



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**JR CASE NO. 21 OF 2015**

**REPUBLIC.....APPLICANT**

**VERSUS**

**PUBLIC PROCUREMENT**

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

**CENTRE FOR MATHEMATICS, SCIENCE &**

**TECHNOLOGY IN AFRICA (CEMESTEA).....2<sup>ND</sup> RESPONDENT**

**LAVINGTON SECURITY LTD .....3<sup>RD</sup> RESPONDENT**

**Ex-parte**

**APEX SECURITY SERVICES**

**JUDGEMENT**

1. The ex-parte Applicant, Apex Security Services through the notice of motion application dated 6<sup>th</sup> February, 2015 prays for orders that:

**“1. An order of CERTIORARI to quash and or suspend the Ruling of Public Procurement Oversight Authority made on the 9<sup>th</sup> Day of January 2015 nullifying the award for provision of security services for the year 2014-2016 granted to the Applicant herein by 2<sup>nd</sup> Respondent on 31<sup>st</sup> October, 2014.**

**2. An order of MANDAMUS compelling the 2<sup>nd</sup> Respondent, the Center for Mathematics, Science and Technology in Africa (hereinafter “CEMESTEA”) to perform the contract for provision of security services at CEMESTEA that it entered in with the Applicant on the 15<sup>th</sup> day of November 2014.**

**3. An order of MANDAMUS compelling the 2<sup>nd</sup> Respondent to withdraw the re-advertisement of the tender for provision of security services in the Daily Nation and the Standard Newspaper both of 22<sup>nd</sup> January, 2015 on pages 28 and 27 respectively until the final determination of this matter.**

**4. An order for PROHIBITION barring the 2<sup>nd</sup> Respondent from accepting and/or further accepting bids from interested bidders for the re-advertised tender of provision of security services in the said Daily Nation and the Standard newspapers of 22<sup>nd</sup> January, 2015, pending the hearing and final determination of this Application.**

**5. An order of PROHIBITION to bar the enforcement of the orders issued by the 1<sup>st</sup> Respondent made on the 9<sup>th</sup> Day of January 2015 nullifying and/or substituting the award for provision of security services for the year 2014-2016 by the Applicant to the 2<sup>nd</sup> Respondent.**

**6. An order of PROHIBITION barring the 2<sup>nd</sup> Respondent from receiving security services from the 3<sup>rd</sup> Respondent or any other person or company other than the Applicant until further Orders of this Honourable Court.**

**7. Costs of this Application be provided for.”**

The application is supported by the chamber summons application for leave, the verifying affidavit sworn on 23<sup>rd</sup> January, 2015 by Sydney Wahome Maina the Operations Director of the Applicant and the exhibits attached to the said affidavit.

2. The Public Procurement Administrative Review Board (“the Board”), Center for Mathematics, Science & Technology in Africa (CEMESTE A) and Lavington Security Limited are the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents respectively.

3. Briefly, the 2<sup>nd</sup> Respondent on 31<sup>st</sup> March, 2014 advertised in the local dailies Tender No CEMESTE A/TC/55/05/2014 for provision of security services for the year 2014 – 2016. The closing date of the tender was 25<sup>th</sup> April, 2014. At the conclusion of the tendering process, the Applicant was notified that its bid was successful. A contract was formally entered into between the Applicant and the 2<sup>nd</sup> Respondent on 15<sup>th</sup> November, 2014.

4. On 11<sup>th</sup> December, 2014 the Applicant received a letter asking for a delay in the taking over of the provision of security services on the ground that 3<sup>rd</sup> Respondent had raised some technical issues. Subsequently on 29<sup>th</sup> December, 2014 the Applicant received a notification and a hearing notice from the Board in respect to Application for Review No. 51 of 2014.

5. On 9<sup>th</sup> January, 2014, the Board delivered its decision and gave orders as follows:

**“a) The Applicant’s Request for Review filed on 11<sup>th</sup> December, 2014 be and is hereby allowed.**

**b) The tender No. CEMASTE A/TC/55/05/2014-2016 for provision of security services to the Centre for Mathematics, Science and Technology in Africa together with all the procurement processes undertaken pursuant thereto are hereby annulled.**

**c) The purported notification of award of contract for provision of security services for the year 2014-2016 by the said Procuring Entity, Centre for Mathematics, Science and Technology in Africa under tender No. CEMASTE A/TC/55/05/2014-2016 to the successful bidder is hereby also annulled.**

