



**REPUBLIC OF KENYA**

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

**CIVIL AND COMMERCIAL DIVISION**

**CIVIL CASE NO. E007 OF 2020**

**ROYAL HISHAM LIMITED.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**KENYA PORTS AUTHORITY.....DEFENDANT/RESPONDENT**

**RULING**

1. What is before court for determination is a Preliminary objection dated 26/10/2020 taken out by the Defendant/Respondent as a response to the Plaintiff's Notice of Motion dated 13/10/2020 as well as the entire suit. In that view I have found it fit to Address the both the Preliminary Objection and the Notice of Motion.

2. The Plaintiff/Applicant's Notice of Motion application is dated 13/10/2020 and brought under the provisions of **Sections 3A, 63 (c) & (e) of the Civil Procedure Act, Order 50 Rules 1 & 3, Order 40 Rules 1,2,3 & 9 of the Civil Procedure Rules, 2020** and all the other enabling provisions of the law. By the application, the Plaintiff/Applicant seeks for the following orders: -

**a) Spent;**

**b) Spent;**

**c) That this Honourable court be pleased to issue temporary injunction to restrain the Defendant/Respondents by themselves their servants, employees, agents, proxies, cronies or any other person(s) under the Defendant/Respondent's authority howsoever from accepting, receiving or in any other manner dealing with the application for Tender No. KPA/051/2020-21/ADM on 14<sup>th</sup> October, 2020 or any day thereafter pursuant to advertisement made in September, 2020 from provisions of COMMUTER BUS SERVICES at the Defendant/Respondent's premises (Mombasa, Nairobi and Kisumu) pending hearing and determination of this suit and/or further orders from this honourable court;**

**d) That this Honourable court be pleased to make such orders as may appear to be fit and convenient to meet the ends of justice;**

**e) That the costs of this application be provided for.**

3. The grounds upon which the application is premised are on face of the application and further explicated in the supporting affidavit of **Salim Kiponda Hinzano**, the Applicant's manager sworn on the 13/10/2020. He deponed that the Plaintiff and the Defendant entered into an agreement dated 16/12/2009 for the Applicant to provide commuter bus services at the Defendant/Respondent's premises at Mombasa (sea port) pursuant to a successful tenderer being (tender No. KPA/051/2009-10/ADM). That Clause 5.0 of the agreement required the Plaintiff to ensure that the commuter vehicles were insured with reputable underwriters, maintained in a road roadworthy state in compliance with Road Traffic Act and the Transport Licensing Board Regulations. It is further averred that the Plaintiff was to hold an operator's licence issued under TBL regulations and ensure that its employees met the requirements under the Road Traffic Act, and the Board's (transport licensing board) Regulations.

4. It is further deponed that the contract enjoined the Plaintiff/Applicant to provide special commuter Bus service which could accommodate disabled persons. To meet those requirements, it is averred that the Plaintiff engaged the services of Yutong HongKong Limited, based in China to supply special modified buses equipped with; low floor entry, low-disable ramp device to carry disabled people, wheel chair area, CCTV cameras inside the buses and rails with hanging rings.

5. According to Mr. Salim, the Plaintiff then applied for a loan facility from the Diamond Trust Bank to purchase the commuter buses and the Defendant was notified of the loan facility vide letters dated 2/4/2015 and bundle of other letters contained in annexure marked as

“SKH-9 & 10. The Plaintiff then offered its properties as security for the loan and Commuter buses were then imported to Kenya on 12/10/2018.

6. The Plaintiff goes on to aver that the Defendant has always taken the position of a dominant party in the contract while the Plaintiff remains the minor party. Consequently, the Defendant/Respondent unilaterally extended the contract on diverse dates and lately, the contract had been renewed on 14/9/2020. It is averred that the Plaintiff/Applicant also wrote to the Defendant in a letter dated 9/6/2020 seeking for the contract to be renewed for a period of six (6) months but the request has to date gone unanswered.

