REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR MISC. NO. 216 OF 2012

REPUBLIC ....APPLICANT

VERSUS

PUBLIC PROCUREMENT

ADMINISTRATIVE REVIEW BOARD ....RESPONDENT

CATERING & TOURISM DEVELOPMENT

LEVY TRUSTEES...1ST INTERESTED PARTY

BASELINE ARCHITECTS LIMITED ....2ND INTERESTED PARTY

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JUDGEMENT

Kamau James Githutho Njendu trading as Gitutho Associates (the ex-parte applicant) has brought these judicial review proceedings on his own behalf and on behalf of the consortium consisting of Harry Njoroge Gakuya trading as Gakiya Associates, Maccad Consulting Engineeers Limited, Josephat Kinyua Njagi trading as Prime Consult Consulting Engineers and Ian Maxwell Suero trading as Raz Extra Productions. The Public Procurement Administrative Review Board (PPARB) is the respondent whereas Catering and Tourism Development Levy Trustees (C&TDLT) and Baseline Architects Limited (BAL) are the 1st and 2nd interested parties respectively. Through the notice of motion application dated 23rd May, 2012 the ex-parte applicant seeks to quash the decision of the respondent made on 11th May, 2012 in PPARB Application for Review No. 14/2012 of 17th April, 2012. The applicant also prays for an order of prohibition prohibiting the 1st interested party from entering into a contract with the 2nd interested party in respect of consultancy services for Design Documentation, Supervision and Contract Management of the proposed Ronald Ngala Utallii College (RNUC) in Kilifi County. The applicant also prays for an order of mandamus compelling the respondent to substitute the decision of the 1st interested party awarding the tender to the 2nd interested party with a decision awarding it (the applicant) the same tender. The application is supported by a statutory statement filed on 18th May, 2012 and the applicant's verifying affidavit sworn on the same date.

The history of this matter is that the applicant led a consortium that signed a Letter of Association on 27th February, 2012 and bid to provide consultancy services to the 1st interested party in respect of the Request for Proposal (RFP) for Design Documentation, Supervision and Contract Management of the Proposed

Ronald Ngala Utalii College in Kilifi County. The applicant's bid was unsuccessful.

The applicant then proceeded to the respondent and requested for review of the 1st interested party's decision as provided by Part VII of the Public Procurement and Disposal Act, 2005. The PPARB, hereinafter simply referred to as the Board, dismissed the request for review.

Now the applicant challenges the said decision on the grounds that:-

1. **The Board unreasonably exercised its powers;**

2. **The board's conduct in the circumstances of the case was irrational;**

3. **The Board abused its powers;**

4. **The Board's decision is procedurally flawed;**

5. **The Board considered irrelevant facts and left our relevant facts;**

6. **The Board proceeded on an error of facts;**

7. **The Board proceeded on an error of law;**

8. **The Board committed a jurisdictional error; and**

9. **The Board failed to fulfill the applicant's legitimate expectation.**

The application was opposed through a replying affidavit sworn by the Secretary to the Board Mr. Cornell Rasanga Amoth on 25th July, 2012. Mr. Allan W. Chenane the Chief Executive Officer of the 1st interested party swore a replying affidavit on 27th June, 2012 outlining the 1st interested party's reasons for opposing the application.

The 2nd interested party opposed the application through a replying affidavit sworn by one of its directors Mr. Morris Gitonga Njue on 5th July, 2012. In brief the respondent and interested parties' response is that the respondent complied with the law in making its decision and what the applicant is trying to do is to argue an appeal through these proceedings.

In my view there are three issues for determination in this matter. The 1st issue is whether the applicant has locus standi to bring these proceedings. The 2nd question is whether the respondent acted irrationally, unreasonably and without jurisdiction in the manner it handled the applicant's application for review. The 3rd issue is whether the orders sought are available to the applicant.

On the issue of locus standi, the 1st interested party submitted that the applicant has no locus standi to commence these proceedings. The 1st interested party argued that Gitutho Associates was the applicant before the Board whereas the applicant herein is a consortium. In reply to this argument, the applicant submitted that he has clearly indicated in his papers before court that he led a consortium in the bid. The applicant argues that even though the other members of the consortium were not party to the application for review before the Board, they still have the standing in this case since they have sufficient interest in the outcome of these proceedings. In my view only a party before the Board can file judicial review proceedings to challenge the decision of the Board. Gitutho Associates was a party to the proceedings before the Board and is the one leading the consortium in these proceedings. Strictly speaking, there was no need to mention the consortium at this stage but no harm has been done to the applicant's application by their inclusion in these proceedings. I therefore reject the 1st interested party's opposition to this application on the ground that the applicant lacks locus standi.

