



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
JR CASE NO 384 OF 2012

REPUBLICAPPLICANT

VERSUS

HON ATTORNEY GENERAL1ST RESPONDENT

PERMANENT SECRETARY

MINISTRY OF STATE FOR DEFENCE2ND RESPONDENT

THE CHAIRMAN TENDER COMMITTEE

MINISTRY OF STATE FOR DEFENCE.....3RD RESPONDENT

EX-PARTE

GOLICHA GANGE OMAR

JUDGEMENT

By way of a notice of motion application dated 6th November, 2012, Golicha Gange Omar the ex-parte Applicant (Applicant) prays for orders:-

“1. THAT this Honourable Court be pleased to issue an Order of Prohibition to prohibit the 2nd and 3rd respondents from further awarding Tender No. MOSD/423(348) 2011/12 for supply of meat (beef) on bone to Eldoret units of the Ministry of State for Defence to any other party other than the Ex-parte Applicant as directed by the Public Procurement Administrative Review Board on 11th May, 2012.

2. THAT this Honourable Court be pleased to issue an Order of Mandamus to mandate the 2nd Respondent to re-award Tender No. MUSD/423 (348) 2011/12 for supply of meat (beef) on bone to Eldoret units of the Ministry of State for Defence to the Ex-parte Applicant as directed by the decision of the Public Procurement Administrative Review Board on 11th May, 2012.

3. THAT the costs of this motion be provided for.”

The application is supported by the grounds on its face, a supporting affidavit sworn by the Applicant on 6th November, 2012, the Chamber Summons application for leave, a statutory statement, the Applicant's verifying affidavit, a further supporting affidavit sworn by the Applicant on 13th January, 2014 plus annexures to the affidavits.

The Attorney General; the Permanent Secretary, Ministry of State for Defence; and the Chairman of the Tender Committee of the Ministry of State for Defence are the 1st, 2nd and 3rd respondents. They opposed the application through an affidavit sworn by the 2nd Respondent, Ambassador Nancy Kirui on 5th December, 2012.

Briefly, the Applicant was among the bidders who had tendered to supply meat on bone to the 2nd Respondent's military units in Eldoret. The Applicant was not successful and the tender was awarded to Ms Eldoret Standard Butchery. The Applicant was dissatisfied with the decision to award the tender to Ms Eldoret Standard Butchery and filed an application for review namely application for Review No. 15/2012 of 18th April, 2012 with the Public Procurement Administrative Review Board (the Board).

Through a decision delivered on 11th May, 2012 the Board allowed the application for review and ordered as follows:-

- “1. The award of the tender to the Successful Bidder is hereby annulled.**
- 2. The Board, pursuant to Section 98(c) of the Act, substitutes the decision of the Procuring Entity by ordering the Procuring Entity to award the tender to Golicha Gange Omar at its quoted price.**
- 3. There will be no order as to costs.”**

The Applicant's case is that the decision of the Board has not been implemented by the 2nd and 3rd respondents.

Through the affidavit of Ambassador Nancy Kirui I get the impression that the respondents are saying that investigations carried out subsequent to the delivery of the Board's ruling reveals that the Applicant used forged documents in its bid. The respondents also contend that these proceedings have been overtaken by events since the tender period has since lapsed and new tenders for the year 2013 have since been advertised.

In my view, it is clear that one of the arguments put forward by the respondents borders on contempt for the rule of law. Once a court or tribunal makes a decision, the only legitimate way of setting aside the decision is by way of review or appeal. A party cannot, like the 2nd Respondent did, decide that the other party's case was based on forgeries and proceed to disobey the decision. The claim by the respondents that the Applicant's case was based on forgeries cannot be sustained. This particular ground of opposition to the Applicant's case is therefore dismissed.

I will now proceed to consider whether this application should succeed considering the material placed before the court.

The substantive notice of motion in a judicial review application should be served on all the parties likely to be affected by the court's decision. This is clearly provided by Order 53 Rule 3 of the Civil Procedure Rules which states:-

“3. (1) When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty-one days by notice of motion to the High Court, and there shall, unless the judge granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion and the day named

therein for the hearing.

(2) The notice shall be served on all persons directly affected, and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein, the notice of motion shall be served on the presiding officer of the court and on all parties to the proceedings.

(3) An affidavit giving the names and addresses of, and the place and date of service on, all persons who have been served with the notice of motion shall be filed before the notice is set down for hearing, and, if any person who ought to be served under the provisions of this rule has not been served, the affidavit shall state that fact and the reason why service has not been effected, and the affidavit shall be before the High Court on the hearing of the motion.

(4) If on the hearing of the motion the High Court is of the opinion that any person who ought to have been served therewith has not been served, whether or not he is a person who ought to have been served under the foregoing provisions of this rule, the High Court may adjourn the hearing, in order that the notice may be served on that person, upon such terms (if any) as the court may direct.”

Ms Eldoret Standard Butchery, as admitted by the Applicant, had entered into a contract with the procuring entity on 19th April, 2012. By the time the Board was making its decision the said Ms Eldoret Standard Butchery was supplying meat to the 2nd Respondent's Eldoret units. The said M/s Eldoret Standard Butchery is therefore directly affected by these proceedings and yet the Applicant never bothered to make it a party to the application. It would be acting against the rules of natural justice to allow the application without giving the said affected party an opportunity to be heard.

The other reason why the application should not be allowed is the fact that any orders issued will no longer serve any purpose. The tender was for the supply of meat for a period of one year. The said period has lapsed and as indicated by the respondents a tender for the period subsequent to the period in question has since been advertised and the tender process should be complete by now. The orders of the Board are no longer implementable.

For the above reasons, I find that the Applicant's application cannot succeed. The application is therefore dismissed. There will be no order as to costs.

Date, signed and delivered at Nairobi this 5th of day December 2013

W. K. KORIR,

JUDGE OF THE HIGH COURT