



**Jacob (t/a Ssebo Intel Co. Auctioneer) v Odhiambo (Civil Appeal
E085 of 2021) [2022] KEHC 10435 (KLR) (23 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 10435 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL E085 OF 2021
RPV WENDOH, J
JUNE 23, 2022**

BETWEEN

KENNEDY OOKO JACOB APPELLANT

T/A SSEBO INTEL CO. AUCTIONEER

AND

EDWARD OKELLO ODHIAMBO RESPONDENT

*(An appeal from the Order of the Honourable SPM M. J. Munguti
delivered on 15/9/2021 in Migori CMCC NO. 128 of 2020)*

JUDGMENT

1. Kennedy Ooko Jacob T/A Ssebo Intel Co Auctioneer (the appellant) filed this appeal against the order of the Hon MJ Munguti (SPM) dated and delivered on 15/9/2021.
2. The grounds of appeal dated 4/10/2021 are in reference to the preliminary objection dated 27/5/2021 which was dismissed by the trial court. The grounds mainly fault the trial Magistrate for failing to appreciate the various provisions of the *Public Procurement and Asset Disposal Act* No 33 of 2015 (PPADA) and misdirecting himself that he had jurisdiction to hear the matter in the absence of the enabling statutory and constitutional provisions.
3. A brief history of the case is that by a plaint dated 10/8/2020, Edward Okello Odhiambo (respondent) sued the appellant for the alleged breach of the law resulting to the public auction which took place on various dates between 3/8/2020 - 7/8/2020. It was the respondent's case that on 3/8/2020, he identified three motor vehicles GKW 841 Isuzu Trooper; KAW 776T Toyota Fortuner (though advertised as Toyota Vigo) and GKA 035H Toyota Hilux 2.8D. He averred that he paid a bidding fee of Kshs 20,000 and was issued with bid no M/V/T/026 and a receipt thereof. On this particular date, the respondent alleged that all the bidders were directed to break for lunch but upon returning



to continue with the bidding all the vehicles had been sold. This was contrary to rule 191 (2) & (3) of the PPADA Regulations 2020.

4. It was further pleaded that on 4/8/2020, another bidding was done for three vehicles GKA 137E Mitsubishi L200 Pick up, GKT Toyota Hilux 2.6 and GKA 549B Toyota Hilux N 167. The respondent successfully bided for GKA 549B Toyota Hilux N 167 at Kshs. 60,000/= and he was issued with a card of serial no. 093 and directed to pay to the Migori County KCB Account. The respondent made the payments but the appellant unreasonably refused to provide him with the certificate of clearance and instead re-auctioned the same vehicle after another bidder emerged without recalling the initial card no. 093. The respondent stated that he once again emerged the highest bidder at Kshs. 999,000/=but the appellant refused to issue him with a card to facilitate the payments at the bank.
5. The respondent also pleaded that on account of him being the highest bidder, he towed the said vehicle to Migori on 5/8/2020 but on 9/8/2020 the appellant in the company of a break down, broke into his home and towed the vehicle and destroyed some of his cars.
6. The respondent prayed that a declaration be made that he is the lawful highest bidder of Motor Vehicle Registration Number GKA 549B Toyota Hilux N167, Pick up, an order compelling the appellant to issue him with a clearance certificate and facilitate the transfer of ownership of motor vehicle registration number GK A 549B Toyota Hilux N167, Pick up, a restraining order against the appellant and costs.
7. The appellant together with two other parties raised a notice of preliminary objection dated 27/5/2021. The objection raised a point of law on the jurisdiction of the court pursuant to the provisions of sections 27,28,167,168,169,170,171,172,173,174 and 175 of the Public Procurement and Asset Disposal Act No 33 of 2015.
8. The learned trial Magistrate delivered his ruling on 15/9/2021 dismissing the appellants' objection with costs which gave rise to this appeal.
9. The appeal was canvassed by way of written submissions and both parties complied.
10. The appellant submitted that in line with the Constitution of Kenya, 2010, the legislators enacted the PPADA and it created the Public Procurement Administrative Board (Board) whose mandate is to handle all issues arising out of Public Procurement and Asset Disposal process. It was submitted that the High Court was given the mandate to handle appeals by way of Judicial Review with strict timelines.
11. On the jurisdiction of the subordinate court, it was submitted that the wording and context must be as clear as possible to subordinate courts which derive their jurisdiction from statute, that is the Magistrate's Court Act and not by implication. The appellant relied on the case of *Joshua Sembei Mutua vs Attorney General & 2 others* Civil Appeal No. 93 of 2015.
12. The appellant narrowed down on the provisions of section 167 of the PPADA in which the word "may" has been used. It was submitted that "what broke the camel's back" is the alleged wrong interpretation and conclusion nor the subordinate court arrived at in finding that it had jurisdiction. It was submitted that the said section should be contrasted with section 175 of the PPADA wherein the word "may" is used. The appellant stated that the word is used as expressing a recourse available that one can choose to pursue or not but not that it can be substituted with the Magistrate's court. It was stated that in situations where the jurisdiction of the court is not clearly spelt, the default court would be the High Court which enjoys unlimited jurisdiction and thus in the instant case, it was wrong for the Magistrate's court to arrogate itself jurisdiction.



