



**REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**HCCC NO 393 OF 2013**

**MARTIN OTIENO OKWACH &**

**CHARLES ONG'ONDO WERE**

**T/A VICTORIA CLEANING SERVICES ..... PLAINTIFF**

**- VERSUS -**

**KENYA POST OFFICE SAVINGS BANK ..... DEFENDANT**

**RULING**

**INTRODUCTION**

1. The Plaintiff filed a Notice of Motion application dated 13<sup>th</sup> September 2013 on the same date. The said application was brought under the provisions of Article 165 of the Constitution of Kenya 2010, Section 7 of the Arbitration Act, Sections 1A, 1B, 3A and 63 (c) and (e) of the Civil Procedure Act, Cap 21 Laws of Kenya, Order 40 Rule and Order 50 Rule 1 of the Civil Procedure Rules, 2010 and all the enabling provisions of the law. It sought the following orders:-

1. Spent
2. Spent
3. That pending the hearing and determination of this suit or pending the referral of the dispute herein to arbitration by the parties pursuant to the provisions of the Arbitration Act and the determination thereof, this Honourable Court do grant an interim measure of protection by way of a temporary injunction restraining the Defendant by itself or through its officers, agents, servants and/or employees or any other person from evaluating, processing and/or awarding any tenders or bids for the provisions of clearing, messengerial and other related services or in any other way howsoever procuring the provision of the said services at the Defendant's specified premises as follows:-
  - a. Cleaning and messengerial services at the Defendant's Headquarters and Karura premises;
  - b. Cleaning and services only at the Defendant's Eldoret, Embu, Nakuru, Thika, Mwingi premises; and
  - c. Cleaning, Tea making and Messengerial services at the Defendant's Nyamira, Wabera/Kenyatta Avenue, Canon House, Jogoo Road, Afya Centre, Nacico, Westlands, Ngara, Dandora, Enterprise, Mlolongo, Wanguru, Karatina, Murang'a, Mariakani, Mombasa, Viwandani, Eastleigh, Kenyatta Market, Oyugis, Narok,

Savani Mombasa premises.

4. **That this Honourable Court do direct, order or compel the Defendant to submit to arbitration in compliance with the terms of the Arbitration Clause in the Service Contract Agreement executed by the Plaintiff and the Defendant dated 19<sup>th</sup> March 2013.**
5. **That this Honourable Court be pleased to make such other or further orders as it deems fit and just to grant.**
6. **That costs of this application be borne by the Defendant.**

2. The dispute herein arose pursuant to an agreement between the Plaintiff and the Defendant dated 19<sup>th</sup> March 2013 which contained an Arbitration clause in Clause J in the said agreement. The said clause stipulated as follows:-

**“In the event of any dispute arising between the parties as to the interpretation of any part of this agreement such dispute shall be referred to an arbitrator to be appointed by both parties and should the parties fail to agree on any one arbitrator the dispute shall be referred to any one arbitrator appointed by the Chairman for the time being of the Law Society of Kenya and it is hereby agreed that the decision of such arbitrator shall be final and binding on both parties.”**

3. The Defendant filed a Replying Affidavit in response to the said application on 9<sup>th</sup> October 2013. The said affidavit was sworn by Jude Chesire, its Legal Officer on 30<sup>th</sup> September 2013.
4. On 26<sup>th</sup> November 2013, the Defendant filed a Chamber Summons application dated 14<sup>th</sup> November 2013 under Section 6 of the Arbitration Act and Rule 2 of the Arbitration Rules, 1997 seeking an order for a stay of the proceedings herein pending the reference of the dispute to arbitration.
5. The Plaintiff responded to the Defendant’s said application by filing Grounds of Opposition dated 27<sup>th</sup> November 2013 and filed on 28<sup>th</sup> November 2013.
6. When the Plaintiff’s Notice of Motion application came up for hearing on 28<sup>th</sup> November 2013, the Defendant’s counsel argued that its Chamber Summons application and a Preliminary Objection that was dated 14<sup>th</sup> November 2013 and filed on 26<sup>th</sup> November 2013 be heard first.
7. The Preliminary Objection raised the following issue:-
  1. **That this court lacked jurisdiction to hear this matter as the same being the preserve of the Public Procurement Administrative Review Board under Section 93 of the Public Procurement and Disposals Act.**

**The Defendant would at the earliest opportunity move to have the same struck out *in limine*.**

8. In view of the fact that jurisdiction would go to the very root of this matter, this court directed that the said Preliminary Objection be heard first. The said Preliminary Objection was therefore heard on 12<sup>th</sup> February 2014.

