



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

JUDICIAL REVIEW DIVISION

APPLICATION NO. E001 OF 2020

REPUBLIC.....APPLICANT

VERSUS

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD.....1ST RESPONDENT

KENYA FERRIES SERVICES LIMITED.....2ND RESPONDENT

SOUTHERN ENGINEERING COMPANY LIMITED.....3RD RESPONDENT

AND

AFRICAN MARINE & GENERAL

ENGINEERING COMPANY LIMITED.....EX PARTE APPLICANT

RULING

The Application

1. By Notice of Motion dated 19/10/2020 the Ex parte Applicant prays for the following orders;

1. Spent

2. That this honourable court be pleased to grant leave to the Applicant to apply for judicial review orders as follows;

a. An order of certiorari to remove into this honourable Court and quash the decision of the 1st Respondent made on the 14th day of March 2011 in Land Disputes Appeals Committee Case Number 399 of 2010.

b. An order of prohibition restraining their servants, agents, employees and/or any person acting under their instructions from awarding Tender No. KFS/DDH-S/04/06/2020 MV Harambee Super Structure Repair Works to any person or entity other than the Applicant herein.

c. Costs of this application be provided for.

d. Such further and other relief that the Honourable Court deems just and expedient to grant.

2. The application was supported by an affidavit by **Sabareesan Asokan** sworn on the 19/10/2020 where he deponed that the tender had been advertised on the 2nd Respondent's website in a local daily on 25/6/2020 and the same was deposited in their tender box on 13/7/2020. That on 13/7/2020 communication was made to the Ex parte Applicant by the 2nd Respondent that the tender had been awarded to the 3rd Respondent. The Ex parte Applicant confirms that they lost the tender on the financial evaluation as they were not the lowest bidders but requested for a review of the decision awarding the tender to the 3rd Respondent having been aggrieved by the same.

Background to Application

3. The *Ex Parte* Applicant has moved this court seeking leave to institute Judicial Review proceedings to apply for orders of *certiorari* and *prohibition* to quash the proceedings, findings and decision by the 1st Respondent made on 5/10/2020 in request for review of application no 126 of 2020 regarding tender no KFS/DDH-S/04/06/2020 MV Harambee super structure repair works and to prohibit the 2nd Respondent from awarding the said tender for repair of MV Harambee super structure to any person other than them.

4. The deponent avers that the request for review was filed on 14/9/2020 and the 2nd and 3rd Respondents filed their pleadings too. The hearing of the said review was to be guided by Circular No 2 Of 2020 issued on 24/3/2020 and the *Ex parte* Applicant filed a further statement in opposition to the responses by the Respondents. A decision to the review was made on 5/10/2020 dismissing the same and the *Ex parte* Applicant is now before this court seeking redress for the said dismissal by the 1st Respondent.

Response

5. In opposing the application, the 3rd Respondent filed its replying affidavit on 19/11/2020 sworn by one **Sanjiv Bhaskaran Nair** dismissing the review application by the *Ex parte* Applicant and the consequent judicial review application before this court. It was averred that the procurement procedure was undertaken as per the provisions of the law and that the application before court was fatally defective as it did not meet the required threshold in law and in fact.

Submissions

6. The Application was canvassed through written submissions. **Mr. Nyange** for the *Ex parte* Applicant submitted that the decision by the public procurement review board was faulted in that it did not exercise its jurisdiction in contravention of Section 167(1) of the Public Procurement & Asset Disposal Act. It was further submitted that the review board was under the legal obligation to entertain the Applicant's issues raised under section 60 and 70 of the Act. That the board failed to give reasons for declining the Applicant's application for review of the tender award and further admitted pleadings filed out of time by the 2nd Respondent. That the 3rd respondent was awarded the tender illegally by submitting false information. The *Ex parte* applicant asked the court to allow the orders sought as the judicial review proceedings had merit.

7. **Mr. Mvoi** for the 1st and 2nd Respondents submitted that the *Ex parte* Applicant had not requested for information from the review board as alleged. It was submitted that the process in requesting for information from the review board is clearly stipulated under Section 78(8) of the Act and the same was not adhered to by the *Ex parte* Applicant. Further that the information provided by the applicants in this case with regard to the tendering process was unlawfully obtained and the same cannot be relied upon. Reliance was placed on **Civil Appeal No 13 Of 2015 Okiya Omtata & Another v Attorney General.**

8. Counsel submitted that the review application by the *Ex parte* Applicant had been filed out of time and hence the board had no jurisdiction to determine the same. That the documents relied upon by the Applicant had not been furnished upon them with authority from the board and hence the manner and nature in which the same was obtained was not only questionable but unlawful.

