



Republic v Public Procurement Administrative Review Board; Urbantech Enterprises (Ex parte); Nairobi City County Assembly (Interested Party) (Miscellaneous Application E069 of 2022) [2022] KEHC 18105 (KLR) (Judicial Review) (29 July 2022) (Judgment)

Neutral citation: [2022] KEHC 18105 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
MISCELLANEOUS APPLICATION E069 OF 2022**

**J NGAAH, J
JULY 29, 2022**

BETWEEN

REPUBLIC APPLICANT

AND

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD RESPONDENT

AND

URBANTECH ENTERPRISES EX PARTE

AND

NAIROBI CITY COUNTY ASSEMBLY INTERESTED PARTY

JUDGMENT

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

1. Certiorari to bring into this Honourable Court for purposes of quashing the respondent’s decision dated 31st May 2022.
2. Prohibition restraining the interested party by itself, its agents or persons acting on his/her behalf from implementing the respondent’s decision dated 31 May 2022.
3. Mandamus directing the interested party to award the Tender No. NCCASB/OT/09/01/ FY2021-2022 for Supply, Installation, Customisation, Configuration, Migration, Testing



and Training For Automation of Chamber Sessions to Support Remote Access and Virtual Meeting for Nairobi City County Assembly to the ex parte applicant is the lowest evaluated responsive bidder and execution of the contract in respect of the said tender.

4. Declaration that the decision of the respondent in request for review number 42 of 2022 was one, egregious, unlawful, illegal, inconsistent, ultra vires and mad with procedural improprieties.”
- 2 The application also seeks for an order for extension of the tender validity and the costs of the application. It is made under sections 8 and 9 of the *Law Reform Act*, Cap. 26, sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 53 Rule 1 of the *Civil Procedure Rules*, sections 4, 57 and 8 of the *Fair Administrative Action Act*, No. 4 of 2015 and Articles 47 and 50 of *the Constitution*.
- 3 The application is based on the statutory statement dated 13 June 2022 and an affidavit sworn by Urbanus Kioko Musango verifying the facts in the statement. Musango has described himself in the affidavit as the sole proprietor of the applicant.
- 4 The genesis of the applicant’s application is a tender floated by the interested party on 27 January 2022 for automation of the chamber sessions of the Nairobi County assembly. It was more particularly described as

" Tender No. NCCASB/OT/09/01/FY2021-2022 for Supply, Installation, Customisation, Configuration, Migration, Testing and Training for Automation of Chamber Sessions to Support Remote Access and Virtual Meeting for Nairobi City County Assembly”.

I will henceforth refer to it as “the tender”.

- 5 The applicant was one of the tenderers that submitted their bids for the tender. Its bid was a joint venture with Technology Benchmark Limited, a company registered under the *Companies Act*, cap. 486.
- 6 The applicant joint venture emerged as the lowest evaluated responsive tender at the bid price of Kshs. 31, 810,000/= . The procuring entity’s tender evaluation committee recommended the applicant to be awarded the tender. However, the procuring entity’s head of procurement, recommended termination of the procurement under section 63 (f) of the *Public Procurement and Asset Disposal Act*, 2015 (hereinafter “the Act”). The procuring entity adopted the recommendation and terminated the tender.
- 7 The applicant was aggrieved by the decision of the procuring entity and so by a request for review dated 22 March 2022 being Review Application No. 25 of 2022 filed before the respondent under section 167(1) of the *Act*, he challenged the decision. The respondent found merit in the request for review and cancelled the notification of the termination of the subject tender sent to the applicant and the rest of the tenderers.
- 8 The procurement entity was also ordered to remit the procurement proceedings of the subject tender to its head of procurement for the latter to review the evaluation report on the procurement proceedings taking into account the Review Board’s (respondent’s) findings in its decision. The procurement entity was also ordered to ensure that the procurement proceedings were concluded within 14 days of the date of the Review Board’s decision.
- 9 Even then, the procuring entity terminated the procurement process on the ground that “material governance issues had been detected.” For the second time, the applicant made an application before the respondent in Request for Review No. 42 of 2022 challenging the procuring entity’s decision.
- 10 The respondent, once again, found merit in the applicant’s request for review and ordered as follows:



- i. The termination of the procurement proceedings of Tender No. NCCASB/OT/09/01/FY2021-2022 for Supply, Installation, Customisation, Configuration, Migration, Testing and Training for Automation of Chamber Sessions to Support Remote Access and Virtual Meetings for Nairobi City County Assembly be and is hereby terminated.
 - ii. The letter of notification of termination dated 28th April 2022 issued by the respondent to all tenderers in Tender No. NCCASB/OT/09/01/FY2021-2022 for Supply, Installation, Customisation, Configuration, Migration, Testing and Training for Automation of Chamber Sessions to Support Remote Access and Virtual Meetings for Nairobi City County Assembly be and are (sic) hereby cancelled and set aside.
 - iii. The respondent is hereby ordered to direct the evaluation committee to conduct due diligence on the applicant's and Technology Benchmark Limited's respective tax compliance certificates submitted to the procuring entity by the applicant in joint venture with the Technology Benchmark Limited taking into consideration our findings herein within 7 days from the date of this decision.
 - iv) The respondent is hereby ordered to award the subject tender to the applicant in joint venture with the Technology Benchmark Limited subject to a positive due diligence exercise conducted pursuant to order 3 above within 14 days from the date of this decision.”
- 11 The respondent also ordered parties to bear their respective costs.
- 12 It is this decision that is the subject of the instant judicial review proceedings.
- 13 Although, on the face of it, the applicant largely succeeded in his request for review, he is dissatisfied with that part of the decision that ordered due diligence on the applicant's and its joint-venture partner's tax compliance certificates.
- 14 It is the applicant's case that upon notification of the procurement entity's termination of the tender, the respondent considered irrelevant matters to the extent that it considered tax compliance certificates that do not belong to the applicant and which are different from those submitted by the applicant in the applicant's tender bid. In any event, the tender attracted firms that already are registered under the Access to Government Procurement Opportunities (AGPO); firms registered under this initiative must, as a prerequisite, have current Tax Compliance Certificates and therefore the question whether the applicant or its joint-venture partner had tax compliance certificates need not have arisen.
- 15 The applicant urges that the respondent illegally and irrationally permitted the conduct of a due diligence exercise based on documents that did not belong to the applicant.
- 16 Philip Okumu, the respondent's secretary, swore a replying affidavit opposing the application. The affidavit largely defends the respondent's decision.
- 17 The interested party filed grounds of opposition dated 20 June 2022 contending, among other things, that the applicant lacks the locus to institute and prosecute the judicial review application. It also urged that the application is incompetent, incurable and fatally defective since the applicant is not a known legal entity with the capacity to sue or to be sued in its own name.
- 18 If there is merit in this last point, then it will not be necessary for the court to go any further and for this very reason, I will start by interrogating this question.
175. Right to judicial review to procurement



