Republic v Public Procurement Administrative Review Board; Inhemeter Africa Company Ltd & 3 others (Exparte); Accounting Officer, Kenya Power & Lighting Company (Interested Party) (Application E088 of 2022) [2022] KEHC 18101 (KLR) (Judicial Review) (29 July 2022) (Judgment)

Neutral citation: [2022] KEHC 18101 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

APPLICATION E088 OF 2022

J NGAAH, J

JULY 29, 2022

BETWEEN

REPUBLIC ..... APPLICANT

AND

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD ..... RESPONDENT

AND

INHEMETER AFRICA COMPANY LTD ..... EXPARTE

SMART METERS TECHNOLOGY LTD ..... EXPARTE

SHENZEN START INSTRUMENTS CO LTD ..... EXPARTE

MAGNATE VENTURES LTD ..... EXPARTE

AND

THE ACCOUNTING OFFICER, KENYA POWER & LIGHTING COMPANY ..... INTERESTED PARTY

JUDGMENT

1. The application before court is the motion dated 17 June 2022 in which the applicant seeks the orders of certiorari, mandamus and prohibition against the respondent. The prayers for these orders have been framed as follows:

    1. An order of *certiorari* be issued to remove into this honourable court for purposes of being quashed the entire decision of the Public Procurement Administrative Review Board dated and delivered on June 10, 2022 in the Request for Review Application No. 45 of 2022 between *Inhemeter Africa Company Limited, Smart Meters Technology Limited, Shenzen Star Instruments Company Limited and Magnate Ventures Limited v the Accounting Officer/CEO*, Kenya Power and Lighting Company.

    2. An order of *mandamus* be issued compelling the Public Procurement Administrative Review Board to hear the applicant's request for review on its merits being Request for Review Application No 45 of 2022 between *Inhemeter Africa Company Limited, Smart Meters Technology Limited, Shenzen Star Instruments Company Limited and Magnate Ventures Limited v The Accounting Officer/CEO, Kenya Power and Lighting Company*.

    3. An order of prohibition be issued prohibiting Kenya Power and Lighting Company from awarding the tender and/or signing any contract in respect to Tender No KPI/9A.3/RT/05/21-22 for supply and delivery of single phase, three phase, postpaid and prepaid metres."

2. The motion is stated to be brought under order 53 rule 3 of the *Civil Procedure Rules*, sections 8(2) and 9 of the *Law Reform Act* cap 26, section 175 (1) of the *Public Procurement and Asset Disposal Act* 2015, sections 7 and 11 of the *Fair Administrative Action Act*, No. 4 of 2015 and article 22, 23(3)(f) 47, 48 and 50 (1) of the *Constitution*.

3. It is based on the statutory statement dated 16 June 2022 and verifying affidavit sworn on even date. This affidavit has been sworn by William Gathecha Kabinga, who describes himself as the managing director of the 1st applicant and he has sworn the affidavit on his own behalf and on behalf of the rest of the applicants.

4. The applicant's application arises from the respondent's decision on the applicant's application for review filed under section 167(1) of the *Public Procurement and Asset Disposal Act*. The application was registered and lodged before the respondent as application No. 45 of 2022.

5. In the application before the respondent, the applicants sought to annul a tender floated by the respondent more particularly described as "Tender No. KPI/9A.3/RT/05/21-22 for supply and delivery of single phase, three phase, postpaid and prepaid metres" on the ground that the requirements in the tender document were unreasonable and discriminatory against local suppliers who included the applicant. According to them, the conditions set out in the tender document were calculated to edge out local manufacturers and assemblers who have hitherto been supplying energy metres to the respondent.

6. Accordingly, the applicant sought to have the procuring entity, which is the interested party in these proceedings, compelled to restrict the tender to local manufacturers and assemblers to the exclusion of international bidders.

7. In the impugned decision, which is the subject of these proceedings, the respondent declined jurisdiction for the reasons that the request for review was filed out of time and therefore contrary to the provisions of section 167(1) of the Act.

8. It is not easy to tell from the statement the grounds upon which this decision is impugned because what the applicants have done is, more or less, to rehash the statement of facts and the depositions made in the verifying affidavit. They only mentioned the grounds of illegality, irrationality and procedural impropriety in passing so that it is not possible to tell which of the facts they have outlined fall under any of the distinct heads of judicial review. In other words, they have left it to court to sift the contentions and make up its mind as to which of these conditions fall under the grounds of illegality, irrationality or procedural impropriety.

