



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

APPLICATION NO. E145 OF 2021

ROADGRIP LIMITED.....1ST APPLICANT

AIRSIDE SOLUTIONS LIMITED.....2ND APPLICANT

VERSUS

THE PUBLIC PROCUREMENT

ADMINISTRATIVE REVIEW BOARD.....1ST RESPONDENT

ALEX GITARI (ACCOUNTING OFFICER,

KENYA AIRPORTS AUTHORITY.....2ND RESPONDENT

KENYA AIRPORTS AUTHORITY.....3RD RESPONDENT

AND

RAYSTIMA SERVICES LIMITED.....INTERESTED PARTY

JUDGMENT

The applicants' motion dated 5 November 2021 was filed pursuant to the leave granted by this Honourable Court on 29 October 2021. The motion is filed under Order 53 Rule 3(1) of the Civil Procedure Rules and the prayers in it have been framed as follows: -

“i. That this Honourable Court be pleased to grant an order of certiorari to remove and bring to this Honourable Court for purposes of quashing the 1st respondent's entire decision and subsequent orders issued on 14th October 2021 in Request for Review Application No. 116 of 2021 annulling the award of Tender No. KAA/RT/JKIA/0098/2020-2021 for Provision of Maintenance Services for Runway Rubber and Paint Removal at Jommo Kenyatta International Airport (hereinafter “the Tender”) to the ex parte applicant.

ii. That this Honourable Court be pleased to grant an order of prohibition to prohibit the 2nd and 3rd respondents from implementing the decision and consequential orders of the 1st respondent in Request for Review Application No. 116 of 2021 issued on 14th October 2021.

iii. That this Honourable Court be pleased to grant an order of mandamus directed at the 2nd respondent compelling him to enter into contract with the ex parte applicant in respect of the Tender in terms of the letter of notification of award dated 10th September 2021.

iv. That the costs of this application be borne by the respondents.”

The motion is supported by a statement of facts dated 27 October 2021 and an affidavit verifying those facts sworn by Sylvester Mutunga Kimasyu who has described himself in the affidavit as “the duly authorized representative of Roadgrip Limited and Airside Solutions Limited.”

As it appears on the face of the motion, the applicant's suit arose out of the 1st respondent's decision on a request for review lodged before it to interrogate a tender award to the applicants. The decision was made on 14 October 2021.

The award in question is a culmination of a procurement process according to which the 2nd respondent sought to procure for renovation or maintenance of the runway at the Jomo Kenyatta International Airport. The tender was more particularly described as 'Provision of Maintenance Services for Runway Rubber and Paint Removal at Jomo Kenyatta International Airport through Restricted Procurement Process otherwise called Tender No. KAA/RT/JKIA/0098/2020-2021'. The tender was published on the procuring entity's website, www.kaa.go.ke on 21 June 2021. The applicants presented their bid as a joint venture and they were among 23 other tenderers, including the interested party, who submitted their tenders.

At the conclusion of the tender process, the award was made and the applicants' joint venture was awarded the tender at the price of USD. 417, 600. The award was made on 14 September 2021. On 23 September 2021 the interested party filed a request for review before the 1st respondent in application No. 166 of 2021. In that application, Alex Gitau, the procuring entity's accounting officer, was named as the 1st respondent while procuring entity was named as the 2nd respondent. The applicants' joint venture was named as the 3rd respondent.

The crux of the interested party's case was that Mr. Bootsy M. Mutiso, the sole shareholder of Airside Solutions Limited, one of the two partners in the joint venture, was or had been a member of the Board of the procuring entity at the time material to the interested party's application.

It was urged that during his tenure as a member of the Board of Directors of the procuring entity, Mr. Mutiso and the accounting officer of the procuring entity participated in the Board discussions revolving around the subject tender and more particularly in the deliberations and resolutions on the budgetary allocation and approval of the procurement plan for the works advertised by the procuring entity.

It was the interested party's case that Mr. Mutiso enjoyed an undue and unfair advantage over the rest of the tenderers since he enjoyed insider information.

The interested party contended that the award ought not to have been made on moral, ethical and integrity concerns. It therefore prayed for the orders that:

"1) That the Board be pleased to make a declaration that the conduct of the respondents is unfair, illegal and unlawful.

