



**Republic v Public Procurement Administrative Review Board  
& 2 others; Raystima Services Limited (Exparte) (Application  
E092 of 2022) [2022] KEHC 18102 (KLR) (5 August 2022) (Judgment)**

Neutral citation: [2022] KEHC 18102 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**APPLICATION E092 OF 2022**

**J NGAAH, J**

**AUGUST 5, 2022**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW  
BOARD ..... 1<sup>ST</sup> RESPONDENT**

**ALEX GITARI, ACCOUNTING OFFICER, KENYA AIRPORTS  
AUTHORITY ..... 2<sup>ND</sup> RESPONDENT**

**KENYA AIRPORTS AUTHORITY ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**RAYSTIMA SERVICES LIMITED ..... EXPARTE**

**JUDGMENT**

1. The applicant’s application is the motion dated 21 November 2022 filed under sections 8 and 9 of the Law Reform Act, cap 26, section 3A of the Civil Procedure Act, section 175 of the Public Procurement and Asset Disposal Act and Order 53 Rule 1 of the Civil Procedure Rules. It seeks the prerogative orders of *certiorari*, prohibition and *mandamus*. The prayers for the orders have been framed in the following terms:

1. A judicial review orders (sic) of certiorari do issue to remove and bring to this Honourable Court for purposes of quashing, part of the 1<sup>st</sup> respondent’s decision and subsequent orders issued on June 14, 2022 in Request for Review Application No 46 of 2022 which decision directed termination of Tender No KAA/RT/JKIA/0098/2020-2021 for Provision



of Maintenance Services for Runway Rubber and Paint Removal at Jommo Kenyatta International Airport (hereinafter “the Tender”).

2. A judicial review order of prohibition do issue restraining the 2<sup>nd</sup> and 3<sup>rd</sup> respondents from implementing part of the decision and consequential orders of the 1<sup>st</sup> respondent in Request for Review Application No 46 of 2022 issued on June 14, 2022, which directed that the procurement proceedings be terminated.
3. An order of mandamus do issue directed at the 2<sup>nd</sup> and 3<sup>rd</sup> respondents compelling them to enter into a contract with the *ex parte* applicant in respect of Tender No KAA/RT/JKIA/0098/2020-2021 and or in terms of the decisions of the Public Procurement Administrative Review Board Application No 116 of 2021 and High Court Judicial Review Application No E145 of 2021.”
2. The motion is supported by the statutory statement dated 20 June 2022 and a verifying affidavit sworn on even date by Janet Kaari Mbijiwe. Mbijiwe has described herself in the affidavit as a director of the applicant.
3. On June 21, 2021, the 3<sup>rd</sup> respondent floated a tender for renovation or maintenance of the runway at the Jomo Kenyatta International Airport. The tender was more particularly described as ‘Tender No **KAA/RT/JKIA/0098/2020-2021 for** Provision of Maintenance Services for Runway Rubber and Paint Removal at Jomo Kenyatta International Airport
4. The applicant company was one among 23 other bidders.
5. At the conclusion of the procurement process, the award was made to Roadgrip Limited at the tender price of USD 417, 600. The award was made on September 14, 2021. On September 23, 2021, the applicant filed a request for review before the 1<sup>st</sup> respondent in application No 166 of 2021. In that application, Alex Gitau, the procuring entity’s accounting officer, was named as the 1<sup>st</sup> respondent while procuring entity was named as the 2<sup>nd</sup> respondent. Roadgrip Limited was named as the 3<sup>rd</sup> respondent.
6. In the application, the applicant prayed for orders that:
  - 1) That the Board be pleased to make a declaration that the conduct of the respondents is unfair, illegal and unlawful.
  2. That the Board be pleased to disqualify the 3<sup>rd</sup> respondent from executing or entering into a contract with the 2<sup>nd</sup> respondent in Tender No KAA/RT/JKIA/0098/2020-2021 for Provision of maintenance services for runway rubber and paint removal at Jommo Kenyatta International Airport.
  3. That the Board be pleased to award the tender to the 2<sup>nd</sup> most responsive bidder (the Applicant herein).
  4. That the Board be pleased to order the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents to meet the costs of these proceedings.  
In the alternative,
  5. The respondent be compelled to pay damages in the sum United States Dollars Four Hundred and Forty-Nine Hundred and Ninety-Nine Twenty cents (USD 444,999.20/=) being the bid offered by the applicant.