A careful scrutiny of the papers filed in court clearly reveals that the applicant is attacking the decision of the Board on the grounds that it failed to consider relevant facts. The applicant also argues that the Board acted in error of law and fact thereby rendering its decision unreasonable and irrational. This therefore calls for a perusal of the decision of the Board. I will first start by bringing out the specific complaints by the applicant.

The applicant told the court that by a letter dated 30th April, 2012 and a reminder dated 7th May, 2012 a request was made to the procuring entity (the 1st interested party) under sections 44(3) and 45(2) of the Public Procurement and Disposal Act, 2005 and Clause 2.11.1 of the Request for Proposal for a summary of the evaluation and comparison of proposals, including the evaluation criteria used but the request was not complied with. The applicant submits that although the respondent was aware of this request, it ignored the issue both at the hearing and in its ruling.

The applicant informed the court that in its ruling, the respondent held that the 2nd interested party had complied with Clause 1(6) of the Letter of Invitation of the Tender Document with respect to Litigation Disclosure and further that the 1st interested party evaluated the 2nd interested party's tender in accordance with the Request for Proposal and rightly found its bid to be responsive. The respondent also held that the 1st interested party did not breach Section 82 of the PP&DA together with Regulation 57 as alleged by the applicant. It is the applicant's case that these findings were based on lack of appreciation of facts and the law.

The applicant further informed the court that the respondent dismissed the Request for Review on the following grounds:-

(a)That the disclosure by the 2nd interested party regarding the case of Coffee Board of Kenya was sufficient because the dispute was between a partnership (Baseline Architects) and not the limited liability company (Baseline Architects Limited i.e. the 2nd interested party) which was the bidder.

(b) That to verify the identity of the parties, it was insufficient to place the Daily Cause List for 26th November, 2008 for High Court Commercial and Tax Division in Milimani showing HCCC No. 152/04 Baseline Architects Ltd v Coffee Board of Kenya was listed for hearing before Lady Justice Khaminwa.

(c) That the NHIF case had been concluded in 2007 and was not within the threshold of the requirement of disclosure of litigation history within the last five years.

(d) That there was no evidence of the alleged case between the 2nd interested party and NSSF.

It is the applicant's case that all these findings were based on an error of law and failure to take relevant facts into consideration. The applicant pointed out that the respondent's failure to conclude that the 2nd interested party's Litigation Disclosure lacked material particulars as the amount in dispute in the NHIF case was not disclosed as per the requirements of Clause 1(6) of the Request for Proposal was both an error of law and fact.

The applicant's case is that the respondent acted unreasonably by failing to find that the NHIF case was within the 5 year period as at the time the 2nd interested party submitted its bid. The applicant cites the ruling of Justice M. A. Warsame (as he then was) delivered in the NHIF case on 7th May, 2008 to support the contention that the matter was within the 5 year period. The applicant also submits that the respondent acted unreasonably by dismissing without reasons the cause list extracted from the National Council for Law Reporting website showing that the Coffee Board of Kenya case was listed before Lady Justice Khaminwa on 26th November, 2008. According to the applicant this was sufficient evidence to show that the case was within 5 years and full litigation disclosure ought to have been made on the same. In the applicant's view, the respondent acted unreasonably by acknowledging that Clause 1(6) of the Request for Proposals required disclosure of the amount in dispute in the litigation but failed to address the clear failure by the 2nd interested party to disclose the amount in dispute in the NHIF case. The applicant also

accuses the respondent of failing to consider that the 2nd interested party did not comply with the requirement by Clause 1(6) of the Request for Proposals that a bidder was to demonstrate by producing relevant documentary evidence information regarding litigation.

