



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. 390 OF 2018

IN THE MATTER OF: AN APPLICATION FOR THE ORDER OF CERTIORARI

BETWEEN

REPUBLIC.....APPLICANT

AND

THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD....RESPONDENT

AND

PELICAN INSURANCE BROKERS (K) LIMITED.....INTERESTED PARTY

EX PARTE: KENYA REVENUE AUTHORITY

JUDGMENT

The Application

1. Pursuant to leave granted on 19th September, 2018, the ex-parte applicant filed a Notice of Motion dated 1ST October, 2018 seeking the following orders:

a) An order of Certiorari to remove into the High Court and quash the decision made by the Public Procurement Administrative Review Board (Review Board) on the 6th September, 2018 by which it allowed the interested party's request for review and directed that the tender be awarded to the interested party.

b) A declaration that the subject tender was duly terminated by the Procuring Entity in accordance with the Public Procurement and Asset disposal Act 2015.

c) A declaration that a duly terminated tender cannot be extended by the Review Board.

d) Costs of the Application be awarded to the Applicant.

2. The application is supported by the grounds set out in the Statement dated 19th September, 2018, the accompanying affidavit of Nicholas Njeru sworn on 19th September, 2018.

3. The Ex-parte Applicant alleges that the review board overruled two preliminary objections one by it and the other by Kenya revenue Authority by ostensibly finding that it had jurisdiction to entertain the request for review and thus made a fundamental jurisdictional error.

4. The Ex-parte Applicant claims that the review board ignored pertinent facts and materials placed before it in finding that the professional opinion recommending the termination of the subject tender was not done in accordance with the Act (Public Procurement and Asset Disposal Act, 2015).

5. The Ex-parte Applicant alleges that the review board erred in finding that the decision of the Applicant to revise member's benefits is not a governance issue for the purposes of the termination of the procurement process under the provisions of Section 63(1) (e) of the Act.

6. According to the Ex-parte Applicant, the review board arrived at an irrational and unreasonable finding that the Applicant letter dated 17th August, 2018 to the Public Procurement Regulatory Authority contravened Section 168 of the Act.

7. The Ex-parte Applicant further alleged that the review board arrived at an irrational and unreasonable decision in holding and finding that it did not notify the bidders of the termination of the tender as per Section 63 of the Act while the time had not yet lapsed to do so.

8. The Ex-parte Applicant alleged that the Review Board in its decision found that it had breached section 87(1) and (3) of the Act, which states that:

87. (1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted...

(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.

It is the Ex-parte Applicant's submission that the said finding was irrational and unreasonable since the Ex-parte Applicant notified all the 13 bidders of the termination of the tender on the 16th August 2018 during the tender period validity and a full month before the tender expired.

THE RESPONSE

9. The Respondent through its Board Secretary Mr. **Henock Kirungu**, responded to the application by way of a Replying Affidavit sworn on 18th October, 2018.

10. The Respondent avers that the review board's decision was arrived at after considering evidence placed before it by the parties and its decision was valid, rational, reasonable, logical, lawful, impartial and in accordance to section 173 of the public procurement and disposal Act, 2015.

11. The Respondent further averred that the ex-parte Applicant's motion is essentially a review of the merits of its decision for all intents and purposes, although it is framed as a judicial review application seeking to improperly invoke an appellate Jurisdiction of the High Court.

12. The Respondent avers that the ex-parte Applicant has not demonstrated that it was guilty of unreasonable exercise of power or guilty of an illegality or impropriety of procedure or irrational in arriving at its decision in order to warrant the variance of the orders of the Review Board, hence, the ex-parte applicant's Application lacks merit and should be dismissed with costs.

Interested Party

13. The Interested Party through its Managing Director Mr. **Robert Kagwe Githui**, responded to the Ex-parte Applicant's application by way of a Replying Affidavit sworn on 18th October, 2018. The Interested Party contends that it filed the request for review of the subject matter of this Application on the 16th August 2018 and in response the Ex-parte Applicant filed a Preliminary Objection and a memorandum of response on the 24th August 2018. The Respondent heard the request for review on the 4th September 2018 and rendered its decision for 6th September 2018 allowing the same.

