



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**(JUDICIAL REVIEW DIVISION)**  
**JUDICIAL REVIEW APPLICATION NO. 491 OF 2016**

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO COMMENCE JUDICIAL REVIEW PROCEEDINGS FOR ORDERS CERTIORARI, PROHIBITION AND MANDAMUS**

**AND**

**IN THE MATTER OF: THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT, NO. 33 OF 2015**

**AND**

**IN THE MATTER OF: A DECISION BY THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD WITH REGARD TO TENDER NO. KPS/T/10/2015-2016 FOR SUPPLY & DELIVERY OF MOTORIZED VEHICLE NUMBER PLATE BLANKS AND TENDER NO. KPS/T/11/2015-2016 FOR SUPPLY & DELIVERY OF MOTORIZED VEHICLE NUMBER PLATE HOT STAMPING FOIL DELIVERED ON 29<sup>TH</sup> SEPTEMBER 2016**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD...1<sup>ST</sup> RESPONDENT**

**THE MINISTRY OF INTERIOR AND COORDINATION**

**OF NATIONAL GOVERNMENT.....2<sup>ND</sup> RESPONDENT**

**AND**

**J KNIEREM BV.....EX-PARTE APPLICANT**

**JUDGEMENT**

**Introduction**

1. In this application, the applicant herein, **J Knierem BV**, seeks the following orders:

- 1) THAT this court be pleased to issue an order of certiorari for the purposes of being quashing the 1st respondent's decision delivered on 29<sup>th</sup> September 2016.**
- 2) THAT this court be pleased to issue an order of prohibition restraining the 1st and 2nd respondents howsoever from implementing or enforcing the said decision from acting upon and/ or executing the directions made and or given by the 1st respondent.**
- 3) THAT this court be pleased to issue an order of mandamus to compel the 2nd respondent to award tender NO. KPS/T/10/2015-2016 for supply and delivery of motorized vehicle number plate blanks and tender number KPS/T/11/2015-2016 for supply and delivery of motorized vehicle number plate hot stamping foil to the ex-parte Applicant.**
- 4) THAT the Respondent be condemned to pay the costs of this application.**

2. The applicant's case was in summary based on the following grounds:

- 1) 1<sup>st</sup> respondent's decision of 29<sup>th</sup> September 2016 was arrived at without observing the principles of natural justice in that:**
  - a) It failed to accord sufficient and reasonable notice of the hearing review application to the ex-parte applicant.**
  - b) It failed to give a fair opportunity to the Ex-Parte applicant to present its case on the review application.**
  - c) It failed to supply the ex-parte applicant with the proceedings that had taken place.**
- 2) The 1<sup>st</sup> respondent acted *ultra vires* to sections 66,98 and 100 of the Procurement and Disposal Act, 2005 in arriving at its decision in that:**
  - a) It failed to follow the criteria set out in the tender document.**
  - b) It awarded tender no KPS/T/10/2015-2016 to Tropical technologies Limited even though the company had failed to pass the technical evaluation stage because it had not obtained a manufacturer's authorization which was mandatory.**
  - c) It upheld the decision of the 2nd respondent to split tender no KPS/T/11/2015-2016 into two tenders namely tender for 120mm by 305 mm and tender for 220 by 305mm even though the 1st respondent found error in this criterion.**
- 3) The decision flies in the face of the applicant's legitimate expectation to a fair administrative action of the respondent and equal treatment of all bidders in the eyes of the law.**

3. According to the ex parte applicant, the Kenya Prisons Services advertised in the East African Newspaper of 31<sup>st</sup> January 2015 to 6th February 2015 Tender NO. KPS/T/10/2015-2016 for supply and delivery of motorized vehicle number plate blanks and tender number KPS/T/11/2015-2016 for supply and delivery of motorized vehicle number plate hot stamping foil and pursuant thereto, the Ex-parte applicant applied for both tenders and its bid was found to be responsive by the 2<sup>nd</sup> respondent technical evaluation committee and passed the preliminary and the technical evaluation stages. However MIG International limited, was awarded tender number KPS/T/11/2015-2016 even though it was not the lowest bidder while EHA Hoffmann International GmbH was awarded tender number KPS/T/10/2015-2016 at USD 6,953,700 even though they had not followed the criteria set out in the tender document.

