



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW MISCELLANEOUS APPLICATION NO. 92 OF 2020**

**IN THE MATTER OF AN APPLICATION TO APPLY FOR JUDICIAL REVIEW ORDERS**

**BETWEEN**

**TENACLE LIMITED.....APPLICANT**

**VERSUS**

**KENYA COPYRIGHT BOARD.....1<sup>ST</sup> RESPONDENT**

**EDWARD SIGEL.....2<sup>ND</sup> RESPONDENT**

**LIBERTY AFRIKA LIMITED.....3<sup>RD</sup> RESPONDENT**

**AND**

**KENYA ASSOCIATION OF MUSIC**

**PRODUCERS.....1<sup>ST</sup> INTERESTED PARTY**

**PERFORMERS RIGHTS SOCIETY OF KENYA..2<sup>ND</sup> INTERESTED PARTY**

**MUSIC COPYRIGHT SOCIETY OF KENYA.....3<sup>RD</sup> INTERESTED PARTY**

**RULING NO 2**

**The Application**

1. Tenacle Limited, the Applicant herein, is aggrieved by the decision of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to award a tender for an ICT System for National Rights Registry, Licencing Module, a Media Monitoring Module and Distribution Module to the 3<sup>rd</sup> Respondent. The Applicant consequently filed an application by way of a Chamber Summons brought under Certificate of Urgency on 7<sup>th</sup> May 2020, seeking the following orders:

- a) **The Notice to the Deputy Registrar be dispensed with in the first instance.**
- b) **The Court be pleased to grant the Applicant leave to apply for Judicial Review.**
- c) **The grant of leave operate as a stay of the decision of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents irregularly granting the 3<sup>rd</sup> Respondent a tender for the supply of National Rights Registry, Licencing Module, a Media Monitoring Module and Distribution Module all forming the ICT system to support management of royalties, communicated on 3<sup>rd</sup> April 2020.**
- d) **The costs of the application.**

2. This Court, in a ruling delivered on 11<sup>th</sup> May 2020, directed that the Applicant’s Chamber Summons application dated 7<sup>th</sup> May 2020 would be heard *inter partes*, and joined the Kenya Association of Music Producers, Performers Rights Society of Kenya and Music Copyright Society of Kenya as 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties herein. It also directed the parties to file and serve their responses to, and

submissions on the Applicant's application.

3. The Applicant subsequently filed skeletal submissions dated 22<sup>nd</sup> May 2020 on the said application. The 3<sup>rd</sup> Respondent filed a replying affidavit and submissions on the said application. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties on their part filed Notices of Preliminary Objection in response. This Court thereupon further directed that the Applicant's Chamber Summons application dated 7<sup>th</sup> May 2020, the 1<sup>st</sup> and 2<sup>nd</sup> Interested Party's Notice of Preliminary Objection dated 9<sup>th</sup> June 2020 and 3<sup>rd</sup> Interested Party's Notice of Preliminary Objection dated 8<sup>th</sup> June 2020 be heard and determined together by way of written submissions. A summary of the parties' respective cases in this regard is as follows.

#### **The Applicant's case**

4. The Applicant's Chamber Summons application is supported by a statutory statement dated 7<sup>th</sup> May 2020, and a verifying affidavit sworn on the same date by Samuel Wanaina, the Applicant's Managing Director. He averred that the Applicant is a limited liability company whose core business is computer software and technology services, and that on 27<sup>th</sup> December, 2019, he saw an invitation to tender published in the Daily Nation for provision of a National Rights Registry, Licensing Module, a Media Monitoring Module and Distribution Module all forming the ICT system to support management of royalties, which was advertised by Music Copyright Society of Kenya (MCSK), Kenya Association of Music Producers (KAMP) and Performers Rights Society of Kenya (PRISK).

