Board & 2 others Masinde Muliro University of science and Technology (2016) eKLR**.

29. **Mr. Omolo** Counsel for the Interested Party reiterated the content of the Interested Party’s Replying Affidavit. He submitted that the Ex-parte Applicant did not furnish the review board with any evidence of the alleged material governance issues. In his view, the Review Board took into account the relevant issues that were before it. Further, Counsel submitted that the discovery of material governance issues after investigations was designed to justify termination of the tender under Section 63(1) (e) of the Act

30. On the extension of the tender validity period, Counsel submitted that Section 48 of the Interpretation and General Provisions Act read together with Section 173(b) empowers the Respondent to give directions to the accounting officer of a procuring entity on anything to be done or re-done in the procurement process. Further, **Mr. Omolo** stated that the decision of 6/01/21 was necessary since a notification under Section 87 of the Act must only be issued within the tender validity period and in this case the validity period was about to lapse, yet the Ex-parte Applicants were yet to issue a notification under Section 87(1) of the Act.

31. Learned counsel further submitted that the purported complaints by one Kabugi Ndungu dated 9/11/21 and Sales Port Equipment which the Regulatory Authority relied on to urge the Exparte Applicant’s to cancel the tender were not availed to the interested party to respond

adequately thus contravening Article 47 of the Fair Administrative Action Act. He contended that neither the Regulatory Authority nor the accounting officer could engage in any investigation regarding a tender whose dispute is a subject of review proceedings in compliance with Section 40 of the Act.

32. According to Mr. Omollo, the ex parte applicant has not demonstrated grounds to warrant the court exercise its discretion in its favour. In this regard, reliance was placed in the case of **Republic v public procurement Administrative Review Board & another ex parte Express DDB Kenya limited (2018) eKLR**.

33. Mr. Omollo went further to submit that the Ex parte A applicant was seeking review on merit contrary to the principles governing judicial review proceedings. To fortify this contention, counsel sought refuge in the case of **Republic v Attorney General & 4 others Ex parte Diamond Hashim Lalji and Ahmed Hasham Lalji & Republic v Public Procurement Review Board and another Ex parte DDB Kenya LTD (supra)** where the court held that Judicial Review is about decision making process and not the decision itself.

Determination.

34. I have considered the application herein, affidavit evidence in support and the response thereto. I have also taken into account rival submissions by both parties' advocates on record together with relevant applicable law and precedents relied upon. Issues that inevitably arise for determination are.

a. Whether the Respondent's decision to re-extend the validity period of the tender was illegal and ultra-vires.

b. Whether the decision of the Respondent to compel the Ex-parte Applicant to continue with the procurement process despite the alleged glaring governance issues was irrational and unreasonable.

35. The Ex-parte applicant is basically seeking a singular relief in the nature of a certiorari order which is ordinarily issued where a public authority or body has acted without authority or in excess of its jurisdiction. Where the impugned decision is arrived at contrary to the law or illegally, irrationally or in breach of rules of natural justice or, where there is proof that the authority relied on irrelevant matters in reaching the decision, the High which is the institution seized of supervisory jurisdiction over Tribunals and subordinate courts will not hesitate to quash such a decision. See **Captain Geoffrey Kugoya Murungi v A.G Misc. Civil Application No.293 of 1993** where the court held that;

“Certiorari deals with decisions already made ...such an order(certiorari) can only be issued where the court considers that the decision under attack was reached without or in excess of jurisdiction or in breach of the rules of natural justice or contrary to the law. Thus, an order of certiorari is not a restraining order”

36. However, to grant or not to grant an order of certiorari or generally any judicial review orders is a matter of discretion of the presiding judge subject to attainment of substantive justice. In **Republic v Public Procurement Administrative Review Board; Shenzhen Instrument Co. Limited & another (Interested Party) Ex parte Kenya Power and Lighting Company Limited [2019] eKLR** Mativo J while relying on the decision in **Paul Kiplagat Birgen & 25 Others v Interim Independent Electoral Commission & 2 Others [2011] eKLR** held as follows;

a. “A Judicial Review court ought to be slow to substitute its own decision solely because it does not agree with the permissible option chosen by the body. Where a body is granted wide decision-making powers with a number of options or variables, a judicial review court may not interfere unless it is clear that the choice preferred is at odds with the law. If the impugned decision lies within a range of permissible decisions, a Judicial Review court may not interfere only because it favours a different option within the range...”

