



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISC. CIVIL APPLICATION CASE NO. 537 OF 2017**

**IN THE MATTER OF AN APPLICATION FOR LEAVE FOR THE ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS**

**AND**

**IN THE MATTER OF THE PUBLIC PROCUREMENT AND DISPOSAL ACT NO. 3 OF 2006**

**AND**

**IN THE MATTER OF THE PUBLIC PROCUREMENT AND DISPOSAL (COUNTY GOVERNMENT REGULATIONS) 2013**

**AND**

**IN THE MATTER OF THE CIVIL PROCEDURE ACT CAP 21 LAWS OF KENYA, CIVIL PROCEDURE RULES ORDER 53 RULES 1 AND 2, LAW REFORM ACT CAP 26 AND FAIR ADMINISTRATION ACT NO. 4 OF 2015**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA 2010 ARTICLES 47 AND 232**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**CABINET SECRETARY,**

**MINISTRY OF TRANSPORT, INFRASTRATURE, HOUSING &**

**URBAN DEVELOPMENT.....1<sup>ST</sup> RESPONDENT**

**PUBLIC PROCUREMENT OVERSIGHT AUTHORITY....2<sup>ND</sup> RESPONDENT**

**DIRECTOR GENERAL,**

**PUBLIC PROCUREMENT OVERSIGHT AUTHORITY....3<sup>RD</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**EX PARTE:**

**GLOBAL AGRO LOGISTICS LIMITED**

**JUDGEMENT**

1. The Amended Notice of Motion dated 15.11.2017 filed by the ex parte applicant Global Agrologistics Limited seeks from this Court

Judicial Review Orders of:

**(1) Certiorari to bring into this Court for purposes of being quashed the list issued vide letter dated 27<sup>th</sup> July 2017, of Suppliers of food stuffs for 2017 – 2019 and supply circular number R03/2017 – 2019 supply and provision of foodstuff dated 3.4.2017.**

**(2) That an order of Prohibition against the Respondents by themselves, their Agents, Servants and Assigns restraining them from procuring food stuff from firms listed on Supply Circular Number RO3/2017 – 2019 Supply and Provision of food stuff dated 3.5.2017.**

**(3) That costs of this application be provided for.**

2. The application is predicated on the statutory statement, verifying affidavit of Omar Abdi Osman and annexures thereto.

3. The applicant's case is that the Ministry of Transport, Infrastructure, Housing and Urban Development advertised a tender for the supply and provision of foodstuff. The applicant's company applied and was notified as being a successful tenderer vide letter dated 25.1.2017 which letter also listed the qualified firms for supply of foodstuff/beans for the period of 2017-2019. That on 3.5.2017 the said Ministry issued a circular to all government Ministries/Departments and public institutions being circular No.R03/2017-2019 supply and provisions of foodstuff being a purported list of successful firms contracted by the Ministry as being the qualified tenderers.

4. In the list/circular issued on 3.5.2017 by the Respondent, it is claimed that it was altered in that some names of the firms notified of being qualified vide letter of 25.1.2017 had been left out and/or replaced and new names added. The applicant claims that this action of the Respondent to mischievously introduce new names on the circular dated 3.5.2017 is illegal and contravenes the provisions **of Part (IV) of the Public Procurement and Disposal Act** which outlines the rules to be adhered to for general procurement.

5. Further, the applicant claims that the alteration of the list by introducing a different list of 3.5.2017 is illegal and contravenes the provision **of Section 42 (1) (b) of the Public Procurement and Disposal Act No. 3 of 2005.**

6. It is further claimed that the list of names contained in the impugned circular is illegal as it contravenes **Section 8 (3) e of the Public Procurement and Disposal Act Regulation 2006** which provides that names of prequalified tenderer should be shortlisted in the list of prequalified tenderers before approval.

