

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO. 27/2020 OF 26<sup>TH</sup> FEBRUARY 2020**

**BETWEEN**

**BIOMAX AFRICA LIMITED.....APPLICANT**

**AND**

**THE ACCOUNTING OFFICER**

**NAKURU WATER & SANITATION SERVICES CO.**

**LIMITED.....RESPONDENT**

Review against the decision of the Accounting Officer of Nakuru Water and Sanitation Services Co. Limited with respect to Tender No. NAWASSCO/29/2019/2020 for the Supply and Delivery of a Vehicle Mounted Sewer Flushing Unit.

**BOARD MEMBERS**

- |                             |                  |
|-----------------------------|------------------|
| 1. Mr. Nelson Mruttu        | -Member Chairing |
| 2. Arch. Steven Oundo , OGW | -Member          |
| 3. Mr. Alfred Keriolale     | -Member          |

**IN ATTENDANCE**

- |                        |                                  |
|------------------------|----------------------------------|
| 1. Mr. Philemon Kiprop | -Holding brief for the Secretary |
| 2. Maryanne Karanja    | -Secretariat                     |

**PRESENT BY INVITATION**

**APPLICANT**

**-BIOMAX AFRICA LTD**

- |                    |           |
|--------------------|-----------|
| 1. Mr. Paul Kinyua | -Advocate |
|--------------------|-----------|

2. Mr. Watimah Kelly N. -Representative

**PROCURING ENTITY**

**-NAKURU WATER &  
SANITATION SERVICES CO.  
LIMITED**

1. Mr. Kipkoech B Ngotah -Advocate, Gordon Ogolla &Kipkoech Advocates

2. Mr. Khakenne Cherotich -Advocate, Gordon Ogolla & Kipkoech Advocates

3. Mr. J N Gachathi -Managing Director

**BACKGROUND TO THE DECISION**

**The Bidding Process**

Nakuru Water and Sanitation Services Co. Ltd (hereinafter referred to as “the Procuring Entity”) advertised Tender No. NAWASSCO/29/2019/2020 for the Supply and Delivery of a Vehicle Mounted Sewer Flushing Unit (hereinafter referred to as “the subject tender”) on 16<sup>th</sup> October 2019 inviting eligible bidders to submit bids in response to the same.

**Bid Submission Deadline and Opening of Bids**

The Procuring Entity received a total of 7 bids by the bid submissions deadline of 16<sup>th</sup> October 2019. A Tender Opening Committee opened the 7 bids on 11<sup>th</sup> November 2019 in the presence of bidders' representatives.

## **Evaluation of Bids**

Having appointed an Evaluation Committee, the bids were evaluated in the following three stages:-

- i.** Mandatory Requirements Evaluation;
- ii.** Technical Evaluation; and
- iii.** Financial Evaluation.

### **1. Mandatory Requirements Evaluation**

At this stage, the Evaluation Committee applied the criteria outlined in Clause 2.0 (A) of Section III. Evaluation and Qualification Criteria of the Tender Document in order to confirm whether bidders had the necessary legal and statutory requirements to carry out business.

At the end of this stage, 5 bidders were found non-responsive, hence did not proceed to Technical Evaluation. Two bidders namely; M/s Sagoo Electricals Limited and M/s Greco International Limited were found responsive therefore eligible to proceed to Technical Evaluation.

## **2. Technical Evaluation**

At this stage, the Evaluation Committee applied the criterion under Clause (B) of Section III. Evaluation and Qualification Criteria at page 29 of the Tender Document which had the following parameters:-

- i.** Compliance to the technical specifications as stipulated in Section VI. Purchasers Requirements of the Tender Document;
- ii.** Provision of the following documentary evidence to establish the conformity of the goods and related services with the Bidding Document:-
  - Product Literature; and
  - Manufacturer's Specifications/Authorization.
- iii.** Delivery period offered in the tender, but the delivery period should not be later than 90 days from contract signature;
- iv.** Duly filled, signed and stamped manufacturers authorization/dealership letter/agreement in accordance with ITB 15.2

At the end of Technical Evaluation, M/s Greco International Limited was found non-responsive hence ineligible to proceed to Financial Evaluation, whereas M/s Sagoo Electricals Limited met all the requirements at the Technical Evaluation therefore could proceed to Financial Evaluation.

