



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 540 OF 2017

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

PUBLIC PROCUREMENT ADMINISTRATIVE

REVIEW BOARD.....RESPONDENT

KENYA POWER & LIGHTING COMPANY LIMITED....INTERESTED PARTY

EX PARTE:

TRANSCEND MEDIA GROUP LIMITED

RULING

The Application

1. This ruling is on an application by way of a Notice of Motion dated 5th February 2018 filed by the Ex Parte Applicant, Transcend Media Group (hereinafter “the Applicant”). The outstanding prayers sought by the Applicant in the said application are as follows:

a) The procurement proceedings under the tenders under Prequalification of Suppliers for Provision of Advertising & Media Services (Tender No KP1/9A.2/OT/50/CS/17-18) be stayed pending hearing and determination of the substantive notice of motion

b) Prayer 2 of the substantive Notice of Motion be reinstated and tender number KP1/9AA-2/OT/03/CS/17-18, KP1/9AA-2/OT/04 /CS /17-18 and KP1/9AA-2/ OT /05/CS /17-18 be substituted with tender number KP1/9A.2/OT/50/CS/17-18 and be heard in the merits.

c) Costs of this application be provided for.

2. The Applicant’s grounds are in the application and supporting affidavit and further affidavit sworn by Lai Muthoka, its director, on 5th February 2018 and 5th March 2018. The main grounds are that the Applicant had initially sought an order of prohibition in its substantive Notice of Motion, to prohibit the Interested Party from evaluating, awarding or implementing tender numbers KP1/9AA-2/OT/03/CS/17-18, KP1/ (9AA-2/OT/04/CS/17-18 and KP1/9AA-2/OT/05/CS/17-18. However, that in the course of the hearing of the substantive Notice of Motion, the Interested Party informed the Court that it had cancelled the said tenders, and the said prayer for prohibition which was prayer 2 of the substantive Notice of Motion was consequently marked as spent and parties did not submit thereon.

3. The Applicant contended that subsequently, on 30th January 2018, the Interested Party advertised a tender for the Prequalification of Suppliers for Provision of Advertising and Media Services (Tender No KP1/9A. 2/OT/50/Cs/17-18). Further, that by so doing the Interested Party was in contempt of court for misleading the court that it had cancelled the tenders; and for implementing the 2nd Respondent’s decision while stay order was in force. Therefore, that unless the tender proceedings advertised are stayed and the substantive prayer 2 of prohibition reinstated, the Applicant will be prejudiced as the judicial review proceedings will be overtaken by events and rendered nugatory. The Applicant annexed a copy of the Tender No KP1/9A. 2/OT/50/Cs/17-18.

4. The Public Procurement Administrative Review Board which is the Respondent herein, did not respond to the Applicant’s application.

5. Kenya Power and Lighting Company, the Interested Party, filed a Notice of Preliminary Objection dated 25th February 2018 on the grounds that the Court lacked jurisdiction pursuant to section 167(1) as read together with section 175(1) of the Public Procurement and Disposal of Assets Act of 2015 (hereinafter referred to as “the Act”). The Interested Party further opposed the application in a replying affidavit sworn on 23rd February 2018 by its Manager for Legal Services, Owiti Awuor. The deponent gave a background on the proceedings relating to the four tenders which are the subject of the substantive Notice of Motion, namely :

- a) Tender For Provision Of Advertising And Media Services (Tender No. KPI/9AA-2/OT/46/CS/15-16, (hereinafter “the First Tender”)
- b) Tender for the Provision of Creative, Production and Media-Buying Services (Tender No KPI/9AA-2/OT /04/CS/17-18, (hereinafter “the Second Tender”)
- c) Tender for Provision of Public Relations and Event Management Services (Tender No.KPI/(9AA-2/OT/04/CS/17-18, (hereinafter “the Third Tender”) and
- d)

said tender. Section 167 of the Act provides 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.

(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.”

16. The issue of whether or not the said section ousts 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. With respect to the matters raised in these proceedings, it is clear that the applicant could not move the Review Board for determination. 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.

174. This does not however mean that a person aggrieved by the action of the Procuring Entity, in such circumstances is left without a remedy. In my view, the remedy in such circumstances is to be found in section 174 of the *Public Procurement and Asset Disposal Act* which provides as follows:

The right to request a review under this Part is in addition to any other legal remedy a person may have.

175. In my view a person who would otherwise be locked out from invoking the provisions of the *Public Procurement and Asset Disposal Act* is not barred from seeking alternative remedy under other provisions of the law. This was the position adopted by this Court in **Elias Mwangi Mugwe vs. Public Procurement Administrative Review Board & 5 Others [2016] eKLR where the Court expressed itself as hereunder:**

“...any person who has no automatic right to participate in the review proceedings may properly resort to other available modes of ventilating his rights.”

