



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Miscellaneous Civil Application 134 of 2011**

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

**AND**

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

**AND**

**IN THE MATTER OF THE PUBLIC PROCUREMENT AND DISPOSAL REGULATIONS 2006**

**AND**

**IN THE MATTER OF THE DECISION DATED 17<sup>TH</sup> MAY 2011 BY THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD....1<sup>ST</sup> RESPONDENT**

**NATIONAL SOCIAL SECURITY FUND.....2<sup>ND</sup> RESPONDENT**

**EX PARTE:  
CEMENTERS LIMITED**

**JUDGMENT**

The Applicant is Cementers Limited, a limited liability company incorporated in Kenya. The 1<sup>st</sup> Respondent is the Public Procurement Administrative Review Board, the body established under the Public Procurement and Disposal Act 2005 (hereinafter referred to as 'the Act').

The 2<sup>nd</sup> Respondent is a body corporate established under the National Social Security Fund Act. In this case, it was the procuring entity.

The application before the court is the amended Notice of Motion dated 2<sup>nd</sup> November 2011 which seeks:

a) An order of certiorari to bring to this court and quash the decision of the Respondent to annul the

award given by NSSF the procuring entity to Cementers Limited (the successful bidder);

b) An order of prohibition to prohibit the National Social Security Fund, the [2<sup>nd</sup>] Respondent, from doing any act that would commence or amount too retendering such as, but not limited to, advertising for tender in relation to the completion of Hazina Trade Centre Office Tower, Nairobi.

c) Costs of the application.

The application is supported by the amended statutory statement, the supporting affidavit and supplementary affidavit of Dipak Halai. It is based on grounds on its face and in particular that:

1. The 1<sup>st</sup> Respondent erred in law and in fact, by failing to take into account the relevant circumstances and facts, and considered facts and circumstances that were irrelevant;

2. The Board reached a decision that was unreasonable within the Wednesbury principle;

3. There is an error of law on the face of the records;

4. The board did not follow the prescribed procedure in arriving at and delivering their decision;

5. It is the contention of the Applicant that the 1<sup>st</sup> Respondent reached a decision which was amongst other wrongful things;

a) In excess of its powers and authority, hence ultra vires more so, when it purported to turn itself into an evaluation committee and selectively and without any power or expertise, purported to evaluate the Applicant's tender;

b) When it purported to evaluate the Applicants tender by using a criteria, not previously set out in the tender documents;

c) When it went beyond its powers of a review tribunal and allocated itself powers to evaluate the applicant's tender and substituted its decision for that of the lawfully established procuring entity's evaluation and tender committee, contrary to the law and the legitimate expectations of the Applicant;

6. Acted unreasonably and contrary to the principles established by the Wednesbury decision that: discretion must be exercised reasonably and that a person entrusted with discretion must direct himself properly in law.

It is the Applicant's case that the Board erred in law in allowing the review application by China Jiangxi International Limited, that the decision reached was wrong and that the ruling of the 1<sup>st</sup> Respondent a nullity to the extent that it does not bear a delivery date. The Applicant further contends that the ruling in question violates the Act and affords an unfair advantage to China Jiangxi International Kenya Limited and other Chinese companies and would render any subsequent tendering restrictive.

The factual background of these proceedings is captured in the Applicant's statement of facts. On or around 1<sup>st</sup> February 2011, the 2<sup>nd</sup> Respondent advertised a tender (Tender No 14/2010-2011) in the local daily newspapers for the completion of Hazina Trade Centre, Officer Tower, Nairobi.

Several bidders, among them the Applicant, responded to the tender. During the evaluation, it was established by the tender evaluation committee that only the Applicant herein had satisfied the requirements, and recommended that the tender be awarded to it. The tender was therefore awarded to the Applicant.

China Jiangxi International Kenya Limited, who was one of the unsuccessful bidders, commended review proceedings with the 1<sup>st</sup> Respondent against the procuring entity. In a ruling dated 17<sup>th</sup> May 2011, the 1<sup>st</sup>

Respondent allowed the review application, annulled the tender awarded to the Applicant herein and ordered that the tendering process begin afresh.

At the time of tendering, Raerex EA Limited did not have a current registration certificate. This company was one of the sub-contractors of the unsuccessful bidder, China Jiangxi International Kenya Limited.

The Applicant now contends that the 1<sup>st</sup> Respondent reached a decision that was wrongful since it failed in its duty to establish whether or not the Applicant, China Jiangxi International Limited, was properly disqualified and therefore reached a conclusion that no reasonable person would reach. The Applicant further states that there is an error on the face of the record because there is no delivery date on the ruling, which renders the decision invalid.

