



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

MISC JR NO E002 OF 2020

REPUBLIC.....APPLICANT

MOI TEACHING AND REFERRAL HOSPITAL.....EX APPLICANT

VERSUS

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD.....RESPONDENT

THE CONSORTIUM OF RENTO AFRICA LTD.....1ST INTERESTED PARTY

PHARMAKEN.....2ND INTERESTED PARTY

RULING

The case for the *ex parte* applicant

The orders sought and the grounds in support thereof

Pursuant to the provisions of Order 53 rule 2 of the Civil Procedure Rules, section 9 of the Fair Administrative Actions Act, section 175 of the Public Procurement and Disposal Act, Article 47 and article 159 2010 Constitution of Kenya and all enabling provisions of the law, the *ex parte* applicant has sought the following orders.

- 1) *spent*
- 2) an order to grant the *ex parte* applicant leave to file for judicial review proceedings out of time.
- 3) an order be granted to stay order No. 3 of the respondent board in PPARB application for review No. 133 of 2020.
- 4) an order be granted to stay order No. 4 of the respondent board in PPARB application for review No. 133 of 2020.
- 5) an order to make provision for costs to be in cause.

The application is based on 13 grounds that are set out on the face of the notice of motion dated 23rd December 2020. The major grounds are as follows. The respondent board nullified all successful and unsuccessful bids in *Tender No. MTRH/RFP/1/2020-2021 for Sourcing Boiler 4 Ton Water/Feed System on Leasing Agreement (Re-tender)* leaving all tenders in abeyance.

The said board further ordered the *ex parte* applicant to re-admit the interested party's bid at the financial stage. It further ordered the said bid be re-evaluated at the financial stage.

The board also ordered the *ex parte* to make an award within 14 days.

The *ex parte* applicant proceeded to re-evaluate the bids on 4th November 2020 and in doing so, it took into consideration the board's findings and guidelines. As a result, the *ex parte* applicant discovered that all bids including the interested party's bid were non-responsive.

Following the finding that all bids were non-responsive, the *ex parte* applicant proceeded to issue notice of unsuccessful bid to all bidders on 6th November 2020 and termination of the *Tender No. MTRH/RFP/1/2020-2021 for Sourcing Boiler 4 Ton Water/Feed System on Leasing Agreement (Re-tender)* to the public procurement regulatory authority on 9th November 2020 as required by section 63 of the Public

Procurement and Disposal Act.

Furthermore, on 19th November 2020 the *ex parte* applicant was served with a request for review No. 140 of 2020. The request was heard and determined. The board once more directed the *ex parte* to adhere to the directions issued in application No. 133 of 2020 specifically order No 3, which in essence meant to arm twist the *ex parte* applicant into awarding the tender to the interested party irrespective of the fact that its bid was found to be non-responsive.

At that point in time the *ex parte* applicant discovered that the orders in application No 133 of 2020 specifically directing the *ex parte* applicant to re-evaluate the interested party's bid and award the tender within 14 days was biased and impractical; since awarding the tender to the interested party would amount to an illegality under the Public Procurement and Asset Disposal Act and would also be contrary to the provisions of article 227 of the 2010 Constitution of Kenya. These constitutional provisions require public entities when entering into contracts for goods and services to do so, in accordance with a system that is fair, equitable, transparent, competitive and cost effective.

Furthermore, by the time the *ex parte* applicant had terminated the tender in question and was being served with a request for review application No. 140 of 2020; the 14 days within which the judicial review application should have been filed had lapsed, since the *ex parte* applicant was complying with the orders of the board to re-evaluate the bids.

The delay in filing a judicial review application to challenge the orders of the board was occasioned by the need to urgently comply with the board's directives within 14 days. Finally, no loss or harm will be occasioned to the board or the 1st interested party, if this application is allowed.

Grounds of objection

The *ex parte applicant* has filed three (3) grounds of opposition to the preliminary objection. First, section 175 of the Public Procurement and Asset Disposal Act, 2015 purports to limit a constitutional right which guarantees the right to a fair administrative action.

