Republic v National Government Constituencies Fund Board & another; Kingsway Business Systems Limited (Exparte) (Application E155 of 2024) [2024] KEHC 10409 (KLR) (Judicial Review) (25 August 2024) (Judgment)

Neutral citation: [2024] KEHC 10409 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

APPLICATION E155 OF 2024

J NGAAH, J

AUGUST 25, 2024

BETWEEN

REPUBLIC ..... APPLICANT

AND

NATIONAL GOVERNMENT CONSTITUENCIES FUND BOARD .... 1ST RESPONDENT

AGILE BUSINESS SOLUTIONS ..... 2ND RESPONDENT

AND

KINGSWAY BUSINESS SYSTEMS LIMITED ..... EXPARTE

JUDGMENT

1. The applicant's application is a motion dated 15 July 2024 expressed to be brought under Order 53 rules 3 and 4 of the Civil Procedure Rules. The orders sought are stated to be as follows:

> " 1. That this Honourable Court do hereby issue Judicial Review Orders of Prohibition to prohibit the 1st Respondent from proceeding with the Award formalities of tender No. NG CDFB/RFP/02/2023-2024 to Agile Business Solutions, the 2nd Respondent herein.
>
> 2. That this Honourable Court do hereby issue Judicial Review Orders of Certiorari to remove into the High Court and quash the letter of Notification of Non-Award dated 14/6/2024 and all the consequential effects thereof

leading ultimately to the cancellation of the said tender and/or re-evaluation of the bids tendered."

The applicant has also sought the order for costs.

2. The application is based on a statutory statement dated 11 July 2024 and an affidavit verifying the facts relied upon sworn on even date by Mr. Kenneth Kadenge who has introduced himself as the business development manager of the applicant company.

3. According to these documents, the 1st respondent made a request for a proposal to undertake supply, install, implement, test, train, commission and maintain an integrated NG-CDF Board Enterprises Resource Plaining (ERP) Solution through a tender, more particularly described as "Tender No. NG-CDFB/RFP /02/2023-2024." Hereinafter I will refer to the tender as "the subject tender".

4. It would appear that the applicant participated in the procurement process for the subject tender because on 14 June 2024, the 1st respondent notified the applicant that its bid did not succeed for the reason that its bid did not meet the mandatory preliminary requirement in the tender document which specifically required copies of certificates or accreditation from Information and Communication Technology (ICT) Authority for cloud computing, ICT consultancy and systems and applications. The tender was eventually awarded to the 2nd respondent at the tender price of Kshs. 854, 752,678.40.

5. According to the applicant, it could not lodge a request for review before the Public Procurement Administrative Review Board under section 167 (1) of the *Public Procurement and Asset Disposal Act*, 2015 because, although the notification of the award of the tender was dated 14 June 2024, the applicant only received the notification on 28 June 2024 through an email of even date.

6. Even then, the applicant appears to concede that it did not meet the mandatory requirements specified by the procuring entity in the notification. I gather this from paragraphs *4*(d) and (e) of what has been set out as grounds upon which the judicial review reliefs are sought. In these paragraphs the applicant has stated as follows:

"

" d) The letter of notification of non-award dated 1 4/6/2024 cited the reason for full noncompliance as being the Applicant's inability to provide copies of certificates or accreditations from ICT Authority for:

i. ICTA 1: Cloud computing;

ii. ICTAl : ICT consultancy; and

iii. ICTAl : Systems and applications

And the Applicant had fully demonstrated its competencies in fulfilling the requirements of ICTAl and were in the process of upgrading its ICTA 4: ICT consultancy to ICT1 consultancy but the 1st Respondent had only provided (7) days to submit the document and the Applicant was disqualified on the ground as it could not beat the deadline, though it is now fully accredited under ICTA 1: ICT consultancy and ICTA 1: systems and Applications. The closing date for the tender was the 7/6/2024 and the Evaluation was undertaken in a record seven [7] days, leading up to the letter of 14/6/2024.

e) The preliminary mandatory requirement is an error and/or oversight that can be corrected without affecting the substance of the tender as per section 79(2)(b) of the *Public Procurement and Asset Disposal Act*, 2015." It is the

applicant's case that "it has invoked the provisions of section 174 of the *Public Procurement and Asset Disposal Act*,2015 to move this Honourable Court as it is apprehensive from the timing in which the email of 28/6/2024 was sent that there are machinations and schemes to frustrate the Review process before the 1st Respondent's Review Board hence unfairly denying the Applicant the tender it believes they deserve and seeks solace in Article 165 of *the constitution* of Kenya, 2010."

