



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

JUDICIAL REVIEW MISC. CIVIL APPLICATION NO. 31 OF 2019

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

KENYA PORTS AUTHORITY.....RESPONDENT

AND

EHICS AND ANTI-CORRUPTION COMMISSION.....INTERESTED PARTY

FERADON ASSOCIATE LIMITED.....EX-PARTE APPLICANT

RULING

The Application

1. Pursuant to leave granted on 17.6.2019, the ex-parte applicant filed a Notice of Motion dated 17.6.2019 seeking the following orders:

a. AN ORDER OF CERTIORARI to bring into this Court and quash the Respondent's decision as contained in their letter 6.5.2019 referenced PSM/CT2/2/02(071) Vol.1 cancelling the award of tender No. KPA/071/2018-2019/PDM-PROVISION OF ELECTRICAL AND MECHANICAL ENGINEERING CONSULTANCY FOR CONSTRUCTION OF NEW KIPEVU OIL TERMINAL (KOT)PORT OF MOMBASA, to the Applicant.

b. AN ORDER OF PROHIBITION to issue against the Respondent,from purporting to cancel the award of tender No. KPA/071/2018-2019/PDM-PROVISION OF ELECTRICAL AND MECHANICAL ENGINEERING CONSULTANCY FOR CONSTRUCTION OF NEW KIPEVU OIL TERMINAL (KOT)PORT OF MOMBASA to the Applicant under Section 63 of the Public Procurement and Assets Disposal Act, 2015.

c. AN ORDER OF MANDAMUS to issue as against the Respondent to compel it to proceed and issue the Applicant with the contract for execution in order to commence the works as spelt out under the awarded tender No. KPA/071/2018-2019/PDM-PROVISION OF ELECTRICAL AND MECHANICAL ENGINEERING CONSULTANCY FOR CONSTRUCTION OF NEW KIPEVU OIL TERMINAL (KOT)PORT OF MOMBASA.(herein referred to as "the tender")

d. Costs of this Application be provided for.

2. The Application is premised on the grounds set out in the Statement dated 14.6.2019, the accompanying Verifying Affidavit and the Supplementary Affidavit sworn on the 7.11.2019 by **Eng. Lydia Esiba Owino** who is the Managing director to the ex-parte Applicant.

3. The *ex-parte* Applicant alleges that the Respondent vide an advertisement in the Daily Nation Newspaper of 22.1.2019 advertised for a Tender. The *ex-parte* Applicant was among the four bidders. The said tender documents were opened at the Respondent's procurement conference room on the 13.2.2019 and only the *ex-parte* Applicant's bid made it to the financial opening stage and subsequently, it was awarded a contract communicated vide letter dated 15.3.2019 and referenced PSM/CTC/1/03(071) Vol. 1.

4. The *ex-parte* Applicant states that it issued a letter of acceptance of the award on the 19.3.2019, which was within 7 days as stipulated by the Respondent's Letter of Award. The *ex-parte* Applicant avers that no bidder challenged the award within the stipulated 14 days as provided under the Public Procurement and Assets Disposal Act (herein referred to as "*the Act*"). That notwithstanding, the Respondent unilaterally without any iota of right, justification, and after going mute for nearly two months, illegally, and maliciously cancelled the award vide letter dated 6.5.2019 and purported to rely on the provisions of Section 63(1) (e) of the Act.

5. The *ex-parte* Applicant claims that it wrote a letter of demand to the Respondent protesting the unilateral cancellation of the award but there has been no response, hence this action.

The Response

6. The Respondent in opposition to the Application filed its Grounds of Opposition dated 22.7.2019 and through its procurement Manager Mr. **Aza Dzengo**, responded to the Application by way of a Replying Affidavit sworn on the 19.7.2019. The Grounds of Opposition are as follows:

a. That this Court lacks jurisdiction to adjudicate on the issues raised in the substantive motion by dint of Sections 27, 28, 167 and 175 of the Act, which provide for a specific mechanism for resolution of disputes arising from the tendering process.

b. That the Applicant grievances can be completely dealt by a specialized administrative body empowered by an Act of Parliament.

c. The Applicant has not invoked the avenues provided for under the relevant Act of parliament and the aforesaid avenue is the first point of call.

7. The Respondent avers that as a state corporation, it is bound by Chapter 12 of the Constitution of Kenya 2010 and in particular the principle of Public Finance as enumerated under Article 201 of the Constitution, which requires public money to be utilized in a prudent manner to ensure that the public gets value for money spent. Further, the Respondent avers that Section 44 of the Act puts the responsibility of ensuring that a public entity complies with the procurement laws on the Accounting Officer who in this case is the Respondent's Managing Director.

