



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
JUDICIAL REVIEW NO. 16 OF 2020

PETRO OIL KENYA LIMITED.....EX PARTE APPLICANT

VERSUS

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD.....RESPONDENT

AND

1. ACCOUNTING OFFICER, KENYA FERRY SERVICES LIMITED

2. GALANA OIL KENYA LIMITED

3. EAST AFRICAN GAS & OIL LIMITED.....INTERESTED PARTIES

RULING

The Application

1. In its Notice of Motion dated 21st April 2020, the ex parte Applicant, prays for the following orders:

1. THAT this matter be certified urgent.

2. THAT this Court be pleased to grant the Applicant leave to apply for an order of Certiorari to be issued to quash the decision made on 1st April, 2020 by the Respondent in **Public Procurement Administrative Review Board Review Application No. 34 of 2020** between the Applicant herein versus the 1st and 2nd Interested Parties herein whereby the Respondent dismissed the Applicant's Request for Review filed on 11th March, 2020 with Tender No. KFS/DDF/01/01/2020-Supply and delivery of diesel for ferries (Vendor Management Inventory System) and in lieu thereof make the following orders:

(a) The entire decision made on 21st February, 2020 by J. Cirindi, the Procurement & Supplies Manager, Kenya Ferry Services Ltd be declared null and void for being contra **Section 87 (3) of the Public Procurement and Asset Disposal Act No. 33 of 2015**

(b) The 1st Interested Party be directed to undertake a fresh tendering process with respect to the supply and delivery of diesel for ferries (Vendor Management Inventory System) at the Kenya Ferry Services Limited.

(c) In the alternative and without prejudice to what is stated herein above, the Public Procurement Administrative Review Board be pleased to direct the 1st and 2nd Respondents to re-evaluate the bids submitted by parties with respect to Tender No. KFS/DDF/01/01/2020-Supply and delivery of diesel for ferries (Vendor Management Inventory System).

3. **THAT** the grant of leave to apply for the Judicial Review Orders sought herein do operate as a stay against the 1st Interested Party, his agents and servants from signing any contract with the 2nd Interested Party with respect to Tender No. KFS/DDF/01/01/2020-Supply and delivery of diesel for ferries (Vendor Management Inventory System) at the Kenya Ferry Services Limited.

4. THAT the Applicant be awarded the costs of the proceedings before Public Procurement Administrative Review Board.

Response

2. In opposing the Motion, the 1st Interested Party filed a Replying Affidavit sworn on 27th April 2020 by Bakari Hamisi Gowa. The 1st Interested Party defends the Board's decision on three broad grounds; firstly, that the reliefs sought, even if merited, cannot be granted; secondly, the Motion is a merit review of the Board's decision which is beyond the scope of a judicial review court; thirdly, that even if the merits are gone into, the Board was exceedingly right in its conclusions.

Background to the Application

3. The Ex parte Applicant seeks an order of certiorari to quash the Respondent's decision made on 01/04/2020 dismissing its request for review made pursuant to Review No. 34 of 220 before the Respondent (hereafter "the Board"). Much of the facts are agreed. Kenya Ferry Services Limited (the 1st Interested Party herein) floated Tender No. KFS/DDF/01/01/2020 for the supply of fuel. The Ex parte Applicant, the 2nd & 3rd Interested Parties and several other entities submitted their bids. The tender was finally awarded by the 1st Interested Party to the 2nd Interested Party. Being dissatisfied with the award the Ex parte Applicant filed Request for Review No. 34 of 2020 before the Board.

4. The Ex parte Applicant accused the 1st Interested Party before the Board with several breaches stated in that action. However, those breaches were denied by the 1st Interested Party. In a considered decision rendered on 1st April 2020, after dismissing some preliminary objections, the Board found no merit in the Request for Review, and dismissed the same.

5. The Ex parte Applicant is now before this Court alleging that the Board; (a) acted illegally in allowing delegation of the duty of notification in

Section 87 of the Public Procurement and Asset Disposal Act (herein after called "PPAD" 2015)

(b) acted unfairly in relying on letters which had not been served upon the Ex parte Applicant;

(c) acted illegally and irrationally in finding that Ex parte Applicant had not serialized its bid.

6. The application is supported by affidavit of Benjamin Kingori sworn on 14/4/2020.

The 1st Interested Party's Response

7. In opposing the Motion, the 1st Interested Party filed a Replying Affidavit sworn on 27th April 2020. He additionally relies on the List of Authorities dated 30th April 2020 in support of these submissions. We learn from the Ex parte Applicant's submissions that the other parties have not filed any papers in opposition. How did we get here?