## **3. Financial Evaluation**

Clause (C) of Section III. Evaluation and Qualification Criteria at page 30 of the Tender Document in respect of the following categories:-

- Historical Financial Performance;
- Average Annual Turnover; and
- Financial Resources

The Evaluation Committee evaluated the bid of M/s Sagoo Electricals Limited to determine its responsiveness to the aforesaid sub-categories of Financial Evaluation.

### **Recommendation**

At the end of this stage, the Evaluation Committee recommended award of the subject tender to M/s Sagoo Electricals Limited at Kshs. 29,816,000/-.

### **Professional Opinion**

In a professional opinion dated 29<sup>th</sup> November 2019, the Procuring Entity's Procurement Manager reviewed the Evaluation Reports and expressed his satisfaction that the subject procurement process met the requirements of Article 227 (1) of the Constitution and the Public Procurement and Asset Disposal Act, 2015. He further urged the Procuring Entity's Managing Director to approve award of the subject tender to M/s Sagoo Electricals Limited at Kshs. 29,816,000/- as recommended by the Evaluation Committee. The Managing Director approved the said professional opinion on the same dated of 29<sup>th</sup> November 2019.

## **Notification to Bidders**

In letters dated 5<sup>th</sup> February 2020, the Procuring Entity notified all successful and unsuccessful bidders of the outcome of their bids.

## **THE REQUEST FOR REVIEW**

M/s Biomax Africa Ltd (hereinafter referred to as "the Applicant") lodged a Request for Review dated 25<sup>th</sup> February 2020 and filed on 26<sup>th</sup> February 2020 together with an Affidavit sworn and filed on even date. In response, the Procuring Entity lodged a Respondent's Replying Affidavit to the Request for Review (hereinafter referred to as "the Procuring Entity's Response") sworn on 28<sup>th</sup> February 2020 and filed on 2<sup>nd</sup> March 2020.

The Applicant sought for the following orders in the Request for Review:-

- i. An order allowing the Review Application;***
- ii. An order annulling the decision of the Procuring Entity through its letter dated 5<sup>th</sup> February 2020 declaring the Applicant's been unsuccessful in Tender No. NAWASSCO/29/2019/2020;***
- iii. The Board be pleased to re-evaluate all submitted tenders and awards to the successful bidder;***
- iv. An order directing the Procuring Entity to bear the incidental costs to the Review Application; and***

***v. Any others orders that the Board deems fit to grant in the circumstances.***

During the hearing, the Applicant was represented by Mr. Paul Kinyua Advocate while the Procuring Entity was represented by Mr. Kipkoech Ngotah appearing together with Mr. Khakenne Cherotich on behalf of the firm of Gordon Ogolla & Kipkoech Advocates.

## **PARTIES' SUBMISSIONS**

### **Applicant's Submissions**

In his submissions, Counsel for the Applicant, Mr. Paul Kinyua, fully relied on the Request for Review and the Applicant's Affidavit.

Mr. Kinyua submitted that the Applicant through its Request for Review challenges the Procuring Entity's decision that the Applicant's bid was found non-responsive. He directed the Board to the letter of notification of unsuccessful bid dated 5<sup>th</sup> February 2020 that was issued to the Applicant specifically the contents of clause 1 thereof which makes reference to Form 2.4.1. According to Counsel, this Form appears at page 28-29 of the Tender Document and that bidders were only required to complete the said Form and submit the same to the Procuring Entity.

He submitted that the Tender Document did not mention requirement of 6 LPOs as alleged by the Procuring Entity, and that by completing the said Form, the Applicant satisfied this criterion.

Counsel then referred the Board to the second limb of Clause 1 of the letter of notification of unsuccessful bid dated 5<sup>th</sup> February 2020 that was submitted to the Applicant. He submitted Form 2.4.1 for the Board's perusal and further stated that the Applicant specified in the said Form that the supply contracts it has been awarded in the past relate to works that meet the threshold of Thirty Million as required by the Procuring Entity. To wit, he made reference to a contract whose value is Kshs. 49.2 Million and another one whose value is Kshs. 83.6 Million.

Regarding Clause 2 of the letter dated 5<sup>th</sup> February 2020, Mr. Kinyua submitted that the first page of Form 2.4.1 indicated that the Applicant supplied 6No. Loaders to Machakos County worth 49.2 Million. He then referred the Board to paragraphs 5 and 8 of the Applicant's Affidavit where the Applicant's Representatives reiterates that it indicated 2 contracts awarded within the last 2 years which a value of at least Kshs. 30 Million.

