



**THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO.E191 OF 2021**

***CONSOLIDATED WITH***

**PETITION NO.227 OF 2021**

**AUTO TERMINAL JAPAN LIMITED.....PETITIONER**

**VERSUS**

**AUDITOR GENERAL .....1<sup>ST</sup> RESPONDENT**

**THE NATIONAL ASSEMBLY.....2<sup>ND</sup> RESPONDENT**

**PUBLIC PROCUREMENT**

**REGULATORY AUTHORITY.....3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**DR. CHARLES NZAI.....5<sup>TH</sup> RESPONDENT**

**DIRECTOR CRIMINAL INVESTIGATIONS.....6<sup>TH</sup> RESPONDENT**

**RULING**

**Background of the case**

1. The Petitioner filed to this court a petition and an application both dated 27<sup>th</sup> May 2021. He filed another petition and an application both dated 28<sup>th</sup> July, 2021. The two petitions were consolidated. Both are brought pursuant to Articles 10, 23, 47, 50(1) and 229 of the Constitution of Kenya, 2010.
2. Its case as presented in the said pleadings is that, it is an international company principally based in Japan and engaged in an inspection and verification of motor vehicles in many countries. Vide an International tender No. KEBS 019/2017-2020, it applied for a tender fronted by the Kenya Bureau of Standards (KEBS) in 2017. It was among the three companies that qualified in their technical proposal, which translated into being subjected to further verification before the tender could be awarded to the successful bidder.
3. Further, vide a letter dated 10<sup>th</sup> January 2018 it was informed by KEBS that its bid was unsuccessful for failing to meet 70 maximum marks. It challenged this decision before the Public Procurement Administrative Review Board (PPARB) but the same was dismissed. Subsequently, despite being an unsuccessful bidder the Auditor General purported to audit it based on the tender documents KEBS 019/2017-2020 and without hearing it or granting it a fair chance to explain any queries, made adverse findings against it.
4. The audit report was then presented to the National Assembly vide the letter dated 31<sup>st</sup> July 2019 and received on 20<sup>th</sup> August 2019. The Committee of the National Assembly proceeded without hearing, analyzing or examining evidential thresholds on some weighty allegations against it, adopted certain findings of the Auditor General and recommended that debarment proceedings be commenced against it.
5. Consequently, the 3<sup>rd</sup> respondent's debarment committee on 1<sup>st</sup> April 2021 notified it that the debarment proceedings had been lodged

against it by the 1<sup>st</sup> and 5<sup>th</sup> respondents. This was done despite there being no request for debarment as provided for under Regulation 22 of the Public Procurement and Asset Disposal Regulations, 2020. It further proceeded to hear the debarment in a manner contrary to the Constitution and prejudicial to the petitioner.

6. The petitioner's main contention is therefore that, the Auditor General acted beyond its mandate by, conducting an audit; making findings against third parties; recommending debarment proceedings; and failing to afford it a hearing prior to the release of its audit report contrary to Articles 10(1) (a) (b) (c), 47(1), 229 (4) (5), 60 of the Constitution and Section 7 of the Public Audit Act, 2015. That the 3<sup>rd</sup> respondent denied it an opportunity to respond to any query or cross examine the 1<sup>st</sup> and 5<sup>th</sup> respondents, failed to give reasons for such denial and entertained the audit report that contravened rules of natural justice contrary to Articles 47 (1) and 50(1) of the Constitution and Section 4 of the FAA Act. Further that the 2<sup>nd</sup> respondent considered the report outside the constitutional timelines contrary to Article 229(8) of the Constitution.

7. In **Pet.297/2021** the petitioner is challenging the Director Criminal Investigation's report (ECCU Inquiry file No.119/2020 being a request for investigation on fraudulent practice. The petitioner argues that it was not given any opportunity to respond to the Director Criminal Investigation's queries and investigations. This it claims violated its right to fair trial/hearing.

8. The Director Criminal Investigation and Attorney General filed a detailed replying affidavit by Chief Inspector Peace M. Maithya. Another replying affidavit was filed on behalf of the 3<sup>rd</sup> respondent by one Pauline Opiyo and sworn on 23<sup>rd</sup> June, 2021.

9. The 5<sup>th</sup> respondent raised a preliminary objection orally on 2nd December 2021 founded on Section 8 of the Fair Administrative Actions Act (FAA Act). It questioned this court's jurisdiction to continue hearing the matter whereas the statutory deadline to hear and determine matters challenging allegations of infraction of Article 47 had been set at ninety (90) days from the date of filing.