13. The respondent submitted on his status in the present dispute citing the provisions of section 167 (1) of the PPADA. It was submitted that by dint of section 167 (1) provisions of the PPADA apply to a candidate or a tenderer but the respondent in this instance was a bidder in the advertised auction while the Migori County Government was the procuring entity who sought the Auctioneering services of the Auctioneers, the appellant pursuant to a tender advertisement. Counsel urged that since the section 167 (1) applies to tenders and candidates, the Respondent does not in that category but under section 174 PPADA.
14. On the jurisdiction of the subordinate court, the respondent submitted that there is no express provision which ousts the jurisdiction of the subordinate court. It was further submitted that sections 167 (1) and 174 of the PPADA created room for seeking legal remedy in other fora including the subordinate courts. Reliance was placed on the cases of *Galsaracho Teteya & 5 others vs Kenya Wildlife Service* Civil Appeal No. 2 of 2020 and *Kenya Wildlife Service vs Karura Bulle Kussen Galgallo* Meru HCCA No. 78 of 2018.
15. I have considered the grounds of appeal, the entire record of appeal and the rival submissions. The main issue for determination is whether the trial court has jurisdiction to determine the suit before it.
16. This being the first appellate court, it has a duty to re-evaluate and analyse all the evidence tendered in the lower court and arrive at its own conclusions but bearing in mind that it neither saw nor heard the witnesses testify. It has to establish whether the decision of the lower court was well founded. See the decision in *Selle & another vs Associated Motorboat Co. Ltd* (1968) EA 123.
17. It is also settled that an appellate court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or on a misapprehension of it or on demonstrably wrong principles not supported by evidence or on wrong principles of the law. This was the finding of the Court of Appeal in *Mbogua Kiruga v Mugecha Kiruga & another* (1988) eKLR.
18. The locus classicus case on jurisdiction is the case of *Owners of the Motor Vessel "Lillian S" -Vs- Caltex Oil (Kenya) Ltd* (1989) KLR 1, where Nyarangi J held that at the earliest opportunity, the issue of jurisdiction ought to be raised and the court seized with the matter should make a decision on the issue right away. Jurisdiction is everything and without it a court should not make any step.
19. Jurisdiction is conferred upon a court, tribunal, person or authority either by *the Constitution* or statute or both . It is trite law that once that jurisdiction is conferred, it must be exercised in accordance with that law. In the case of *Samuel Kamau Macharia & Another -vs- Kenya Commercial Bank Limited & 2 others* (2012) eKLR, the Supreme Court 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...”
20. The appellant raised an objection that the lower court is bereft of jurisdiction to handle the suit before it on grounds that several provisions of the law in the *Public Procurement and Asset Disposal Act* oust its jurisdiction but the respondent is of contrary view..
21. The contentious provision which both parties have submitted on its interpretation is section 167 (1) of the PPADA which provides as follows:-

“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 a manner as may be prescribed.”

