



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT NAIROBI**

**JUDICIAL REVIEW DIVISION JUDICIAL**

**MISCELLANEOUS CIVIL APPLICATION NO. 70 OF 2021**

**REPUBLIC.....APPLICANT**

**VERSUS**

**PUBLIC PROCUREMENT ADMINISTRATIVE**

**REVIEW BOARD.....RESPONDENT**

**KENYA URBAN ROADS AUTHORITY.....1<sup>ST</sup> INTERESTED PARTY**

**M/S DELFREE COMPANY LTD.....2<sup>ND</sup> INTERESTED PARTY**

**ex parte:**

**FAHIMYASIN COMPANY LTD**

**JUDGMENT**

Before court is the applicant's motion dated 10 May 2021; it is filed under Section 8 and 9 of the Law Reform Act and Order 53 Rule 3 of the Civil Procedure Rules, 2010. In the applicant has sought prayers which have been framed as follows:

***“(i) An order of certiorari be hereby issued to remove into this court and quash the decision of the Respondent herein, the Public Procurement and Administrative Review Board dated 26<sup>th</sup> April, 2021 and sent on 27<sup>th</sup> April, 2021 dismissing the Ex-parte Applicant's application for review No. 48 of 2021.***

***(ii) A declaration that the decision of the Interested Party dated 15<sup>th</sup> March, 2021 awarding TENDER NO. KURA/RMLF/SR/149/2020-2021 FOR LABOUR BASED WORKS FOR CONSTRUCTION OF WALKWAYS IN KIPTEMBWO AREA IN NAKURU TOWN-LOT 20) to M/S Delfree Company LTD is illegal and unconstitutional.***

***(iii) Further and in the alternative and without prejudice to any other prayers sought herein, an order of mandamus be issued directing the Interested party to undertake fresh evaluation of all bids received in strict adherence to the tender, the Act and the regulations and award TENDER NO. KURA/RMLF/SR/149/2020-2021 FOR LABOUR BASED WORKS FOR CONSTRUCTION OF WALKWAYS IN KIPTEMBWO AREA IN NAKURU TOWN-LOT 20 to the bidder with the most responsive bid.***

***(iv) An order that leave so granted operates as stay of the decision of the Respondent herein, the Public Procurement and Administrative Review Board dated 26<sup>th</sup> April, 2021 and sent on 27<sup>th</sup> April, 2021 dismissing the Ex-parte Applicant's application for review no 48 of 2021 and any other consequential act including signing or award of contract 2<sup>nd</sup> Interested Party.***

***(v) Costs of this Application be awarded to the Applicant.”***

The application is supported by a statement of facts which have been verified by the affidavit of Yasin Jaldesa who has described himself in the affidavit as “the ex-parte applicant's representative” and its Chief Executive Officer.

According to Jaldesa, the decision on the applicant's Request for Review No. 48 of 2021 on 27 April, 2021 is alleged to have been made without consideration of the applicant's supplementary affidavit and submissions. It is his case that the applicant was never invited for hearing either in person or on virtual platform. He also complains that the decision itself is said to have been rendered in the absence of parties.

The background of the applicant's application before the respondent is that on 26 January 2021, the 1<sup>st</sup> interested party invited sealed bids from tenderers to demonstrate their technical and financial competence in providing services to the 1<sup>st</sup> interested party which was the procuring entity in respect of Tender No. KURA/RMLF/SR/149/2020-2021/ Labor Based Works for Construction of Walkways in Kaptembwo Area in Nakuru Town-Lot 20 (youth category) (hereinafter referred to as "the tender"). The advertisement was posted on the 1<sup>st</sup> interested party's website [www.kura.go.ke](http://www.kura.go.ke), the Public Procurement Information Portal [www.tenders.go.ke](http://www.tenders.go.ke), and was also published in "MyGov" Newspaper.

In response to this invitation, the applicant submitted its bid on 8 February, 2021.

According to the applicant, it complied with all the mandatory requirements but the 1<sup>st</sup> interested party rejected it without any particular reason; nonetheless, the applicant conceded that the reason given for rejection of its bid was for what he described as 'minor error'.

