REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR MISC. APPLICATION NO. 356 OF 2016

BETWEEN

REPUBLIC……..……..……..……..APPLICANT

VERSUS

PUBLIC PROCUREMENT ADMINISTRATIVE

REVIEW BOARD……..……..……..……..RESPONDENT

AND

KENHORN JUBA (K) LIMITED ……....……...….INTERESTED PARTY

***EXPARTE*: WAJIR COUNTY GOVERNMENT**

RULING

1. Pursuant to the leave granted herein on 9th August, 2016, the applicant herein, **Wajir County Government**, by a Notice of Motion dated 10th August, 2016 filed herein on 11th August, 2016, seeks the following orders:

> **1. THAT this Court do issue an order of Certiorari to remove into the High Court and quash the entire decision of the Public Procurement Administrative Review Board dated 18th July, 2016 and made in PPARB Application No. 43 of 2016 dated 27th June, 2016 – Kenhorn Juba (K) Limited vs. Wajir County Government.**
>
> **2. THAT the costs of and/or incidental to the leave application and the substantive motion for the prerogative order of certiorari be provided for.**
>
> **3. THAT any such additional and/or alternative orders as the court may deem fit and proper in the circumstances.**

2. Before the said Motion could be heard the Interested Party herein, **Kenhorn Juba (K) Ltd**, filed a notice of intention to raise a preliminary objection to these proceedings. It is the said objection that is the subject of these proceedings.

3. The said objection was argued on behalf of the said interested party by its learned counsel **Mr Masika**.

According to learned counsel, the decision sought to be quashed was made by the Respondent on 18th July, 2016. Pursuant to section 175 of the ***Public Procurement and Asset Disposal Act, 2015*** (hereinafter referred to as "the Act"), it was submitted that these proceedings ought to have been commenced within 14 days which according to **Mr Masika** ought to have been on or before the 1st August, 2016. However the same were commenced on 9th August, 2016 which according to him was 8 days out of time.

4. Though the learned counsel conceded that the Respondent's decision was collected on 28th July, 2016, it was submitted that the applicant had ample time within which to commence these proceeding before the expiry of the time limited for doing so.

5. In support of the objection, the Interested Party relied on this Court's decision in **Republic vs. Public Procurement Administrative Review Board & Another ex parte Teachers Service Commission & Zacs Construction Ltd [2015] KLR**.

6. The objection was supported by **Miss Odhiambo**, learned counsel for the Respondent who similarly reiterated that these proceedings were indeed filed out of time.

7. On behalf of the ex parte applicant, **Mr Wanjohi**. According to the ex parte applicant the issue raised herein is not a pure point of law which can be the subject of a preliminary objection.

8. It was submitted that the Respondent did not immediately upon the delivery of its decision furnish the parties with copies of its decision despite knowledge of the timelines under section 175 of the Act and despite numerous attempts made by the applicant. It was therefore contended that the delay was deliberate and was intended to severely prejudice the procuring entity's right to challenge the Respondent's decision by way of judicial review contrary to Article 47 of the Constitution. It was learned counsel's view that a strict interpretation of section 175 of the Act presupposes that the decision would be furnished to the parties immediately upon the reading of the same. This Court was urged that in light of the glaring lacuna in section 175 aforesaid, the said provisions ought not to be construed as ousting the jurisdiction of this Court. By parity of reasoning the ex parte applicant referred the Court to section 79G of the ***Civil Procedure Act***.

9. The Court was therefore urged to adopt a purposive approach in determining the objection raised herein. In support of its submissions the applicant relied on **Republic vs. Public Procurement Administrative Review Board and Another ex pare Selex Sistemi Integrati [2008] eKLR**, **Samuel Waweru vs. Geffrey Muhoro Mwangi [2014] eKLR** and **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696**.

10. As was held in **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd** (supra), a preliminary objection, properly speaking raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. In my view it does not mean that a preliminary objection cannot be based on facts. What the law requires is that the person raising the objection must do so on the assumption that the factual averment by his adversary are correct. In other words the party raising a preliminary objection is not permitted to do so while disputing the factual averments of the other side.