22. The *Public Procurement and Disposal Act*, No. 3 of 2015 was enacted by Parliament to give effect to article 227 of *the Constitution*. section 4 of the PPADA provides that it is applicable to all state organs and public entities and with respect to procurement planning and processing, inventory and asset management, disposal of assets and contract management.
23. Section 27 of the PPADA establishes the Public Procurement and Administrative Review Board (Board) whose functions are outlined under sections 28 as follows:-
 - 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, Regulation or any other written law.
24. The question then becomes who are the parties who can approach the Board to seek review? Section 170 of the PPADA provides for the following category of persons as follows: -
 - a) The person who requested the review;
 - b) The accounting officer of a procuring entity;
 - c) The tenderer notified as successful by the procuring entity and
 - d) Such other persons as the Review Board may determine.
25. One of the ways a procuring entity may dispose of its assets is through a public auction as per the provisions of section 165 of the Ppada. Disputes arising from public auctions can also be determined by the Board as per section 28 of the PPADA.
26. The suit in the lower court is centred around the public auctions which took place between 3/8/2020 - 9/8/2020 and the substratum thereof are the alleged violations, non - compliance with the processes and procedures which are laid out in the PPADA. Where there are such breaches, the first point of call to seek remedy is through the administrative review as per section 167 (1) of the PPADA. Section 27 of PPADA establishes the Public Procurement Administrative Review Board while section 28 sets out the functions of the Review Board. They provide:-

“Section 27 Establishment of the Public Procurement Administrative Review Board

- (1) There shall be a central independent procurement appeals review board to be known as the Public Procurement Administrative Review Board as an unincorporated Board.
- (2) The Review Board shall ensure a reasonable access to its services in all parts of the Republic, as far as it is appropriate to do so.

Section 28 Functions and powers of the Review Board

- (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.
 - (2) In performance of its functions under subsection (1) 9a) of this section, the Review Board shall have powers to develop rules and procedures to be gazetted by the Cabinet Secretary.”
- 27. The instructing client was the Migori County Government which is a state organ governed by the procedure under the PPADA when carrying out its procurement and disposal of assets processes. The appellant was sub - contracted to perform the auction for Migori County Government property and therefore it was bound for all intent and purposes, to observe the law and regulations under the PPADA.
- 28. The avenue which one should seek the administrative review has been clearly provided for under Section 2 (1) of the PPADA as follows: -

“ appeal - means a request for administrative review or complaint filed with the Appeals Review Board pursuant to Section 167 of this Act.”
- 29. Therefore, it is not correct to contend that Section 167 (1) of the PPADA does not mention which fora an aggrieved party should seek its remedy. Section 2(1) of the PPADA states that the administrative review is the one filed with the Appeals Review Boards and not any other fora. The word ‘may’ as used, does not connote that the aggrieved party can seek remedy in any fora but it means the aggrieved party can choose whether or not to pursue his claim for the alleged breach. The Administrative Review Board has the powers and mandate to entertain any allegations of breach by the procuring entity under the PPADA and its regulations.
- 30. It is therefore my opinion that the first point of call in the event of breach, is the Administrative Review Board. The suit filed before the lower court was premature. With profound respect, the Magistrate had no jurisdiction to determine the matter. It is important that a litigant should first exhaust the available statutory remedies before invoking the court’s jurisdiction. See the decision of the Court of Appeal in Geoffrey Muthinja Kabiru & 2 others Vs. Samuel Munga Henry & 1756 others (2015) eKLR and See Speaker of the National Assembly v James Njenga Karume (2008) 1KLR 425.
- 31. The respondent raised the issue that he was neither a tenderer nor a candidate and therefore he cannot be bound by the PPADA. First it is clear from a reading of section 28 that the Board deals with matters relating to asset disposal. Section 4 of the Act provides that the Act applies to all State organs and public entities with respect to
 - a) Procurement planning
 - b) Procurement processing
 - c) Inventory and asset management
 - d) Disposal of assets and
 - e) Contract management.”
- 32. Migori County Government is a government entity and disposal of any of its assets is therefore governed by this Act.
- 33. Under section 170, the PPADA can determine who can be heard before it. Further, the Regulations to the PPADA, and in particular, Regulation 191 gives an elaborate procedure on what happens in a



public auction and the conduct between the auctioneer and the bidders. The respondent cannot run away from that. He must approach the proper forum for disputes resolution. Law is meant to provide order and predictability. Parties cannot be seen to choose whatever forum they wish.

From the foregoing, these are the final orders: -

- a) The appeal is merited.
- b) The notice of preliminary objection dated 27/5/2021 is upheld.
- c) The Ruling and order of 15/9/2021 is hereby set aside.
- d) Migori CMCC 128 of 2020 is struck out.
- e) Costs of this appeal and the lower court suit to the applicant

DATED, DELIVERED AND SIGNED AT MIGORI THIS 23RD DAY OF JUNE, 2022.

R. WENDOH

JUDGE

Judgment delivered in presence of:-

Ms. Okota for Appellant

Mr. Kanyangi for Respondent

Nyauke - Court Assistant