7. It is further alleged that the Respondent's actions contravenes **Section 25(1) of the Public Procurement and Disposal Regulations 2006** which sets out the manner in which candidates should be approved to be qualified for tenders, and finally, that the action by the Respondents, undermines the purpose of the **Public Procurement and Disposal Act No. 3 of 2005** as set out under **Section 2 of the said Act.**

8. The verifying affidavit of Omar Abdi Osman reiterates the above facts and annexes copies of letter dated 25.1.2017 by the 1<sup>st</sup> Respondent notifying the Permanent Secretary (*State Department of Special Programmes*) while attaching a list of qualified firms for supply of foodstuff/beans for the period 2017-2019, letter dated 27.7.2017 by the head of supply chain Management of the 1<sup>st</sup> Respondent to Permanent Secretary, Ministry of Development & Planning, attaching a list of valid qualified firms for supply and provision of foodstuff for the period 2017-2019 for use and letter of 3.5.2017 from the 1<sup>st</sup> Respondent to all Government Ministries/Departments & all Public Institutions Notifying them that the contract for supply and provision of food stuff to user Ministries/Departments and all Public Institutions "As and when Required" basis had been concluded for the period of 2 years ending on 28.1.2019 as per the detailed list thereunder.

9. The Respondents filed grounds of opposition through the office of Attorney General on 21.11.2017 contending that: the application as drawn and taken out is bad in law and fatally defective as it is based on a misapprehension of the applicable law on matters procurement.

10. That the applicant lacks *locus standi* to institute and maintain these proceedings as it never made any application to be included in the list of firms for the supply of foodstuffs/beans, such application having been made by Global Agro Logistics as shown from the annexure in the pleadings filed by the applicant, that the application is base on a falsehood as the applicant was never notified of being a successful tenderer as alleged; that from Annexure "OAO 1" the letter was addressed to the Pricipal Secretary, State Department of Special Programs in the Ministry of Devolution and Planning and not to the applicant herein. That the 1<sup>st</sup> Respondent was well within its mandate to issue the impugned circular by dint of the **PPADACT, 2015**, and that this application ass filed is premature and not suitable for determination by this Court, that a reading of **Section 9 (2) of the Fair Administrative Action Act** as read together with **Section 167 of the Public Procurement and Asset Disposal Act, 2015**, contemplates that Court action must be proceeded by recourse to Statutory redress through administrative review by the Public procurement Administrative Review Board hence the application is unmerited and should be dismissed forthwith with costs to the Respondents.

11. Both parties filed their written submissions to canvas the Notice of Motion with the applicant's Counsel filing written submission on 22.12.2017 dated the same day whereas the Respondent's submissions dated 18<sup>th</sup> January 2018 were filed in Court on 24.1.2018 and on 7.2.2017, this Court fixed the matter for delivery of judgment on 28.3.2018 after adopting the parties written submissions. However, the judgment ate had to be brought forward as the Court is in transit to another station in the exparte applicant's submissions filed in Court on 22.12.2017, advocate Ms. Billy Amendi sets out the background of the matter and frames issues for determination, arising from the Respondent's Grounds of Opposition as filed namely: **Whether the applicant's application dated 15.11.2017 is based on misapprehension of the applicable law on matters relating to procurement. The applicant in answering this issue submits that the application was brought under order 53 Rules 1 & 3 of the CPR 2010 which is the established procedure for seeking Mandamus Prohibition and certiorari.** He also invoked **Section 3 and 3A of the Civil Procedure Act** gives this Court inherent powers to make any orders necessary for the ends of Justice.

12. In addition it was submitted that the application was brought under **Section 8 & 9 of the Law Reform Act** which outlines the procedural

requirements and circumstances when the writs of Mandamus, Prohibition and certiorari should be given by this Court.

13. Counsel for the applicants further submitted that the application was also brought under Part III of the **Fair Administrative Action Act No. 4 of 2015**, which stipulates the manner in which proceedings under J.R. should be instituted, the period for the determination of such applicants, the procedure in which such application are brought before the Court, Rules governing such proceedings and the orders that can be given by Court in JR Proceedings.

