



**Counternine Holdings Ltd v Kirui & 3 others (Civil Suit
E003 of 2022) [2022] KEHC 12524 (KLR) (29 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 12524 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CIVIL SUIT E003 OF 2022**

**RL KORIR, J
JULY 29, 2022**

BETWEEN

COUNTERNINE HOLDINGS LTD PLAINTIFF

AND

SAMUEL KIRUI 1ST DEFENDANT

JOB NGETICH TOWETT 2ND DEFENDANT

COUNTY GOVERNMENT OF BOMET 3RD DEFENDANT

ALEXANDER CHIRCHIR 4TH DEFENDANT

RULING

1. The subject of this Ruling is the Preliminary Objection filed by the 4 Defendants. The same was dated 20th April 2022 and it raised the following grounds: -
 - i. That the suit herein is fatally defective since the dispute emanates from a procurement process and this Honorable Court had no jurisdiction in the first instance to entertain this matter.
 - ii. That the proper body to address the dispute in question is the Public Procurement Administrative Review Board established under Section 27 and with clear functions under Section 28 of the *Public Procurement and Asset Disposal Act*, 2015.
 - iii. That the suit herein offends the clear provisions of law in particular Section 167 of the *Public Procurement and Asset Disposal Act*, 2015 on request for Review by the Review Board where the Tenderer is aggrieved by the Procurement Process and Section 178 (1) on protection from personal liability for acts done in good faith and the plaintiff has not demonstrated bad faith on part of the 1st, 2nd and 3rd Defendants.



- iv. That the procurement process is only complete upon execution of the Contract and since the same has not been executed, the Plaintiff's recourse lies squarely at the Review Board.
- v. That the suit offends the doctrine of exhaustion of remedies since the Review Board is best placed to address the dispute herein
- vi. That we pray that the suit be dismissed with costs.

Applicants/defendants Submissions

2. The Applicants submitted that the proper body to address this matter in the first instance was the Public Procurement Review Board (PBRB) established under the *Public Procurement and Asset Disposal Act*, 2015. They relied on the case of *Joseph C. Kiptoo & Another v Kericho Water And Sewerage Company* [2016] eKLR to support this submission. It was their further submission that this court lacked jurisdiction to entertain this case.
3. The Plaintiff/Respondent did not respond to the Preliminary Objection but instead chose to file Written Submissions.

The Respondent's/ Defendant's Submissions.

4. The Respondent submitted that the Preliminary Objection was not merited as it had been filed in the absence of a Defence. That this court could not give the Applicants audience as they had not complied with the civil procedure rules.
5. It was the Respondent's submission that Section 167 of the *Public Procurement and Asset Disposal Act*, 2015 clearly demonstrated the instances where the Public Procurement Administrative Review Board had jurisdiction and where the validity of the tender had lapsed, the Review Board was divest of jurisdiction to entertain such an application because the tender process had come to an end by operation of the law. That the validity of the tender was 120 days and the same had lapsed on 30th October 2021. It was its further submission that the purported cancellation was done months later on 24th January 2022. It relied on the case of Republic v Public Procurement Administrative Review Board; Consortium Of Gbm Projects Limited And Erg Insaat Ticaret Ve Sanayi A.s (interested Party); National Irrigation Board Ex Parte [2020] eKLR to support this submission.
6. It was the Respondent's submission that the Preliminary Objection was not based on a pure point of law and hence it did not meet the threshold set in the locus classicus case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696. That the Applicants have only detailed matters relating to fact rather than law whose issues require production of evidence.
7. The Respondent submitted that Section 167 of the *Public Procurement and Asset Disposal Act* used the word 'may' which meant that there was no specific provision which made it mandatory for tenderers to seek administrative review proceedings before calling the court to intervene. That the Review Board was not an exclusive entity where all complaints relating to tenders must first be presented before the board. That a person who would otherwise be locked out from invoking the provisions of the Act would not be barred from seeking an alternative remedy under other provisions of the law. It relied on the case of *Elias Mwangi Mugwe v Public Procurement Administrative Review Board & 5 Others* [2016] eKLR to support this submission.
8. It was the Respondent's submission that the value of the subject matter was Kshs 17,133,772.39 and according to Section 7 of the Magistrate's Act, the matter was to be presided over by the Chief Magistrate's Court which currently there was none in Bomet. It was its further submission that this



court had inherent jurisdiction to hear and determine this case in line with the spirit of Article 50 and 159 (2) (d) of *the Constitution*.

9. The Respondent submitted that the functions of the Public Procurement Administrative Review Board pursuant to Section 28 of the Act was to hear, review and determine tendering and asset disposal disputes and to perform any other function conferred to it by the Act. That the right to request a review to the Board was in addition to any other legal remedy available to any party and thus the Respondent had come to this court to seek remedies against the Applicants.
10. I have gone through and considered the Notice of Preliminary Objection dated 20th April 2022, the Applicants Written Submissions dated 4th July 2022 and their accompanying authorities and the Respondent's Written Submissions dated 8th July 2022 and their accompanying authorities and they raise one issue for determination:

Whether this court has jurisdiction to determine the suit

11. What constitutes a Preliminary Objection is set out in the oft cited case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696, where it was held that:

“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... a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”

12. In the case of *Oraro v Mbaja* [2005] eKLR, Ojwang J (as he then was) further explained thus: -

“A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed”.

