Republic v Public Procurement Administrative Review Board; On The Mark Security Ltd & another (Interested Parties); Accounting Officer, Kenya Revenue Authority & another (Exparte) (Application E102 of 2022) [2022] KEHC 18054 (KLR) (Employment and Labour) (23 September 2022) (Judgment)

Neutral citation: [2022] KEHC 18054 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

EMPLOYMENT AND LABOUR

APPLICATION E102 OF 2022

J NGAAH, J

SEPTEMBER 23, 2022

BETWEEN

REPUBLIC ..... APPLICANT

AND

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD ..... RESPONDENT

AND

ON THE MARK SECURITY LTD ..... INTERESTED PARTY

SKAGA LIMITED ..... INTERESTED PARTY

AND

ACCOUNTING OFFICER, KENYA REVENUE AUTHORITY ..... EXPARTE

KENYA REVENUE AUTHORITY ..... EXPARTE

JUDGMENT

1. The motion before court is dated 12 August 2022 and is stated to be filed under Articles 22 (1), 23(3) (f), 48, 50(1) and 165 (6)(7) of *the Constitution* and section 175(1)(3) of the *Public Procurement and Asset Disposal Act*, 2015. It is also stated to have been brought under Part VI of the *Law Reform Act*,

Cap 26 and Order 53 Rule 1 of the Civil Procedure Rules. It primarily seeks the order of certiorari and whose prayer is couched as follows:

> An order of certiorari to quash the purported decision and orders of the respondent communicated in its judgement dated 27 July 2022 but issued on 2 August 2022."

2. The motion is supported by the affidavit of Grace Murichu who is an employee of the 2nd applicant; it was sworn on 12 August 2022. Besides the affidavit, there is a verifying affidavit also sworn by Murichu in verification of the facts in the statutory statement dated 5 August 2022 both of which were filed together with the chamber summons seeking leave to file the present substantive motion.

3. The events that make up the facts leading to the present application are somewhat convoluted.

4. By a request for review dated 6 July 2022 and lodged before the respondent on even date, On the Mark Security Limited, the 1st interested party in this application, sought for review of the decision of the Kenya Revenue Authority with respect to the procurement proceedings in a tender described as "Tender No. KRA/HQS/NCB-046/2019-2020 for the supply and delivery of K9 dogs and training of dog handlers." The tender was floated sometimes in January, 2020.

5. The 1st interested party was disqualified at the technical evaluation stage while Skaga Limited, the 2nd interested party, qualified for the next stage which was financial evaluation. As a matter of fact, it was the only tenderer that qualified for that stage. The evaluation committee recommended it as the lowest evaluated tenderer at the tender price of Kshs. 18,473,000.00. It was awarded the tender and the requisite notifications dated 27 March 2020 were sent to the successful tenderer and the failed bidders respectively.

6. The 1st interested party was not satisfied with the award and therefore it lodged a request for review number 51 of 2020. The request was successful to the extent that both the letters of the award of the tender and notification of the unsuccessful bid were cancelled and set aside. The procuring entity was also directed to readmit the 1st interested party's bid at the technical evaluation stage and, further, award the tender within 14 days from the date of the respondent's decision.

7. The procuring entity together with the 2nd interested party appealed against the decision in this Honourable Court in Judicial Review Miscellaneous Application Number 101 and 102 of 2020.

8. The applications were dismissed by this Honourable Court (Nyamweya, J. as she then was) on 16 November 2020.

9. Following these dismissals, the procuring entity readmitted the tenders of both the 1st and the 2nd interested parties and evaluated them afresh at the technical evaluation stage. Both tenders made it through to the technical evaluation stage and therefore proceeded to the financial evaluation. This time round, the 1st interested party was found to be the lowest evaluated bidder at the tender price of Kshs. 15,619,400/=. However, due diligence conducted on this bidder yielded negative results and therefore the evaluation committee did not recommend it for the award of the tender. It recommended the award to be made to the 2nd lowest rated bidder which, as noted was the 2nd interested party.

10. On the Mark Security Limited, once again, sought for review of this decision in request for review number 158 of 2020. The application for review was allowed and the procuring entity's letter dated 15 December 2020 awarding the tender to the 2nd interested party was cancelled and set aside. Similarly, the notification of unsuccessful bid dated 15 December 2020 was also cancelled and set aside.

11. Even then, the procuring entity was directed to proceed with the procurement process and make an award within 14 days from the date of the decision of the respondent.

12. This time round, the evaluation committee recommended termination of the subject tender due to what it described as financial errors which are said to have been noted by the evaluation committee. Following this recommendation, the procuring entity terminated the tender.

13. Both bidders were not satisfied with the decision and therefore they lodged requests for review in review applications number 21 of 2021 and 22 of 2021 respectively.

