



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO. 7 OF 2016

MIGORI COUNTY GOVERNMENT.....APPELLANT

-VERSUS-

INB MANAGEMENT & CONSULTING LTD.....RESPONDENT

(Being an Appeal From The Decision of Public Procurement Administrative Review Board Dated And

Delivered On 15th January, 2016)

JUDGMENT

The **County Government of Migori**, the Appellant herein, advertised tender No.MC/49/2013-2014 for proposed Supply, Customization, Installation and Implementation of a Revenue Collection Cash Flow Management and Funds Requisition System in Migori County (hereinafter “**the Tender**”).

Many entities expressed interest by bidding for the Tender. At the end of the procurement process, **INB Management & Consulting LTD**, the Respondent herein, emerged the successful bidder.

Before the procurement process could proceed further, the Appellant cancelled the award. The appellant’s action aggrieved the Respondent. The respondent sought the intervention of the **Public Procurement Administrative Review Board** (hereinafter “**The Board**”) vide **Review No. 65 of 2015**.

The Board considered the dispute and in its decision of **15/01/2016**, the Appellant was ordered to complete the tender process. The Appellant was dissatisfied with the Board’s decision hence this Appeal.

In its Memorandum of Appeal dated **12/02/2016**, and evenly filed, it set out 20 grounds of Appeal which can be condensed into the following 10 grounds;

- 1. The Review Board erred in fact and in law when it accepted and admitted a request for review of the Appellants decision to terminate the award. Yet the review application was filed outside the 14 days period contrary to Regulation 73(2)(c) of The Public procurement and Disposal Regulations, 2006 (PPDA);**
- 2. The Review Board erred when it failed to hold that the Respondent had failed to sign the Contract within the tender validity period contrary to section 20 of PPDA;**
- 3. The Review Board’s decision that the Respondent had signed the Contract was without evidence. Since is the Respondent that refused to sign the Contract despite the appellant’s letter dated 12/02/15 instructing the Respondent to do so by 17/02/2015.**
- 4. The Review Board erred in law and fact when it failed to notice the absence of written communication between the Appellant and the Respondent after the Appellant’s letter dated 21/01/2015 contrary to section 37(1) of PPDA.**
- 5. The Review Board erred in law and in fact when it failed to appreciate the fact that the Respondent engaged in corrupt practices with its officials contrary to section 40(1) of PPDA hence the entire process after notification of award failed the accountability, integrity, fairness and transparency test, the core values of public procurement.**
- 6. The Review Board erred in law and in fact when it failed to give effect to the Appellant’s rights, power and duty to terminate procurement. In that it was in error in directing the Appellant to execute a non-existent contract when there was no extension**

contrary to section 60 of PPDA.

7. *The decision by the Review board to have the Appellant proceed with the tender after expiry of its validity period is contrary to Articles 10 and 227 of the Constitution of Kenya and section 68(2) of PPDA.*

8. *The Review Board erred both in law and fact when it failed to give the Appellant notice of its decision thus prejudicing its rights under the law.*

9. *The Review Board erred in law and fact when it failed to appreciate that public interest was best served in the tender process starting afresh thereby defeating section 2 of the PPDA.*

10. *The Review Board erred in law and facts when it relied on material that was never served upon the Appellant thereby occasioning it prejudice.*

Based on the above grounds, the Appellant prays for the following orders;

a) *The decision of the Review Board dated 15/1/2016 be set aside.*

b) *Spent.*

c) *The appellant's decision dated 19th November 2015 as communicated to the Respondent vide letter dated 23rd November 2014 in relation to the tender be upheld.*

d) *The Appellant be paid the costs of these proceedings.*

e) *Any other relief.*

Directions were taken that the appeal to be canvassed by way of written submissions.

The Appellant who was represented by Okongo Wandago Advocates submitted that the appeal challenges the merits of the decision of the Board and is premised on the provisions of **section 100(2)** of the PPDA which states;

“Any party to the Review aggrieved by the decision of the Review Board may appeal to the High Court and the decision of the High Court shall be final”

The appellant contended that the Board committed a jurisdictional error by admitting the Respondent's request for review when such request was filed outside the stipulated time of 7 days of the date of the decision sought to be challenged, contrary to **Regulation 73(2)** of the **Public Procurement and Disposal Regulations, 2006**. (hereinafter '**the PPDR**').