6. That the Honourable Board be pleased to make any or such further orders as the ends of justice may require.”
7. The 1<sup>st</sup> respondent was persuaded by the interested party’s case and so it allowed the application and made the following orders: -
  - 1) The award of the tender to the 3<sup>rd</sup> respondent with respect to Tender No KAA/RT/JKIA/0098/2020-2021 for Provision of Maintenance Services for Runway Rubber and Paint Removal at Jomo Kenyatta International Airport be and is hereby quashed in its entirety.
  2. The Procuring entity be and is hereby directed to exclude the 3<sup>rd</sup> respondent from the procurement proceeding and proceed to award the tender to the next lowest evaluated tenderer bearing in mind the findings of the Board in this decision.
  3. The accounting officer of the procuring entity is directed to proceed with the subject procurement process including the making of an award within 14 days from the date of this decision.
  4. Given that the procurement proceedings are not yet concluded, each party shall bear their own costs in the Request for Review.”
8. This decision was challenged in this Honourable Court in Judicial Review Application No E145 of 2021. For reasons I delivered in my judgment rendered on 17 October 2021, I dismissed the application.
9. Rather than comply with the decision of the 1<sup>st</sup> respondent, which was effectively upheld by this Honourable Court, the procuring entity terminated the tender on 13 May 2022, allegedly in exercise of its powers under section 63 (1) (e) of the [Public Procurement and Asset Disposal Act](#).
10. For the second time, the applicant sought to challenge the decision of the procuring entity and filed Application No 46 of 2022 before the 1<sup>st</sup> respondent; this was on 24 May 2022. To be precise, the applicant sought for the following orders:
  - a) That the Board be pleased to make a declaration that the conduct of the respondents is in contempt of court and or contempt of the orders of the Board issued on October 14, 2021.
  - b) That the board be pleased to quash the decision of the 1<sup>st</sup> and 2<sup>nd</sup> respondents dated May 13, 2022 in respect of Tender No KAA/RT/JKIA/0098/2020-2021 for Provision of Maintenance Services for Runway Rubber and Paint Removal at Jomo Kenyatta International Airport.
  - c) That the Board be pleased to award Tender No KAA/RT/JKIA/0098/2020-2021 for Provision of Maintenance Services for Runway Rubber and Paint Removal at Jomo Kenyatta International Airport to the applicant having been the second lowest bidder.
  - d) That the Board be pleased to order the 1<sup>st</sup> and 2<sup>nd</sup> respondents to meet the costs of this proceedings.

In The Alternative

- e) that the respondents be compelled to pay damages in the sum United States Dollars Four Hundred and Forty-Four Thousand Nine Hundred and Ninety-Nine Twenty Cents (USD 444,999.20) being the bid offered by the applicant.

SUBPARA f)

That this Honourable Board be pleased to make any or such further orders as the ends of justice may require.”



