



**Eldoret Uasin Gishu Cleaners Limited v County Government Of Uasin Gishu & 2 others
(Miscellaneous Application 9 of 2023) [2023] KEHC 24365 (KLR) (30 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24365 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS APPLICATION 9 OF 2023
RN NYAKUNDI, J
OCTOBER 30, 2023**

BETWEEN

ELDORET UASIN GISHU CLEANERS LIMITED APPLICANT

AND

COUNTY GOVERNMENT OF UASIN GISHU 1ST RESPONDENT

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD 2ND
RESPONDENT**

MUNICIPALITY OF ELDORET' 3RD RESPONDENT

RULING

1. The 1st and 3rd respondents Notice of Preliminary objection dated September 27, 2023 premised on the following grounds;
 1. This honourable court lacks Jurisdiction to hear and determine the Suit and Application herein pursuant to the provisions of section 167 to 175 of the *Public Procurement and assets Disposal Act* 2015 and the Regulations made thereunder.
 2. This honourable court lacks jurisdiction to hear and determine the Application as the Judicial Review Application concerns public procurement which is governed by the provisions of the *Public Procurement and Assets Disposal Act* 2015, and the various Regulations made thereunder which provisions provide for Disputes Resolution Mechanisms.
 3. The Application herein is mischievous, ill-conceived and a blatant abuse of court process as the right to institute Judicial Review in procurement proceedings can only lie in this honourable court after the Public Procurement and Administrative Review Board has rendered its decision pursuant to section 175 of the *Public Procurement and Disposal Act* 2015.



2. The Notice of Preliminary objection is in regards to the application dated August 29, 2023 filed by the Applicants seeking leave to apply for Judicial Review orders for an order of certiorari to remove into this court and quash the decision of the Municipality of Eldoret and Uasin Gishu County Government made on April 7, 2023 rejecting the application for award of tender No. CGU/EM/T/001/2022-2023. The Applicants therein also sought orders of mandamus compelling the respondents to review the applicants' application and award the tender to the applicant and to pay the applicant for its services rendered.
3. I note that the applicant did not file a response to the preliminary objection.

1st & 3rd Respondent/applicant's Case

4. Learned counsel for the respondents filed submissions on October 3, 2023. Counsel urged that section 5 of the *Civil Procedure Act* establishes the general jurisdiction of courts to handle civil cases, while also recognizing that there may be certain types of civil cases or situations where the court's jurisdiction is restricted or prohibited by law. In the present context, while the High Court may have original jurisdiction in all civil matters by dint of article 165 of the *Constitution*, there are those matters such as those concerned with the award or rejection or tenders by public entities, whose jurisdiction has been specifically excluded as the preserve of the Public Procurement Administrative Review Board [herein after "the board"] under the PPADA.
5. Learned counsel submitted that under section 27 of the *PPADA*, the Board is established and given duties under section 28 (1) (a) to 'review, hear and determine tendering and asset disposal disputes'. The board is mandated to ensure all public procurements and Asset disposals conform to the Act, and the principles of public procurement set out under article 227 (1) of the Constitution of Kenya. The Board in the context of its conduct of review, has been granted powers under section 173 of the Act and may grant remedies, including annulling the decision of the accounting officer, give directions to be done or redone anything in the procurement and disposal proceedings, terminating the procurement proceedings or ordering costs.
6. The respondent's case is that in instances where a tenderer or candidate wishes to challenge the decisions of a procuring entity, section 167 of the *PPADA* grants such a person a right to request for a review from the board. Further, that after such a review by the board as anticipated in section 171, the *PPADA* affords a person who is aggrieved by the decision of the Board the right to seek judicial review at the High Court within 14 days from the date of the decision of the *PPARB*, failure to which the decision of the *PPARB* will be final and binding per section 175 (3) of the *PPADA*. It is only after such a process and the making of a decision by the board that the law anticipates a person dissatisfied with procurement decision to have a right of review, in this instance of the Board's decision, before the High Court. Additionally, the *PPADA* under section 175 (4) gives a person aggrieved by the decision of the High Court, the right to appeal to the Court of Appeal within seven days of the decision of the High Court with the decision made by the Court of Appeal being final.
7. Learned counsel urged that the substratum of the present challenge by the applicant to the 1st and 3rd Respondents' action as contained in the letter dated April 7, 2023 is the award of the tender no. CGU/EM/T/00V2022-202B, by the County government of Uasin Gishu in exercise of its public procurement functions as governed by the *PPADA*. In its prayers before this court, the applicant has sought among other prayers for this court to quash the decision of the Municipality of Eldoret and Uasin Gishu County Government made on April 7, 2023, rejecting the application for award of tender No CGU/EM/T/001/2022-2023", as well as an order for mandamus compelling the Respondents to forthwith review the applicant's application and award the tender to the Applicant.



