



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 99 OF 2020

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

KENYA PIPELINE COMPANY LIMITED.....RESPONDENT

AND

M/S HELINT AVIATION LIMITED.....1ST INTERESTED PARTY

M/S LEVEL UP LIMITED.....2ND INTERESTED PARTY

EX PARTE:

LADY LORI (KENYA) LIMITED

RULING NO. 2

1. Lady Lori (Kenya) Limited, the *ex parte* Applicant herein (hereinafter referred to as “the Applicant”), filed an application by way of a Chamber Summons dated 7th May 2020, seeking the following orders:

1. An order of Certiorari to remove to this Court and quash the Letter of Notification dated 14th February, 2020 issued by the Respondent awarding Tender Number KPC/PU/004-OT/19-20; Tender For Repairs And Maintenance of 2 NO. AS350B3 Helicopters At Nairobi, Wilson Airport (“the tender”) to the 1st and 2nd Interested Parties, M/S Helint Limited and M/S Level Up Limited.

2. An order of Mandamus compelling the Respondent to commence de novo the procurement process for the award of Tender Number KPC/PU/004-OT/19-20; Tender for Repairs and Maintenance of 2NO. AS350B3 Helicopters at Nairobi, Wilson Airport (“the tender”) comply with the requirements of the Constitution, and Sections 3 and 80(2) of the Public Procurement and Disposal Act (2015) and the Public Procurement and Disposal Regulations, 2006.

3. That the grant of leave aforesaid to apply for the said orders of Certiorari and Mandamus do operate as a stay against the Respondent, its officers, agents, servants, body or authority appointed for that purpose from acting on the Letter of Notification dated 14th February, 2020 until the determination of the application for the said Orders of Certiorari and Mandamus, or until the further order of the court.

4. Costs of, and incidental to this application be in the cause.

2. The said application is supported by a statement dated 7th May 2020, and a verifying affidavit sworn on the same date by Ian Mimano, a director of the Applicant. This Court directed the parties to canvass the application for leave *inter partes* by way of written submissions. Kenya Pipeline Company, which is sued as the Respondent, filed a replying affidavit dated 27th August, 2020 sworn by Boniface Ndaka, a manager with the Respondent’s Airwing department, who also served as the Chairman of the Respondent’s Tender Evaluation Committee for Tender Reference Number KPC/PU/004-OT/19-20. The parties’ respective cases are as follows.

The Applicant’s case

3. The Applicant stated that it had been awarded several tenders for the maintenance of the Respondent's helicopters in the past. However, that in the month of August 2019, the Respondent covertly, illegally and irregularly directly invited M/S Helint Aviation Limited and M/S Level Up Limited, the 1st and 2nd Interested Parties respectively to tender for the said services, and neither advertised the tender nor invited the Applicant who was a pre-qualified supplier to tender for the services. Further, that the Respondent then proceeded to award the tender to the 1st & 2nd Interested Parties.

4. Subsequently, that the Applicant lodged a complaint with the Public Procurement Regulatory Authority, whereupon the Respondent cancelled the award of the tender to the 1st and 2nd Interested Parties and advertised Tender Reference Number KPC/PU/ 004-OT/ 19-20 for Repairs and Maintenance of 2No. AS350B3 Helicopters at Nairobi, Wilson Airport. The Applicant asserted that it duly submitted its tender documents before the tender closing date of 10:00am 30th January 2020, and that on 17th February, 2020 via an email from the Tender Committee Secretariat of the Respondent, it received a letter of notification dated 14th February, 2020 notifying that it was unsuccessful.

5. It was averred that the Respondent proceeded to further notify the Applicant that the tender was awarded to M/S Helint Aviation Limited and M/S Level Up Limited, the 1st and 2nd Interested Parties respectively. Being dissatisfied with the award made to the 1st & 2nd Interested Parties, the Applicant stated that it moved to the Public Procurement Administrative Review Board on 28th February, 2020 and filed a Request For Review via **Application No. 29 of 2020 : Lady Lori (Kenya) Limited v Accounting Office, Kenya Pipeline Company Limited & 2 Others** challenging the decision by the Respondent to award the tender to the 1st & 2nd Interested Parties on account of the breach of the procurement laws running up to the award of the tender. He added that the Procurement Board, in a decision rendered on 19th March, 2020 struck out the said Request for Review for want of jurisdiction

6. The Applicant detailed the alleged irregularities in the award of the tender. In summary the Applicant alleged that there was an abuse of power by the Respondent in illegally and unprocedurally splitting and awarding the Tender to the 1st & 2nd Interested Parties. It was further deponed that the award criteria was skewed to favour the 1st and 2nd Interested Parties respectively, and the Respondent did not thereby meet the constitutional threshold of fairness, equity, transparency and competitiveness as set out under Articles 10 and 227 of the Constitution. Lastly, the Applicant alleged that there was manifest bias, as the person chairing the Respondent's Evaluation Committee for the subject tender was a former employee with whom it had a history of poor working relationship.