7. However, what prompted the present litigation is the tender advert by the Defendant inviting bids for the provision of commuter bus services for Mombasa port vide tender No. KPA/051/2020-21/ADM, TENDER DOCUMENT, SEPTEMBER, 2020. The Plaintiff/Applicant avers that it invested hugely to provide the commuter services at the Defendant’s premises and some of the loans acquired to ensure the engagement was a success, are still outstanding to the extent that if the contract between itself and the Defendant is not renewed for five (5) more years, then the probable outcome is that the Plaintiff’s properties, used as collateral for the loans, will be auctioned.

8. It is also the Plaintiff’s contentions that if the contract is not extended further, it will suffer loss of business and loss its investments, and probably be wound up by its creditors in bankruptcy proceedings. In any event, according to the Plaintiff, the Defendant will not suffer any prejudice if it extends the contract and if the court grants the orders sought.

9. The application is a duplication of the averments set out in the Plaint and I need not repeat the same save that the Plaintiff/Applicant also seeks for an order compelling the Defendant to comply with the provision on the original contract which particularly emphasized the Defendant would renew and/or extend the contract.

10. The Defendant opposed the application dated 13/10/2020 and the entire suit. In doing so, it filed a notice of Preliminary Objection and Grounds of Opposition dated 26/10/2020 and a Replying Affidavit sworn by its procurement officer, **Anne A. Otit** on even date. The Preliminary Objection raises among others, points of jurisdiction in that this court is divest of jurisdiction in the first instance and the suit has been instituted against the express provisions of **Section 167 of Public Procurement and Asset Disposal Act No. 33 of 2015**. Further that since the suit challenges an ongoing tender of which the applicant just like any other prospective bidder is at liberty to compete, it follows that the suit offends the doctrine of exhaustion. According to the Respondent, the Applicant’s suit is tantamount to an obstructive practice described under **Section 66 of the Public Procurement and Asset Disposal Act** which offends the provisions of **Article 227 of the Constitution**.

11. In the Replying Affidavit, it is deponed that the Applicant’s contract was expected to last until 12/1/2021 and it is not in any way to be affected by the signing in of a new contract with a successful bidder from a tender which has been advertised openly and in accordance with the provisions of the law. As such the deponent avers that the suit by the Plaintiff is immature, speculative and amounts to abuse of the court process. Be that as it may, the Respondent contents that the Applicant has not met the threshold for granting injunctive orders sought as provided for under **Order 40 of the Civil Procedure Rules**.

12. Parties were directed to dispose of the Preliminary Objection by way of written submissions and the record reflects that both parties have complied. The Plaintiff/Applicants submissions were filed on 3/2/2021 and they canvassed the argument that **Section 167 of Public Procurement and Asset Disposal Act No. 33 of 2015** is not couched in mandatory terms and the court may exercise its unlimited jurisdiction under **Article 165 (3) of the Constitution** in assuming jurisdiction in the instant case. Further, that the advertised tender has already been overtaken by events and it is in the spirit of justice that their application be heard.

13. On the other hand, the Defendant/Respondent’s submissions were filed on 29/1/2021. The position taken by the Respondent is that the suit offends the doctrine of exhaustion and the Public Procurement Administrative Review Board is the correct forum to hear, review and determine the tendering and asset disposal disputes.

#### **Analysis and Determination**

14. I have considered the Plaint, the Notice of Motion application dated 13/10/2020, affidavits in support and objection thereof, the Preliminary Objection by the Defendant, the written submissions and judicial authorities therein.

15. My view in this matter is that it is a legal precept that where a Preliminary Objection is raised in any suit, the mode of practice is that the court will first determine the Preliminary Objection for the reason that when preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.

16. Before this Court embarks on determining the merits of the **Notice of Preliminary Objection**, it will first determine whether what has been raised by the Defendant/Respondent satisfies the ingredients of a **Preliminary Objection**. In this determination, the Court will be persuaded by the findings in the case of **Oraro...v...Mbaja(2005) 1KLR 141**, where it was held that:-

***“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”.***

17. The Defendant/Respondent has in its Preliminary Objection averred that the suit herein as well as the application subject of this ruling, offend the doctrine of exhaustion and by virtue of **Section 167** of the **Public Procurement and Asset Disposal Act**, this court is divested of jurisdiction to hear the case in the first instance.

