



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

(CORAM: A.K. NDUNG'U J.)

JUDICIAL REVIEW NO E156 OF 2021

**IN THE MATTER OF AN APPLICATION BY THE JOINT VENTURE
OF LEX OILFIELD SOLUTIONS LTD & CFAO KENYA LTD FOR LEAVE
TO COMMENCE JUDICIAL REVIEW PROCEEDINGS PURSUANT TO
ORDER 53 OF THE CIVIL PROCEDURE RULES**

AND

**IN THE MATTER OF THE DECISION OF THE PUBLIC PROCUREMENT
AND ADMINISTRATIVE REVIEW PPARB IN APPLICATION 115 OF 2021
CONCERNING TENDER NO KGN-GDD-040-2021 FOR IMPROVEMENT
OF CIRCULATION WATER SYSTEM AT OLKARIA II POWER STATION
AND COMPACTION GROUTING**

AND

**IN THE MATTER OF THE PUBLIC PROCUREMENT AND DISPOSAL
ACT NO. 33 OF 2012 AND THE REGULATIONS THEREUNDER**

AND

**IN THE MATTER OF ARTICLE 10, 47, 50, 201, 221 AND 227 OF
THE CONSTITUTION OF THE REPUBLIC OF KENYA 2010**

BETWEEN

**THE JOINT VENTURE OF LEX OILFIELD
SOLUTIONS LTD & CFAO KENYA LTD.....APPLICANT**

VERSUS

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

AND

THE ACCOUNTING OFFICER,

KENYA ELECTRICITY GENERATING COMPANY PLC....1ST INTERESTED PARTY

KENYA ELECTRICITY GENERATING COMPANY PLC...2ND INTERESTED PARTY

H. YOUNG & COMPANY (EAST AFRICA) LIMITED.....3RD INTERESTED PARTY

CFAO KENYA LTD.....4TH INTERESTED PARTY

JUDGMENT

1. This court in its ruling dated 21st October, 2021 granted the applicant herein leave to file for judicial review orders and directed that the said leave do operate as a stay of the decision of the respondent in Public Procurement Administrative Review Board Application No. 115 of 2021 dated 7th October 2021. The court further directed the applicant to file its substantive motion within 5 days of the date thereof and responses to the same were to be filed within 5 days of service.

2. The matter was to be disposed of by way of written submissions and as such the applicant was directed to file within 5 days of service of the responses and the respondent was to file within 5 days of service of the applicant's submissions. The court directed that the matter be mentioned on 29th November, 2021 to confirm compliance.

3. The applicant's substantive Notice of Motion Application before this court is dated 19th October, 2021 and it seeks the following orders:

(i) An order of certiorari be issued removing to the High Court for purposes of quashing the record, proceedings, decision, and Ruling of the Respondent in Public Procurement Administrative Review PPARB Application No. 115 of 2021 dated 7th October 2021.

(ii) An order of prohibition be issued against the 1st and 2nd Interested Parties precluding them, its officers, servants and/or agents from awarding and signing a contract of procurement subject to procurement proceedings in Tender No KGN-GDD-040-2021 FOR IMPROVEMENT OF CIRCULATION WATER SYSTEM AT OLKARIA II POWER STATION AND COMPACTION GROUTING with the 3rd Interested Party.

(iii) An order of prohibition be issued against the 1st and 2nd Interested Parties precluding them, its officers, servants and/or agents from annulling, readvertising, revoking, or canceling Tender No KGN-GDD-040-2021 FOR IMPROVEMENT OF CIRCULATION WATER SYSTEM AT OLKARIA II POWER STATION AND COMPACTION GROUTING.

(iv) An order of mandamus be issued against the Respondent compelling it reinstates Request for Review 115 of 2021 filed by the Applicant dated 17th October 2021 within reasonable time and the review request be heard de novo on its merits.

(v) An order of prohibition be issued against the Respondent restraining it from entertaining the 1st and 2nd Interested Parties preliminary objections dated 27th September 2021 and the 4th Interested Party's notice of motion dated 5th October 2021.