9. It has been stated that this kind of pleading in judicial review proceedings is deprecated and would not endear the applicant to the court.

10. While reiterating the importance of stating grounds for judicial review in concise and precise terms, Michael Fordham in his book, *Judicial Review Handbook*, at Paragraph 34.1 states as follows:

> "The need to identify and express accurately the possible grounds for judicial review is not simply a matter of analytical nicety. It is one of practical necessity. The provisions of the new order require the accurate identification of (a) potentially applicable grounds and (b) the time at which they arose. Given the frequent presence of multiple targets, the elusive nature of certain grounds, their disarming interrelationship, and the understandable fear of missed opportunity, it is easy to see why public lawyers may feel tempted to 'throw everything' including grounds which are dangerously close to the inconceivable. This approach is unlikely to endear them to the court."

11. The 'new order' referred to in this passage is order 53 of the *Rules of the Supreme Court of England* whose provisions are more or less in *pari materia* with our own order 53 of the *Civil Procedure Rules,2010* . The point is, however, clear that courts will not entertain applications where grounds have not been identified and accurately stated. Stating the grounds in precise terms is not, as it were, a matter of analytical nicety but it is a practical necessity.

12. But even if the applicants were to be given the benefit of doubt and assume that they seek to impeach the decision on all or any of the traditional grounds for judicial review, they would not go very far. I say so because it is apparent from the record and it is not in dispute the tender document in which the conditions that have been faulted were prescribed was brought to the attention of the applicants on 15 March 2022. Under section 167(1) of the *Public Procurement Act*, this is the date of the alleged breach and for purposes of computation of time within which the applicant ought to have filed their request for review, this is the date the clock started ticking. Accordingly, they ought to have filed the application for review by 30 March 2022.

13.

> Section 167(1) of the Act reads as follows;

167. Request for a review

(1) 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 manner as may be prescribed.

14. In its decision, the respondent considered this provision of the law and several decisions that have been rendered by this court on its interpretation including Judicial Review Miscellaneous Application No E064 of 2021 *Republic v Public Procurement Administrative Review Board* and Judicial Review Application No 2 of 2019 *Extreme Engineering Services Limited v Public Procurement Administrative Review Board & another*.

15. The two decisions are in agreement that, according to this provision of the law, there are two instances when time starts to run for purposes of filing a request for review with the respondent; these are, first, the date of notification of the award upon conclusion of the tender process or, second, the date of occurrence of the alleged breach, at any stage of the procurement process.

16. The latter decision went further to state that a request for review ought to be filed within 14 days from the date the aggrieved party learns of the breach complained of.

17. The applicant's case largely revolves around the interpretation given to section 167 (1) of the *Public Procurement Act* by the respondent and, in the applicant's view, the respondent misconstrued this particular provision of the law. This can easily be discerned from some of the paragraphs contained in the statutory statement as grounds upon which the application is based. Sample these:

"18. That as a consequence, the respondent narrowly and restrictively interpreted section 167 of the *PPADA* on the meaning of a breach complaint of to find that the applicants complained of breaches which are of a continuing in nature and creates fresh causes of action todate since the offending clauses are still maintained in the tender documents prior to its closing date.

19. That in interpreting section 167(1) in a narrow and restrictive (sic) violates the principles of openness in the tendering process and thus unconstitutional as it restrict (sic) access to justice on continuing breach by the procuring entity without affording an opportunity to the public to participate in the judicial proceedings arising therefrom.

22. That the applicant avers that the in the circumstances the respondent gravely misconstrued the scope of its own powers as conferred by section 173 of the *PPADA*, unlawfully failed to exercise its jurisdiction under the Act and violated the applicant's legitimate expectation that the respondent would exercise its lawful jurisdiction and hear the applicant on the merits of its request for review."

18. If the applicants are seeking this Court's opinion on the interpretation of section 167 (1) of the *Public Procurement and Asset Disposal Act*, different from that which was given by the respondent, they are

in essence appealing against the respondent's decision although the application is couched as a judicial review application.

