REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Judicial Review 92 of 2011

REPUBLIC…….....……..APPLICANT
VERSUS

THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD…….1ST RESPONDENT

KENYA RAILWAYS CORPORATION…….....……2ND RESPONDENT

EX PARTE

GIBB AFRICA LTD &

CANARAIL CONSULTING INC.

JUDGMENT

The applicants are Gibb Africa Limited and Canarail Consultants Inc. Gibb Africa Limited is a limited liability company incorporated in Kenya, whereas Canarail Consultants Inc. is a limited liability company incorporated in Canada. The applicants are consulting engineering firms. The 1st respondent is the Public Procurement Administrative Review Board (PPARB) which is established under the provisions of the Public Procurement and Disposal Act, 2005 hereinafter simply referred to as the Act. The 1st respondent is granted powers under the Act to review decisions made by procuring entities in procurement proceedings falling under the Act. The 2nd respondent is the Kenya Railways Corporation which is a state corporation established under the Kenya Railways Corporation Act, Cap 397 of the Laws of Kenya. Its key mandate is to plan and develop railway transport systems, and promote and facilitate national railway network development. In this case, the 2nd respondent was a procuring entity within the definition of the Act. The interested party (Italferr S.P.A.) was the successful bidder in the tendering process conducted by the 2nd Respondent.

The application for determination is the Notice of Motion dated 13th April 2011 which seeks orders of:-

a) Certiorari to remove to the High Court and quash the decision dated 25th March 2011 (and delivered on 30th March 2011) of the 1st respondent to dismiss the applicant's Application for Review No. 7 of 2011 between the applicants and the 2nd respondent;

b) Prohibition be issued restraining the 2nd respondent from enforcing the said decision and/or

taking any other steps in the procurement proceedings that form the subject matter of the said Application for Review No. 7 of 2011; and

c) Costs of the application.

The application is based on the grounds set out in the statutory statement of the applicants, and the verifying affidavit of Charles Kasyoka Malinda. These grounds are that:-

a) The decision of the 1st respondent was made without jurisdiction;

b) The decision of the 1st respondent was made in excess of jurisdiction;

c) There was an error of the law on the face of the record; and

d) The decision was unreasonable and unfair.

The genesis of these proceedings is a procurement process by the 2nd Respondent for services under the provisions of the Act. For purposes of record the specific procurement is INTERNATIONAL TENDER NO: KRC/PLM/71/2010 being ***"REQUEST FOR PROPOSALS (RFP) FOR CONSULTANCY SERVICES FOR PRELIMINARY DESIGN, ENVIRONMENTAL AND SOCIAL IMPACT ASSESSMENT FOR DEVELOPING A MODERN HIGH CAPACITY STANDARD GAUGE RAILWAY LINE BETWEEN MOMBASA AND MALABA WITH A BRANCH LINE TO KISUMU"***.

The applicants' case is that during the procurement process, the 2nd respondent was required by law to use the Standard Request for Proposal (RFP) as prescribed under Section 29 of the Act. The 2nd respondent prepared a RFP and at clause 2.7.1 complied with the law by providing the evaluation criteria of the technical proposal with comments as follows:-

"The evaluation committee appointed by the Client shall evaluate the proposals on the basis of their responsiveness to the Terms of Reference, applying the evaluation criteria as follows

	Points
(i) Specific experience of the consultant	
Related to the assignment	***10***
(ii) Adequacy of the proposed work plan	
And methodology in responding to the Terms of reference	***40***
(iii) Qualifications and competence of the	
Key staff for the assignment	***40***
(iv) Suitability to the transfer of Technology	
Programme (training)	***10***

Total Points ***100***

Each responsive proposal will be given a technical score (St). A proposal shall be rejected at this stage if it does not respond to important aspects of the Terms of Reference or if it fails to achieve the minimum technical score indicated in the Appendix "ITC"."