176. It is not in doubt that one of the available remedies for challenging a decisions made by the IEBC is to apply for judicial review which is what the ex parte applicant sought in these proceedings.”

17. On appeal, the Court of Appeal (Musinga JA and Murgor JA, with Gatembu JA dissenting) upheld the learned Judges decision on the issue of the High Court’s jurisdiction in **Al Ghurair Printing and Publishing LLC v Coalition for Reforms and Democracy & 2 Others, [2017] eKLR**, and in addition noted that the Supreme Court of Kenya in **Communications Commission of Kenya vs Royal Media Services Ltd [2014] eKLR** held that the Constitution of Kenya, 2010 has elevated the process of Judicial Review to a pedestal that transcends the technicalities of common law, and as a result all power of judicial review in Kenya is founded upon the Constitution.

18. In the present application, the Applicant’s case is that the Fifth Tender is related to the First, Second, Third and Fourth Tenders, which are already the subject of the substantive Notice of Motion that is pending before this Court. As this Court is the one currently seized of proceedings relating to the said Tenders and not the Respondent, then this Court is the appropriate forum to give a decisive determination if indeed such a relationship exists or not, and to provide the appropriate orders as the case may be. In any event, the Applicant is also entitled to independently seek such relief under section 174 of the Act.

19. On the second issue as to whether the Court can amend the Notice of Motion on the terms sought by the Applicant, in the case of **Republic vs Permanent Secretary Ministry of Planning and National Development Ex-Parte Mwangi S Kimenyi [2006] eKLR**, Nyamu J. (as he then was) observed that this Court has inherent powers to amend a Notice of Motion in judicial review proceedings thus:

“It is also significant to note that the wording of O. 53 Rule 4(2) clearly stipulates that an amendment to the statement may be sought on the hearing of the motion. The above takes care of the principal objection as raised above. As regards the amendment of the Notice of Motion I hold that the court has inherent powers to allow it so that the purpose of the proposed amendment in the statement is not defeated.”

20. Order 53 Rule 4(2) Civil Procedure Rules, 2010 provides as follows:

“4. (2) The High Court may on the hearing of the motion allow the said statement to be amended, and may allow further affidavits to be used if they deal with new matter arising out of the affidavits of any other party to the application, and where the applicant intends to ask to be allowed to amend his statement or use further affidavits, he shall give notice of his intention and of any proposed amendment of his statement, and shall supply on demand copies of any such further affidavits.”

21. Likewise, in **Republic v Commissioner of Lands & another Interested Party Masai Villas Limited Ex-Parte Jimmy Mutinda, [2013] eKLR**, Korir J. held that while a plain reading of the section indicates that only a statement may be amended, if a relief sought in the statutory statement is amended, then the substantive notice of motion should be amended to take care of the amended relief in the statement.

22. It is thus my finding that this Court therefore has power and discretion to allow an amendment of a substantive Notice of Motion in judicial review proceedings in light of the foregoing judicial decisions and provisions of the law. On whether the amendment can be allowed as sought by the Applicant, this Court has already noted that the Applicant alleges that the Fifth Tender that is sought to be substituted in the substantive Notice of Motion is related to and is for the same services that are the subject of the substantive Notice of Motion. It is thus my view that the Applicant will be unduly prejudiced if not given the opportunity to canvass its position if indeed this turns out to be the case. The Applicant is thus an aggrieved person and has an arguable case with respect to the Fifth Tender.

23. I accordingly order as follows:

- a) The procurement proceedings under the Tenders for Prequalification of Suppliers for Provision of Advertising & Media Services (Tender No KP1/9A.2/OT/50/CS/17-18) be stayed pending hearing and determination of the substantive Notice of Motion
- b) Prayer 2 of the substantive Notice of Motion be and is hereby reinstated and tender number KP1/9AA-2/OT/03/CS/17-18, KP1/9AA-2/OT/04 /CS /17-18 and KP1/9AA-2/ OT /05/CS /17-18 shall be substituted with tender number KP1/9A.2/OT/50/CS/17-18 and be heard in the merits.
- c) The Applicant is granted leave to file and serve the amended substantive Notice of Motion an amended statement, a further affidavit of need be, and further submissions upon the Respondent and Interested Party within fourteen days from the date of this ruling.
- d) The Respondent and Interested Party are granted corresponding leave to file and serve further affidavits in response and further submissions within 14 days from the date of service by the Applicant.
- e) The costs of the Notice of Motion dated 5th February 2018 will be in the cause.

DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF MAY 2018

P. NYAMWEYA

JUDGE

DELIVERED AT NAIROBI THIS THIS 30TH DAY OF MAY 2018

J. MATIVO

JUDGE