



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**JUDICIAL REVIEW NO. 11 OF 2014**

**REPUBLIC .....APPLICANT**

**VERSUS**

**THE KENYA FOREST SERVICE .....1<sup>ST</sup> RESPONDENT**

**THE ECOSYSTEM CONSERVATOR NAKURU COUNTY.....2<sup>ND</sup> RESPONDENT**

**AND**

**JOHNSON MEOPI .....1<sup>ST</sup> INTERESTED PARTY**

**KIHOTO WOOD MART.....2<sup>ND</sup> INTERESTED PARTY**

**WINNIE NDEGWA .....3<sup>RD</sup> INTERESTED PARTY**

**KAPTOROKWO SAW MILL .....4<sup>TH</sup> INTERESTED PARTY**

***EX-PARTE***

**GEORGE NJENGA MUTERU T/A NJENJO ENTERPRISES**

**PETER GATUNDU MWENDA**

**JOEL KANYIRI GICHORA**

**DAVID MWANGI GATHARA**

**JAMES KARIUKI KURIA**

**DAVID ROTICH .....APPLICANTS**

**RULING**

1. The Ex-parte Applicants filed a Notice of Motion dated 21<sup>st</sup> March, 2014. The application is brought under Order 53 Rule 3 of the Civil Procedure Rules seeking the following orders:

- a. **That this Honorable court be pleased to issue an order of Judicial Review prohibiting the Respondents from allocating forest produce and material exclusively to the Interested Parties within Nakuru County and an order of mandamus directing the Respondents to conduct an open and competitive process of allocation of forest produce and materials to all pre-qualified saw millers within Nakuru County.**
- b. **That costs of this application including the cost of the application seeking leave to lodge this application be provided for:-**

2. The application was supported by an affidavit sworn by **George Njenga Muteru** on 24<sup>th</sup> March, 2014.
3. The Respondents were served with the application and filed a Notice of Preliminary Objection dated 15<sup>th</sup> May, 2014 based on the grounds that:

- a. **That this court lacks jurisdiction to entertain this suit by virtue of The Public Procurement and Disposal Act no. 3 of 2005 and Article 159 (2) (c) of the Constitution of Kenya**
- b. **That this court's jurisdiction has not been properly invoked as the Ex-parte Applicants failed to cite the provisions of the Law Reform Act Cap 26, Laws of Kenya, contrary to the procedure.**

4. Together with the Preliminary Objection, the Respondents further filed a Replying affidavit dated 16<sup>th</sup> May, 2014. The Interested Parties filed their response opposing the application through a Replying Affidavit dated 24<sup>th</sup> April, 2014.
5. The application came up for hearing on 21<sup>st</sup> March, 2014. The learned counsel, **Mr. Murimi** was present for the Applicants whilst the learned counsel **Miss Said** and **Mr. Mwangi** appeared for the Respondents and Interested Parties respectively.
6. Following a brief submission by counsel, this court decided to address the issue of the Preliminary Objection first as a preliminary legal issue. It is therefore the subject of this ruling.
7. Miss Said for the Respondents submitted that Section 29 (1), 93 and 98 of the Public Procurement Disposal Act provides that the Public Procurement Review Board is mandated to oversee disputes on the procurement and disposal process. The Ex-parte Applicants therefore were wrong to move this court before exhausting the laid down procedure in the Act.
8. Counsel contended that there was no decision reached and therefore this court has no jurisdiction to entertain the matter and urged the court to promote the set out alternative dispute resolution mechanism under Article 159(2) (c) of the Constitution.
9. Mr. Mwangi for the Interested Parties associated himself with the submissions of Miss Said and enunciated that the Public Procurement and Disposal Act created the Review Board to hear grievances on performance of any procurement agency. Section 101 of the Act provides that the decision of the board was final unless Judicial Review is commenced within 14 days after the decision. According to counsel therefore the Applicants could only move the court after a decision of the review board and therefore prayed that the motion be dismissed with costs.
10. Mr. Murimi opposed the Preliminary Objection. He submitted that **Section 93** of the **Public Procurement and Disposal Act** gives discretion to a candidate to institute administrative review of a decision. The operative word in the act was **“may”** as opposed to **“shall”** which would then make the set down procedure mandatory. As such, counsel contends that the Act does not preclude a candidate from seeking redress from the High Court and that sections 93-100 of the Act do not oust the jurisdiction of the court to hear the matter and thus submitted that the preliminary objection was frivolous and a waste of time. In any case, he submitted that the court under Article 159 of the Constitution should administer substantive justice without undue regard to technicalities. He urged the court to strike out the Preliminary Objection with costs to the Applicants.