The Respondent's case

7. The Respondent on its part confirmed that it placed an advertisement being Tender Reference Number KPC/PU/004-OT/19-20 for Repairs and Maintenance of 2 No. AS350B3 Helicopters at Nairobi Wilson Airport on 14th January 2020, and that the Applicant submitted its tender before the closing date on 30th January 2020. That the Applicant was thereby a bidder or tenderer within the meaning ascribed thereto under section 2 of the Public Procurement and Asset Disposal Act, 2015. Further, that on 10th February 2020, the Respondent's Tender Evaluation Committee evaluated and compared the tenders submitted by the Applicant and the Interested Parties, using the procedures and criteria set out in the tender document and as per statutory requirements.

8. In addition, that using the aforesaid criteria, it was determined at the preliminary stage that the Applicant's bid did not meet all the preliminary and mandatory requirements to qualify to the technical evaluation, and the Respondent detailed the reasons for this finding in its pleadings. As such, that the Applicant's bid did not progress to the Technical Evaluation Stage and this was communicated to the Applicant by a letter dated 14th February 2020, which letter also informed the Applicant that the tender had been awarded to the Interested Parties.

9. Thereafter, that the Applicant filed a Request for Review on 28th February 2020 at the Public Procurement and Administrative Review Board being PPARB No. 29 of 2020, and that in its decision of 19th March 2020, the Board found that the Applicant had failed to demonstrate loss or damage suffered as a result of the actions of the Respondent and as such, its jurisdiction could not be properly invoked under Section 167(1) of the Public Procurement and Asset Disposal Act, 2015. It was averred that following the Board's decision, the Respondent in compliance with the law, deferred the signing of the contract with the winning bidder until after the expiry of 14 days to accord an opportunity to any person aggrieved by the Board's decision to seek judicial review by the High Court within 14 days from 19th March 2020.

10. The Respondent asserted that the law is clear that upon failure to challenge the Board's decision by way of judicial review to the High Court within 14 days, the decision of the Board shall be final and binding to both parties, and added that upon expiry of the said 14 days, it entered into a contract with the 2nd Interested Party for Repairs and Maintenance of its 2 No. AS350B3 Helicopters. Therefore, that the prayers sought by the Applicant had been overtaken by events, and it would be in vain for this Court to quash a decision that has already been implemented just because the Applicant inexplicably delayed in filing the instant judicial review application. It was also averred that there has never been a stay of execution of the decision of the Respondent or the Board decision and the Applicant herein approached this Court after the Procurement process had been concluded.

11. According to the Respondent, the Applicant filed the instant application on 13th May 2020 as an afterthought, and after a lapse of over 1 ½ months from the date of the decision of the Board, by purporting to invoke section 174 of the Public Procurement and Asset Disposal Act, 2015. The Respondent contended that while section 174 of the Public Procurement and Asset Disposal Act, 2015 entitles a person to other remedies, the provision cannot be said to be open to a person who has an automatic right to file a Request for Review under section 167(1) of the Act, and who in fact filed a Request for Review and participated in the proceedings before the Board to the logical end. Therefore, that a distinction must be drawn between a party with a right to participate in the review proceedings at the Board, such as the Applicant, and any other person who has no automatic right to participate in the review proceedings and that only the latter may properly resort to other available modes of ventilating its rights.

12. The Respondent's case is that section 174 of the said Act is only available to persons who are not competent to request for review before the Board, or persons who are competent but have issues that the Board cannot address because they are outside its jurisdiction. Therefore,

that following the Board's decision on 19th March 2020, the Applicant ought to have invoked the provisions of Section 175(1) of the Act by filing for Judicial Review at the High Court within 14 days. The Respondent asserted that where there is a clear procedure for redress of any particular grievance prescribed by law, that procedure should be strictly followed, and that the timelines in the Act were set for a purpose chiefly being that proceedings touching on procurement matters ought to be heard and determined without undue delay.