The Appellant further stated that it cancelled the tender on **19/11/2015** and the Respondent filed for Review on **29/12/2015**, 41 days after its decision to cancel and as such, this Court has the inherent duty to correct the wrong visited upon the Appellant.

Further to the foregoing, the Appellant submitted that pursuant to **section 36 of PPDA**, it terminated the contract after the Respondent failed to execute the contract within the tender validity period. It argued that it had the right to terminate the procurement proceedings at any time before entering into a contract, a decision which could not be questioned by either the court or the Board.

The Appellant argued that the Board acknowledged that the Appellant wrote termination notices to the Respondent in compliance with **section 36(2) of PPDA** but nonetheless, it (the Board) declared the eventual termination a nullity.

The Appellant further argued that the Board's decision annulling the termination was in error since parties had not duly executed the contract and as such there was no contract in the first place.

To demonstrate the propriety of their application of **section 36** in terminating the procurement, the Appellant referred the Court to the decision in **Republic -vs- National Social Security Fund Board of trustees (2015) eKLR** where it was observed that notification of termination of the tender process precedes the termination itself; that the section requires that each person who submitted a tender, proposal or quotation be notified of such termination and on request by such person, furnish the reasons therefor.

Further to the foregone, the Appellant submitted that any further action it took after its decision of 19/12/2015 to terminate did not amount to a decision capable of review under the PPDA.

The Appellant further faulted the Board for annulling their decision to terminate the tender yet, they submit, the Respondent failed to sign the contract within the tender validity period as required under section 69 of the PPDA. They submitted that the Board without evidence, held that the Respondent had executed the Contract when in fact, no such signed contract existed and non was availed before the Board.

It was submitted that the Board failed to have regard to the Appellant's letter dated **12/02/2015** which requested the Respondent to execute the contract by **17/02/2015**; that since the Respondent failed to sign the contract as per the requirement of section 68 of PPDA, the Board

ought to have dismissed the Respondent's case.

The Appellant further submitted that the Board's decision seeks to confer upon the Respondent a benefit which is non-existent in view of section 68 of the PPDA. That the said order of the Board is contrary to the provisions of **Article 10** and **227** of the Constitution of Kenya. The Appellant also submits that failure by the Board to issue notice of the impugned decision prejudiced its rights under the law.

The appellant urged this court to re-evaluate all the evidence and circumstances of the case and arrive at its own independent decision this court being a first and final arena.

The appellant also took issue with the identity of the party that was before the Board. It claimed that there was an unexplained difference in the names of the successful bidder; that whereas the successful bidder was **INB Management & IT Consulting**, the entity that took out review proceedings before the Board was **INB IT Management and Consulting Limited**. It urged the court not to ignore the concerns by placing public funds in such an entity.

In urging the court not to compel the Appellant to enter into a contract with the Respondent, it was submitted that the same would be enforcing an illegal contract. Reliance was placed in the decision in **Kenya Pipeline Company Limited -vs- Glencore Energy (U.K) Limited (2015)**. It was stated that the Respondent had not met the mandatory conditions for the award of the tender, and as such, ought not to be awarded the tender. Support was found in the decision in **Republic -vs- Public Procurement Administrative Review Board Ex Parte Kenya Electricity Generating Company (KENGEN) & 3 Others (2016) eKLR others**.

In closing, the Appellant argued that the Respondent had not satisfied the grant of orders it sought before the Board. It claimed that the instant appeal raises important issues of public importance in light of Article 227 of the Constitution and reiterated its prayers as set out in paragraph 5 above.

The Respondent's submissions are dated 29/06/2018 and filed in Court on 03/07/2018 by Gitonga Mureithi Advocates. The respondent challenged the jurisdiction of this Court. The Respondent argued that according to the provisions of **Section 100(1), (2) (3) & (4) of PPDA**, appeals to the High Court against the decision of the Board are supposed to be by way of Judicial Review. as such, the Appellant in this case ought to have instituted a Judicial Review Application and not an Appeal in the context of a Memorandum of Appeal. Consequently it was submitted that the Appeal was incompetent and ought to be struck out.