### **ISSUES FOR DETERMINATION**

- i. Sections 8 and 9 of the Law Reform Act- whether the omission to cite ousts this court's jurisdiction

- ii. Whether to uphold the Preliminary Objection and strike out the application.
- iii. Costs

## **ANALYSIS**

- 11. The Applicants have brought this application under Order 53 of the Civil Procedure Rules and this court notes that the requisite sections 8 and 9 of the Law Reform Act have not been cited. This court opines that whereas it is true that the above sections give this court jurisdiction this court concurs with the submissions of Counsel for the Applicants that this court should administer substantive justice and the omission is curable by Article 159 of the Constitution, which provides that justice should be done without undue regard to technicalities.
- 12. The above error notwithstanding this court is satisfied that Order 53 of the Civil Procedure Rules gives this court the mandate and jurisdiction to hear and determine applications seeking prerogative orders and that the application is found to be properly before this court.
- 13. The next issue to be addressed is whether the application herein is premature. The Public Procurement and Disposal Act creates The Public Procurement Administrative Review Board and its core function is to resolve disputes arising from disputed procurement proceedings by parties who take part in public procurement.
- 14. An aggrieved candidate may seek administrative review by appealing to the Board and when this option is taken, the request ought to be made within 14 days.
- 15. The decision that the Review Board reaches is defined as;

**“.....the determination, ruling, order or judgment pronounced by the Board when considering or disposing of a review.....”**

- 16. The Act goes on to provide that thereafter any party to the review who is aggrieved by the Board’s decision may appeal to the High Court.
- 17. Though the operative word used is ‘**may**’ which could mean that the process is not compulsory but voluntary, but going by the provisions of Sections 93 to 100 of the Public Procurement Act this court is of the view that the Sections envisage a situation whereby the first port of call for an aggrieved candidate would be a request for review to the Review Board thereafter an appeal should be lodged in the High against such a decision.
- 18. This court is of the view that the Public Procurement Act sets out the procedure that should be followed which would be an appeal to the Public Procurement Review Board and this Board’s determination would then be the subject matter for either the lodging of an appeal to the High Court or the prerogative orders sought by the Applicants. Therefore this court states that there is no judgment, order, decree from the Review Board for the High Court to act on as the laid down procedure has not been exhausted by the Applicants.
- 19. This court is guided by the Court of Appeal case of **Speaker of The National Assembly V. The Hon. James Njenga Karume C.App. No. NAI. 92 of 1992** where Kwach, Cockar and Muli JJ.A stated:

**‘ ....that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that Order 53 cannot oust clear constitutional and statutory provisions’**

- 20. This court finds that the Preliminary Objection raised by the Respondents touches on a pure point of law and is not blurred with facts and details which require evidential enquiry and this court is therefore satisfied that the objection meets the threshold set down in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696.**

## **FINDINGS AND DETERMINATION**

- 21. For the reasons stated above this court makes the following findings;
- 22. This court finds that despite the omission of Sections 8 and 9 of the Law Reform Act in the Title

- this does not oust the jurisdiction of this court.
23. This court finds the Application to be premature and the Preliminary Objection is hereby upheld.
  24. The Application is found to be incompetent and is hereby struck out.
  25. The Respondents and the Interested Parties shall have costs.

It is so Ordered.

**Dated, Signed and Delivered at Nakuru this 23rd day of September, 2014.**

**A. MSHILA**

**JUDGE**