REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Judicial Review 222 of 2011

IN THE MATTER OF AN APPLICATION BY BUFFET PARK LIMITED FOR JUDICIAL REVIEW ORDERS OF CERTIORARI,PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF THE PUBLIC PROCUREMENT AND DISPOSAL ACT, 2005
AND

IN THE MATTER OF TENDER NO.CCN/CE/T/014/2007-08: REHABILITATION AND LEASE OF UHURU PARK RESTAURANT

AND

IN THE MATTER OF DECISION BY CITY COUNCIL OF NAIROBI MADE ON THE 6TH JUNE 2011

AND

IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM ACT CAP.26 LAWS OF KENYA

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEFURE RULES, 2010

BETWEEN

REPUBLIC……...……APPLICANT
-VERSUS-

CITY COUNCIL OF NAIROBI…….……RESPONDENT

AND

SAVANNAH GOLD LIMITED……..…..…….INTERESTED PARTY

EX-PARTE

BUFFET PARK LIMITED

J U D G M E N T

In the Notice of Motion dated 19th September 2011 filed in court on 20th September 2011, the Exparte Applicant Buffet Park Ltd ***(hereinafter referred to as the applicant)*** seeks the following orders:

(a) THAT an Order of Certiorari do issue to remove to the High Court and quash the decision of the Respondent made on 6th June 2011 granting the Interested Party Savannah Gold Ltd access to Uhuru Park Restaurant to carry out reconstruction, repairs and renovation work and to lease Uhuru Park Restaurant.

(b) THAT an Order of Prohibition do issue to prohibit the Respondent from granting the Interested Party Savannah Gold Ltd access to Uhuru Park Restaurant to carry out reconstruction, repairs and renovation work and leasing Uhuru Park Restaurant to Interested Party Savannah Gold Ltd.

(c) THAT an Order of Mandamus do issue to compel the Respondent to grant Applicant Buffet Park Ltd **access** to Uhuru Park Restaurant to carry out rehabilitation, reconstruction, repairs and renovation work on Uhuru Park Restaurant and to sign the lease of Uhuru Park Restaurant in favour of Buffet Park Ltd.

(d) THAT Costs be provided for.

The application was filed pursuant to leave granted on 15th September 2011 and is supported by a statutory statement dated 14th September 2011 and a verifying affidavit sworn by a Mr. Billy Kimani Mwangi, the managing director of the applicant and annextures thereto.

The application was opposed by both the respondent, the City Council of Nairobi and the interested party, Savannah Gold Limited.

The respondent filed a replying affidavit sworn on its behalf by K.J. Ayiecho, Chief Valuer in its administrative department. The said affidavit was sworn on 19th April 2011 and filed in court on the same date.

The interested party opposed the applicant's motion through a replying affidavit sworn on its behalf on 19th December 2011 by Mr. Peter B. Wahome one of its directors.

In the verifying affidavit filed on 14th September 2011, Mr. Billy Kimani depones that the applicant is a limited liability company which has been engaged in the hotel business since November 1998. It owns and operates Buffet Part Restaurant situated along Arwings Kodhek Road Hurlingham Shopping Centre Nairobi, Tamasha Park Restaurant located at Uchumi Hyper along Langata Road and Buffet Park Restaurant at Nairobi West.

It is the applicant's case that following an invitation to bid placed by the respondent in the Daily Nation Newspaper of 22nd October 2007 for tender No.CE/7/003/17-08, the applicant obtained documents for the said tender also described as contract No.CCN/CE/7/014/2007–08 from the offices of the respondents Director of Procurement and complied with all terms and conditions of the tender.

The tender was for the leasing of all those premises known as Uhuru Park Restaurant comprising of a bar, restaurant, kitchen, store, boiler room and toilet facilities which were in a state of disrepair on a Rehabilitation-Operate-Transfer (ROT) basis. The invitation to bid was made to interested firms with experience in Hotel Restaurant management in compliance with the provisions of the Public Procurement and Disposal Act, 2005.

