

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. 679 OF 2017

In the matter of an application by Express DBB Kenya Limited for Orders of Certiorari,

Prohibition and Mandamus pursuant to order 53 of the Civil Procedure Rules, 2010

and Sections 8 and 9 of the Law Reform Act, Cap 26, Laws of Kenya.

and

In the matter of the Decision of the Public Procurement Administrative

Review Board Made on 23 November 2017 in Review No. 95 of 2017.

BETWEEN

Republic.....Applicant

and

Public Procurement Administrative Review Board.....1st Respondent

Kenya Airports Authority.....2nd Respondent

Ex-Parte.....Express DDB Kenya Limited

JUDGMENT

The ex parte applicant's case

1. By an application dated 11th December 2017, pursuant to the leave of this court granted on 7th December 2017, the ex parte applicant seeks the following orders:-

a. An order of Certiorari to remove into this Honorable court and quash the decision of the first Respondent dated 23rd November 2017 in Review Case No. 95 of 2017; Express DDB Kenya Limited vs Kenya Airports Authority.

b. An order of Mandamus to compel the second Respondent to proceed with and complete the Tender Process in Tender No. KAA/HQ/MBD/1158 provision of Branding/Advertising Agency Services for Kenya Airports- Lot 1 & 2 and accordingly in conformity with the recommendation of its evaluation committee recommending the award of the Tender/contract to Express DDB Kenya Limited.

c. An order of prohibition directed to the second Respondent precluding it, its officers, services and or agents from revoking, annulling or otherwise terminating the Tender No. KAA/HQ/MBD/1158 Provision of Branding/Advertising Agency Services for Kenya Airports Authority-Lot 1 & 2.

d. An order of prohibition directed to the second Respondent precluding it, its officers, services and or agents from retendering or awarding Tender No. KAA/HQ/MBD/1158 Provision of Branding/Advertising Agency Services for Kenya Airports Authority-Lot 1 & 2 or any other Tender for Provision of Branding/Advertising Agency Services for Kenya Airports Authority to any person or entity other than the ex parte applicant herein.

e. Such other or further orders, writs or alternative reliefs as it may deem just and expedient by this Honorable.

f. That the costs of this application be provided for.

2. The application is premised on the grounds on the face of the application, the statutory statement and the verifying affidavit of M.S.

Dhariwal filed on 6th December 2017. The grounds can be summarized as follows:-

i. that on 23rd November 2017, the first Respondent allowed the Applicant's Request for Review in Review Case No. 95 of 2017, Express DDB Kenya Limited vs Kenya Airports Authority by annulling the decision of the second Respondent terminating the tender proceedings but "**inadvertently**" directed the second Respondent to proceed and re-tender for Tender No. **CAA/HQ/MBD/1158** provision of Branding/Advertising Agency Services for Kenya Airports Authority-Lot 1 & 2.

ii. that the first Respondent correctly held that the second Respondent's letter dated 23rd October 2017 purported to terminate the Tender No. **CAA/HQ/MBD/115** provision of Branding/Advertising Agency Services for Kenya Airports Authority-Lot 1 & 2 was a nullity but it "**erroneously**" proceeded to make a finding that it could not direct the second Respondent to complete the tender process on allegations that the tender validity period for the subject tender expired during the pendency of the impugned review proceedings.

iii. that the second Respondent had completed the entire tender evaluation process and recommended that the letter of Award be issued to the applicant herein before it unilaterally, unlawfully and arbitrarily terminated the tender process.

iv. that the first Respondent made an error in law in making an irrational and unreasonable findings that it does not have jurisdiction to direct the second Respondent to complete the Tender process, that the decision is vitiated by a fundamental error of law, and "**misapplication**" of Section 173 of the Public Procurement and Asset Disposal Act [1] (herein after referred to as the act).

v. that the decision is unreasonable in that the first Respondent annulled the second Respondent's letter dated 23rd October 2017 but arbitrarily misdirected the second Respondent to re-tender afresh thereby allowing the second Respondent to perpetuate the illegality of wrongfully terminating the tender to the detriment of the ex parte applicant,

vi. that the decision purports to vindicate the illegal and arbitrary acts of the second Respondent and it is tainted with illegality, irrationality, unreasonableness and bias.

Second Respondent's Replying Affidavit.

