



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**APPLICATION NO. E281 OF 2019**

**IN THE MATTER OF:**

**AN APPLICATION BY LORDSHIP AFRICA LIMITED FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND MANDAMUS**

**IN THE MATTER OF:**

**TENDER NO. NCC/UR&H/RFP/526/2018-2019 REDEVELOPMENT OF**

**NGONG ROAD PHASE 2 ESTATE WITHIN NAIROBI CITY COUNTY THROUGH JOINT VENTURE PARTNERSHIP (RE-TENDER)**

**IN THE MATTER OF:**

**A DECISION BY THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD IN RESPECT OF AN APPLICATION FOR REVIEW OF THE DECISION BY THE NAIROBI CITY COUNTY TO AWARD EDERMANN PROPERTY LIMITED THE RE-TENDER**

**IN THE MATTER OF:**

**THE PUBLIC PROCUREMENT AND ASSETS DISPOSAL ACT**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

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

**AND**

**NAIROBI CITY COUNTY ..... 1<sup>ST</sup> INTERESTED PARTY/APPLICANT**

**ERDEMANN PROPERTY LTD ..... 2<sup>ND</sup> INTERESTED PARTY**

**LORDSHIP AFRICA LTD ..... EX-PARTE APPLICANT**

**RULING**

1. Following a Chamber Summons application dated 25<sup>th</sup> September, 2019, Lordship Africa Ltd (hereinafter the Ex Parte applicant) was granted leave to commence these judicial review proceedings by orders of court (Nyamweya J, as she then was) on 26<sup>th</sup> September, 2019.

2. In exercise of the leave granted, the ex parte applicant filed a substantive application by way of Notice of Motion dated 30<sup>th</sup> September, 2019 seeking the following orders:

a) *An order of certiorari to issue to remove into the High Court for purposes of being quashed, the Respondent's decision dated 3<sup>rd</sup> September 2019 as delivered in PPARB Application No. 89 of 2019 Lordship Africa Limited vs The Accounting Officer, Nairobi City County & Another.*

b) *An order of Certiorari to issue to remove into High Court for purposes of being quashed, the decision on the Nairobi City County of 23<sup>rd</sup> July 2019 to award Tender No. NCC/UR&H/RFP/526/2018-2019 - Redevelopment of Ngong Road Phase 2 Estate Within Nairobi City County Through Joint Venture Partnership (Re-Tender) to Edermann Property Limited.*

c) *An order of Certiorari to issue to remove into the High Court for purposes of being quashed, the entire procurement proceedings with respect to Tender No. NCC/UR&H/RFP/526/2018-2019 - Redevelopment of Ngong Road Phase 2 Estate Within Nairobi City County Through Joint Venture Partnership (Re-Tender).*

d) *An order of Mandamus to issue to compel the Nairobi City County to commence a fresh procurement process with respect to Tender No. NCC/UR&H/RFP/526/2018-2019 - Redevelopment of Ngong Road Phase 2 Estate Within Nairobi City County Through Joint Venture Partnership (Re-Tender).*

e) *Costs and further incidentals of this Application be provided for.*

3. Subsequently, the 1<sup>st</sup> Interested Party raised a preliminary objection on jurisdictional issues arising from the alleged filing of the judicial review proceedings outside the timelines set in **Section 175 (1) of the Public Procurement and Asset Disposal Act**. By a ruling dated 3<sup>rd</sup> February, 2020, the preliminary objection was dismissed.

4. In addition to the initial directions on the hearing of the matter the Judge (Nyamweya, J) gave further comprehensive directions on 30<sup>th</sup> April 2020 regarding the hearing of the application by the ex parte applicant by way of Notice of Motion dated 16<sup>th</sup> December, 2019. A virtual hearing was to be held on 21<sup>st</sup> July, 2020 but the same was stalled by failure of service of documents on some parties. A hearing date was set for the 1<sup>st</sup> September, 2020 wherein the application was heard and ruling reserved for the 9<sup>th</sup> November, 2020. That ruling was eventually delivered on 30<sup>th</sup> December, 2020 and a hearing date of 15<sup>th</sup> April, 2021 was set.

5. Before hearing of the substantive motion could take place, the 1<sup>st</sup> Interested Party filed an application by way of Notice of Motion dated 31<sup>st</sup> March 2021 seeking to strike out the suit.