10. The other respondents supported the preliminary objection. Subsequently, the petitioner, 4<sup>th</sup> & 5<sup>th</sup> respondents filed their submissions in relation thereto. Parties further highlighted their submissions on 31<sup>st</sup> December 2021.

#### **The 4<sup>th</sup> respondent's submissions in support of the preliminary objection**

11. The 4<sup>th</sup> respondent filed submissions dated 3<sup>rd</sup> December 2021, through learned counsel Mr. Thande Kuria. He argues that the petitioner's case is based on alleged violation of Article 47 of the Constitution by the respondents, which is also evidenced in prayers (a) (b) and (c) of the petition. He submitted that the FAA Act gives effect to Article 47 of the Constitution and for connected purposes. Further, Section 8 therein is couched in mandatory terms that an application for the review of an administrative action or an appeal under the said Act shall be determined within ninety days of filing the application. Accordingly, the petition having been filed on 27<sup>th</sup> May, 2021, and founded on allegations of violations of Article 47 of the Constitution ought to have been determined on or before 27<sup>th</sup> August 2021.

12. Thus he contends that the jurisdiction of this court expired by operation of law and any consideration of the petition is a nullity. Counsel relied on the cases of **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR** and **In the matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application No. 2 of 2011** to support his argument.

13. He further submitted that the allegation that the 1<sup>st</sup> respondent exceeded its jurisdiction in conducting the special audit report and that Parliament considered and prepared a report adopting the recommendation of the Auditor General outside the period contemplated under Article 229(8) of the Constitution was also subject to Section 8 of the FAA Act. This is by dint of Section 7(2) of the said Act and cannot be determined by this Court. Relying on **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989]** counsel argued that the jurisdiction of this court has therefore lapsed by effluxion of time and provisions of statute and it must down its tools.

#### **5<sup>th</sup> respondent's submissions**

14. The 5<sup>th</sup> respondent's submissions are dated 6<sup>th</sup> December, 2021 and were filed by Sigano and Omollo LLP advocates. Counsel has raised similar issues on the adherence to timelines as submitted by Mr. Thande Kuria for the 4<sup>th</sup> respondent. In support of this argument he cites the cases of:

(i) **Arprim Consultants v Parliamentary Service Commission & Another, Public Procurement Administrative Review Board Nairobi Civil Appeal No. E 039 of 2021 ;**

(ii) **Gerald Iha Thoya v Chiriba Daniel Chai & another [2018] eKLR;**

(iii) **Martha Wangari Karua v Independent Electoral and Boundaries Commission & 3 others [2019] eKLR.**

The 1<sup>st</sup> respondent supports the preliminary objection.

#### **Petitioner's response to the 4<sup>th</sup> and 5<sup>th</sup> respondents' submissions**

15. The petitioner filed submissions dated 7<sup>th</sup> January 2022 through James Oketch & Co. advocates on even date. Counsel argued that its petition and application are predicated upon the breach of the petitioner's constitutional rights by the respondents. Further, that contrary to the respondents' assertions on the applicability of section 8 of the Fair Administrative Actions Act (FAA) to its petition and application, it

has neither filed an application for Judicial Review nor an appeal before the High Court to warrant its application/import herein.

16. Counsel further maintained that the petitioner was in court to seek redress for having been condemned by the respondents unheard. Further, its application is brought under Article 50 of the Constitution and at paragraph 57 of the petition, it had specifically pleaded violation of its rights to hearing under Article 50(1) of the Constitution which was affected by the administrative actions of the respondents. In any event, it argues that nothing precluded it from relying on other statutes to propagate the extent to which its right to fair hearing had been violated.

17. On the proposition that a case is only an authority for what it decides, counsel submits that the authorities relied on by the respondents are inapplicable and entirely distinguishable from the facts and circumstances of the petition and application herein. He relied on the following authorities in support of his argument:

(i) *Bhavnagar University v. Palitana Sugar Mills Pvt Ltd (2003) 2 SC (para 59)*;

(ii) *State of Orissa vs. Sudhansu Sekhar Misra MANU/SC/0047/1967* as cited by Odunga J. in *Humphrey Mutegi Burini & 9 others v Chief of the Kenya Defence & another [2017] eKLR*

(iii) *Judicial Review Application No. 102 of 2018 in Republic v Kenya Revenue Authority Exparte Stanley Mombo Amuti [2018] eKLR.*

18. The petitioner maintained during the oral submissions that the delay in hearing and determining the petition and application was not of its own doing; rather it was occasioned by the many applications filed by the 5<sup>th</sup> respondent. It further argued that the FAA Act could not apply in isolation of other provisions of the law and affirmed that Articles 22, 23 & 165 of the Constitution cloth this court with jurisdiction.