14. Finally, it was submitted that the application is grounded on **Part IV of the PP & Disposal Act No. 4 of 2005** that outline general procurement rules including the qualification of persons to be awarded contracts under **Section 31** and which stipulates complainants dealings and inappropriate influence on evaluations, illegality altering procurement records under **Section 42**, and anchored in the **PPAD Regulations 2006** setting out the manner in which candidates should be approved to be qualified for tenderers under **Section 25 (1) of the Act**.

15. On the Second issue of whether the applicant has *locus standi* to bring this application, the applicant maintained relying on the definition of *locus standi* by Black's Law Dictionary 9<sup>th</sup> Edition that it is the right to bring an action or to be heard in a given forum and submitted that the constitution of **Kenya 2010 under Articles 22 and 258 and the Fair Administrative Action Act, 2015** sets out who has the *locus standi* to bring an action and that the applicant being a limited liability company registered company is a person within the interpretation Article 260 of the Constitution. That the applicant having been listed as a qualified firm to supply beam as per the 1<sup>st</sup> Respondent's letter dated 25.1.2010, that the introduction by the 1<sup>st</sup> Respondent of other names of 11 other firms in the circular dated 3.5.2017 in the categories where the applicant was a successful bidder, was an act in bad faith as the said firms are competing with the applicant which is detrimental to the applicant's interests.

16. On the Respondent's contention that the applicant's name appears in the list as Global Agro Logistics and not Global Agro Logistics Limited it was submitted that, that was a procedural technicality which does not go to the substance of the matter as was espoused in the case of **Mumo Matemu V Trusted Society of Human Right Allince & 5 Others [2014] eKLR**.

17. On the issue of whether the applicant's application is based on a falsehood, it was submitted that although the applicant was not notified as a successful bidder, the letter dated 25.1.2017 was addressed to the Principal Secretary – Special Programmes which is a Public Office and that the letter acknowledges the original list of qualified firms for the supply of foodstuff, that it begs the question why the 1<sup>st</sup> Respondent would produce a list of Prequalified Suppliers yet produce a completely different circular that was not in agreement with the earlier list.

18. On the contentions by the 1<sup>st</sup> Respondent that it was within its mandate to issue the impugned circular, it was submitted that there is no law cited that gives the 1<sup>st</sup> Respondent the mandate hence its action were illegal.

19. On the issue of whether the Notice of Motion is properly before the Court, it was submitted that this Court has supervisory jurisdiction over tribunals, persons, body or authority exercising judicial or quasi judicial function but not over a superior court. Reliance was placed on **R Vs. Chairman N L C & 2 Others exparte Peter Njoroge Wakaba & Macharia Kinyanjui [2016] citing Owner of Motor Vessel "Lilian ....." V Caltex Oil (K) Limited [1989], and Samuel Kamau Macharia & Another V. KCB Ltd & 2 Others [2012]** on where the Court derives its jurisdiction from which is the Constitution or legislation or both. It was therefore submitted that this application has merits and the Court was urged to allow it.

20. On the part of the Respondent it was submitted that the law Applicable to these proceedings is the **2015 PPAD Act** as the alleged advertisement was made after 7.1.2016 hence an reference to the 2005 statute is wrong law as it has been repealed on the issue of whether the application on filed is suitable for determination by the Court, it was submitted that the applicant should have lodged a complaint before the PPAR Board as stipulated in **Section 167 of the 2015 Act** and that therefore failure to exhaust available remedies offends the provisions of **Section 9 (2) of the Fair Administrative Action Act, 2015**, which stipulate that one must exhaust interval review/appeal mechanisms before resorting to judicial review remedy. It was submitted that **Section 107 (1) of the PPAD Act, 2015** makes provision for an aggrieved party to tender process to lodge a claim before the Review Board and that J.R. being a remedy of last resort was not available the applicant. Reliance was placed on **R Vs NEMA exparte sound Equipment Ltd [2011] eKLR, Speaker of the National Assembly Vs Karume [1992] KLR 22** that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.