Mr. Kinyua referred the Board to section 80 (2) of the Public Procurement and Asset Disposal Act, 2015 and took the view that the evaluation process conducted by the Procuring Entity did not satisfy that provision. Upon



enquiry by the Board, Mr. Kinyua urged the Board to grant the prayer directing the Procuring Entity to re-evaluate the Applicant's bid.

### **Procuring Entity's Submissions**

In his submissions, Counsel for the Procuring Entity, Mr. Kipkoech, fully relied on the Procuring Entity's Response and urged the Board to consider the confidential documents submitted to it by dint of section 67 (3) (e) of the Act.

Counsel for the Procuring Entity referred the Board to Clause 4.2.1 and submitted that there was need for bidders to provide evidence of two contracts completed in the last 2 years. In Counsel's view, the Applicant did not submit contracts completed in the last 2 years between October 2019 and October 2017. Further, Counsel submitted that the Applicant did not provide evidence of contracts completed in the last years whose value were 30 Million Kenya Shillings. With reference to the contract of Machakos County, Counsel submitted that the same was undertaken by the Applicant in 2016, therefore falling outside the period of 2 years required by the Procuring Entity. To buttress this view, he urged the Board to consider paragraphs 28 and 29 of the Procuring Entity's Response.

Counsel then urged the Board to consider that the subject procurement process, falls under the water sector and that the Board should take into consideration the heavy responsibility vested on the Procuring Entity to supply water to the residents of Nakuru County and that the subject procurement should not be delayed any further.

Mr. Kipkoech further raised the issue that the Affidavit filed in Support of the Request for Review is commissioned and drawn by Mr. Paul Kenneth Kinyua contrary to section 4 (1) of the Oaths and Statutory Declarations Act, Chapter 15, Laws of Kenya. In his view, a party alleging to contentious matters ought to comply with the aforesaid provision when swearing an Affidavit such that the Affidavit cannot be commissioned by a person drawing, in the same firm. He therefore submitted that the Affidavit ought to be struck out.

He further submitted that if the Board were to disagree with the Procuring Entity on the manner in which the Applicant's Affidavit ought to have been filed, Counsel submitted that the Applicant is of a fluid and dodgy nature, in the sense that it has no proper residence and cannot be trusted with a critical service as sanitation and water provision to the residence of Nakuru County.

In conclusion, he urged the Board to uphold the Procuring Entity's decision on award of the subject tender.

## **Applicant's Rejoinder**

In a rejoinder, Counsel referred the Board to Form 2.4.1, at Number 000159 appearing at the bottom of the said Form which in his view indicates the Award and Completion Dates of previous contracts undertaken by the Applicant as December 2018 and August 2019 respectively. Counsel reiterated that the Tender Document did not require bidders to submit contracts but to fill Form 2.4.1 and that all relevant sections in the said Form were duly completed by the Applicant.

Counsel then objected to the allegations made by the Procuring Entity regarding the character of the Applicant as a company. According to Mr. Kinyua, the Applicant is a legal person and not a body of water. He further submitted that the Applicant is located in Mombasa County and received the Board's invitation to the hearing and has been paying taxes since its incorporation under the Laws of Kenya.

On the Applicant's Affidavit, Mr. Kinyua urged the Board to determine the Request for Review on its merits without undue regard to technicalities. He submitted that the Board has a statutory mandate to establish whether or not procurement processes comply with the Public Procurement and Asset Disposal Act, 2015 and not concern itself with the formalities of the documents before it.

## **BOARD'S DECISION**

The Board has considered each of the parties' cases, the documentation filed before it including confidential documents submitted to it pursuant to section 67 (3) (e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") and the oral submissions made by parties on the hearing date.

The issues for determination are as follows:-

***I. Whether the Request for Review filed by the Applicant is fatally defective.***

Depending on the determination of the above issue:-

***II. Whether the Procuring Entity rightfully evaluated the Applicant's bid at the Mandatory Requirements Stage in accordance with Clause 2.0 (A) of Section III. Evaluation and Qualification Criteria of the Tender Document***

The Board now proceeds to address the above issues as follows:-

On the first issue, the Procuring Entity submitted that no proper Request for Review application was filed before the Board with respect to the subject tender, for the reason that the Affidavit sworn by one Ms. Kelly

Watima, that is, the Applicant's Regional Representative, in Support of the Request for Review is commissioned and drawn by **Mr. Paul Kenneth Kinyua Advocate** who is the same Advocate on record for the Applicant. According to Counsel for the Procuring Entity, the manner in which the Applicant's Affidavit was commissioned contravenes section 4 (1) of the Oaths and Statutory Declarations Act, Chapter 15, Laws of Kenya.

