



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
CIVIL SUIT NO. 380 OF 2014

SORROWAN IRRIGATION SYSTEMS.....PLAINTIFF/REPOENDENT

VERSUS –

NATIONAL IRRIGATION BOARD.....DEFENDANT/APPLICANT

RULING

1. The defendant has asked the court to strike out the suit on the grounds that the court lacks jurisdiction to entertain it.
2. According to the defendant, the substratum of the plaintiff's suit is a procurement process. Therefore, the defendant submitted that the proper forum before which the plaintiff should have ventilated its claim is the Public Procurement Administrative Review Board.
3. The primary response to the application is that the plaintiff's claim is of a hybrid nature, and that, therefore, the Public Procurement Administrative Review Board lacked jurisdiction to entertain it.
4. At paragraph 7 of the plaint, the plaintiff complains about the alleged failure by the defendant;

“..to evaluate the plaintiff's bid in accordance with the directives contained in the Treasury Circular No. 14 of 2103 which requires entities categorized under youth and women groups be granted preferential terms over and above other competitors”.
5. What was the plaintiff competing for?
6. At paragraph 2 of the plaint, it is disclosed that the defendant had invited a TENDER for the construction, planning and preparation costs for the GALANA/KAULU FOOD SECURITY PROJECT.
7. In what capacity was the defendant participating?
8. The answer is provided by the plaintiff at paragraph 5 of the plaint, which reads as follows;

“That at all material times the defendant was a procuring entity governed by the provisions of the Public Procurement and Disposal Act 2005 as well as Article 227 of the Constitution of Kenya 2010”.
9. It is because the plaintiff was aware of the statute governing the process that the plaintiff accused the defendant, (*at paragraph 8 of the plaint*), of being in breach of the provisions of the Public Procurement

and Disposal Act 2005.

10. It therefore follows that when the plaintiff filed suit, claiming damages from the defendant, the court would have to delve into the question as to whether or not the defendant was in breach of the statute governing the procurement process.

11. In order to make the appropriate determination, in those circumstances, the court would be obliged to perform the function which ought to have been performed by the Public Procurement Review Board, pursuant to Section 93 (1) of the Public Procurement and Disposal Act, 2005.

12. The said Section states that if any candidate claims to have suffered or to risk suffering loss or damage due to the breach of the duty imposed on the procuring entity, the said candidate may seek Administrative Review.

13. As I understand the plaintiff, it is seeking compensation for alleged loss and damage attributable to the breach of a duty imposed on the defendant, in its capacity as a procuring entity.

14. Therefore, the very place which the plaintiff ought to have commenced action is before the Review Board.

15. Thereafter, if the plaintiff had been dissatisfied with the decision of the Review Board, it could have come to the High Court.

16. Accordingly, I find that the law has stipulated a procedure and a forum which the plaintiff should have used.

17. It would be wrong for the High Court to entertain the plaintiff's claim as a court of first instance, when the applicable law stipulates that in matters of this nature the High Court should be a forum where an aggrieved party may seek Judicial Review, after the Public Procurement Review Board had given its determination.

18. I appreciate that the project which was the basis of the claim, is now at an advanced stage. In the circumstances, it would be futile to reverse or to undo what had already been executed.

19. However, just because the plaintiff did not take action in a timely manner, and before the designated forum, cannot be reason enough to warrant it being allowed to come straight to the High Court. The plaintiff has to live with the consequences flowing from its failure to take action within the time stipulated, and before the designated forum.

20. I therefore uphold the Preliminary Objection, and order that the plaint be struck out forthwith.

21. The plaintiff is ordered to pay to the defendant the costs of the suit.

DATED, SIGNED and DELIVERED at NAIROBI this 30th day of May 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

No appearance for the Plaintiff/Respondent

Baraka for Juma for the Defendant/Applicant

Collins Odhiambo – Court clerk.