7. In response to the application, the 1st and 2nd respondent raised a preliminary objection on the ground that this Honourable Court lacks original jurisdiction to entertain the applicant's suit since the applicant has not exhausted the mandatory administrative review procedure under section 167 of the *Public Procurement and Asset Disposal Act*. According to the 2nd respondent, the applicant ought to have invoked section 167(1) of the Act and challenged the decision of procuring entity before the Public Procurement Administrative Review Board.

8. As far as the fourteen-day limitation period is concerned, the 2nd respondent has urged that the time starts running from the date of receipt of the notification and not the date on the notification.

9. In the sum, the respondents have urged that in the absence of a decision from the Public Procurement Administrative Review Board, the jurisdiction of this Honourable Court has been prematurely invoked. The 1st respondent has urged further that since the applicant has not exhausted the available review mechanisms under the *Public Procurement and Asset Disposal Act*, this application is in breach of section 9(2) of the *Fair Administrative Action Act*, 2015.

10. Besides preliminary objections, the 1st and 2nd respondents also filed replying affidavits. The 1st respondent's affidavit was sworn by Mr. Charles Gesongo Mugita who has introduced himself as the manager, monitoring and evaluation in the 1st respondent. Mr. Mugita has reiterated in his affidavit, the grounds raised in the preliminary objection. The 1st respondent has, however, added that, as a matter of fact, there is a request for review pending before the Public Procurement Administrative Review Board as application no. No.66 of 2024 Green Com Enterprises Limited versus National Government Constituencies Development Fund & Agile Business Solutions Ltd in which the applicant is either participating or ought to participate pursuant to Section 170 of the *Public Procurement and Asset Disposal Act*.

11. The 1st respondent has admitted that it floated the subject tender as alluded to by the applicant. The tender was meant to improve efficiency and effectiveness of the procuring entity's programs, management, and business operations, at its headquarters in Nairobi, the regional level and in 290 constituency offices throughout the country. The criteria for evaluation of the bids received in response to the subject tender were set out in the Request for Proposal (RFP) that was part of the tender document. Interested bidders were required to submit their bids by 7 June 2024 at 10.00 am.

12. As far as the evaluation process is concerned, the procuring entity's evaluation committee carried out an evaluation of bids submitted in response to the subject tender, including the applicant's bid, in five stages. The first stage was the Mandatory Requirements Evaluation - Compliance with Mandatory Preliminary Requirements according to which all the bidders were to required to comply with the mandatory requirements. The second stage was the Mandatory Technical Requirements and the third stage was technical Evaluation and System Demonstration Evaluation. The fourth and fifth stages were the financial evaluation and due diligence evaluation stages respectively.

13. The evaluation process entailed ensuring that the bids complied with all the mandatory preliminary requirements as set out in Clause 22.1 of the tender document which also provided that the assessment

of these requirements would be either "Responsive" or "Non-Responsive" and failure to meet any of the mandatory requirements would lead to an automatic disqualification.

14. The procuring entity's evaluation committee applied these criteria to all the bids submitted including the applicant's bid in accordance with Sections 79 (1) and 80 of the *Public Procurement and Asset Disposal Act* as read with Regulation 74 of the Public Procurement & Asset Disposal Regulations which are couched in mandatory terms; requiring procuring entities such as the 1st Respondent, to undertake a preliminary evaluation to confirm all the eligibility and other mandatory requirements in the tender documents.

15. Requirement No.16 of the Mandatory Requirements under Clause 22.1 of the request for proposal, for instance, required that bidders provide copies of certificates or accreditations from ICT Authority for:

    i) ICTA 1: Cloud Computing

    ii) ICTA 1: ICT consultancy

    iii) ICTA 1: Systems and applications (Verification will be done online)

    But in its bid, the applicant provided certifications for:

    i) ICTA 5: Cloud Computing

    ii) ICTA 4: ICT consultancy

    iii) ICTA 6: Systems and applications

16. The requirement was for all certifications to be at ICTA Level 1 which is a high certification whereas the applicant only submitted evidence of ICTA Levels 4, 5 and 6 which are of a lower level. The applicant did not, therefore, meet this mandatory requirement at Stage 1 of the evaluation process and was disqualified from proceeding to the next stage of the process in accordance with the terms of the request for proposal. The decision of the evaluation committee was communicated to the applicant by a letter dated 14 June 2024.

17. The 1st respondent has sworn further that it is not true that the applicant was disqualified for failure to meet the deadline. The tender advertisement was published on 28 May 2024 and interested bidders were given up to 7 June 2024 to respond with their bids. The applicant is said to have submitted a voluminous bid document of over 1000 pages and other documents in response. If the applicant did not have the requisite certification at the time it was submitting its response, it is a fault of the applicant's own making and cannot be attributed to the 1st respondent.