11. In this case, it is not disputed at the decision under challenge was delivered on 18th July, 2016. It is not also disputed that a copy thereof was furnished on 28th July, 2016 to the parties. The law relating to the timelines for the filing of the judicial review is also not in controversy. The only issue that falls for determination is the legal interpretation of the said provision based on the uncontroverted facts. That in my view is an issue that can properly be the subject of a preliminary objection.

Determinations

12. I have considered the submissions made by the parties herein.

13. Section 175 of the Act provides as follows:

> ***(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.***
>
> ***(2) The application for a judicial review shall be accepted only after the aggrieved party pays a percentage of the contract value as security fee as shall be prescribed in Regulations.***
>
> ***(3) The High Court shall determine the judicial review application within forty five days after such application.***
>
> ***(4) A person aggrieved by the decision of the High Court may appeal to the Court of Appeal within seven days of such decision and the Court of Appeal shall make a decision within forty-five days which decision shall be final.***
>
> ***(5) If either the High Court or the Court of Appeal fails to make a decision within the prescribed timeline under subsection (3) or (4), the decision of the Review Board shall be final and binding to all parties.***
>
> ***(6) (6) A party to the review which disobeys the decision of the Review Board or the High Court or the Court of Appeal 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 or the Court of Appeal shall be null and void.***
>
> ***(7) (7) Where a decision of the Review Board has been quashed, the High Court shall not impose costs on either party.***

14. Section 9(3) of the ***Law Reform Act*** Cap 26, Laws of Kenya provides:

> ***In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.*** [Emphasis mine].

15. Therefore for the purposes of judicial review, an enactment may perfectly provide a shorter period within which challenge to a decision of the Review Board may be taken and if not taken that decision would be final. That is exactly what section 175 of the Act provides. A provision limiting the time for making an application for judicial review is therefore perfectly in order and cannot therefore be termed as being unconstitutional. Accordingly the decision in **Republic vs. Public Procurement Review Administrative Board & Another ex parte Selex Sistemi Integrati** (supra) is distinguishable. Where Parliament has provided for a period within which judicial review proceedings may be commenced, this Court cannot by craft or innovation go round such a legislative edict. As was held in **Raila Odinga & 6 Others vs. Nairobi City Council Nairobi HCCC No. 899 of 1993; [1990-1994] EA 482**:

> **"Order 53 contains the procedural rules made in pursuance of s. 9(1) of the Law Reform Act. S. 9(2) of that Act states that the rules made under subsection (1) may prescribe that an application for mandamus, prohibition and certiorari shall be made within six months or such shorter period as may be prescribed. Thus it will be seen that on one hand s. 9(2) of the Act enjoins that the court may make rules prescribing that application for mandamus prohibition and certiorari shall be made within six months or such shorter period as may be prescribed by the rules...The parliament in its wisdom has imposed this absolute period of six months and it is the Parliament alone which can amend it. The Court's duty is to give effect**

to the law as it exists...Thus an application for judicial review, may it be for an order of mandamus, prohibition or certiorari should be made promptly and in any event within a maximum period of six months from the date when the ground for the application arose…"

16. It is not for this Court to interpret legislation in a manner that completely alters the legislative intent of the enactment. Where there is a lacuna I law as contended by the ex parte applicant herein the recourse is to move Parliament to correct the same and not to urge this Court to in effect amend the same. It is not competent to any court to proceed upon an assumption that Parliament has made a mistake, there being a strong presumption that Parliament does not make mistakes. If blunders are found in legislation, they must be corrected by legislature, and it is not the function of the Court to repair them. Thus while terms can be introduced into a statute to give effect to its clear intention by remedying mere defects of language and to correct obvious misprints or misnomers no provision which is not in the statute can otherwise be implied to remedy an omission. See **Italframe Ltd vs. Mediterranean Shipping Co. [1986] KLR 54; [1986-1989] EA 174.**

17. In this case what the applicant is asking the Court to do is not just to correct mere defects of language or obvious misprints or misnomers but to substantially alter the legislative intent as enacted in section 175 of the Act by inserting a clause therein whose effect would amount to the extension of time as enacted by the Legislature. That, in my mind this Court cannot do.