5. Further, that pursuant to this advertisement, the Applicant submitted a comprehensive bid on 16<sup>th</sup> January, 2020 and attended an opening ceremony for the bids presented on 17<sup>th</sup> January, 2020, and that on 30<sup>th</sup> January, 2020, he attended the tender interviews. The deponent averred that on 3<sup>rd</sup> February, 2020, he received calls from various people congratulating him on the success of their bid, and consequently began preparing the ICT System with the specifications required. However, that on 3<sup>rd</sup> April, 2020, he saw a notice on the 1<sup>st</sup> Respondent's official social media accounts informing members of the public who are copyright holders to register onto the "RYZIKIMUSIC" system, which upon inquiry, he learnt had been prepared by the 3<sup>rd</sup> Respondent.

6. The Applicant stated that it was not aware of any parallel procurement process for the same system by the 1<sup>st</sup> Respondent, and that on 7<sup>th</sup> April, 2020 through its advocates, it sent a demand letter to the 1<sup>st</sup> Respondent which has been ignored. He averred that following the uproar caused by the fraudulent award of tender to the 3<sup>rd</sup> Respondent, he received a copy of the minutes of the tender committee which confirms the scores and the recommendation that Tenacle Limited be awarded the tender.

7. According to the Applicant, it ought to have been notified of any changes on the procurement process, and given a chance to challenge the decision by the 1<sup>st</sup> Respondent to award the tender to the 3<sup>rd</sup> Respondent. Further, that it should have been given a reason as to why the Applicant was being denied the tender despite being the winner in the bidding process. In conclusion, the Applicant averred that the 1<sup>st</sup> Respondent has acted *ultra vires* and in an arbitrary manner that is likely to cause irreparable damage to its company and loss in revenue, as it has invested resources in the production of the ICT System.

8. The Applicant annexed copies of the tender documents it submitted to the tender committee, the minutes dated 3<sup>rd</sup> February, 2020 of the tender committee, screenshots of social media pages on the 3<sup>rd</sup> Respondent's ICT system, and of its demand letter.

#### **The Respondents' case**

9. In opposition to the application, the 3<sup>rd</sup> Respondent filed a replying affidavit sworn by Sidney Wachira a Director of the 3<sup>rd</sup> Respondent, whose stated that the 3<sup>rd</sup> Respondent's correct name is Liberty Afrika Technologies Limited. He averred that the 3<sup>rd</sup> Respondent has been in the business of providing mobile Value Added Services (VAS), and that on 17<sup>th</sup> January 2020, all the three Interested Parties, who are private associations, placed advertisement on their respective websites inviting sealed tenders for the supply of National Rights Registry, Licensing Module, a Media Monitoring Module and Distribution Module. The 3<sup>rd</sup> Respondent annexed a copy of the said advertisement, and averred that it applied for, and was subsequently and rightfully declared the successful bidder. Further, that following negotiations, the Interested Parties and the 3<sup>rd</sup> Respondent entered into a contract on 15<sup>th</sup> April, 2020, a copy of which was annexed.

10. According to the 3<sup>rd</sup> Respondent, the instant application is fatally defective as the invitation to tender by the Interested Parties was an invitation to treat and a pre-contractual negotiation, as opposed to an offer, and therefore, judicial review remedies are unavailable because the performance of a public duty or fair administrative action does not arise. Further, that the Applicant's remedy if any, would be an action for breach of contract. In addition, that the application does not specify the orders for which leave is being sought; and there is no decision by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents capable of being quashed, as the contract entered into was between the Interested Parties and the 3<sup>rd</sup> Respondent.

11. Lastly, that there is no procurement process capable of being interfered with, as the tender process has been finalized and a contract signed, and the Interested Parties, who are not even respondents in the application, cannot therefore be compelled to conclude the procurement process.

12. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents did not file any response to the application.