At the heart of the dispute on the mandatory requirements was the interested party's form of written power of attorney found under schedule 2 in section XI of the tender document. According to the 1<sup>st</sup> interested party, the applicant's signatory to the requisite form did not have the power of attorney. The applicant's position, on the other hand, is that the signatory, Yasin Jaldesa, had the power of attorney to execute the relevant documents on behalf of the applicant company.

In any event, Jaldesa swore, that the tender document did not have sufficient information on the requirement of the power of attorney as a result of which the applicant was 'confused'.

The applicant's depositions on this issue were as follows:

***"20. The procuring entity violated Section 70 (3) PPADA 2015 which provides that "The tender documents used by a procuring entity pursuant to subsection (2) shall contain sufficient information to allow fair competition among those who may wish to submit tenders". The page lacked sufficient information hence causing the confusion which unfairly affected the Applicant's bid.***

***21. Specifically, the part titled power of attorney lacks the following-***

***i. The statement or information by donor to show that its (sic) giving its powers;***

***ii. Any place for the donor to sign to show assent to donating powers;***

***iii. The sole purpose of the page as per the document to provide information on person for correspondence. Specifically, it indicates that "The bidder shall state here below the names and address of his representative who is/are authorised to receive on his behalf correspondence in connection with the Bid".***

***Indeed, it does not indicate that it is granting any power in clear terms.***

***22. The minor oversight arose out of confusion between two pages which followed each other requiring almost similar information without material information to distinguish them. The page that gave rise to the oversight is 119 which requires the details of a duly authorized person to sign on behalf of the company. A copy of the document is annexed hereto and marked as "ANNEXTCRE YJ-8"***

***23. By failing to invoke section 79 of Public Procurement and Asset Disposal Act 2015 which provides that a tender shall not be affected by minor deviations that do not materially depart from the requirement in tender documents and errors or oversights that can be corrected without affecting the substance of the tender.***

***24. In sum had the Respondent read the entire tender document as one united piece it would not have concluded that "signatory had no power of attorney". As demonstrated above, the bidder gave authority to Yasin Jaldesa to sign the documents on its behalf."***

The respondent refuted the applicant's allegations in a replying affidavit sworn by Philip Okumu, its Acting Secretary.

Okumu confirmed that indeed on 6 April 2021, the ex parte applicant filed a Request for a Review before it, challenging the 1<sup>st</sup> Interested Party's letters of notification dated 15 March 2021 and the decision to award the tender to the 2<sup>nd</sup> interested party.

In line with the provisions of Section 168 of the Public Procurement and Asset Disposal Act, 2015, he notified the 1<sup>st</sup> interested party of the pending review before the respondent through a letter dated 14 April 2021 and also notified the parties of the suspension of the procurement proceedings relating to the tender. He also directed the 1<sup>st</sup> interested party to forward all confidential documents pertaining to the subject tender together with a list of bidders who participated in the tender and their contacts.

Upon receiving the list of bidders who participated in the tender, he notified them of the existence of the request for review, informing them of their right to respond to Review No. 48 of 2021. He also attached Circular No. 2/2020 dated 24 March 2020 issued by the respondent detailing an administrative and contingency plan to mitigate against Covid-19 pandemic during the proceedings. According to this Circular, parties were informed of the timelines for filing their respective responses and written submissions given that the respondent had dispensed with physical hearings and directed that all matters shall proceed by way of written submissions.

The applicant was aware of these guidelines in the Circular and at no time did he ever challenge them. As a matter of fact, he participated in the Request for Review proceedings and, among other things, he filed a supplementary affidavit dated 23 April, 2021 and written submissions dated 26 April 2021 in compliance with the directions in the Circular.

Apart from the circular, the respondent explained in its decision the challenges posed by Covid-19 pandemic and why, therefore, it was not practical to take viva voce evidence.

In coming to its decision, Okumu swore, the respondent considered all the issues raised not only in support of but also in opposition to the request for review including the question challenging the competence of the applicant's request and jurisdiction of the 1<sup>st</sup> respondent to dispose of the application; on this particular question, the respondent ruled in favour of the applicant.