2) That the Board be pleased to disqualify the 3rd respondent from executing or entering into a contract with the 2nd respondent in Tender No. KAA/RT/JKIA/0098/2020-2021 for Provision of maintenance services for runway rubber and paint removal at Jommo Kenyatta International Airport.

3) That the Board be pleased to award the tender to the 2nd most responsive bidder (the Applicant herein).

4) That the Board be pleased to order the 1st, 2nd and 3rd respondents to meet the costs of these proceedings.

In the alternative,

5) The respondent be compelled to pay damages in the sum United States Dollars Four Hundred and Forty-Nine Hundred and Ninety-Nine Twenty cents (USD. 444,999.20/=) being the bid offered by the applicant.

6) That the Honourable Board be pleased to make any or such further orders as the ends of justice may require."

The 1st respondent was persuaded by the interested party's case and so it allowed the application and made the following orders: -

"1) The award of the tender to the 3rd respondent with respect to Tender No. KAA/RT/JKIA/0098/2020-2021 for Provision of Maintenance Services for Runway Rubber and Paint Removal at Jomo Kenyatta International Airport be and is hereby quashed in its entirety.

2) The Procuring entity be and is hereby directed to exclude the 3rd respondent from the procurement proceeding and proceed to award the tender to the next lowest evaluated tenderer bearing in mind the findings of the Board in this decision.

3) The accounting officer of the procuring entity is directed to proceed with the subject procurement process including the making of an award within 14 days from the date of this decision.

4) Given that the procurement proceedings are not yet concluded, each party shall bear their own costs in the Request for Review."

In coming to this conclusion, the 1st respondent noted, *inter alia*, that it was incumbent upon the applicants to disclose Mr. Mutiso's previous relationship with the procuring entity and for the procuring entity to have considered this in the evaluation process in order to dispel any notion that the successful bidder had an undue advantage over the other bidders.

It is this decision that is the subject of this judgment.

According to the applicants, the orders made by the 1st respondent are in excess of the latter's jurisdiction, and an abuse of power because the question whether Mr. Mutiso was a Board member of the procuring entity was not an evaluation criterion in the Tender Document.

In any event, the applicants have urged Mr. Mutiso, though a member of the Board, did not sit in the meeting that approved the budgetary allocation for the tender in question. According to the applicants, Mr. Mutiso's tenure as a member of the Board of the procuring entity ended on 21 May 2021 and therefore it was presumptuous and unreasonable for the 1st respondent to conclude that the disclosure of Mr. Mutiso's prior relationship with the procuring entity was necessary.

The applicants have urged further that the 1st respondent made a "grave" error of law when it based its findings on the fact that the Mr. Mutiso had undue advantage over other bidders on a certification exercise of a different entity, Kenya Civil Aviation Authority (**KCAA**) even though it is this exercise that preceded the procurement process.

The applicants have urged that the 1st respondent acted illegally by introducing extraneous evaluation criteria contrary to the provision of section 80(2) of the Public Procurement and Asset Disposal Act by placing a duty on the applicant to disclose a conflict where disclosure was unnecessary and, in any event, not part of the criteria in the Tender Document.

The 1st respondent opposed the application and Stanley Miheso, swore an affidavit on behalf of the 1st respondent in response to the application.

The affidavit does not dispute matters of fact pertaining to the procurement process but it, by and large, defends the 1st respondent's impugned decision.

The 2nd and 3rd respondents filed a joint replying affidavit. It was sworn by Patrick K. Wanjuki, the General Manager, Procurement and Logistic of the procuring entity.

The 2nd and 3rd respondents have, nonetheless, supported the applicant's application in their "replying affidavit".

Mr. Wanjuki confirmed that Mr. Mutiso was a director in the procuring entity's Board until 21st May 2021 but that he was not part of the Board when the tender was advertised.

Again, at the time of approval of the procurement plan and budget for the financial year 2020/2021, Mr. Mutiso was not present at the Board of Directors meeting held on 30th July 2020 which deliberated and approved the procurement plan and budget and therefore the issue of conflict of interest does not arise.

The interested party also filed a replying affidavit sworn by Juliet Kaari Mbijiwe, its director. The interested party opposed the application urging that at the time of identification of the need to repair the Runaway by **KCAA**, Mr. Mutiso was a director of the procuring entity. This fact, according to the interested party ought to have been disclosed.