6. Come 15<sup>th</sup> April, 2021, the date set for hearing, the court was unable to give directions on the matter given that the Court of Appeal had made a determination in C.A no. E039 of 2021 in which the court found the provisions of **Section 175 (3)** mandatory but had reserved its reasons on the matter. The court directed that the matter be mentioned on 31<sup>st</sup> May, 2021. Same was mentioned severally thereafter and the parties are now before the court for directions on the way forward.

7. The reasons for the findings of the Court of Appeal in Civil appeal no. E039 of 2021 have since been given shedding light on the applicable jurisprudence surrounding the application of **Section 175 (3)** of the **Public Procurement and Asset Disposal Act**.

8. It is common ground that at present and even at the point when the application dated 31<sup>st</sup> March, 2021 by the 1<sup>st</sup> Interested Party was filed, these judicial review proceedings had long surpassed the **45 days** allowed under **S175(3)** of the Act. That section provides:

***“(3) The High Court shall determine the judicial review application within forty-five days after such application”***

9. The Court of Appeal in Civil Appeal no. E039 of 2021, while acknowledging the practical difficulties with meeting the timelines set by the Act, held as follows:

*“Without a doubt, there are serious practical difficulties with meeting the 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 timeliness in disposal of public procurement and disposal disputes. It would seem to us quite basic that before imposition of timeliness of the 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 a question such as leave the courts with a degree of discretion, or are they 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.”*

10. The court went ahead to buttress the constitutionality of **Section 175** and held the same view as taken by the same court in **Al Ghurair Printing and Publishing LLC vs Coalition for Reforms and Democracy and 2 others (2017) eKLR**, where Gatembu, JA rendered himself as follows:

*"36. Section 175 of the Act as a whole provides for an elaborate time bound process for escalating the dispute from the Review Board (which must complete its review within 21 days after receiving the request), to seeking judicial review to the High Court (which must be done within 14 days from the date of the decision of the Review Board): to the High Court (which has 45 days such application to make its decision). A person aggrieved by the decision of High Court may appeal to the Court of Appeal within 7 days of the High Court decision. The Court of Appeal shall make a decision within 45 days which decision shall be final.*

*37. The importance of the timelines is buttressed by Section 175(5), which provides that the decision of the Review Board shall be final and binding to all the parties should the High Court or the Court of Appeal fail to make a decision within the prescribed timelines.*

*40. In my view, there is nothing in the elaborate provisions under Section 175 of the Act that goes against the Constitution or that is inimical or likely to lessen or adversely affect or undermine the constitutional underpinning of the remedy of judicial review. Nyamu, J (as he then was) in Republic vs. Public Procurement Administrative Review Board & Another Ex-Parte Selex Sistemi Integrati [2008] KLR 728 opined that the elaborate provisions and ouster clauses in the then Public Procurement and Disposal Act, 2005 'were tailored to accelerate finality of public projects.'*

11. The Court of Appeal in C. A. E039 of 2021 went further to hold that the jurisdiction of the High Court only subsisted within the 45 days prescribed in law. The moment the 45 days ended, the jurisdiction also ended. Any judgment returned outside time would be without jurisdiction and therefore a nullity, bereft of any force of law. The court adopted the words of the Supreme Court in **Samuel Macharia & Another vs. Kenya Commercial Bank Ltd and 2 others [2012] eKLR** on the question of source of jurisdiction.

12. As noted earlier, and it is common ground, the 45 days allowed under **S175(3)** of the Public Procurement and Asset Disposal Act long lapsed, this matter the Substantive Motion having been filed on 1<sup>st</sup> October, 2019. In the circumstances, and alive to the applicable law, there is no avenue through which to breathe life to this litigation. Any attempt so to do will come a cropper as any findings made would be a nullity as same shall be made without jurisdiction.

13. The unsavoury result is that the continued prosecution of this matter shall be an exercise in futility, an academic exercise of no utilitarian value to the Ex Parte applicant. In the circumstances, I proceed to dismiss the suit. As regards costs, the justice in the matter commends that each part bears its own costs.

**Dated, Signed and Delivered at Nairobi this 17<sup>th</sup> Day February, 2022**

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**A. K. NDUNG'U**

**JUDGE**