14. For the third time the respondent allowed the requests for review and cancelled the procuring entity's notification of termination of tender. It also ordered the procuring entity to award the tender to the 1st interested party.

15. The 2nd interested party moved this Honourable Court in Judicial Review Application No. E038 of 2021 to challenge the decision of the respondent. Nyamweya, J. as she then was, made certain orders in respect of the application and made reference to a decision by the Court of Appeal in Civil Appeal No. 39 0f 2021 Aprim Consultants versus Parliamentary Service Commission, according to which judicial review applications arising from the decisions of the Public Procurement Administrative Review Board and which are ordinarily filed under section 171 (5) of the *Public Procurement and Asset Disposal Act*, must be disposed of within 45 days from the date of their filing. The 2nd interested party's application appears to have been caught out by time when Nyamweya J. (as she then was) made the orders on 20 April 2021.

16. The 2nd interested party filed an appeal against these orders in the Court of Appeal in Civil Appeal Number E232 of 2021. On 3 December 2021, the appeal was struck out for the reason that it was filed without leave.

17. With this outcome in the Court of Appeal, the decision in force remained the respondent's decision made on 3 March 2021 which, among other things, awarded the tender to the 1st interested party.

18. By a letter dated 15 June 2022 the procuring entity informed the 1st interested party that the tender had been frustrated by intervening events and, in particular, the protracted legal battles. It therefore could not award the tender to the 1st interested party.

19. For the umpteenth time, the 1st interested party lodged another application, being review application no. 63 of 2022, before the respondent seeking, inter alia, annulment of the procuring entity's letter of 15 June 2022 and an order for the award of the tender to the 1st interested party. The application was lodged on 6 July 2022. It was opposed by the applicants.

20. By a decision dated 27 July 2022, the respondent allowed the 1st interested party's application. It nullified and set aside the impugned letter and directed the procuring entity to award the tender to the 1st interested party.

21. It is this decision that is now the subject of these proceedings.

22. Both the respondent and the interested party opposed the motion and filed replying affidavits in that regard. Philip Okumu, the respondent's secretary, swore a replying affidavit on 25 August 2022 on behalf of the respondent. Solomon Kimeu, a director of the 1st interested party, swore two replying affidavits respectively sworn on 17 August 2022 and 29 August 2022.

23. When I consider these affidavits, I note that the facts leading to the impugned decision dated 27 July 2022 are not in dispute. The only question is whether the decision is tainted by illegality, irrationality or procedural impropriety as suggested by the applicants in the grounds in the statutory statement.

24. These grounds of judicial review were enunciated in the English decision of Council of Civil Service Unions versus Minister for the Civil Service (1985) A.C. 374,410 in which Lord Diplock set out the three heads which he described as "the grounds upon which administrative action is subject to control by judicial review". These grounds are illegality, irrationality and procedural impropriety. While discussing susceptibility of administrative actions to judicial review and, in the process defining these grounds, the learned judge stated as follows:

> My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.

26. 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.

27. 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. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in Edwards v. Bairstow [1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.

28. I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all."

29. The grounds of illegality, irrationality and procedural impropriety are ordinarily regarded as the traditional grounds for judicial review. The court will intervene and grant the remedy for judicial review if any of them is proved to exist. But as Lord Diplock suggested, the list is by no means exhaustive. The learned judge hastened to say that further development of this area of law may yield further grounds

on a case by case basis and it is in this spirit that the principle of proportionality as a further ground for judicial review has been developed.

30. According to the applicant, the respondent's decision flouted section 171 of the *Public Procurement and Asset Disposal Act* which requires that a decision on an application for review to be made within a period of 21 days from the date of filing the application. It has been urged, that the decision was given outside the prescribed timelines and to that extent, it is illegal, irrational and it is want of procedural propriety.

31. The respondent's case on the other hand, is that the decision was given within the prescribed timelines and therefore there is nothing illegal, irrational or procedurally improper about it.

32. It follows that the dispute is as much factual as it is legal. It is factual because whether a decision was given on a particular date rather than the other is a question of fact. For the same reason, it is also legal because whether it was rendered within or outside the prescribed timelines, it is a question that section 171 (1) of the *Public Procurement and Asset Disposal Act* would be concerned about. That section reads as follows:

> 171. Completion of review
>
> (1) The Review Board shall complete its review within twenty-one days after receiving the request for the review.

33. A copy of the request for review exhibited to the applicant's affidavit shows that it was received by the respondent on 6 July 2022. Proof of this date as the date when the respondent received the request for review is demonstrated by the respondent's stamp showing that it was received on this particular date.

34. If time started running on 7 July 2022, the application ought to have been concluded and a decision delivered on or before 28 July 2022 because that's when the limitation period prescribed by section 171 (1) of the Act lapsed.