By letter dated 26th March 2008, the respondent notified the applicant that it had accepted the applicant's bid for the tender and subject to acceptance of the terms of the contract within 14 days after 26th March 2008, the applicant had been awarded the contract for the rehabilitation, operation and transfer (ROT) of Uhuru Park Restaurant. The applicant duly confirmed acceptance of the said contract by letter dated 31st March 2008 addressed and delivered to the respondent.

However, the decision by the respondent's tender committee to award the contract to the applicant was appealed against to the Public Procurement Administrative Review Board in Application No.15 of 2008 by Sorrento Limited one of the companies who had bidded for the said tender. The Public Procurement Administration Review Board ***(hereinafter referred t as the Board)*** in its Ruling delivered on 9th May 2008 nullified the award of the tender to the applicant and awarded the same to Sorrento Limited. Aggrieved by the decision of the Board, the respondent commenced judicial review proceedings against the Board in **Misc. Appn. No.229 of 2008** and named the applicant as the 7th interested party in the case. On 14th July 2009 the High Court issued orders of Certiorari quashing the ruling of the Board delivered on 9th May 2008.

It is the applicant's case that the quashing of the Board's decision had the effect of reinstating the respondent's committee's decision to award the tender to the applicant but that despite numerous requests in writing asking the respondent to forward the lease and give the applicant access to Uhuru Park Restaurant as per terms of their contract, the respondent refused to respond in any way – see 8 letters in bundle of documents marked I, pages 26 – 33 annexed to the Notice of Motion.

On 1st September 2011, the applicant received information that by letter dated 6th June 2011, the respondent had unlawfully awarded the interested party the contract to rehabilitate and lease Uhuru Park Restaurant in total disregard of the subsisting valid contract between the applicant and the respondent for the same purpose and the High Court's order in Misc. Appn. No.229 of 2008. It is the applicant's further contention that the respondent's action was in direct contravention of the mandatory provisions of the Public Procurement and Disposal Act of 2005.

It is this action by the respondent granting the interested party access to lease and rehabilitate Uhuru Park Restaurant that provoked the institution of the current judicial review proceedings.

The applicant complains that the decision by the respondent to award the contract to the interested party while a similar contract previously awarded to it was subsisting was made in bad faith and was illegal, irregular, unprocedural, unreasonable and that it amounted to abuse of office by the respondent's officers.

The applicant further claims that the said decision was illegal as it was made without following the procedural steps provided for in the Public Procurement and Disposal Act ***(hereinafter referred to as the Act)*** which are mandatory for all public entities when procuring for goods and services.

The respondent in the replying affidavit sworn on its behalf by K.J. Ayiecho admitted that the tender No.CCN/CE/7/014/2007-08 had been awarded to the applicant by the respondent's Tender Committee on 28th March 2008 on a Rehabilitation-Operate-Transfer (ROT) basis. The deponent also admitted the facts as narrated by the applicant concerning institution and outcome of Appn. No.15 in the Public Procurement Administration Review Board and Misc. Appn. No.229 of 2008 in the High Court of Kenya.

It is however the respondent's case that the orders issued by the High Court in Misc. Appn. No.229/08 did not have the effect of reinstating the contract entered into between the applicant and the respondent. The

respondent argued that it had acted within the law following a decision made in a full council meeting under Section 148 of the Local Government Act, Cap.265 Laws of Kenya that the said premises be rented out instead of being tendered for as earlier done. The respondent stated that following this decision, it published an advertisement for renting of the suit premises at a rent of Kshs.200,000/- per month in a special issue of the Kenya Gazette notice dated 15th October 2011.

It is the respondent's case that the applicant's motion is bad in law and amounts to an abuse of the court process and that it should be dismissed with costs.

On its part, the interested party opposed the applicant's motion on grounds that it lawfully rented the suit premises from the respondent at a rent of Kshs.300,000 per month as per letter of offer dated 19th October 2010 which was in response to the interested party's expression of interest to lease and rehabilitate the premises for use as a restaurant as stated in letter dated 11th December 2009 – see annexture marked PBWI.