37. In **Municipal Council of Mombasa vs. Republic & Another [2002] eKLR** the Court of Appeal expressed itself as follows:

“The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was sufficient evidence to support the decision –and that, as we have, is not the province of judicial review”.

38. However, this Court is alive to the fact that the scope of Judicial Review proceedings has since expanded under the 2010 Constitution, and in appropriate cases, the court will enter into the merits of a decision made by an inferior body. The Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others [2016] eKLR** held as follows ...

“that while Article 47 of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act reveals an implicit shift of judicial review to include aspects of merit review of administrative action, reviewing court has no mandate to substitute its own decision for that of the administrator.”

Whether the Respondent's decision to re-extend the validity period of the tender was illegal and ultra-vires.

39. The crux of the issue in controversy is whether the Respondent (Review Board) has powers in law to order or direct the Accounting officer of the Ex-parte Applicant as a procuring entity to extend the validity period of the subject tender more than once. Section 88 of the

Act(PPADA) provides for the extension of the tender validity period. The provision stipulates that;

(1) Before the expiry of the period during which tenders shall remain valid the accounting officer of a procuring entity may extend that period.

(2) The accounting officer of a procuring entity shall give in writing notice of an extension under subsection (1) to each person who submitted tender

(3) An extension under subsection (1) shall be restricted to not more than 30days and may only be done once

40. What was the intention of the drafters of this legislation and in particular the inclusion of Section 88? In my view, this provision was intended to guard against any possible mischief or abuse of office or power by accounting officers especially where uncontrolled timelines will give them a free hand to temper with the tendering process to favour their friends or closely related persons. In other words, once the already extended validity period for a period of 30 days lapses, the tendering process in respect of that tender becomes moot or rather it extinguishes. Upon lapsing, the Procurement entity is at liberty to re-advertise for fresh tendering and the process then follows the full circle like it was never tendered for before.

41. Therefore, the foregoing provision permits extension of a tender validity period by an accounting officer only once and that that extension must be made before the expiry of the already stipulated tender validity period. It is common knowledge that one cannot extend time that has already lapsed. See Administrative Review board; Consortium of GBM Projects Limited and ERG Insaat vs Sanayi A.S(interested party); Exparte Applicant National Irrigation Board Judicial Miscellaneous Application No. 103 of 2019(2019)eKLR in which the court held that;

“The Respondent fell into jurisdictional error by extending the Validity period of a lapsed tender which was non-existent”

42. The Concise Oxford English Dictionary eleventh Edition defines extension inter alia as:

“An additional period of time given to someone to hold office or to fulfil an obligation.”

43. Extension therefore, presupposes a period specified. It is not in dispute that the respondent in Review NO. 150/ 2021 extended the tender validity period for 30 days from the date of its expiry. In the instant case, during the Financial evaluation stage, it became apparent that the bids submitted were way beyond the budgetary allocation of the Exparte Applicant. Vide a letter dated 10/08/2020 the Accounting Officer notified all tenderers that the tender had been cancelled.

44. Aggrieved by this move, the Interested Party challenged the tender cancellation before the Review Board through a Request for Review No.119/20. On 7/09/20, the Board set aside the said cancellation letter and directed the Accounting officer to engage the method of Competitive negotiation under Section 131 of the Act and conclude the tender within 14days. Having failed to comply, the accounting officer through a letter dated 21/09/20 again cancelled the tender on similar grounds as before. This prompted the Interested party to go back to the board under request for Review No. 131/2020.