8. The Respondent avers that indeed it is only the Applicant that passed the preliminary stage of the tender process, and so, the tender was awarded to the *ex-parte* Applicant based on the recommendation of the Evaluation Committee, and a letter of Notification of Award was issued to the *ex-parte* Applicant subject to the conducting of due diligence on reference to the sites of the bidder's previous assignment and negotiations in order to establish rates charged on the quoted professional fees. The Respondent's case is that the Notification of Award did not constitute a contract, which contract was to be signed within 30 days from the date of the said notification.

9. The Respondent states that while in the process of preparing for negotiation on the financial bid, it received a letter dated 18.4.2019 from the Ethic and Anti-Corruption Commission (EACC) directing it to suspend the execution of the tender pending the investigation of some alleged irregularities. However, the Respondent states that since in the Act there is no provision of suspension of a tender, and the investigations by the EACC on the tender were still pending with no definite conclusion date, the Respondent opted to cancel the tender process and advertise a new tender in order to undertake a fresh tendering process.

Interested Party

10. The Interested Party through its Investigator **Mr. Lamek Okun**, responded to the *ex-parte* Applicant's application by way of a Replying Affidavit sworn on 16.10.2019. He avers that he is part of the team currently investigating allegations of corruption, abuse of office and willful failure to comply with the provisions of the Act, in respect of the tender and that so far it has been established that the tender was undertaken without a procurement plan and budget, and therefore, contrary to the provisions of the Act and Sections 68, 147, 196(1), 197(h), (i), (o); 198(1) (d) of the Public Finance Management Act.

11. He further deposes that the Interested Party in discharge of its mandate informed the Respondent about the ongoing investigations over the said tender on the 3.7.2019 and 18.4.2018. Therefore, if the *ex-parte* Applicant's application is allowed, it will be a miscarriage of justice and contrary to Sections 3(2)(b) and 11(1)(d) (g) (j) of the Ethics and Anti-corruption Act 2011, and Sections 23, 45(2) (b)(c) and 46 of the Anti-corruption and Economic Crimes Act and Sections 2 and 66(1) of the Act.

12. In response to the Replies by the Respondent and the Interested Party, the *ex-parte* Applicant filed a Supplementary Affidavit sworn on the 7.11.2019. In response to the Respondent's Grounds of Opposition, she deposed that the said opposition was entirely based on skewed interpretation of the provisions of the Act, as there was never any complaint or claims by the rest of the participants in the tender process. The *ex-parte* Applicant avers that Section 63 of the Act does not contemplate a cancellation subsequent to a Notification of Award. Therefore, the jurisdiction of the review board in the circumstances is ousted, leaving this Court with the requisite jurisdiction.

13. She further deposed that Article 165(3) (a) of the Constitution clothes this Court with unlimited original jurisdiction. Therefore, the Application is properly before this Court.

14. In response to the Interested Party's Replying Affidavit, she deposed that the alleged investigations are still underway and a conclusion to charge has yet to be reached. Therefore, the Interested Party's reply is based on malice and bad faith and its interpretation of the Anti-corruption and Economic Crimes Act distorted.

Submissions

15. Parties filed submissions, which I have considered. **Mr. Okoth**, Learned Counsel for the *Ex-parte* Applicant submitted that the dispute transcends the provisions of the Act and covers the provision of the Anti-Corruption and Economic Crimes Act by virtue of the involvement of the Interested Party and by virtue of the award being cancelled because of alleged corruption. Further, he submitted that the Act does not contemplate cancellation of the tender after a notification of award. Consequently, the said cancellation was undertaken outside the law and based on mere allegations that are yet to be substantiated as investigations are still pending.

16. Mr. **Wafula**, Learned Counsel for the Respondent submitted that Section 167 (1) of the Act provides that any party aggrieved by the decision made in a procurement process must approach the review board for redress. He further submitted that the procurement process ends upon the signing of the contract, hence a party could seek redress of an alleged breach at any stage of the procurement process before a contract is signed as provided under Section 135(4) of the Act.

17. Counsel further submitted that since the contract had not been signed, this Court lacked the jurisdiction over the dispute and that Section 167(4) of the Act highlights matters the Review board is prohibited from adjudicating. He went on to submit that the involvement of the Interested Party does not change the issue as the Interested Party sought to be enjoined after the ex-parte Applicant had already instituted the present suit. For authority, reliance was placed on the case of **John Mburu vs. County Government of Mombasa (2019) eKLR**.

18. On the substantive motion, **Mr. Wafula** submitted that judicial review orders are discretionary and in this case, since allegations of corruption are involved, the Respondent could not ignore the concerns raised by the Interested Party by going ahead and entering into a contract with the ex-parte Applicant. Therefore, granting the orders sought by this Court would amount to sanitizing an irregular procurement process and facilitating a crime.

19. **Mr. Makori** Learned Counsel for the Interested Party adopted its submission filed on the 14.11.2019, and reiterated the contents of its Replying Affidavit.

