



**IN THE HIGH COURT OF KENYA NAIROBI**

**MILIMANI LAW COURTS**

**JUDICIAL REVIEW DIVISION**

**MISC. APPL. JR. NO. 18 OF 2013**

**BETWEEN**

**REPUBLIC OF KENYA ..... APPLICANT**

**AND**

**PUBLIC PROCUREMENT**

**ADMINISTRATIVE REVIEW BOARD ..... RESPONDENT**

**AND**

**THE REGISTERED TRUSTEES OF THE**

**KENYA PORTS AUTHORITY**

**PENSION SCHEME ..... INTERESTED PARTY**

***EX-PARTE***

**NELSON KORIR & LIVINGSTONE WAMATHAE**

**trading as NELSON & FRANCIS ASSOCIATES**

**JUDGMENT**

**Introduction**

1. The *ex-parte* applicants (“the applicants”) seek to challenge a decision of the Public Procurement Administrative Review Board (“the Board”). The Board declined to consider their application for review on the ground that it was filed out of time.

## **Background**

2. The facts upon which the application is based are common ground and are to be found in the verifying affidavit of Nelson Korir, a partner in the applicant firm, sworn on 21<sup>st</sup> January 2013. In opposition, the interested party relied on the affidavits of Simon Nyakundi and Stephen Kyandih sworn on 26<sup>th</sup> February 2013 and 11<sup>th</sup> March 2013 respectively.
3. The applicants trade as a firm of accountants. They responded to an advert by the Kenya Ports Authority Pension Scheme (“the Scheme”) inviting eligible bidders to tender for provision of audit service for the year 2012. It was among the various firms that responded to the tender. On 23<sup>rd</sup> November 2012, it received a letter informing it that its bid was unsuccessful.
4. When the applicants received the notification they wrote to the Scheme on 4<sup>th</sup> December 2012 requesting to be given reasons for the decision. The Scheme responded by a letter dated 5<sup>th</sup> December 2012 informing the applicants that their bid was rejected because they had not provided audit services to any institution whose size was in excess of Kshs.8 billion.
5. The applicants were aggrieved by the Scheme’s decision on the ground that the bidding instructions indicated a qualifying threshold of Kshs.5 billion and not Kshs. 8 billion which was the figure provided in the newspaper advert to which the applicants responded. The applicants therefore moved the Board through Application **No. 67 of 2012** on 14<sup>th</sup> December 2012 to challenge the decision of the Scheme to reject their bid.

## **The Board decision**

6. The Board heard the application for review and dismissed it on 10<sup>th</sup> January 2013. In its determination the Board identified three issues for consideration as follows;
  - i. *Whether there was a discrepancy between the information contained in the tender advertisement and the information contained in the tender document issued to the bidders as to whether the qualifying threshold was Kshs.8 billion or Kshs. 5 billion.*
  - ii. *Whether the pension scheme is a Procuring Entity as envisaged by the public procurement and Disposal Act 2005.*
  - iii. *Whether the request for Review was filed within time and whether the Board had jurisdiction to entertain the matter.*
7. The Board rested its decision on the third issue, that is the issue of jurisdiction, where it stated as follows;

*The issue for the Board to determine is whether the Board has jurisdiction and in this regard, the board examines the dates of filing the Request for Review vis avis the date of notification. In order to answer that question the Board makes the following observations:*

- a. *That the Applicant was notified that its bid was not successful on the 23<sup>rd</sup> November 2012. Indeed, during the hearing, the Applicant confirmed that it collected its letter of notification on the 23<sup>rd</sup> November 2012.*
- b. *That the Applicant filed this Request for Review on 14<sup>th</sup> December 2012.*

*The Board notes that, Regulation 73 states as follows, “A request for review under the Act shall be made in Form RBI set out in the Fourth Schedule to these Regulations. The request referred to in paragraph 1 shall –*

a).....

b) .....

c) *Be made within fourteen days of –*

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

*(ii) The notification under sections 67 or 83 of the Act.”*

*Section 67(1) states as follows: “Before the expiry of the period during which tenders must remain valid, the Procuring Entity shall notify persons submitting the successful tender that his tender has been accepted.”*

*This being a Request for Proposal, it falls under section 83 which requires a Procuring Entity to Notify both the Successful and unsuccessful bidders of the outcome of their proposals at the same time.*

*In this case, the Kenya Ports Authority Pension Scheme notified all the bidders of the outcome of their proposals on 23<sup>rd</sup> November 2012.*

*Pursuant to Regulation 73(2) (c) (ii), a Request for Review can only be filed within 14 days of the notification. In the instant matter, following notification on 23<sup>rd</sup> November 2012, the 14 days appeal window opened on 24<sup>th</sup> November and closed on 7<sup>th</sup> December 2012. The Board finds that the Applicant filed its request for Review on 14<sup>th</sup> December 2012 which apparently is 7 days after the appeal window closed.*

*Consequently, the Board finds that the Request for Review was filed outside the stipulated period.*

*In the circumstances, the Board holds that it has no jurisdiction to hear and determine the matter. Consequently, in view of this finding, the Board hereby downs its tools and therefore it is not necessary to make any findings on the other issues raised by the parties.*

*Taking into account the foregoing, the Request for Review is hereby dismissed and the procurement process may proceed.*

### **The Applicants’ Case**

8. Being dissatisfied with the Board’s decision, the applicants moved the court by the Notice of Motion dated 1<sup>st</sup> February 2013 seeking an order of certiorari to quash the decision of the Board and an order of mandamus to compel the Board to hear the applicant’s request on the merits.
9. Before the hearing commenced, Mr Kyandih, counsel for the Scheme, informed the Court that the tender subject of these proceedings was not awarded but that an extension was given to the existing service provider to continue with the services pending determination of these proceedings. In the circumstances, Mr Mengich, counsel for the applicants, properly conceded that the court could not grant an order quashing any contract entered into by the Scheme and the successful bidder.
10. Mr Mengich submitted that the applicants were not treated fairly as their grievances before the Board were not heard on merits as the Board only considered the issue of jurisdiction yet the applicants had placed before it other grounds for challenging the decision of the Scheme. Counsel argued that the Board ought to have considered and made findings on all aspects of the application for review hence the applicant right to natural justice was denied.