11. The 1<sup>st</sup> respondent allowed the application but rather than award the applicant the tender, it ordered, among other things, the procuring entity to terminate the tender in accordance with section 83 of the *Act*. The orders were framed thus:
  1. The respondents (sic) termination of procurement proceedings for Tender No KAA/RT/JKIA/0098/2020-2021 for Provision of Maintenance Services for Runway Rubber and Paint Removal at Jomo Kenyatta International Airport be and is hereby nullified and set aside.
  2. The letter of notification of termination dated 13 May 2022 for Tender No KAA/RT/JKIA/0098/2020-2021 for Provision of Maintenance Services for Runway Rubber and Paint Removal at Jomo Kenyatta International Airport addressed to the applicant and all other tenderers in the subject tender by the 1<sup>st</sup> respondent be and are (sic) hereby cancelled and set aside.
  3. The 1<sup>st</sup> respondent is hereby directed to terminate the procurement proceedings of Tender No KAA/RT/JKIA/0098/2020-2021 for Provision of Maintenance Services for Runway Rubber and Paint Removal at Jomo Kenyatta International Airport in accordance with Section 83 of the Act read with regulation 48 of Regulations 2020 taking into consideration the findings of the Board in this decision.
  4. Given the findings herein, each party shall bear its own costs in the request for review.”
12. The decision was made on 14 June 2022 and it is this decision that is the subject of this judgment.
13. It is the applicant’s case that the 1<sup>st</sup> respondent acted outside its jurisdiction by substituting its reason for termination of the procurement proceedings for that of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. The 1<sup>st</sup> respondent is alleged to have deliberately and in bad faith misinterpreted its earlier decision in order to direct termination of the procurement proceedings.
14. The applicant also urged that the 1<sup>st</sup> respondent dwelt on the issues that were not before it for determination and; in any event, section 83 of the Act was inapplicable in the circumstances.
15. The 1<sup>st</sup> respondent did not file any response but Lilian Okidi, the Acting General Manager of the 3<sup>rd</sup> respondent, swore a replying affidavit on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. Though the affidavit is filed against the motion, the facts culminating in the 1<sup>st</sup> respondent’s decision are not in dispute. By and large, the affidavit is defending the decision. The only question that arises from this affidavit is whether the procuring entity was right in terminating the procurement process. It is more or less a legal question which has been properly taken up as such in the submissions filed by the respective parties.
16. I have considered the submissions filed by both the applicant, on the one hand, and the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, on the other hand, and my immediate impression is that the 1<sup>st</sup> respondent’s decision has all the characteristics of illegality and irrationality. These grounds, amongst other grounds of judicial review were explained in the English decision of *Council of Civil Service Unions versus Minister for the Civil Service* [1985] A.C. 374,410 where Lord Diplock noted as follows:

“By “illegality” as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.



By “irrationality” I mean what can by now be succinctly referred to as “Wednesbury unreasonableness” (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which 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. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system.

17. The 1<sup>st</sup> respondent’s decision bears the characteristics of illegality because section 83 which the 1<sup>st</sup> respondent invoked in directing the procuring entity to terminate the procurement proceedings does not give the 1<sup>st</sup> respondent or the procuring entity such powers. The section has three subsections and it is not clear which of these subsections the 1<sup>st</sup> respondent invoked to direct as it did. The entire section reads as follows:

83. Post-qualification

- (1) An evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act.
- (2) The conduct of due diligence under subsection (1) may include obtaining confidential references from persons with whom the tenderer has had prior engagement.
- (3) To acknowledge that the report is a true reflection of the proceedings held, each member who was part of the due diligence by the evaluation committee shall—
  - (a) initial each page of the report; and
  - (b) append his or her signature as well as their full name and designation.

It is clear that no part of this section empowers the 1<sup>st</sup> respondent to direct the procuring entity to terminate the procurement proceedings. Not even the procuring entity can terminate the procurement proceedings under it. It can, therefore, be safely concluded that in coming to the decision it did, the 1<sup>st</sup> respondent neither understood correctly the import of this provision of law nor gave effect to it.

As far as irrationality is concerned, it is quite clear that the 1<sup>st</sup> respondent’s decision is diametrically opposite to its previous decision of 14 October 2021 in which it ordered, in rather clear and unambiguous terms, as follows:

- 4) The Procuring entity be and is hereby directed to exclude the 3<sup>rd</sup> respondent from the procurement proceeding and proceed to award the tender to the next lowest evaluated tenderer bearing in mind the findings of the Board in this decision.” (Emphasis added).

19. The order leaves no room for uncertainty on at least two important points the first of which is that the tender should be awarded. And as to whom the award should be made, it is clear that it should be awarded to the next “lowest evaluated tenderer” who, in this case, is none other than the applicant.