The said RFP has Appendix "ITC" which has a general clause which provides that:-

"The following information for procurement of consultancy services and selection of consultants shall complement or amend the provisions of the information to consultants, wherever there is a conflict between the provisions of the information to consultants and the provisions of the appendix, the provisions of the appendix herein shall prevail over those of the information to consultants."

At clause 2.7.1 of the appendix a technical evaluation criteria is provided as follows:-

"Technical Evaluation Criteria ***Maximum Points***

(i) Specific experience of the consultant

Related to the assignment ***10***

(ii) Adequacy of the proposed work plan and

methodology in responding to the terms of reference ***36***

(iii) Qualifications and competence of the key staff

for the assignment ***50***

(iv) Suitability to the transfer of Technology

Programme (Training)

4

Total Max. Points

100."

According to the applicants the standard RFP provides for the range of scores for each parameter and a procuring entity cannot award scores outside the provided range. The range is as follows:-

"Parameter ***Points***

(i) Specific experience of the consultant

related to the assignment ***(5-10)***

(ii) Adequacy of the proposed work plan and

methodology in responding to the terms

of reference ***(20-40)***

(iii) Qualifications and competence of

the key staff for the assignment ***(30-40)***

(iv) Suitability to the transfer of Technology

Programme (Training) ***(0-10)***

Total Points ***100"***

The applicants submitted their bid but the tender was awarded to the interested party. The applicants filed Application for Review No. 7 of 2011 before the 1st respondent. After hearing the application the 1st respondent dismissed the application. The applicants have now come to this court to challenge the decision of the 1st respondent.

A perusal of the applicants' papers shows that the applicants are also challenging the decision of the 2nd respondent to award the tender to the interested party. The applicants contend that the 2nd respondent's RFP was unlawful in the following respects:-

a) The 2nd respondent made an error of law when it chose not to use the mandatory requirements at clause 2.7.1 of the standard RFP which provides for the scores to be awarded for the technical assessment and instead purported to amend the criteria used in the award of scores in the appendix to its RFP. This is particularly in respect of parameter (iii) of the evaluation criteria which in the standard RFP provides for a score of between 30-40 points for "qualifications and competence of the key staff for the assignment". The applicants aver that the 2nd respondent changed the score for this parameter to 50 points in the appendix to its RFP and awarded the interested party the 50 points on this parameter thereby skewing the playing field in favour of the interested party.

b) The 2nd respondent's RFP did not have the weightings which would determine the ranking of the proposals according to their combined technical and financial scores, yet the mandatory requirements of the standard request for proposals are that a procuring entity must include these weightings.

These are the grounds which the applicants urged in its application for review before the 1st respondent. Another ground raised in the application for review was that the 2nd respondent had failed to comply with an earlier ruling of 1st respondent dated 8th September, 2010 in which the 1st respondent had concluded that it (2nd respondent) had breached the mandatory provisions of the law and in particular sections 29 and 82 of the Act. For purposes of record the applicants had, in the earlier application for review, successfully challenged before the 1st respondent the 2nd respondent's procurement process in respect of the same tender.

Now the applicants contend that in dismissing their application for review, the 1st respondent misdirected itself by:-

a) Using information that was not pleaded in the defence, during the application for review, in making its finding; and

b) Failing to find that the 2nd respondent had erred by not complying with the mandatory requirements of the standard RFP yet it had based its earlier ruling of 8th September 2010 on that issue.

The 1st respondent after dismissing the application for review ordered that the 2nd respondent should proceed with the procurement process. It is this decision that the applicants wish this court to quash and prohibit the 2nd respondent from implementing.

The applicants' case is that they were aggrieved by the decision of the 2nd respondent in the evaluation of their technical proposal and as a result, they (the applicants) filed a review application under the Act

before the 1st respondent. They further argue that the 1st respondent in reaching its decision failed to adhere to the law and thus the need for this court to intervene through judicial review.