18. In any case, the applicant has admitted that it was in the process of obtaining the requisite certification thereby confirming that at the time of submitting its bid in response to the tender, the applicant did not have the requisite certifications which were stipulated as being mandatory.

19. According to the 1st respondent, the applicant's contention that its admitted non-compliance amounted to an excusable minor deviation has no basis in law because non-compliance with mandatory provisions cannot amount to a minor deviation. To be precise, lack of the requisite certifications is not a minor error or minor oversight as the certifications are needed to ensure that the successful bidder can effectively install, manage and maintain the ERP system required in view of the substantially large scale of the 1st respondent's operations and the number of staff. This fundamentally affects the substance of the tender and cannot have been deemed to be a minor deviation. Further, to allow the applicant to submit a non-responsive bid that does not meet all the mandatory requirements

of the subject tender under the guise of "minor errors or oversights" would open what the 1st respondent thinks is a pandora's box for procuring entities as all non-responsive bidders would make similar arguments that would consequently cripple the tendering and procurement process.

20. The 2nd respondent's affidavit was sworn by Anthony Kibet Kohen who has sworn that he is the director of the 2nd respondent and that the 2nd respondent participated in the subject tender. After the evaluation process, the 2nd respondent's bid was determined to be successful bid and, therefore, it was awarded the tender at a contract sum of Kshs. 854,752,678.40 by way of a letter of notification of award dated 14 June, 2024. According to the notification, the 2nd respondent was required to communicate its acceptance to the 1st respondent. Subsequently, through a letter dated 18 June 2024, the 2nd respondent communicated its acceptance and intention to enter into a formal contract.

21. The 2nd respondent has sworn that at the time of filing the application for leave for a substantive motion for judicial review reliefs, the applicant was still within time to file a request for review which, according to the 2nd respondent, was due to lapse on 15 July 2024. Accordingly, the applicant's assertion that it was edged out from filing the request for review before the Public Procurement Administrative Review Board by being notified on 28 June, 2024 does not hold any substance in law and fact. The applicant, having admitted that it did not meet the mandatory requirements, the applicant's application is unmerited and an abuse of the process of this Honourable Court.

22. Having considered the application, the responses thereto and the submissions filed by the parties in response to the positions they have adopted in support of or in opposition to the application, I find it necessary to dispose of, in limine, the question whether the applicant's application is properly before this Honourable Court. This is the question upon which the respondents' preliminary objections revolve and it is the question whose answer may as well determine the fate of the application.

23. All the parties, including the applicant, are in agreement that since the applicant was dissatisfied with the procuring entity's decision, the decision ought to have first been subjected for review by the Public Procurement Administrative Review Board and that it is only after the delivery of the Board's decision that the applicant could have moved this Honourable Court for judicial review reliefs; assuming that the applicant was still dissatisfied with the Board's decision.

24. No doubt, this is what the law says in sections 167(1) and 175(3) of the *Public Procurement and Asset Disposal Act*. Section 167(1) reads as follows:

> 167. Request for a review
> (1)Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.

25. The task of administrative review to which reference has been made in this provision of the law is placed on the Public Procurement Administrative Review Board which is established under section 27 of the *Public Procurement and Asset Disposal Act*. Section 28 of the Act says that amongst the functions for which the Board has been established is to review, hear and determine tendering and asset disposal disputes (see section 28.1(a)).

26. Section 175(1) of the Act, on the other hand, provides that a party aggrieved by the Board's decision has the alternative of moving this Honourable Court for judicial review. The section reads as follows:

175. Right to judicial review to procurement

(1) A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board's decision, failure to which the decision of the Review Board shall be final and binding to both parties.

According to section 175 (3), upon filing of the application, the court would be enjoined to determine it within fourty-five days from the date of filing.

27. The explanation proffered for the applicant's failure to abide by the procedure prescribed in sections 167(1) and 175(3) of the Act is that it received the notification on the fourteenth day after the date of the notification. To be precise, the notification of the award of the tender which also informed the applicant of its disqualification was dated 14 June 2024 but it was sent to the applicant by email on 28 June 2024.