Reference was made to the marginal notes which provides "**right to Judicial review to Procurement**" and it was argued that courts have used marginal notes to interpret statutes. To that end, support was drawn from the decision in **Ramadhan -vs- Republic (1969) EA 269 where Platt J held;**

"it could be said that the various subsections of section 269 are not necessarily interrelated and that must be so. But I think the marginal notes may afford some guide... I have on previous occasion considered the validity of using marginal notes in the interpretation of the meaning of the corresponding section of the legislation concerned. Suffice it, therefore, to say, that in my opinion the modern view is that marginal notes may be used in assisting the interpretation of the relevant provisions of the law.

The Respondent emphasized that the Appeal was wrongly before this court and ought to be struck out with costs. Counsel referred the court to the finding in **JR. Application No. 87 of 2014 Republic -vs- Central Bank of Kenya & Another Ex-Parte Horsebridge Network Systems E.A LTD** and the decision in **Civil Appeal No. 38 of 2015 Riley Services Limited -vs- Judiciary (2015) eKLR** where in the latter, Mabeya J interpreted section 100 as follows;

"...the procedure given did not envisage long and tedious process of appeals under Order 42 of the Civil Procedure Rules. The decision of the PPARB are meant to be swiftly challenged by way of Judicial review only.

Analysis and Determinations

This court has carefully read and understood the grounds of appeal, the Record of Appeal, the parties' submissions as well as the authorities relied upon. The issues that emerge for determination are as follows;

- i. Whether this court has jurisdiction to entertain an Appeal from a decision of a Tribunal;
- ii. Whether the Board erred in admitting and hearing the Review outside the stipulated time of 14 days.
 - a) The propriety of the Board's decision
 - b) Whether there was cancellation of the tender and whether it was communicated to the Respondent.
 - c) Whether there was a valid contract signed.

The contest on jurisdiction goes to the core of this dispute. It must be dealt with in the first instance. I however note that the issue was addressed and settled conclusively by my brother Hon. Mrima J. in his Ruling delivered on **14/02/2019**.

When this suit was instituted, the Respondent raised a Preliminary Objection (hereinafter '**The P.O**') stating that there is no appeal under the Public Procurement and Asset Disposal Act 2015. It was its position that under section 175(1) of the said Act, only Judicial Review could be lodged by a person aggrieved by the decision of the Review Board.

Upon hearing the Preliminary Objection the learned Judge held that the Appeal was competent. He found that the applicable law was **Public Procurement and Disposal Act of 2005** which entitled the Appellant audience before this Court on the basis of section 100 of the PPDA. An excerpt of his analysis will suffice;

“13. There are some settled facts in this matter. They include that the enactment of the 2015 Act repealed the 2005 Act and that the 2015 Act was assented to on 18/12/2015 and commenced on 17/01/2016. It is also not in doubt that the Appellant first advertised the Tender through the Standard Newspaper Edition of Wednesday, 19th March 2014.

14. Section 183 of the 2015 Act provided for the application of the transitional provisions under the Third Schedule. Clauses 1(1) and (2) of the Third Schedule provides as follows: -

1.(1) Procurement proceedings commenced before the commencement date of this Act shall be continued in accordance with the law applicable before the commencement date of this Act.

(2) For purposes of sub paragraph (1), procurement proceeding commences when the first advertisement relating to the procurement proceeding is published or, if there is no advertisement, when the first documents are given to persons who wish to participate in the procurement proceeding.

15. There is no doubt that any procurement proceedings commenced before the enactment of the 2015 Act were to be continued in accordance with the 2005 Act. The question which now begs an answer is whether the procurement proceedings herein were commenced before the enactment of the 2015 Act on 17/01/2016. Clause 2(2) of the Third Schedule answered that question by clarifying when procurement proceedings are deemed to commence; that it is on the first publication of the advertisement on that procurement or, if there is no advertisement, when the first documents are given to persons who wish to participate in the procurement proceeding. The law is that clear.

16. Given that the first publication of the advertisement on the procurement in issue was on 19/03/2014 through the Standard Newspaper and the 2015 Act came into operation on 17/01/2016, then the procurement proceedings herein were commenced before the commencement date of the 2015 Act and as such they must be continued in accordance with the 2005 Act which allowed a party aggrieved by the decision of the Board to appeal to the High Court.