The 2nd respondent opposes the application through the replying affidavit sworn by its Managing Director Mr. Nduva Muli on 6th May, 2011. The 2nd respondent's case is that the bidding process for the consultancy services was first started in May 2010 and concluded in July 2010. The applicants were unsuccessful in their bid and challenged the outcome by lodging **Request for Review Application Number 48/2010** with the 1st respondent. In that application the applicants had challenged the use of an open tender by the 2nd respondent and submitted that the tendering method that ought to have been used was Request for Proposals. The challenge was successful and the 2nd respondent was asked to commence the process afresh. In compliance with the order the 2nd respondent began a fresh procurement process on 8th October, 2010 by advertising in the local dailies a request for expression of interest for the project.

Once again the ex-parte applicants challenged the process before the 1st respondent through **Request for Review Application No. 58/2010** on the grounds that the advertisement would increase competition in the tender process and as such diminish its chances of winning the tender. The 1st respondent dismissed this particular application and directed the 2nd respondent to continue with the tender process.

The procurement process proceeded and the 2nd respondent successfully completed the technical evaluation process. The applicants participated in the process but failed to attain the minimum prescribed score of 70% required to proceed to the next level. The applicants' tender was therefore rejected at this stage.

The applicants challenged this decision by way of **Request for Review Application No. 7/2011.** In this particular request for review, the applicants' main ground was that they had scored 76% in the technical evaluation conducted under the procurement process which was annulled by the 1st respondent in **Request for Review Application No. 48/2010,** and as such, the 2nd respondent ought to have automatically awarded them the said 76% during the technical evaluation in the new procurement process. The 1st respondent heard the matter and dismissed the same on the ground that it had no merit.

The 2nd respondent argues that the ex-parte applicants' case should fail in that it seeks to challenge the 1st respondent's findings on fact and its decision as a whole. The same does not attack the process leading to the decision and the decision is therefore not amenable to judicial review. It is the 2nd respondent's view that this court lacks jurisdiction to grant the remedies sought by the applicants. On the claim that the 1st respondent allowed the 2nd respondent to depart from its pleadings and in particular paragraph 24 of its Memorandum of Response, the 2nd respondent submitted that it had only reproduced Clause 2.7.1 of the standard RFP in the Memorandum of Response. The 2nd respondent submitted that it complied with the law in handling the procurement in question. The 2nd respondent further submitted that even if there was confusion about the technical evaluation scores then the applicants ought to have asked for clarification as provided by the tender documents instead of waiting until it lost the tender before complaining. It argues that if there was any anomaly then judicial review orders are not available to the applicants because of acquiescence. The 2nd respondent also argues that the applicants have not brought this application in good faith and are only interested in derailing its plans to improve the Kenyan rail system.

The Attorney General submitted that the 1st respondent conducted its proceedings in line with the provisions of sections 95 and 98 of the Act and it cannot be accused of having acted unlawfully in reaching its decision. On the question as to whether the 1st respondent acted without jurisdiction in allegedly departing from the pleadings in arriving at its decision, the Attorney General argued that the 1st respondent was not bound by the rules of evidence during its hearings.

The interested party opposed the application through grounds of opposition dated 26th July, 2011. The interested party's case is that the process undertaken by the 1st respondent in reviewing the applicants'

application for review was administrative and not judicial. The interested party contends that the mandate of the court in a judicial review action is to review the process of tendering and not descend into the technical details of the tender. These technical matters are the preserve of the procuring entity itself. The interested party concurs with the 2nd respondent that this matter is not brought in good faith since the applicants only claimed the tender documents were unlawful after they lost the tender.

Parties also filed submissions to advance their various positions. From my reading of the statutory statement I notice that the applicants particularly take issue with the dismissal of their application for review because the 1st respondent sanctioned what in their view were illegal actions by the 2nd respondent. The applicants argue that the 2nd respondent altered and awarded the interested party points on parameter (iii) beyond those allowed by the standard RFP which is a document provided by statute.

