AAR Insurance Company Limited v Public Procurement Administrative Review Board; Secretary, Independence Electoral and Boundaries Commission & another (Interested Parties) (Judicial Review E087 of 2021) [2021] KEHC 12544 (KLR) (Judicial Review) (16 August 2021) (Judgment)

Neutral citation: [2021] KEHC 12544 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW E087 OF 2021

J NGAAH, J

AUGUST 16, 2021

BETWEEN

AAR INSURANCE COMPANY LIMITED ..... APPLICANT

AND

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD ..... RESPONDENT

AND

SECRETARY, INDEPENDENCE ELECTORAL AND BOUNDARIES COMMISSION ..... INTERESTED PARTY

ZAMARA RISK AND INSURANCE BROKERS LIMITED .... INTERESTED PARTY

JUDGMENT

1. On 2 July 2021 the applicant moved this Honourable Court by a motion of even date for orders that

    1. The application be certified urgent and be heard ex parte.

    2. Pending hearing and determination of the Application, there be an interim stay of the Respondent's Decision dated 23rd June, 2021 in Application 76 of 2021 between AAR Insurance Company Limited v Secretary, Independent Electoral and Boundaries Commission and another.

3. The Respondent's Decision in Application No. 76 of 2021 between AAR Insurance Company Limited v Secretary, Independent Electoral and Boundaries Commission be set aside and the Application be remitted with directions to the Respondent for reconsideration.

4. The Applicant be awarded cost of the Application."

2. The motion is said to have been filed under Article 22(1), 47(1), 48, 50(1) of *the Constitution* of Kenya, 2010; Section 5(a) of the High Court (Organisation and Administration) Act, 2015; Section 4(3), 7(1)(a)(2)(c)(d), 9(1) Il(l)(e)(j) and 12 of the *Fair Administrative Action Act*, 2015 and Section 175(1)(3) of the *Public Procurement and Asset Disposal Act*, 2015 and was supported by the affidavit of Wilfred Mutuku Nzong'a

3. The impugned decision, the subject of these proceedings, was made by the respondent on 23 June 2021. It was decision on the application by the applicant for review of the decision by the Secretary or Accounting Officer of the 1st interested party to award a tender described as "Tender No. IEBC/OT/21/02/2020-2021 for Provision of Medical Insurance, Group Life Assurance (GLA) and Group Personal Accident covers for Commissioners and Staff", hereinafter referred to as "the tender" to Zamara Risk & Insurance Brokers Ltd and Four M Insurance Brokers Limited on or about the 17th day of May 2021.

4. The award of the tender was a culmination of a tender process that commenced with the advertisement of the tender on the 1st interested party's website and the public procurement information portal on 16 March 2021. According to the bid document, bidders were at liberty to bid for the following lots.

1. Lot 1- Provision of Medical Insurance Cover;

2. Lot 2-Provision of Group Life Insurance Scheme; and

3. Lot 3 Provision of Group Personal Accident Cover.

5. 42 bids were received by 30 March 2021, which was the submission deadline. The bids were evaluated at the Mandatory/Preliminary Evaluation stage; the vendor evaluation; the technical evaluation; and, the Financial Evaluation stages.

6. At the end of these evaluation stages Lot 1-Provision of Medical Insurance Cover was awarded to Ms Zamara Risk & Insurance Brokers at the tender price of Kshs. 456,468, 392.00. Lot 2 Group Life Assurance was also awarded to the same bidder at the tender price of Kshs. 11, 399, 953.00 while Lot 3 Group Personal Accident was awarded to M/s Four M Insurance Brokers at their tender price of Kshs. 7,540,766.00.