Before I proceed to consider the decision of the respondent, I will first consider what Morris Gitonga Njue stated in his replying affidavit of 5th July, 2012. He averred that in 1993 he together with his partner the late Francis Charles Muriuki registered a business known as Baseline Architects under the Registration of Business Names Act Cap. 499. He exhibited a certificate of registration and informed the court that the partnership was no longer in existence. He also averred that in 2003 together with Motanya D. Otengo they incorporated Baseline Architects Limited under the companies Act Cap. 486. He exhibited a certificate of incorporation. The 2nd interested party's case is that all the requirements in the request for proposal were met.

I now turn to the decision of the respondent. In its ruling of 11th May, 2012, after considering the evidence placed before it regarding the Coffee Board of Kenya case, the respondent concluded that:-

"With respect to the first disclosure, the Board notes that in the disclosure, Baseline Architects, a partnership, is the party involved in the dispute; and that the amount under the dispute was not declared. The issue for the Board to determine in this instance is who the successful Bidder was – Baseline Architects, a partnership or Baseline Architects Limited; and whether the amount under dispute ought to have been disclosed in that instance. From the Tender Documents, the Board finds that Baseline Architects Limited was the tenderer in the subject tender under review and that there was no bid document submitted by Baseline Architects, a partnership. Therefore, the Board finds that the litigation disclosure requirements stated under Clause 1(6) of the Letter of Invitation, was applicable to the bidder, Baseline Architects Limited and not to the partnership of Baseline Architects. Subsequently, in this regard, the Board finds that the disclosure as submitted by the Applicant with respect to the Coffee Board of Kenya case, without disclosure of the disputed amount, was sufficient because the dispute was between the partnership and not the limited liability company which was the bidder. This is consistent with the Board's finding in its decision dated 18th March, 2011, in the matter of Review No. 5 and 6 between Promare Consultancy Limited and Mathu and Gichuiri Associates Limited vs Kenya Institute of Education, where the Board held that the Procuring Entity erred in the evaluation of tax compliance requirements by verifying with KRA the PIN Number for Mathu and Gichuiri Associates (a partnership) which did not participate in the tender instead of the Applicant's Mathu and Gichuiri Associates Ltd."

Even after reaching this conclusion the respondent went ahead to make a finding on the issue of the cause list extracted from the National Council for Law Reporting website and concluded that:-

"With regard to the applicant's allegation that the High Court daily cause list indicated that Baseline Architects Ltd was the party in a matter before the court against Coffee Board of Kenya; the Board finds that it is upon the Applicant to place before the Board sufficient material, in this instance, a copy of the pleadings relating to the cited case for the Board to be able to verify the real identity of the parties."

In my view the respondent clearly made a finding that the 2nd interested party was not under any obligation to disclose the litigation between Baseline Architects and Coffee Board of Kenya since the 2nd interested party was a different entity from the partnership known as Baseline Architects. The respondent also gave reasons why it could not rely on the extract from the National Council for Law Reporting website to establish the identities of a party to a case. There is nothing unreasonable or irrational in those findings.

The respondent then proceeded to address the NHIF case and the alleged litigation between the 2nd interested party and NSSF and made findings as follows:-

"With regard to the allegations alluded to by the Applicant as published by the Weekly Citizen of

16th-22nd April, 2012, which the Applicant relied on in filing this request for review, the Board notes that the publication indicated that Baseline Architects had failed to disclose its litigation history with National Health Insurance Fund (NHIF) Coffee Board of Kenya and National social Security Fund (NSSF).

As the Board has already found, the bidder in the tender under review was Baseline Architects Limited and not Baseline Architects; and that there were two disclosures submitted by the successful Bidder, namely the Coffee Board of Kenya case with Baseline Architects, a partnership, and the NHIF case which was submitted as having been concluded in 2007 and was not within the threshold of the requirement of disclosure of litigation history within the last 5 years.

At the hearing, the Board enquired from the Applicant as to the position of the third alleged undisclosed case, that with NSSF. The Applicant admitted that it could not find any evidence of this alleged case in the High Court records."

