



**Riley Services Limited v Judiciary (Civil Appeal 38 of 2015)
[2015] KEHC 6976 (KLR) (Civ) (17 February 2015) (Ruling)**

Riley Services Limited v Judiciary [2015] eKLR

Neutral citation: [2015] KEHC 6976 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL
CIVIL APPEAL 38 OF 2015
A MABEYA, J
FEBRUARY 17, 2015**

BETWEEN

RILEY SERVICES LIMITED APPELLANT

AND

JUDICIARY RESPONDENT

**Challenges to the decisions of Public Procurement Administrative Review Board to be made via
Judicial Review Proceedings only**

Reported by Beryl A Ikamari

Civil Practice and Procedure - preliminary objection - threshold to be met in raising a preliminary objection - whether the points raised in a preliminary objection required certain facts to be ascertained.

Statutes - statutory interpretation - section 100 of the Public Procurement and Disposal Act - whether a challenge to the decision of the Public Procurement Administrative Review Board could only be made via Judicial Review proceedings - Public Procurement and Disposal Act (Cap 412C), section 100; Civil Procedure Rules, 2010, Orders 42 & 43.

Brief facts

The applicant instituted a suit to challenge a public procurement process for the provision of security services to the Judiciary. The suit was instituted *via* a memorandum of appeal as an appeal from a decision of the Public Procurement Administrative Review Board, from which a review had been sought concerning the same procurement process for security services. The applicant also made an application for a stay to restrain the respondent (the Judiciary) from entering into contracts for the provision of security services with Lavington Security Services Ltd and Bedrock Security Services Ltd.

Lavington Security Services Ltd and Bedrock Security Services (the interested parties) responded through a preliminary objection contending that the appeal against the decision of the Public Procurement



Administrative Review Board could only be made via judicial review in accordance with the procedure set out in order 53 of the Civil Procedure Rules 2010.

Issues

- i. Whether points raised in a preliminary objection application required certain facts to be ascertained so as to meet the required legal threshold for its determination.
- ii. Whether a challenge to the decision of the Public Procurement Administrative Review Board could only be made through judicial review proceedings.

Relevant provisions of the Law

Public Procurement and Disposal Act (Cap 412C);

section 100

(100) (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.

Held

1. The preliminary objection had been raised on the basis of the facts pleaded by the applicant. There was no need for any facts to be ascertained in order for it to be determined and it therefore met the required threshold and was not premature.
2. The High Court had original and appellate jurisdiction as conferred upon it by article 165 of the Constitution of Kenya 2010 and legislation. It also had supervisory jurisdiction as provided for in article 165(6) of the Constitution of Kenya 2010.
3. The terms “appeal and judicial review” as used in section 100 of the Public Procurement and Disposal Act (Cap 412C) referred to one and the same thing, that is, seeking a relook at the decision made by the Public Procurement Administrative Review Board.
4. Judicial Review was a process by which exercise of powers by statutory bodies were checked, reviewed or looked at by the High Court. Both the Public Procurement and Disposal Act and the Interpretation and General Provisions Act (Cap 2) did not define the term “appeal”. However, the term was defined in the Black’s Law Dictionary, 9th Edition 2009 at page 12 as a proceeding undertaken to have a decision reconsidered by a higher authority; especially, the submission of a lower court’s or agency’s decision to a higher court for review and possible reversal.
5. The marginal notes to section 100 of the Public Procurement and Disposal Act indicated that the section dealt with the right to judicial review to procurement. Section 100(2) of the Act referred to an appeal whilst the definition offered to the term appeal in the Black’s Law Dictionary was to the effect that an appeal included judicial review.
6. The intention of the drafters of the Public Procurement and Disposal Act was that decisions relating to procurement were to be expedited and concluded within the shortest time possible. The procedure given did not envisage the normally long and tedious process of appeals under Order 42 of the Civil Procedure Rules 2010. The decisions of the Public Procurement Administrative Review Board were meant to be swiftly challenged by way of judicial review only.

Preliminary objection upheld.



Orders

The applicant was at liberty to file judicial review proceedings over the dispute.

Citations

East Africa

1. *Macharia v Kenya Commercial Bank & 2 others* [2012] 3 KLR 199 - (Explained)
2. *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696 - (Explained)
3. *Ramadhani v Republic* [1969] EA 269 - (Explained)
4. *Republic v Ministry of Interior and Co-ordination of National Government Ex parte ZTE & another* Judicial Review No 441 of 2013 - (Mentioned)
5. *Republic v Public Procurement Administrative Review Board & another Ex parte Selex Sistemi Integrati* [2008] KLR 728- (Distinguished)

Statutes

East Africa

1. Civil Procedure Rules, 2010 (cap 21 Sub Leg) order 42 rule 6; order 51; order 53- (Interpreted)
2. Constitution of Kenya, 2010 articles 10, 27(1); 47(1); 50(1); 165(3) (e)(5)(6); 227(1); 232(1); 259(1)(3) - (Interpreted)
3. Interpretation and General Provisions Act (cap 2) In general - (Cited)
4. Public Procurement and Disposal Act, 2005 (Act No 3 of 2005) sections 2(a); 100(1-4) - (Interpreted)