14. The Interested Party also contends that the Respondent in making the decision dated 6th September 2018 was within its mandate as donated under Section 173 of the Act and there is no basis for interference with the Respondent's decision. Accordingly, therefore the tender was awarded in accordance to the recommendation of its tender evaluation committee and the Applicant has not demonstrated that the Respondent acted in excess of its jurisdiction to warrant this court interfere with the award dated 6th September 2018. The Interested Party contends that the ex-parte Applicant's Application is in the nature of an Appeal against the wisdom of the board's decision and therefore outside the jurisdiction of this Court.

Submissions

15. Parties filed submissions which I have considered. **M/S Mburugu**, Counsel for the Ex-parte Applicant submitted that the jurisdiction of the board is limited to adjudicating on matters where public bodies are undertaking procurement and Section 167(4) of the Act prohibits the Review Board from adjudicating on a termination of a tender under section 63 of the Act.

16. Counsel argued that once the Respondent discovered that the tender was terminated, then it should have immediately downed its tools. Instead, the Review Board acted without jurisdiction, outside the strict and express confines of section 167(4) b of the Act. She relied on the decisions in **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others Supreme Court Civil Application No. 2 of 2011 (UR)** and **The Owners Of The Motor Vessel 'Lillian s' vs. Caltex Oil (K) LTD[1989] KLR 1**.

17. M/s. Mburugu submitted that the Review Board misconstrued the decision of the High Court in **R v The Public Procurement Administrative Review Board, The Kenya Civil Aviation Authority and Thales Air system ex-parte Selex Sistemi Intergraded Nai High Court Misc. APP no. 1260 of 2007**, since in the said case termination of the tender was after the award of the tender but in this instant case the tender was terminated before the award of the tender and this fact is not disputed.

18. M/s. Mburugu further submitted that the decision of the Review Board was irrational, illogical, unreasonable and against the rules of

natural justice as demonstrated under section 63(2) and (3) of the Act and no reasonable and objective person seized with the facts as presented before the Review Board would arrive at the same decision.

19. Counsel submitted that the *ex-parte* Applicant notified all the 13 bidders of the termination of the tender on the 16th August 2018, which was during the validity period of the tender and it was erroneous for the Review Board to hold that the communication to the bidders was outside the tender validity period.

20. Counsel further argued that the *ex-parte* Applicant conducted itself in accordance with the procedure laid down in the Act and in the tender document. Therefore, the *Ex-parte* Applicant had a legitimate expectation that termination of a tender under section 63 of the Act could not be revived and consequently it cannot be forced to enter into a contract it has validly terminated.

THE RESPONDENT'S SUBMISSIONS

21. The Respondent filed its submissions on 22nd November, 2018. **Mr. Munene** learned Counsel for the Respondent submitted that the Review Board's decision was arrived at after considering the submissions and evidence of all the parties in the review proceedings. Counsel submitted that the *Ex-parte* Applicant's Application is essentially a review of the merits of the decision of the Respondent, framed as a judicial review Application seeking to improperly invoke the appellate jurisdiction of the High Court. Counsel further submitted that the *Ex-parte* Applicant has not demonstrated any illegality, unreasonableness and failure to act in good faith as to warrant an order of certiorari. It is incumbent upon a party in a judicial review Application to prove the grounds it relies on.

22. Mr. Munene also argued that the Review Board in granting its orders remained faithful to its mandate and did not divert from the same contrary to the Act. Indeed, the Review Board acted within Section 173 of the Act and it had the power and jurisdiction to hear and determine the request for review and reiterates its findings.

Interested Party's Submission

23. The Interested Party filed its submissions on **21st November, 2018**. **Mr. Kiprono** learned Counsel for the Interested Party submitted that judicial review is concerned with the decision making process as opposed to the merits of the impugned decision as was held in **R v Disciplinary Committee & Another Ex-Parte Daniel Kamunda Njue [2016] eKLR**. Therefore, the Applicant has not met the threshold for grant of the orders sought. Counsel submitted that the Respondent considered two preliminary objections from the *ex-parte* Applicant and found that there was no valid termination of the tender as envisioned under Section 63 of the Act and hence the provisions of section 167(4) (b) of the Act had not crystalized to oust its jurisdiction. Counsel further submitted that the Respondent acted within its powers in reviewing the *Ex-parte* Applicant's purported termination of the tender. It is provided under Section 173 of the Act that the Respondent has the discretion to substitute its decision for that of the procuring entity. He relied in the finding of the Court of Appeal in **Kenya Pipeline Company Ltd v Hyosung Ebara Company limited & 2 others [2012] eKLR**.