The respondent therefore made a finding that the alleged litigation between the 2nd interested party and NSSF did not exist. It then proceeded to find that the case between the 2nd interested party and NHIF **"was not within the threshold of the requirement of disclosure of litigation history with the last 5 years. "**

Those are findings which the respondent was entitled to make. The respondent concluded that the respondent did not breach Section 82 of the PP&DA and Regulation 57 as alleged by the applicant. The finding as to whether the NHIF case was within the 5 years threshold is a finding which the respondent made after considering the evidence placed before it. It may have been a wrong finding but that does not in itself entitle the applicant to judicial review orders. The Court of Appeal in the case of**KENYA PIPELINE COMPANY LIMITED V HYOSUNG EBARA COMPANY LIMITED & 2 OTHERS[2012] eKLR** noted that:-

"We have similarly set out the grounds of the Judicial Review application and the findings of the High Court. We have, in addition, considered the submissions made by the respective counsel in High Court. Upon analysis of the grounds of the judicial review application, the submissions of the 1st Respondent's counsel in support of the Judicial Review application, the replying submissions and the judgment of High Court, we have unhesitatingly come to the conclusion that the application for Judicial Review was for all intents and purposes an appeal from the decision of the Review Board. It was a Judicial Review application only in name but in essence it was an appeal against the findings of fact and law by the Review Board."

I entirely agree with the decision of the Court of Appeal. Judicial review is not an alternative to an appeal. It seeks to examine the decision making process. Once it is established that the process which led to the making of a decision complied with the basic legal requirements then a judicial review court must down its tools. The applicant approached this court on grounds of unreasonableness and irrationality. It was not established that the respondent acted unreasonably or irrationally. The applicant might have been wrong in its decision. That, however, is not an issue within the judicial review docket of this court. This proposition was upheld by the Court of Appeal in the already cited **KENYA PIPELINE COMPANY LIMITED** case in the following words:-

"The Review Board is a specialized statutory tribunal established to deal with all complaints of breach of duty by the procuring entity. By Reg. 89, it has power to engage an expert to assist in the proceedings in which it feels that it lacks the necessary experience. S. 98 of the Act confers very wide powers on the Review Board. It is clear from the nature of powers given to the Review Board including annulling, anything done by the procurement entity and substituting its decision for that of the procuring entity that the administrative review envisaged by the Act is indeed an appeal. From its nature the Review Board is obviously better equipped than the High Court to handle disputes relating to breach of duty by procurement entity. It follows that its decision in matters within its jurisdiction should not be lightly interfered with.

Having regard to the wide powers of the Review Board we are satisfied that the High Court erred in holding that the Review Board was not competent to decide whether or not the 1st Respondent's tender had met the mandatory conditions. The issue whether or not the 1st Respondent's tender was rightly rejected as unresponsive was directly before the Review Board and the Board had jurisdiction to deal with it.

In conclusion, it is manifest that the application for Judicial Review was not well founded. The 1st Respondent did not establish that the Review Board had acted without jurisdiction or in excess of jurisdiction or in breach of rules of natural justice or that the decision was irrational. The Judicial Review was not confined to the decision making process but rather with the correctness of the decision on matters of both law and fact. So long as the proceedings of the Review Board were regular and it had jurisdiction to adjudicate upon the matters raised in the Request for Review, it was as much entitled to decide those matters wrongly as it was to decide them rightly.

The High Court erred in essence in treating the judicial review application as an appeal and in granting judicial review orders on the grounds which were outside the scope of Judicial Review jurisdiction."

There is always the temptation to descend into the arena and substitute the tribunal's decision with that of the court. A judicial review court should avoid this temptation. Where a party is dissatisfied with the decision of a tribunal then the best option is to file an appeal as provided for by the Act of Parliament creating the particular tribunal. Although judicial review is a powerful tool for checking on the excesses of public bodies, it must always be remembered that its scope is indeed limited.

The applicant also argued that the respondent exceeded its jurisdiction by ordering that the procurement process should continue. According to the applicant, the said order contravened the provisions of Section 100 of the PP&DA. In my view the respondent did not exceed its jurisdiction. Its powers are found in Section 98 of the PP&DA and Section 100(1) only gives a right of appeal or application for review. Even if the respondent had not indicated that the process should continue, the availability of an opportunity to appeal or go for review could not have stopped the 1st interested party from continuing with the procurement process.

In light of the above findings I do not find it necessary to consider the question as to whether the orders sought are available to the applicant. The net result is that the applicant's application fails and the same is dismissed with costs to the respondent and interested parties.

Dated, signed and delivered at Nairobi this 16th day of April , 2013

W. K. KORIR,
JUDGE