21. It was submitted that the failure by the applicant to challenge the decision of the P.E. (1<sup>st</sup> Respondent) before the Review Board disentitled him the right to resort to Judicial Review proceeding and that the decision of the 1<sup>st</sup> Respondent became binding on Parties as it was not challenged within the timelines given under the Act. Reliance was placed on the **S.C Case of LCK & 5 Others Vs. Royal Media Services Ltd & 5 Others [2014] eKLR**.

22. The Respondents urged the Court to dismiss the Application with costs.

#### **DETERMINATION:**

23. I have considered all the foregoing matters and in my view, the main issues for determination in this matter are:

***I. Whether the remedy of Judicial Review is available to the exparte applicant;***

***II. What orders should this court make?***

***III. Who should bear costs of these Judicial Review proceedings?***

24. On the issue of whether the Orders of J.R. sought are available to the ex parte applicant, the commencement point is the applicable law. The ex parte applicant has heavily relied on the **2005 Public Procurement and Assets Disposal Act** to urge the Court to grant the orders sought.

25. The Respondents contends that the applicant misapprehended the applicable law and that the applicable law is the **PPAD Act No. 33 of 2015** and not the 2005 legislation since there is nothing on record to show that the procurement process was commenced and/or conducted prior to the coming into **force of the 2015 Act**, which latter Act repealed the 2005 Act.

26. I have carefully perused the documents annexed to the applicant's application and I do not find any reference to a procurement process commenced or conducted in the period prior to the coming into force of **PPAD Act No. 33 of 2015** which took effect on 7<sup>th</sup> January 2016. The impugned process from the documents annexed took place in 2017 and the 1<sup>st</sup> Respondent advised the P S Ministry of Devolution of the list of qualified firms for supply of foodstuff/beans for the period 2017-2019, on 25<sup>th</sup> January, 2017.

27. The Applicant did not annex any Notification of prequalification of suppliers for this Court to appreciate when the firms were prequalified but documents annexed show that the process which is impugned was conducted from January 2017 and there is no other evidence to the contrary. For that reason, I agree with the Respondent's contention and submission that the applicant misapprehended the applicable law by relying on the 2005 repealed Act.

28. The applicable law is the Act which came into effect on 7.1.2016 which, at **Section 183 (1) repealed the 2005 Act**, since the applicant does not disclose when the advertisement for the impugned tender was made, which question this Court could have determined in accordance **Section 1 (1) of the Act and Section 8 of the 3<sup>rd</sup> schedule which stipulate that the procurement process commenced before commencement of the 2015 Act** shall be continued in accordance with the law applicable before the commencement of the **2015 Act No. 33 of 2015**.

29. On the issue of whether the Judicial Review Orders sought are available to the applicant, the applicant alleges that its interests are violated by the 1<sup>st</sup> Respondent's issuance of a circular of 3.5.2017 containing names of firms that were never quantified in the first instance and as communicated by the 1<sup>st</sup> Respondent to the PS Devolution State Department of Special Programmes. That it will be prejudiced because the items which it was prequalified to supply, namely, beans, have been subsequently shared out to firms which did not feature in the letter of 25.1.2017 which is considered an illegal Act.

30. The Respondents contended that in any event the applicant was never notified of being a successful tenderer.

31. On this latter aspect, I must emphasize that transparency and accountability in Public Procurement proceedings is key as stipulated in section 2 of the Act and Article 227 of the Constitution. Therefore it is expected that the procuring entity would disclose publicly all those prequalified firms for supplies of the foodstuffs and even notify those firms in writing upon completion of the process; whether the firms were successful or unsuccessful bidders.

32. **Section 67 (2) of the PPAD Act** provides that at the same time as the person submitting the successful tenderer is notified, the PE shall notify all other persons submitting tenders that they were not successful.

33. Therefore, the 1<sup>st</sup> Respondent cannot communicate the outcome of the tendering process to the P S Ministry of Devolution without notifying the successful and unsuccessful tenderers. That would be contrary to the law.