35. According to the applicant, the respondent's decision was delivered on 2 August 2022. The applicants' depositions on this point are found in paragraphs 32 to 36 of the verifying affidavit. In those paragraphs they have deposed as follows:

> 32. That since the judgement had not been delivered on/before 27th July, 2022 which is within 21 days from the date of the application for review, the ex parte applicant vide a letter dated 2nd August, 2022 informed the respondent of this position and requested the respondent to issue and serve it with the judgement if any.
>
> Annexed and marked as GM 12 is the copy of the said letter dated 2nd August, 2022).
>
> 33. That the respondent however ignored/failed to respond to the letter or serve/ notify the ex parte applicants of the judgement.
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> 34. That the respondent, with the knowledge that the judgement was not within the timelines and being guilty of statutory laches, illegally issued the same on 2nd August 2022 but dated it 27th of July 2022 and served it/notified only the 1st interested party but purported to issue orders to the ex parte applicant in the said judgement for compliance.

35. That the respondent had no justification for failing to deliver the judgement within the timelines and notifying or effecting service to the ex parte applicants as the addresses of service of the ex parte applicants were at all times within the knowledge of the respondent based on the previous correspondence and memorandum of response filed before the respondent on 13th July 2022.

    Annexed and marked as BK 13 is the evidence of correspondences and address of service of the ex parte applicants)

36. That the 1st interested party, having been notified of the respondent's judgement delivered on 2nd August 2022 though dated 27th of July 2022 as aforestated immediately served the said judgement to the ex parte applicants on 2 August 2022."

36. Ordinarily, a judicial review court would not be concerned with interrogation of facts in dispute to make a determination on the true state of affairs. But the case here is relatively unique in the sense that in order to determine the question whether the respondent's decision is contrary to section 171(1) of the Act and therefore illegal, irrational or procedurally improper, a finding of fact on whether the decision was delivered on 27 July 2022 or on 2 August 2022 has, somehow, to be made.

37. The respondent's answer to the applicants' allegation is found at paragraphs 4 and 21 of the affidavit of Philip Okumu where he has stated thus:

    4. That I confirm on 27th of July 2022 the respondent board delivered its decision in review application No. 63/2022 in regard to Tender No. KRA/HQS/NCB046/2019-2020 for the supply and delivery of dog handler.

    23. That the Board issued its orders within the 21-day period provided for in section 171 of the *Public Procurement and Asset Disposal Act* 2015 and therefore denies the allegations levelled against it by the ex parte applicant."

38. There is no record of proceedings of when the decision was delivered except that on the last page of the decision it is said to be "dated at Nairobi this 27th Day of July, 2022."

39. A record of proceedings of the respondent would certainly have demonstrated when the session to render the decision was convened and whether any or all of the parties were present or represented. But if it was delivered on a virtual platform, it would also be apparent from the record or the decision itself and a transcript of such proceedings would have sufficed.

40. The import of such details becomes obvious not only when in a case such as the present one, the date on which the decision was delivered is an issue but also because it is must be demonstrated that section 171(1) of the Act was complied with and that the respondent's decision was delivered timeously. In short, the date when the respondent's decision is rendered should not be left to speculation for the simple reason that time within which it is to be rendered is of essence.

41. In the instant case, apart from the bare allegation that the decision was delivered on 27 July 2022, no proof has been provided that indeed the decision was delivered on this date. It is true that the decision is dated 27 July 2022 but the fact that the decision is dated does not necessarily mean that it is on the same date that it was delivered.

42. There is no proof that the applicant, or any other party for that matter, was notified of when the decision was due for delivery and that it was delivered as scheduled. Neither is there any proof that

soon after the delivery, the respondent transmitted the judgment to the parties, and to the applicant, in particular.

43. In the absence of any contrary evidence, the applicant's contention that the decision was rendered on 2 August 2027 but backdated to 27 July 2022 cannot be ruled out. The applicant's evidence that it wrote to the respondent on 2 August 2022 alerting it that the time when the decision ought to have been delivered had lapsed and it is only on 12 August 2022 when Mr. Ogado, the learned counsel for the 1st interested party, forwarded the decision to the applicant gives credence to the contention that the decision was delivered outside the limitation period.

44. That being the case the decision smacks of illegality for the simple reason that it is contrary to the provisions of section 171(1) of the Act. It is irrational because no sensible person who had applied his mind to the section 171(1) could have reached the same decision. It lacks procedural propriety because, it was delivered outside the time limits set by law.

45. In the absence of a proper decision for consideration by this honourable court, it is moot to delve into other issues raised by the parties.

46. For these reasons I allow the applicants' application and hereby quash the respondent's decision dated 27 July 2022. Parties will, however, bear their respective costs. It is so ordered.

SIGNED, DATED AND DELIVERED ON 23 SEPTEMBER 2022

NGAAH JAIRUS

JUDGE