



**Bevaj Furniture Limited v Principal Secretary, Ministry of Interior and Coordination of National Government, State Department for Correctional Services & another (Judicial Review E139 of 2021) [2022] KEHC 15719 (KLR) (Judicial Review) (24 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15719 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
JUDICIAL REVIEW E139 OF 2021  
AK NDUNG'U, J  
NOVEMBER 24, 2022**

**BETWEEN**

**BEVAJ FURNITURE LIMITED ..... APPLICANT**

**AND**

**PRINCIPAL SECRETARY, MINISTRY OF INTERIOR AND COORDINATION  
OF NATIONAL GOVERNMENT, STATE DEPARTMENT FOR  
CORRECTIONAL SERVICES ..... 1<sup>ST</sup> RESPONDENT  
ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. Pursuant to this court's orders of October 8, 2021, the applicant herein filed its substantive motion dated October 15, 2021 and the motion seeks several orders as follows;
  1. That the honourable court be pleased to grant an order of *certiorari* to remove into this honourable court and quash the decision of the 1<sup>st</sup> respondent contained in the letter dated September 20, 2021 terminating the contract dated February 27, 2021 issued to the applicant in respect of a tender for supply and delivery of Household and Institutional Appliances.
  2. That the honourable court be pleased to grant an order of mandamus to compel the 1<sup>st</sup> respondent to specifically perform and honour the contractual obligations contained in the agreement dated February 27, 2021 with the applicant.
  3. That the honourable court be pleased to grant an order Of prohibition to remove into this honourable court and prohibit the respondents or either of them from taking any other or further administrative action against the applicant herein or proceeding with any tender



process for supply and delivery of Household and Institutional Appliances which would be in contravention of the signed contract with the applicant dated February 27,2021.

4. That such further and other reliefs that this honourable court may deem just and expedient to grant.
5. That costs of and incidental to the application be provided for.”
2. The application is supported a supporting affidavit sworn by Rosaline Mbugi on October 15, 2021. The applicant’s case is that upon being awarded a tender for supply and delivery of household and institutional appliances on January 26, 2021 it signed a contract with the 1<sup>st</sup> respondent and on April 8, 2021 it was given a purchase order no 7573 to supply 16,646 feeding pans 60-100% aluminum at a contract price of kshs 32,459,700.00.
3. The applicant alleges to have faithfully performed its contractual duties and always kept the respondent a breast with any new developments. It is only when Kaluworks Limited a local manufacturer was put under administration sometime in May,2021 that the issues started. The applicant states that it informed the 1<sup>st</sup> respondent of the said challenges and immediately initiated an alternative sourcing from A P Enterprise in India. The 1<sup>st</sup> respondent’s officers agreed to the sample and the said order was to be delivered Mid November.
4. However, on October 4, 2021, the applicant was informed through a letter dated September 20,2021 by the 1<sup>st</sup> respondent that the contract had been terminated and subsequently an advertisement made for the supply of the same items. The applicant is said to have already incurred a cost of over Kshs 5 Million paid to Kaluworks and has also committed over USD 20,000 to the second supplier which it stands to lose.
5. The respondent in its defence filed a replying affidavit sworn on May 10, 2022 by Wilfred Nyagwanga, the secretary administration in the 1<sup>st</sup> respondent. In the affidavit it is deponed that upon M/s Foresight Holdings Ltd, which was the successful tenderer after the 1<sup>st</sup> tender process failing to supply 29,509 feeding pans by December 31, 2020 as had been agreed, the commissioner general of prisons recommended that the purchase order be cancelled and an alternative supplier be identified.
6. The applicant herein being the 2<sup>nd</sup> lowest evaluated bidder was considered to supply the same and it undertook to do so by mid-June 2021 before the closure of the financial year to enable the payment to take place. The State Department for Correctional Services decided to terminate the contract as the applicant herein had failed to perform its obligation as set out in the contract dated February 27, 2021.
7. The respondent’s case is that pursuant to regulation 141 (4) of the [Public Procurement and Asset Disposal Regulations 2020](#), an accounting officer of a procuring entity shall be required to terminate a contract within a reasonable time when it becomes apparent that a contract is frustrated based on the evidence from the contract implementation team pursuant to section 151 (2) (a) and (g) of the Act.
8. It is contended that the prisons department is experiencing serious inadequate challenges of feeding pans to cater for the current prisoners who are between 50,000-55,000 and that its officers have had to improvise feeding pans cut from plastic mineral water bottles to address the shortage.
9. On November 1, 2021 the State Department for Correctional Services issued notification awards to 14 companies which were successful tenderers one of which was the applicant herein who was awarded a tender to supply 2 types of jikos;200 liters and 300 litres Energy Saving Jikos. Only five tenderers were awarded tenders to supply feeding pans and that by November 26, 2021 local purchase orders had been issued to 3 out of the 5 firms as per available funds.