- (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.

- 19 The question is who would be the 'person' referred to in this section of the law? Does it not connote a natural person or being, or a juristic person or any other legal other entity capable, for our purposes, of being described as "a candidate or a tenderer" and who, by virtue of this character, is capable of suing and being sued as envisaged in section 175 (1) of the Act?
- 20 My answer to this question would be in the affirmative because, unless it is an incorporated entity or a natural human being, a name by itself cannot, for instance, submit a tender bid or participate in the procurement process. Neither can it initiate proceedings under section 167(1) or section 175(1) the Act.
- 21 Where it is an unincorporated entity or a firm, the person in whose name it is registered must, at one point or another, come out as the person behind the entity, firm or partnership. Such occasions would include occasions such as when he makes an application before the respondent under section 167(1) or when he invokes the jurisdiction of this Honourable Court under section 175 (1) of the Act.
- 22 I am a little bit baffled by the arguments by the pleadings and submissions of Urbanus Musanga Kioko on this point. In the written submissions, he has sought to dissociate himself from the applicant and urged as follows:

- " 7. The ex parte applicant, Urbantech Enterprises participated in the subject procurement process in joint venture with M/s Technology Benchmark Limited. In a nutshell, the individual Urbanus Musanga Kioko was never a candidate or tenderer in the subject procurement process.
11. Your Lordship The ex parte applicant (aggrieved party) in this instance was a tenderer in the procurement proceedings initiated by the interested party and a participant in the request for review proceedings in Review Nos. 25 of 2022 and Review No. 42 of 2022. This tenderer was not Urbanus Musanga Kioko but Urbantech Enterprises.
14. The nature of this case is that it involves a youth enterprise registered by the National Treasury to tender for government projects. The registration certificate has been issued in the name of Urbantech Enterprises and not (Urbanus Musanga Kioko trading as Urbantech Enterprises. It is on the strength of the AGPO certificate that the ex parte applicant herein submitted its bid in joint venture with the Technology Benchmark Limited.
15. The certificate differs with the one normally issued by the business registration services which ordinarily describes the proprietor together with the business name. Registration under the business registration services would describe as follows:
Urbanus Musanga Kioko trading as Urbantech Enterprises".
16. Your Lordship would appreciate that the certificate issued to the ex parte applicant does not mention the name of Urbanus Musanga Kioko. The said certificate has been issued to Urbantech Enterprises."



- 23 These submissions appear to contradict the verifying affidavit sworn in support of the motion by Urbanus Musanga Kioko who started his depositions by stating that:
- " 1. That I am the sole proprietor of Urban Enterprises, hence competent to swear this affidavit."
- 24 This deposition would imply that for purposes of trading, Urbanus Musanga Kioko and Urbantech Enterprises refer to one and the same person and, therefore, no suit can be initiated in the name of Urbantech Enterprises without reference to Urbanus Musanga Kioko.
- 25 In the same affidavit, Urbanus Musanga Kioko has exhibited a tax compliance certificate in support of the applicant's case against the respondent. The certificate is in the name of Urbanus Musanga Kioko and not Urbantech Enterprises.
- 26 It follows that it cannot be argued that the tender bid was all about Urbantech Enterprises yet the documents submitted in support of the bid are in the name of Urbanus Musanga Kioko.
- 27 One other thing that comes out clearly in the applicant's application is that the applicant is not even registered as a business name. The certificate issued upon registration is issued by the National Treasury and Urbantech Enterprises is said to "have been registered under the *Public Procurement and Asset Disposal Act* 2015".
- 28 While the procuring entity may have been free to transact with business names, assuming 'Urbantech Enterprises was such a name, a court of law would not entertain such a name as a claimant in a suit. Whoever approaches this Honourable Court for any remedy is certainly subject to procedural thresholds of instituting suits one of which is that a non-existent person cannot maintain an action. (see *Banque Internationale de Commerce de Petrograd v. Goukassow* (1923) 2 KB. 682 at p. 688 (per Bankes L.J)).
- 29 I am therefore satisfied that there is no or no proper application before this Honourable Court. The purported application is misconceived, incompetent and an abuse of the due process of this Honourable Court. It is struck out with costs to the respondent and interested party. It is so ordered.

SIGNED, DATED AND DELIVERED ON 29TH JULY 2022

NGAAH JAIRUS

JUDGE