**d) The Procuring Entity is directed to re-tender afresh for the Provision of Security Services for the years 2014-2016 within a period of Fifteen (15) days from today’s date.**

**e) Each party shall bear its own costs of this Request for Review.”**

6. The Applicant being aggrieved by the said decision has filed these proceedings. From the documents filed in Court, and in particular the statutory statement, the Applicant seeks relief on the ground that the Board lacked jurisdiction to entertain the request for review on two grounds. The first ground is that the application for review was filed out of time. The second ground is that the Board's jurisdiction had been ousted since the Applicant and the 2<sup>nd</sup> Respondent had already signed a contract by the time the request for review was filed by the 3<sup>rd</sup> Respondent.

7. The 2<sup>nd</sup> Respondent (the Procuring Entity) supported the application through a replying affidavit sworn on 9<sup>th</sup> February, 2015 by its Deputy Director and Chairman of the Tender Committee, Moses Kawa. According to the 2<sup>nd</sup> Respondent it complied with all the laws pertaining to procurement in respect of the tender in question.

8. The 2<sup>nd</sup> Respondent avers that it notified all the unsuccessful bidders, including the 3<sup>rd</sup> Respondent, of the result of the tender on 31<sup>st</sup> October, 2014. The Procuring Entity concedes that the reasons given to the 3<sup>rd</sup> Respondent as to why its bid was unsuccessful were erroneous.

9. The Procuring Entity avers that on 15<sup>th</sup> November, 2014 it entered into a written contract for the provision of security services with the Applicant and this was in pursuance of the award made on 31<sup>st</sup> October, 2014. The 2<sup>nd</sup> Respondent faults the Board for failing to consider that there was a written contract between it and the Applicant. Further, that the Board failed to consider the fact that the Applicant was awarded the tender on merit as it had provided the most favourable quotation.

10. The 2<sup>nd</sup> Respondent admits that the award was made outside the validity period, but submits that the decision to award the tender to the Applicant was fair and the lapse of the validity period did not prejudice any bidder in anyway. It is the Procuring Entity's case that the procurement of the said services was in accordance with Article 227 of the Constitution which requires a fair, equitable, transparent, competitive and cost effective procurement. Further, that even though the award was made outside the validity period, it was neither discriminatory nor unfairly favourable to any of the bidders.

11. The Board opposed the application through a replying affidavit sworn on 2<sup>nd</sup> February, 2015 by its Principal Officer, Philip J. Okumu. In summary, the Board asserts that its decision was rational, reasonable, logical, lawful, impartial and in line with public policy and public interest and the intention of Parliament in enacting the Public Procurement and Disposal Act, 2005 (PP&DA). The Board therefore urged this Court to dismiss the application as it lacks merit.

12. It was submitted on behalf of the Board that since the 120 days validity period had lapsed on 25<sup>th</sup> August, 2014, all actions taken thereafter in regard to the tender were null and void. The purported award of the tender on 31<sup>st</sup> October, 2014 was in breach of Section 67(1) of the PP&DA which provides that a tender shall be awarded to the successful tenderer during the tender validity period for the subject tender. Further that, although the Section 61 of the PP&DA provides for extension of the validity period by a procuring entity, no such extension was done in the instant case and no notice of extension of the validity period was issued to any of the bidders. The Board therefore asserted that as a consequence, the tender awarded to the Applicant was a nullity.

13. The Board contended that it made a finding that no notice was issued on 31<sup>st</sup> October, 2014, as alleged by the Procuring Entity, informing the 3<sup>rd</sup> Respondent that its bid was unsuccessful. Further, that the two reasons given to the 3<sup>rd</sup> Respondent as to why its bid was unsuccessful were erroneous. Firstly it was stated that the 3<sup>rd</sup> Respondent had not provided proof of funds and secondly that it had failed to attach an integrity declaration form as required under the mandatory requirements. It was the Board's case that it found that the 3<sup>rd</sup> Respondent had not been disqualified on these grounds at the preliminary stages but actually proceeded up to the final stage where its bid was found to be non-responsive on the ground that it was not the lowest bidder. The Board asserted that a notice that contains the wrong reasons is invalid and that it why it reached the conclusion that the 3<sup>rd</sup> Respondent was never notified.

14. On the assertion that a contract had already been signed and the Board had no jurisdiction to hear the matter, it was submitted that the purported contract was null as it was entered into outside the tender validity period.

