



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO. 51 OF 2013

FLEET TRACKING SOLUTIONS AFRICA LTD.....PLAINTIFF

VERSUS

KENYA ROADS BOARD.....DEFENDANT

RULING

1) The subject matter of this ruling are the motion dated 18.5.2017 and the Notice of Preliminary Objection dated 25.2.2013.

2) The aforesaid motion is taken out by Kenya Roads Board, the

defendant herein, in which it sought for the following orders:

a. This honourable court be pleased to dismiss this matter for want of prosecution.

b. The cost of this application be awarded to the defendant.

3) The motion is supported by the affidavit of Prof. Albert Mumma.

When served with the aforesaid motion, Fleet tracking Solutions Africa Ltd, the plaintiff herein, filed the replying affidavit of Arunkumar Achanya to oppose the motion.

4) The defendant in its preliminary objection dated 25.2.2013 put forward the following grounds:

a) This honourable court lacks the requisite jurisdiction to entertain and/or hear this matter for the reasons that the same is a grievance over procurement which falls within the jurisdiction of the Public Procurement Administrative Review Board by virtue of Sections 93, 98, 99 and 100 of the Public Procurement and Disposal Act No. 3 of 2005.

b) The plaintiff can only approach this honourable court to address a procurement dispute by way of an appeal and/or judicial review proceedings as provided by Section 100 of the Public procurement and Disposal Act No. 3 of 2005.

c) The procurement process herein is concluded and the court is being engaged in an academic exercise as there is no substratum to the case herein.

d) The honourable court lacks jurisdiction over the suit subject matter.

5) The plaintiff filed a notice of reply to the defendant's notice of preliminary objection.

6) With the approval of learned counsels appearing in this matter, this court gave directions to have both the motion and the preliminary objection determined by written submissions.

7) I think it is appropriate to begin by first determining the notice of preliminary objection. I have already enumerated the grounds put forward by the defendant in the notice of preliminary objection. The main ground which commends itself for determination is whether this court has jurisdiction to entertain this action.

8) It is the defendant's submission that this court has no jurisdiction to entertain this suit since the same was filed contrary to Section 100 of the Public Procurement and Disposal Act, 2005 (now repealed). It was pointed out by the defendant that the plaintiff's case was heard by the Public Procurement Administrative Review Board which determined the dispute in accordance with Sections 97 and 98 of the Public Procurement and Disposal Act, 2005 and the available remedy for the plaintiff is set out under Section 100. The defendant further argued that the plaintiff opted to file this suit instead of filing a Judicial Review Application or an appeal.

9) In response to the defendant's preliminary, the plaintiff argued that this court has jurisdiction to try this suit since it is not based on the provisions of the Public Procurement and Disposal Act no. 3 of 2005. It is argued that this suit is specifically for the procuring entity who has moved to do what was not ordered to do for reasons that the Act does not provide for the avenue for having such acts dealt with, as judicial review and appeals are meant for the decision of the board.

10) The plaintiff further argued that this court has jurisdiction to hear and determine this matter because it is for the enforcement of the decision by the Public Procurement Administrative Review Board which does not fall within the ambit of Section 100 the Public Procurement and Disposal Act no. 3 2005. It is argued that the procuring entity did not follow the award by the Tribunal and decided to unilaterally deny the plaintiff its rightful gain of the tender.

11) Before determining the question of jurisdiction which is the gist of the preliminary objection, it is important to set out in brief the background of this dispute. The plaintiff moved this court by way of the plaint dated 20.2.2013 in which the plaintiff sought for *inter alia* a declaration that the plaintiff was the successful bidder for tender no. KRB/627/2012-2013 for the supply, installation, testing and commissioning of light portable weigh-in motion vehicle weigh bridges and to compel the defendant to award the plaintiff the tender.

12) This suit was filed after the plaintiff felt aggrieved by the decision of the defendant to award M/s Avery E.A. Ltd the aforesaid tender on 30.10.2012. In fact the plaintiff being aggrieved by the decision of the Public Procurement and Disposal Act sought a review of the defendant's decision to award the tender at the Public Procurement Administrative Review Board on 6.12.2012 and a decision was rendered by the Review Board on the review application on the 7th January, 2013.

13) Having given the background of this dispute, the question has to be answered here is whether or not this court has jurisdiction to entertain and determine this dispute?

It is not in contention that the dispute at hand falls within the provisions of the Public Procurement and Disposal Act no. 3 2005 (now repealed).

14) Under Section 100 of the aforesaid Act it is provided as follows:

1. A decision made by the Review Board shall, be final and binding on the parties unless judicial review thereof commences within fourteen days from the date of the Review Board's decision.

2. Any party to the review aggrieved by the decision of the Review Board may appeal to the High Court, and the decision of the High Court shall be final.

3. A party to the review which disobeys the decision of the Review Board or the high Court shall be in breach of this Act and any action by such party contrary to the decision of the Review Board or the High Court shall be null and void.

4. If judicial review is not declared by the High Court within thirty days from the date of filing, the decision of the Review Board shall take effect.

15) It is now apparent that the plaintiff did not follow the procedure set out under Section 100 of the Public Procurement and Disposal Act within the timelines set. It is also clear that in such matters this court assumes jurisdiction by way of Judicial Review or by Appeal which is not the case here.

16) The plaintiff has no discretion to ignore the relevant provisions of statute. With respect, I agree with the defendant's submissions that this court has not been properly approached. Consequently, the defendant's preliminary objection is upheld and the plaintiff's suit is ordered struck out with costs to the defendant.

17) Having determined the defendant's preliminary objection, I now turn my attention to the motion dated 18.5.2017 in which the defendant seeks for this suit to be dismissed for want of prosecution. It is the submission of the defendant that since the matter was last in court on 23rd October 2013, the plaintiff has not taken any other step to have the action prosecuted. The defendant further stated that this shows that the plaintiff has lost interest in prosecuting the suit.

18) When faced with such arguments, the plaintiff blamed the defendant for causing the delay in the prosecution of the suit by filing the notice of preliminary objection which in law must be determined first before the suit can be fixed for hearing. The plaintiff pointed out that the defendant filed the preliminary objection in 2013 and has never bothered to fix it for hearing.

19) The plaintiff further submitted that it has not lost interest in pursuing the suit. The plaintiff admitted that there was delay but added that the delay is not inordinate therefore the same is excusable.

20) It is clear from the submissions of both parties that indeed there was delay in prosecuting this suit. It is the duty of the plaintiff to list its case for hearing.

21) The law does not place any duty on the defend to cause the suit to be listed for hearing. The plaintiff's argument that the defendant's preliminary objection was the cause of the delay cannot be true.

22) The preliminary objection did not in any way hinder the plaintiff from having the preliminary objection heard and determined expeditiously. In any case the notice of preliminary did not act as a bar or a stay order against the plaintiff listing the suit for hearing. The plaintiff has not given a plausible explanation to enable this court save the suit from dismissal. I am convinced that the defendant has too, mounted a strong case for the dismissal of the suit for want of prosecution. Consequently, I find the motion dated 17.5.2017 to be meritorious it is allowed as prayed.

23) In the end and on the basis of the above reasons, this suit is ordered struck out and dismissed with costs to the defendant.

Dated, Signed and Delivered at Nairobi this 30th day of November, 2018.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff/Applicant

..... for the Defendants/Respondents