



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)**

**Judicial Review 210 of 2011**

**IN THE MATTER OF An Application by MFI Leasing Limited for Judicial Review Orders of Certiorari directed at the Public Procurement & Administrative Review Board**

and

**IN THE MATTER OF The Public Procurement & Disposal Act and Regulations (No. 3 of 2005)**

and

**IN THE MATTER OF The Public Procurement & Administrative Review Board dated 16<sup>th</sup> August 2011 in respect of Application Number 33 of 2011**

between

**REPUBLIC.....APPLICANT**

**AND**

**THE PUBLIC PROCUREMENT**

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

**AND**

**KENYA PORTS AUTHORITY.....1<sup>ST</sup> INTERESTED PARTY**

**EXPRESS AUTOMATION LIMITED .....2<sup>ND</sup> INTERESTED PARTY**

**EXPARTE: MFI LEASING LIMITED**

**RULING**

The Applicant has come before this court by way of Notice of Motion dated 12<sup>th</sup> September 2011, seeking the following orders:

- 1. An order of Certiorari to bring to the High court to be quashed the decision and ruling given by the respondent on 16<sup>th</sup> August 2011 dismissing the Ex parte applicant’s request for review and directing that the 1<sup>st</sup> Interested party proceed with the procurement**

## **2. That costs of the Application be provided for.**

The application is made on grounds on the face of the Notice of Motion and in particular that:

- 1. the decision of the Respondent reached on 16<sup>th</sup> August 2011 was ultra vires;**
- 2. that the decision by the Respondent was informed by irrelevant considerations;**
- 3. the decision of the Respondent was contrary to the Public Procurement and Disposal Act and Regulations (The Act);**
- 4. the decision of the Respondent was wrong in law;**
- 5. the decision of the Respondent was unreasonable;**
- 6. in arriving at its decision the respondent took into account irrelevant considerations.**

The ex parte Applicant also relies on its Statement of Facts and Verifying affidavit dated 30<sup>th</sup> August 2011, as well as the Chamber summons dated 5<sup>th</sup> October 2011 and the affidavit supporting the Chamber application.

The application is opposed by the Kenya Ports Authority, the 1<sup>st</sup> Interested Party herein, by way of a replying affidavit sworn by Johnson Gachanja, the Principal Procurement Officer (CTC and Tenders).

The Applicant is a limited liability company incorporated in the Republic of Kenya. The Respondent, is a body created under the Public Procurement & Disposal Act for the purpose of hearing reviews of persons aggrieved by the decisions of a procuring entity. The 1<sup>st</sup> Interested Party is a public body. It was the procuring entity in this case. The 2<sup>nd</sup> Interested Party is a limited liability company incorporated in the Republic of Kenya. The 2<sup>nd</sup> Respondent was awarded the tender in question.

On 10<sup>th</sup> May 2011, The Interested Party advertised in the daily newspaper tender number KPA/166/2011-11PSM. This was an invitation for bids for Provision of Lease of multi-functional products, photocopying, printing and scanning. The Applicant was among four parties who submitted tenders in response to the advertisement. During evaluation of the submitted bids, the evaluation committee was of the view that the Applicant's tender was non-responsive and thus rejected the tender. The Applicant, being aggrieved by this rejection, lodged a request for review with the Respondent challenging the decision of the 1<sup>st</sup> Interested Party and also requesting the reasons for which the tender was rejected. On 16<sup>th</sup> August 2011, the Respondent dismissed the Applicant's request for review and directed the 1<sup>st</sup> Interested Party to continue with the procuring process. It is this decision that the Applicant seeks to have reviewed.

The Applicant puts forth several grounds on which it has based its case. In particular, It is the Applicant's case that the Respondent's decision was *ultravires* its powers, unreasonable and bad in law. The Applicant is also of the view that the Respondent erred in failing to consider and make a determination on relevant material. The Applicant also contends that the Respondent acted *ultravires* its powers in failing to make a finding that the three other parties that had responded had failed to comply with the requirements of the tender document

It is also the Applicant's contention that the 1<sup>st</sup> Interested Party contravened the provisions of the Public Procurement and Disposal Act by accepting tender securities that did not meet the requirements of the tender documents, and that the tender documents were misleading.

The 1<sup>st</sup> Interested Party is of the view that the Respondent's decision made on 16<sup>th</sup> August 2011 is not *ultra vires*, unreasonable or wrong in law. In the affidavit dated 13<sup>th</sup> October 2011, the Principal

Procurement Officer of the Interested Party avers that after the process of evaluation of the tenders, the Applicant was found to have failed at the preliminary stage owing to a defective tender security, which was a mandatory requirement for the 1<sup>st</sup> Interested Party. Upon finding that the Applicant's tender was non-responsive, and after the review process of the Respondent, the 1<sup>st</sup> Interested Party completed the review process and awarded the tender to the 2<sup>nd</sup> Interested Party. The 2<sup>nd</sup> Interested Party has already begun performing its part of the contract.