#### **LEGAL SUBMISSIONS BY THE DEFENDANT**

9. The Defendant’s written submissions were dated and filed on 3<sup>rd</sup> December 2013. Counsel for the Defendant orally highlighted the same.
10. It was the Defendant’s submission that the matter herein belonged to the Public Procurement Administrative Board as was envisaged in Section 93 of the Public Procurement Disposals Act, 2006. The said Section stipulated as follows:-

**“(1) subject to the provisions of this part, any candidate who claims to have suffered or to risk suffering, loss or damage due to breach of any duty imposed on a procuring entity by this Act or the regulations, may seek administrative review as in such manner as may be prescribed.”**

11. It argued that the Plaintiff was a “**candidate**” by dint of Section 3 (1) of the Public Procurement Disposal Act which provided that a candidate was defined as “**a person who has submitted a tender to a procuring entity**” in which case the proper forum for challenging the procurement of goods or services was the Public Procurement Administrative Board.
12. It said that the High Court only came at the review or appellate stage of the decisions of the Board which were final and that the Plaintiff was purporting to clothe this court with original jurisdiction. It referred the court to the case of **Francis Gitau Parsimei & 2 others – Vs – National Alliance Party & 4 others [2012] KLR** quoting the decision in the case of **Civil Application No 92 of 1992 of Speaker of National Assembly – Vs – The Honourable James Njenga Karume (unreported)** in which the Court of Appeal held as follows: -

**“It is against this background that the Court of Appeal established the principle that where the Constitution and or statute establish a dispute resolution procedure, then that procedure must be used.”**

13. It was its further argument that the words “**loss**” and “**damage**” as used in Section 93 of the Public Procurement Disposal Act squarely placed the dispute herein within the ambit and purview of the Public Procurement Administrative Review Board and that in any event, the prayer for an order of “**general damages**” was misplaced since general damages could not obtain for breach of contract.
14. In view of Article 159 of the Constitution of Kenya, 2010, the Defendant averred that this court was mandated to promote alternative dispute resolution and therefore urged it to find that where there was a court or tribunal created for a specific purpose, then a party must go to that forum.
15. The Defendant therefore urged this court to strike out the Plaintiff’s suit on the ground that the same was improperly before this court due to lack of jurisdiction to determine the dispute herein. It relied on the case of **Owners of Motor Vessel “Lillian S” – Vs – Caltex Oil (K) Limited [1989] KLR 1** where the court held that:-

**“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of a proceeding . . .”**

#### **LEGAL SUBMISSIONS BY THE PLAINTIFF**

16. On its part, the Plaintiff filed his written submissions dated 11<sup>th</sup> December 2013 on 18<sup>th</sup> December 2013. His counsel also orally highlighted the same.
17. The Plaintiff argued that the Defendant’s Preliminary Objection was misconceived as it was premised on the ground that the suit was challenging a procurement process. He was categorical that the dispute herein was one for a breach of contract which fell under common law. He said that the Public Procurement Review Board had no power to adjudicate the dispute herein as its mandate was limited to procurement proceedings.
18. He further contended that his application was seeking an interim measure of protection as parties proceeded for arbitration and that the Public Procurement Disposal Act did not preclude him from seeking alternative remedy from any court which has jurisdiction to hear matters as set out in Article 165 of the Constitution of Kenya and Section 7 of the Arbitration, 1995. It relied on the case of **Samuel Kamau Macharia & Another – Vs – KCB Limited & 2 others [2012] e KLR**.
19. The Plaintiff urged this court to dismiss the Defendant’s Preliminary Objection as the matter was properly before it because, although the Public Procurement Review Board had power to stay procurement processes, it cannot grant interim relief.