The 2nd Interested Party's Response

8. The application is also opposed by the 2nd Interested Party through a Replying Affidavit sworn by Raphael Kimani on 4/5/2020. The 2nd Interested Party's case is that the Ex parte Applicant has not satisfied the statutory threshold to warrant the orders of judicial review in the nature of certiorari and mandamus thus the application amounts to an abuse of due process of court; that the grounds supporting the application for judicial review application are too general, and are mere allegations not supported by evidence or at all; the Applicant's position in essence seeks that the court directs a public officer to exercise or not to exercise his statutory discretion in a particular manner hence usurping the said officer's authority; the veiled prayer for mandamus is not grounded on any leave of court sought and had, and therefore those prayers cannot stand in these proceedings; that the Ex parte Applicant was at all times given a fair hearing before the Board and tenets of natural justice were met; that the court would only be concerned with the process leading to the making of the decision and not the merits of the decision made as the latter would be asking the court to act as a Court of Appeal over the decider, which is not the province of judicial review; that the Respondent heard and determined this matter and made an elaborate judgment addressing each and every issue raised by the Applicant; and that the material contract has been finalized and is in the process of implementation.

9. The Respondent (the Board) did not participate in these proceedings. Their counsel, M/s. Wasuna, submitted that they rely on the documents and submissions of the 1st Interested Party herein.

Submissions

10. Parties filed submissions and authorities which I have carefully considered. In my view the following are the issues for determination:

(i) Whether the reliefs sought can be granted.

(ii) Whether the application seeking a merit review of the Board's decision.

(iii) Whether the Board acted illegally, unfairly or irrationally.

(i) Whether the reliefs sought can be granted

11. Mr. Kongere, learned counsel for the 1st Interested Party submitted that no matter how merited, the reliefs sought herein cannot be

granted. Counsel submitted that certiorari, which is what Ex parte Applicant has sought, issues to;

“...quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons (Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR)”.

12. The upshot is that if the Ex parte Applicant gets the certiorari it seeks, it would only be effective to quash the Board's decision, which merely dismissed the Ex parte Applicant's request for review. The effect of the grant of certiorari therefore would be to upset the Board's decision but leave the 1st Interested Party's decision to award the tender to the 2nd Interested Party intact.

13. Mr. Kipkorir, learned Counsel for the 2nd Interested Party emphasized this fact, that indeed no leave was sought for the remedy of mandamus, and therefore the veiled prayer for mandamus cannot be entertained. So the Ex parte Applicant must stick to its prayer for certiorari. Both Counsel, however, submitted that even the said remedy of certiorari cannot issue herein because it would not be efficacious. It would serve no purpose. A court should not issue orders in vain.

14. In my decision in **Naimisha Somchand Shah vs. Resident Magistrate, Mombasa & 3 others [2017] eKLR** I stated that certiorari will not issue if it would not be efficacious:

“...it is settled law that Judicial Review remedies are discretionary and should be granted where they represent the most efficacious resolution of the dispute. ...What the ex parte applicant has asked for is a quashing of the decision of the 1st Respondent. If the decision is quashed, it leaves the decision of the Tribunal undisturbed. What then will the parties do with that decision by the Tribunal more so in light of the repeal of the Land Disputes Tribunal Act?”

15. That is the exact scenario here. If this court quashes the Board's decision, what then? The Ex parte Applicant must have appreciated this, and that is probably why within the prayer for certiorari, it asks that:

“The 1st Interested Party be directed to undertake a fresh tendering process with respect to the supply and delivery of diesel for ferries (Vendor Management Inventory System) at the Kenya Ferry Services Limited.”

16. An order of certiorari cannot compel the performance of a duty, only mandamus can do that. In **Ex Parte Geoffrey Gathenji (supra)** the court observed as follows:

“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty.”

17. If certiorari was granted to quash the Board's decision, then mandamus would issue, if sought and if appropriate, to compel the performance of a public duty. However, it is not clear that mandamus could issue here. In **Energy Regulatory Commission vs. S G S Kenya Limited & 2 others [2018] eKLR** the Court of Appeal stated:

“Further, and more critical, the appellant did not bear a statutory duty to award the tender to SGS or to any other entity to attract the compulsive force of mandamus. The grant or award of such tenders and contracts are matters that lie within its discretion.”

