



**Republic v Public Procurement & Administrative Review Board & another; Modason Cleaners, Furnishers & Suppliers Ltd (Exparte Applicant); The Accounting Officer, County Government of Kericho – Department of Health Services & another (Interested Parties) (Miscellaneous Judicial Review E006 of 2022) [2023] KEHC 1419 (KLR) (23 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1419 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERICHO  
MISCELLANEOUS JUDICIAL REVIEW E006 OF 2022  
AN ONGERI, J  
FEBRUARY 23, 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**THE PUBLIC PROCUREMENT & ADMINISTRATIVE REVIEW BOARD ..... 1<sup>ST</sup> RESPONDENT**

**SWIFTMAX SERVICES LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**MODASON CLEANERS, FURNISHERS & SUPPLIERS LTD .... EXPARTE APPLICANT**

**AND**

**THE ACCOUNTING OFFICER, COUNTY GOVERNMENT OF KERICHO – DEPARTMENT OF HEALTH SERVICES ..... INTERESTED PARTY**

**COUNTY GOVERNMENT OF KERICHO – DEPARTMENT OF HEALTH SERVICES ..... INTERESTED PARTY**

**JUDGMENT**

1. The ex parte applicant was granted leave to apply for an order of Certiorari to remove into this Court and quash the entire decision of the Public Procurement and Administrative Review Board (the 1<sup>st</sup> Respondent herein) delivered on 1/12/2022, annulling the letter of notification of award of tender no. CGK/T/11/006/2022 – 2024 for provision of cleaning services, Gardening and Environmental



Management at Kericho County Referral Hospital (KCRH) dated 27/10/2022 as well as the attendant contract dated 10/11/2022 both issued by the Interested Parties to the ex parte applicant.

2. The Application is based on the grounds on the face of it as follows;
  - i. That the 1<sup>st</sup> Respondent by its decision dated 1/12/2022 acted per incurium sound judicial precedent hence arriving at an unreasonable decision.
  - ii. That it was unreasonable, against public policy and interest contrary to article 227 of *the constitution* for the 1<sup>st</sup> Respondent to purport to down play efficiency and capacity to deliver at the alter of the lowest price.
  - iii. That the 1<sup>st</sup> Respondent exceeded its jurisdiction in purporting to compelling the interested parties to award the tender to the 2<sup>nd</sup> respondent notwithstanding the red flag raised in the due diligence report done pursuant to section 83 of the Public Procurement and Assets Disposals Act, 2015.
  - iv. That the 1<sup>st</sup> Respondent's decision was contrary to constitutional and statutory provisions specifically article 227 of *the constitution* and section 83 of the Public Procurement and Assets Disposals Act and was therefore irregular, illegal, ultra vires and void ab initio.
  - v. That the 1<sup>st</sup> Respondent has frustrated the applicant's legitimate expectation with respect to an efficient, transparent and/or accountable public procurement process as envisaged under article 227 of *the constitution*.
  - vi. That the ex parte applicant has invested about Kshs. 1,000,000/= in execution of the contract tender No. CGK/T/H/006//2022 – 2024 for provision of Cleaning Services, Gardening and Environmental Management at Kericho County Referral Hospital and will suffer huge financial loss if the 1<sup>st</sup> Respondent's decision is implemented.
3. The Application is supported by the Affidavit of Lydia Chepkoech Sigilai, a managing director of the ex parte applicant dated 06/12/2022.
4. The ex parte applicant avers that they were a successful tenderer in respect of tender CGK/T/H/006//2022 – 2024 for provision of Cleaning Services, Gardening and Environmental Management at Kericho County Referral Hospital and a contract was signed between the 1<sup>st</sup> Respondent and Interested Party dated 10/11/2022 pursuant to this they were issued with a letter of notification of award dated 27/10/2022.
5. The ex parte applicant avers that they initiated execution of the contract by acquiring the requisite machinery and engaged about fifty staff and as a result spent close to Kshs. 1,000,000/=.
6. The ex parte applicant avers that the 1<sup>st</sup> Respondent in a decision dated 1/12/2022 pursuant to Review Application No. 95/2022 issued orders with the effect of annulling and setting aside the letter of notification of award of tender no. CGK/T/11/006/2022 – 2024 for provision of Cleaning Services, Gardening and Environmental Management at Kericho County Referral Hospital (KCRH) dated 27/10/2022 as well as the attendant contract dated 10/11/2022.
7. The ex parte applicant avers that notwithstanding that there was a clear finding from the due diligence report that the 2<sup>nd</sup> Respondent was non – responsive for want of meeting the similarity of the