18. The applicant has however justified its failure to comply with section 75 of the Act on the basis that the Respondent provided it with the decision on 28th July, 2016 hence time ought to be deed to start running from the date the same was furnished. Section 175 however provides that judicial review is to be sought ***within fourteen days from the date of the Review Board's decision***. That was the same phrase employed in section 100(1) of the repealed ***Public Procurement and Disposal Act*** which was the subject of this Court's decision in **Republic vs. Public Procurement Administrative Review Board & Another ex parte Teachers Service Commission & Zacs Construction Ltd** (supra) in which this Court expressed itself as hereunder:

"The applicant has however justified its failure to comply with section 100(1) of the Act on the basis that it was unable to secure a hard copy of the decision in order to make a decision whether to apply for judicial review or not and that by the time it got the decision there were only three days left. Section 100(1) however provides that 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*. It does not say that the time starts running from the date when a copy of the decision is supplied."

19. On the issue of the delay in supplying copies of the Board's decision to the parties, this Court has decried the same in **Republic vs. Public Procurement and Administrative Review Board *ex parte* Akamai Creative Limited Misc Civil Applic. No. 513 of 2015** where the Court expressed itself as follows:

"It was contended that the Board's failure to furnish the applicant with a signed decision until after the expiry of 7 days after the delivery of the decision violated Article 47 of the Constitution. In my view, Article 47 of the Constitution requires that parties to an administrative proceedings be furnished with the decision and the reasons therefor within a reasonable time in order to enable them decide on the next course of action. It is not merely sufficient to render a decision but to also furnish the reasons for the same. Accordingly where an administrative body unreasonably delays in furnishing the parties with the decision and the reasons therefor when requested to do so, that action or inaction may well be contrary to the spirit of Article 47 aforesaid."

20. The recurrent delays by the Respondent in supplying parties with copies of its decision was lamented by this Court in **Republic vs. Public Procurement Administrative Review Board & 2 Others Ex-parte Coast Water Services Board & Another [2016] eKLR** where this Court expressed its sentiments thereon as follows;

> **"A complaint was raised with respect to the delay in supplying the parties with typed copies of the proceedings and decision. This complaint I must say with respect to the Board is a recurring complaint in many applications. In my view efficiency in procurement processes not only demands speedy determination of the disputes but also encompasses speedy and timely availability of the decisions to the parties so as to enable them decide on their next course of action. It is therefore my view that to unreasonably delay in furnishing proceedings and decisions to the parties amounts to unfair administrative action…The Board is therefore advised to put into motion the necessary steps to rectify this problem. Where the Court finds that the period between the furnishing of the proceedings and the decision and the last day for filing the request for review was too short to enable the party challenge the decision, the Court may well be entitled to find that such action was meant to deprive the said party of the opportunity to challenge the said decision hence would amount to a violation of the letter and/or spirit of Article 47 of the Constitution as read with section 6 of the *Fair Administrative Action Act, 2015*."**

21. The Board ought take the above sentiments seriously in future if only to void imputation of malice on their part.

22. That said, it is however clear that there is nothing wrong with legal provisions limiting the timelines for applying for orders of certiorari within a period of less than six months from the date of the decision sought to be challenged. A reading of section 2 of the Act clearly reveals that one of the objects of the procurement process is speed hence public policy and interest is geared towards expeditious resolution of procurement disputes. See **Republic vs. Public Procurement Review Administrative Board & Another ex parte Selex Sistemi Integrati** (supra).

23. It follows that these proceedings were commenced contrary to the express stipulation of section 175(1) of the Act and are consequently fatally incompetent.

Order

24. It follows that the application herein must fail on that basis. In the result this application is struck out with costs to the Interested Party.

25. It is so ordered.

Dated at Nairobi this 19th day of September, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Wanjohi for the Applicant

Mr Masika for the interested party

Cc Mwangi