Second, section 175 of the Public Procurement and Asset Disposal Act, 2015 purports to limit a constitutional right which guarantees access to justice.

Third, the first interested party's preliminary objection does not raise a pure point of law.

The submissions of the *ex parte* applicant

Mr Owino G. Ochieng, counsel for the *ex parte* applicant, submitted that the decision making process of the respondent was flawed and ought to be challenged for two reasons. First, in order to prevent loss of public funds. Second, in order to uphold the principles of fairness, equity, transparency, competitiveness and to uphold a cost-effective procurement system as enshrined in article 227 of the 2010 Constitution of Kenya.

Counsel for the *ex parte* applicant has pointed out that the Public Procurement and Asset Disposal Act in section 175 (1) provides that:

“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.”

Counsel has also submitted that the issue for determination is whether the *ex parte* applicant has provided sufficient reason for the court to exercise its discretion to allow it to file out of time an application for judicial review.

Counsel has submitted that the inability of the *ex parte* applicant to file the application for judicial review was due to the fact that the nature of the procurement process is a lengthy and procedural process.

Furthermore, counsel has submitted that the impugned decision of the board was delivered on 27th October 2020. By virtue of that decision the *ex parte* applicant was directed to conduct a re-evaluation using the criteria set out by the said board.

In compliance with the order of the board, the *ex parte* applicant reconstituted the tender evaluation committee; which sat on 4th November 2020. It evaluated the bids. It then found that none of the bidders was responsive. The *ex parte* applicant, then sought certain clarifications from the first interested party on certain issues, highlighted by the tender evaluation committee. The first interested party failed to offer any clarification. The *ex parte* applicant eventually terminated the tender on 9th November 2020.

Counsel has also submitted that in order to establish the flaw and illegality of the decision of the respondent board, it was necessary to conduct a re-evaluation using the criteria set out by the respondent board.

Counsel for the *ex parte* applicant has submitted that it was left with only two days to file an application for judicial review; which counsel says was not enough to research, draft and file a judicial review application.

It is counsel's submission that the delay in filing the judicial review application is not inordinate and has also not prejudiced both the respondent and the interested party. It was also the submission of counsel that the tender has not been awarded.

Furthermore, counsel for the *ex parte* applicant has also submitted that the *ex parte* applicant is likely to suffer irreparable loss, if it is not allowed to challenge the decision of the board, since it will be forced to comply with an illegal order to award the tender to a non-responsible bidder.

Counsel has further submitted that it is for the foregoing reasons that the court ought to exercise its inherent and discretionary powers as provided for in section 3A of the Civil Procedure Act (Cap 21) Laws of Kenya to allow the *ex parte* applicant to file the judicial review application out of time.

Counsel submitted that the provisions limiting access to courts must be read in a manner that conforms with the constitution. Further, counsel submitted that the provisions of article 159 (2) (d) of the Constitution mandates the courts to administer substantive justice without undue regard to technicalities.

Counsel cited the decision of this court (Mativo, J) in *Republic v Speaker of the Senate & Another, ex parte Afrison Export Import Ltd & Another*, in which that court observed that the bill of rights, under which the right to a fair administrative action is contained is a constitutional right and therefore access to courts is a fundamental right and can only be limited in a manner that can pass constitutional muster. Additionally, the court in that case observed that the court should adopt an interpretation that most favours the enforcement of a right or fundamental freedom.

Counsel further cited *Republic v Kenya Revenue Authority, ex parte Stanley Mombo Amuti, [208] e-KLR*, in which that court observed that in an application for extension of time, all that the applicant is required to do is to demonstrate that he has a good reason for failing to file the application within the time allowed by the court.