13. In addition, that being a competent party before the Board under section 167(1) of the Public Procurement and Asset Disposal Act, 2015, the Applicant ought to have exhausted the available dispute resolution mechanisms under Section 175(1) of the Act, before approaching this court under section 174. The Respondent further averred that that the instant application offends section 9(2) of the Fair Administrative Action Act, 2015 as the remedies available under the Public Procurement and Asset Disposal Act, 2015 against the decision of the Review Board by the Applicant have not been exhausted. Further, that the Applicant had not demonstrated exceptional circumstances warranting exemption from the obligation to exhaust all remedies nor had an application been made seeking such exemption, thus this suit offends the doctrine of exhaustion of statutory available remedies.

14. Lastly, it was averred that the nature of the Applicant's complaint before the Board is similar to the complaint before this Court, and that this Application seeks to relitigate issues already conclusively determined by the Public Procurement Administrative Review Board, instead of contesting the Board's decision through the prescribed route of judicial review at the High Court under section 175(1) of the Public Procurement and Asset Disposal Act, 2015.

The Determination

15. I have considered the application dated 7th May 2020, and the substantive issue that require to be determined is whether leave should to be granted to the Applicant to commence judicial review proceedings. I am in this respect mindful of the provisions of *Order 53 Rule 1* of the Civil Procedure Rules, which provide that no application for judicial review orders should be made unless leave of the court was sought and granted. The main reason for the leave as explained by Waki J. (as he then was), in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996**, is to ensure that an applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration.

16. The question to be answered therefore is whether the *ex parte* Applicant's case is sufficiently meritorious to justify leave. It is trite that the Court in this regard ought not to delve deeply into the arguments of the parties, but should make cursory perusal of the evidence before it in arriving at a decision whether there is an arguable case. It was explained by Lord Bingham in **Sharma vs Brown Antoine (2007) 1 WLR 780**, that a ground of challenge is arguable if its capable of being the subject of sensible argument in court, in the sense of having a realistic prospect of success, however, that the test is flexible depending on the nature and gravity of the issues.

17. In most cases, the determination of whether the test of an arguable case has been met is relatively straightforward. However, a number of other factors can come to play in determining whether a claim is sufficiently merited, and which will affect the exercise of this Court's discretion to grant leave. Relevant factors include the capacity and interest of an applicant to bring a claim, whether the claim is amenable to judicial review, whether it is in abuse of the court process, the availability of another remedy and whether there has been delay.

18. In the present application, the argument has been made that the Applicant did not exhaust the available statutory mechanisms, and its application is also time barred under the section 175(1) of the Public Procurement and Asset Disposal Act, 2015. The Applicant has in this respect urged that it has brought the application herein pursuant to the right to seek judicial review that is saved by section 174 of the Public Procurement and Asset Disposal Act of 2015, which allows for other legal remedies with respect to the procurement of public tenders, in addition to the review provided for under the Act.

19. The Applicant in its submissions dated 10th June, 2020 filed by its Kembi-Gitura & Company Advocates reiterated that the awarding of the impugned tender to the 1st & 2nd Interested Parties is illegal, biased and an unfair administrative action actuated by ulterior motives, and violates the constitutional threshold of fairness, equity, transparency and competitiveness as set out under Articles 10 and 227 of the Constitution. The Applicant contended that prior to filing the instant proceedings it invoked the jurisdiction of the Public Procurement Administrative Review Board in Application No. 29 of 2020 on a request to review the decision of the Respondent to award the tender to the Interested Parties.

20. Further, that it proceeded to the Board with the knowledge that the Public Procurement and Asset Disposal Act has a self-contained dispute resolution system, and that any party aggrieved by a procurement process ought first, to file an appropriate claim for relief at the Board. The Applicant submitted that it was guided by the holdings of the Court of Appeal in **Speaker of National Assembly v Karume [1992] eKLR** and in **Geoffrey Muthinja Kabiru & 2 Others vs Samuel Munga Henry & 1756 Others [2015] eKLR**, that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Also cited in this respect was the decision **In the Matter of the Mui Coal Basin Local Community [2015] eKLR**.

21. However, that the said Request for Review was struck out by the Board on 19th March 2020 on the grounds that the Applicant had failed to demonstrate loss and *locus standi* in accordance with Section 167 (1) of the Public Procurement and Asset Disposal Act to invoke the jurisdiction of the PPARB. Therefore, that the statutory remedy of review before the Board was unavailable to the Applicant, and it finds itself in a position where it has a legitimate grievance and no recourse to the Board for redress of its grievances. The Applicant relied on the decision in **Republic vs. Independent Electoral and Boundaries Commission and Others ex parte Coalition for Reform and Democracy , Misc. Application No. 637 of 2016** for the submission that section 174 of the Public Procurement and Asset Disposal Act provides that the right to request a review is in addition to any other legal remedy a person may have, and hence, the only avenue open to the it is to approach this Court for leave to apply for judicial review proceedings of the Respondent's decision to irregularly award the subject tender to the Interested Parties.