Texts and Journals

Garner, BA., (Ed) (2009) *Black's Law Dictionary* St Paul Minnesota:

West Group 9th Edn p 12

RULING

1. On 3rd February, 2015, the Applicant filed a Notice of Motion expressed to be under Articles 10, 27(1), 47(1), 50(1), 227(1), 232(1) and 259(1) & (3) of the Constitution of Kenya; Section 100 of the Public Procurement and Disposal Act 2005, Order 42 Rule 6 and Order 51 of the Civil Procedure Rules. The Applicant sought an order of stay to restrain the Respondent from entering into or executing contracts for provision of security with Lavington Security Services Ltd and Bedrock Security Services Ltd. The Applicant also sought that the matter be heard as a matter of priority under Sections 2(a) and 100 of the Public Procurement and Disposal Act.
2. On being served the Respondent did not file any response but Lavington Security Ltd and Bedrock Security Services Ltd, as Interested Parties, took out a Preliminary Point of Law against the Motion. That objection dated 9th February, 2015 was argued before me on 9th February, 2015 and is the subject of this ruling. In the Notice, the Interested Parties objected to the Motion on two grounds. Firstly, that under Section 100 (1) and (2) of the Public Procurement and Disposal Act 2005, appeals to the High Court are supposed to be by way of Judicial Review and that, Secondly the procedure for Judicial Review proceedings is as set out in Order 53 of the Civil Procedure Rules and that in the premises the Applicant's Motion was incurably defective.
3. Mr. Bundotich appearing for the Interested Parties submitted that, under Section 100(1), (2), (3) and (4) of the Public Procurement and Disposal Act (hereinafter "the Act") the Procedure for appealing is by way of Judicial Review which must be determined within 30 days; that Judicial Review is governed by Order 53 and does not presuppose the filing of a Memorandum of Appeal as the Applicant had done in the present case. In his view, what Section 100(2) had done was to give a right of appeal and



- not an alternative mode of challenging the decision of the Public Procurement Administrative Review Board (“PPARB”). He therefore, urged that the Motion and Memorandum of Appeal be struck out.
4. Mr. Gachuba, Learned Counsel for the Applicant opposed the objection. According to him, the Preliminary Objection was mischievous and was intended to derail the hearing of the application and thereby enable the Interested Parties conclude a contract with the Respondent. That the objection did not meet the threshold of *Mukisa Biscuits Case* as no evidence had been proffered. That since facts had not crystallized the Preliminary objection was premature.
 5. Mr. Gachuba further submitted that under Section 100(2) of the Act an appeal to the High Court is allowed; that Section 100 does not restrict the right of an aggrieved party to the procedure of Judicial Review only under the Act. Counsel urged that this court has jurisdiction to entertain the Motion because, on the authority of *Samuel Kamau Macharia v KCB & 2 others* (2012) eKLR jurisdiction is conferred by either the *Constitution* or statute. That in the instant case, Section 100(2) of the Act and Article 165 (3) (e) of the *Constitution* of Kenya gives aggrieved parties from the decision of the PPARB a right to appeal to this court; that since Judicial Review restricts itself to decision making process, appeals deal with merits of the decisions. That in the instant case, the application was challenging the merit of the decision of the PPARB. That the Applicant was entitled to challenge the merit of the decision because the PPARB had made a decision on matters such as the competence of the tender committee. The decision in *Republic v Ministry of Interior and Co-ordination of National Government Ex parte ZTE & another* (2014) eKLR was cited as an authority for that proposition.
 6. Counsel argued that Section 100(4) of the Act had been declared unconstitutional in *Republic v Public Procurement Administrative Review Board & another Ex parte Selex Sistemi Integrati* (2008) eKLR. That in the premises this court has jurisdiction to deal with the current matter.
 7. I have carefully considered the documents on record, the submissions of counsel and the authorities submitted by counsel for the Applicant.
 8. In *Mukisa Biscuits Co. v West End Distributors* (1969) EA 696, Sir Charles Newbold President held at page 701: -

“ A preliminary objection is in the nature of what used to be a demur. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”
 9. To my mind, what the court meant by the foregoing was that, once a party raises a preliminary Objection, he is taken to admit all the facts pleaded by the other side to be correct. It does not mean that all the parties to the dispute must plead their facts or evidence to be settled before a Preliminary Objection can be raised as contended by the Applicant . In this regard, I reject the submission by Mr. Gachumba that the Preliminary Objection is premature. What I will hold is that the Interested parties, and by extension the Respondent who was served but failed to file a response, agree to the correctness of the matters pleaded by the Applicant in its Motion before me.
 10. The next issue to consider is whether this court has jurisdiction to entertain the Motion filed under an Appeal. Mr. Bundotich’s contention is that the appeal to this court should have been by way of a Judicial Review application while Mr. Gachuba’s position is otherwise.