17. The Appellant was therefore within its legal rights to lodge an appeal to the High Court. The objection is hence misconceived and is for rejection.

The respondent did not appeal against this ruling.

From the foregoing, it is clear that the instant appeal is competent. It is not open for this Court to consider the second time over, the same issue as raised by the Respondent in their submissions. The principle of Res-judicata bars this court. Having found so, I will now consider the other issues.

Whether the Board erred in admitting and hearing the Review:

The Appellant contends that the Respondent filed for Review after expiry of 14 days of the dispute complained of and the Board, in error, admitted, heard and determined the said dispute contrary to provisions of section 73(2)(c) of the Public Procurement and Disposal Regulations, 2006 (hereinafter ‘PPDR’).

Section 73 (2)(c) of PPDR provides as follows;

73. (1) A request for review under the Act shall be made in Form RB 1 set out in the Fourth Schedule to these Regulations.

(2) The request referred to in paragraph (1) shall-

(a) state the reasons for the complaint, including any alleged breach of the Act or these Regulations;

(b) be accompanied by such statements as the applicant considers necessary in support of its request;

(c) be made within fourteen days of-

(i) the occurrence of the breach complained of where the request is made before the making of an award; or

(ii) the notification under sections 67 or 83 of Act;

From the Record of Appeal, the Request for review was received by the Board on **29/12/2015**. The Board Secretary acknowledged receipt of the said request by affixing his signature on the said date. As per the requirement of **section 73(2)(c)**, the date of lodging the complaint must have been within 14 days of the occurrence of the breach complained of. In this instance therefore, given the date of request of review, it means that the occurrence of breach must not have happened earlier than **15/12/2015**.

Naturally, the question that begs for an answer is when the breach complained of occurred and more importantly, when formal

communication of the same happened.

The Appellant's letter cancelling the award is dated 23/11/2015. If the contents of the said letter was communicated to the Respondent that same day, it would mean that the Respondent could lodge a request for review not later than **06/12/2015**.

The twin issues that this court must unravel is to ascertain when the decision to cancel the award was arrived at and when that decision was communicated to the Respondent.

The **Minutes for Tender Committee Meeting No. 11/2015-2016** (hereinafter '**Tender Committee Minutes**') is dated **19/11/2015**. It houses the decision to cancel the tender as can be seen in **minute 9.11** where the committee resolved as follows;

“9.11.1 ...After being awarded the tender to offer services for the supply, customization and implementation of Revenue Collection, cash flow Management and Funds Requisitioning System in Migori County vide offer letter Ref: MC/SCMS/06/3VOL.IV (457) dated 21st January 2015, it should be noted that the successful bidder did not enter into contract with Migori County after failing to come for (sic) back for contract negotiation despite being issued with a copy.

Whereas the Tender Committee Meeting is dated **19/11/2015**, the members signed the resolutions therein on **25/11/2015**. For purposes of this suit, this court will go by the date when members affixed their signatures on the resolutions as being the effective date of cancellation.

This Court has thoroughly combed the record in a bid to find evidence of when communication of cancellation was effected upon the Respondent but it has been in vain. Not a single document establishes that fact save for the Respondent's stamp of receipt indicating that the said letter was received in their offices on 24/12/2015. In the request for Review, the respondent also admitted to have learnt of the decision on 24/12/2015

From the forgone analysis, it can therefore safely be concluded that the following was the sequence of events; Tender Committee resolves to cancel the award on 19/11/2015, a letter containing the said information is dated 25/11/2015 and the same is communicated to the Respondent on 24/12/2015, one month and the day after the date of the decision.

For purposes of lodging the impugned Review, when did time start running? Is it the date of the decision or of receipt of the said decision. the decision in **Republic vs. Kenya Revenue Authority Ex Parte Webb Fontaine Group FZ-LLC & 3 Others [2015] eKLR is helpful. It was held:**

“...In my view with respect to the unsuccessful bids, the 2nd respondent's time for making a request to the Respondent started running from the date that it was communicated to it either impliedly or expressly that its bid was unsuccessful.