3. **Katherine Kisila**, the second Respondent's Corporation Secretary swore the Replying Affidavit dated 19th January 2018. She avers that:- **(i)** the second Respondent advertised inviting interested bidders to lodge their bids for tender No. CAA/HQ/MBD/1158-Provision of Branding/Advertising Agency Services for Kenya Airports Authority-Lt 1 & 2; **(ii)** that the interested bidders submitted their bids which were publicly opened on 30th June 2017; **(iii)** the evaluation of the bids was carried out as required; **(v)** before the notification of the award was made, the second Respondent terminated the process after governance issues were detected so as to preserve the integrity of the procurement.

4. She also avers that:- **(i)** at the proceedings before the first Respondent, its position was that it acted within the provisions of Section 63(3) of the Act; **(ii)** that the second Respondent communicated the termination to all bidders and gave the reasons for the termination which reasons were within the purview of section 63 (1) (e) of the Act; **(iii)** it would have been unlawful and unfair to proceed with the procurement process in which integrity issues had been raised, and, **(v)** that the procurement process had not been concluded or awarded.

5. Further, **M/s Kisila** also averred that:- **(i)** procurement proceedings are confidential, [2] hence it was questionable how the applicant knew that he was awarded the tender and possession of the said information goes to the root of the credibility of the process and the spirit of Article 227 of the Constitution and Section 3 of the Act; **(ii)** that the tender validity period lapsed on 27th October 2017; **(iii)** it is in public interest that the second Respondent re-tenders afresh.

Ex parte applicant's further Affidavit.

6. **M. S. Dhariwal**, the ex parte applicant's Chief Executive Officer swore the further Affidavit dated 6th February 2018. He avers that:- **(i)** at no time did the ex parte applicant have knowledge of the tender proceedings; **(ii)** the ex parte applicant was the successful bidder as stated in the tender proceedings; **(iii)** the tender evaluation committee had recommended that the tender be awarded to the ex parte applicant hence the ex parte applicant had a right to legitimate expectation; **(iv)** the tender validity period had not lapsed.

Issues for determination.

7. The core issue for determination is whether or not the ex parte applicant has established grounds to warrant this Court to grant the Judicial Review orders sought.

8. Counsel for the ex parte applicant submitted that the first Respondent purported to terminate the impugned decision after the second Respondent's evaluation Committee and professional opinion had recommended and approved the award of the tender to the ex parte applicant. He submitted that the first Respondent had powers under section 173 (b) of the Act to direct the second Respondent to proceed and complete the tender.

9. He further submitted that the first Respondent failed to give effect to the provisions of the law, but instead considered irrelevant issues, and that the tender was terminated before the expiry of its validity period, and that the decision was unreasonable in that it purported to give the second Respondent whimsical discretion to arbitrarily and unlawfully start, terminate and restart tender proceedings at any stage. [3] He also submitted that where a body takes into account irrelevant considerations, any decision arrived at becomes unlawful [4] and argued that the decision directing the second Respondent to re-tender afresh was unlawful, unconstitutional and contrary to public policy and legitimate

expectation.

10. The second Respondent's counsel submitted that the procurement process had not been completed, hence legitimate expectation could not arise, nor can legitimate expectation be enforced in violation of clear provisions of the law.^[5] He submitted that Section 87(1) of the Act provides that award of tenders should be made before the expiry of the tender validity period. He argued that the Board determined that the tender validity period had expired and therefore the procurement entity could not be compelled to issue the award as it would be null and void. Further, counsel argued that it is untenable that the ex parte applicant insists on legitimate expectation at the expense of the credibility of the process contrary to Article 227 of the Constitution and Section 3 of the Act.

11. He also submitted that an order compelling the first Respondent to complete the procurement process amounts to mandating it to commit an illegality since the validity of the tender in question had lapsed and that the Board does not have jurisdiction to commit an illegality.^[6] Counsel further submitted that the tender lapsed on 27th October 2017. He also argued that the decision requiring the second Respondent to re-tender was in public interest to initiate a process that met the threshold set in Section 3 and Article 227, and that the applicant failed to prove irrationality, unreasonableness, illegality or procedural impropriety.^[7] Counsel also argued that this Judicial Review is an appeal disguised as a Review and does not challenge the decision making process^[8] and that decisions of the Review Board should not be lightly interfered with.^[9]

Determination.

12. Judicial review is about the decision making process, not the decision itself. The role of the court in judicial review is supervisory. It is not an appeal and should not attempt to adopt the 'forbidden appellate approach'. Judicial review is the review by a judge of the High Court of a decision; proposed decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction - reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised.