The letter of 19th October 2010 bearing the letter heads of the respondent and signed by the deponent to the replying affidavit filed on behalf of the respondent and addressed to the interested party stated as follows:

RE: RENTING OF UHURU PARK GARDEN RESTAURANTNAIROBI

The above matter and your application dated 11/12/2009 refers.

Your request has been approved subject to the following conditions:

1. Rent payment of Kshs.300,000/- per month payable quarterly in advance, exclusive of service charge payments with an escalation of 5% every year.

2. Submission proof of financial capability to carry out reconstruction, Repairs and Renovation to the tune of about 15 – 20 million in line with the Council Chief Architects details

3. The amount in No.2 above to be recovered from the rent.

4. Lease term of six (6) years, renewable.

5. To pay for the requisite licenses.

6. To operate the restaurant to satisfactory standards.

Should the above conditions be acceptable, then I shall be pleased to receive your acceptance in writing.

The conditions in the said letter of offer were accepted by the interested party in letter dated 26th October 2011 and by letter dated 2nd June 2011 the interested party was granted access to the suit premises to carry out reconstruction, repairs and renovation works to accommodate a restaurant. The said letters are exhibited as annextures to the interested party's replying affidavit marked PBWI – 4.

The interested party contends that there was nothing illegal in renting the suit premises from the respondent.

To further advance their respective positions in this matter, the parties filed written submissions which were highlighted by their counsels before the court on 1st March 2012.

After considering the pleadings and the submissions made by counsel for the respective parties in this case, I find that the main issue for determination by this court is whether the applicant is entitled to

the reliefs sought and in resolving this issue the court has to consider whether the decision to rent out the suit premises to the interested party was illegal, irrational or unreasonable within the meaning of Wednesbury's unreasonableness and whether it violated the applicant's legitimate expectations.

Before embarking on a consideration of the merits or otherwise of the applicant's application, I think it is appropriate to first deal with the preliminary objection raised by the interested party regarding the jurisdiction of this court to issue orders of certiorari as sought by the applicant. The interested party's challenge on this point is based on the claim that the applicant's prayer for certiorari is barred by operation of the law since the application was filed in September 2011 long after 6 months had expired from the date the respondent decided to rent out the suit premises to the interested party on 19th October 2010. It is the interested party's view that the application offends the provisions of Section 9 of the Law Reform Act and Order 53 Rule 2 of the Civil Procedure Rules which provides that applications for orders of certiorari must be made within 6 months from date the impugned decision was made.

The question to pose at this juncture is – *when was the decision to rent/lease the premises to the interested party made by the respondent?*

In my considered view, the correspondence exchanged between the respondent and the interested party annexed to the replying affidavit of Peter B. Wahome shows clearly that the letter of 19th October 2010 contained an offer to lease the suit premises to the interested party and it did not amount to a decision to lease the said premises to the interested party. Though the interested party accepted the offer on 26th October 2010, no further communication appears to have emanated from the respondent to the interested party until 2nd June 2011 when the respondent granted the interested party access to the suit premises to reconstruct, carry out repairs and renovate the same to accommodate a restaurant. This letter made reference to the offer letter dated 19th October 2010 and in my opinion, this is the letter that signified the respondent's decision to lease/rent the premises to the interested party and is the one that aggrieved the applicant.

The applicants sought and obtained leave to commence judicial review proceedings on 15th September 2011 and it is therefore obvious that the proceedings were commenced within the time prescribed by Section 9 of the Law Reform Act and order 53 Rule 2 of the Civil Procedure Rules.

Moving now to a consideration of whether the applicant has demonstrated that he is entitled to the orders sought on grounds of illegality, irrationality, unreasonableness and breach of its legitimate expectations, let me begin by stating at the outset that judicial review is concerned with the supervision of inferior courts, tribunals or public authorities like the respondent to ensure that they act or make decisions within the confines of the law and that they do not abuse their powers to the detriment of persons who appear before them. The purpose of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected.

In Halsbury's laws of England, 4th Edition Volume 1 (1), it is stated at page 92:

"The grounds upon which administrative action is subject to control by judicial review have been conveniently classified as threefold. The first ground is *'illegality'*: the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. The second is *'irrationality'* namely *Wednesbury* unreasonableness. The third *is 'procedural impropriety'*.