Counsel for the Procuring Entity therefore urged the Board to strike out the Request for Review for being fatally defective.

In a rejoinder, Counsel for the Applicant, **Mr. Paul Kenneth Kinyua**, submitted that the Board should entertain the Request for Review application on its merit as the question of who commissioned the Applicant's Affidavit is a mere procedural technicality. According to Counsel for the Applicant, the Board has the statutory mandate to interrogate all public procurement and asset disposal processes conducted pursuant to the 2015 Act and not concern itself with the formalities of documents filed before it.

The Board has considered each of the parties' cases on the first issue for determination and proceeds to make the following findings:-

Section 4 (1) of the Oaths and Statutory Declarations Act, Chapter 15, Laws of Kenya (hereinafter referred to as "the Oaths and Statutory Declarations Act") that was cited by Counsel for the Procuring Entity states as follows:-

***"4. Powers of commissioner for oaths***

***(1) A commissioner for oaths may, by virtue of his commission, in any part of Kenya, administer any oath or take any affidavit for the purpose of any court or matter in Kenya, including matters ecclesiastical and matters relating to the registration of any instrument, whether under an Act or otherwise, and take any bail or recognizance in or for the purpose of any civil proceeding in the High Court or any subordinate court:***

***Provided that a commissioner for oaths shall not exercise any of the powers given by this section in any proceeding or matter in which he is the advocate for any of the parties to the proceeding or concerned in the matter, or clerk to any such advocate, or in which he is interested"***

Further, the Black's Law Dictionary, 6<sup>th</sup> Edition explains that a "Commissioner for Oaths" is:-

***"A person that can administer oaths and take affidavits. They may only do this for other clients not their own."***

The proviso to section 4 (1) of the Oaths and Statutory Declarations Act was considered by the Court in **Succession Cause No. 421 of 2008, In the Matter of the Estate of Joseph Angulushi between Francis Shimenga & 2 Others v Josphat DelissMworeh [2009] eKLR** where it was held as follows:-

***"The proviso to section 4(1) of the Oaths and Statutory Declarations Act, however, stipulates that;***

*"a commissioner for oaths shall not exercise any of the powers given by the section in any proceedings or matter in which he is the advocate for any of the parties to the proceeding or concerned in the matter, or clerk to any such advocate, or in which he is interested".*

***I understand that proviso to bar a commissioner for oaths, who is acting as an advocate for a particular client, from administering an oath or taking any affidavit in the matter in which he was acting as an advocate.***

***I think that the intention was to have a distinction between the advocate acting for a party and the Commissioner for Oaths who commissions the affidavits***

***of such a party. If that were not the intention, it would be at all too easy for the commissioner for oaths to go around the proviso, by commissioning the affidavit for his client, and thereafter, coming on record as the advocate for the said client, shortly after the affidavit had been filed in court. In the event that that happened, the proviso would be rendered meaningless, in my considered view. And, I do not think that the drafters intended it to be without meaning.***

***In the event, I find that Mr. Getanda advocate ought not to have come on record as the advocate for the petitioners, and also to have appeared in court on their behalf, after he had commissioned their affidavits, the petition and the Guarantees. In effect, I uphold the preliminary objection, to that extent.”***

From the above case and having considered the definition of “a Commissioner for Oaths”, it is worth noting that, a Commissioner for Oaths can administer oaths and take affidavits but not exercise such powers in any proceeding or matter in which he administered oaths and took affidavits by appearing on record as the same Advocate for any of the parties to the proceeding or concerned in the matter.



This proviso cured instances where a commissioner for oaths would commission the affidavit for his client, and thereafter, go on record as the advocate for the said client, shortly after the affidavit has been filed before a court or any other decision making body.

In its proceedings, a court or any other decision making body is expected to consider the contentious issues alleged in the Affidavit or Statement filed by an applicant or any other party to those proceedings. In other instances, there would be need to call upon the Commissioner for oaths to verify that he administered the oath, only to realize that the same Advocate who administered the oath is the one acting on behalf of the person whose Affidavit (or Statement) needs to be verified. Such an Advocate will advance the interests of his client (i.e. the person to whom he administered an oath to) even though there is a likelihood that the Advocate and his Client may mislead the court or any other decision making body, for the benefit of such client's case.