4. It was averred that in June 2015, one of the unsuccessful bidders, Tropical Technology Limited lodged an application for review before the 1<sup>st</sup> respondent in which proceedings the ex-parte applicant was joined as an interested party and presented its case before the 1<sup>st</sup> respondent which eventually cumulated to the latter's decision of 17<sup>th</sup> July 2015 whereby the awards to MIG international limited and EHA Hoffmann International GmbH were annulled and the 1<sup>st</sup> respondent directed the 2<sup>nd</sup> respondent to carry out a fresh re-evaluation of the two tenders. However without notification to the Ex-parte Applicant, a re-evaluation process was carried out and a report dated 31<sup>st</sup> August 2015 was submitted to the Board. Without notification to the Ex-Parte applicant the 1<sup>st</sup> respondent awarded tender no KPS/T/11/2015-2016 to MIG International Limited. Similarly, without notification tender no KPS/T/10/2015-2016 for supply and delivery of motorized vehicle hot stamping foil was split into 2 and size 120mm by 305mm was awarded to EHA Hoffmann International GmbH while size 220mm by 305mm was recommended for re-advertisement. The Ex- parte applicant was never notified of this award that was done in September 2015.

5. The applicant averred that on 9<sup>th</sup> September 2016, the ex parte applicant received a hearing notice from the 1<sup>st</sup> respondent stating that following the High Court's decision 17<sup>th</sup> August 2016 in Misc. Application no. 362 of 2015 dated, a request for review no 46 of 2016, that had been lodged on 9<sup>th</sup> September 2015 regarding tender no KPS/T/10/2015-2016, was to be heard again on 2<sup>nd</sup> September 2016. On the same day, the Ex-parte applicant wrote to the 1<sup>st</sup> respondent pointing out that the notice had been received after the hearing date and requested the 1<sup>st</sup> respondent to provide it with proceedings of that day. However the 1<sup>st</sup> respondent never acted on this letter and no proceedings were provided to the Ex-Parte applicant.

6. The applicant averred that upon the ex-parte applicant's own enquiries, it was informally informed that the review application had been fixed for ruling on 22<sup>nd</sup> September 2016 on which date the ex-parte sent their representative to attend the ruling, only to be informed that the review application was proceeding for hearing/ final submissions from the parties.

7. It was averred that submissions were presented for both tenders and not just for tender no KPS/T/11/2015-2016 as it had been indicated in the 1<sup>st</sup> respondent's hearing notice after which the 1<sup>st</sup> respondent directed that it would render its decision on 27<sup>th</sup> September 2016 which was later postponed to 29<sup>th</sup> September 2016 on which date the Ex-Parte applicant lodged an application requesting the 1<sup>st</sup> respondent for an opportunity to be heard and make submissions the review application but the 1<sup>st</sup> respondent ignored and /or neglected and /or refused to hear the ex-parte applicant's application and went ahead to deliver its decision wherein:

a. It annulled and set aside award of tender no KPS/T/10/2015-2016 made to Hoffman International GmbH and directed that the 2<sup>nd</sup> respondent award the tender to Tropical Technology Limited.

b. It upheld the decision of the 2<sup>nd</sup> respondent to award tender no KPS/T/11/2015-2016 for supply and delivery of hot stamping foil no 120mm by 305mm to MIG International Limited.

c. It directed that the 2<sup>nd</sup> respondent should re-advertise tender no KPS/T/11/2015-2016 for supply and delivery of hot stamping foil no 220mm by 305mm within 14 days from the date of the decision.

