



**Mercow Engineering and Gen Supplies Ltd v Public Procurement Administrative Review Board; Mathare National Government Constituency Development Fund Board, Mathare NGDC Office & 4 others (Interested Parties) (Judicial Review E205 of 2021) [2023] KEHC 260 (KLR) (Judicial Review) (19 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 260 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
JUDICIAL REVIEW E205 OF 2021  
AK NDUNG’U, J  
JANUARY 19, 2023**

**BETWEEN**

**MERCOW ENGINEERING AND GEN SUPPLIES LTD ..... APPLICANT**

**AND**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD ..... RESPONDENT**

**AND**

**MATHARE NATIONAL GOVERNMENT CONSTITUENCY DEVELOPMENT FUND BOARD, MATHARE NGDC OFFICE ..... INTERESTED PARTY**

**CDF COMMITTEE, MATHARE NATIONAL GOVERNMENT CONSTITUENCY DEVELOPMENT FUND, MATHARE NGDC OFFICE ..... INTERESTED PARTY**

**FUND ACCOUNT MANAGER, MATHARE NATIONAL GOVERNMENT CONSTITUENCY DEVELOPMENT FUND ..... INTERESTED PARTY**

**FIXCAR (EA) GROUP LIMITED ..... INTERESTED PARTY**

**ORIS AND SONS CONTRACTORS LIMITED ..... INTERESTED PARTY**

**RULING**

1. A brief background to this matter shows that the Ex Parte Applicant file d a Notice of Motion dated 29<sup>th</sup> December 2021 on the 30<sup>th</sup> of December 2021 seeking judicial review orders of certiorari against orders of the Public Procurement Administrative Review Board issued on 23<sup>rd</sup> December 2021.



2. The matter came up for hearing on the 2<sup>nd</sup> of February 2022 where upon it was brought to the court's attention of the existence of Constitutional Petition No. E035 of 2022 filed in the Constitutional and Human Rights Division of this court over the same subject matter. Parties agreed to have this matter placed in abeyance awaiting the outcome of the petition.
3. Subsequently, Petition No. E035 of 2021 was dismissed and the Parties, intent of prosecuting this matter, appeared before this court on 27<sup>th</sup> April 2022. By then the 45 days within which this matter ought to have been determined in accordance with Section 175(3) of The [Public Procurement and Asset Disposal Act](#) had long lapsed.
4. Cognisant of that fact, Mr Ochieng for the Ex Parte Applicant sought the directions of the court on the matter so as to avoid the parties having to engage in an academic exercise. Alive to the Constitutional right to be heard, the court directed that parties file skeletal submissions on the propriety of the proceedings in light of the lapse of the 45 days provided in law. The court record confirms submissions by the Ex Parte Applicant and the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Interested Parties. All but the 4<sup>th</sup> Interested Party take the view that the jurisdiction of the court is ousted by the lapse of time. The 4<sup>th</sup> Respondent while acknowledging that by dint of the lapse of time the court has become functus officio, pleads with the court to veer away from that direction considering that such a declaration would extremely prejudice the 5<sup>th</sup> Interested Party.
5. The applicable law in regard to the timelines for determination of judicial review applications under Section 175(1) is now well settled. I will begin by reproducing Section 175 of the [Public Procurement and Asset Disposal Act](#) which provides as follows;

- “(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.
- (2) The application for a judicial review shall be accepted only after the aggrieved party pays a percentage of the contract value as security fee as shall be prescribed in Regulations.
- (3) The High Court shall determine the judicial review application within forty-five days after such application. (emphasis added)
- (4) A person aggrieved by the decision of the High Court may appeal to the Court of Appeal within seven days of such decision and the Court of Appeal shall make a decision within forty-five days which decision shall be final.
- (5) If either the High Court or the Court of Appeal fails to make a decision within the prescribed timeline under subsection (3) or (4), the decision of the Review Board shall be final and binding to all parties.
- (6) A party to the review which disobeys the decision of the Review Board or the High Court or the Court of Appeal shall be in breach of this Act and any action by such party contrary to the decision of the Review Board or the High Court or the Court of Appeal shall be null and void.
- (7) Where a decision of the Review Board has been quashed, the High Court shall not impose costs on either party.



No doubt the provision is couched in mandatory terms and as such this court is obligated to render a decision within 45 days of filing of the Judicial Review application.