The 1<sup>st</sup> Respondent is also said to have misconducted itself by failing to accord the Applicant a certified copy of the ruling forthwith, thereby prejudicing the Applicant's options.

The 1<sup>st</sup> Respondent has opposed this application through the replying affidavit dated 14<sup>th</sup> November 2011. The affidavit is sworn by Cornel R. Amoth who is the Secretary to the 1<sup>st</sup> Respondent.

The 1<sup>st</sup> Respondent's case is that it received an application, being No 15 of 2011 for review of the decision of the procuring entity. The application was lodged by China Jiangxi International Limited. The 1<sup>st</sup> Respondent heard the application and found that the tendering process was flawed. It allowed the review, annulled the award of the tender and authorised the 2<sup>nd</sup> Respondent to retender.

One of the reasons that the 1<sup>st</sup> Respondent allowed the review was that it found that China Jiangxi was wrongfully disqualified from the tender process as there was no written evidence that the subcontractor was not currently registered.

The 1<sup>st</sup> Respondent also noted that the 2<sup>nd</sup> Respondent had allowed only one bidder to proceed to the technical and evaluation stages of the process, thereby defeating the objects of section 2 of the Act.

The 1<sup>st</sup> Respondent contends that each party, inclusive of the Applicant herein, was given an opportunity to present its case. It states that the ruling in question is properly dated and the allegation that it does not bear a date is untrue. It further states that notice was also issued on the ruling and the Applicant was aware that the ruling was delivered on the 17<sup>th</sup> May 2011 but failed to pick it up on the same date.

The 1<sup>st</sup> Respondent submits that in allowing the review, it exercised its powers under section 98 of the Act and made the decision on merit and without favouring any party.

It states further that the Applicant is not in any way prejudiced since it still has another chance to participate in the tendering process once the 2<sup>nd</sup> Respondent reissues the tender.

The 1<sup>st</sup> Respondent takes issue with the time taken in filing the present application. It states that the application is fatally defective as it is filed out of time, and that the Applicant was not given leave to institute proceedings as against the Respondents hence the same ought to be struck out.

The 2<sup>nd</sup> Respondent also opposed the application. It did so through grounds of opposition dated 15<sup>th</sup> November 2011.

The 2<sup>nd</sup> Respondent states that the decision of the 1<sup>st</sup> Respondent was reasonable and perfectly within the provisions of section 98 of the Act.

The 2<sup>nd</sup> Respondent's case is that the 1<sup>st</sup> Respondent has power to annul anything the procurement entity has done in the proceedings including annulling the proceedings in their entirety. It further submits that

the allegation that the ruling bears no date is unfounded as it bears the the date 17<sup>th</sup> May 2011, and relates to two review applications: Application Numbers 14 of 2011 and 15 of 2011.

The 2<sup>nd</sup> Respondent further contends that the Applicant's case amounts to an attack on the merits of the decision of the 1<sup>st</sup> Respondent and as such is not amenable for judicial review. It states that the orders sought should only be granted in case there is a serious injustice that cannot be remedied in any other way which is not the case here, as the Applicant has the opportunity to participate in the new tender.

I have considered all the pleadings and submissions filed by counsel. I have also read the submissions and the authorities by the parties.

When the matter came up for oral submissions on 1<sup>st</sup> December 2011, Mr. Nyakundi and Mr. Kihara, advocates for the Applicant, raised a constitutional issue regarding section 97 (2) and section 100 of the Act. They argued that these sections have the effect of limiting or curtailing the Applicant's right to a fair hearing which in turn constitutes a breach of its fundamental rights and freedoms contained in Article 47, 50, 22 and 23 of the Constitution of Kenya. The Applicant therefore wants this court to determine if section 100 of the Act is unconstitutional. This section reads as follows:

***'100. (1) A decision made by the Review Board shall, be final and binding on the parties unless judicial review thereof commences within fourteen days from the date of the Review Board's decision.'***

***(2) Any party to the review aggrieved by the decision of the Review Board may appeal to the High Court and the decision of the High Court shall be final.***

***(3) A party to the review which disobeys the decision of the Review Board or the High Court shall be in breach of this Act and any action by such party contrary to the decision of the Review Board or the High Court shall be null and void.***

***(4) If judicial review is not declared by the High Court within thirty days from the date of filing, the decision of the Review Board shall take effect.'***

In short, the applicant wants this court to determine the legality of section 100 (1) which limits the time within which an aggrieved party may bring judicial review proceedings, in light of the fact that the Law Reform Act and Order 53 of the Civil Procedure Rules gives the time limit for commencement of judicial review proceedings as within six months from the time a decision is made.