In this case, M/s Mwasame learned counsel for the applicant insisted in her submissions that the respondent's decision to rent/lease the suit premises to the interested party was illegal since it was made without following the mandatory provisions of the Public Procurement and Disposal Act of 2005.

Mr. Aduda on his part submitted that the respondent was not bound to follow the provisions of the Act in renting the premises to the interested party as it had obtained permission from the Minister to rent the premises at a minimum monthly rent of 200,000 under Section 148(B) of the Local Government Act which permission was published in a gazette notice issued on 15th October 2010.

A perusal of the Public Procurement and Disposal Act ***(the Act)*** reveals that the respondent is a public entity within the meaning of Section 2 of the Act which defines a public entity to include a Local Authority under the Local Government Act. Being a public entity there cannot be any doubt that the respondent was as a matter of law required to follow the provisions of the Act.

For purposes of procurement, it is clear from a reading of Section 2 and Section 3 of the Act that procurement includes the renting/leasing of premises by public entities.

From the material placed before me in this case, it is obvious that the respondent unilaterally made a decision to rent/lease the suit premises to the interested party without following the laid out procedures provided by either Part 4 or Part 6 of the Act.

It is my view that for any procurement by a public entity to be lawful, the public entity (***procuring entity)*** must follow the procurement procedures laid out in the Act. The public entity must use either open tendering or the alternative procurement procedures of restricted tendering or direct procurement if the conditions set out by Section 29(3), 73(2) and Section 74 of the Act are satisfied.

Since it is not disputed that the respondent did not follow the mandatory provisions of the Act in renting/leasing the suit premises to the interested party herein while renting/leasing of premises by public entities is clearly proclaimed by Section 2 and 3 of the Act to be procurement to which provisions of the Act applies, I find that the respondent's decision to rent/lease the suit premises to the interested party without following the provisions of the Act was illegal, null and void as it was made ***ultra vires*** the provisions of the Act.

The claim by the respondent and the interested party that the decision was lawful as it was done under Section 148 of the Local Government Act with the consent of the Minister for Local Government cannot avail the respondent or interested party since in my humble view and with much respect to Mr. Aduda for the interested party, Section 148 of Cap 265 only allows public authorities to impose fees and charges by a resolution of the Local Authority with the consent of the minister.

It is my finding that Section 148 of Cap.265 only mandated the respondent with the consent of the minister to set the amount of rent, fees or charges to be charged for its various facilities but it did not authorize the respondent to rent/lease the respondent's facilities which include the suit premises to any person let alone the interested party in this case. It did not exempt the respondent from following the provisions of the Public Procurement and Disposal Act in selecting the person who was to be awarded the contract for leasing and rehabilitating the Uhuru Gardens Restaurant.

I am fortified in this finding by the contents of the special issue of the Kenya Gazette dated 15th October 2010 which clearly indicated at page 3772 that the proposed charges/rent shown for the various establishments owned by the respondent were minimum amounts which were subject to the procurement provisions of 2005 on competitive bidding obviously referring to the requirement of open tendering in the Act.

The applicant also invited this court to find that the decision of the respondent to rent/lease the suit premises to the interested party was irrational and unreasonable given that the respondent had previously awarded a tender to the applicant to reconstruct, repair and renovate the suit premises for purposes of running a restaurant on a rehabilitation-operate-transfer basis. The applicant claimed that following award of the said tender, it had entered into a contract with the respondent to lease the premises which contract was still subsisting as the same had not been terminated and it was on similar terms as those being extended to the interested party.

Though the applicant has not proved the existence of the alleged contract between it and the respondent as the same was not exhibited in court, it has nonetheless demonstrated by credible evidence which is not disputed by the respondent that it was the bidder who was awarded the tender No.CE/7/003/17–08 also described as Tender No.CCN/CE/7/014/2007–08 which was to culminate in the leasing of the suit premises to the applicant for purposes of operating a restaurant on a rehabilitation-

operate-transfer basis but which lease the respondent refused to forward to the applicant for execution without any reason.