#### **The Interested Parties' Cases**

13. The 1<sup>st</sup> and 2<sup>nd</sup> Interested Party's filed a Notice of Preliminary Objection dated 9<sup>th</sup> June, 2020, wherein they stated that they would raise a Preliminary Objection on a point of law to have the Applicant's application struck out on the grounds that it is undisputed that the subject

of the said application is a complaint on the award of a tender by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties for the provision of an integrated ICT System for a National Rights Registry, a Licensing Module, a Media Monitoring Module and a Distribution Module pursuant to the advertisement done on the 27<sup>th</sup> December, 2019 in the *Daily Nation*. Further, that by dint of section 28 as read together with section 167(1) of the Public Procurement and Asset Disposal Act, 2015, the Public Procurement Administrative Review Board is the body statutorily mandated to review, hear and determine tendering disputes in the first instance.

14. According to the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties, it is trite law that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, then that procedure must be strictly adhered to, accordingly, this e Court lacks the requisite jurisdiction to entertain the present Application in the first instance as sought. Further, that, the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties as well as the 3<sup>rd</sup> Interested Party are not “public entities” as envisioned under section 2 of the Act, but private companies and hence not subject to the provisions of the Act. Therefore, that the application before this Court is thus not only misconceived, but also bad in law for having contravened express statutory provisions and should be struck out with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties.

15. The 3<sup>rd</sup> Interested Party’s likewise in its Notice of Preliminary Objection dated 8<sup>th</sup> June, 2020, stated that this Court lack jurisdiction to hear and determine the instant application and intended proceedings, as the decision sought to be reviewed is not a decision within the contemplation of Article 47 of the Constitution, as well as the Fair Administrative Action Act. Further, that the instant suit challenges a procurement process and is contemplated under the Public Procurement and Public Disposal Act, but a contract has already been signed and the Judicial Review orders sought cannot issue. In any event, that the suit offends the provision of Section 9(2) and (3) of the Fair Administrative Action Act.

### **The Determination**

16. The preliminary objections raised by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents will of necessity need to be determined first, as they have the potential of disposing of the Applicant’s case if found to be merited. The circumstances in which a preliminary objection may be raised was in this regard explained by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**, as follows:

***“a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”***

17. The effect of a preliminary objection if upheld, renders any further proceedings before the court impossible or unnecessary. On the other hand, a preliminary objection cannot be raised if any fact requires to be ascertained. In the case of **Oraro vs Mbaja, (2005) 1 KLR 141**, the court held that any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. The Court of Appeal also stated in **Mukisa Biscuit Company -vs- West End Distributors Ltd (supra)** that a preliminary objection cannot be raised if what is sought is the exercise of judicial discretion.

18. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties have in this respect objected to this Court’s jurisdiction to hear and determine the Applicant’s application on the ground that this Court is not the proper forum. Two reasons are proffered for this position. Firstly, that the proper forum to hear a procurement dispute involving a public body in the first instance under the Public Procurement and Asset Disposal Act, is the Public Procurement Administrative Board. Secondly, that the tender was in any event floated and entered into by private bodies, and not public bodies.

19. A Court’s jurisdiction flows from either the Constitution or statute or both, or and by principles laid out in judicial precedent. It is thus clearly a pure question of law. I am in this respect guided by the case of **Owners of Motor Vessel “Lillian S” vs Caltex Oil (Kenya) Ltd (1989) KLR 1** where Justice Nyarangi JA (as he then was) held:

***“I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”***

20. The Court of Appeal proceeded to define jurisdiction and its source as follows:

***“By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given”***

21. It is not in dispute in this regard that the Applicant has commenced judicial review proceedings in relation to an invitation to tender by

the Interested Parties, which it alleges has been interfered with by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent and as a result the tender was awarded to the 3<sup>rd</sup> Respondent. The Applicant describes the 1<sup>st</sup> and 2<sup>nd</sup> Respondent in its statutory statement as a state corporation established under Section 3 of the Copyright Act and an office is established under Section 11 of the Copyright Act respectively. They are therefore statutory bodies that are amenable to judicial review.