13. Judicial review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a court will not interfere. As was held in *Republic vs Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji*^[10]:-

“Judicial review applications do not deal with the merits of the case but only with the process. In other words judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant.....”

14. The grant of the orders or certiorari, mandamus and prohibition is discretionary. The court is entitled to take into account the nature of the process against which judicial review is sought and satisfy itself that there is reasonable basis to justify the orders sought.

15. Section 173 of the act provides for the powers of the Review Board. It provides that upon completing a review, the Review Board may do any 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 (d) order termination of the procurement process and commencement of a new procurement process.

16. The above section has been the subject of determination in numerous case in this Country. Discussing a similar provisions in The Public Procurement and Disposal Act,^[11] which was repealed by the current act, the Court of Appeal in *Kenya Pipeline Ltd vs. Hyosung Ebara Company Ltd.*^[12]

“The Review Board is a specialized statutory tribunal established to deal with all complains of breach of duty by the procuring entity. By Reg. 89, it has power to engage an expert to assist in the proceedings in which it feels that it lacks the necessary experience. S. 98 of 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 procurement entity. It follows that its decision in matters within its jurisdiction should not be lightly interfered with.”

17. Lord Reid in *Animistic -vs- Foreign Compensation Commission*^[13] where it was held that:-

“It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word 'jurisdiction' has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in questions. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may

have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly."

18. The ex parte applicants complaint is that the Review Board allowed its request for Review but proceeded to order that pursuant to powers conferred by it by section 173 of the act and being cognizant of the fact that Tender No. KAA/HQ/MBD/1158 Provision of Branding /Advertising Agency Services for Kenya Airports Authority-Lt 1 & 2 tender validity period had lapsed on 27th October 2017, the Board orders and directs the Procuring entity M/S Kenya Airports Authority to restart the tendering process for provision of Branding/Advertising Agency Services for Kenya Airports Authority forthwith.

19. Ground 5 of the ex parte applicants grounds states that *"the decision of the first Respondent ...is vitiated by a fundamental error of law in particular a misdirection and misapplication of the powers of the first Respondent exercised pursuant to section 173..."*The ex parte applicant also states that *"on 23rd November 2017, the first Respondent allowed the Applicant's Request for Review in Review Case No. 95 of 2017, Express DDB Kenya Limited vs Kenya Airports Authority by annulling the decision of the second Respondent terminating the tender proceedings but "inadvertently" directed the second Respondent to proceed and re-tender for Tender No. KAA/HQ/MBD/1158 provision of Branding/Advertising Agency Services for Kenya Airports Authority-Lot 1 & 2.*

20. Another ground cited is "that the first Respondent correctly held that the second Respondent's letter dated 23rd October 2017 purported to terminate the Tender No. KAA/HQ/MBD/115 provision of Branding/Advertising Agency Services for Kenya Airports Authority-Lot 1 & 2 was a nullity but it "erroneously" proceeded to make a finding that it could not direct the second Respondent to complete the tender process on allegations that the tender validity period for the subject tender expired during the pendency of the impugned review proceedings.

21. The choice and use of the words "inadvertently" and "erroneously" is to me an invitation to this court to examine the merits of the decision which is an appellate function and outside the purview of Judicial Review proceedings. Broadly, in order to succeed in a Judicial Review proceeding, the applicant will need to show either:-

a. the person or body is under a legal duty to act or make a decision in certain way and is unlawfully refusing or failing to do so; or

b. a decision or action that has been taken is 'beyond the powers' (in latin, 'ultra vires') of the person or body responsible for it.

22. The ex parte applicant seeks an order of *Mandamus* to compel the second Respondent to complete the tender process in conformity with the recommendations of the evaluation committee. *Mandamus* is a judicial command requiring the performance of a specified duty which has **not been performed.** Originally a common law writ, *mandamus* has been used by courts to review administrative action.[14] *Mandamus* is employed to compel the performance, when refused, of a ministerial duty, this being its chief use. It is also employed to compel action, when refused, in matters involving judgment and discretion, **but not to direct** the exercise of judgment or discretion in a particular way, nor to **direct the retraction or reversal of action already taken in the exercise of either.**[15]

23. In the present case, the first Respondent has not refused to act. It has made a decision. In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality.[16] The Board anchored its decision on section 173 of the act. *My reading of the impugned decision and section 173 of the act leaves me with no doubt that the Board acted within the purview of the said section. In arriving at the decision, the Board considered that the validity period of the Tender had lapsed.*

24. An administrative decision can only be challenged for **illegality, irrationality and procedural impropriety**. A close look at the material presented before me does not demonstrate any of the above. The decision has not been shown to be illegal or *ultra vires* and outside the functions of the first Respondent. A petition for a writ of *certiorari* is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. The applicant invites this Court to find that the first Respondent acted inadvertently, or misapplied the law or acted erroneously. The context in which the said words are used fall outside the province of the Judicial Review Orders sought.