The Determination

9. I have carefully considered the application and the submissions thereto. The following issues for determination are carved out from the same;

a) **Whether or not the Ex parte Applicant has met the threshold for the judicial review orders sought.**

b) **Whether or not the Board acted illegally, unfairly or irrationally**

10. The Court has on several occasions pronounced itself on the principles governing the judicial review process. One of the instances was by the Court of Appeal in **Republic v Kenya Revenue Authority, Ex parte Yaya Towers Limited [2008] eKLR** where the Court stated as follows:

“... the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision-making process itself. It is important to remember in such 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/she has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or that of individual judges for that of the authority constituted by law to decide the matter in question.”

11. From the foregoing it is clear that the main objective of judicial review remedy is not with the merits of a decision that is subject of the application for Judicial Review but the decision-making process itself leading to the said decision. In **The Republic v Permanent Secretary to the Cabinet and Head of Public Service and another Ex parte Nga'ng'a and others [2006] LLR 5958 HCK, 2 EA 294 HCK** per Visram J.):

“The purpose of Judicial Review is to check that Public bodies do not carry out their duties in a manner that is detrimental to the public at large. The institution of a Judicial review is not a bar to seeking other forms of relief as Judicial review posit that as soon as a public body exceeds its jurisdiction or acts unfairly or disregards the principles of natural justice then the very act of the public body must be scrutinized.”

12. The application before the court seeks orders of certiorari to quash the decision of the Public Procurement Administrative Review Board made on 5/10/2020 and an order of prohibition to prohibit the 2nd Respondents from awarding the tender to the 3rd respondent or to anyone other than the Ex parte Applicant. An order of certiorari cannot compel the performance of a duty, only mandamus can. For the court to be compelled to issue orders for a certain duty to be performed then orders of mandamus would suffice at that instance. However, the same have not been prayed for. It is trite law that parties are bound by their pleadings, the court cannot act *suo moto* in interfering with issues like award of tenders which have laid down procedures in law.

13. In JR No. 89 of 2012 **Republic v Public Procurement Administrative Review Board & 2 others [2013] eKLR** the court declined to grant certiorari orders. The learned Judges of Appeal held as follows:

“I agree with the respondent’s submission that in light of the powers granted to the Board under section 98 of the Act, the Board is entitled to conduct a review not only the allegations made in the application for review before it but also review of the entire procurement process to see that it complies with the prescribed procedures and ensure that the objects of the Act are fulfilled. 29. The reliefs set out in section 98 are within the discretion of the Board. The Court will be reluctant to interfere unless the decision is irrational, illegal or lacks propriety. As observed in by the Court of Appeal in Kenya Pipeline Company Limited v Hyosung Ebara Company Limited & 2 Others (supra), “[21] Moreover, where the proceedings are regular upon their face and the inferior tribunal has jurisdiction in the original narrow sense (that is, to say, it has power to adjudicate upon the dispute) and does not commit any of the errors which go to jurisdiction in the wider sense, the quashing order (certiorari) will not be ordinarily granted on the ground that its decision is considered to be wrong either because it misconceived a point of law or misconstrued a statute (except misconstruction of a statute relating to its own jurisdiction) or that its decision is wrong in matters of fact or that it misdirects itself in some matter.” The court further noted that, “Lastly, it is important to appreciate that judicial review orders of certiorari, mandamus and prohibition are public law remedies and the court has the ultimate discretion to either grant or not to grant the remedies to the successful applicant.” 30. In my view, the Board was not obliged to award the tender to Creations. The Board found that fair competition would be undermined ...”

14. From the foregoing, it is clear that the Ex parte Applicant has not met the threshold for the judicial review orders sought. Further, the 1st Respondent intimated in its pleadings that a contract had already been entered upon with the 3rd Respondent and the repair works had already commenced.

Whether or not the Board acted illegally, unfairly or irrationally

15. The Public Procurement Administrative Review Board is established under section 27 of the Public Procurement and Asset Disposal Act hereinafter referred to as the Act. The functions of the board are stipulated under section 28 of the Act as follows;

Functions and powers of the Review Board

(1) The functions of the Review Board shall be—

(a) reviewing, hearing and determining tendering and asset disposal disputes; and

(b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law.

(c) In performance of its functions under subsection (1)(a) of this section, the Review Board shall have powers to develop rules and procedures to be gazetted by the Cabinet Secretary.

(d) The Authority shall provide secretariat and administrative services to the Review Board.