24. Mr. Kiprono also argued that the grounds **c, d, e, f, g, h** and **I** of the Application are an invitation for this court to examine the merit of the Respondents decision rather than questioning the legality, rationality and procedural propriety or otherwise of the decision, which is the realm of judicial review.

Determination.

25. The Application was canvassed by way of written submissions which the parties relied upon for determination. In considering the *ex-parte* Applicant's Application, this court has read through the pleadings, submissions, cited authorities and the law. The following issues arise for determination.

a. Whether the Review Board had jurisdiction to consider the request for review on account of the subject tender

b. Whether the Review Board's decision was irrational and unreasonable.

c. Whether this court sitting as a judicial review court has the mandate to review the review board's decision and grant the order sought by the Ex-parte Applicant;

A. Whether the Review Board had jurisdiction to consider the request for review on account of the subject tender

26. It was the *Ex-parte* Applicant's submission that the Respondent herein acted in excess of its jurisdiction and powers in entertaining the Interested Party's request for review, instead of downing its tools when it realized that the tender had been terminated under section 63 of the Act. Also, that the Respondent contravened Section 167 (4) (b) of the Act which excludes the termination of a procurement or asset disposal proceedings under section 63 of the Act from review.

27. The Respondent on its part submitted that mere allegation without proof is not sufficient, and that the Review Board in granting the orders sought remained faithful to its powers and mandate provided under section 173 of the Act.

28. The Interested Party on its part submitted that the Respondent acted within its powers in reviewing the *ex-parte* Applicant's decision and referred to Sections 28(1) and 173 of the Act which prescribes the scope of the functions and powers of the Respondent respectively. The Interested Party relied on the Court of Appeal decision in **Kenya Pipeline Company Ltd vs. Hyosung Ebara Company Limited & 2 others [2012]eKLR**, in which it was stated that the Review Board is better equipped to handle disputes relating to breach of duty of the procuring entity, hence its decisions in matters within its jurisdiction should not lightly be interfered with.

29. The primary issue this court ought to consider is whether the Respondent erred in finding it had jurisdiction to entertain the Interested Party's Request for Review of the ex-parte Applicant's decision to terminate the tender. This issue calls for an interrogation of the role and powers of the Review Board when determining a request for review. The powers of the Board when exercising its jurisdiction are prescribed in section 173 of the Act as hereunder:

173 . 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.**

30. Section 167 of the Act in this regard provides as follows on the jurisdiction and powers of the Respondent in a request for review:

(2) A request for review shall be accompanied by such refundable deposit as may be prescribed in the regulations, and such deposit shall not be less than ten per cent of the cost of the contract.

(3) A request for review shall be heard and determined in an open forum unless the matter at hand is likely to compromise national security or the review procedure.

(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.”**

31. Termination of procurement proceedings is provided for in section 63 of the Act as follows:

“(1) An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies—

- (a) the subject procurement have been overtaken by—**
 - (i) operation of law; or**
 - (ii) substantial technological change;**
- (b) inadequate budgetary provision;**
- (c) no tender was received;**
- (d) there is evidence that prices of the bids are above market prices;**
- (e) material governance issues have been detected;**
- (f) all evaluated tenders are non-responsive;**
- (g) force majeure;**
- (h) civil commotion, hostilities or an act of war; or**
- (i) upon receiving subsequent evidence of engagement in fraudulent or corrupt practices by the tenderer.**

(2) An accounting officer who terminates procurement or asset disposal proceedings shall give the Authority a written report on the termination within fourteen days.

(3) A report under subsection (2) shall include the reasons for the termination.

(4) An accounting officer shall notify all persons who submitted tenders of the termination within fourteen days of termination and such notice shall contain the reason for termination.”

32. The Ex-parte Applicant at the hearing of the request for review raised preliminary objections that:

a. That the request for review no.103 of 16th August 2018 is improperly before the public procurement Administrative Review Board by reason of having been terminated in accordance with section 63 of the Public procurement and Asset Disposal Act 2015.

b. That the request for review no.103 of 16th August 2018 is fatally defective as the same is filed contrary to section 167 (4) b of the Public Procurement and Asset Disposal Act 2015.