25. Mandamus is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles. In the present case, I find no basis to compel the first Respondent as prayed.

26. The applicant also seeks an order of prohibition. The writ of prohibition arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person. A prohibiting order is similar to a quashing order in that it prevents a tribunal or authority from acting beyond the scope of its powers. The key difference is that a prohibiting order acts prospectively by telling an authority not to do something in contemplation. However, as stated above, the illegality of the impugned decision has not been established.

27. The discretionary nature of the Judicial Review remedies sought in this application means that even if a court finds a public body has acted wrongly, it does not have to grant any remedy. Examples of where discretion will be exercised against an applicant may include where the applicant's own conduct has been unmeritorious or unreasonable, for example where the applicant has unreasonably delayed in applying for judicial review, where the applicant has not acted in good faith, or where a remedy would impede the authority's ability to deliver fair administration, or where the judge considers that an alternative remedy could have been pursued.

28. I stand guided by the above cited Court of Appeal decision in *Kenya Pipeline Ltd vs. Hyosung Ebara Company Ltd*^[17] that “The Review Board is a specialized statutory tribunal established to deal with all complains of breach of duty by the procuring entity. 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 procurement entity. It follows that its decision in matters within its jurisdiction should not be lightly interfered with.”

29. It is not disputed that the first Respondent is vested with powers to make the decision in question. No abuse of such powers has been alleged or proved. It has not been shown that this power was not exercised as provided for under the law. It has not been proved or even alleged that the first Respondent acted outside its powers or the decision was arrived at after taking into account irrelevant or extraneous matters. It is my view that the nature and circumstances of the decision fall into the category of areas which are not disturbed by the courts unless the decision under challenge is illegal, irrational, or un-procedural.

30. I find that the *ex parte* applicant has not satisfied the threshold for this court to grant the orders sought. Accordingly, the *ex parte* Applicant's Application dated 11th December 2017 is dismissed with costs to the second Respondent.

Orders accordingly.

Signed, Delivered and Dated at Nairobi this 20th day of June 2018

John M. Mativo

Judge

[1] Act No. 33 of 2015.

[2] Section 67 of the Act.

[3] Counsel cited *R vs Public Procurement Administrative Review Board & 3 Others ex parte Olive Telecommunications PVT Limited* {2017} eKLR.

[4] *Zachariah Wagunza & Another vs Office of the Registrar of Academic Kenyatta University & 2 Others* {2013}eKLR.

[5] Counsel cited *Nelson Havi vs LSK & 3 Others*, Pet No. 607 of 2017.

[6] Counsel cited *JGH Marine A/S Western Marine Services Ltd CNPC Northeast Refining & Chemical Engineering Co. Ltd/Pride Enterprises vs Public Procurement Administrative Review Board & 2 Others* {2015}eKLR.

[7] Counsel cited *Council of Civil Unions vs Minister for the Civil Service* {1985}AC 2.

[8] Counsel cited *Municipal Council of Mombasa vs Republic & Umoja Consultants Ltd* {2012} eKLR.

[9] *Kenya Pipeline Company Ltd vs Hyosung Ebara Company Ltd & 2 Others* {2012} eKLR.

[10] {2014} eKLR.

[11] Act No. 3 of 2005.

[12]{2012} eKLR.

[13] {1969} 1 All ER 20

[14]W. GELLO1RN & C. BYSE, *Administrative & Review Law, Cases and comments* 119-20 (5th ed. 1970). Originally, mandamus was a writ issued by judges of the King's Bench in England. American courts, as inheritors of the judicial power of the King's Bench, adopted the use of the writ.

[15] *Wilbur vs. United States ex rel. Kadrie*, 281 U.S. 206, 218 (1930). See also Jacoby, *The Effect of Recent Changes in the Law of "Nonstatutory" Judicial Review*, 53 GEO. IJ. 19, 25-26 (1964).

[16] *Pastoli vs Kabale District Local Government Council and Others* {2008} 2EA 300.

[17] *Supra*.