Counsel finally cited *Nicholas Kiptoo Arap Korir Salat v IE&BC & 7 Others [2014] e-KLR*, a case in which the Supreme Court laid down seven (7) the guidelines to be followed in exercising its discretion to extend time to enable a party to file a matter. Those guidelines include the fact that the applicant has explain the cause of the delay to the satisfaction of the court and the court has to make a determination on a case to case basis.

Based on the foregoing authorities, counsel has urged the court to find that the *ex parte* applicant has met the threshold for the grant of the extension of time within which to file an application for judicial review.

The case for the respondent

The respondent has opposed the application. It has through its written submissions supported the preliminary objection raised by the first interested party.

Upon instructions of the Attorney General, Mr. M. W. Odongo, HSC, appeared for the respondent. He submitted, firstly that this court lacks jurisdiction to entertain the instant application; since the *ex parte* applicant complied with the respondent's award in PPARD Application Review No. 133 of 2020 and cannot now purport to challenge it.

Secondly, counsel submitted that this court lacks jurisdiction because the *ex parte* applicant failed to challenge the award within 14 days and by virtue of section 175 of the PPAD, 2015, the award became final and binding upon the parties.

Counsel has submitted that the statutory time line of 14 days was enacted in 2015 in full conformity with the 2010 Constitution of Kenya. There has never been a finding of unconstitutionality of this provision. In view of this, counsel has submitted that the invitation by the *ex parte* applicant that this provision infringes on the *ex parte* applicant's right to access to justice and a right to fair hearing is a non-starter. Counsel cited *Republic v PPARB & Another, ex parte, Teacher's Service Commission, infra, and the Republic v PPARB & Another, ex parte, Wajir County Governor [2016] e-KLR*, in which the propriety, legality and constitutionality of the statutory timelines under section 175 (1) of the PPADA *vis-a-vis* the limitation on access to justice under section 148 of the Constitution, was adjudicated. The courts in those two cases found no conflict.

The case for the 1st interested party.

The 1st interested party has opposed the application on the merits in addition to raising a preliminary objection in point of law. The 1st interested party desires this point of objection to be determined *in limine*.

The preliminary objection in point of law according to Mr. Muganda, counsel for the 1st interested party is:

“Whether the Honourable court has jurisdiction to extend time for the filing of judicial review proceedings?”

The 1st interested raised the preliminary objection in point of law, that the application of the *ex parte* applicant is brought outside the permitted 14 days within which to file proceedings for judicial review. It was the contention of the 1st interested party that the court lacks jurisdiction to entertain and determine the application.

Mr. Muganda, counsel for the 1st interested party submitted that the decision of the Public Procurement Administrative Review Board hereinafter referred to as PPARB in Review No. 133 of 2020, was delivered on 27th October 2020. The *ex parte* applicant was required to file judicial review proceedings to challenge the impugned decision by 19th November 2020; but failed to do so. It is counsel's submission that the impugned decision became final and binding from 11th November 2020 in terms of section 175 (1) of the PPADA; which provisions

are couched in mandatory language.

Furthermore, counsel cited the decision of the court in *Republic v PPARB & Another, ex parte, Teacher's Service Commission [2015] e-KLR*, in which the court refused to grant leave to institute judicial review proceedings; for they were filed outside the permitted 14 days' period of limitation. That court added the court cannot go round the legislative edict of section 175 (1) of the PPADA by craft or innovation.

The immediate foregoing decision was cited with approval in *Raila Odinga & Another v Nairobi City Council, being Nairobi HCCC NO. 899 of 1993, [1990-1994] EA 482*, in which that court took the view that article 159 (2) (d) of the 2010 Constitution was not a panacea for all ills and could not be relied upon to revive a claim which is expressly extinguished by statute.

Counsel further submitted, based on *Republic v PPARB, ex parte Teachers Service Commission, supra*, that the court should not grant the application because:

"a reading of section 2 of the Act clearly reveals that one of the objects of the procurement process is speed hence public policy and interest is geared towards expeditious resolution of procurement disputes.....It follows that this application is fatally incompetent. It cannot be resuscitated by breathing life into it. It is beyond the intensive care unit..."