11. In the case of *Samuel Kamau Macharia & another v KCB Ltd & 2 others* (2012)eKLR, the Supreme Court held that: -

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

12. The Jurisdiction of this court is decreed by Article 165 of the Constitution. The only limitation of that jurisdiction is to be found in Article 165 (5). Its jurisdiction is unlimited and extends to that of original as Appellant as may be conferred upon on it by legislation and Article 165 (3) (e). This includes its supervisory jurisdiction under Article 165 (6) of the Constitution.

13. Section 100 of the Act provides: -

“ 100

- (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.

14. It is clear from the foregoing that, the Section gives both the right and the procedure of a recourse for a party aggrieved by the decision of the PPARB. To my mind the terms “Appeal and Judicial Review” in the circumstances of the Act, may mean and refer to one and the same thing, i.e. seeking a relook at the decision made by the PPARB.

15. Judicial Review is a process by which exercise of powers by statutory bodies are checked, reviewed or looked at by the High Court. Both the Act and the Interpretation and General Provisions Act, Cap 2 of the Laws of Kenya do not define the term “appeal”. However, the term has been defined in Blacks Law Dictionary, 9th Edition 2009 at page 12 as: -

“A proceeding undertaken to have a decision reconsidered by a higher authority; especially, the submission of a lower court’s or agency’s decision to a higher court for review and possible reversal.”

16. From the marginal notes to Section 100, the Section deals with “Right to judicial Review to Procurement” Sub-Sections 1 and 4 of Section 100 specifically refer to the procedure for challenging the decision of the PPARB as being through Judicial Review. It would seem that the marginal notes intended to show that Section 100 of the Act was meant to deal with the Right of Judicial Review on



PPARB matters. Courts have hitherto used marginal notes to interpret sections of statutes. In the case of *Ramadhani v Republic* (1969) EA 269, Platt J held: -

“It could be said that the various subsections of Section 269 are not necessarily interrelated and that must be so. But I think the marginal notes may afford some guide..... I have on previous occasion considered the validity of using marginal notes in the interpretation of the meaning of the corresponding Section of the legislation concerned. Suffice it, therefore, to say, that in my opinion the modern view is that marginal notes may be used in assisting the interpretation of the relevant provision of the law.

That being the case, it may as well be that Section 100 relate to the right of challenging, the decisions of the PPARB by way of Judicial Review.

17. The term “appeal” appears in subsection (2) of Section 100. The Applicant contends that that term refers to normal appeals lodged in the High Court from subordinate courts and tribunals whereby merits of decisions of such courts and tribunals are challenged. Mr. Gachuba further submitted that Subsection 4 of the Section 100 has since been declared unconstitutional.
18. My take of it is that, from the definition of the term “appeal” given by Black’s Law Dictionary, “appeal” includes Judicial Review. This is so because, both appeal and Judicial Review are proceedings undertaken in a higher court to challenge a decision of a lower body. I take the view that in order to properly construe subsection 2 of Section 100, the same has to be read in the context of the whole of Section 100 of the Act.
19. Section 100 of the Act gives both the right and procedure of how to challenge the decisions of the PPARB. In my view, if the term appeal used in Section 100(2) meant the normal Appeal where merits of the decisions are challenged, there were two ways in which the drafters of that Section would have effected such an intention. Firstly, Section 100(1) should have stated expressly that the decision of the Board shall be final unless “Judicial Review or an appeal thereof commences within 14 days...” or Secondly, subsection 2 should have been separate from the rest of the provisions of Section 100 which relate to the Challenge of the decision of the Board by way of Judicial Review.
20. Subsection 4 may seem to be unreasonable. The reasons why the time frame was being addressed in that sub-section, in my view, is the very nature of the matters that pertain to PPARB decisions. They relate to the long procedures of public procurement of services or goods vis avis public spending. Unless such matters are concluded expeditiously, public spending which is ordinarily pegged on government financial years will become cumbersome. I have looked at the case of *Republic v Public Procurement Administrative Review Board & another* (2008) eKLR cited by Mr. Gachuba but I have not and I am unable to conclude that the sub-section was declared unconstitutional. It was only held that, the sub-section did not oust the High Court jurisdiction to hear and determine matters touching on PPARB outside the timeframe given therein.
21. In the premises, I hold that it was the intention of the drafters of the *Public Procurement and Disposal Act* 2005 that decisions relating to procurement be expedited and concluded within the shortest time possible. The procedure given did not envisage the normal long and tedious process of appeals under Order 42 of the *Civil Procedure Rules*. The decisions of the PPARB are meant to be swiftly challenged by way of Judicial Review only.
22. Accordingly, I uphold the Preliminary objection and the Notice of Motion together with the Memorandum of appeal filed on 3rd February, 2015 are hereby struck out. Since the Interested Parties had not been enjoined, I make no order as to costs.



23. The Applicant is at liberty to lodge a Judicial Review application in the normal manner.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF FEBRUARY, 2014.

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A MABEYA

JUDGE