10. The applicant in its written submissions identifies 4 issues for determination and these are whether the 1<sup>st</sup> respondent acted unprocedurally and illegally in terminating the tender awarded to the applicant, whether the respondent acted fairly and reasonably in issuing another tender invitation notice for tender no SDC/24/2021-2023, whether the 1<sup>st</sup> respondent violated the applicant's legitimate expectations by issuing the tender advert for the subject contract herein and whether the applicant merits the reliefs sought.
11. The applicant in its submissions argues that the termination of tender no SDC/3/2020-2022 for supply and delivery of household and institutional appliances is muddled with irregularities and not done in compliance with the section 153 of the Public Procurement Disposal Act.
12. Further that clause 3.16 of the subject tender document allows the 1<sup>st</sup> respondent to terminate the contract but upon written notice which notice was not given contrary to the above. It is further urged that no grounds for the termination were given and no procedures were followed as provided under section 153(2) of the Act. In addition, that the 1<sup>st</sup> respondent did not give any audience to the applicant despite there being a good relationship and an explanation for the delay in supply being given.
13. The 1<sup>st</sup> respondent is said to have acted against the law, as according to the applicant the process of issuing a new tender during the pendency of an existing tender is illegal and is unreasonable for the 1<sup>st</sup> respondent to terminate the Applicant's contract without having raised any complaint for non-performance of contractual obligations.
14. The 1<sup>st</sup> respondent's actions are said to be in breach of the applicant's legitimate expectations as has been explained in the case of *Republic v Attorney General; Law Society of Kenya (Interested Party); ex-parte: Francis Andrew Moriasi* [2019] eKLR.
15. The respondents in their written submissions contend that this honourable court does not have jurisdiction to determine the matter before it as the same relates to an alleged breach of contract and judicial review cannot provide a remedy for an alleged breach of contract and since the applicant's complaints relate to contractual issues, judicial remedies are not available to it. Clause 3.18 of the contract is said to provide for dispute resolution in the event of a disagreement or dispute between the parties.
16. The respondents also contend that an order of prohibition being futuristic in nature will only issue in cases where a decision has not yet been made. Further that it is intended to restrain an unlawful action that is threatened and has not yet been actualized. The procuring entity is said to have already advertised for fresh bids and the tenders awarded to different companies with the applicant having participated in the process and therefore it cannot purport to challenge a process that it took part in.
17. It is further urged that the applicant did not seek an order of *certiorari* to quash the tenders advertised by the procuring entity on September 31, 2021 and as such without quashing the subsequent tender, judicial review cannot be invoked to stop public bodies from executing their statutory functions. The respondents also relied on the case of *Republic v Export Processing Zones Authority ex-parte Ricardo EPZ International Co Ltd* [2015] eKLR where the court reiterated that judicial review cannot provide a remedy for an alleged breach of contract.
18. I have considered the application the responses and submissions on record. Of determination is whether the applicant has established the legal threshold for the grant of the judicial review orders sought. The disclosed facts raise serious issues of this court's jurisdiction on two fronts;
  1. The subject matter is a public procurement governed by article 227 of the *Constitution* and the provisions of the *Public Procurement and Asset Disposal Act*.



2. The subject matter relates to a contract between two parties whose remedy (even assuming that article 227 and the [Public Procurement and Asset Disposal Act](#) do not apply) lies under the law of contract.
19. Disputes between tenderers and government procurement agencies including a dispute over termination during the procurement process are governed by the elaborate provisions under the [Public procurement and asset disposal Act](#). In [Republic v Public Procurement Administrative Review Board exparte Nairobi City & Sewerage Company; Webtribe Limited t/a Jambopay Limited \(Interested Party\)](#) [2019] eKLR the court stated;

Article 227 of the [Constitution](#) lays down minimum requirements for a valid tender process. The article requires that the tender process preceding the conclusion of contracts for the supply of goods and services must be fair, equitable, transparent, competitive and cost-effective. Finally, as the decision to award a tender constitutes administrative action, it follows that the provisions of [Fair Administrative Action Act](#) apply to the process.