The Board was referred to Article 159 (2) (d) of the Constitution which provides as follows:-

**"159 (1) .....**

**(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—**

**(a) .....**

**(b) .....**

**(c) .....**

**(d) *justice shall be administered without undue regard to procedural technicalities***

This Board addressed its mind on the position taken by courts on the import of Article 159 (2) (d) of the Constitution vis à vis the requirement of section 4 (1) of the Oaths and Statutory Declarations Act and notes the following:-

Article 159 (2) (d) of the Constitution stipulates that,when called upon to administer justice, any court or tribunal that exercises judicial authority, shall not give undue regard to procedural technicalities. The word 'undue' is defined under the Cambridge English Dictionary to mean: -

***"a level that is more than is necessary, acceptable, or reasonable"***

'Undue regard' may therefore be interpreted to mean that a court or tribunal should not disregard procedural technicalities but at the same time, should not give more than the necessary, acceptable or reasonable regard or attention to procedural technicalities.

A definition of 'procedural technicality' was provided by the Honourable Justice Richard Mwangi, in **Kenya Ports Authority v. Kenya Power & Lighting Co. Limited (2012) eKLR** where he held as follows: -

***"Combining the meanings of these words "procedural technicalities" may be described as those that concern the modes of proceedings and the rules involved that regulate formality and processes rather than substantive rights under law. This may not be an all-encompassing definition, but I think people generally associate procedural technicalities with annoying strictures and rules which hinder the achievement of substantial justice...."***

With regard to what amounts to undue regard to procedural technicalities Lady Justice C.K. Byamugisha's in her essay on **Administering Justice Without Undue Regard to the Technicalities (2013)**, stated as follows:-

***"In particular, administration of justice without undue regard to technicalities was understood to mean that rules of procedure were handmaidens of justice. What this meant in practical terms was that the courts were charged with resolving disputes without being unduly hindered by legal technicalities. In other words, rules of procedure are supposed to help the courts expedite court business but are***

**not supposed to be ironclad obstacles to all cases in all circumstances.** [Emphasis by Board]

This position was further explained in **First National Finance Bank Limited v Universal Apparels (EPZ) Ltd & 2 others [2017] eKLR** where the Court held:-

***"Where the statute or the applicable rules stipulate a procedure to be followed, parties ought to comply. It is only when rules are followed that there is orderliness in the manner in which proceedings are handled. If the courts were to totally disregard the rules of procedure, the result is likely to be total anarchy.***

**Nonetheless, Article 159 (2) (d) of the Constitution makes it clear that when called upon to administer Justice, the courts or any other tribunals which exercise judicial authority, shall not be blindly enslaved by procedural technicalities.**

**The Constitution does not urge the courts to disregard procedural rules. It only says that the courts should not have undue regard to procedural technicalities.**

**Ordinarily therefore, Article 159 (2) (d) of the Constitution ought to be a shield, rather than a spear. It ought to be invoked to protect a substantive application so that the application can be heard, rather than having the application**

**struck out or dismissed on the basis of a technicality.”**

**[Emphasis by the Board]**

Lady Justice C.K. Byamugisha in her essay cited hereinbefore further addressed the discretion that a court must exercise in determining what amounts to procedural technicalities and had this to say:-

**“In exercising its discretion, the circumstances of each case are very important. However, the right to be heard should always be a relevant consideration and therefore should be considered before such applications are rejected on technical grounds... In any case, our judicial system should never permit a party to be driven from the judgment seat without the court considering his/her/its/ right to be heard except in cases where the cause of the action is obviously and almost uncontestably bad.”**

Accordingly, it is clear that procedural technicalities should not hinder the achievement of substantial justice in any legal proceeding and the courts in exercising their discretion to determine what amounts to procedural technicalities, must first examine the circumstances of the case before it. In essence, there ought to be a balance between; deciding what amounts to procedural technicalities while at the same time exercising caution not to disregard procedural technicalities in an attempt to excuse non-compliance with mandatory provisions of the law.