On the issue of the alleged confusion, the respondent deposed that the applicant ought to have sought further clarification from the 1<sup>st</sup> interested party if it found the requirements in the tender document unclear or, alternatively, it ought to have filed a request for review within 14 days of occurrence of what the applicant considered a breach; if it opted for this latter option, time started ticking on 11 February 2021 and, therefore, according to section 167 (1) of the Act, it lapsed on 25 April 2021.

Okumu also swore that the applicant's bid was found non-responsive during preliminary evaluation and thus did not proceed for technical and financial evaluations where other compliant bids were evaluated, among them the 2<sup>nd</sup> interested party's bid which was the lowest evaluated bidder among those evaluated at the Financial evaluation stage.

Having considered the applicant's application, I find that it is hinged mainly on two grounds the first of which is that he was not heard. The second ground is that certain aspects of the tender documents, with particular reference to the requirement of the power of attorney were confusing. Nonetheless, it was its argument, despite this confusion, the applicant complied and its representative had power of attorney and, in exercise of this power, he executed the necessary documents.

The first question can be disposed of fairly easily. And its answer is found at the beginning of the decision of the respondent. In it the respondent stated as follows:

***“On 16<sup>th</sup> March 2020, the Board issued Circular No. 1/2020 and the same was published on the Public Procurement Regulatory Authority's website (www.ppra.go.ke) in recognition of the challenges posed by Covid-19 pandemic. Through the said Circular, the Board instituted certain measures to restrict the number of representatives of parties that may appear before the Board during administrative review proceedings in line with the presidential directives on containment and treatment protocols to mitigate against the potential risks of the pandemic.***

***On 24<sup>th</sup> March 2020, the Board issued Circular No. 2/2020 further detailing the Board's administrative and contingency management plan to mitigate Covid-19 pandemic. Through this circular, the Board dispensed with physical hearings and directed that all request for review applications would be canvassed by way of written submissions. Clause 1 at page 2 of the said Circular further specified that pleadings and documents would be deemed as properly filed if they bear the official stamp of the Board. The Applicant lodged written submissions dated 23<sup>th</sup> (sic) April 2021 and filed on 26<sup>th</sup> April 2021. The Respondents and the Interested Party did not file written submissions.”***

It is clear that the mode of disposal of the applicant's application was not only clearly spelt out to all the parties to the application but also that the applicant embraced it and acted accordingly. The applicant cannot therefore be heard to argue that he ought to have been heard in any particular manner which, for reasons given by the respondent, was not practical. None of the reasons given why the hearing proceeded in the manner it did has been challenged as being unreasonable or on any other ground for that matter. Of importance to note is that the applicant was heard irrespective of the manner of the hearing. It follows that the applicant's allegation that it was not heard has no substance.

The fact that the applicant filed this application in time also goes to show that it received it in time and, at any rate, it was dispatched early enough for the applicant to file the present application timeously, within the prescribed timelines.

On the question of the respondent's criteria to which the bids were subject or, specifically, the terms in the tender document with respect to the requirement of power of attorney, the applicant's complaint on this issue is a bit hazy and, at best, ambiguous. I say so because, on the one hand, the applicant claims that, somehow, it was confused as a result of which it committed a 'minor error' in submission of its bid documents. On the other hand, it states that in fact, it complied with all those requirements relating to the power of attorney.

For purposes of determination of the instant application, it is sufficient to know that in coming to its decision, the respondent considered the extent of the applicant's compliance with the mandatory requirements and was satisfied that the applicant's bid was properly disqualified at the preliminary evaluation stage.

One important fact that has come out clearly and which the applicant has not disputed is that as early as 11 February 2021, it was aware of not only what it has termed as breaches by the respondent in the procurement process, but also the fate of its bid. This being the case, the applicant was enjoined to take action immediately to have its grievances remedied and, in any event, not later than fourteen days from the date of the alleged breach. This is what section 167(1) of the Public Procurement Act, 2015 is all about. This section reads as follows:

## 167. Request for a review

**(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.**

This provision of the law is self-explanatory; where a candidate or tenderer considers himself aggrieved he has to seek administrative review within fourteen days of the date of the breach at any stage of the proceedings and not necessarily after the award has been made.