### **Analysis and determination**

19. Having carefully considered the parties pleadings, submissions and cited cases and the law I find one issue falling for determination which is:

***i. Whether this court has jurisdiction to hear and determine this matter by dint of section 8 of the FAA Act and any provision of the law.***

20. The 5<sup>th</sup> respondent argued that the petitioner's case as set out in the petition and notice of motion are entirely based on Article 47(1) of the Constitution as read with Section 4 of the FAA Act. He also argues that the petitioner has sought to review the administrative actions by the respondents by heavily relying on the said provisions of the Law. Thus, such an application should have been heard and determined within 90 days of filing the same.

21. The 4<sup>th</sup> respondent holds the same position. Counsel further argued that the FAA Act gives effect to Article 47 (1) of the Constitution and that Section 8 of the said Act is explicit that an application for review of an administrative action or appeal shall be determined within 90 days of filing the application. Counsel submitted that just as the petitioner alleges that the processes by the 1<sup>st</sup> – 3<sup>rd</sup> respondents was conducted out of time they too submit that the matter cannot be heard by the court out of time by virtue of Section 8 of the FAA Act.

22. In opposing the preliminary objection, the petitioner argues that its case is on breach of its constitutional rights. Further that the FAA Act is not applicable to its special circumstances which neither fall under Judicial Review or appeal. It dismissed the cases relied on by the respondents as being inapplicable to this case.

23. The case of *Owners of Motor vessel Lillian S v. Caltex Oil (Kenya) Limited [1989] KLR1* is the locus classicus case on jurisdiction. The court therein stated that;

***“... 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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority:***

***“By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited...”***

24. Similarly, in *Samuel Kamau Macharia & Another Vs Kenya Commercial Bank Limited and 2 Others (2010) eKLR*, the Court held 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...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”.***

25. From the pleadings the petitioner was involved in some International tendering vide tender No. KEBS 019/2017-2020 which was

unsuccessful. Later the Auditor General did an audit on the petitioner and the same was presented to the National Assembly whose committee considered it and recommended debarment proceedings against it. It claims that all this was done without its participation. It however, admits to having challenged the decision of its unsuccessful bid in the tendering exercise. The public procurement administrative review board (DPARB) dismissed it.

**26. Section 7 of the Fair Administrative Actions Act** provides for the institution of proceedings for review against an administrative action. **Section 8 of the said Act** provides for the timelines within which to hear and determine an application for the review of an administrative action or appeal. The petitioner has invoked the jurisdiction of this court not for review of an administrative action or an appeal but for a declaration of violation of fundamental rights and freedoms. Its case as set out in the petitions and applications is one on breach of fundamental rights and freedoms.

**27.** Although it has heavily relied on Article 47(1) of the Constitution, it has also relied on other provisions of the Constitution such as Articles 50(1), 10 and 229 of the Constitution to buttress its case. Therefore the matter having been filed on the basis of violation of the rights to fair trial premised on Articles 10, 50(1) and 229 of the Constitution it cannot be confined to the timelines set out in section 8 of the FAA Act.

**28.** I have however, further scrutinized the pleadings and record herein and note that when the original Petition No.191/2021 was filed, the petitioner filed a notice of motion dated 27.5.2021, seeking conservatory orders. The record shows that an exparte conservatory order suspending debarment proceedings by the 1<sup>st</sup> and 5<sup>th</sup> respondents was issued on 2<sup>nd</sup> June, 2021 by Justice Korir pending the hearing of the said notice of motion. The said notice of motion has never been heard to date.

**29.** Debarment is a creature of section 41 of the Public Procurement and Asset Disposal Act. The Act was enacted to give effect to Article 227 of the Constitution; to provide procedures for efficient public procurement and for assets disposal by public entities; and for connected purposes. There is no dispute that the petitioner was involved in tendering which is the basis of the claim herein. Section 41 of the Act provides for instances when one may be debarred. It provides thus:

#### **Debarment**

**(1) The Board shall debar a person from participating in procurement or asset disposal proceedings on the ground that the person—**