34. Nevertheless, in this case, the applicant managed to obtain copy of the Notification given to the P S Devolution, State Department of Special Programmes and identified the firms which were successful bidders for the Supply of foodstuffs for the year 2017-2019 by the user Ministries. And as it awaited the circular indicated in the letter of 25.1.2017, it learnt through the letter of 3.5.2017 that other 11 firms which had not featured in the earlier list of 25.1.2017 were included as being successful bidders to supply the same items as those which the applicant was to supply thereby being illegal and prejudicing the applicant's interests. The Applicant nonetheless does not state when it learnt of the 3.5.2017 letter, prior to instituting these proceedings on 29.8.2017, which was over three months from the date of the impugned letter.

35. The Applicant urges this Court to quash the circular dated 3.5.2017 as it contains names of firms which did not go through the procedural requirements of being awarded tenderers as successful tenderers. The Respondents contend that the Applicant should have filed a request for review before the Public Procurement Administrative Review Board and not seek for Judicial Review as Judicial Review is a remedy of last resort and that there was an alternative remedy which the Applicant should have exhausted before resorting to Judicial Review. Reliance was placed **on Section 167 (1) of the PPAD Act, 2015 and Section 9 (2) of the FAA Act, 2015**.

36. **Section 167 (1) of the PPAD Act, 2015** provides:

*“Subject to the provision of this Act, a candidate or a tenderer, who claim 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 Regulation, 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.”*

37. In PPARB & Another ex parte Avante International Technology inc. [2013] eKLR, the Court held:

*“The first issue for determination is whether despite the application for review made pursuant to the provision of Section 93 of the Act it would still be upon the applicant to challenge the decision of the Commission by way of Judicial Review. Whereas*

***under Section 99 of the Act it is provided that the right to request a review under this part is in addition to any other legal remedy a person may have, it is my view that for a party who has opted to apply for review of a decision of a procuring entity to invoke the supervisory Jurisdiction of the Court challenging the decision of the said entity subsequent to the delivery of the Board's decision, would amount to gambling with the Court process and ought not to be entertained by the Court.***

38. The Applicant herein qualified as a tenderer for the supply of foodstuffs and although the Respondent claims that it tendered as Global Agro Logistics but is now Global Agro logistics Ltd, in my view, it is not a fatal description of a party as it has not been shown that the two names belong to different persons/companies.

39. Being an aggrieved person as stipulated in **Section 175 (2) of the Public Procurement and Asset Disposal Act, 2015**, the applicant was entitled to complain to the Public Procurement Administrative Review Board on the alleged misconduct of the 1<sup>st</sup> Respondent, by filing for a review to the Review Board as stipulated in **Section 175 (1) of the Act** which stipulate that:

***“(1) A person aggrieved by a decision made by the Review Board may seek Judicial Review by the High Court within Fourteen days from the date of the Review Board's decision, failure to which the decision of the Review Board shall be final and binding to both parties.”***

40. What is being challenged here, however, is not the decision of the Review Board but of the procuring entity. Which is the 1<sup>st</sup> Respondent. The Applicant also had the option **under Section 167 (1) to file for Judicial Review** to file for judicial review to the High Court within 14 days of notification of tender award or date of occurrence of the alleged breach at any stage of the procurement or disposal process.

41. Nonetheless, the remedy of Judicial Review is now elevated to a Constitutional remedy hence it is now a remedy that transcends the technicalities of common law and as a consequence, the power of Judicial Review in Kenya is founded upon the Constitution (see CCK Vs RMS Ltd (Supra).

42. It is clear that these proceedings were initiated after 14 days of the decision of the procuring Entity complained of hence neither Sections 167 (1) nor **175 (1) of the PPAD Act** were adhered to by the Applicant. Although the application was also brought under the Law Reform Act, nonetheless the matter concerns Public Procurement and therefore the applicable law with regard to the timeframe for challenging the decision of the procuring Entity is either **Section 167(1) or 175 (1) of the Public Procurement and Asset Disposal Act**.