26. A decision to award a procurement contract by an organ of state is a matter of public law and it is governed by the Constitution, and the power to award such procurement contract is constrained by the principle that the organ of state must exercise no power and perform no function beyond that conferred on it by law. The Constitution is the repository of all state power. That power is distributed by the Constitution— directly and indirectly – amongst the various institutions of state and other public bodies and functionaries and its exercise is subject to inherent constitutional constraint – if only for legality – the extent of which varies according to the nature of the power that is being exercised.
27. These constitutional requirements, in article 227(1) of the [Constitution](#) must inspire all aspects of the process including termination. A policy, a tender process, or a decision terminating a tender process, which clashes with the requirements of article 227, would be unconstitutional, and therefore legally invalid. It is for this reason that the Constitution obliges organs of state to ensure that a procurement process is fair, equitable, transparent, competitive and cost-effective. Where the procurement process including a termination of a tender process is shown not to be so, courts have the power to intervene.
28. As a state organ, the applicant is required to ensure compliance with the Constitution and the procurement legislation. A procuring entity is not allowed to act beyond the provisions of the procurement legislation. The exercise of all public power must be in accordance with the law. Organs of state may exercise no power and perform no function beyond that conferred upon them by law. It is central to the conception of our constitutional order that those who exercise public power, are constrained by the principle that they may exercise only those powers and perform only those functions which are conferred upon them by the law. Their sole claim to the exercise of lawful authority rests in the powers allocated to them under the law. The common law principle of *ultra vires* is now underpinned by the constitutional doctrine of legality, which is an aspect of the rule of law. Thus, what would have been *ultra vires* under the common law by reason of a public official exceeding a statutory power is now invalid according to the doctrine of legality.



29. It follows that if an organ of state fails to heed the provisions of the procurement laws and or a policy, it would be acting unlawfully and any of its decision, as a result thereof, would be open to an attack. As an administrative authority, therefore its action will be in conflict with the rule of law and the principle of legality, which requires that the organ of state to exercise only public power conferred on them and nothing more.
30. The national legislation prescribing the framework within which procurement policy must be implemented is the Public Procurement and Asset Disposal Act (the Act) and The Public Procurement and Disposal Regulations, 2006 (the Regulations). A decision to award a tender constitutes administrative action so the provisions of Article 47 of the Constitution and the Fair Administrative Action Act from which a cause of action for the Judicial Review of administrative action arises, apply to the process.
31. Section 3 of the Act provides that Public procurement and asset disposal by state organs and public entities shall be guided by the values and principles laid down in article 227 of the Constitution and relevant legislation. Statutes do not exist in a vacuum. They are located in the context of our contemporary democracy. The rule of law and other fundamental principles of democratic constitutionalism should be presumed to inform the exercise of all official powers unless Parliament expressly excludes them. There may even be some aspects of the rule of law and other democratic fundamentals, which Parliament has no power to exclude. The courts should therefore strive to interpret powers in accordance with these principles.
32. Section 63 of the act provides for termination or cancellation of procurement and asset disposal proceedings in the following words:
  - (1) An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies—(a) the subject procurement have been overtaken by—(i) operation of law; or (ii) substantial technological change; (b) inadequate budgetary provision.
20. In our instant suit, the procurement process was complete and an award made and a contract signed. The Applicant for the various reasons offered was unable to supply the goods in the time agreed. This takes me to the 2nd front about contract.
21. Once a contract was signed between the parties, specific obligations and rights as provided in the contract document came into play. Even though one of the parties is a public body, the obligations and rights upon signing the contract become purely contractual. Any breach thereof cannot be remedied under the scope of judicial review. A distinction must be made between an infringement of statutory provisions giving rise to public law rights and those that arose solely from a breach of the contract.
22. In *Samuel Mbaka Mondesto v Permanent Secretary, Ministry Of Lands & Housing* [2005] eKLR The court held;
 

“Though in the present case, the applicant is not trying to enforce breach of contract of employment, the emphasis I wish to make here is that it is upon the applicant to show that



he enjoyed a public law right which has been infringed. In the instant case, it is my view that the applicant is trying to impose terms of a contract on the Respondents and if he is entitled to any remedy it would be under the ordinary law of contract and Judicial Review being a public law remedy would not apply.”

23. In light of the foregoing, the applicant has failed to establish any public law right that has been breached. The threshold for the grant of judicial review orders has not been achieved. With the result that the application dated is dismissed. Each party is to bear its own costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY NOVEMBER, 2022**

**A K NDUNG’U**

**JUDGE**

