



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
JR CASE NO. 88 OF 2013
(FORMERLY ELDORET HIGH COURT JUDICIAL REVIEW NO. 31 OF 2012)

REPUBLIC.....APPLICANT

VERSUS

KENYA POWER & LIGHTING COMPANY LTD.....1ST RESPONDENT

PUBLIC PROCUREMENT

ADMINISTRATIVE REVIEW BOARD2ND RESPONDENT

BINARY COMPUTER SYSTEMS LTDINTERESTED PARTY

EX-PARTE

FLEET TRACKING SOLUTIONS AFRICA LIMITED

JUDGEMENT

Pursuant to leave granted on 1st July, 2013, Fleet Tracking Solutions Africa Limited, the ex-parte Applicant herein, on 8th July, 2013 filed an amended notice of motion application dated 4th July, 2013 in which it seeks orders as follows:-

“1. THAT a writ of CERTIORARI do issue to bring before this Honourable court the decision of THE TENDER COMMITTEE OF THE KENYA POWER & LIGHTING COMPANY LIMITED made on 11th October 2012 in the matter of Tender No. KP1/9AC/PT/04-11/12 awarding the said tender to the BINARY COMPUTER SYSTEMS LIMITED instead of the Applicant for scrutiny as to its origin, legality and fairness vis-à-vis the Rules and Principles of Natural Justice and Procedure and that the said decision be quashed.

2. THAT a writ OF CERTIORARI do issue to bring before this Honourable court the decision of PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD delivered on 14th December 2012 and as contained in Request for Review No. 58 of 2012 upholding the decision of the Tender Committee of Kenya Power and Lighting Company

Limited of 11th October 2012 for scrutiny as to its origin, legality and fairness vis-à-vis the Rules and Principles of Natural Justice and Procedure and that the said decision be quashed.

3. THAT a writ of MANDAMUS do issue to THE TENDER COMMITTEE OF THE KENYA POWER & LIGHTING COMPANY LIMITED compelling it to award the tender to FLEET TRACKING SOLUTIONS AFRICA LIMITED being the actual lowest evaluated bidder.

4. THAT in the alternative to order (3) above, a writ of MANDAMUS do issue directed to the KENYA POWER & LIGHTING COMPANY LIMITED to re-evaluate and award the tender in compliance with provisions of the Public Procurement and Disposal Act No. 2005, the Public Procurement and Disposal Regulations 2006 and the Tender Document issued by the First Respondent.

~~5. That a writ of PROHIBITION do issue to prohibit the KENYA POWER & LIGHTING COMPANY LIMITED, its agents, servants and/or employees from getting into and/or signing any contract in relation to the tender subject with BINARY COMPUTER SYSTEMS LIMITED~~

5.B THAT a writ of CERTIORARI do issue to remove into this Honourable Court and quash the Contract/Agreement dated 28th March, 2013 between the KENYA POWER & LIGHTING COMPANY LIMITED and the BINARY COMPUTER SYSTEMS LIMITED pursuant to the decision of the Public Procurement Administrative Review Board delivered on 14th December 2012 in the Request for Review No. 58 of 2012 upholding the decision of the Tender Committee of Kenya Power and Lighting Company Limited of 11th October, 2012.

6. THAT a writ of MANDAMUS do issue to PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD as an organ of PUBLIC PROCUREMENT OVERSIGHT AUTHORITY/KENYA POWER & LIGHTING COMPANY LIMITED to institute debarment proceedings against BINARY COMPUTER SYSTEMS LIMITED for misleading a public body in order to influence the procurement process.

7. THAT the PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD and KENYA POWER & LIGHTING COMPANY LIMITED be compelled to pay costs in this Notice of Motion Application and the Chamber Summons Application dated 27th December 2012 seeking for leave giving rise to these proceedings.”

The application is supported by grounds on its face to wit:-

- a. THAT the decision of the First Respondent's Tender Committee was an error of fact apparent on the face of the record for failure to conform to the public procurement law and the Tender Document.
- b. THAT the decision of the Second Respondent was made in error of fact apparent on the face of the record for failure to render a review of the award which conforms to the Rules and Principles of Natural Justice and also for granting a decision which is *ultra-vires* the law.
- c. THAT the decisions by the Respondents arose from illegality, as they did not follow the law governing public procurement, being the Public Procurement and Disposal Act No. 3 of 2005.
- d. THAT the Respondents acted *ultra vires* in arriving at their decisions.
- e. THAT the First Respondent acted without good reasons and unreasonably in awarding the tender to the Interested Party despite credible evidence that the said party did not comply with the law.
- f. THAT the Second Respondent acted without good reasons and unreasonably in upholding

the decision of the First Respondent despite evidence that the First Respondent's decision was unlawfully arrived at in error.