8. According to the ex parte applicant, the 1<sup>st</sup> respondent's decision of 29<sup>th</sup> September 2016 was arrived at without observing the principles of natural justice in that:

a. It failed to accord sufficient and reasonable notice of the hearing review application to the ex-parte applicant.

b. It failed to give a fair opportunity to the Ex-Parte applicant to present its case on the review application.

c. It failed to supply the ex-parte applicant with the proceedings that had taken place.

9. It was the ex parte applicant's case that the 1<sup>st</sup> respondent acted *ultra vires* to sections 66, and 96 of the ***Procurement and Disposal Act, 2005*** in arriving at its decision in that:

a. It failed to follow the criteria set out in the tender document.

b. It awarded tender no KPS/T/10/2015-2016 to Tropical technology Limited even though the company had failed to pass the technical evaluation stage because it had not obtained a manufacturer's authorization which was mandatory.

c. It upheld the decision of the 2<sup>nd</sup> respondent to split tender no KPS/T/11/2015-2016 into two tenders namely tender for 120mm by 305 mm and tender for 220 by 305mm even though the 1st respondent found error in this criterion.

10. The ex parte applicant therefore believed that in the circumstances it is fair and just that the orders prayed for in the application filed herewith are granted.

### **Determination**

11. On 17<sup>th</sup> August, 2016, this Court delivered a decision in **Miscellaneous Application No. 356 of 2015 (Consolidated with Miscellaneous Application No. 362 of 2015)** in which it issued the following orders:

**1. The Respondent Board's decision awarding Tender No. KPS/ICB/T/11/2015-2017 for supply and delivery of motorized vehicle hot stamping foils size 220mm X 305m to the interested party is hereby removed to this Court and is quashed and the decision of the Procuring Entity recommending re-advertisement thereof is hereby upheld.**

**2. The decisions of the Board in respect of the other two Tenders which were awarded to the interested party is hereby quashed and the Board is directed to hear all the parties on the issue of the alteration of the forms and whether the interested party's quoted prices were within the funds appropriated by the Procuring Entity towards the said tender and make a determination thereon. Based on the outcome of the said decision, the Board is at liberty to make appropriate orders under section 98 of the Act.**

**3. The recommendation by the Board to the Director of the Public Procurement Oversight Authority and other investigative Agencies of the Government to carry out an investigation to establish whether there was any impropriety in the Procuring Entity's decision to alter the prices submitted by the parties in their tenders and or in adopting prices and awarding the subject tenders to bidders at prices not set out in the form of tenders, is hereby quashed.**

**4. As none of the parties can be said to have wholly succeeded, there will be no order as to costs.**

12. It is clear that the ex parte applicant herein was not a party to those proceedings. In other words the ex parte applicant herein did not challenge the decision of the Board. Section 175(1) of the ***Public Procurement and Asset Disposal Act*** provides as follows:

***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.***

13. The effect of the said provision is that where the Review Board makes certain determinations which are not upset by the High Court, the same may well be final. Accordingly, if the Board did not make favourable determination as far as the ex parte applicant herein was concerned and the ex parte applicant

did not contest the same, the ex parte applicant cannot subsequently seek orders which would reopen the Board's decision unless the Court ordered that the tendering process be started de novo and in that fresh process, the ex parte applicant participated.

14. In my view the ex parte applicant cannot be permitted to in effect now rely on a determination of this Court to benefit from the proceedings in which it did not participate and which it could have participated by either seeking to be joined as a party or filing its own proceedings.

15. In the result, this motion fails and is dismissed with no order as to costs.

16. It is so ordered.

**Dated at Nairobi this 11<sup>th</sup> day of August, 2017**

***G V ODUNGA***

**JUDGE**

**Delivered in the presence of:**

**Mr Kinyanjui for the 1<sup>st</sup> interested party**

**Mr Munene for the Respondent**

**Mss Kimari for Mr Thangei for the 2<sup>nd</sup> interested party**

**CA Mwangi**