(vi) A declaration extending leave herein to operate as stay of the decision of the Respondent in Public Procurement Administrative Review PPARB Application No.115 of 2021 dated 7th October 2021.

4. The application is supported by the grounds on its face, a verifying affidavit sworn by Emmanuel Kitusa on 19th October, 2021 and a statutory statement of even date. The applicant herein also filed a supplementary affidavit dated 2nd December, 2021 and written submissions dated 11th December, 2021.

5. In response to the motion the respondent herein filed a replying affidavit dated 29th November, 2021, grounds of opposition dated 30th November 2021 and written submission dated 15th December, 2021. The 1st and 2nd interested parties also filed a replying affidavit dated 4th November, 2021 and written submissions dated 15th December, 2021. Similarly the 3rd interested Party also filed a replying affidavit dated 29th October, 2021 and written submissions dated 14th December, 2021, while the 4th interested party filed a replying affidavit dated 25th November, 2021 and written submissions dated 14th December, 2021.

6. In line with court's above-mentioned directives, only the 1st, 2nd, and 3rd interested parties had filed responses when the matter came up for confirmation of compliance on 29th November, 2021. The respondent was given 2 days to file a response, and the applicant was given 3 days to file a supplementary affidavit after it was served. In addition, the applicant was required to file written submissions within three days of the affidavits being closed, and the respondent and interested parties were required to file their submissions within three days after service. The applicant's learned counsel sought to have the matter mentioned on 15th December, 2021 to reserve a judgement date.

7. On the said date parties confirmed to having filed their responses and the matter was slated for the next day to fix a judgement date. During the mention on 16th December, 2021 learned counsel for the applicant confirmed to the court that the 45 days window allowed under

section 175(3) of the Public Procurement and disposal Act (The Act) had lapsed on 6th December,2021, however he sought 1 day to file his written submissions. The court directed Mr. Juma to file his submissions within 4 days and for the matter to be mention on 17th December,2021 for directions in view of section 175(3) of the Act.

8. During the mention on 17th December, 2021, Mr. Juma, learned counsel for the applicant urged that the principle of *stare decisis* in not absolute and that the Court of Appeal acted *per incuriam* in its decision regarding the application of section 175(3) of the Act. Further that this court was under an obligation to render its determination on the judicial review proceedings before it as the same was still alive despite the expiry of the 45 days' timelines. The Respondent and Interested Parties argued that they were surprised by the learned counsel's decision to have the matter mentioned on 15th December,2021 yet he was alive to the fact that there were timelines that had to adhered to in accordance with the law.

9. Learned counsels argued that the judicial review proceedings before this court were a nullity as they had been overtaken by events in light of the Court of Appeal decision in **Civil Appeal No. E039 OF 2021, Aprim Consultants vs. Parliamentary Service Commission & Another** and this Court's decision in **JR No. E1155 OF 2020, Republic vs. Public Procurement Administrative Review Board & 2 Others Ex parte Express Automation Limited**.

DETERMINATION

10. It is obvious from the foregoing that this judgement must first and foremost address the question of the effect of section 175(3) of the Act on this litigation given that it is admitted from both divides that the 45 days allowed under section 175(3) of the Act have lapsed.

11. 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.

(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.”

12. It is clear from the above provision that the same 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.

13. 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..."

14. 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 19th October, 2021. By the date of the last mention on 17th December 2021, the matter was in its 59th 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 no-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."

17. The court can only exercise jurisdiction conferred upon it by the constitution and the law. Any act done without jurisdiction is illegal. 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."*

18. From the foregoing, it is clear that this court's jurisdiction in the matter before it has been ousted by effluxion of time as per the dictates of section 175(3) of the Act. Without jurisdiction the court cannot move one further step but is obligated to down its tools.

19. With the result that the suit herein is dismissed for flouting section 175(3) The Public Procurement and Disposal Act and for the for want of jurisdiction arising therefrom. In the circumstances of the case, it is only fair and just that each party bears its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF JANUARY 2022.

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A. K. NDUNG'U

JUDGE