- g. THAT the First Respondent and the Interested Party have since signed a Contract/Agreement in the pendency of the proceedings.**

The application is also supported by the chamber summons application for leave, the statutory statement and the supporting affidavit of Arunkumar Acharya the Managing Director of the Applicant. All these documents were filed in court on 27th December, 2012. The Applicant also filed a further supporting affidavit sworn by Arunkumar Acharya on 4th July, 2013 and another further supporting affidavit sworn by the same deponent on 25th July, 2013.

The other parties to these judicial review proceedings are Kenya Power and Lighting Company Limited (Kenya Power) and the Public Procurement Administrative Review Board (the Board) being the 1st Respondent and 2nd Respondent respectively. Binary Computer Systems Limited (Binary) is an Interested Party. Though Binary was served with the papers in this matter, it did not file any replies and neither did it participate in these proceedings.

The background of this matter will help in understanding these judicial review proceedings. Through an advertisement in the print media, Kenya Power invited tenders from interested local manufacturers and suppliers for the supply of GPS Real-Time Fleet Tracking System With on-Board Tracking Units. The Applicant and Binary were among the bidders who participated in the tender. At the end of the tendering process, the tender was awarded to Binary. The Applicant being aggrieved by Kenya Power's decision applied for review of the decision before the Board in Request for Review No. 58 of 2012. In a decision dated 14th December, 2012 the Board upheld the decision of the Tender Committee of Kenya Power to award the tender to Binary. That is why the Applicant moved to this court and sought leave to commence these proceedings.

The Applicant's case is clearly brought out by the statutory statement dated 27th December, 2012. According to the statutory statement, the grounds upon which the reliefs are sought are:-

- a. **That the decision of the First Respondent's Tender Committee was an error of fact apparent on the face of the record.**
- b. **That the decision of the Second Respondent was made in error of fact apparent on the face of the record.**
- c. **THAT the decisions by the respondents arose from illegality, as they did not follow the law governing public procuring, being the Public Procurement and Disposal Act No. 3 of 2005.**
- d. **THAT the respondents acted *ultra vires* in arriving at their decisions.**
- e. **THAT the First Respondent acted without good reasons and unreasonably in awarding the tender to the Interested Party despite credible evidence that the said party did not comply with the law.**
- f. **THAT the Second Respondent acted without good reasons and unreasonably in upholding the decision of the First Respondent despite evidence that the First Respondent's decision was unlawfully arrived at in error.**

Kenya Power opposed the application through a replying affidavit sworn on 17th July, 2013 by its Senior Legal Officer Mr. Owiti Awuor. It is Kenya power's case that the decision of its Tender Committee was the subject of the application for review before the Board and this court has no jurisdiction to grant the orders sought in respect of the decision of the Tender Committee. Kenya Power argues that the Applicant is challenging the merits of the decision of the Board and not the process under which the decision was arrived at and as such judicial review remedies are not available in this matter. Kenya Power also argues that these proceedings have been overtaken by events since it has already signed a contract with Binary and the said contract is in the process of being executed. Finally, Kenya Power asserts that the Applicant has failed to prove that the Board acted *ultra vires* or that it failed to adhere to the rules of natural justice.

The Board opposed the application through a replying affidavit sworn on 31st July, 2013 by its Secretary Ms Pauline M Opiyo. It is the Board's case that it followed the due process of the law and considered all the evidence and submissions placed before it by the parties before making its decision. It avers that it complied with the rules of natural justice and procedure. It is the Board's submission that the application attacks the merits of its decision yet judicial review proceedings are targeted at the decision-making process. The Board also argues that it does not have power to debar Binary since such power is vested on the Director General who exercises this power with the approval of the Public Procurement Advisory Board in accordance with the Public Procurement and Disposal Act. The Board consequently argues that an order of mandamus cannot issue to compel it to commence debarment proceedings against Binary.

Considering the pleadings of the parties in this matter, I find that the issues for determination in these proceedings are:-

1. Whether the Applicant has established grounds for the grant of judicial review remedies;
2. Whether the reliefs should be granted to the Applicant; and
3. Who should meet the costs of the application?

The principles of judicial review were summarized by Lord Diplock in the **COUNCIL OF CIVIL SERVICE UNIONS v MINISTER FOR THE CIVIL SERVICE [1984] 3 ALL ER 935** case as follows:-

"Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety.".....

By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness"

(Associated Provincial Picture Houses Ltd, v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system.

I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."