- assignment threshold, the 1<sup>st</sup> Respondent adopted that the finding of the report be overlooked and focus be shifted to the tenderer with the lowest evaluated tender price.
8. The ex parte applicant avers that the 1<sup>st</sup> Respondent acted ultra vires in purporting to compel the Interested Parties to award the tender to the 2<sup>nd</sup> Respondent.
  9. The ex parte applicant avers that the decision making process was tainted with procedural impropriety and that the impugned award was made to a bidder who did not achieve the highest combined technical and financial scores.
  10. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents and also the 1<sup>st</sup> and 2<sup>nd</sup> interested parties filed Replying Affidavits which averments I have considered.
  11. The 1<sup>st</sup> Respondent filed a Replying Affidavit opposing the ex parte applicant's motion for judicial review, the Replying Affidavit was sworn by JAMES KILAKA the Acting Secretary of the Public Procurement Administrative Review Board (hereinafter referred to the Board) and dated 08/12/2022.
  12. The 1<sup>st</sup> Respondent avers that the impugned contract was signed contrary to section 135 (3) of the [Public Procurement and Asset Disposal Act](#), 2015, it was signed before 14 days had lapsed from the date of notification of the outcome of the evaluation of the subject tender to all tenderers.
  13. The 1<sup>st</sup> Respondent avers that subject to the applicant's request for review which succeeded, the Board nullified the contract signed between the ex parte applicant and the interested party whilst taking into consideration the Board's power of review as stipulated in section 173 of the [Public Procurement and Asset Disposal Act](#), 2015.
  14. The 1<sup>st</sup> Respondent avers that in its decision-making process it considered confidential documents submitted together with the evaluation criteria set out in the tender documents.
  15. The 1<sup>st</sup> Respondent avers that its decision was reasonable, rational and lawful without overreaching its mandate and jurisdiction.
  16. The 2<sup>nd</sup> Respondent filed a Replying Affidavit sworn by Cherotich Beatrice a director of the 2<sup>nd</sup> Respondent and dated 21/12/2022.
  17. The 2<sup>nd</sup> Respondent avers that it submitted its tender as required in the invitation to tender as required in the invitation to tender and sent a representative who attended the tender opening thereof.
  18. The 2<sup>nd</sup> Respondent avers that it was issued with a letter of regret dated 27/10/2022 stating that its references were not of a similar assignment and therefore could not be considered. The 2<sup>nd</sup> Respondent being dissatisfied with the decision therein filed a request for review with the Public Procurement and Administrative Review Board vide Review No. 95 of 2022.
  19. The 2<sup>nd</sup> Respondent avers that it was the lowest bidder and it was wrongfully denied the award.
  20. The 2<sup>nd</sup> Respondent avers that the Board's decision was arrived at rightfully by dint of section 173 of the Public Procurement and Assets Disposal Act which provides that it has powers to substitute the decision of the Accounting Officer of the 1<sup>st</sup> Interested Party.
  21. The 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties filed an Affidavit in support of the application sworn by Beatrice Koech a Supply Chain Management Officer at the County Government of Kericho and dated 14/12/2022 who was a member of the Tender Evaluation Committee in respect of Tender No. CGK/T/H/006/2022 – 2024.