6. This Court in its decision in JR No. E1155 of 2020, *Republic vs. Public Procurement Administrative Review Board & 2 Others Ex parte Express Automation Limited (unreported)* while addressing its mind on the issue of timelines cited the Court of Appeal decision in Civil Appeal No. E039 OF 2021, *Aprim Consultants vs. Parliamentary Service Commission & Another* where the court held as follows;

“Without a doubt, there are serious practical difficulties with meeting timelines set by the Act, and it may well be that given the sheer numbers of such judicial review matters that get filed before the relevant division of the High Court; the limited number of judges to handle them; and numerous other matters. Besides, as public procurement is but one of the areas in administrative law that spawns judicial review applications, the wisdom of so short a timeline may be fairly questioned. One may wonder whether a situational analysis or any other scientific, data-based research was done to determine the reality on the ground and inform the time that is practical to effectuate the legitimate desire for timelines in disposal of public procurement and disposal disputes. It would seem quite basic that before imposition of timelines sort in section 175 of the Act, there should have been a robust engagement with stakeholders, foremost of whom would be the Judiciary leadership and specifically the judges and registrars of the relevant division. We very much doubt that such engagement did occur given the patently unrealistic timelines in the provision.

“That said, is it open for the High Court, no matter how reasonable its premises, to nonetheless go on and flout the timeliness or proceed as if they did not exist? Are the timelines in question such as leave the Courts with degree of discretion, or they are to be construed as being inflexibility binding?”

“We think, with respect, that the provisions of section 175 are couched in terms that are plain and unambiguous, admitting to no interpretive wriggle room...”

7. In *Republic v Public Procurement Administrative Review Board Ex parte Joint Venture of Lex Oilfield Solutions Ltd & another; Accounting Officer, Kenya Electricity Generating Company PLC & 3 others (Interested Parties)* [2022] eKLR I made the following observations;

“Without a doubt, the matter before court is a perfect example of the serious difficulties posed by the short timelines set in section 175(3) of the Act. The requirement of the law is not matched by corresponding resources given the many matters filed and the limited number of personnel. Whereas the court will do all in its power to meet the timelines as we continue doing in many of the matters, more than usual diligence is called upon from would be applicants to ensure they, with the support of the court, drive the agenda to meet the timelines set by law.

15. The Judicial Review proceedings herein were initiated through a substantive motion dated 19<sup>th</sup> October, 2021. By the date of the last mention on 17<sup>th</sup> December 2021, the matter was in its 59<sup>th</sup> day since filing, well out of the 45 days envisaged in the Act. As a result, the proceedings are well past the 45-day statutory deadline. Any attempt to proceed with the matter and/or deliver a judgement on merit would be futile and an unwarranted assumption of a non-existent jurisdiction, an illegal voyage that this court would eschew.



16. This position is buttressed by the Court of appeal decision in the Aprim Consultants case (supra) where the court stated;

Our reading of the Act is that the High Court was under an express duty to make its determination within the time prescribed. During such time did its jurisdiction exist, but it was a time bound jurisdiction that ran out and ceased by effluxion of time. The moment the 45 days ended, the jurisdiction also ended. Thus any judgement returned outside time would be without jurisdiction and therefore a nullity, bereft of any force of law.

That legal conclusion remains irrespective of the avowed reasons, no matter how logical, sound, reasonable or persuasive they may be. No amount of policy, wisdom or practicality can invest a decision made without jurisdiction with any legal authority.” (See also the Court of Appeal decisions in *ADK Technologies Ltd in Consortium with Computer Technologies Ltd v Public Procurement Administrative Review Board & 4 others* (Civil Appeal E598 of 2021) [2022] KECA 407 (KLR) (4 March 2022) (Judgment) in *The Consortium of TSK Electronica Y Electricidad S.A. & Ansaldoenergia v. PPARB & 3 Others*, CA. No. E012 of 2022)

8. It is trite that jurisdiction is the authority that grants a court or a tribunal power to adjudicate on a dispute before it. Any act without jurisdiction is illegal and a nullity. The court can only exercise jurisdiction conferred upon it by the constitution and the law. The Supreme Court in *Samuel Macharia & Another vs. Kenya Commercial Bank Ltd & 2 others* [2012] eKLR had this to say on jurisdiction of courts;

“68. A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

9. From the foregoing and in light of the consistent decisions of the court of appeal and this court on the interpretation of Section 175(3) of the Public Procurement and Asset Disposal Act, it is clear that this court’s jurisdiction over this litigation no longer exists. Without jurisdiction, I must down my tools. With the result that the Notice of Motion dated 29<sup>th</sup> December 2021 is hereby struck out. In the circumstances of this case, each party is to bear its own costs.



**DATED SIGNED AND DELIVERED AT NAIROBI THIS 19<sup>TH</sup> JANUARY, 2023.**

**A. K. NDUNG’U**

**JUDGE**