I have carefully read the decision of the 1st respondent delivered on 25th March, 2011 in **Review No. 7/2011** of 28th February, 2011. At page 35 it is stated that:-

"From the Table, it is clear that the parameter number (iii) "Qualifications and competence of the key staff for the Assignment" was granted 50 marks, whereas according to the RFP document, the same had been allocated 30-40 marks. This is the point of contention raised by the Applicant. On this variation of the Marks allocated to the parameter number (iii), the Board finds that, the Procuring Entity made the said variation procedurally in line with the Appendix "ITC" which allowed the change. Accordingly, the Board finds that this limp of the Applicant's ground has no merit and hence fails."

The 1st respondent then proceeds to address the issue of the failure by the 1st respondent to state the weightings for the Technical and Financial Evaluations in the Appendix "ITC" and concludes that:-

"All the above notwithstanding, the Board notes that the Applicant did not qualify at the Technical Evaluation Stage to proceed to the Financial Evaluation stage, where the above Financial evaluation models were to apply."

From the foregoing it is clear that the 1st respondent considered all the issues raised by the applicants before proceeding to dismiss their request for review. In my view the applicants are asking me to look at the 1st respondent's said decision and reach a conclusion that the 1st respondent erred both in fact and in law when it reached that decision. The question would then be whether this court acting as a judicial review court has powers to interfere with the said decision.

The reach of judicial review is now well established. In the case of **COUNCIL OF CIVIL SERVICE UNIONS V MINISTER FOR THE CIVIL SERVICE [1984] 3 ALL ER 935**Lord Diplock summarised the scope of judicial review thus:-

"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."

In judicial review therefore, the court's jurisdiction is limited to applying the three tests of "legality", "rationality" and "procedural propriety" to the decision under review and once the decision passes the tests the court has no business taking any further step in respect of that decision. There is always a temptation to descend into the arena and substitute the judge's decision with that of the public body whose decision is under attack. A judge should, however, avoid this temptation by all means least he be accused of abusing the powers given to him to review the decisions of subordinate courts and tribunals. The Court of Appeal in**GRAIN BULK HANDLERS LIMITED V J. B. MAINA & CO. LTD & 2 OTHERS [2006] eKLR** summarised the purpose of judicial review by stating 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."

From the foregoing it is clear that in judicial review, the court does not exercise its appellate powers. It mainly looks at the decision-making process to ensure that the citizen who has come into contact with an administrative body or tribunal has been treated fairly. But as observed by Lord Diplock in the already cited**CIVIL SERVICE UNIONS V MINISTER FOR THE CIVIL SERVICE**case, the court can quash the decision if the same is so unreasonable to the extent that a reasonable tribunal addressing its mind to the facts of the case would not have arrived at such a decision. In doing so, I submit, the court will have descended into the arena of decision-making. For a court to justify such action it must be clearly obvious that the decision is truly and obviously unreasonable.

The 1st respondent is established under section 25 of the Act. Part VII of the Act provides for the administrative review of procurement proceedings. In procurement proceedings, an aggrieved person is allowed to seek review in accordance with sections 97 – 99 of the Act. Under Section 98, the 1st respondent is given power to:-

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 this case, it is clear that the 1st respondent exercised its power within the law in hearing and reaching its decision. There has been no complaint on the procedures used by the 1st respondent. The annexures to the pleadings before this court show that the applicants, as well as all other parties who had an interest in the procurement proceedings, were represented during the review before the 1st respondent. The 1st respondent cannot therefore be accused of having acted outside its jurisdiction or of having breached the

rules of natural justice. Judicial review cannot therefore come to the aid of the applicants on the grounds of illegality or procedural impropriety.

The Applicants' other contention is that the 1st respondent misinterpreted the law thereby allowing the 2nd respondent to continue with an unlawful procurement process. The respondents and the interested party on the other hand have taken the view that the 1st respondent arrived at its decision having considered the facts placed before it and interpreted the law as applicable to those facts. They argue that this court cannot look at the facts and reach a different decision as desired by the applicants since that would amount to this court usurping the powers of the 1st respondent. Moreover, the 2nd respondent states that none of the bidders, the applicants included, challenged the distribution of scores prior to the commencement of the procurement process. They all submitted their bids on the basis of the scores that had been indicated in the appendix to the RFP.

