



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**JUDICIAL REVIEW DIVISION**  
**MISC. J. R. APPLICATION NO. 371 OF 2016**

**REPUBLIC.....APPLICANT**

**VERSUS**

**PUBLIC PROCUREMENT ADMINISTRATIVE**

**REVIEW BOARD.....RESPONDENT**

**KENYA MEDICAL SUPPLIES AUTHORITY.....1<sup>ST</sup> INTERESTED PARTY**

**REVITAL HEALTHCARE (EPZ).....2<sup>ND</sup> INTERESTED PARTY**

**ANOCMA ENTERPRISES.....3<sup>RD</sup> INTERESTED PARTY**

***EX PARTE* APPLICANT **SYNER-CHEMIE LIMITED****

**JUDGEMENT**

**Introduction**

1. In these proceedings, the applicant seeks an order of certiorari to remove to this Court for the purposes of being quashed the decision of the Respondent in Request for Review No. 51 of 2016 delivered on 5<sup>th</sup> August, 2016 by which the Respondent struck out the applicant's request for review dated 14<sup>th</sup> July, 2016 in respect of Tender Number KEMSA/OIT5/2015-2017 for the Supply of Pharmaceuticals (Capsules, Dermatological, Disinfectants and Antiseptics) and proceeded to direct that the Procuring Entity was at liberty to proceed with and complete the procurement process for the said items. The ex parte applicant also applied for an order of mandamus directing the Respondent to hear and determine on merit the ex parte applicant's said Request for Review.

**Applicant's Case**

2. According to the ex parte applicant, the cause of action herein arose from the 1<sup>st</sup> interested party's Tender for Supply of Pharmaceuticals (Capsules, Dermatological, Disinfectants and Antiseptics) being Tender Number KEMSA/OIT5/2015-2017 (hereinafter referred to as "the Tender") in respect of which the applicant submitted a tender in respect of the tender notice.

3. According to the ex parte applicant, it received a notice from the 1<sup>st</sup> interested party on 2<sup>nd</sup> July, 2016

notifying it that its tender was unsuccessful. Due, to the time constraints, it was averred that the applicant was unable to file the request for review on 15<sup>th</sup> July, 2016. Similarly, as 16<sup>th</sup> July, 2016, fell on a Saturday he was unable to do so as the Respondent's registry remained closed for business. It therefore filed the said request on 18<sup>th</sup> July, 2016.

4. However, the 1<sup>st</sup> interested party filed a Notice of Preliminary objection contending that the said Request was filed out of time contrary to section 167(1) of the **Public Procurement and Asset Disposal Act, 2015** (hereinafter referred to as "the Act") which was upheld by the Respondent on 5<sup>th</sup> August, 2016 and the Request struck out on the grounds that the Request ought to have been filed by 16<sup>th</sup> July, 2016. It was this decision that provoked these proceedings.

5. It was contended by the ex parte applicant that there was an error apparent on the face of the record as the Award related to Tender Number KEMSA/oit5/2015-2017 for the Supply of Pharmaceuticals (Capsules, Dermatological, Disinfectants and Antiseptics) as opposed to the Tender Number KEMSA/OIT7/2015-2017 for the supply of non-pharmaceutical (Surgical Tubes & Cannulaes).

6. It was the applicant's case that the Respondent considered extraneous matters not before it and failed to determine the dispute before it.

7. It was the ex parte applicant's contention based on its advocate's information that the Award was availed to the said Advocates in the afternoon of 17<sup>th</sup> August, 2016.

8. It was contended by the applicant that the Respondent's decision was tainted with unreasonableness and irrationality by virtue of the information it was seized of. The Respondent, it was contended, knew that the last day for the filing of the Request was Saturday 16<sup>th</sup> July, 2016 which day was not an official working day in that its registry was not open for filing Requests for Review. Accordingly, it was contended that the Respondent ought to have been guided by section 57 of the **Interpretation and General Provisions Act** and allowed the applicant to file the Request on 18<sup>th</sup> July, 2016. It was submitted that Articles 10(2)(a) and 47(1) of the Constitution read with section 4(1) of the **Fair Administrative Action Act** obligated the Respondent to make a decision in accordance with section 31(b) and 57(b) of the **Interpretation and General Provisions Act**.

9. In support of its case the applicant relied on **Duncan Wainaina vs. Samuel Mbugua [2011] KLR, Republic vs. Bernard Kungu Kariuki [2009] eKLR, Nandi Tea Estates Ltd vs. George Ochieng Oduogo [2015] eKLR**, all of which held that under the said section 57, in computation of time, the date of the decision in question is to be excluded as well as the last date if it falls on a public holiday or official non-working days (Saturdays and Sundays).

10. It was the ex parte applicant's case that the Respondent abused its powers by reducing the ex parte applicant's time for filing the request for review from 14 days to 13 days and thereby violated the ex parte applicant's rights to equal protection and benefit of section 31(b) and 57(b) of the **Interpretation and General Provisions Act** as guaranteed by Article 27(1) of the Constitution, the right to fair administrative action under Article 47(1) of the Constitution, the right to access justice under Article 48 and the right to fair hearing under Article 50(1) of the Constitution.