33. A plain reading of Section 167(4) (b) of the Act is to the effect that a termination that is in accordance with section 63 of the Act is not subject to review. Therefore, there is a statutory pre-condition that first needs to be satisfied in the said sub-section namely that the termination proceedings are conducted in accordance with the provisions of section 63 of the Act, and that the circumstances set out in section 63 were satisfied, before the jurisdiction of the Respondent can be ousted.

Did the ex-parte Applicant comply with Section 63 of the Act while terminating the tender?

34. In holding that it had jurisdiction, the Respondent argued that it was not in dispute that the Ex-parte Applicant's Accounting Officer was entitled to terminate the tender as long as he had complied with the provisions of Section 63(1) of the Act.

35. Since the gravamen of the Ex-parte Applicant's case is on jurisdiction of the Respondent, this Court will give priority to the issue of jurisdiction since the same is capable of dispensing with this instant Application.

36. The person mandated to terminate the procurement proceedings (the tender) is the Accounting Officer. The same is provided under section 63(1) of the Act.

37. The letter dated 16th August, 2018 notifying all the 13 bidders that the tender had been terminated was signed by one Nicholas Njeru who was the Head of Procurement to the Ex-parte Applicant. The Ex-parte Applicant failed to demonstrate to the Review Board that Mr. Nicholas Njeru was indeed the Accounting officer referred under section 63(1) of the Act or that he had acted with express authority of the Accounting officer in terminating the subject tender.

38. The definition of an accounting officer is provided for under the **Section 67 of the Public Finance and management Act,2012 which provides as follows:**

67(1)The Cabinet Secretary, except as otherwise provided by law, shall in writing designate accounting officers to be responsible for the proper management of the finances of the different national government entities as may be specified in the different designations.

(2) Except as otherwise stated in other legislation, the person responsible for the administration of a Constitutional Commission or institution or Independent Office shall be the accounting officer responsible for managing the finances of that Commission, institution or Independent Office.

(3) The Cabinet Secretary shall ensure that at any time there is an accounting officer in each national government entity.

39. Also, it is evident that Mr. Nicholas Njeru prepared the professional opinion dated 21st May 2018 on the tender evaluation report pursuant to the provisions of Section 84 of the Act and he was also responsible for the second opinion dated 7th August 2018 that recommended the termination of the subject tender.

40. The role of the Head of procurement is provided under section 84 of the Act, as follows:

84. (1) The head of procurement function of a procuring entity shall, alongside the report to the evaluation committee as secretariat comments, review the tender evaluation report and provide a signed professional opinion to the accounting officer on the procurement or asset disposal proceedings.

(2) The professional opinion under sub-section (1) may provide guidance on the procurement proceeding in the event of dissenting opinions between tender evaluation and award recommendations.

(3) In making a decision to award a tender, the accounting officer shall take into account the views of the head of procurement in the signed professional opinion referred to in subsection (1).

41. It was the finding of the Respondent which this Court agrees with, that Section 84(3) of the Act did not envisage a situation where the Head of Procurement after making his Professional Opinion in accordance with Section 84(1) of the Act, would later on be the one to consider his own views and recommendation in the professional opinion prepared by him, then finally in accordance with Section 84(3),

make a decision of whether to terminate or award the tender.

42. It is therefore the finding of this Court that the letter dated 16th August 2018 terminating the tender, ought to have originated from the Accounting Officer who is mandated under section 63(1) of the Act to terminate any procurement process as per the said section of the Act. The fact that the letter dated **16th August 2018** terminating the subject tender emanated from the Head of Procurement means that the Applicant had engaged in a process that was *ultra vires* and void *ab initio* as the termination failed to comply with the mandatory provisions of section 63(1) and 84 (3) of the Act and was illegal.

43. Consequently, the Respondent was justified in holding that there was no valid termination of the suit tender to begin with, and the purported termination as conveyed in the letter dated 16th August 2018 was a nullity, hence the tender was still alive. As a result, the provisions of section 167(4) (b) had not crystalized to oust the jurisdiction of the Respondent, hence the Respondent was within its jurisdiction as provided under Section 173 of the Act when it entertained the request for review.

B. Whether the Review Board's decision was irrational and unreasonable.

44. The ex-parte Applicant also submitted that the Respondent's decision was irrational and unreasonable as filing of a request for stay cannot stay the provisions of the Act, and that the provisions of Section 63 of the Act could not be ousted by a filing a review and that informing the Respondent that the tender had been terminated is not part of the procurement proceedings.