The Applicant contends that there is a conflict between the Act, the provisions of the Constitution relating to procurement and fair administrative action and the Law Reform Act.

Mr. Kaumba, counsel for the 1<sup>st</sup> Respondent in response submitted that section 100 (1) does not oust the jurisdiction of this court. He further correctly submitted that even under the Constitution of Kenya, the some rights are subject to a limitation under Article 24. This Article provides for the limitation of rights to the extent permissible in **'an open and democratic society ... and taking into account other relevant factors'** such as the nature of the right, the importance or the purpose of the limitation and the nature of extent of the limitation.

Section 100 sets a time limit within which parties must initiate judicial review proceedings against the 1<sup>st</sup> Respondent. Before making a determination on the propriety of this section, it is important to first look at the intention behind the enactment of this legislation. The Act was passed by parliament, **'to establish procedures for efficient public procurement'**. The objects of the Act are set out in section 2, which I have reproduced hereunder:

**2. The purpose of this Act is to establish procedures for procurement and the disposal of unserviceable, obsolete or surplus stores and equipment by public entities to achieve the following**

*objectives –*

- (a) to maximise economy and efficiency;*
- (b) to promote competition and ensure that competitors are treated fairly;*
- (c) to promote the integrity and fairness of those procedures;*
- (d) to increase transparency and accountability in those procedures; and*
- (e) to increase public confidence in those procedures.*
- (f) to facilitate the promotion of local industry and economic development.*

My determination and interpretation is that the time limit was to ensure that procurement proceedings are completed in a quick, efficient and expeditious manner so that the objects of the Act are not defeated. It is also meant to ensure that government and government organs operate and carry out their public responsibilities and obligations smoothly and in order to give efficient and effective service to the citizens. A delay in the finalisation of a procurement process may result in grave and gross injustice to the persons to the persons interested in goods and services offered by a public entity.

This special legislation was meant to add a unique and peculiar process of procurement within the government and statutory organs that provide public services. In my view, section 100, does not attempt to oust the jurisdiction of the High Court either in judicial review, or as an appellate body.

Order 53 Rule 2 provides that judicial review proceedings may not be instituted unless ***‘unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act;’***. Clearly, the drafters of this rule envisaged a situation where the time limit for bringing judicial review proceedings could be shortened from the six (6) month period. It is therefore my finding that section 100 (1) does not attempt to oust the supervisory or appellate jurisdiction of this Court.

The Applicant contends that it only managed to get hold of a copy of the ruling after 25<sup>th</sup> May 2011. This was a full week after the delivery of the decision of the 1<sup>st</sup> Respondent. The present suit was first filed on 2<sup>nd</sup> June 2011. Order 53 Rule 7 provides that an order of certiorari will not issue unless a copy of the disputed decision has been lodged with the court. Where the Applicant has not lodged a copy of the decision complained off, he must account for his failure to do so to the satisfaction of the Court. In my view, the Applicant has properly accounted for his failure to file his application within the time stipulated by the Act. Article 159 directs all courts to deliver justice without undue technicalities. In my view, to find that the Applicant is time barred when it has offered a reasonable explanation for the shortcoming would amount to a propounding an injustice.

The issue for determination is whether the 1<sup>st</sup> Respondent exceeded its authority in reaching the decision in Application No 15 of 2011.

The 2<sup>nd</sup> Respondent board is established by section 25 of the Act. Candidates (in any tendering process) are given the option to apply for administrative review for the board. After hearing an application for review, the board may make any one of the following orders:

- a) annul anything the procuring entity has done in the procurement proceedings, including annulling the procurement proceedings in their entirety;*
- b) give directions to the procuring entity with respect to anything to be done or redone in the procurement proceedings;*
- c) substitute the decision of the Review Board for any decision of the procuring entity in the procurement proceedings; and*

**d) order the payment of costs as between parties to the review.**

In the present case, the 1<sup>st</sup> Respondent annulled the procurement proceedings and gave the Procuring entity the option of tendering afresh.

The applicant has taken the view the ruling was not dated and therefore is a nullity. This ruling is annexed to the Applicant's pleadings as the annexure marked DH8. It is clear that the ruling relates to the consolidated review of applications 14 of 2011 and 15 of 2011. At page 24 of the ruling, it is clearly indicated 'dated at Nairobi this 17<sup>th</sup> day of May 2011'. It is therefore not clear what the Applicant is referring to when it states that the ruling is not dated. This ground of the motion therefore fails.