From the foregoing, it is clear that a judicial review court does not consider the merits of the decision of a tribunal or public body. Any person dissatisfied with the merits of the decision of a tribunal or public body ought to file an appeal where an appeal is provided for. I, however, hold the view that a declaration that the decision of a tribunal or public body is unreasonable in the *Wednesbury* sense (**ASSOCIATED PROVINCIAL PICTURE HOUSES LTD v WEDNERSBURY CORPORATION [1948] 1 KB 223**)

is an attack on the merits of the decision. In the words of Lord Diplock at paragraph 110 in **THE COUNCIL OF CIVIL SERVICE UNIONS** case (supra) an unreasonable administrative decision is:-

“So outrageous in defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.”

Having established the legal principles that drive judicial review proceedings, I will now move to consider the Applicant’s case vis-à-vis these principles.

I have already reproduced the grounds upon which the Applicant seeks relief. They encompass illegality, irrationality and procedural impropriety. I will first consider the grounds of irrationality or unreasonableness and procedural impropriety.

The Applicant contends that the award of the Board did not conform to the rules and principles of natural justice. I think the cardinal rule of natural justice can be summarized in one line: that no man should be condemned without a fair hearing. That means no man should be condemned without a hearing but even where there is a hearing, the hearing should encompass an opportunity to prepare a defence and a chance to defend oneself before an independent and an unbiased tribunal. The Applicant has not pointed out a single incident in which it believes the Board breached the rules of natural justice. On the face of it, it is clear that the Board complied with the rules of natural justice.

Was the decision of the Board *ultra vires* the Public Procurement and Disposal Act 2005 (the Act)? According to Section 93(1) of the Act, the Board was established to deal with complaints from **“any candidate who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the regulations.....”** The jurisdiction of the Board is ousted by Section 93(2) of the Act as follows:-

“93 (2) The following matters shall not be subject to the review under subsection (1)—

(a) the choice of a procurement procedure pursuant to Part IV;

(b) a decision by the procuring entity under section 36 to reject all tenders, proposals or quotations;

(c) where a contract is signed in accordance to section 68;

and

(d) where an appeal is frivolous.”

Considering the circumstances surrounding the Applicant’s case one cannot say that the Board acted outside its jurisdiction. The illegality the Applicant talks of is that the decision of the Board was *ultra vires* the law. The Applicant also argues that the Board did not comply with the provisions of the Act. It is further the Applicant’s case that Kenya Power acted unreasonably by awarding the tender to Binary despite credible evidence that the said bidder did not comply with the law. The Applicant also claims that Kenya Power and Binary breached the law by signing a contract during the pendency of these proceedings.

In order to understand and give an answer to the Applicant’s complaints, one must look at the decision of the Board.

The Applicant submits that the respondents failed to consider relevant factors and considered irrelevant factors. It is the Applicant’s case that Binary provided false information so as to qualify for the tender, but when this information was brought to the attention of the Board it acted unreasonably and irrationally by finding that “KMT Jasusi Trackers” is a trade name of Binary. It is the Applicant’s case that one of the requirements of the tender documents was that a bidder ought to have supplied 1000 units. The

Applicant contends that the clients of a legal entity known as Key Merging Technologies Limited were used to show that Binary had supplied 1000 units. The Applicant claims that Kenya Power deemed it (the Applicant) not to have passed the technical qualification for failing to provide audited accounts whose auditing was done within 15 months from the date of the tender. The Applicant submits that it submitted accounts which were within 17 months from the date of the tender and a variation of two months in audited statements is minor and cannot constitute a material deviation that affects the substance of the tender. The Applicant accuses the Board of prejudice and statutory impropriety for finding that Kenya Power was correct in declaring the Applicant's bid non-responsive because the Applicant had failed to provide the audited accounts specified in the tender document. The Applicant asserted that the respondents failed to exercise discretionary powers in compliance with the law. It is the Applicant's case that it requested the respondents to verify its allegation that Binary had misrepresented its status but the respondents refused to do so. It is the Applicant's case that the respondents ought to have carried out investigations on its allegation that Binary and Key Merging Technologies Limited were different legal entities.

The Applicant alleges that the respondents failed to adhere to the objective of the Act which at Section 2 provides that while engaging in procurement of goods and services, public entities are to conduct themselves in a manner that is honest, efficient, fair, competitive, accountable and transparent and in a way that inspires confidence in the procurement procedures. It is the Applicant's case that the respondents failed these objectives by determining that Binary's bid was responsive while the same was based on misrepresentations. The Applicant further argued that the evaluation of its audited accounts did not comply with the objectives of the Act. The Applicant submitted that comparing its bid price with that of Binary was wrong since Binary's bid ought to have been declared non-responsive. The Applicant contended that Kenya Power acted against the objectives of the Act by signing an agreement with Binary while these proceedings were pending the decision of this court. It is the Applicant's case that this court has jurisdiction to quash both the decision of the Board and that of Kenya Power. The Applicant also submits that this court has jurisdiction to quash the contract entered into between Kenya Power and Binary.