45. On 23/10/20, the board cancelled the letter of 21/09/20 and directed the Ex-parte applicant to comply with the earlier order. The Board also extended the tender Validity period by 30 days. In compliance, the accounting officer did extend the validity period thereby inviting the interested party and the second lowest bidder into competitive negotiation whereby the interested party emerged the lowest bidder (bidder) within the budgetary allocation.

46. However, the Accounting Officer did not give the award notification letter claiming that governance issues affecting the credibility of the I/Party had emerged through the Regulatory Authority in which allegations were made that the I/Party had used forged documents to tender. Realizing that it was remaining one day to expiry of the validity period, the I/Party moved to the Board vide Request for Review No. 150/21 wherein the Board on 6/01/21 ordered the Exparte Applicant to comply with the orders of 23/10/20 and to submit status report on compliance. It further directed extension of the validity period for a further 30days. It is the legality of this further extension that the Exparte Applicant is challenging on grounds that it is illegal and amounts to an assault on Section 88(3) which caps extension of time to 30 days and only once.

47. Counsel for the I/Party contends that, Section 88(3) of the Act only limits the Accounting officer and not the Review board who have wide inherent powers under section 173 of the Act. The question begging for an answer is; whether the Review Board is bound by Section 88(3). Section 88(1) & (2) expressly refers to the powers of the Accounting officer in extending time but not the Review Board. Sub-section (3) refers to the accounting officer’s powers of extension of validity period once and not beyond 30days pursuant to subsection (1).

48. From the plain reading of that Section, it is only applicable and binding on the accounting officer and nobody else. Nothing would have been easier than the legislators to include or provide the Review Board’s mandate under that section. To that extent, I do agree with counsel for the I/Party that Section 88(3) of the Act does not bar the Review board from making decisions that are deemed to be necessary for the wider attainment of substantive justice. These Residual powers can be derived from Section 173 of the Act which provides;

“Upon completing a review, the Review Board may do any one or more of the following;

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

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

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

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

e. order termination of the procurement process and commencement of a new procurement process”

49. Under section 173(a)(b) & (c) of the Act, the Board has wide discretionary powers for the better management of tendering system to direct the doing or not doing or redoing certain acts done or omitted from being done or wrongly done by the accounting officer. Although the Act does not expressly limit the powers of the Board from extending tender validity period more than once, one can imply that the powers conferred upon the Review board includes powers to extend validity period to avert situations where the accounting officer can misuse powers under Section 88 to frustrate tenderers or bidders not considered favourable.

50. In any event, the exparte applicant has already complied with the order for extension of the validity period by engaging in competitive negotiation whereby the I/Party emerged the lowest bidder(11) within the budgetary allocation. To that extent, the excuse that tax payers were to lose money by spending more than budgeted for does not arise. At para 33 of the verifying affidavit, the exparte Applicant admitted that the only reason why they could not issue the notification letter was complaints regarding corruption against the I/party.

51. Having complied with the order partly by extending time, the exparte Applicant acknowledged the legality of the decision and therefore cannot be heard to allege commission of any illegality by the Board. How would they engage in an illegality themselves by accepting to extend time, engage in competitive negotiation within the budgetary allocation and then retreat by claiming that the board committed an illegality? To raise such an argument is a fallacy which in my view amounts to abuse of the court process. I do agree with the board's finding that, under section 173 of the Act, they have residual powers to direct extension of validity period more than once. Without those supervisory powers, the procuring entities can frustrate the tendering process. Since it was one day to the expiry, the I/party had to move with speed to avoid being trapped into the technicality of the validity period having expired hence nothing remaining to extend. Therefore, I do find that the extension of time was not illegal, unreasonable nor without jurisdiction.