**(a) has committed an offence under this Act;**

**(b) has committed an offence relating to procurement under any other Act or Law of Kenya or any other jurisdiction;**

**(c) has breached a contract for a procurement by a public entity including poor performance;**

**(d) has, in procurement or asset disposal proceedings, given false information about his or her qualifications;**

**(e) has refused to enter into a written contract as required under section 135 of this Act;**

**(f) has breached a code of ethics issued by the Authority pursuant to section 181 of this Act or the code of ethics of the relevant profession regulated by an Act of Parliament;**

**(g) has defaulted on his or her tax obligations;**

**(h) is guilty of corrupt or fraudulent practices; or**

**(i) is guilty of a serious violation of fair employment laws and practices.**

**(2) Without limiting the generality of subsection (1) the Board may debar a person from participating in any procurement process if that person—**

**(a) has breached the requirements of the tender securing declaration form in the tender documents; or**

**(b) has not performed according to professionally regulated procedures.**

**(3) The Authority, may also debar a person from participating in procurement or asset disposal proceedings—**

**(a) on the recommendation of a law enforcement organ with an investigative mandate;**

**(b) on grounds prescribed by the Authority in Regulations.**

**(4) A debarment under this section shall be for a specified period of time of not less than three years.**

***(5) The procedure for debarment shall be prescribed by Regulations***

30. The procedure for debarment is prescribed by Public Procurement and Asset Disposal Regulations 2020 and in particular Regulation No.22 which provides:

***22. (1) A request for debarment may be initiated—***

***(a) by the accounting officer of a procuring entity, or any other***

***person with knowledge of facts that may support one or***

***more grounds for debarment;***

***(b) by the Director-General on his or her own motion based on***

***findings from investigations, inspections, or reviews; or***

***(c) on the recommendation of a law enforcement agency with an investigative mandate.***

31. Upon notification of the process for debarment the petitioner rushed to court for conservatory orders. No debarment proceedings had taken place. That was premature because the Auditor General has the mandate to carry out such audits. The moment for him to challenge the report would have been during the debarment proceedings. The process is well set out under Regulations 22(5) which provides:

***For purposes of section 41(5) of the Act and this regulation, debarment procedures shall be as follows—***

***(a) upon receipt of a request for debarment, the Board shall analyze the case within thirty days to determine whether there is a prima facie case for debarment;***

***(b) if the analysis establishes a prima facie case for debarment, the Board shall issue a notice of intended debarment to the party, who shall be the subject of the debarment proceedings requiring him or her to file a written response with the Board;***

***(c) the notice of intended debarment issued under paragraph (b) shall contain the grounds of debarment, a brief statement of the facts in support of debarment and the consequences that may arise from the debarment;***

***(d) the respondent shall within fourteen days of receipt of a notice of intended debarment, file a written response with the Board;***

***(e) where the facts of the intended debarment are contested, the debarment committee shall within twenty-one days of receipt of the response in paragraph (d) hold a debarment hearing to determine the disputed facts;***

***(f) a seven (7) days' notice shall be given to the parties to appear before the debarment committee;***

***(g) the debarment committee shall prepare a report of its findings and recommendations, and make a determination on the request for debarment within thirty days from the date of hearing;***

***(h) where the request for debarment is approved, such debarment shall be for a period of not less than three years;***

***(i) the decision to debar a person shall promptly be communicated to the parties involved in the debarment proceedings;***

***(j) after the expiry of twenty-one days from the date of the debarment decision, the Authority shall publish the details of the person debarred and the corresponding period of debarment;***

***(k) the Authority shall forward the details of the debarred person to the Cabinet Secretary for gazette.***

32. What the petitioner wants this court to do is what should be done by the 3<sup>rd</sup> respondent's board in the first instance. Based on the above observations I do find that this matter was prematurely filed before this court. The petitioner should appear before the Public Procurement Regulatory Authority Board for the debarment proceedings where it will be given an opportunity to contest the process and any other issues. On those reasons, I hereby strike out and dismiss **petition No.E191/2021** dated 27<sup>th</sup> May, 2021 together with the notice of motion of even date. The conservatory orders issued on 2<sup>nd</sup> June, 2021 are hereby vacated.

33. That leaves this court with **Petition No.297/2021** against the DCI and the Attorney General where a response has already been filed by the respondents. The same will be mentioned on 17<sup>th</sup> May, 2022 for directions on the hearing.

**DELIVERED VIRTUALLY, SIGNED AND DATED THIS 24<sup>TH</sup> DAY OF MARCH, 2022 IN OPEN COURT AT MILIMANI, NAIROBI.**

**H. I. Ong'udi**

**Judge of the High Court**