The Board notes that the Supreme Court has adopted a similar position and cautioned against a blanket application of Article 159 (2) (d) of the Constitution in the case of **Law Society of Kenya v. The Centre for Human rights & Democracy & 12 Others, Petition No. 14 of 2013**, where it opined as follows: -

***"Indeed, this Court has had occasion to remind litigants that Article 159(2) (d) of the Constitution is not a panacea for all procedural shortfalls.All that the Courts are obliged to do is to be guided by the principle that "justice shall be administered without undue regard to technicalities." It is plain to us that Article 159 (2) (d) is therefore applicable on a case-by-case basis"*** [Emphasis by the Board]

The Court of Appeal in addressing the question whether Article 159 of the Constitution should override procedure held as follows in the case of **Nicholas Kiptoo Arap Korir Salat versus Independent Electoral and Boundaries Commission & 6 others [2013] eKLR**(hereinafter referred to as "the Nicholas Salat Case"):-

***"It ought to be clearly understood that the courts have not belittled the role of procedural rules. It is emphasized that procedural rules are tools designed to facilitate adjudication of disputes; they ensure orderly management of cases. Courts and litigants (and their lawyers) alike are, thus, enjoined to abide strictly by the rules. Parties and lawyers ought to be***

**reminded that the bare invocation of the oxygen principle is not a magic wand that will automatically compel the court to suspend procedural rules. And while the court, in some instances, may allow the liberal application or interpretation of the rules that can only be done in proper cases and under justifiable causes and circumstances. That is why the Constitution and other statutes that promote substantive justice deliberately use the phrase that justice be done without "undue regard" to procedural technicalities.**

***In the circumstances of this appeal, it is common ground that the notice of appeal and the record of appeal were lodged within the time prescribed by the rules. The record of appeal was similarly served within the time allowed. The only sticking point is the service of the notice of appeal on the respondents within 7 days as required by Rule 77.***

***It is noted also that the record of appeal that was admittedly served upon the respondents on 3<sup>rd</sup> September, 2013, only 13 days from the date of the judgment contained a copy of the notice of appeal. It can be said that if the notice of appeal was lodged on 22<sup>nd</sup> August 2013 and the respondents learnt about the appeal on 3<sup>rd</sup> September, 2013, there was delay of only four days. In my view, and in the circumstances***

***of this appeal, I find that there was substantial compliance with the rules.***

***It must also be noted that an appeal, by dint of Rule 82 (1) reproduced at the beginning of this ruling, is instituted by lodging in the registry, various documents listed thereunder, 60 days from the date when the notice of appeal was lodged, and not by serving upon the respondent, the notice of appeal. The failure to serve the respondents within 7 days did not occasion to them any real prejudice.***

***The contention by the 1<sup>st</sup>, 3<sup>d</sup> to 8<sup>th</sup> respondents that they were "startled", "unsettled" and "ambushed" cannot amount to a prejudice warranting the striking out of this appeal. There is no evidence that there was intentional or contumelious default on the part of the appellant. For their inconvenience the respondents can be compensated in costs. The period of delay before the respondents were made aware of the appeal was not inordinate; there was no risk of failure of fair trial of the appeal. The proportionality of the sanction of striking out of the entire appeal for the reason only of non-service is unconscionable and unjustified. The invitation to strike the appeal out is, in a manner of speaking, a case of killing a fly with a sledge hammer."***



It is clear from the above excerpt that the Court of Appeal judges in the *Nicholas Salat Case* were of the view that in determining what amounts to undue procedural technicalities, a court should carefully examine the circumstances of each case.

In **Election Petition Appeal No. 1 of 2017, Pius Njogu Kathuri v Joseph Kiragu Muthura & 3 others [2018] eKLR**, the High Court held as follows:-

***"It is a mandatory requirement that a petition be supported by affidavit of the petitioner. Having found that the petition is not supported by affidavits as mandatorily required under the Rules, the petition cannot stand. This is not a defect which can be cured under Article 159 (2) (d) of the Constitution which deals with procedural technicalities. It has been stated in Zacharia Okoth Obanado -V- Edward Akong'o Oyugi & 2 Others:-***

*"Article 159 (2) (d) of the Constitution simply means that a Court of Law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the Court."*

***The affidavits of the petitioner ought to be struck out for not being affidavits as envisaged by the law. The petition has not***

***complied with the mandatory requirements with regard to affidavits. Failure to support the petition with affidavits goes to the root and content of the petition. "***

All of the above authorities demonstrate that, from the onset, Article 159 (2) (d) of the Constitution does not require courts and other decision making bodies to exempt parties from complying with mandatory provisions of the law. However, what amounts to a procedural technicality that can be cured by Article 159 (2) (d) of the Constitution should be determined on a case by case basis.