The Determination

20. After considering the pleadings, submissions and arguments made by the parties, this Court finds it prudent to first address a preliminary issue raised by the Respondent as to the Jurisdiction of this Court to adjudicate on the issues raised in the substantive motion dated 17.6.2019. I am in this respect guided by the case of **Owners of Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd (1989) KLR 1** where Justice Nyarangi JA (as he then was) held:

"I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

21. Section 27 of the Act establishes the Review Board as an unincorporated Board, and its functions are set out in Section 28 of the Act as follows:

"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.

(2) 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 gazette by the Cabinet Secretary.

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

22. The jurisdiction of the review board as regards review of procurement processes, is provided for under section 167(1)(4) of the Act which states as follows: -

"(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

...

(4) The following matters shall not be subject to the review of procurement proceedings under subsection (1)—

(a) the choice of a procurement method;

(b) a termination of a procurement or asset disposal proceedings in accordance with section 62 of this Act; and

(c) where a contract is signed in accordance with section 135 of this Act."

23. Under Section 168 of the Act, the requests for review are to be made to the Public Procurement Administrative Review Board established under Section 27 of the Act. The issue of whether or not the said sections oust the jurisdiction of this court was extensively dealt with by Odunga J. in **Republic v Independent Electoral and Boundaries Commission & Another Ex Parte Coalition for Reform and Democracy & 2 Others [2017] eKLR** where the learned Judge held as follows:

“173. I agree with the IEBC that pursuant to section 167(1) of the *Public Procurement and Asset Disposal Act, 2015* administrative review is available only to the candidates or tenderers and that the Applicant was neither a candidate nor a tenderer in the subject procurement. Strictly speaking therefore it was not the spirit or text of that law that parties other than candidates or tenderers should be permitted to challenge procurement processes through the procedure provided for under the Act. To that extent I agree that persons who fall within the category of the Applicant herein have no locus to commence proceedings before the Review Board.”

24. It is not in dispute, that the Applicant is aggrieved by the manner in which the Respondent cancelled the tender after the same had been awarded to it vide letter dated 15.3.2019. It is also not in dispute that at the time of the cancellation of the award a contract had not been signed between the Respondent and the ex-parte Applicant.

25. In order to determine when a procurement process ends, it's prudent to look at Section 135 (3) and (4) of the Act which is on ***creation of procurement contracts*** and it stipulates as follows:

135. (1) The existence of a contract shall be confirmed through the signature of a contract document incorporating all agreements between the parties and such contract shall be signed by the accounting officer or an officer authorized in writing by the accounting officer of the procuring entity and the successful tenderer

...

(3) The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period. [Emphasis added].

(4) No contract is formed between the person submitting the successful tender and the accounting officer of a procuring entity until the written contract is signed by the parties.

26. From the foregoing, I find and hold that the procurement process had not come to a halt since the Respondent was in the process of conducting its due diligence and the ex-parte Applicant has not provided any document to show that a contract was entered into.

27. Since the gravamen of the ex-parte Applicant's claim is the cancellation of the tender under Section 63(1) (e) after a notification of award had been issued, in my view, the proper forum for the Applicant to ventilate the issues of cancellation of the tender under Section 63(1) (e) of the Act was the Review Board, by virtue of Section 167(1) of the Act since the ex-parte Applicant has a right to seek for review at any time there is a breach during the procurement process which in my view, ends when the contract is entered into between the procurement entity and the successful bidder herein being the ex-parte Applicant.

28. The law limits this Court's jurisdiction when it comes to disputes between procuring entities and bidders arising from public procurement processes. This Court is only seized of jurisdiction to review the Review Boards decisions on such disputes under section 175(1) of the Act. It is in this regard that the Court of Appeal observed as follows with regard to the jurisdiction and powers of the Review Board in **Kenya Pipeline Company Ltd vs Hyosung Ebara Company Limited & 2 Others [2012] eKLR**:

“...The Review Board is a specialized statutory tribunal established to deal with all complaints of breach of duty by the procuring entity. It has power to engage an expert to assist in the proceedings in which it feels it lacks the necessary experience. The Act confers very wide powers on the Review Board. It is clear from the nature of powers given to the Review Board including annulling anything done by the procurement entity and substituting its decision for that of the procuring entity that the administrative review envisaged by the Act is indeed an appeal. From its nature the Review Board is obviously better equipped than the High Court to handle disputes relating to breach of duty by the procurement entity. It follows that its decision in matters within its jurisdiction should not be lightly interfered with.”

29. I accordingly find that the Respondent's Grounds of Opposition is merited for the foregoing reasons, and I hereby strike out the ex-parte Applicant's Notice of Motion dated 17.6.2019.

30. parties shall bear own costs.

31. Orders accordingly.

Dated and Delivered at Mombasa this 28th day of April, 2020.

E. K. OGOLA

JUDGE

In the presence of

Mr. Wafula for the Respondent

N/A for the interested party

N/A for the ex-parte Applicant

C/A Kaunda