18. The Supreme Court affirmed that finding in **S G S Kenya Limited v Energy Regulatory Commission & 2 others [2020] eKLR**.

19. Whatever the case, mandamus is in fact not sought in this application. As correctly submitted by Mr. Kongere, absent an order of mandamus, assuming it could be granted, certiorari to quash the Board's decision would not, in itself, upset the 1st Interested Party's decision of 21st February 2020.

20. The question then becomes whether it is possible to grant the orders enumerated as (a), (b) & (c) in the motion. It is true that if granted, those orders would achieve the end goal that the Ex Parte Applicant seeks. However, in judicial review, the court is under a tight leash in terms of the orders it can grant. In **Cortec Mining Kenya Limited vs. Cabinet Secretary, Attorney General & 8 others [2015] eKLR** the court observed that:

“Perusal of the provisions of Appellate Jurisdiction Act and the Law Reform Act shows that...the latter statute focuses on civil actions and prerogative orders, to wit, orders of mandamus, certiorari and prohibition.

These are the only orders in judicial review that the High Court is enjoined to grant.”

21. Mr. Kongere submitted that no matter how well-intentioned the court may be, it cannot issue the reliefs sought in (a), (b) & (c) of the Motion.

22. Mr. Gikandi was however of contrary opinion. Counsel submitted that there is in fact a prayer for mandamus, and that even if such prayer is not there, this court has the constitutional latitude under Article 47 of the constitution and the Fair Administrative Action Act to render a Judgment which resonates with court's finding after quashing the decision by the grant of an order of certiorari. Section 11 (1) of

the Fair Administrative Action Act provides that in proceedings for judicial review under Section 8 (1):

“... the court may grant an order that is just and equitable, including an order declaring rights of the parties in respect of any matter to which the administrative action relates.”

23. Therefore, counsel submitted rightly in my view that should this court grant an order of certiorari quashing the decision of the Board, then an order of mandamus should follow in order to give effect to such quashing, and for the ends of justice. Indeed that is true. This court is not limited in terms of the remedies it can give in judicial review proceedings. However, those remedies will only ensue where they are deserved, and not necessarily in every judicial review proceeding. In the matter before the court, I have not been satisfied, in the first place, that I should even grant an order of certiorari to quash the decision under review made by the Respondent.

24. In JR No. 89 of 2012 **Republic vs. 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 Uto Creations. The Board found that fair competition would be undermined ...”

Similarly in the instant case, the Respondent was not obliged to allow the Applicant’s request for review. The discretionary aspect of judicial review remedies mean that not every applicant who appears to be deserving will succeed in securing these orders. The court must still look at the ends of justice, and the likely effect of the grant of these on the parties. Before the court is a private tender contract which has already been awarded by the Board acting within its jurisdiction. There is no public duty owed by the procuring entity to award the tender to the Ex parte Applicant. I find and hold that this court cannot issue the orders sought herein by the Ex parte Applicant.

(ii) Whether the Ex parte Applicant is seeking a merit review of the Board’s decision.

25. Mr. Gikandi urged the court to consider the merits of the Board’s decision. However, Mr. Kongere submitted that it is settled that judicial review is not concerned with the merits of the decision but rather the process. That may be so. However, Judicial review proceedings have increasingly taken a constitutional nature and under the Fair Administrative Actions Act, a merit review is clearly possible. But that will depend on the nature of orders sought and alleged constitutional infringements proven. From a reading of the Board’s decision, it was faced with two questions. The first was whether issuance of a notification of award could be delegated and whether it was in fact delegated. The second was whether the Ex parte Applicant’s bid was properly serialized in accordance with the Tender Document and section 74 of PPAD 2015. The Board perused and analyzed the facts, and identified the law and applied the law to the facts. It then made a founding. Clearly in deciding those two issues the Board was acting within its jurisdiction.

26. The Ex parte Applicant however, urges the court, in a Judicial Review application, to go beyond the process and look at the evidence before the Board to determine whether it was sufficient to lead to the conclusions which the Board reached. The Ex parte Applicant wants the court to look at the letters and find out whether they did or did not amount to a delegation by the 1st Interested Party. Further, that the court should look at the Ex parte Applicant’s bid and decide whether it was in fact serialized as per the tender document. The court in **Energy Regulatory Commission (supra)** frowned upon such characterized merit review:

“...the learned Judge was embarking on an exercise of making value judgments regarding the evidence, weighing it and minutely examining or interrogating it to determine whether it reached a certain standard of acceptance. With respect, that approach is far removed from process, the purpose and province of judicial review, and is a delving into the merits of the decision as one would do were he dealing with an appeal.”