52. It is worthy noting that the Respondent acts as an appeal channel in the procurement process against decisions or complaints against the procuring entity hence the powers to exercise inherent jurisdiction to make decisions even where there is no express provision for the just determination of a matter in controversy by applying section 173. **In Republic v Public Procurement Administrative Review Board & 3 others Ex-Parte Saracen Media Limited [2018] eKLR**, Mativo J cited the case of **Kenya Pipeline Ltd vs. Hyosung Ebara Company Ltd [2012] eKLR** where the Court of Appeal opined that:

“The Review Board is a specialized statutory tribunal established to deal with all complains of breach of duty by the procuring entity. From the nature of powers given to the Review Board including annulling, anything done by the procurement entity and substituting its decision for that of the procuring entity that the administrative review envisaged by the Act is indeed an appeal”.

Having made a finding on the first issue, I will now turn to the second issue which is equally weighty

Whether the decision of the Respondent to compel the Ex-parte Applicant to continue with the procurement process despite the alleged glaring governance issues was irrational and unreasonable.

53. One of the grounds relied on to challenge implementation of the Review board decision was the allegation that the I/party had credibility issues thus contravening chapter six of the Constitution. The I/party argued that those issues were not raised or brought to his attention. Apparently, the alleged complaints were within the knowledge of the Exparte Applicant by 14/12/2021 or even earlier given the correspondences available between the Procurement Regulatory Authority and the Exparte Applicant.

54. Article 47(3) of the constitution gives this court the mandate to review the decision of an administrative body (the review board) if it fails to take into account material factors or if it takes into account immaterial factors. Section 7(2) as read with section 11(1) (e) of the Fair Administrative Action Act provides grounds for quashing of decisions. They include the grounds of relevant and irrelevant considerations in a decision, the rationality, and reasonableness of a decision, its proportionality, whether legitimate expectations have been violated by the decision, and whether the decision was made for proper or improper purposes. These grounds are questions of law on which there are settled applicable principles, and which of necessity entail a merit review of the impugned decision in the context of the adduced evidence.

55. It is noteworthy that the Respondent when dismissing the Ex-parte Applicants' argument in support of termination of the subject tender pursuant to Section 63 (1) (e) of the Act on account of material governance issue, held as follows:

a. ...the Board observes that from the documentation provided by the procuring Entity, there is no evidence that investigation have been conducted with finality regarding the allegations raised against the Applicant. Furthermore, no evidence was furnished to the board showing that real and tangible evidence of material governance issues were discovered following conclusion of investigations by the aforementioned institutions, so as to justify the exercise of the discretion under Section 63(1) of the Act...otherwise, it would disenfranchise tenderers if for example, an investigation is undertaken and the outcome of it shows there was no real and tangible evidence to support allegations of material governance issues, yet a procuring entity already terminated a procurement process relying on unverified allegations on forgery of documents. This goes to the heart of natural Justice in that the tenderer are not deprived of their right to administrative review where a procurement process they participated in, is terminated solely on allegations without a verification process being undertaken.

56. In Geothermal Development Company Limited vs. Attorney General & 3 Others [2013] eKLR it was held that:

a. “20. Article 47 enshrines the right of every person to fair administrative action. Article 232 enunciates various values and principles of public service including “(c) responsive, prompt, effective, impartial, and equitable provision of services” and “(f) transparency and provision to the public of timely, accurate information.”

b. 28. As a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against it. Elementary justice and the law demands that a person be given full information on the case against him and given reasonable opportunity to present a response. This right is not limited only in cases of a hearing as in the case of a court or before a tribunal, but when taking administrative actions as well. (See *Donoghue v South Eastern Health Board [2005] 4 IR 217*). Hilary Delany in his book, *Judicial Review of Administrative Action*, Thomson Reuters 2nd edition, at page 272, notes that, “Even where no actual hearing is to held in relation to the making of an administrative or quasi-judicial decision, an individual may be entitled to be informed that a decision which will have adverse consequences for him may be taken and to notification of the possible consequences of the decision.”