Given this fact and the fact that the respondent commenced judicial review proceedings to challenge the Board's decision to nullify the award of the said tender to the applicant and vigorously defended the award of the tender to the applicant by its tender committee with the result that the High Court in Misc. Appn. No.229/08 quashed the decision of the Board, I agree with the applicant's position that given the trouble that the respondent went into to defend its right to the award of the said tender, the decision by the respondent to lease the suit premises to the interested party on terms similar to those given to the applicant was both irrational and unreasonable within the meaning of Wednesbury's unreasonableness – **see Associated Provincial Picture Houses Ltd. –Vs- Wednesbury's Corporation [1947] EWCA Civ.1.**

In those circumstances, it is my view that no other reasonable body or Local Authority would have reached the same decision as the respondent. The said decision made nonsense of the respondent's fight in Misc. Appn. 229/08 to nullify the decision of the Board to award the tender to a third party.

It is also clear from the undisputed facts in this case that the said decision violated the applicant's legitimate expectations that having won the tender lawfully and the respondent having successfully prosecuted Misc. Appn. No.229/08 defending the legality of the award of the tender to the applicant that it was the applicant who was to be awarded the lease for the premises to operate a restaurant on terms stated in the tender documents and not any other party.

Even without belabouring the point any further, I think I have discussed sufficient grounds which demonstrates that the respondent in this case acted not only illegally but also acted arbitrarily and unreasonably to the detriment of the applicant.

Having taken everything into account, I am persuaded to conclude that the respondent treated the applicant unfairly and denied it its right to fair administrative action guaranteed under Article 47 of the Constitution of Kenya 2010.

Consequently, I have no doubt in my mind that the applicant is entitled to the reliefs sought in this case except for orders of mandamus. ***Why do I say so?*** I say so because the applicant has demonstrated that the impugned decision by the respondent was made illegally, was irrational and unreasonable and is therefore a good candidate for quashing by way of orders of certiorari.

On the Prayer for orders of prohibition, I find that the applicant has made out a good case for the issuance of orders of prohibition since from the material placed before the court, it is apparent that though the respondent had granted the interested party access to the suit premises to start reconstruction and renovation works, no formal lease or agreement for a lease had been executed between the respondent and the interested party for leasing of the said premises. It is settled law that prohibition looks into the future to forbid the implementation of illegal acts or decisions made following a flawed process or made in excess or outside the jurisdiction of an inferior tribunal, body or public authority. It forbids such bodies or authorities from acting contrary to the law.

The applicant has ably demonstrated by undisputed evidence that the respondent intends to lease the suit premises to the interested party without following the law as prescribed under the Public Procurement and Disposal Act. An order of prohibition is therefore deserved in order to prohibit the respondent from acting contrary to the law.

Lastly, with regard to the prayer for an order of mandamus, it is my finding that the applicant has not demonstrated that it is deserving of the said orders as prayed. The order of mandamus is a discretionary remedy which is issued by the High Court in its supervisory jurisdiction directed at persons or inferior tribunals requiring them to do a specified act which appertains to a public office and is in the nature of a public duty.

The Court of Appeal had occasion to discuss the scope and efficacy of the remedy of mandamus in the case of R –Vs- Kenya National Examination Council, Exparte Geoffrey Gathenji & 9 Others, Civil Appeal No.266 of 1996 in which it stated:

"The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, mandamus cannot command the duty in question to be carried out in a specific way.

What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed"

Applying the above principles to the present case, can it be said that the respondent had either a statutory or public duty to grant the applicant access to the suit premises to carry out rehabilitation, reconstruction and renovation works and to execute a lease for the suit premises in favour of the applicant? In my humble opinion the answer is **NO**.

Though there is no doubt that the respondent after faithfully following the mandatory provisions relating to procurement awarded the tender for rehabilitation, reconstruction and renovation of the suit premises to the applicant, the said award was not followed by the execution of a written contract between the parties based on the tender documents as required by Section 68 of the Act.

Section 68(3) emphasizes in mandatory terms that "No contract is formed between the person submitting the successful tender and the procuring entity until the written contract is entered into".