Worse still, the applicant did not attach a copy of CR 12 form from the Registrar of Companies to their bid document. This in itself ought to have disqualified the applicants' bid as non-responsive since the inclusion of this form was a mandatory requirement.

Again, by a gazette notice No.106683 published on 16th October 2021, Mr. Mutiso was appointed as a director of Kenya Civil Aviation Authority, the regulator of the operation of the procuring entity.

Upon considering the applicants' application, the responses thereto and the submissions filed by the respective parties, I am persuaded that the primary point of contention is whether it was open for the 1st respondent to consider the question whether Mr. Mutiso was a member of the procuring entity's Board at the time material to the tender in question and whether the applicants ought to have disclosed this fact in their bid documents.

Narrowing down to the grounds upon which an application for Judicial Review may be made, the pertinent question is whether, in coming to its decision, the 1st respondent considered irrelevant matters and therefore came to the wrong decision.

If the court comes to the conclusion that this question was irrelevant and ought not to have been considered, it will exercise its discretion in favour of the applicants. On the other hand, if it comes to the conclusion that this was a relevant consideration, the application should be dismissed.

In this latter case, the court will not be concerned with the merits of the decision since Judicial Review is more about the process than the merits of the decision.

Again, the relevancy test as laid down in the **Associated Provincial Houses Ltd vs Wednesbury Corporation (1948) 1KB 223** that the body in question must take into account of relevant factors and ignore irrelevant factors. If it did, that is the end of the case (*as Lord Greene expressly said*) as far as the test is concerned. The body has then acted "*within the four corners of its jurisdiction, and it is not for the court to interfere*". If it did it would be substituting its discretion on the merits for that of the authority, whereas it is properly concerned only with legality.

The Wednesbury case is the authority on relevancy rules. In that case Lord Greene noted: -

“If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, that authority must disregard those irrelevant collateral matters”.

And in **Republic vs Secretary of State for Trade and Industry, ex parte Lonrho Plc (1989) 1WLR, 525 per Lord Keith at page 533D** said: -

“The discretion...must be exercised...by reference to relevant and not irrelevant consideration”.

In **Secretary of State for Education and Science vs Tameside MBC (1977) AC 101, 1064H-1065 B Lord Diplock;**

“It is not for any court of law to substitute its own opinion for that of Secretary of State’ but it is for a court of law to determine whether it has been established that in reaching his decision unfavorable to the council he had directed himself properly in law and had in consequence taken into consideration the matters which upon true construction of the Act ought to have considered and excluded from his consideration matters that were irrelevant to what he had to consider see Wednesbury...or, put more compendiously, the question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?”.

Turning back to the case at hand, the question whether Mr. Mutiso was or had been a member of the procuring entity’s board at the time material to the subject tender and therefore whether he ought to have declared his interest at the time of submitting his tender was the very question that the 1st respondent was presented with for determination in the Review Application No. 116 of 2021. There was no way, from the very outset, the 1st respondent would have come to its decision without considering this question.

Secondly, and more crucially, according to **Article 10(1) (2) (c) of the Constitution**, all state organs, state officers, public officer and generally all persons are bound by the national values and principles of governance which include good governance, integrity, transparency and accountability with specific reference to procurement of public goods and services.

Article 227(1) of the Constitution enjoins a state organ or any other public entity contracting for goods and services to do so in accordance with a system that is fair, equitable, transparent, competitive and that is cost-effective.

This theme is replicated in section 3 of the Public Procurement & Asset Disposal Act on the guiding principles of all procurement of goods and services and disposal of assets by state organs. This provision of the law is clear that the state organs must be guided by, among other things; national values under Article 10 of the Constitutional and principles of integrity under the leadership and integrity Act, 2012.

Narrowing down to the question of conflict of interest, **section 66(1) of the Act** provides that a person to whom the Act applies shall not be involved in, *inter-alia*, conflict of interest in any procurement or asset disposal proceedings.

Now, it is not in dispute that Bootsy M. Mutiso is the sole shareholder in Airside Solutions Limited. This company was registered on 1 November 2019 when Mr. Mutiso was serving as a director or member of the procurement entity’s board.