7. AAR Insurance Company Limited lodged a request for review of the awards before the respondent. This was Request for Review No. 76 of 2021. It sought for the following prayers:

1. An order annulling and setting aside the disqualification of the Applicant's (AAR's) tender;

2. An order annulling and setting aside the award of the tender;

3. An order annulling and setting aside the notification of the award dated 19 May 2021

4. An order directing the applicant's tender be re-admitted and re-examined in accordance with section 79(2) of the *Public Procurement and Asset Disposal Act*, 2015 and clause 2.7.1 (a),2.8.1, 2.9.1.2.20.3 and 2.20.4 of the Tender Document dated 16th March, 2021 as read with section 72 of the *Interpretation and General Provisions Act*; and,

5. An order awarding the applicant costs of the application."

8. In its decision of 23 June 2021, the respondent made the following orders:

    1. The accounting officer of the Procuring Entity's Letter of Notification of unsuccessful bud in Lot. 1 of Tender No. IEBC/21/02/2020-2021, Provision of Medical Insurance, Group Life Assurance (GLA) and Group Personal Accident (GPA) covers for commissioners and staff dated 19th May 2021 addressed to the applicant and all other unsuccessful bidders be and are hereby cancelled and set aside.

    2. The accounting officer of the Procuring Entity's Letter of Notification of award of Lot. 1 of Tender No. IEBC/21/02/2020-2021, Provision of Medical Insurance, Group Life Assurance (GLA) and Group Personal Accident (GPA) covers for commissioners and staff dated 19th May 2021 addressed to M/s Zamara Risk & Insurance Brokers be and are hereby cancelled and set aside.

    3. The accounting officer of the Procuring entity is hereby directed to issue new letters of notification of the outcome of evaluation of Lot. 1 of the Tender No. IEBC/21/02/2020-2021, Provision of Medical Insurance, Group Life Assurance (GLA) and Group Personal Accident (GPA) covers for commissioners and staff to all tenderers in accordance with section 87 of the Act read together with Regulation 82 of Regulations 2020 within seven days from the date of this decision taking into consideration the Boards (sic) findings in this Review.

    4. Given that the subject procurement process has not been completed, each party shall bear their own costs in the Request for Review."

9. The applicant was dissatisfied with this decision and for this reason, he moved the court for the orders that I have reproduced above.

10. The application was opposed by the respondent and the interested party. The parties filed their respective submissions in support of and in opposition to the motion.

11. One issue that stands out in the application and which I ought to dispose of as a preliminary point is that the motion was filed without leave of the court. I note, however, that none of the parties has addressed this particular issue; even then, owing to its relevance in applications such as the one before court, it is an issue that deserves attention. It is an issue that I cannot ignore and proceed to determine the applicant's motion as if leave was sought and obtained when it is clear from the record that none was granted.

12. The starting point in this regard would be Order 53 (1) of the Civil Procedure Rules which states as follows:

    1.(1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.

13. This rule leaves no doubt that grant of leave is a precondition to filing of a substantive motion for the prerogative orders of mandamus, prohibition or certiorari; without such a leave the substantive application cannot be entertained.

14. The need for leave has been explained in several decisions by the courts in England; these English decisions are relevant in our jurisdiction by virtue of section 8 (2) of the *Law Reform Act*, cap. 26 which provides the basis upon which the jurisdiction to grant judicial review reliefs of mandamus, prohibition or certiorari is exercised. That section reads as follows:

8. (2) In any case in which the High Court in England is, by virtue of the provisions of section 7 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, (1 and 2, Geo. 6, c. 63) of the United Kingdom empowered to make an order of mandamus, prohibition or certiorari, the High Court shall have power to make a like order.

15. In Cocks v Thanet District Council (1983) 2 AC 286 at page 294F Lord Bridge said that leave is one of the safeguards built into the order 53 to protect from harassment public authorities on whom Parliament has imposed a duty to make public law decisions. And in O'Reilly v Mackman (1983)2 AC 237 Lord Diplock said at p. 281 A-C that the requirement of a prior application for leave to be supported by full and candid affidavits verifying the facts relied on is an important safeguard against groundless or unmeritorious claims that a particular decision is a nullity.

16. The leave stage is a procedure which provides an expeditious method according to which the court sifts out cases with no chance of success at a relatively little cost to the applicant and no cost to any prospective respondent. The requirement for leave has always provided procedural limitations which, in turn, provide a necessary protection to public authorities against claims which it is not in the public interest for the courts to entertain. It is one of the safeguards imposed in the public interest in respect of groundless, unmeritorious or tardy attacks on the validity of decisions made by public authorities in the field of public law.