45. It is the finding of this court that since it is in agreement with the Review Board's finding which held that there was no valid termination of the tender and the purported letter dated 16th August 2018 is a nullity, then determining the issues of request for stay by the Interested Party and the what process was to be adhered to after termination of the tender would amount to an academic exercise.

46. Additionally, this Court could only hold that the Respondent's decision was irrational and unreasonable if at all the *ex-parte* Applicant endeavored to tender evidence to demonstrate that the said decision was tainted with irrationality and unreasonableness in its pleadings. This was not the case herein.

47. In a nutshell, the *ex-parte* Applicant did not tender any proof that the termination letters dated 16th August 2018 were served upon all the 13 bidders, neither did it prove that the Head of Procurement was authorized to terminate the said tenders vide the letter dated 16th August 2018 on behalf of the Accounting Officer.

48. In **Republic v Public Procurement Administrative Review Board; Leeds Equipments & Systems Limited (interested Party); Ex parte Kenya Veterinary Vaccines Production Institute [2018] eKLR**, Pauline Nyamweya J held as follows...

"It is now an established principle of law that the decision of a public body will be unlawful if it is irrational or unreasonable, in the sense of being a decision which no public body acting reasonably would have reached. This was principle was settled by the decisions in Associated Provincial Picture Houses vs Wednesbury Corporation(1948)1KB 223 and Council of Civil Service Unions vs The Minister for the Civil Service (1985) 1 AC 374. This ground was also explained in Pastoli vs Kabale District Local Government Council & Others, (supra) as follows:

"...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards..."

49. In **Republic v Public Procurement Administrative Review Board & 2 others [2019] eKLR Mativo J** held as follows...

"The power of the court to Review an administrative action is extraordinary. It is exercised sparingly, in exceptional circumstances where illegality, irrationality or procedural impropriety has been proved..."

50. This Court has established that the Respondent took into account the provisions of Section 63 (1) of the Act and relevant factors when it made the impugned decision. The *ex-parte* Applicant has failed to satisfy this Court that the said decision was illegal, irrational or was tainted with procedural impropriety.

Whether this court sitting as a judicial review court has the mandate to review the decision and grant the order sought by the Ex-parte Applicant;

51. An order of certiorari is issued where a public authority has acted without or in excess of its jurisdiction; where the decision is based on some illegality or where the authority relied on irrelevant matters in reaching the decision.

52. In **Republic v Public Procurement Administrative Review Board; Shenzhen Instrument Co. Limited & another (Interested Party) Ex parte Kenya Power and Lighting Company Limited [2019] eKLR Mativo J** while relying in the decision in **Paul Kiplagat Birgen & 25 Others v Interim Independent Electoral Commission & 2 Others {2011} eKLR** held as follows...

"A Judicial Review court ought to be slow to substitute its own decision solely because it does not agree with the permissible option chosen by the body. Where a body is granted wide decision-making powers with a number of options or variables, a judicial review court may not interfere unless it is clear that the choice preferred is at odds with the law. If the impugned decision lies within a range of permissible decisions, a Judicial Review court may not interfere only because it favours a different option within the

range”...

53. In **Municipal Council of Mombasa vs. Republic & Another [2002] eKLR** the Court of Appeal expressed itself as follows:

“The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was sufficient evidence to support the decision –and that, as we have, is not the province of judicial review”.

54. However, this Court notes that the scope of Judicial Review proceedings has since expanded under the new constitutional order, and in appropriate cases the court will enter into the merits of a decision made by an inferior body. The Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others [2016] KLR** held as follows ...

“that while Article 47 of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act reveals an implicit shift of judicial review to include aspects of merit review of administrative action, reviewing court has no mandate to substitute its own decision for that of the administrator.”

55. From the foregoing, it is the finding of this Court that the Applicant’s Notice of Motion dated 1st October, 2018 is not merited, and it accordingly fails. The same is hereby dismissed. However, parties shall bear own costs of the Application.

56. Orders accordingly.

Dated, Signed and Delivered in Nairobi this 11th day of April 2019.

E.K. OGOLA

JUDGE

In the Presence of:

M/S Opiyo for the Interested Party.

M/S Onyango holding brief for M/S Mburugu for the Applicant.

Mr. Ibrahim Court Assistant