22. The 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties avers that the decision by the 1<sup>st</sup> Respondent ignores the due diligence report which found the 2<sup>nd</sup> Respondent non - responsive to be an unreasonable decision that justifies the lowest evaluated tender price without factoring in the capacity of the tenderer to conduct the task.
23. The Judicial Review Application was canvassed by way of written submissions which I have considered.
24. The ex parte applicant submitted that the decision by the 1<sup>st</sup> Respondent dated 1/12/2022 was unlawful, unreasonable, irrational and made ultra vires and was therefore suitable for quashing orders.
25. The ex parte applicant submitted that the 1<sup>st</sup> Respondent's decision dated 1/12/2022 was unlawful for being per incurium sound judgment and cited Nairobi HCC JR 190/2016 R V Public Procurement Administrative Review Board, Palona Enterprises Ltd & Another, R V Public Procurement Administrative Review Board 7 2 Ors Ex Parte Numerical Machining Complex Ltd. The ex parte applicant reiterated that the 1<sup>st</sup> Respondent made an unreasonable and unlawful decision by overlooking the due diligence report finding that the 2<sup>nd</sup> Respondent was non - responsive for want of meeting the similarity of assignment threshold.
26. The ex parte applicant contended that the 1<sup>st</sup> Respondents decision was unreasonable, against public policy and interest contrary to article 227 of *the constitution* to the extent that it purported to down play efficiency and capacity to deliver at the altar of the lowest price.
27. The ex parte applicant contended that the 1<sup>st</sup> Respondent has frustrated it's legitimate expectation with respect to an efficient, transparent and /or accountable public procurement process as envisaged in article 227 of *the constitution*.
28. The ex parte applicant further contended that it was performing and had invested Kshs. 1,000,000/= in execution of the contract tender no. CGK/T/H/006/2022 – 2024 and would suffer huge financial loss if the 1<sup>st</sup> Respondent's decision is implemented.
29. The 1<sup>st</sup> Respondent submitted that it is a creature of statute, that is, the *Public Procurement and Asset Disposal Act*, No.33 of 2015, its jurisdiction flows from section 167 (1) of the Act, it exercises its review powers under section 172 and 173 of the Act and that it has powers to substitute the decision of the accounting officer of the procuring entity with its own decision. The 1<sup>ST</sup> Respondent was therefore within its jurisdiction to substitute the decision of the procuring entity for its own decision.
30. The 1<sup>st</sup> Respondent contended that the ex parte applicant had not particularized the details of the alleged procedural breaches rather it pleaded the breaches in an omnibus manner.
31. The 1<sup>st</sup> Respondent submitted that the pre conditions of signing a procurement contract under section 135 of the Act include the contract being signed within the tender validity period and not earlier than fourteen (14) days following the giving of a notification award to the winner, the contract herein was signed in violation of the said sections of the law and therefore no obligation accrued to the Applicant under the tender and therefore no money claim for part performance as claimed by the applicant should be awarded.
32. The 1<sup>st</sup> and 2<sup>nd</sup> interested parties conceded that in as much as it was true that the 1<sup>st</sup> Respondent found that the 2<sup>nd</sup> Respondent responsive at the technical evaluation stage on capacity to deliver, that was before carrying out of the due diligence which established that the experience highlighted was not in respect of a similar assignment.
33. The 1<sup>st</sup> and 2<sup>nd</sup> interested parties submitted that the decision by the 1<sup>st</sup> Respondent ignored the due diligence report which found the 2<sup>nd</sup> Respondent non responsive, and further that the decision was