I have considered all the documents and authority presented by the parties. I have also taken into consideration the submissions filed herein

The first issue for determination is whether the Review Board acted ultra vires in reaching the decision that the applicant's tender was non-responsive due to the fact that it did not comply with the standard for tender documents. Did the Review board make an error of law?

The tender was advertised by the 1<sup>st</sup> Interested Party on the 10<sup>th</sup> of May 2011 in two news dailies, the Nation and Standard newspapers. After the expiry of the advertisement, the submitted tenders were opened on 7<sup>th</sup> June 2011 in the presence of the bidders. The bids were checked for the presence of the following documents: the tender security, business questionnaire and declaration form, and the manufacturer's authorisation. At the preliminary evaluation stage the Applicant's bid was declared non-responsive owing to the fact that its tender security validity period was ninety [90] days contrary to the requirement that it be one hundred and twenty days therefore its bid did not move beyond the technical evaluation stage. A letter informing the Applicant of the rejection of the bid was sent out on 1<sup>st</sup> July 2011. The Applicant lodged a request for review with the Respondent on 18<sup>th</sup> July 2011.

One of the grounds relied on by the applicant is that the technical evaluation was carried out twice. I have perused the proceedings of the Review Board, which were annexed to the affidavit of the 1<sup>st</sup> Interested Party, and take note of the fact due to an error made by the Tender Evaluation Committee of the 1<sup>st</sup> Interested Party (which was the procuring entity), the Applicant had been allowed to move to the technical evaluation stage of the tender process. The Procurement Department of the 1<sup>st</sup> Interested Party noted that the tender security of the Applicant was inadequate and the Tender Evaluation Committee was notified. At this point, the Tender Evaluation Committee repeated the evaluation at the preliminary stage, and it was at this stage that the Applicant's bid was declared non-responsive.

At the Review process, the Applicant faulted the tender documents for not specifying the duration of the tender security. The Respondent rejected this submission and found the tender documents to have contained all the relevant information as required under the Act. The Applicant now would like me to review this decision.

Administrative review of procurement proceedings is found under Part VII of the Act. Section 98 provides that:

**“Upon completing a review, the Board may...**

**(a) annul anything the procuring entity has done in the procuring proceedings, including annulling the procurement proceedings in their entirety;**

**(b) give directions to the procuring entity with respect to anything to be done or re-done in the procurement proceedings;**

**(c) ....”**

The Respondent took into consideration all the matters raised by the Applicant in the request for review and found no grounds for reviewing the decision. The Respondent further directed that the 1<sup>st</sup> Interested Party could continue with the procurement process. I find that the decision of the Respondent was within

the ambit of section 98 of the Act and the Applicant's motion fails on this ground.

The question is whether the applicant is entitled to the orders sought no doubt, judicial review deals with the process of decision making of a public body, and not the process in which the decision was made. It is not concerned with the merits or demerits of a decision that is reached with the public body, rather with the procedure that was used by the public body in reaching that decision. I have previously set out the considerations to be taken into account when granting an order of certiorari, in the case of **PAUL KIPLAGAT BIRGEN & 25 others v INTERIM INDEPENDENT ELECTORAL COMMISSION & 2 others [2011] eKLR:**

**“Certiorari issues to quash a decision which is *ultra vires*. Certiorari is also concerned with the decision of some inferior tribunal or authority in order that it may be investigated. If the decision does not pass the test, it is quashed.... Judicial review must be accurately focused upon the actual exercise of a legal power and not upon mere preliminaries. The concern of certiorari is about a decision whether or not made under a legal power or a legal authority.”**

There is nothing before the court that shows that the Respondent took into account irrelevant factors in reaching its decision. The Applicant's motion also fails on this ground.

Having addressed my mind to the respective issues raised by the parties herein, I find that the Respondent acted within its legal authority in making the decision. I therefore decline to grant the order of certiorari sought.

Furthermore, I have noted that after the decision of the Respondent, the 1<sup>st</sup> Interested Party finalised the procurement process and entered into a contract for the supply of the multifunctional products (photocopying, printing and scanning) with the 2<sup>nd</sup> Interested Party. An order of certiorari would effectively overturn the decision of the Respondent and require the 1<sup>st</sup> Interested Party to cancel the contract that it has already entered into with the 2<sup>nd</sup> Interested Party. I cannot ignore the economic and logistical ramifications that would arise should the 1<sup>st</sup> Interested Party cancel this contract. Judicial review orders are discretionary orders, and they must be granted prudently. In this instance, it would not be appropriate to issue the orders sought.

Accordingly and for the reasons stated, I dismiss the Applicant's motion with no order costs.

**Dated, Signed and Delivered at Nairobi this 25<sup>th</sup> day of July 2012.**

**M. WARSAME**  
**JUDGE**