According to Kenya Gazette Notice No. 5145 of 2018, he was appointed to the Board on 22 May 2018 for a term of three years meaning that he was to serve in that capacity until 21 May 2021.

It is also not in dispute that sometimes in September 2019 when Mr. Mutiso was serving, the Kenya Civil Aviation Authority conducted a certification audit of Jomo Kenyatta International Airport and prepared a report dated 20 September 2020 which highlighted deficiencies in the airport that would result in severe safety concerns. Among these deficiencies were that there were rubber deposits that had completely obliterated the runaway markings. **KCAA** required the procuring entity to submit a corrective plan.

The 1st respondent found as a fact, and it was not disputed, that the subject tender was part of the corrective measures that were to be implemented a result of the **KCAA’S** audit.

The procuring plan for that procuring entity for the financial year 2020-2021 was prepared on 30 July 2020 and approved in August 2020. The budget and the procurement plan were approved on 20 July 2020.

It is therefore obvious that all the background activities that culminated in the subject tender were undertaken during Mr. Mutiso’s tenure as a member of the Board of Director of the procuring entity.

In these circumstances, it is difficult to see why the question whether Mr. Mutiso’s company was conflicted could not have arisen and considered.

In my humble view, and based on the Wednesbury test, it was a material or a relevant question that the 1st respondent was bound to consider.

In considering this question the 1st respondent noted as follows: -

“As much as Mr. Mutiso did not sit in the meeting that approved the budgetary allocation and the procurement plan for the

subject tender, it is the Board's view that it is probable that he knew the details of tender before it was floated considering that he sat on the procuring Entity's Board at the material time. The Board noted from Kenya Gazette Notice No. 5145 of 2018 that Mr. Mutiso was appointed as a member of the Procuring Entity on 22nd May 2018 for a period of 3 years. He was thus a member of the Board during the period KCAA conducted the above mentioned certification exercise that noted deficiencies in the runway which subsequently necessitated the subject tender. The Claimant assertion that the successful bidder had undue advantage over the other candidates due to possible information asymmetry is accordingly not far-fetched.

Neither the Procuring Entity nor the 3rd Respondent has confirmed why Mr. Mutiso did not attend the meeting of 30th July 2020. It was contended that he recused himself on account of potential conflict of interest. It has also not been claimed or shown, that Mr. Mutiso did not receive the Requisite Board Papers relevant to the meeting in issue, or that the minutes of that meeting were not discussed in subsequent Board Meetings where he would have present.

It was thus incumbent upon the 3rd Respondent to disclose Mr. Mutiso's previous relationship with the Procuring Entity and for the Procuring Entity to have considered this in the evaluation process in order to dispel any notion that successful bidder and undue advantage over the other bidders. We have looked at the evaluation report and did not see that there was any such consideration". (see page 22-23 of the decision).

The 1st respondent then came to the conclusion that the disclosure was necessary and made the orders it made. There is no doubt that these orders were informed by **Section 173 of the Public Procurement and Asset Disposal Act** which provides as follows: -

Upon completing a review, the Review Board may do any one or more of the following: -

- (a) Annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;*
- (b) Give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;*
- (c) Substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;*
- (d) Order the payment of costs as between parties to the review in accordance with the scale as prescribed; and*
- (e) Order termination of the procurement process and commencement of a new procurement process".*

As to whether the 1st respondent's the correct decision or not is not for this Honourable Court to say. All that the court would be concerned with is whether the question that informed its decision was relevant or not. Once the court is satisfied that it was a relevant question, it needs not go any further unless the decision reached is so unreasonable or outrageous that no reasonable tribunal could have reached it.

According to **Foulkes Administrative Law, 7th Edition by David Foulkes at page 228.**

"The relevancy test as laid down in Wednesbury is that the body in question must take into account of relevant factors and ignore irrelevant factors. If it did, that is the end of the case as far as that test is concerned. The body has then acted within the four corners of its jurisdiction' and it is not for the court to interfere. If it did, it would be substituting its discretion on the merits for that of the authority, whereby it is property concerned only with legality".

For all I have said, I am not satisfied that the applicants have made out a case deserving any of the Judicial Review orders sought. The motion dated 5 November 2021 is thus dismissed with costs. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF DECEMBER, 2021.

Ngaah Jairus

JUDGE