#### **FURTHER LEGAL SUBMISSIONS BY THE DEFENDANT**

20. In response to the Plaintiff’s counsel’s oral submissions, the Defendant reiterated that there was no contract between it and the Plaintiff with regard to the process or tender intended to be impugned by the Plaintiff. It conceded that if there was a contract, then the Public Procurement Review Board would not have jurisdiction to hear the dispute between the parties herein.
21. The Defendant was categorical that the Constitution of Kenya must be read complementarily with other legislation and that there was no conflict as all bodies/instructions had their respective roles

- to play.
22. The Defendant also reminded the court that the suit could not stand as it was brought by way of a Plaintiff as opposed to an Originating Summons.

### **LEGAL ANALYSIS**

23. This court has carefully considered the parties' pleadings, oral and written submissions and case law and notes right at the outset that Exhibit "COW 1" shows that the Plaintiff and the Defendant executed a Services Contract on 19<sup>th</sup> March 2013.
24. Exhibit "COW 2" is a letter of 13<sup>th</sup> May 2013 by the Defendant to the Plaintiff requesting the Plaintiff to append his signature aimed at amending the duration of the contract and the termination clause which the Plaintiff responded to and returned the unexecuted addendum to the said agreement on the ground that no amendments were to be done.
25. The court has found it necessary to look at the Plaintiff's Notice of Motion application to get an idea as to whether or not there was an existing contract or whether or not the dispute related to the procurement process.
26. Indeed in paragraph 7 of the Statement of Defence dated 14<sup>th</sup> November 2013 and filed on 26<sup>th</sup> November 2013, the Defendant admitted that the contract was executed by both parties on 19<sup>th</sup> March 2013. It is therefore evident from the said pleadings that there was a valid contract between the Plaintiff and the Defendant and that the relationship between the two (2) parties had gone beyond the procurement process and not as alleged by the Defendant.
27. The court finds and holds that once the contract was executed, the jurisdiction of the Public Procurement Review Board was ousted. The issue became more of interpreting the agreement through arbitration as was contemplated by Clause J of the said agreement and the Special Conditions of Contract in Section IV in the tender document marked Exhibit "COW 3".
28. The question of whether or not the contract was for one (1) or two (2) years would therefore not fall within the jurisdiction of this court. As was rightly pointed out by the Defendant, jurisdiction is everything and without it, a court cannot proceed in a matter. This court's jurisdiction is only limited to intervening within the confines of the Arbitration Act Cap 49 (Laws of Kenya).
29. This court is also not satisfied that the Plaintiff's suit ought to be struck out either on the ground that the court did not have jurisdiction to determine the dispute herein or that the Plaintiff's case ought to have been commenced by way of an Originating Summons and not by way of a Plaintiff. This is because Article 159 (2) (d) of the Constitution of Kenya, 2010 mandates the court to determine matters without undue regard to procedural technicalities.
30. This court agrees with the Plaintiff's submissions that the cases cited by the Defendant are distinguishable from the facts of this case. It is the view of this court that the said cases have not assisted the Defendant's case in any way.
31. The question of whether or not the Plaintiff would be entitled to the reliefs sought in his Notice of Motion application is a different matter. This court therefore finds and holds that it is necessary that the substantive application be ventilated and argued on merit.

### **DISPOSITION**

32. For the reasons foregoing, this court has come to the conclusion that the Defendant's Preliminary Objection dated 14<sup>th</sup> November 2013 and filed on 26<sup>th</sup> November 2013 cannot be sustained at all and being unmeritorious, the same is hereby dismissed with costs to the Plaintiff.
33. Orders accordingly.

**DATED SIGNED and DELIVERED at NAIROBI this 19<sup>th</sup> day of March 2014.**

**J. KAMAU**

**JUDGE**