The applicant takes issue with the considerations that the 1<sup>st</sup> Respondent took in reaching the decision to annul the initial tendering process. The Applicant states that the 1<sup>st</sup> Respondent relied on contradictory statements in reaching its decision. The Applicant further takes issue with the fact that the 1<sup>st</sup> Respondent allowed the application for review despite there being reasons against this advanced by the 2<sup>nd</sup> Respondent.

At this stage it is important to point out that a judicial review court shall not sit as a court of appeal in any decision of an inferior body. Halsbury's Laws of England 4<sup>th</sup> Edition Volume 1 at page 92 it is stated that:

***“judicial review is concerned with reviewing the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself. It is thus different from an ordinary appeal. The purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected: it is no part of that purpose to substitute the opinion of the judiciary or that of individual judges for that authority constituted by law to decide the matters in question”***

This position has also been clarified in several local decisions. In ***Republic V Judicial Service Commission ex parte Pareno [2007] 1 KLR 203*** Justice Nyamu (as he then was) held that

***“the remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision-making process itself.”***

This was also stated by Musinga J in ***Nicholas Muchora & 5 Others V Senior Resident Magistrate (Milimani Commercial Courts) [2011] eKLR (Miscellaneous Application 259 of 2007)*** wherein he stated that:

***“The remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself.”***

In ***Kenya Pipeline Company Limited And Hyosung Ebara Company Limited And Others [2012]eKLR (Civil Appeal No 145 of 2011)*** the court of appeal further clarified this principle as follows:

***“moreover, where proceedings are regular upon their face and the inferior tribunal has jurisdiction in the original narrow sense (that is to say it has power to adjudicate upon the dispute) and does not commit any of the errors which go to jurisdiction in the wider sense, the quashing order (certiorari) will not ordinarily be granted on the ground that its decision is considered to be wrong either because it misconceived a point of law or misconstrued a statute (except a misconstruction of a statute relating to its own jurisdiction) or that its decision is wrong on matters of fact or that it misdirects itself in some matter.”***

The court in exercising its judicial review jurisdiction would therefore not issue orders merely on the fact that a tribunal has reached an incorrect decision. The only instance where the court will delve into the merits of the decision is in an instance where a decision is so unreasonable that it would meet the

threshold of 'Wednesbury unreasonableness'. This was set out in the case of *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corporation* [1947] 2 ALL E.R. 680. In this case, Green MR stated..

***'...If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority.'* (emphasis mine)**

In the same case, Warrington, L.J., stated:

***'I think it was, 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. In fact, all those things largely fall under one head.'***

The question therefore is whether the decision of the 1<sup>st</sup> Respondent was unreasonable in the Wednesbury sense. In my view it was not. I have had an opportunity to read the ruling that offends the Applicant. In part, this ruling states that :

***'...Only one bidder proceeded to the technical and financial evaluation in a tender whose total contract is about six (6) billion shillings. The action by the Procuring Entity is contrary to the objection (sic) of the Act as set out in section 2...'***

It is my considered view that the 1<sup>st</sup> Respondent, took into consideration all the relevant matters in making its ruling. As has been pointed out by the 2<sup>nd</sup> Respondent, there has been no great prejudice occasioned to the Applicant. No contract had been signed between itself and the procuring entity. The Applicant has an opportunity to participate once more should the 2<sup>nd</sup> Respondent elect to retender.

The grounds on which a court would grant judicial review orders are those that were outlined in the English case of *Council of Civil Service Unions Vs Minister for Civil Service (1985) AC 374 at 410*. These grounds are among others illegality, irrationality and procedural impropriety.

The Court of Appeal has also stated this in *Grain Bulk Handlers Limited V J. B. Maina & Co. Ltd & 2 Others [2006] eKLR* where the Court of Appeal stated that:

***'Judicial Review jurisdiction regulates the process by which a decision making power given by the law is exercised by the person or body given the jurisdiction. The subject matter of Judicial Review is the legality of such decisions.'***

In this case, the Applicant has failed to demonstrate any of the grounds outlined in the *Council of Civil Service Unions Vs Minister for Civil Service case*. It has also failed to show that the proceedings before the 1<sup>st</sup> Respondent were in any way irregular.

It is therefore my decision that the Applicant has not disclosed any reasons to warrant the grant of the orders sought. In the circumstances, the application dated 2<sup>nd</sup> November 2011 fails for lack of merit.

Each party shall bear its own costs

**DATED, SIGNED and DELIVERED this 29<sup>th</sup> day of November 2012**

**M. WARSAME  
JUDGE**