19. I wouldn't have any problem with the respondent's interpretation of this provision of the law if I was sitting as an appellate court because I am of the humble view that if it was the intention of the legislature that a party aggrieved by any breach in the procurement process is at liberty to lodge the request for review at any time the breach obtains, it would have stated so. However, I am not exercising appellate jurisdiction and all I can say is that in a judicial review application, the court is not entitled to substitute its own decision on any particular issue, irrespective of whether legal or factual, for that of a subordinate court or tribunal, as the case may be. This is because, in exercise of its jurisdiction as a judicial review court, the court does not thereby assume appellate jurisdiction; all it would be concerned with is the process by which the impugned decision was arrived at. Unless the interpretation given to a particular legal provision in issue is glaringly erroneous leading, inevitably, to an equally erroneous decision, there would be no basis for the court's intervention and interference with the impugned decision.

20. This point was aptly expressed by the Court of Appeal in *OJSC Power Machines Limited, TransCentury Limited, and Civicon Limited (Consortium) v Public Procurement Administrative Review Board Kenya & 2 others* [2017] eKLR Civil Appeal No. 28 of 2016 where it was stated as follows:

> "Save for a limited scope, which we shall return to later, the court, considering a judicial review application, must never consider its role as appellate court and must avoid any temptation to go into the substance of the impugned decision itself or to ask questions, whether there was or there was no sufficient evidence to support the decision of the public body concerned. It is not for the court or individual judges to substitute their opinion for that of the public body constituted by law to decide the matter in question. See *Republic v Kenya Revenue Authority ex parte Yaya Towers Limited* (2008) Misc Civil Appl No 374 of 2006. In judicial review proceedings, the mere fact that the public body's decision was based on insufficient evidence, or on misapplication of evidence, cannot be a ground granting judicial review remedies. Whether that decision was right or not, the affected party ought to challenge it on appeal. In reaching its determination, it must, however, be recognized that a tribunal or statutory body or authority has jurisdiction to err and the mere fact that in the course of its inquiry it errs on the merits is not a ground for quashing the decision by way of judicial review as opposed to an appeal. It is only an appellate tribunal which is empowered and in fact enjoined in cases of the first appeal to re-evaluate the evidence presented at the first instance and arrive at its own decision on facts. Whereas a decision may properly be overturned on an appeal, it does not necessarily qualify as a candidate for juridical review. See *East African Railways Corp v Anthony Sefu Far-Es-Salaam* (1973) EA 327."

21. In short, a judicial review court has no jurisdiction to substitute its own opinion for that of a tribunal. It has been held that it is not part of the purpose for judicial review to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question (see Lord Hailsham in *Chief Constable of the North Wales Police v Evans* (1982) 1 WLR 1155 at 1160F).

22. Again, in *R v Entry Clearance Officer, Bombay ex p Amin* (1983) 818 at 829 (B-C) per Lord Fraser it was held that judicial review is entirely different from an ordinary appeal. It is made effective by the court quashing an administrative decision without substituting its own decision, and it is to be contrasted with an appeal where the appellate tribunal substitutes its own decision on the merits for that of the administrative officer.

23. The same point was emphasised in *Chief Constable of North Wales Police v Evans* (*supra*) where Lord Brightman said at page 1173F and 1174G that:

> "Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power...Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made."

Lord Hailsham stated in the same case that:

> "The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court." At page 1161A.

24. On his part Lord Roskil said in *R v Inland Revenue Commissioners ex parte National Federation of Self-Employed and Small Businesses Ltd* 1982(AC) 617 at 633C that:

> "The court must not cross that boundary between administration whether good or bad which is lawful and what is unlawful performance of a statutory duty."

25. These decisions point to the conclusion that to the extent that the applicants want this Honourable Court to substitute its own decision for that of the respondent, their application is misconceived.

26. At any rate, there is no proof that the applicant's decision is tainted by illegality, irrationality or procedural impropriety. In other words, I am not persuaded that in coming to the decision it made, the respondent did not understand correctly the law that regulates its decision-making power and that it failed to give effect to it. I cannot also say that the decision is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Finally, there is no evidence of procedural unfairness. (See *Council of Civil Service Unions v Minister for the Civil Service* (1985) AC 374,410)

27. Failure by applicants to comply with the law and lodge their request for review within the prescribed timelines cannot be attributed to the respondent. It was a fault of the applicants' own making. In the ultimate, I do not find any merit in the applicant's application and it is hereby dismissed. I make no orders as to costs. It is so ordered.

SIGNED, DATED AND DELIVERED ON 29 JULY 2022.

NGAAH JAIRUS

JUDGE