In respect of jurisdiction of this court, counsel submitted, based on *Samuel Kamau Macharia v & Another v Kenya Commercial Bank Ltd & 2 Others [2012] e-KLR*, that this court lacks jurisdiction to extend the time within which the *ex parte* applicant may file its application. In that case the court observed that the jurisdiction of the court is conferred by the constitution or statute or both. Finally, counsel cited Owners of the Motor Vehicle Vessel "Lillian S" v *Caltex Oil (Kenya) Ltd [1989] e-KLR*, in which the court observed that without jurisdiction, a court has no power to make any further step and must therefore down its tools in respect of the matter before it.

The case for the 2nd interested party

The 2nd interested party did not participate in these proceedings.

Findings on the disputed issue of jurisdiction

It is common ground among the *ex parte* applicant, the respondent and the first interested party that the instant application was filed out of time, following the delivery of the impugned decision.

Furthermore, it is trite law that jurisdiction is donated by the constitution or statute or both, according to *Samuel Kamau Macharia v & Another v Kenya Commercial Bank Ltd & 2 Others, supra*. The *ex parte* applicant has not pointed to any constitutional or statutory provision that donates to this court power to extend time within which to file its application for judicial review, outside the permitted 14 days.

Counsel for the *ex parte* applicant cited the decision of this court (Mativo, J) in *Republic v Speaker of the Senate & Another, ex parte Afrison Export Import Ltd & Another, supra*, in which that court held that the right to a fair administrative action is a constitutional right and therefore access to courts is a fundamental right and can only be limited in a manner that can pass constitutional muster. The court then proceeded to grant the application through the interpretation process.

Furthermore, counsel for the *ex parte applicant* also cited *Republic v Kenya Revenue Authority, ex parte Stanley Mombo Amuti, supra*, in which that court observed that in an application for extension of time, all that the applicant is required to do, is to demonstrate that he has a good reason for failing to file the application within the time allowed by the court. I find that a court of law must interpret the words used in a statute by giving effect to their ordinary and plain meaning.

I therefore find it difficult to follow the ratio decidendi in the above cases.

Additionally, counsel for the *ex parte applicant* has urged this court to rely on its inherent powers and discretion to allow the application. I accept that a court of law has inherent powers to enable it to administer justice as enshrined in section 3A of the Civil Procure Act. It is the law that a court of law is not allowed to resort to its inherent and discretionary powers, where there are statutory provisions to meet the circumstances of the case. Inherent powers should not be resorted to, where they will be in conflict with those statutory provisions. They may only be resorted to where there is a lacuna or ambiguity in a statute. They may also be resorted to in order prevent an abuse of the court process.

Furthermore, it is also important to point out that section 175 of the PPADA has not made any statutory provisions for the enlargement of time, within which an applicant may out of time file an application for judicial review; where such applicant has failed to file such an application within the permitted 14 days.

Additionally, the 2010 Constitution of Kenya has not provided for the period within which an applicant may be allowed by the court to file out of time an application for judicial review proceedings.

In the absence of the enabling constitutional and/or statutory provisions, a court of law is not allowed by law through interpretation, to aggrieved applicant to file out of time an application for judicial review. In the words of the court in *Republic v PPARB & Another, ex parte, Teacher's Service Commission, supra*, a court of law cannot go round the legislative edict of section 175 (1) of the PPADA by craft or innovation.

It is for the foregoing reasons that I am unable to agree with the decisions of the court in *Republic v Speaker of the Senate & Another, ex*

parte Afrison Export Import Ltd & Another and Republic v Kenya Revenue Authority, ex parte Stanley Mombo Amuti, supra.

The constitutionality, propriety and legality of the statutory timelines as set out in section 175 (1) PPADA *vis-a-vis* the limitation on access to justice under section 148 of the Constitution, was adjudicated upon in *Republic v PPARB & Another, ex parte, Teacher's Service Commission, infra, and in the Republic v PPARB & Another, ex parte, Wajir County Governor, supra*, and the courts in those two cases found no conflict. I find that these two authorities are persuasive.