17. In IRC v. National Federation of Self-Employed and Small Businesses Ltd (1982) AC 617 Lord Diplock explained the need for leave this way:

> Its purpose is to prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived."

18. The two purposes identified here are to save court's time and so as not to leave public authorities in a state of uncertainty as to whether they can safely proceed. It is an essential protection against abuse of legal process. Woolf J has referred to the need for leave as "the unique statutory means by which the court can protect itself against abuse of judicial review." (R v Secretary of State for the Environment, ex p Greater London Council (1985) Times, 30 December.

19. These authorities are clear that the requirement for leave when seeking to invoke Judicial Review jurisdiction serves a specific purpose; it is not a pastime exercise and neither is it an option that a litigant seeking judicial review remedies may choose to comply with at his convenience; it is a mandatory procedural step without which the court would not be able to exercise the discretion with which it is clothed either to allow or decline the institution of the substantive suit for judicial review reliefs.

20. I am minded that among the various provisions of the law that the applicant has invoked in its quest for reliefs sought, Section 8(2) of the *Law Reform Act* and Order 53(1) of the Civil Procedure Rules are not among them. But the omission to invoke these provisions of the law does not necessarily imply that the applicant is thereby exempted from complying with the procedure for invoking the judicial review jurisdiction of this Honourable Court. As long as an applicant is seeking judicial review reliefs, irrespective of whether they are the traditional reliefs of mandamus, certiorari and prohibition or the expanded ones under section 11 of the Fair Administrative Actions Act, No. 4 of 2015, he is bound by the procedure for filing the application for such reliefs.

21. And there is no doubt that the applicant is seeking judicial review reliefs and, in so doing, has invoked the judicial review jurisdiction of this honourable court since it is the only way prescribed by the *Public Procurement and Asset Disposal Act*, 2015, by which a party aggrieved by a decision of the Public Procurement Administrative Review Board can challenge that decision; section 175 of that Act speaks of that procedure and states as follows:

> 175. Right to judicial review to procurement
>
> (1) 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.

21. I am also aware that the applicant has invoked various provisions of the Fair Administrative Actions Act none of which provide for application for leave as the preliminary step in lodging the application for judicial review. However, none of those provisions expressly oust the application of Order 53 (1) of the Civil Procedure Rules in applications for judicial review. The specific provision in the Fair Administrative Actions Act relating to procedure is section 9 of the Act; it provides as follows:

> 9. Procedure for judicial review.
>
> (1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of *the Constitution*.
>
> (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 anyother 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.
>
> (5) A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.

22. The Act does not say how the application is made and, in my humble view, this is a deliberate omission because the procedure for invoking judicial review jurisdiction remains Order 53 of the Civil Procedure Rules.

23. One very important point to remember is that the common law principles upon which the requirement for leave was grounded still subsist today and are as much relevant today as they were before. I suppose it is for this reason that section 12 of the Fair Administrative Actions Act is express that the Act is complementary to and not a substitute of the general principles of common law; that section reads as follows:

12. Principles of common law and rules of natural justice.

This Act is in addition to and not in derogation from the general principles of common law and the rules of natural justice.

24. Section 14 on transition provisions affirms the position that the procedure adopted in judicial review applications before the coming into force of the Fair Administrative Actions Act has not been done away with. That section states as follows:

14. Transition provisions.

(1) In all proceedings pending whether preparatory or incidental to, or consequential upon any proceedings in court at the time of the coming into force of this Act, the provisions of this Act shall apply, but without prejudice to the validity of anything previously done.

(2) Despite subsection (1)-

(a) if, and in so far as it is impracticable in any proceedings to apply the provisions of this Act, the practice and procedure obtaining before the enactment of this Act shall be followed; and

(b) in any case of difficulty or doubt the Chief Justice may issue practice notes or directions as to the procedure to be adopted. (Emphasis added)

25. Although section 14 (2) (a) suggests that the practice and procedure obtaining before the enactment of the Act may only apply in circumstances where it is impracticable to apply the provisions of the Act, the Act does not invalidate the practice and procedure preceding the enactment of the Act.