22. The Respondent's Advocates, Kipkenda & Company Advocates, filed submissions dated 9th September, 2020, wherein it submitted firstly, that the Applicant is estopped from instituting these review proceedings a new against the Respondent having been heard and

determined with finality by the Public Procurement and Administrative Review Board. Secondly, the Respondent submitted that the remedies available to the Applicant were not exhausted before filing the instant application. Thirdly, it was the Respondent's submission that the instant application is time-barred. In this regard, the Respondent reiterated that in as much as section 174 of the Public Procurement and Asset Disposal Act 2015 entitles a person to other remedies, this provision cannot be said to be open to a person who had an automatic right to participate and in fact participated in review proceedings before the Review Board.

23. Further, that the application of Section 174 is limited by the doctrine of exhaustion and especially the provision of section 9(2) of the Fair Administrative Action Act, 2015, and is only available to persons who are not competent to request for review before the Review Board or to persons who are competent but have raised issues that are outside the scope of the Review Board's jurisdiction. In support of this assertion, the Respondent cited the decisions in **Republic vs Independent Electoral and Boundaries Commission (I.E.B.C.) Ex Parte National Super Alliance (NASA) Kenya & 6 Others [2017] eKLR** and **Elias Mwangi Mugwe vs Public Procurement Administrative Review Board & 5 Others [2016] eKLR** that a person who has no automatic right to participate in the review proceedings may properly resort to other available modes of ventilating his rights.

24. It was thus submitted that the Applicant, having opted to file a Request for Review and having failed in the first attempt, ought to have exhausted the remedies available to it under Section 175 of the Public Procurement and Asset Disposal Act 2015 by filing for judicial review against the decision of the Review Board within 14 days of the Board's Decision of 19th March 2020.

25. The Respondent maintained that this Application merely seeks to relitigate issues already conclusively determined by the Public Procurement Administrative Review Board, instead of contesting the Board's decision through the prescribed route of judicial review at the High Court under Section 175(1) of the PPAD Act, 2015. Reliance was placed on the Supreme Court of Kenya decision in **Communications Commission of Kenya & 5 Others vs Royal Media Services Limited & 5 Others [2014] eKLR** at that such relitigation gives rise to issue estoppel. It was thus submitted that, being a competent party before the Review Board under Section 167(1) of the Public Procurement and Asset Disposal Act 2015, the Applicant ought to have exhausted the available dispute resolution mechanisms under Section 175(1) of the Act before instituting fresh proceedings in this court close to 2 months after the Review Board decision.

26. In conclusion, the Respondent asserted that the Applicant was therefore estopped from instituting fresh proceedings to challenge a decision on facts and issues finally determined by the Review Board. In addition, that the law is clear that upon failure to challenge the Review Board's decision by way of judicial review to the High Court within 14 days, the decision of the Review Board shall be final and binding to both parties, and the prayers sought by the Applicant have been overtaken by events.

27. Reliance was in this regard placed on the decisions in **Republic vs Cabinet Secretary, Ministry of Transport, Infrastructure, Housing & Urban Development & 3 Others Ex parte Global Agro Logistics Limited [2018] eKLR**; **Ethics and Anti-Corruption Commission vs. Horsebridge Networks Systems (EA) Ltd and Another, Civil Appeal No. 69 of 2015; Republic vs Public Procurement Administrative Review Board & 2 others Ex Parte Central Bank of Kenya & 2 others [2018] eKLR**; and **Republic vs. Public Procurement Administrative Review Board & another Ex-parte Selex Sistemi Integrati [2008] KLR 728** for the submissions that a decision of the Review Board is final and binding on the parties unless judicial review thereof commences within 14 days from the date of the Review Board's decision, and that proceedings touching on procurement matters ought to be heard and determined without undue delay

28. I have considered the pleadings and arguments made by the Applicant and Respondent, and note that the timelines for filing judicial review proceedings in this Court by an applicant in a procurement disputes is regulated by the law, and if not complied with, may have the effect of ousting the jurisdiction of this Court as explained by Nyamu, J (as he then was) in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi, [2008] KLR 728**. Section 175 (1) of the Public Procurement and Asset Disposal Act in this respect provides timelines within which applications for review from decisions of the Public Procurement Administrative Review Board can be filed as follows:

“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.”