The court in **Miscellaneous Application 302 of 2016 Republic v Public Procurement Administrative Review Board & 2 others Ex parte Kenya Power and Lighting Company Limited [2017] eKLR** interpreted section 167(1) of **Public Procurement and Asset Disposal Act 2015**, the section that limits the time when a review can be filed and observed as follows;

“167. It is therefore clear that the 14 days period starts running from the date of the notification of the award or the date of the alleged breach.”

It therefore cannot be disputed that the period of 14 days started running with effect from 24/12/2015, the date of actual receipt of the notice of cancellation of the award by the Respondent as opposed to 23/11/2015 the date on the notice. In the premises, the Request for Review was timeous having been lodged on 29/12/2015, four days later, and as such, the Board had jurisdiction to determine the request for Review.

Having found so, **the final issue is the propriety of the Board's decision**. The Appellant contends that the Respondent failed to sign the tender within the validity period allowable in law and as such was within its legal rights to terminate it.

This court has had a look at The Tender. At page 20 is clause 2.29 which is entitled **Signing of Contract**. It provides;

2.29. At the time as the procuring entity notifies the successful tenderer that its tender has been accepted, the procuring entity will send the tenderer the Contract Form provided in the tender documents, incorporating all agreements between the parties.

2.29.2 The parties to the contract shall have it signed within 30 days from the date of notification of contract award unless there is an administrative review request.

2.29.3 Within thirty (30) days of receipt of the Contract Form, the successful tenderer shall sign and date the contract and return it to the procuring entity.

The Respondent was notified of being the successful bidder through the Appellant's letter dated 21/01/2015. In the said letter, it was required that the Respondent acknowledge the offer and indicate acceptance within seven days of the letter. On 12/2/2015, the appellant sent a reminder to the respondent that the contract was supposed to have been signed by 10/2/2015 and were requested to avail themselves for signing on 17/2/2015 for signing of the contract. However, there is no evidence of service or receipt of the said letters by the Respondent. On its part the respondent expressed disappointment in the appellant frustrating its effort to sign the contract as can be evidenced from the letter dated 17/8/2015 addressed to the Governor Migori and the text messages(sms) and alleged trips made to the offices of the County Government of Migori to try and finalize the contract. From the Record, there is no acknowledgment and acceptance of the said offer.

Similarly, the allegation by the Respondent that it executed the contract is without proof. This court has perused the contract allegedly signed by the Respondent but the claim is unsupported. Neither the Appellant nor the Respondent signed it. Both parties have thrown blame at each other on who frustrated the signing of the contract.

The Board's decision to nullify the Appellant's termination of the contract on the basis that the contract was signed by the Respondent is without proof. Therefore, the parties herein had essentially not transcended into the phase where contractual obligations had arisen. Obligations had not crystallized as to bring parties within the rights envisioned by sections 68 and 69.

In view of the evidence presented before this court and the fact that no party had signed the contract, it can safely be concluded that the parties were still within the precincts of **section 36** of PPDA in which case, recourse was not available to either the Court or The Review Board. The said section provides that;

36.(1) A procuring entity may, at any time, terminate procurement proceedings without entering into a contract.

(5) the procuring entity shall not be liable to any person for a termination under this section.

For purposes of completeness of the above finding, it is important to reiterate that as per the provisions of **clause 2.29 of the Tender** which is titled **Signing of Contract**, neither party had done so within the stipulated 30 days. It is therefore the finding of this court that the finding of the Review Board was without evidence and that led it to an erroneous conclusion.

Section 67(1) of PPDA leaves it open for the parties to a procurement process to set the time limits for validity of the tender. it provides;

Before the expiry of the period during which tenders must remain valid, the procuring entity shall notify the person submitting the successful tender that his tender has been successful.

The board therefore erred in making findings based on material that was not supported by evidence.

In the end, this court finds merit in the Appeal and the appeal succeeds in the following terms;

i. The decision of the Review Board is hereby set aside.

ii. The decision of the Appellant dated 19th November 2015 to terminate the Tender is hereby upheld.

iii. Each party to bear its own costs.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 18th DAY OF MARCH 2021

R. WENDOH

JUDGE

Judgment delivered in the presence of

Mr. Odera for the applicant

Oloo Court Assistant