18. Generally speaking, and on the authority of the Supreme Court decision in the case of **Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others**, a court can only exercise that jurisdiction that has been donated to it by either the Constitution or

legislation or both. Therefore, it cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. Jurisdiction is in the end everything since it goes to the very heart of a dispute. Without it, the court cannot entertain any proceedings and must down its tools. (Also see the case of **The Owners of the Motor Vessel Lilian ‘S’ v Caltex Kenya Limited [1989] KLR 1**).

19. It is therefore clear that the issue as to whether this court has jurisdiction to hear the matter or not, is a pure question of law. As for whether the Defendant/Respondent’s Preliminary Objection has merit, it was submitted that the Applicant is challenging a tender advert for tender for provision of commuter services on the ground that the Applicant stands to suffer loss due to breach of duty by the Defendant/Respondent.

20. According to the Defendant, the Plaintiff ought to have first filed a review in accordance with **Section 167** of the Procurement and Assets Disposal Act. In that regard, I have read through **Section 167 of the Public Procurement and Asset Disposal Act** which forms the basis of the Preliminary Objection. It 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.”**

21. The requests for review referred to by Section 167 above are made under Section 168 to the Procurement Administrative Review Board established under Section 27 of the Act.

22. In my view, case law has established that provisions statutory provisions providing an alternative forum for dispute resolution must be carefully read so as not to oust the jurisdiction of the Court to consider valid grievances from parties who may not have audience before the forum created, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit. See the case of **Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others [2017] eKLR**

23. I also agree with the court in the above case that the situation more likely than not arises where, as here, the right to approach the statutory forum created (in this case the Review Board) is limited to certain parties who are aggrieved in a particular manner as defined by the statutory scheme and where the particular party seeking to bring the suit does not fit into any of the categories defined by the Statute.

24. To determine whether the Plaintiff is among the persons enjoined to seek review before the Procurement Review Board, **firstly**, I will consider the provisions of Section 165(1) of the Public Procurement and Asset Disposal Act (PPAD) which provides that *“the persons who may seek administrative review as 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.”* Further, Section 2 of PPAD Act defines a *“candidate”* as meaning *“a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity”* while a *“tenderer”* is defined by the same a section as meaning *“a person who submitted a tender pursuant to an invitation by a public entity”*.

25. In the present case, there were no documents obtained by the Plaintiff in relation to Tender No. KPA/051/2020-21/ADM nor has it been shown that the Plaintiff has submitted any tender document with regard to tender No. KPA/051/2020-21/ADM thus, clearly the Plaintiff does not fit the definition of either a *“candidate”* or a *“tenderer”* and therefore could not have sought administrative review.

26. It then follows that a person who is not competent to request for review, has an avenue of other legal remedies including filing of a civil suit as the case herein. Therefore, a person who would otherwise be locked out from invoking the provisions of the Procurement and Asset Disposal Act is not barred from seeking alternative remedy under other provisions of the law. This was the position adopted by the Court in the case of **Elias Mwangi Mugwe v Public Procurement Administrative Review Board & 5 Others [2016] eKLR** where it explicitly expressed itself thus: *“...any person who has no automatic right to participate in the review proceedings may properly resort to other available modes of ventilating his rights.”*

27. Therefore, looking at our case law on the doctrine of exhaustion, the nstatutory schema provided for under the PPAD Act and especially the wordings on which parties have a right to file a review application thereunder, I am of view that the suit is properly filed before the Court.

28. I therefore proceed to dismiss the Preliminary Objection but with no order as to costs.

29. The Plaintiff shall fix a mention date at the court registry for directions in the matter.

It is so ordered.

**Dated, Signed and Delivered at Mombasa this 12<sup>th</sup> day of February, 2021.**

**D. O. CHEPKWONY**

**JUDGE**

**Order**

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15<sup>th</sup> March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open Court.

**JUSTICE D. O. CHEPKWONY**