28. My understanding of the phrase "fourteen days of notification of award or date of occurrence of the alleged breach" in section 167 (1) is that, the time for filing of the request for review starts running once the aggrieved party has been notified of the award or the date of the occurrence of the alleged breach. In either case, knowledge, on the part of the aggrieved party, is critical; the timing that counts is when the notification of the award or the alleged breach is brought to the attention of the aggrieved party or when he became aware of the notification or the breach. It is not necessarily the date indicated on the notification or when the alleged breach occurred. Certainly, it is logical and stands to reason that an aggrieved party cannot be expected to commence action on a notification or breach that he is not aware of and, in my humble view, it would be absurd to interpret section 167(1) as saying so.

29. In short, the clock for the applicant to file the request for review under section 167(1) of the Act started ticking on 28 June 2024 when the email of the notification of the award was sent to it and not on 14 June 2024, the date indicated on the notification. That being the case, there is no plausible reason why the applicant could not file the request for review as it was obligated to but, instead, chose to invoke the judicial review jurisdiction of this Honourable Court.

30. But even if it was to be assumed that the applicant had a valid reason to sidestep the Public Procurement Administrative Review Board, section 9 (4) of the *Fair Administrative Action Act*, 2015 enjoined it to make an application to be exempted from exhausting the review mechanism prescribed by section 167(1). According to section 9(4) of the *Fair Administrative Action Act*, while it is mandatory under section 9(2) and (3) for a party to exhaust internal mechanisms for appeal or review before invoking this Honourable Court's judicial review jurisdiction, the party may be exempted from these processes in exceptional circumstances and where justice of the case so demands. For better understanding, it is necessary that I reproduce the entire section 9 here; it reads as follows:

9. Procedure for judicial review.

(1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of *the Constitution*.

(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

(5) A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal. (Emphasis added).

31. Thus, Section 9(4) would be the legal basis for the application for exemption and the order for exemption would only be made on an application by an applicant seeking exemption. There is nothing in this provision that suggests that the application would be heard and determined ex parte and, therefore, the order for exemption from exhausting the review mechanism can only be made after all the parties to the application have been given an opportunity to be heard. In the applicant's case, no such an application for exemption was ever made and, therefore, no order for the exemption could possibly be made.

32. As noted, section 9(2) of the *Fair Administrative Action Act* provides in rather peremptory terms that 'the High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.'

33. It is trite that the existence of an alternative remedy is never enough to oust jurisdiction in judicial review (see Leech versus Deputy Governor of Parkhurst Prison (1988) AC 533 per Lord Bridge at 562D). However, it has been held in R versus Inland Review Commissioners, ex p Preston (1985) AC 835 that:

> " A remedy by way of judicial review is not to be made available where an alternative remedy exists...Judicial review is a collateral challenge: it is not an appeal. Where parliament has provided by statute appeal procedures, as in taxing statutes, it will only be very rarely that the courts will allow the collateral process of judicial review to be used to attack an appealable decision..."

34. Addressing the same issue in R versus Peterkin, ex p Soni (1972) Imm AR 253 Lord Widgery CJ had this to say:

> " Where Parliament has provided a form of appeal which is equally convenient in the sense that the appellate tribunal can deal with the injustice of which the applicant complains this court should in my judgement as a rule allow the appellate machinery to take its course. The prerogative orders form the general residual jurisdiction of this court whereby the court supervises the work of inferior tribunals and seeks to correct injustice were no other adequate remedy exists, but both authority and common sense seem to me to demand that the court should not allow its jurisdiction under the prerogative orders to be used merely as an alternative form of appeal when other and adequate jurisdiction exists elsewhere."

35. The Court of Appeal has held in the *Speaker of the National Assembly v. Karume, Civil Application No. NAI 92 OF 1992* that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.

36. Thus, both the statute and precedent point to the conclusion that it is pertinent for an aggrieved party to embrace alternative remedies including review or appellate procedures before moving court for judicial review remedies. The reviewing courts will always be conscious that in considering whether a public body may have abused its powers, they must not abuse their own by entertaining matters which they otherwise ought not to have entertained.

37. All said and done, the applicant has conceded in unambiguous terms that its bid for the tender fell short of certain mandatory requirements. That being the case, its hands are soiled and, in all likelihood, what would have been its request for review under section 167(1) of the Act may not have gone very far. As far as this application is concerned, all I can say on this particular issue is that it has neither moral nor legal basis upon which to question the procuring entity's decision.

38. What all these boil down to is that from whichever angle one considers the applicant's application, it is bound to fail. Accordingly, I hereby hold that the applicant's application is misconceived and an abuse of the due process of this Honourable Court. The respondents' preliminary objections are hereby sustained and the applicant's suit struck out with costs. It is so ordered.

SIGNED, DATED AND POSTED ON THE CTS ON 25 AUGUST 2024

NGAAH JAIRUS

JUDGE