A reading of Section 68 of the Act as a whole reveals that inorder to complete the procurement process and for an award of a tender to remain valid, it must be followed by the execution of a written contract by the parties integrating the terms and conditions specified in the tender documents and this must be done within the period during which the tender in question was to remain valid.

In this case, there is no evidence that a written contract incorporating the terms of the tender won by the applicant was ever signed between the applicant and the respondent. I make this finding because no such contract was exhibited before the court to prove that it existed. From the applicant's pleadings and submissions, it appears that the applicant was equating the award of the tender to a contract entitling it to lease of the suit premises for the purposes specified in the tender documents. However, the Act draws a distinction between the award of the tender and execution of a written contract between the parties based on the terms of the tender awarded.

In the absence of proof that there was a contract duly executed by the parties on terms of the tender awarded to the applicant, the court cannot be expected to assume that such a contract existed. Though there is proof that there was an offer made by the respondent vide letter dated 26th March 2008 which was accepted by the applicant vide letter dated 31st March 2008 there is no proof that there was any consideration offered to complete the requirement of a legally bidding contract between the parties.

In view of this fact and the fact that it is clear from letters exhibited by the applicant that no lease had been executed by the respondent in favour of the applicant, I find that the respondent was not under any duty to grant the applicant access to the suit premises especially after the validity period of the tender expired.

The applicant has maintained the position that the effect of the High Court Order quashing the decision of the Board was to reinstate the respondent's decision to award the tender to the applicant.

The High Court in Misc. Appn. No.229/08 simply quashed the decision of the Board meaning that

it declared it null and void and of no legal effect. This in my view meant that the award of the tender to the applicant was left undisturbed and the respondent had an option of going through with it by formalizing it into a written contract if the validity period of the tender had not expired or exploring other options if the validity period of the tender had expired.

The High Court did not make any orders concerning the award of the tender to the applicant and did not direct the respondent to lease the restaurant in question to the applicant in terms of the tender award.

It is however noted that by the time the orders of the High Court were issued, the tender's validity period may have expired since the orders were issued about one year or so after the said tender had been advertised.

In view of the fact that the parties had not executed a written contract incorporating the terms of the tender, I find that the respondent did not have either a contractual, public or statutory duty to grant the applicant access to Uhuru Park Restaurant to rehabilitate and carry out reconstruction works therein or to execute a lease for the said restaurant in favour of the applicant. Since the respondent had discretion to select the person or entity it found appropriate to carry out the said rehabilitation and reconstruction works provided it complied with the provisions of the Public Procurement and Disposal Act, I find that compelling it to execute a lease for the suit premises in favour of the applicant would be tantamount to compelling it to exercise its discretion in a certain way which is not permissible in law.

For all the foregoing reasons, I find that the applicant has not demonstrated that it is deserving of the Orders of Mandamus as sought in Prayer (c) and I therefore decline to grant the same.

In conclusion, the upshot of this judgment is that the applicant has proved that it is entitled to Orders of **Certiorari a**s sought in Prayer (a) and Orders of Prohibition as sought in Prayer (b) but with some slight modification. The Notice of Motion dated 19th September 2011 is consequently allowed in terms of Prayer (a).

As for Prayer (b) an Order of Prohibition is hereby issued to prohit the respondent from granting the interested party Savannah Gold Ltd access to Uhuru Park Restaurant to carry out reconstruction, repairs and renovation work and leasing Uhuru Park Restaurant to the interested party Savannah Gold Ltd until fresh procurement for that purpose is undertaken by the respondent in accordance with the provisions of the Public Procurement and Disposal Act.

As the applicant has not proved that it is deserving of the order of Mandamus, I decline to issue order of Mandamus as prayed.

Finally, as the applicant has been partially successful in this case, it is entitled to costs of the application which should be borne by the respondent and the interested party. It is so ordered.

Dated, **Signed**and**Delivered** by me at Nairobi this **12th** day of June, 2012.

C. W. GITHUA
JUDGE

In the presence of:

Florence – Court Clerk

M/s Mwarsame for Applicant

M/s Abwao for Respondent

Mr. Anunda for Interested party