15. The 3<sup>rd</sup> Respondent did not file any response to the application or submissions despite being given ample time to do so.

16. The purpose of the remedy of judicial review is now well established. In the House of Lords decision of **R v Chief Constable of North Wales, ex p. Evans [1982] UKHL 10 (22 July 1982)** it was stated that judicial review is available to prevent excessive exercise of power by administrative bodies or officials; to ensure that an individual is given fair treatment by administrative authorities; to keep administrative excesses in check; and to provide remedy to those aggrieved as a result of excessive exercise of power by administrative bodies.

17. The summary of it is that the remedy of judicial review is meant to check maladministration. Maladministration can manifest itself in various forms and it is upon the Judge hearing a given application to identify the malady and issue the necessary cure.

18. However, the reach of judicial review is limited to illegality, irrationality/unreasonableness and breach of the rules of natural justice. The purpose of judicial review was aptly captured by Justice Kasule in the Ugandan case of **Pastoli v Kabale District Local Government Council & others [2008] 2 EA 300** when he stated that:

**“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University*, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).**

**Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality.....**

**Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph “E”.**

**Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876).”**

19. Considering the pleadings and the submissions filed in this Court, the only question to be answered is whether the Board had jurisdiction to entertain the request for review.

20. The Applicant submits that the Board acted outside its jurisdiction for two reasons. The first reason is that since the request for review was filed outside the 14 days allowed by Regulation 73 of the Public Procurement and Disposal Regulations, 2006 (“the Regulations”) the Board had no jurisdiction to hear the matter. The second reason is that since a contract had been signed as provided by Section 68 of the PP&DA, the Board’s jurisdiction was automatically ousted by Section 93(2)(c) of the same Act which

provides that where a contract has been signed in accordance with Section 68 the tender in question shall not be subject to review.

21. In the award made on 9<sup>th</sup> January 2015 the Board at pages 7 and 8 identified the following three issues for its determination:

**“1. Whether the Procuring Entity awarded the subject tender to the successful bidder outside the tender validity period contrary to the provisions [of] Section 67(1) as read together with Section 61 of the Public Procurement and Disposal Act (2005).**

**2. Whether the applicant was served with a notification that its tender was unsuccessful and whether any notice purportedly served on the Applicant by the Procuring Entity was valid and in compliance with the provisions of Section 67(1) and (2) of the Public Procurement and Disposal Act (2005).**

**3. Whether the contract dated 25<sup>th</sup> November, 2014 purportedly executed between the Procuring Entity and the successful bidder deprived the Board of jurisdiction to hear and determine the applicant’s Request for Review by virtue of the provisions of Section 67(1), 68(1) and (2) and 93(2)(c) of the Public Procurement and Disposal Act (2005).”**

22. I have carefully perused the decision of the Board and I do not seem to find a determination by the Board as to the exact date the 3<sup>rd</sup> Respondent was notified by the Procuring Entity that its bid had failed. What is clear is that the 3<sup>rd</sup> Respondent filed its application for review on 9<sup>th</sup> December, 2014. The Procuring Entity insisted that it had notified the 3<sup>rd</sup> Respondent of the results on 31<sup>st</sup> October, 2014.

23. The Board found that there was no evidence that the 3<sup>rd</sup> Respondent had been notified about the outcome of the tender on 31<sup>st</sup> October, 2014. The Board then went ahead and stated at page 16 that:

**“The law on notification requires that a notice under Section 67 of the Act must contain reasons. A notice which admittedly contains the wrong reasons, a fact that was expressly admitted by the Procuring Entity cannot be a valid notice particularly considering the purpose of a notification. A notification with reasons is meant to enable a tenderer to among other things know the reasons why its bid was not successful and to decide depending on the reasons given, whether to challenge the Procuring Entity’s decision or not.**

**Finally on this issue and arising from the Board’s finding on issue No. 1, this tender lapsed after 25<sup>th</sup> August, 2014 and as the Board has already observed all or any steps taken pursuant to a tender which has lapsed, including the issuing of any notices is a nullity or are nullities.”**

24. Nowhere does the Board answer the question as to when the 3<sup>rd</sup> Respondent received notification. It is clear that the 3<sup>rd</sup> Respondent was notified and that is why it filed a request for review. The only date given for that notification was given by the Procuring Entity and that date is 31<sup>st</sup> October, 2014.