11. Based on **Kenya National Examination Council vs. Republic ex parte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR**, the ex parte applicant urged the Court to allow the application.

## **2<sup>nd</sup> Interested Party's Case**

12. In opposing the application, the 2<sup>nd</sup> interested party herein contended that the Respondent had no jurisdiction to determine the matter filed outside the statutory time limit as provided in law.

13. It was the said interested party's case that section 167(1) is worded in peremptory language and does

not admit of ambiguity or further search for the intention of Parliament and that the failure to file review within 14 days is not a mere irregularity but goes to the root of the matter – jurisdiction.

14. The Court was urged in exercising its discretionary powers to consider the contumelious and indolent conduct of the ex parte applicant including its failure to file the substantive motion pursuant to the leave granted and subsequently seeking of extension of time for doing so. It was however submitted that this Court had no jurisdiction to extent the time for filing these proceedings hence these proceedings are a nullity and an abuse of the process of this Court.

15. As regards the applicability of section 57 of the *Interpretation and General Provisions Act*, it was contended that the same applies only where no contrary intention appears in the legislation under reference. To the 2<sup>nd</sup> interested party, there is clearly a contrary intention manifesting through the fabric of the *Public Procurement and Asset Disposal Act* in so far as the strict timelines and objective of the Act are concerned.

### **Determination**

16. I have considered the issues raised herein. This Court dealt with the issue of the applicability of the provisions of the *Interpretation and General Provisions Act* to the provisions of *Public Procurement and Asset Disposals Act* in Republic vs. Public Procurement & Asset Disposal Administrative Review Board & 4 Others ex parte J. Knieriem BV [2016] KLR as follows:

**“According to the preamble to the *Interpretation and General Provisions Act*, it is:**

***An Act of Parliament to make provision in regard to the construction, application and interpretation of written law, to make certain general provisions with regard to such law and for other like purposes.***

**It is therefore clear that in the interpretation of any written law, the applicable statute for the purposes of such interpretation is the *Interpretation and General Provisions Act*, Cap 2. This must be so because statutes of general application such as the *Interpretation and General Provisions Act*, Cap 2, apply across board unless excluded. To make this clear, section 2 of the *Interpretation and General Provisions Act*, Cap 2 provides that:**

***This Act shall not apply for the construction or interpretation of the Constitution, which is not a written law for the purposes of this Act.***

**Therefore unless this section is repealed expressly or by legal implication, the only legal instrument to which the *Interpretation and General Provisions Act*, Cap 2 does not apply is the Constitution. The 1<sup>st</sup> interested party has not cited to me any express provision of the law that excludes the application of the *Interpretation and General Provisions Act*, Cap 2 to the *Public Procurement and Asset Disposal Act*. With respect to implied repeal, it only applies where there is an inconsistent provision in a latter Act from an earlier one. No such inconsistent provision in the *Public Procurement and Asset Disposal Act* has been cited to me. It is therefore my view and I so find that section 57 of the *Interpretation and General Provisions Act*, applies to the timelines under *Public Procurement and Asset Disposal Act* and in particular section 175(1) thereof and hence the date of the decision is excluded from the reckoning of time.”**

17. It follows that the provisions of the *Interpretation and General Provisions Act* as relate to time apply with equal force to the provisions of the *Public Procurement and Asset Disposals Act, 2015*. Section 57 of the *Interpretation and General Provisions Act*, Cap 2 Laws of Kenya provides as hereunder:

***In computing time for the purposes of a written law, unless the contrary intention appears -***

***(a) a period of days from the happening of an event or the doing of an act or thing shall be***

*deemed to be exclusive of the day on which the event happens or the act or thing is done.*

*(b) If the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;*

*(c) Where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;*

*(d) Where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.*

18. The Court of Appeal in dealing with computation of time expressed itself in State of Israel vs. Michael Lewis Somen Civil Appeal (Application) No. 148 of 2005 as hereunder:

**“Whereas Rule 3(b) of the Court of Appeal Rules does not specifically exclude a Saturday in reckoning time, it is noteworthy, however, that the said rule was identical to section 57(b) of the Interpretation and General Provisions Act before the words “or all official non-working days” were inserted by Act No. 11 of 1993... Rule 3(b) being a subsidiary legislation is subordinate to section 57(b) of the Act, and since the rule is inconsistent with the Act, the Act prevails and it follows that Saturday being an official non-working day is an excluded day in computation of time and since the following day was a Sunday, also an excluded day, the appeal was filed on the following day, within the permitted time.”**

19. In Simon Towett Maritim vs. Jotham Muiruri Kibaru Nakuru HCCC No. 188 of 2007, Ouko, J (as he then was) expressed himself as follows:

**“It is common ground that the cause of action arose on 27<sup>th</sup> July, 2004. The applicant’s claim being for damages for conversion, he was required to file the suit, in terms of Section 4(2) of the Limitation of Actions Act, within three years from 27<sup>th</sup> July, 2004. The plaint herein was filed on 20<sup>th</sup> August 2007. In computing time for the purposes of a written law, unless the contrary intention appears, regard must be had to section 57 of the Interpretation and General Provisions Act, Cap 2. Between 27<sup>th</sup> July, 2004 (excluding 27<sup>th</sup> July 2004) and 20<sup>th</sup> August, 2007, there are eleven months which constitute what are referred to as excluded days in the Interpretation and General Provisions Act (Saturday, Sunday and public holidays). Eleven months out of the period in question would bring the suit well within the prescribed period.”**

20. This was the position adopted in Duncan Wainaina vs. Samuel Mbugua [2011] KLR, Republic vs. Bernard Kungu Kariuki [2009] eKLR, Nandi Tea Estates Ltd vs. George Ochieng Oduogo [2015] eKLR.

21. It is not in contested that 16<sup>th</sup> July, 2016 which was clearly the last day fell on a Saturday and was therefore an excluded day. As 17<sup>th</sup> July, 2016 was a Sunday it was similarly excluded so that in effect the last day was 18<sup>th</sup> July, 2016 when the Request was filed. Even if the ex parte applicant had the proceedings he was not disentitled from filing his request on the last day. This was the position of the Court of Appeal in Jackson Mutuku Ndeti vs. A. O. Bayusuf & Sons Ltd. Civil Application No. Nai. 231 of 2002, where it was held that:

**“Although it is true that a party who decides to wait until the very last day or a few days before presenting a record of appeal runs the risk that time may expire for him before complying with the directions of a registrar, an intending Appellant is given sixty days within which to lodge a record of appeal and the only day that is to be explained is the delay falling outside the sixty days and it does not matter that an appeal is lodged on the very last day**

**because the law allows sixty days and there must have been a valid reason for giving that period of time.”**

22. The Respondent has once again raised the issue of jurisdiction of the Court to extend the time for filing of the substantive Motion. That issue has already been dealt with and unless and until set aside on appeal or review, cannot be revisited in this judgement.

23. As was held by **Warsame, J** (as he then was) in **Re: Kisumu Muslim Association Kisumu HCMISC. Application No. 280 of 2003**, where an officer is exercising statutory power he must direct himself properly in law and procedure and must consider all matters which are relevant and avoid extraneous matters. The learned Judge further held that the High Court has powers to keep the administrative excess on check and supervise public bodies through the control and restrain abuse of powers. Concerning irrelevant considerations, where a body takes account of irrelevant considerations, any decision arrived at becomes unlawful. Unlawful behaviour might be constituted by (i) an outright refusal to consider the relevant matter; (ii) a misdirection on a point of law; (iii) taking into account some wholly irrelevant or extraneous consideration; and (iv) wholly omitting to take into account a relevant consideration. See **Padfield vs. Minister of Agriculture and Fisheries [1968] HL.**

24. In this case it is clear that the Respondent misdirected itself in law and in particular section 57 of the ***Interpretation and General Provisions Act***. It is now clear that judicial review remedies can be granted on grounds of *ultra vires*, jurisdictional error, misdirection in law, errors of precedent fact such as fundamental factual errors or findings devoid of evidence, abdication of or fettering discretion, insufficient inquiry or failure to consider material or relevant facts, considering irrelevant facts, bad faith or improper motive, frustration of the legislative purpose, substantive or procedural fairness, inconsistency in decision making, unreasonableness, lack of proportionality, bias and failure to give reasons for the decision. See ***Judicial Review Handbook*** 6<sup>th</sup> Edition by **Michael Fordham**.

25. In this case, it is my view and I hold that the Respondent’s decision cannot be allowed to stand. Consequently I find merit in this application.

### **Order**

26. In the result I hereby issue an order of certiorari removing into this Court, for the purposes of being quashed, the decision of the Respondent in Request for Review No. 51 of 2016 delivered on 5<sup>th</sup> August, 2016 by which the Respondent struck out the applicant’s request for review dated 14<sup>th</sup> July, 2016 in respect of Tender Number KEMSA/OIT5/2015-2017 for the Supply of Pharmaceuticals (Capsules, Dermatological, Disinfectants and Antiseptics) and proceeded to direct that the Procuring Entity was at liberty to proceed with and complete the procurement process for the said items, which decision is hereby quashed.

27. I further issue an order of *mandamus* directed to the Respondent compelling it to hear and determine on merit the ex parte applicant’s said Request for Review.

28. Each party will bear the costs of these proceedings since the merits of the dispute remains undetermined.

29. It is so ordered.

**Dated at Nairobi this 25<sup>th</sup> day of January, 2018**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

*Miss Chichi for Mr Gachuba for the ex parte applicant*

*Mr Onganda, Jnr for the interested party*

*CA Ooko*