- unreasonable because it justified the lowest evaluated tender price without factoring in capacity of the tenderer to conduct the task.
34. The 1<sup>st</sup> and 2<sup>nd</sup> interested parties submitted that decision to award the tender to the 2<sup>nd</sup> Respondent was tainted with procedural impropriety hence ultra vires in that it was made to the bidder who did not achieve the highest combined technical and financial scores.
35. The issues for determination in this judicial review application are as follows;
- i. Whether the decision by the 1<sup>st</sup> Respondent should be removed into this court and be quashed.
  - ii. Whether the ex parte Applicant should be refunded Kshs.1,000,000/= incurred in execution of the impugned contract.
36. Section 27 of the *Public Procurement and Asset Disposal Act* of 2015 (hereinafter “the Act”) which establishes the 1<sup>st</sup> Respondent as an unincorporated Board, and its functions are set out in section 28 of the Act as follows;
- “ 1) The functions of the Review Board shall be—
    - (a) reviewing, hearing and determining tendering and asset disposal disputes; and
    - (b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law.
37. On the issue as to whether the decision of the Review Board (the 1<sup>st</sup> Respondent) should be removed to this court and be quashed, I have considered the Review Board’s ruling and It evident that due diligence was only conducted on the 2<sup>nd</sup> Respondent and not on the Exparte Applicant and the same was done at post qualification stage and that the 2<sup>nd</sup> Respondent was not given specific reasons for the decision by the procuring entity.
38. In the circumstances, I find that the 1<sup>st</sup> Respondent acted within it’s mandate to change the decision of the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties.
39. The 1<sup>st</sup> Respondent’s jurisdiction as regards review of procurement processes is provided for in Section 167(1) of the *Public Procurement and Asset Disposal Act* which states as follows:-
- “(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.
  - (2) A request for review shall be accompanied by such refundable deposit as may be prescribed in the regulations, and such deposit shall not be less than ten per cent of the cost of the contract.
  - (3) A request for review shall be heard and determined in an open forum unless the matter at hand is likely to compromise national security or the review procedure.



- (4) The following matters shall not be subject to the review of procurement proceedings under subsection (1)—
- (a) the choice of a procurement method;
  - (b) a termination of a procurement or asset disposal proceedings in accordance with section 62 of this Act; and
  - (c) where a contract is signed in accordance with section 135 of this Act.”

40. I find that the Review Board found that the Procuring Entity demonstrated lack of objectivity and fairness by relying on reports from two of the 2<sup>nd</sup> Respondent’s referees and disregarded two of the referees contrary to Article 47 and 227(1) of the constitution as read with Section 82 and 83 of the Act.
41. The Review Board also found that the 2<sup>nd</sup> Respondent was not given prior and adequate notice of the adverse reports and an opportunity to be heard and to make representations regarding the issues raised in the said reports and that the same was in breach of the laws of natural justice.
42. In the circumstances, I find that the Review Board was right in its finding and I uphold the same.
43. On the issue as to whether the ex parte applicant should be refunded Kshs. 1,000,000/= it incurred in execution of the contract, I find that there was no evidence tabled before this court to demonstrate how and when the said amount was incurred and even there was such information, I find that the said contract was signed contrary to the Law before the time granted for a party to apply for review.
44. I find that it is not in dispute that the pre-conditions of signing a procurement contract under section 135 of the Act include the contract being signed within the tender validity period and not earlier than fourteen (14) days following the giving of a notification award to the winner.
45. I find that the contract herein was signed in violation of the said sections of the law and therefore no obligation accrued to the Applicant under the tender and therefore no money claim for part performance as claimed by the applicant should be awarded.
46. In the case of Republic v Public Procurement Administrative Review Board & 2 others Exparte Adan Osman Godana t/a Eldoret Standard Butchery [2017] eKLR the Court said as follows;
- “It therefore follows that the law does not contemplate that any contract would be entered into between the Procuring Entity and the ‘successful’ tenderer before elapse of 14 days of the date of the decision by Review Board. To do so would no doubt be in violation of Section 175(1) of the Act, which it has been held, not once or twice, operates as an automatic stay of any action by the Procuring Entity until the elapse of the 14 days or until the court gives directions as to stay”.
47. In the circumstances, this Judicial Review Application lacks in merit and the same is dismissed with no orders as to costs.

**DELIVERED, DATED AND SIGNED AT KERICHO THIS 23RD DAY OF FEBRUARY, 2023.**

**A. N. ONGERI**

**JUDGE**