29. In this respect, section 167 and 168 of the Public Procurement and Asset Disposal Act of 2015, provides for review by the Public Procurement Review Administrative Board as a statutory dispute resolution mechanism of public tender procurement disputes, but only where the applicant is a candidate or tenderer in a tender. The right to judicial review of decisions made by the Public Procurement Administrative Review Board is in this respect regulated by section 175 (1) of the Act. The question therefore that arises for determination is whether a tenderer or candidate who has sought review of a procurement decision in the Public Procurement Administrative Review Board can sidestep the procedure and timelines set by section 175 (1) of the Act, by using the provisions of section 174 of the Act.

30. The answer to this question is in the negative for two reasons. The first is that while a literal interpretation of section 174 may lead one to the conclusion that it can apply concurrently with section 175, such an interpretation will not only lead to an absurd result but also one that is contrary to the legislature's intention and the public interest. It is notable that Article 174 provides that “*the right to request a review under this Part is in addition to any other legal remedy a person may have.*” The Part referred to in the section is Part XV of the Act on “Administrative Review of Procurement and Disposal Proceedings” which provides for a procedure of continuing and incremental review of decisions made public procurement proceedings, firstly by the Public Procurement Administrative Board, and if one is still aggrieved, by the High Court, and lastly by Court of Appeal, whose decision is final in the review proceedings.

31. The interpretation by the Applicant that a party who has this right of judicial review from a decision of the Public Procurement Administrative Board can break this continuum and can approach this Court afresh to review decisions that are the same subject matter of the a decision already made by the Board using section 174 of the Act, will lead to the absurd and undesirable result of relitigating issues already decided upon by a forum of competent jurisdiction, namely the Public Procurement Administrative Review Board which is expressly prohibited and frowned upon by the law under the doctrines of *res judicata* and estoppel, which are embodied in sections 6, 7 and 8 of the Civil Procedure Act. These doctrines are meant to guard against abuse of the judicial process by collateral attacks on judicial decisions,

and extension of litigation on matters already litigated in earlier proceedings.

32. Such a result also goes against the expressly stated purpose of the Public Procurement and Asset Disposal Act of 2015, which is to provide procedures for efficient public procurement and for assets disposal by public entities; and also goes against one of the basic principles of legal policy that informs interpretation of statutes, which is that the law should serve the public interest. A purposive interpretation of section 174 of the Act is therefore necessary, which lends itself to the interpretation that judicial review under the section cannot be available to matters already covered by section 175.

33. The second reason is that there is a clearly defined procedure that was required to be followed by the Applicant under section 175 of the Act if aggrieved by the decision of the Public Procurement Administrative Review Board, including the decision made by the Board that the Applicant had no *locus standi* and therefore no remedy. In this respect, the exhaustion of statutory remedies is 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 on the subject. Article 159(2)(c) of the Constitution in this regard obliges this Court to observe the principle of alternative dispute resolution.

34. Specifically, with respect to the exercise of the judicial review jurisdiction of this Court, sections 9(2) (3) and (4) of the Fair Administrative Action Act state as follows:

“(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.”

35. The Court of Appeal first embodied the doctrine of exhaustion in Speaker of National Assembly vs Karume (1992) KLR 21, and further clarified the doctrine under the current constitutional dispensation in Geoffrey Muthinja Kabiru & 2 Others vs Samuel Munga Henry & 1756 Others (2015) eKLR as follows:

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews..... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. The Ex Parte Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.”

36. It is therefore the finding of this Court that the current application is in abuse of process of Court for the foregoing reasons, and this Court is also divested of jurisdiction, as the *ex parte* Applicant is time barred by the provisions of section 175 from seeking review of the decisions made by the Public Procurement Administrative Review Board, which is its proper cause of action before this Court .

The Disposition

37. The Applicant has accordingly not met the threshold of an arguable case for the foregoing reasons, and is therefore not entitled to leave to commence judicial review proceedings against the Respondent. The question of whether the said leave can operate as a stay is therefore also moot.

38. The Applicant’s Chamber Summons application dated 7th May 2020 is therefore dismissed, and each party shall bear its own costs of the application.

39. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 31ST DAY OF MARCH 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 Applicant’s, Respondent’s and Interested Parties’ advocates respective email addresses.

P. NYAMWEYA

JUDGE