



**Erdemann Properties Limited v Public Procurement
Administrative Review Board & another (Application 132 of 2020)
[2022] KEHC 18059 (KLR) (Judicial Review) (25 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 18059 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
APPLICATION 132 OF 2020
J NGAAH, J
NOVEMBER 25, 2022**

BETWEEN

ERDEMANN PROPERTIES LIMITED APPLICANT

AND

EXPORT PROCESSING AUTHORITY 1ST RESPONDENT

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD 2ND
RESPONDENT**

JUDGMENT

1. By a motion dated 23 June 2020, the applicant has sought prerogative orders of *certiorari*, prohibition and *mandamus*. It also sought various declarations. The prayers for these orders have been framed as follows:
 - a. An order of *certiorari* to bring to the Honourable Court for purposes of being quashed the decision of the 1st Respondent delivered on June 8, 2020 dismissing the Applicant's Request for Review in PPARB No 64 of 2020.
 - b. A declaration that the 2nd Respondent's letter dated April 30, 2020 is null and void and of no legal effect having been issued in contravention of the provisions of Section 175(6) of the *Public Procurement and Asset Disposal Act*.
 - c. A declaration that in view of the breach by the 2nd Respondent of its obligations under statute, the time for execution of the contract with the Applicant ought to be extended so as to give effect to the provisions of Article 227 of the *Constitution* and *Public Procurement and Asset Disposal Act* and to so extend the said time.



- d. An order of *mandamus* to compel the 2nd Respondent to execute the formal contract in respect of Tender No RFP/EPZA/01/2019-2020 for development of affordable housing at Athi River under Joint Venture partnership within Export Processing Zones at Athi River within 30 days as per Clause 32.6 of Request for Proposals.
 - e. An order of prohibition restraining the 2nd Respondent re-tendering, advertising or inviting fresh tenders of undertaking any further procurement in respect of the subject matter of Tender No RFP/EPZA/01/2019-2020 including termination of the tender process for development of affordable housing at Athi River under Joint Venture Partnership within Export Processing Zones at Athi River.”
2. The application is supported by the verifying affidavit sworn by one Zeyun Yang, the managing director of the applicant company. It is also based on a statutory statement filed in this Honourable Court on 24 June 2020.
 3. As the prayers on the face of the motion suggest, the applicant sought to impeach the decision of Public Procurement Administrative Review Board in Review Application No 64 of 2020.
 4. The record shows that the court (Mativo, J, as he then was) issued directions on disposal of the suit on 22 June 2020; 1 July 2020 and 28 September 2020. On this latter date the court directed as follows;
 - (a) The respondent is granted leave from today to file and serve their submissions.
 - (b) The applicant is granted leave to file supplementary submissions.
 - (c) Highlighting via video link on 2nd November 2020 at 10.00 am via video-link”.
 5. The matter did not proceed on 2 November 2020 as scheduled. However, after I joined the judicial review division, in which this suit is filed, parties appeared before me for the very first time on 14 December 2020. On this particular date, I noted that some of the parties’ submissions had not been uploaded on the portal of the judiciary’s case tracking system and neither were there copies in the court file. On 26 February 2021, I reserved the judgment for 16 March 2021.
 6. In the meantime, and more particularly on 3 March 2021, the Court of Appeal rendered a judgment in Civil Appeal No E039 of 2021; *Aprim Consultants versus Parliamentary Service Commission & Another* holding that a judgment in an application, such as the instant one, challenging a decision of the Public Procurement Administrative Review Board must be given within forty-five days of the date of filing the application more particularly as prescribed by section 175 (3) of the [Public Procurement and Asset Disposal Act](#), No 33 of 2015. Subsection (3) is of more apt to the question at hand but it is better understood in the context of the entire section 175. This section reads as follows:
 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.
 - (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. (Emphasis added)

7. In dismissing the appeal before it, the Court of Appeal made reference to this provision of the law and determined as follows:

“We have had the opportunity to consider the appeal, the submissions and the authorities cited and being mindful of the Public Procurement and Assets Disposal Act, we hereby give our decision in accordance with Rule 32(4) of the Court of Appeal Rules that the judgment of the High Court delivered on 18th January, 2021 is a nullity having been rendered outside the mandatory timelines provided under section 175 of the Public Procurement and Assets Disposal Act.”

8. The court did not, however, give its reasons for the decision until 8 October 2021. In the reasoned judgment, the court reiterated that the timelines set in section 175 are cast in stone. It noted as follows:

“Our reading of the Act is that the High Court was under an express duty to make its determination within the time prescribed. During such time did its jurisdiction exist, but it was a time-bound jurisdiction that ran out and ceased by effluxion of time. The moment the 45 days ended, the jurisdiction also ended. Thus, any judgment returned outside time would be without jurisdiction and therefore a nullity, bereft of any force or effect in law.

That legal conclusion remains irrespective of the avowed reasons, no matter how logical, sound, reasonable or persuasive they may be. No amount of policy, wisdom or practicality can invest a decision made without jurisdiction with any legal authority.”

9. The Court continued:

“It seems clear to us that the jurisdiction of the High Court in public procurement judicial review proceedings is expressly limited in terms of time and is not open to expansion by that court. To step out of time is to step out of jurisdiction and any act or decision outside jurisdiction is, by application of first principles a nullity.”

10. The instant suit is no different from the Aprim Consultants case at least to the extent that both parties contested the decisions of the Public Procurement Administrative Review Board which decisions are by law made under section 173 of the *Public Procurement and Asset Disposal Act* as read with section 167 and 171 of that Act. The Court of Appeal’s interpretation of section 175 of the Act, in so far as



the timelines for determination of disputes arising out of the decisions of the Review Board, would thus apply to both cases in equal measure.

11. It then follows that this suit ought to have been concluded by 7 August 2020. But as has been noted, as late as 28 September 2020, the Court was still imploring parties to comply with its previous directions and file and exchange written submissions. And as at 14 December 2020, some of the parties had either not filed their submissions or had not uploaded them to the portal.
12. Against this background, it is not difficult to reach the conclusion that any proceedings conducted after 7 August 2020, which is the deadline on or before which the suit ought to have been concluded, are nothing more than a nullity.
13. Without appearing to contradict the Court of Appeal decision in the *Aprim Consultants* case (*supra*), I have held elsewhere that where circumstances are such that they are beyond the control of the court so that a decision cannot be delivered within the prescribed timelines, section 175 of the *Act* should not be interpreted to render the court helpless. If, for instance, the systems broke down rendering the delivery of the judgment on the penultimate date impossible or for such like reason or reasons, the court should still deliver its decision albeit outside the prescribed timelines, if not for anything else, to pay tribute to the constitutional right of a litigant to access justice as guaranteed by Article 48 of the *Constitution*. (See *Republic v Public Procurement Administrative Review Board & 3 Others; ex parte Techno Relief Services Limited* [2021] eKLR.)
14. I would have been prepared to take that route in this case if those unforeseen circumstances were demonstrated to exist. But there is no evidence and, indeed, there has never been any suggestion by any of the parties that those mitigating circumstances obtain. All I gather from the record is that parties were somewhat lethargic in complying with the court's directions and this delay inevitably led to the delay in concluding the matter within the prescribed timelines.
15. I need not say more save to state the obvious that under the doctrine of *stare decisis* I am bound by the decision of the Court of Appeal in the *Aprim Consultants* case (*supra*). The applicant's application dated 23 June 2022 is, therefore, dismissed. Considering the circumstances under which the application has died, I make no orders as to costs. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON 25 NOVEMBER, 2022

NGAAH JAIRUS

JUDGE