13. The Respondent filed a suit against the Applicants where it stated that it had won a tender for the excavation of Samarek Water Pan under tender number CGB/AGRI/KCSAP/RFQ/001/2021/2022. The Respondent contended that its winning bid was Kshs 17,133,772 and at the end of the entire procurement process, it was issued with a Letter of Notification of Award dated 23rd September 2021 by the 2nd Applicant, Job Ngetich Towett.
14. The Respondent averred that the award of the Tender was terminated by a letter dated 24th January 2022 because it had not been issued with a contract during the Tender validity period. It was its further case that it had suffered loss due to the negligence of the Applicants and its prayers among others was that the 4th Applicant, the County Government of Bomet be compelled to award the contract to it.



15. The Applicants contended that the suit offended the clear provisions of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as PPAD Act). Section 167 (1) of the PPAD Act states 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”

16. Section 27 of the PPAD Act establishes the Public Procurement Administrative Board (hereinafter referred to as the Review Board). Section 28 goes ahead to list its functions as follows: -

“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”.

17. It is clear from the Pleadings on record that the 4th Defendant through its officers terminated the award of Tender number CGB/AGRI/KCSAP/RFQ/001/2021/2022 that had been awarded to the Plaintiff. This cancellation is the main dispute between the parties to the suit. This in my view amounts to a tender dispute.

18. As earlier stated, the PPAD Act is clear that a candidate or tenderer who claims to have suffered loss due to a breach of duty imposed by a procuring entity may seek administrative review at the Review Board within 14 days of the date of the alleged breach.

19. Section 175 of the PPAD Act states that: -

- “(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”.

20. This then poses the question whether this court has the requisite jurisdiction to hear and determine this matter in the first instance. Jurisdiction is defined in the Black’s Law Dictionary, 10th Edition as:

“A court’s power to decide a case or issue a decree”.

21. In the case of *Phoenix Of E.a. Assurance Company Limited v S. M. Thiga T/a Newspaper Service* [2019] eKLR, the Court of Appeal stated that: -

“It is a truism jurisdiction is everything and is what gives a court or a tribunal the power, authority and legitimacy to entertain any matter before it. What is jurisdiction?

In common English parlance, ‘Jurisdiction’ denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae”.

22. It is trite that the High Court has unlimited original jurisdiction as envisaged under Article 165 (3) (a) of *the Constitution* of Kenya. However, it is clear from the wording of Section 175 of the PPAD Act that the jurisdiction of this court is invoked upon an application for judicial review of a decision made by the Review Board. It therefore goes without saying that the Review Board has the jurisdiction of dealing with tender disputes at the first instance. In the case of *Joseph C. Kiptoo & Another v Kericho Water And Sewerage Company* [2016], Mumbi J. (as she then was) held: -

“It has been stated time and again that where an Act of Parliament provides for a mechanism for resolution of disputes, that mechanism must be strictly followed.

23. In the case of *The Speaker Of The National Assembly v Karume* [2008] 1KLR (E.P) 425, the Court of Appeal held that: -

“In our view there is considerable merit that where there is a clear procedure for the redress of any particular grievance prescribed in *the Constitution* or an Act of Parliament, the procedure should be strictly followed.

24. It is salient to note that the Preliminary Objection was not responded to. The Respondent submitted on issues that would require production of evidence and this would fall foul of the essence of a Preliminary Objection.

25. There is nothing on the record to indicate that the Respondent sought a Review at the Review Board. It is my finding that it has not exhausted the remedies available to it according to the PPAD Act. I am persuaded by the case of *Republic v Public Procurement Administrative Review Board & 2 Others Ex-parte Pelt Security Services Limited* [2018] eKLR, where Mativo J stated: -

“It has been said repeatedly that [62] The Review Board is a specialized statutory tribunal established to deal with all complains of breach of duty by the procuring entity. From



the nature of powers given to the Review Board including annulling anything done by the procurement entity and substituting its decision for that of the procuring entity that the administrative review envisaged by the Act is indeed an appeal. From its nature the Review Board is obviously better equipped than the High Court to handle disputes relating to breach of duty by procurement entity. It follows that its decision in matters within its jurisdiction should not be lightly interfered with.

An administrative functionary that is vested by statute with the power to consider and make a decision is generally best equipped by the variety of its composition, by experience, and its access to sources of relevant information and expertise to make the right decision. The Court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary”.

26. Similarly, in 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, Ong’udi J stated that: -

“When there are such breaches of the Act the first point of call is the Review Board or the Regulatory Authority, which have the mandate to deal. If a party is aggrieved with the decision made, it then moves to the High Court for review of the decision. In this case it has not been disclosed whether any decision was made by the Review Board or if that be the case, this court is wondering what decision is being challenged in the Nairobi Judicial Review Case No. E205 of 2021. The parties therein must be challenging a decision before JR Division. Which is that decision as none has been disclosed here?

What this court is trying to stress is that once a dispute resolution process has been put in place the same must be exhausted first before parties run to court”.

27. It is my finding that the Preliminary Objection dated 20th April 2022 has merit it having been based on a point of law that this court did not have the jurisdiction to hear and determine this matter in the first instance. It has not been shown to me that the plaintiff has utilised the mechanism provided in law in the first instance.
28. The upshot is that the Preliminary Objection dated 20th April 2022 is upheld. The suit is therefore struck out. I however decline to award costs to the Defendants.

RULING DELIVERED, DATED AND SIGNED AT BOMET THIS 29TH DAY OF JULY, 2022.

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R. LAGAT-KORIR

JUDGE

Ruling delivered in the presence of Ms. Chepngetich holding brief Mr. Sang for the Plaintiff, Ms. Chirchir holding brief Mr. Koech for the Defendants and Kiprotich (Court Assistant).