25. Rule 73(2)(c) of the Regulations provides that:

**“(2) The request referred to in paragraph (1) shall—**

**“(c) be made within fourteen days of—**

**(i) the occurrence of the breach complained of where the request is made before the making of an award; or**

**(ii) the notification under section 67 or 83 of Act;”**

26. The Applicant's assertion that the request for review was filed 14 days after notification of the results of the tender has not been rebutted. The Board therefore had no jurisdiction to entertain the matter.

27. As stated by the Supreme Court in **Samuel Kamau Macharia v Kenya Commercial Bank Limited & 2 others [2012] eKLR** jurisdiction is everything and without jurisdiction a court or tribunal has no business inquiring into the matter before it. Without jurisdiction the Board had no business entertaining the matter however grave the allegations in respect of the procurement. The seriousness of the allegations against the Procuring Entity did not mandate the Board to overlook the fact that the application had been filed outside the period provided by the rules.

28. In **Petition No. 7 of 2014 Mary Wambui Munene v Peter Gichuki King'ara & 2 others**, the Supreme Court overturned the decision of the Court of Appeal which had nullified the election of the Appellant as a Member of Parliament for Othaya Constituency on the ground that the election petition had been filed in the High Court outside the statutory period for filing election petitions. The Court reached the decision notwithstanding the fact that the Court of Appeal had concluded that there were many breaches of the law and regulations in the election of the Appellant.

29. **A similar decision was reached in the case of Paul Posh Aborwa v Independent Electoral and Boundaries Commission and 2 Others, Civil Appeal No. 52 of 2013**, where the Court of Appeal declined to entertain a matter on the ground that it had no jurisdiction as the same had been filed out of time. The Court held:

***"The result of the foregoing is that we uphold the preliminary objection and determine that we have no jurisdiction to hear and determine the appeal emanating as it does from the proceedings that are a nullity by reason of having been instituted outside of the time limit set out under Article 87(2) of the Constitution of Kenya, 2010."***

30. In **Republic v Principal Secretary Ministry of Health and another, exparte Apex Communication Limited trading as Apex Porter Novelli**, Odunga, J upheld the decision of the Public Procurement Administrative Review Board not to entertain a request for review on the ground that the same had been filed outside the period for filing such a review and it did not have jurisdiction to deal with it. The decision of Odunga, J confirms the fact that the Board's jurisdiction is limited to entertaining applications for review filed within the timeframe provided by the Regulations.

31. The jurisdiction of the Board is only available where an application for review has been filed within 14 days from the date of the delivery of the results of the tender process or from the date of the occurrence of an alleged breach where the tender process has not been concluded. The Board has no jurisdiction to hear anything filed outside fourteen days. In fact the time for filing an application for review was reduced to seven days by an amendment introduced by Regulation 20 of the Public Procurement & Disposal (Amendment) Regulations, 2013 (Legal Notice No. 106 of 2013). As such the 3<sup>rd</sup> Respondent's request for review ought to have been filed within seven days from 31<sup>st</sup> October, 2014.

32. The timelines in the PP&DA were set for a purpose. Proceedings touching on procurement matters ought to be heard and determined without undue delay. Once a party fails to move the Board within the time set by the Regulations, the jurisdiction of the Board is extinguished in so far as the particular procurement is concerned.

33. The assertion by the Applicant and the Procuring Entity that the 3<sup>rd</sup> Respondent's application for review was filed outside the time given by Rule 73 of the Regulations has not been rebutted by the 1<sup>st</sup> and 3<sup>rd</sup> respondents.

34. Having established that the Board had no jurisdiction to entertain the matter as it had been filed out of time, I do not find it necessary to explore the question as to whether the Board's jurisdiction was ousted by the fact that a contract had been signed between the Procuring Entity and the Applicant.

35. The Board acted outside its jurisdiction by hearing the matter which was filed after 7 days from the date of the notification of the results of the tender. By doing so, the Board engaged in a futile exercise which amounts to nothing. The result is that the award of the Board dated 9<sup>th</sup> January, 2015 is called into this Court and quashed.

36. The 2<sup>nd</sup> Respondent/Procuring Entity is directed to forthwith proceed to perform the contract entered between it and the Applicant on 15<sup>th</sup> November, 2014. All the other prayers asked for by the Applicant have either been overtaken by events and or are superfluous and I will not grant them. Each party will bear own costs of these proceeding.

Dated, signed and delivered at Nairobi this 30<sup>th</sup> day of April, 2015

**W. KORIR,**

**JUDGE OF THE HIGH COURT**