22. The judicial review jurisdiction of this Court is in this respect granted by Articles 47 and 165(6) of the Constitution, when a contravention and/or violation of constitutional and statutory provisions by a public body, or unfair action by an administrator is alleged. In addition, Article 165 (6) of the Constitution in this regard provides that the High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function in this regard.

23. Several statutes also specifically provide for redress to aggrieved parties by way of judicial review by this Court, including section 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules which grants this Court power to give judicial review orders, and the Public Procurement and Asset Disposal Act 2015, which under section 175 provides that a person who is aggrieved by the decisions of the Respondent may seek judicial review of those decisions in this Court.

24. The Interested Party objection is that this Court is divested of this judicial review jurisdiction, as the proper forum to hear the Applicant's grievances is the Public Procurement Administrative Review Board. In this regard, section 167 of the Public Procurement and Asset Disposal Act 2015 provides as follows:

**“(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.**

**(2) A request for review shall be accompanied by such refundable deposit as may be prescribed in the regulations, and such deposit shall not be less than ten per cent of the cost of the contract.**

**(3) A request for review shall be heard and determined in an open forum unless the matter at hand is likely to compromise national security or the review procedure.**

**(4) The following matters shall not be subject to the review of procurement proceedings under subsection (1)—**

**(a) the choice of a procurement method;**

**(b) a termination of a procurement or asset disposal proceedings in accordance with section 62 of this Act; and**

**(c) where a contract is signed in accordance with section 135 of this Act.”**

25. Under section 168, the requests for review are to be made to the Public Procurement Administrative Review Board established under section 27 of the Act. In the present case, the Applicant states that it was an unsuccessful bidder in the impugned procurement process, and section 167(1) of the Act is therefore applicable to it. It is also not in dispute that the Applicant is aggrieved by the manner in which the decision to award the tender to the 3<sup>rd</sup> Respondent was arrived at, and specifically states that due process was not followed. The proper forum for the Applicant to ventilate any non-observance of the applicable provisions of the law on procurement by public entities is the Public Procurement Administrative Review Board, by virtue of section 167 of the Public Procurement and Asset Disposal Act 2015.

26. Therefore, the law limits this Court's judicial review jurisdiction over the Respondents in the first instance, when it comes to disputes between public entities and bidders arising from procurement processes. It is also notable in this respect that there can be a restriction of a Court's jurisdiction by way of statute, as held in Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [supra] as follows:

**“**

**By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics.”**

27. In addition, the exhaustion of alternative remedies is now a constitutional and legal imperative under Article 159 (2)(c) of the Constitution and section 9(2) and (3) of the Fair Administrative Action Act, and as exemplified by emerging jurisprudence in cases such as those by the Court of Appeal in Geoffrey Muthinja Kabiru & 2 Others vs Samuel Munga Henry & 1756 Others [2015] eKLR. This Court will therefore defer to the constitutional and statutory prescriptions on the exercise of its judicial review jurisdiction arising from the circumstances of the instant application.

28. I accordingly find that the Interested Parties' Preliminary Objections are merited for the foregoing reasons, and hereby strike out the Applicant's Chamber Summons dated 7<sup>th</sup> May 2020, with no order as to costs.

29. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 15<sup>TH</sup> DAY OF JANUARY 2021

P. NYAMWEYA

JUDGE

**FURTHER ORDERS ON THE MODE OF DELIVERY OF THIS RULING**

In light of the declaration of measures restricting Court operations due to the COVID -19 Pandemic, and following the Practice Directions issued by the Honourable Chief Justice dated 17th March 2020 and published in the Kenya Gazette on 17th April 2020 as Kenya Gazette Notice No. 3137, this ruling will be delivered electronically by transmission to the email addresses of the *ex parte* Applicant's Respondents' and Interested Parties' Advocates on record.

P. NYAMWEYA

JUDGE