“...it must, however, be recognized that a tribunal or statutory body or authority has jurisdiction to err and the mere fact that in the course of its inquiry it errs on the merits is not a ground for quashing the decision by way of judicial review as opposed to an appeal.”

27. The Board may have erred in finding that the 1st Interested Party delegated its authority to sign the notification of award or in finding that the Ex parte Applicant’s bid was not properly serialized. But those errors go to the merits of the decision and not the process, a path which this court should not stray into.

(iii) Whether the Board acted illegally, unfairly or irrationally

28. The Board is accused here on three distinct grounds - misinterpreting section 87 of PPAD 2015; misinterpreting section 74 of PPAD

2015; and relying on improperly produced evidence.

29. Mr. Gikandi submitted that the two letters relied on by the Board were in fact not a delegation, but an abdication, is a submission which invites the court to question the Board's analysis of the evidence. On Section 87 of PPAD 2015, the Board found, relying partly on section 37 of the Interpretation and General Provisions Act Cap 2, that it is permissible to delegate the authority in Section 87 of PPAD 2015. The Board is castigated for relying on Cap 2, being general statute. The Ex parte Applicant submitted that Cap 2 cannot be applied where the PPAD 2015, a specific statute is applicable.

30. But Cap 2 was not the Board's only basis for finding that the 1st Interested Party's powers could be delegated. The Board also relied on the holding in **R vs. PPARB ex parte Kenya Revenue Authority [2019] eKLR** which it expressly cited. The 1st Interested Party had also pointed the Board to section 69(4) of PPAD 2015 which allowed delegation provided it was in writing. The Board, having taken all these into account, inevitably had to find that Section 87 of PPAD 2015 did not expressly exclude the 1st Interested Party from delegating his powers.

31. Section 74 of PPAD 2015 is another instance where the Ex parte Applicant is inviting the court to delve into a merit review. The Board analyzed the provisions of Section 74 of PPAD 2015 and found them reflected in the tender document. It then set out its understanding of serialization as used in the PPAD 2015.

32. It is the finding of this court that these decisions, whether right or wrong, cannot be the sole basis for quashing the decision of the Board. The court has no mandate to substitute its decision for that of the Board unless the dictates of justice so require. At the end of the day judicial review remedies are discretionary, and a court is entitled to judiciously use that discretion for the ends of justice. When the scale of justice is balanced, the Ex parte Applicant is found wanting.

33. The Ex parte Applicant also claims the Board's decision relied on two letters, reproduced in the decision, to hold that the 1st Interested Party had in fact delegated his authority. The Ex parte Applicant's case is that it ought to have been served with copies of the two letters. That it was not served violated its right to a fair hearing. For the reasons already stated above, this court is unable to see any substance in this contention. First, section 67 of PPAD 2015 is emphatic that documents relating to the procurement are not to be disclosed. Even in a Request for Review, a summary of the documents is what ought to be provided to the Applicant. The actual documents are transmitted to the Board. Non-disclosure therefore, is expressly demanded by statute. Further, it is settled that tribunals as the Board herein, are masters of their own procedure, and may not be converted into a court with all its rigors. All it is required to do is achieve fairness appropriate to the task before it. In **George Kingi Bamba vs. National Police Service Commission [2019] eKLR** the court observed that:

“...it has been held that the investigating body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigation and the consequences which it may have on the persons affected by it...The investigating body is however the master of its own procedure. It need not hold a hearing. It can do everything in writing. It need not allow lawyers. It need not put every detail of the case against a man. Suffice it if the broad grounds are given. It need not name its informants. It can give the substance only.”

34. Therefore it is clear that not every document must be supplied, but a summary of it may do. That is what happened here where the summary of the document was provided to Ex parte Applicant in the Memorandum of Response and confirmed by the Board. This court finds that there was no miscarriage of justice in this regard to attract the quashing of the Board's orders.

35. For the foregoing reasons the Ex parte Applicant's motion before the court dated 21/4/2020 is dismissed for lack of merit.

36. There shall be no order on costs.

Dated, Signed and Delivered at Mombasa this 21st day of May, 2020.

E. K. OGOLA

JUDGE

Ruling delivered via MS Teams in the presence of:

Mr. Kongere for 1st Interested Party

Mr. Gikandi for Ex parte Applicant

No appearance for Respondent

No appearance for 2nd Interested Party

Mr. Kaunda Court Assistant