16. The Ex parte Applicant filed a request for review on 14/9/2020 and a response over the same was filed by the 1st Respondent on 22/9/2020 while the 2nd Respondent filed their response on 22/9/2020. In the said request the Applicant prayed for orders that

i. Annuling/setting aside the tender award and the notification of tender award

ii. Order annulling the procurement proceedings leading to award of the tender

iii. Order directing 1st respondent to award tender to the applicant

iv. Order directing fresh procurement with respect to the tender

v. Order nullifying notification letter issued to the 2nd respondent awarding the tender

vi. Costs of the review application.

17. The review application was based on the grounds that the 3rd Respondent had falsified information on the tender documents in a bid to win the tender which information included qualifications of a key personnel working for them and the quotation and price of Lloyd steels used in the repair subject of the tender. The Ex parte Applicants based the said findings on a confidential document whose source they did

not disclose but pegged the said evidence under the purview of section 67[3][e] of the Act.

18. The 1st Respondent stated that it lacked jurisdiction to deal with the review application based on the provisions of Section 167[1] of the Act. The review application by the Applicant was under the provisions of section 60 and 70 of the Act. The said sections provide for the specific requirements of a tender and the standard tender documents. The Applicants herein attached the said documents from the boards determination of who had qualified to be awarded the tender. It is however noteworthy that the document relied upon by the Applicant was not issued by the board. The manner in which the said document came into possession of the Applicant has not been disclosed. This court is guided by the wordings of Lenaola J in Petition 58 of 2014 **Okiya Omtatah Okoiti & 2 Others v Attorney General & 3 others [2014] eKLR** where the learned judge pronounced himself as follows;

“The Petitioners cannot simply rely on information that they obtained in unclear circumstances and to allow them to do so would in my view, defeat the very essence of Article 35 of the constitution and the purposes it intends to achieve as well as the rights of privacy enshrined in article 31 of the constitution.

I have already said that a citizen is entitled to information held by the state and it is thus clear that there is no need or room to use irregular methods in obtaining information since the law has entitled every citizen the right to information only by use of lawful means. The duty of the state to show why that information should not be given as sought is also clear but it must be remembered that the right to information is not absolute and may be limited in appropriate and reasonable circumstances”.

19. It is clear that the circumstance under which the Applicant’s evidence was obtained was unprocedural. Section 78[8] of the Act provides for the accounting officer of a procuring entity to avail the tender opening register to any person submitting a tender. Further under section 67[4] an Applicant seeking for a review of the decision of the board is entitled to a summary of proceedings of the opening tenders, summary of evaluation and comparison of tenders and the proposals or quotations. The Applicant herein however did not request for the said information but unprocedurally obtained the 3rd Respondent’s tender documents which held sensitive information about the said company. The Applicant is therefore before this court with unclean hands.

20. Section 4 of the Fair Administrative Actions Act 2015 amplifies the prominence of Article 47 of the Constitution which protects the right to a fair administrative action. Article 47 states:

“47(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration.”

21. This court is of the view that the 1st Respondent in dispensing off its duties with reference to the review proceedings acted within its powers. It is clear that the evidence relied upon by the Applicant was unlawfully obtained and the same could not be relied upon by the board. It would be unreasonable to annul the tender, and to start the process afresh. Further, if that were to happen the applicant would have an upper hand in the new tendering process as it had within its reach and means information pertaining the 3rd Respondent which information this court considers confidential and should not be within the public domain.

22. Furthermore, Section 167 of the Act is clear that a review may be sought if a tenderer claims to have suffered or risks suffering loss or damage due to breach of duty imposed on the procuring entity. The applicant herein has not demonstrated to this court the risk or damages they have or are bound to suffer as a result of the 1st Respondent’s actions. It is trite law that he who alleges must prove. This position is anchored in law and captioned under sections 107,108 and 109 of the Evidence Act which provide erudite guidance in this area. They state as follows;

Section 107: Burden of proof

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

Section 108: Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Section 109: Proof of particular fact

The burden of proof as to any particular fact lies in the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of fact shall lie on any particular person.

23. For the foregoing reasons the Ex parte Applicant's motion before court dated 19/10/2020 is dismissed for lack of merit. Parties to bear their own costs.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 29TH DAY OF JULY, 2021.

E. K. OGOLA

JUDGE

Ruling delivered via MS Teams in the presence of:

Mr. Nyange for Ex parte Applicants

Mr. Otieno for 3rd Respondent

Ms. Njau for 1st and 2nd Respondents

Ms. Peris Court Assistant