Furthermore, it should be borne in mind that the constitutional right of access to courts is not an absolute right. It is one of those rights that may be limited in terms of article 24 of the 2010 Constitution of Kenya. The only rights that cannot be limited are those set out in article 25 of the 2010 Constitution of Kenya; whose provisions read as follows:

“Despite any other provision in the Constitution, the following rights and fundamental freedoms shall not be limited-

(a) freedom from torture and cruel, inhuman or degrading treatment or punishment;

(b) freedom from slavery or servitude;

(c) the right to a fair trial; and

(d) the right to an order of habeas corpus.

With the foregoing in mind I now turn to the specific grounds of objection of the *ex parte* applicant.

In ground 2 the *ex parte* applicant has challenged the provisions of section 175 of the Public Procurement and Asset Disposal Act, 2015 for they purport to limit a constitutional right which guarantees access to justice.

I find that the limitation imposed by section 175 of the PPADA in requiring an aggrieved party to file judicial review proceedings within 14 days is not in conflict with the Constitution. The purpose of the said limitation is, according to *Republic v PPARB, ex parte Teachers Service Commission, supra*, “geared towards expeditious resolution of procurement disputes...”

This limitation is justifiable on two grounds. First, it is justified on the basis of speedy resolution of the disputes in issue. Second, it is geared towards reducing prolonged litigation with its attendant monetary expenses; which is not conducive to investors who transact commercial business in the country.

In the premises, I find no merit in the second ground of objection that section 175 of the Public Procurement and Asset Disposal Act, 2015 purports to limit a constitutional right that guarantees access to justice.

In ground 1 the respondent has challenged section 175 of the Public Procurement and Asset Disposal Act, 2015 for purporting to limit the *ex parte* applicant's constitutional right to a fair administrative action. I find that section 175 of the Public Procurement and Asset Disposal Act, 2015 allows an aggrieved party to file within 14 days an application for judicial review in the High Court. This in itself is a guarantee to the aggrieved party to challenge any unfair administrative action. The purpose of judicial review to enable the High Court to exercise judicial control over administrative bodies, including the instant PPARB. It is therefore clear that the *ex parte* applicant access to justice through the administrative action has not been limited. This ground therefore lacks merit and is hereby dismissed.

I therefore find that grounds 1 and 2 of the objection fail and are hereby dismissed for lacking in merit.

In ground 3 of the objection, the *ex parte* applicant has submitted that the first interested party's preliminary objection does not raise a pure point of law.

In this regard, I find that the limitation to challenge the order of the respondent within 14 days is one that is imposed by section 175 of the PPADA. It therefore follows that the issue raised by the first interested party is a pure point of law. In the premises, I find no merit in this objection, which I hereby dismiss.

Furthermore, the *ex parte* applicant urged the court invoke the provisions of article 159 (2) (d) of the 2010 Constitution and apply substantive justice by allowing the applicant's application.

In this regard, I find that the foregoing provisions are not a panacea for all ills and cannot be relied upon to create a legal right, which does not exist in law.

In the premises, I reject the submission of the *ex parte* applicant that the provisions of section 175 (1) the PPADA are not in conformity with the constitution.

I therefore find, that in the absence of the enabling statutory provisions in the PPADA, this court lacks jurisdiction to entertain and determine the instant application.

The upshot of the foregoing is that the application fails and is hereby dismissed with costs to the respondent and the first interested party.

RULING SIGNED, DATED AND DELIVERED AT KAPENGURIA VIA E-MAIL ADDRESSES OF ALL COUNSEL FOR THE PARTIES THIS 30TH DAY OF MARCH 2021

J. M. BWONWONG'A

JUDGE

In the Presence of

Mr Okodoi..... Court Administrator