Turning to the circumstance of this Request for Review, it is worth noting that, the proviso in section 4 (1) of the Oaths and Statutory Declarations Act is couched in mandatory terms regarding its direction that a Commissioner for Oaths is precluded from exercising any of the powers given by that provision in any proceeding or matter in which he is the Advocate for any of the parties to the proceeding or concerned in the matter.

It is evident that the Applicant's Request for Review (which is similar to a Notice of Motion Application or a Petition) must be supported by an Affidavit or a Statement. Regulation 73 of the Public Procurement and

Disposal Regulations, 2006 (hereinafter referred to as "the 2006 Regulations") provides that:-

**"73 (1) A request for review under the Act shall be made in Form RB 1 set out in the Fourth Schedule to these Regulations.**

**(2) The request referred to in paragraph (1) shall-**

**(a) .....**

**(b) be accompanied by such statements as the applicant considers necessary in support of its request"**

The use of the word "shall" in the introductory sentence under Regulation 73 (2) (b) of the 2006 Regulations demonstrates that it is mandatory for a Request for Review to be accompanied by statements, save that it is an applicant that determines whether such a statement would be in the form of an Affidavit or a Statement in Support of the Request for Review.

However, whether such a statement is an Affidavit or a Statement in Support of a Request for Review, a Request for Review cannot stand without either of the two for the reason that contentious issues of fact are stated in such a statement by the Applicant's representative well conversant with the facts being alleged. Since such a representative would be alleging to contentious issues of fact that the Board has to consider and make a determination on the same, section 4 (1) of the Oaths and

Statutory Declarations Act provides guidance on the manner in which Affidavits or other Statements are taken as has been noted hereinbefore.

The Applicant's Affidavit is commissioned by **Mr. Paul Kenneth Kinyua Advocate**, who is the same Advocate on record and acting on behalf of the Applicant in this Request for Review proceedings. Counsel for the Applicant did not deny the Procuring Entity's assertion that it was the same Advocate that commissioned the Applicant's Affidavit, and the same Advocate on record in this Request for Review proceedings acting on behalf of the Applicant.

This, in the Board's view, is not an issue of mere procedural technicality but an issue of non-compliance with a mandatory provision of the law, regarding commissioning of Affidavits in accordance with section 4 (1) of the Oaths and Statutory Declarations Act and the same cannot be cured by Article 159 (2) (d) of the Constitution.

This Board has the obligation to interpret the law and apply it as it is and cannot close its eyes to non-compliance with the law especially where the Applicant wishes the same to be excused as a technicality. As observed by courts, a blanket application of Article 159 (2) (d) of the Constitution has the potential of encouraging parties to ignore mandatory provisions of the

law, in the hopes that they will invoke the said provision even where the circumstances of the case do not support its application.

The Board finds that the Applicant's Affidavit offends section 4 (1) of the Oaths and Statutory Declarations Act and the same cannot be cured by Article 159 (2) (d) of the Constitution. Accordingly, the Applicant's Affidavits hereby expunged from the record of the proceedings before this Board to the effect that the Request for Review Application is left without any document to support it.

In totality, the Board finds that the Applicant's Request for Review is fatally defective and the Board proceeds to make the following specific orders:-

### **FINAL ORDERS**

In exercise of the powers conferred upon in by Section 173 of the Public Procurement and Asset Disposal Act, 2015, the Board makes the following orders in the Request for Review:-

- 1. The Request for Review filed on 26<sup>th</sup> February 2020 by M/s Biomax Africa Ltd, the Applicant herein with respect to Tender No. NAWASSCO/29/2019/2020 for the Supply and Delivery of a Vehicle Mounted Sewer Flushing Unit, be and is hereby struck out.**
- 2. Each party shall bear its own costs in the Request for Review.**

**Dated at Nairobi this 17<sup>th</sup> day of March 2020**

**CHAIRPERSON**

**SECRETARY**

**PPARB**

**PPARB**

**Delivered in the presence of:-**

- i.** Mr. David Mutugu, Representative of the Applicant; and
- ii.** Mr. John Ouma, holding brief for Mr. KipkoechNgotah for the Respondent