The respondent properly addressed itself to this question in its decision and stated as follows:

**“In the Respondent’s view, if the applicant was not satisfied by the technical evaluation criteria, it ought to have sought clarification from the Procuring Entity. In the absence of any clarification, it is the Respondent’s view that any complaint raised before the Board is time barred pursuant to section 167(1) of the Act.**

**In addressing this issue, the Board observes that one of the scenarios provided in section 167(1) of the Act read together with Regulation 203(2) (c) of Regulations 2020 within which a request for review can be filed is fourteen days from the date of occurrence of the breach complained of where the request is made before the making of an award.**

**With that in mind, the Board observes the statutory timeline provided under section 167(1) of the Act provides an opportunity within which an aggrieved candidate or tenderer may exercise its right to administrative review challenging a breach of duty by a procuring entity as soon as the breach occurs so that once the Board dispenses with a review application, the procurement process can proceed to its logical conclusion for the public good.**

**This Board has noted the rising number of bidders who abuse options under section 167(1) of the Act, whereby they learn of an alleged breach of duty during the early stages of a procurement process but wait for the outcome of their bids, and if such outcome is not favourable, they feel motivated to file a case against a procuring entity, raising complaints that could have been raised at any stage before evaluation is concluded. If the outcome of the bids is favourable, such applicants never raise any alleged breaches they might have identified at any stage of the procurement process or disposal process.**

**The applicant participated in the subject procurement processes by submitting a tender by the tender submission deadline of 11<sup>th</sup> February 2021 without challenging those technical specifications in a request for review filed before this Board as opposed to participating in the procurement process.**

**The applicant could have approached the Board within fourteen days after the tender submission deadline raising an allegation that the Tender Documents did not meet the provisions of the law.**

**Had it been awarded the subject tender, the Board is persuaded that the applicant would not raise any complaint with the tender document. The applicant participated in the subject procurement process, waited patiently for the outcome of its bid and is now challenging the Tender Document, so late in the day after sleeping on its right to seek administrative review.”**

I would go further and say that as long as the alleged breach was not challenged within the mandatory statutory timeliness, the applicant had no *locus standi* to initiate the review against the award because after disqualification and upon expiry of the period within which the applicant could possibly have challenged the disqualification or the alleged breach, the applicant ceased being “a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage” and who for this reason, would be entitled to challenge the award.

The application for review before the respondent was, for all intents and purposes, a nullity *ab initio*.

But even if the application was properly before the respondent, I see nothing in the respondent’s decision that suggests that it was blemished on any of the grounds for judicial review. There is no evidence that it was illegal, for the respondent properly exercised its powers under the Public Procurement and Asset Disposal Act, 2015 including section 173 of the Act according to which it was entitled to make the decision it made. The decision can also not be said to have been irrational or unreasonable since it was based on the facts and the law; it certainly cannot be said to have been “so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it”. (See **Council of Civil Service Unions & Others versus Minister for the Civil Service (1985) AC 374; Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 KB 223**). Neither can it be said to have been tainted with procedural impropriety because there is evidence that the applicant was accorded a fair hearing and the rest of the parties in the proceeding for review did not enjoy any advantage over the applicant during the proceedings of its application.

Last but not least, the applicant has to be reminded that a judicial court will normally concern itself with the process by which a decision is arrived at and not the merits of the decision. To this end I would adopt the words Lord Hailsham L.C. in **Chief Constable of North Wales Police vs. Evans (1982) 3 ALL E.R. at pg. 141** where the learned judge said of the remedy of judicial review as follows:

**“It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question.” (Emphasis added).**

In the final analysis, I am not convinced that the applicant has made out a case for judicial review orders sought. Accordingly, its application

dated 10 May 2021 is dismissed with costs. Orders accordingly.

**DATED, SIGNED AND DELIVERED ON 25TH JUNE 2021.**

**NGAAH JAIRUS**

**JUDGE**