c.29. Fair and reasonable administrative action demands that the taxpayer would be given a clear warning on the probable consequences of non-compliance with a decision before the same is taken; in this case, the Company should in no uncertain terms have received information as to the implication of the letter and the consequences of its failure to make good the payments demanded in the notice. (See Supreme court decision in *TV3 v Independent Radio and Television Commission [1994] 2 IR 439*).

d. 30. In many jurisdictions around the world, it has long been established that notice is a matter of procedural fairness and an important component of natural justice. As such, information provided in relation to administrative proceedings must be sufficiently precise to put the individual on notice of exactly what the focus of any forthcoming inquiry or action will be. (See *Charkaoui v Canada [2007] SCC 9*, *Alberta Workers’ Compensation Board v Alberta Appeals Commission (2005) 258 DLR (4th)*, 29, 55 and *Sinkovich v Strathroy Commissioners of Police (1988) 51 DLR (4th) 750*.)”

57. Section 4(3) of the *Fair Administrative Action Act, 2015* provides as follows:

a. (3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

1. prior and adequate notice of the nature and reasons for the proposed administrative action;
2. an opportunity to be heard and to make representations in that regard;
3. notice of a right to a review or internal appeal against an administrative decision, where applicable;
4. a statement of reasons pursuant to section 6;
5. notice of the right to legal representation, where applicable;
6. notice of the right to cross-examine or where applicable; or
7. information, materials and evidence to be relied upon in making the decision or taking the administrative action.

58. In this case, it is clear that the ex-parte applicants’ decision to terminate the subject tender on account of material governance issues was not arrived at after hearing the Interested Party’s position on allegation of forgery of documents in the tender document, which was very serious in nature. This Court is not concerned with whether or not the ex-parte applicants were correct in terms of merit in taking the decision they did. Rather, the Court’s concern is the process through which the decision was arrived at. The ex-parte Applicants (procuring entity) being an administrative body ought to have afforded the Interested Party an opportunity to be heard by hearing it’s side on the allegations of forgery levelled against it by concerned members of the public vide letter dated 26/11/2020 and the letter dated 10/12/2020 from PPRA. Secondly, this court is in consonance with the Respondent’s finding that no documentation was furnished and/or adduced by the Ex-parte Applicants demonstrating that the said investigations have been concluded and the outcome of the said investigations verifies the truthfulness, or lack thereof of the allegations levelled against the Interested Party.

59. In this court’s view, once it is shown that the applicant’s right to be heard was violated, that is the end of the matter. This was the position in Onyango Oloo vs. Attorney General [1986-1989] EA 456 where the Court of Appeal expressed itself as follows:

a. “The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at.....Denial of the right to be heard renders any decision made null and void ab initio.”

60. The above notwithstanding, Section 40 of the Act prohibits any form of investigations from being conducted in relation to a matter pending before the Review Board for determination or on which the Board has Reviewed. It is presumed that, such investigations at the tail

end of the tendering process may unduly exert undue influence on the Review Board. In any event, whistle blowers will always be there and the only recourse the procuring entity had in my view was to lay the alleged complaints before the board for consideration rather than ignore its decision all together.

61. In view of my analysis and findings on the issues discussed above, the only conclusion which becomes irresistible to make is that, I do not find any basis to fault the Respondent's findings on extension of the validity period of the subject tender and refusing to uphold the termination of the subject tender on account of material governance issues (forgery of documents). I wish to reiterate that orders issued by the Respondent on 23/10/2020 and 6/01/21 be complied with by the ex-parte Applicants.

62. In the premises, I find that the Applicant's Notice of Motion dated 26/1/2021 is not merited, and accordingly the same is hereby dismissed. Parties to bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 5TH DAY OF MARCH 2021

J.N. ONYIEGO

JUDGE