8. Counsel posited that the reason of the existence of the Board established under section 27, cannot be the forum anticipated in law for the adjudication leading to the orders sought. In any case, section 167 of the PPADA has provided an elaborate timeline, procedure, and forum wherefrom those dissatisfied with actions by procuring entities can seek redress from. It is only after a decision by the board has been made under section 171 of the Act, does the applicant have a right to approach this Court in the manner it has presently invoked the jurisdiction of this Court. He cited the case of the Court of Appeal; *Kenya Pipeline Company Limited v Hyosung Ebara Company Limited & 2 others* [2012] eKLR where the upheld the place of the Board as the entity vested with primal authority to adjudicate on disputes relating to breach of duty by procurement entities relative to the High Court noting the powers it had been granted in law including annulling, anything done by the procurement entity and substituting its decision for that of the procuring entity. Counsel urged that this is the forum anticipated in law through which the applicant's dissatisfaction with the County government as a procuring entity should have been ventilated. The respondents stated that a failure to stick to the statutorily provided avenues is a fatal undoing of ones' cause and more one involving issues that have strict statutory timelines in their adjudication processes. In the present case, the Tenderer's decision to initiate a Judicial Review Cause before this Court without first exhausting the available administrative remedy before the board is procedurally and legally in contravention of the PPADA.
9. Learned counsel for the respondents stated that the courts may decline to hear cases where administrative remedies have not been exhausted, referring the court to the doctrine of administration in this regard. He cited the case of *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR where the court held that the question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a court of law on an action without pursuing available remedies before the agency itself. Further, that the Court of Appeal has in more than two instances emphasized the importance of exhausting the available statutory remedies before invoking the court's jurisdiction. In *Geoffrey Muthinja Kabiru & 2 others v. Samuel Munga Henry & 1756 others* [2015] eKLR the court noted how imperative it was that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked so that courts ought to be fora of last resort and not the first port of call the moment a storm brews.
10. Learned counsel urged that the *Civil Procedure Act* at section 5 gives courts such as the High Court the power to try all civil suits excepting suits of which its cognizance is either expressly or impliedly barred in the manner the PPADA does and, that the express provision of Section 167 of the Act is one such occasion that would bar this court from hearing the present suit. Counsel cited the case of *Ezekiel Otieno v Funds Account Manager, Mathare National Constituency Development Fund & 2 others; Public Procurement Review Board & 12 others (Interested Parties)* [2022] eKLR where through a ruling delivered on March 22, 2022, the court upheld a preliminary objection similar to the instant one, where the substratum of the Petitioner's action therein was a procurement process undertaken by the Respondents and therefore upheld its lack of jurisdiction Appreciative that section 60 of the *Evidence Act* empowers this court to take notice of matter of national prominence and importance, and those principles attendant in law, the respondents implored the court to take note of the provisions in law cited and uphold the preliminary objection.

Analysis & Determination

11. Upon consideration of the pleadings and submissions tendered, the following issues arise for determination;

SUBDIVISION - Whether the preliminary objection is merited



12. The law pertaining to preliminary objections is well captured by all the parties herein. In the famous *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696, the Court of Appeal for Eastern Africa, stated (Law JA) in part that

“So far as I’m aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

13. Sir Charles Newbold President of the court in the *Mukisa case* went on to state;

“a preliminary objection cannot be said to be such if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.” (Page 710).

14. The objection is premised on the contention that the court does not have jurisdiction to hear this matter. The locus classicus case on jurisdiction is the case of *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] KLR 1, where Justice Nyarangi of the Court of Appeal (As he then was) held as follows: -

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools”

15. In the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, the Supreme Court of Kenya stated that: -

“...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...”

16. The relevant section of the law that provides for review of an award for a tender is section 167(1) of the Public Procurement and Asset Disposal Act No. 33 of 2015 which provides that: -

“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.”

17. The Court of Appeal addressed the doctrine of exhaustion in *Geoffrey Muthinja Kabiru & 2 others v Samuel Munga Henry & 1756 others* as follows;

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial



consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts...This accords with article 159 of the Constitution which commands courts to encourage alternative means of dispute resolution."

18. It is discernible from the pleadings that the dispute herein arises from the award of tender no. CGU/EM/T/001/2022-2023. The applicant had applied for said tender and was unsuccessful in its bid. The applicant then approached this court seeking the aforementioned reliefs. Judicial review is a relief under Fair Administrative Action. Section 9 of the fair Administrative Action Act gives the right to an aggrieved party arising from an administrative action to apply for Judicial Review of such an administrative action. It states as follows;

- (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.

Section 9(2) is couched in mandatory terms, thereby restricting the court from reviewing an administrative action unless the internal mechanisms as prescribed by law have been exhausted.

The applicants have not provided any evidence that they attempted to have the award reviewed pursuant to section 167 of the PPDA which provides timelines for the same. The jurisdiction of the High Court in such matters is governed by section 175 of the PPDA which succinctly states;

- (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.



- (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

19. The law anticipates a situation where an aggrieved party shall seek relief from the board before approaching the court. The high court can only come in upon the exhaustion of the mechanisms provided in the act. Therefore, the court finds that the preliminary objection is merited as the court does not have jurisdiction to entertain the application dated August 29, 2023. The application is struck out with costs to the respondents.

It is so ordered.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 30TH DAY OF OCTOBER 2023

In the Presence of:

M/s Kibet Cheruiyot for the Respondent.

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R. NYAKUNDI

JUDGE