43. It follows that the applicant had the opportunity either to file a challenge before the Review Board or to this Court but in Either of the two avenues, it had to file the challenge within 14 days from the date of the decision or notification of award or date of occurrence of the alleged breach at any stage of the procurement process or disposal process.

44. Accordingly, I agree with the Respondents Counsels submission that the Import of **Section 167 (1) and 175 (1) of the Act** as read with **Section 9 (2) of the Fair Administrative Action Act, 2015**, is that Judicial Review being a remedy of last resort should only be invoked upon exhaustion of all other available remedies unless the party so applying for Judicial Review Orders has been granted specific exemption from the requirement for exhaustion of other available remedies in terms of **Section 9 (4) of the FAA Act, 2015**. **Section 9 (2) of the FAA Act, 2015** provides:-

***“The High Court or a subordinate Court under Subsection (i) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.”***

45. The Court of Appeal in **R Vs. NEMA exparte Sound Equipment Ltd [2011]** and Citing Speaker of the **National Assembly Vs Karume [1992] KLR 22** held, inter alia:

***“The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a Statutory appeal procedure, it is only in exceptional circumstances that an Order for Judicial Review would be granted, and that in determining whether an exception should be made and Judicial Review granted, it was necessary for the Court to look carefully at the suitability of the Statutory appeal in the context of the particular case and ask itself what in the context of the Statutory Powers, was the real issue to be determined and whether the Statutory appeal procedure was suitable to determine it. See for example R Vs Birmingham City Council exparte Ferrero Ltd case. The learned trial Judge, in our respectful view, considered these strictures and came to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute. With respect, we agree with the Judge.”***

46. In the Karume (Supra) case, the Court held that:

***“Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedure.”***

47. The Applicant in this case is challenging the decision of the 1<sup>st</sup> Respondent, PE to insert in the circular new names of firms which were not on the original list of prequalified supplies. Nothing stopped the applicant from challenging that decision before the PPARB or seeking for review of that decision before this Court within 14 days of the date of the decision or alleged breach. It did not and neither has the applicant demonstrated that there are exceptional circumstances to warrant exemption of the alternative review mechanisms and neither has it

sought such exemption by way of an application as stipulated in **Section 9 (3) and (4) of the Fair Administrative Action Act, 2015**. The Review Board is a specialized body mandated to review as a first port of call, decisions of the procuring entity. The challenge to the decision of the PE and the Review Board are stipulated by set timeframes within **Section 167 (1) and 175 (1) of the Act**.

48. The Applicant did not even seek for enlargement of time within which to challenge the decision of the PE and even if no such leave was necessary, no such application for exemption from resorting to alternative remedies on account of exceptional circumstances was even sought. **(see Sec 9 (3) (4) of FAA Act, 2015**.

49. None of the above questions raised by the Respondents were controverted by the exparte applicant who merely relied on the stale Act to try and persuade this Court to find the 1<sup>st</sup> Respondent's actions were illegal.

50. It is not enough to say that this Court has supervisory Jurisdiction over the applicant P E as stipulated in **Article 165 (6) of the Constitution**,.One must demonstrate under which statutory law the supervision is being exercised. And where the law specifically sets out the procedure for doing anything, that procedure must be followed unless it is demonstrated that that other procedure is not effective.

51. Consequently, I find and hold that the applicant has not demonstrated that it is entitled to the orders sought. Furthermore, the decision was made in May 2017 and these proceedings were made in August 2017. The applicant did not seek for orders of stay of enforcement of the decision of 3.4.2012 which decision could have been implemented by now. It will be acting in vain if this Court were to quash a decision which was already been implemented and to prohibit a decision which is already implemented. The Applicant delayed in seeking the remedy.

52. In the end the only order that is available for the Court to make is to dismiss the Applicant's Notice of Motion as amended and filed on 15.11.2017 with an order that let each party bear their own costs of these proceedings.

**Dated signed and Delivered in open court at Nairobi this 28<sup>th</sup> day of September, 2018.**

**R. E. ABURILI**

**JUDGE**