There is no dispute that Kenya Power has indeed awarded the tender to Binary and a contract for the execution of the tender was signed in March, 2013. Kenya Power has indicated that the contract is being performed even as these proceedings continue. Whenever a request for review has been filed before the Board, the procuring entity is notified of the pending review and the procurement proceedings are suspended—see Section 94 of the Act. Where judicial review proceedings are filed in the High Court, the decision of the Board is stayed for 30 days—see Section 100(4) of the Act. The decision of the Board was made on 14th December, 2013 and by the time the contract was signed in March, 2013 thirty days had lapsed. There was no order of stay issued by the court and Kenya Power and Binary were at liberty to enter into the contract. Their entering into a contract cannot be held against them since they did not break any law.

Kenya Power's counsel submitted that these proceedings have been overtaken by events because the contract has been signed. In my view, a contract entered into as a result of an illegal procurement process by a procuring entity or as a result of a procedurally improper, illegal or unreasonable decision of the Board can be upset by this court for being void. The court will not encourage lawlessness by saying that it has no power to cancel contracts based on illegalities.

I now come back to the Applicant's complaints about the decision of the Board. A perusal of the Applicant's submissions shows that the Applicant has merely escalated to this court, the complaints it had made against Kenya Power before the Board. The Board considered all those complaints and made findings on the same. I will cite two of the issues raised by the Applicant before the Board and reproduce the decision of the Board. As to whether Binary misrepresented its identity, the Board at page 19 of its decision found that:-

“On the issue of whether the successful Bidder misrepresented itself to the Procuring Entity as to its identity and working associates, the Board finds that the evidence placed before it confirms that the Successful Bidder attached to its bid documentation evidence

to confirm that it was carrying on business under the trade name of “KMT Jasusi Trackers’. The Applicant did not place any evidence before the Board to the contrary on this issue other than a mere allegation which the Board finds to be baseless.”

The Applicant argued that the Board ought to have investigated if KMT Jasusi Trackers was indeed the Applicant’s trade name and not the trade name of Key Merging Technologies Ltd. In support of this argument the Applicant cited to this court the decision of the Board in **REQUEST OF REVIEW NO. 69/2012 OF 14TH DECEMBER, 2012 KONNEXION SYSTEMS LTD V INDEPENDENT ELECTION AND BOUNDARIES COMMISSION (IEBC)** in which the Board indicated that it had requested information from Kenya Revenue Authority and the Registrar of Companies to verify information submitted to the procuring entity by a successful bidder. I agree that the Board indeed decided to carry out its own inquires in the above cited decision. In the case before me, the Board was however satisfied on the evidence before it that KMT Jasusi Trackers was Binary’s trade name. The Board was therefore not obligated to carry out further enquiries in respect of the allegations made by the Applicant.

The Board also considered the Applicant’s failure to comply with one of the conditions of the tender i.e. supply of audited accounts and held that:-

“With regard to the issue of whether or not the Applicant’s failure to supply its audited accounts for 15 months - together with its bid documents amounted to a minor deviation, the Board finds that the Procuring Entity’s requirement in this respect was set out at clause 3.13.3(b) of the appendix to Instruction to Tenderers which provides:

“The audited financial statements required must be those that are reported within fifteen (15) calendar months of the date of the tender document.”

The Board did not find any set of Accounts attached to the Applicant’s bid documents as required by the above clause. The Applicant’s attachment of a letter from the Kenya Revenue Authority did not qualify as a requirement for Audited Accounts.

Accordingly the Board finds that the Applicant’s bid did not meet the mandatory requirements of the subject tender and that it was properly rejected by the Procuring Entity.”

The Board considered all the arguments of the Applicant and made findings on each of those issues. The Board may have been wrong in its decision but this court would be usurping the statutory function of the Board were it to substitute its own views for those of the Board.

The counsel of the Court of Appeal in **KENYA PIPELINE COMPANY LIMITED v HYOSUNG EBARA COMPANY LIMITED & 2 OTHERS [2012] eKLR** is apt in this matter. In that case the Court observed that:-

“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."

I think the words of Lord Greene, M.R. at page 229 in the **Wednesbury Corporation** case (supra) will make good closing remarks in this case. He observed that:-

"It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in Short v Poole Corporation [1926] Ch. 66, 90, 91 gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another

It is not enough for an applicant in judicial review proceedings to claim that a tribunal has acted illegally, unreasonably or in breach of the rules of natural justice. The actual sins of a tribunal must be exhibited for judicial review remedies to be granted.

It needs no further explanation to show that none of the prayers in the application should be allowed. The application therefore fails and it is dismissed with costs to the respondents.

Dated, signed and delivered at Nairobi this 10th day of September , 2013

W. K. KORIR,

JUDGE