



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

H.C JUDICIAL REVIEW NO. 13 OF 2013

MUHORONI SUGAR COMPANY LIMITED..... APPLICANT

VERSUS

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD RESPONDENT

RULING

By the Notice of Motion dated 2nd April, 2013 Muhoroni Sugar Company Limited (in receivership) (the exparte applicant) seeks an order of certiorari to remove into this court the decision of the public Procurement Administrative Review Board (the Respondent) dated 21st February, 2013 for purposes of its being quashed and that on such removal the decision be quashed. It also seeks the costs of these proceedings.

The gist of the application is that the Respondent had no jurisdiction to adjudicate the dispute between the applicant and the interested party- **Lavington security limited** termination of the procurement proceedings and before the signing of the contract; that the respondent did not notify the applicant of the date of reading the award which was in bad faith, took away its right to be heard in violation of the principles of natural justice and was in violation of the cardinal rule of fairness and the applicant's legitimate expectation of the respondent as a quasi-judicial public body. Further that the decision of the board was unreasonable and had the effect of frustrating the purpose and intent of the provisions of the Act giving the applicant the discretion to terminate procurement proceedings before entering a contract.

The application is opposed. In an affidavit sworn on 17th April, 2013, **Pauline O. Opiyo** the Acting secretary of the Respondent/Board deposes that the board received the third parties' request for Review on 22nd January, 2013 and that it heard submissions from both sides and delivered its ruling on 21st February, 2013. She deposes that the applicant herein was aware of the date of the ruling/award as it was represented at the hearing of 19th February, by one Thomas Makeni, a receiver Manager submitted before the board and was present when the board informed the parties the date of the ruling. She further deposes that the board ordered the Applicant/procuring entity to finalise the procurement process upon finding that the purported termination of the tender was not done in accordance with **section 36 of the Act** and that termination had been done after the procurement proceedings had been suspended pursuant to **section 94 of the Act** following the filing of the request. She deposes therefore that the procuring entity had jurisdiction in the matter and that the applicant/procurement entity was duly informed of the boards ruling.

The directions given by the court were that the application would be canvassed by way of written submissions and these were duly filed. I shall not reproduce them here but suffice it to say that the same have been carefully considered alongside the application, the grounds thereof, the affidavits, annexures thereto as well as the authorities cited and relevant law.

Briefly the background of this matter is that sometimes in August, 2012 the applicant/procuring entity invited bids for provision of security services under a tender No. **Musco/TSS/2012-2013**. The third party herein participated and by a letter dated 29th October, 2012 was notified of its bids-success. In the letter the applicant/procuring entity informed it that the commencement date would be communicated later. On 2nd November, 2012 the third party accepted the award and according to the third party the date of commencement was agreed to be 31st December, 2012 when the current providers contract was to expire. The third party also contended that according to the tender documents the procuring entity/applicant was required to execute the contract within 30 days of the award which days would have lapsed on 2nd December 2012. By 1st January, 2013 the Applicant/procurement entity had not prepared the contract and a follow up meeting was held on 2nd January, 2013 and on 15th January, 2013 the third party wrote to the applicant/procuring entity asking it to execute the contract. It was then that it received a letter from the applicant/procuring entity to the effect that there was some investigation concerning a complaint by another firm and so they were not yet ready to execute the contract. It was at this point that the third party sought the intervention of the Board/Respondent. In its ruling delivered on 21st February, 2013 the board ordered the procuring entity/applicant to finalise the procurement process within 30 days. Being aggrieved the procurement entity/Applicant filed this Notice of Motion. These being judicial review proceedings this court is not so much concerned with the merit of the determination of the board but with the process by which it was arrived at and more so whether the board had jurisdiction to hear and determine the matter.

Section 36(i) of the Public Procurement and Disposal Act allows a procuring entity to at any time terminate procurement proceedings without entering into a contract. Subsection 2 however, matter it mandatory for the procurement entity to give prompt notice of the termination to each person who submitted a tender. The applicant/procuring entity contends that it was entitled to terminate the procurement proceedings as it did and that therefore the board/respondent had no jurisdiction to hear the review requisitioned by the third party as its jurisdiction having been ousted by section 36(6) which provides:-

“ A termination under this section shall not be reviewed by the Review board or a court.”

On its part the board/respondent contends that since the procuring entity/applicant had not notified the third party that it had terminated the procurement proceedings it had jurisdiction. The procuring entity/Applicant entitled to terminate the procurement proceedings without entering into a contract. Section 68(3) provides that no contract is formed between the person submitting the success tender and the procuring entity until the written contract is entered into “ Section 68 (2) provides that the written contract shall be entered into within the period specified in the notification to the tenderer that the has been successful in this case the letter dated 29th October, 2012. It will be noted that this letter makes no mention of the written contract but only promises to communicate the date of commencement of the tender later. Three months later no contract had been entered into and clearly by the time the third party filed its request for review on 21st January, 2013 the procurement proceedings had not been terminated. Indeed, it was not until 18th February, 2013 that the procuring entity/applicant purported to cancel the tender. This a day before the board was scheduled to hear the matter. Indeed the third party was not even aware of the termination yet section 6(2) of the Act requires that those who participated in the tender be notified promptly. The board had by a letter dated 22nd January 2013-Annexure P005 notified the procuring entity/applicant that it had received the request for review and that the procurement process had been suspended. By then the procuring entity had not terminated the proceedings. It did so only the day before the review was heard and by then the board/respondent had suspended the proceedings as it was empowered to under section 94 of the Act. The board had jurisdiction to hear the review. Indeed even after the procuring entity purported to cancel/terminate the proceedings it did not notify the third party. It did so only at the hearing. The procuring entity/applicant was duly represented at the review hearing and its representative was duly notified of the date of the ruling. This is evidenced by the record. The board did not act unfairly in reading its ruling in their absence since they had been duly notified.

In the end I find no merit in the Notice of motion and dismiss it with costs to the board/respondent. It is

so ordered;

E.N. MAINA

JUDGE

Signed, dated and delivered this 26th day of February, 2015.

In the presence of; _

Miss Alinaitwe for Exparte application

No Appearance for the Respondent.

Court clerk : Moses Okumu