11. Counsel for the applicant also submitted that the decision was irrational and unreasonable as time for lodging the review application to the Board was to be calculated from the time reasons for the rejection of the tender were received which was 23<sup>rd</sup> December 2012 and as opposed to 23<sup>rd</sup> November 2012 when the applicants received the letter informing them that their bid was unsuccessful. In this respect counsel relied on the case of ***R. v Public Procurement and Administrative Review Board & Others ex parte China Petroleum Technology and Development Ltd*** Nairobi HC Misc. Appl. No. 53 of 2010 (2010) eKLR.

### **Respondent and Interested party's Case**

12. The respondent opposed the application. Ms Chilaka, who appeared for the Board, contended that the Board considered the issues before it and held that it lacked jurisdiction. She submitted that the Board properly considered the applicable law, that is **regulation 73 (2) (c)** of the ***Public Procurement and Disposal Regulations, 2006*** (“*the Regulations*”) and applied it to the facts of the case and it reached the conclusion that the request was filed outside the time provided. In essence, she argued that the Board was correct in dealing with the matter as it did and that no basis for the grant of orders of judicial review had been established.

13. Mr Kyandih supported the Board's position and urged the court to dismiss the application. He contended that the Board had acted within jurisdiction and the court, in an application for judicial review, was not concerned with the merits of the decision.

### **Resolution**

14. The principles upon which the court acts in judicial review applications are now well settled. The court is concerned with the process to ensure that it is fair. The court does not sit on appeal from the decision of the board to review the merits of the decision (See generally ***R v Judicial Service Commission exp Pareno*** [2004] 1 KLR 203). As regards the orders of certiorari, the Court of Appeal in ***Republic v Kenya National Examinations Council ex parte Geoffrey Gathenji and 9 Others Civil Appeal No. 266 of 1996*** explained that, “*the remedies of certiorari and prohibition are tools that this court uses to supervise public bodies and inferior tribunals to ensure that they do not make decisions or undertake activities which are ultra vires their statutory mandate or which are irrational or otherwise illegal. They are meant to keep public authorities in check to prevent them from abusing their statutory powers or subjecting citizens to unfair treatment.*”

15. The main issue upon which the Board grounded its decision was that of jurisdiction. The issue of jurisdiction is a primary issue for consideration before any tribunal. The issue may be raised as a preliminary point where the jurisdictional facts are not in dispute and the matter is on application of law to the undisputed facts hence the term preliminary objection as defined in the case of ***Mukisa Biscuit Manufacturing Company Ltd v West End Distributors Limited*** [1968] EA 696. The issue may also be dealt with at the substantive hearing where the jurisdictional facts need to be ascertained and established.

16. Contrary to the applicants' contention, their right to a fair hearing was not violated as they had the opportunity to present their case. The Board heard submissions of the parties and perused documents before it and came to the conclusion that one of the issues presented was enough to dispose of the matter.

17. The jurisdictional issue was whether the request for review was filed within 14 days in accordance with the ***Regulations***. The Board considered the material before it and came to the conclusion that the notification was received on 23<sup>rd</sup> November 2012. This finding was within the Board's jurisdiction to determine and it cannot be faulted in that regard.

18. In ***R v Public Procurement and Administrative Review Board & Others ex-parte China Petroleum Technology and Development Ltd*** (*supra*) the court was clear that under the ***Regulations*** that time for filing the application for review started running when the notification was received. Wendoh J., upheld the previous decisions of the Board where it held that the 14

days appeal window starts to run when the notification is received. In her remarks Wendoh J., observed that, *“The Review Board had justification to enter into inquiry on the request for review. It also had jurisdiction to hear the preliminary objection raised by the 1<sup>st</sup> interested party but should have investigated whether the request was lodged on time and whether the alleged breach of Reg. 73 was substantive and given reasons for its determination. By failing to consider these relevant issues and failing to give reasons, the respondent fell into error and breached the rules of natural justice of a fair hearing.”*

19. In the case at hand, the Board properly investigated the facts necessary for determination whether it had jurisdiction and it came to a conclusion that was not unreasonable, irrational or illegal. Once the Board had reached the conclusion that it could not entertain the matter, its only course was to *“down tools.”* It could not consider the other substantive grounds made out in the application for review. The failure of the Board to entertain the complaint on the ground that it was filed out of time could not amount to a violation of the rules of natural justice.

### **Disposition**

20. In light of the foregoing, the Notice of Motion dated 1<sup>st</sup> February 2013 is dismissed with costs to the interested party.

**DATED and DELIVERED at NAIROBI** this 27<sup>th</sup> day of September 2013

**D.S. MAJANJA**

**JUDGE**

Mr Mengich instructed by Metto, Ratemo and Company Advocates for the ex-parte applicant.

Ms Chilaka, Litigation Counsel, instructed by the State Law Office for the respondent.

Mr Kyandih, Advocate, instructed by the interested party.