20. For the avoidance of doubt, the 1<sup>st</sup> respondent was not under any illusion that the second evaluated lowest bidder was the applicant when it stated in its decision thus:
- “With this in mind and noting that the lowest evaluated tenderer on whom a due diligence exercise had been conducted upon, was excluded from the subject tender’s procurement proceedings pursuant to order 2 of the Board’s decision of October 14, 2021, the next lowest evaluated tenderer was the applicant.”
21. Having been that clear, it is irrational and unreasonable that the 1<sup>st</sup> respondent would literally somersault in a subsequent decision on the same procurement proceedings and state that:
- “3. The 1<sup>st</sup> respondent is hereby directed to terminate the procurement proceedings of Tender No KAA/RT/JKIA/0098/2020-2021 for Provision of Maintenance Services for Runway Rubber and Paint Removal at Jomo Kenyatta International Airport in accordance with Section 83 of the Act read with regulation 48 of Regulations 2020 taking into consideration the findings of the Board in this decision.”
22. It must be noted that nothing had changed between the time the 1<sup>st</sup> respondent made its decision of 14 October 2021 directing the procuring entity to award the tender to the applicant and the time it turned round and directed termination of the tender. The only new development, if it is to be so considered, was the failure by the procuring entity to comply with the 1<sup>st</sup> respondent’s order to award the applicant the tender but chose, instead, to terminate the same tender.
23. If it is to be accepted that the order made by the 1<sup>st</sup> respondent in the previous decision awarding the applicant the tender was consistent with the provisions of section 173 of the *Public Procurement and Asset Disposal Act* which stipulate the powers of the 1<sup>st</sup> respondent in the request for review proceedings, there would be no basis for renegeing on the same decision.
24. It is true that under section 83 (1) of the *Act*, the evaluation committee of a procuring entity may conduct due diligence on the successful bidder before the tender is awarded but there is nothing in the order directing the procuring entity to award the tender subject to due diligence. If that was the 1<sup>st</sup> respondent’s intention, nothing stopped it from expressly stating so in the order.
25. It must also be noted that the wording of section 83(1) is such that the evaluation committee has the discretion either to conduct or not conduct due diligence before the award is made. Considering the circumstances under which the procuring entity was directed to make the award, the suggestion by the 1<sup>st</sup> respondent that the evaluation committee could possibly go round the order on the pretext of conducting a due diligence is not feasible.
26. In other words, there would be nothing wrong with the procuring entity awarding the tender as directed because it would simply be complying with the order of the 1<sup>st</sup> respondent which, as noted, the 1<sup>st</sup> respondent is competent to make under section 173 of the *Act*.
27. And if, for whatever reason, the procuring entity harbored any doubts on the legality of the award being made without conducting due diligence, it was open to challenge the 1<sup>st</sup> respondent’s order. There is no proof and neither has it even been suggested that the procuring entity contemplated taking such action.
28. It is reasonable to conclude, in these circumstances, that the 1<sup>st</sup> respondent’s decision fits the description given in *Council of Civil Service Unions versus Minister for the Civil Service* case (supra), as



a decision that 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”.

29. In the final analysis, I allow the applicant’s application in terms of prayers 1, 2 and 3. For the avoidance of doubt:

1. The order of certiorari is hereby issued removing into this Honourable Court for purposes of being quashed, part of the 1<sup>st</sup> respondent’s decision and subsequent orders issued on June 14, 2022 in Request for Review Application No 46 of 2022 directing termination of Tender No KAA/RT/JKIA/0098/2020-2021 for Provision of Maintenance Services for Runway Rubber and Paint Removal at Jommo Kenyatta International Airport.
2. The order of prohibition is hereby issued restraining the 2<sup>nd</sup> and 3<sup>rd</sup> respondents from implementing part of the decision and consequential orders of the 1<sup>st</sup> respondent in Request for Review Application No 46 of 2022 issued on June 14, 2022, which directed that the procurement proceedings be terminated.
3. The order of mandamus is hereby issued compelling the 2<sup>nd</sup> and 3<sup>rd</sup> respondents to enter into a contract with the *ex parte* applicant in respect of Tender No KAA/RT/JKIA/0098/2020-2021 as directed by the 1<sup>st</sup> respondent in its decision in Procurement Administrative Review Board Application No 116 of 2021.
4. I make no order as to costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON 5 AUGUST, 2022.**

**NGAAH JAIRUS**

**JUDGE**