This court is being asked to determine whether the 1st respondent misapprehended the law as relates to the technical evaluation and award of scores thereunder. In my view, such an enquiry would amount to sitting on appeal over the decision of the 1st respondent. Indeed Parliament was alive to the distinction between judicial review and appeal in procurement proceedings when it provided in Section 100 of the Act that:-

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) …

In **AMIRJI SINGH v THE BOARD OF POST GRADUATE STUDIES KENYATTA UNIVERSITY, CIVIL APPLICATION NUMBER 1400 OF 1995,** Justice Aganyanya (as he then was)clearly explained that a judicial review application cannot be turned into an appeal. He stated that:-

"But an application by way of judicial review before the High Court is not intended to [turn] it (this Court) into an appellate one to deal with the merits of the issue before the inferior tribunal."

Professor Mumma for the 2nd respondent rightly pointed out to this court that a party who has chosen judicial review must play within the rules of judicial review. A party should not be allowed to argue an appeal through a judicial review application. The path to the sublime orders of judicial review is narrow and those who opt to take this road must be ready to operate within its limited space.

In my opinion, the only ground upon which the applicants can be allowed to challenge the decision of the 1st respondent is that of unreasonableness or irrationality. The test for unreasonableness that has been accepted was set out in the English case of **ASSOCIATED PROVINCIAL PICTURE HOUSE LTD V WEDNESBURY COPORATION (1947) 2 ALL ER 680** where Greene MR stated as follows:

"In the present case we have heard a great deal about the meaning of the word 'unreasonable'. Lawyers familiar with the phraseology commonly used in relation to the exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must direct himself properly in law ... you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority …That is unreasonable in one sense. Theoretically it is true to say - and in practice it may operate in some cases - that if a decision on a competent matter is so unreasonable that no authority could ever have come to it, then the courts can interfere. That I think is right, but that would require overwhelming proof, and in this case the facts do not come anywhere near such a thing."

The question therefore is whether the decision of the 1st respondent was so absurd, that a sensible administrative body or tribunal wouldn't make such a decision. Having read through the submissions of counsel and the decision of the 1st respondent, I find that the 1st respondent did not make an absurd conclusion that would warrant the intervention of this court. There is no evidence placed before the court by the applicants to show that the decision of the 1st respondent is unreasonable in the **Wednesbury** sense.

In**KENYA PIPELINE COMPANY LIMITED V HYOSUNG EBARA COMPANY LIMITED & 2 OTHERS, CIVIL APPEAL NO. 145 OF 2011** the Court of Appeal observed that:-

"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 be ordinarily 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 went ahead and concluded that:-

"The 1st Respondent did not establish that the Review Board had acted without jurisdiction or in excess of jurisdiction or in breach of the rules of natural justice or that the decision was irrational. The Judicial Review was not confined to the decision making process but rather 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."

In my view the applicants are asking me to exercise my appellate powers in this matter. That is not possible in a judicial review matter. As already pointed out the 1st respondent gave reasons for its decision. Therefore, the application as it stands has failed to establish grounds for the review of the 1st respondent's decision.

Finally, it is now well established that judicial review remedies are discretionary in nature. The applicants have admitted that the procurement documents had two different scores for the technical evaluation parameters. They nevertheless went ahead to submit their bid in a procurement process, which in their view, was founded on flawed document. It is only after they failed to attain the minimum technical evaluation marks that they started complaining. The document had clearly provided room for seeking clarifications but they did not take this opportunity. Even if they had established grounds for review of the decision, I think they would not have been entitled to the orders sought.

The end result is that this application is dismissed with costs to the respondent and the interested party.

Dated and signed at Nairobi this 27th day of November , 2012

W.K. KORIR,

JUDGE