26. In any event, it is a legitimate argument that as long as the Act does not provide the procedure for the making of applications for judicial review, then the practice and procedure in making such applications before the enactment of the Act are to be followed.

27. What may appear to be a gap in matters procedure will, perhaps, be filled once the regulations or practice directions contemplated under section 13 and 14 (2) have been made.

28. Section 13 says:

13. Regulations.

(1) The Cabinet Secretary may, in consultation with the Commission on Administrative Justice, make regulations for the better carrying out of the provisions of this Act.

(2) Regulations made under subsection (5) shall, before publication in the Gazette, be approved by Parliament.

29. In the absence of the regulations or practice directions, it would be premature to assume that the requirement of leave has been rendered unnecessary. In the current scheme of things, there is no legal basis to institute judicial review proceedings without leave of the court. It would, in the words of section 14(2) (a) of the Fair Administrative Actions Act, be impracticable to invoke the jurisdiction of a judicial review court without leave.

30. In any event, considering the common law principles and rationale behind the requirement for leave which I have adverted to, there is no plausible reason to assume that the regulations or practice directions, once made, will dispense with the need for leave.

31. One other thing I am inclined to say is, as much as the Fair Administrative Actions Act has widened the scope of judicial reliefs, it must always be remembered that the administrative process is not, and cannot be, a succession of justiciable controversies. Public authorities are set up to govern and administer, and if their every act or decision were to be reviewable on unrestricted grounds by an independent judicial body, the business of administration could be brought to a standstill. The prospect of judicial relief cannot be held out to every person whose interests may be affected by administrative action. (see De Smith, Woolf and Jowell, Judicial Review of Administrative Action, at page 3).

32. In the same book at page 18 it was stated that:

> Yet in public law cases the quest for the lawful exercise of power will take into account both the rights of the person challenging Government action (who may be an individual, a group of individuals or another public body) and the fact that the body challenged is frequently acting on behalf of the public. Neither side should be favoured on the basis of their status as litigants. Yet at the heart of a system of public law should be a recognition of the need to strike the appropriate balance between the legitimate requirements of public authorities that they should be free to perform their proper functions on behalf of the public and the corresponding requirement that they should have due regard for the legitimate rights and interests of the individual and groups of individuals. When performing their functions, public authorities should recognise their responsibility to strike this balance. When this does not happen there needs to be a means of redress."

33. It is for this reason that the Court has the discretion to grant or not to grant leave to an applicant to file an application for judicial review. In the absence of this step, public bodies would face a floodgate of judicial review applications and certainly 'the business of administration would be brought to a standstill.'

34. I must reiterate that judicial review remedies are discretionary and it is partly for this reason that a judicial review court has been clothed with the discretion to interrogate, at a preliminary level, the intended application for prerogative orders. It is that stage that, in exercise of its discretion, the judicial review court will weigh between 'the legitimate requirements of public authorities that they should be free to perform their proper functions on behalf of the public and the corresponding requirement that they should have due regard for the legitimate rights and interests of the individual and groups of individuals.'

35. If, upon examination of the material before it, the court is persuaded that a case has been made out that on further interrogation the legitimate rights and interests of the individual or group of individuals may have been abrogated, it will intervene and exercise its discretion in favour of grant of leave to institute a substantive motion for judicial review reliefs.

36. It follows that the application for leave is not a mere procedural technicality that can be dispensed with at the whims of either the court or an applicant. It is a material stage in the application for judicial review orders at which the discretion of this Honourable Court is called into question and which, for this very reason, cannot be taken away without an express provision of the law in that regard.

37. Granted, an aggrieved party has a right to judicial review under section 175(1) of the *Public Procurement and Asset Disposal Act*; however, it can never have been the intention of the legislature that in assuming that right, the aggrieved party would by-pass certain steps and, worse still, deprive the court of its discretionary powers, in making the application for judicial review. If that was the intention, nothing would have been easier than expressly state so.

38. In the ultimate, I find the applicant's motion dated 2 July 2021 to be fatally defective; I hereby strike it out with costs. It so ordered.

SIGNED, DATED AND DELIVERED ON 16 AUGUST 2021.

NGAAH JAIRUS

JUDGE