



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISCELLANEOUS CIVIL APPLICATION NO. 261 OF 2010**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY GETRIO INSURANCE BROKERS LIMITED**

**IN THE MATTER OF TENDER FOR PROVISION OF INSURANCE BROKERAGE SERVICES BY KENYA REVENUE  
AUTHORITY**

**IN THE MATTER OF PUBLIC PROCUREMENT AND DISPOSAL ACT, 2005 & PUBLIC PROCUREMENT AND DISPOSAL  
REGULATIONS, 2006**

**IN THE MATTER OF REPUBLIC .....APPLICANT**

**VERSUS**

**PUBLIC PROCUREMENT OVERSIGHT AUTHORITY .....RESPONDENT**

**CANOPY INSURANCE BROKERS LIMITED.....1<sup>ST</sup> INTERESTED PARTY**

**KENYA REVENUE AUTHORITY.....2<sup>ND</sup> INTERESTED PARTY**

**EX PARTE: GETRIO INSURANCE BROKERS LIMITED**

**RULING**

The ex parte applicant's application dated 13<sup>th</sup> August, 2010 seeks the following orders:

- “1. An order of mandamus directed to Public Procurement Oversight Authority to carry out investigations as to the circumstances surrounding and leading to the award of Tender No. KRA/HQS/DP002/2009/2010, provision of Insurance Brokerage Services by the Kenya Revenue Authority (KRA) and in particular whether KRA violated the Public Procurement and Disposal Act, 2005, the Public Procurement and Disposal Regulations, 2006 and the directions issued by the respondent to procuring entities.**
- 2. An order of mandamus directed to Public Procurement Oversight Authority to carry out investigations as to the circumstances surrounding and leading to the award of Tender No. KRA/HQS/DP002/2009-2010, Provision of Insurance Brokerage Services by the Kenya Revenue Authority (KRA) and in particular whether KRA violated the Public Procurement and Disposal Act, 2005, the Public Procurement and Disposal Regulations, 2006 and the Directions issued by the respondent to procuring entities.**
- 3. An order of mandamus directed to Public Procurement Oversight Authority to carry out investigations as to the circumstances surrounding and leading to the award of Tender No. KRA/HQS/DP002/2009-2010, Provision of Insurance Brokerage Services for Staff Pension Scheme by the Kenya Revenue Authority (KRA) and in particular whether KRA violated the Public Procurement and Disposal Act, 2005, the Public Procurement and Disposal Regulations, 2006 and the Directions issued by the respondent to procuring entities.**
- 4. An order that cost of this application be awarded to the applicant.”**

The application was premised on the following main grounds:

- “1. That the respondent has failed, refused and/or neglected to execute its express mandate as stipulated under the Public Procurement and Disposal Act, 2005 as read together with the Public Procurement and Disposal Regulations, 2006.**
- 2. That the procuring entity has failed to carry out the procurement proceedings in respect of the three (3) tenders in a fair, transparent and accountable manner and there is reason to believe that the process was manipulated for the benefit of a few individuals.**
- 3. That the respondent has failed, refused and/or neglected to address very pertinent and fundamental issues raised by the applicant with respect to the above three (3) tenders and it is only fair that this honourable court compels the respondent to undertake its lawful mandate.**
- 4. That unless the orders sought herein are granted the respondent will continue to neglect its lawful mandate and the achievement of the intent and purpose of the Public Procurement and Disposal Act, 2005, that is, to ensure transparency and accountability in the management of public resources will be a mirage.”**

The application was supported by a statutory statement and a verifying affidavit sworn by **Charles Kimenyi Macharia**, the ex parte applicant’s Managing Director. The respondent is established under **Section 8** of the **Public Procurement and Disposal Act, 2005**, hereinafter referred to as **“the Act”** and its functions are set out under **Section 9** of the Act. The functions include ensuring that the procurement procedures established under the Act are complied with and to monitor the Public Procurement System and thereafter make appropriate reports to the Minister with recommendations for improvement as may be deemed necessary. **Sections 102 to 105** give the respondent unfettered powers to order investigations of procurement procedures for purposes of determining whether there has been breach of the Act, the regulations or directions relating to procuring entities.

At the outset, it is important to state the provisions of the preamble to the Act which are as follows:

**“An Act of Parliament to establish procedures for efficient public procurement and for the disposal of unserviceable, obsolete or surplus stores, assets and equipment by public entities and to provide for other related matters .”**

The purpose of the Act is set out in **Section 2** thereof. It reads as 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 maximize 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.”**

The definition of **“public entity”** is set out under **Section 3** of the Act and there is no dispute that the respondent and the 2<sup>nd</sup> Interested Party are public entities.

The ex parte applicant stated that it had participated in two tenders by the Kenya Revenue Authority (KRA) which tenders the ex parte applicant has reasons to believe were not undertaken in a fair, accountable and transparent manner as envisaged under the provisions of **Section 2** of the Act. The ex parte applicant further stated that it had on several occasions brought to the attention of the respondent cases of breach of the Act and the regulations by KRA with a request that the respondent carries out investigations as mandated by the Act but the respondent has failed, refused and/or neglected to carry out the requisite investigations. The applicant cited a tender notice issued on 27<sup>th</sup> November, 2009 where KRA invited bids for **Tender Number KRA/NCB/007/2009-2010**, provision of Insurance Brokerage Services for the period commencing 1<sup>st</sup> May, 2010. The bids were to be opened on 18<sup>th</sup> December, 2009 but later extended to 6<sup>th</sup> January, 2010 by way of an Addendum. On 10<sup>th</sup> December, 2009, while still preparing bids in respect of the aforesaid tender, the respondent, pursuant to **Section 46(2)** of the Act, published in the **“Daily Nation”** newspaper of the same date, the Kenya Procurement Journal Supplement. In the said journal the respondent published and informed the Kenyan public that KRA had on 17<sup>th</sup> July, 2009 awarded another tender, **Tender Number KRA/HQS/DP 002/2009/2010**, for provision of Insurance Brokerage Services to M/S Canopy Insurance Brokers for a tender sum of **Kshs.12,304,263.48/=**.

By a letter dated 18<sup>th</sup> February, 2010 the ex parte applicant enquired from the respondent the circumstances under which the above tender was advertised, evaluated and eventually awarded to Canopy Insurance Brokers Limited. The respondent raised various issues among them:

- (a) Whether the procuring entity advertised the tender as is required because there was no documentary evidence of there having been any notice inviting tenders for the same.**

**(b) Whether there were other bidders whose tenders were evaluated and compared with that of Canopy Insurance Brokers Limited.**

**(c) Whether KRA was running two parallel brokerage contracts and both awarded to the same broker and if so, what the justification of the action was.**

**(d) Why the applicant had not received its financial bid unopened as stipulated under Regulation 45(2) of the Regulations for the Tender Number KRA/NCB/007/2009-2010 yet two bidders had been verbally invited for the opening of the financial bids on 5<sup>th</sup> February, 2011 at 10.00 a.m.**

The aforesaid letter did not elicit any response until 20<sup>th</sup> April, 2010 when Mr. M.J.O. Juma, Acting Interim Director-General of the respondent, wrote to the ex parte applicant and stated as follows:

**“We acknowledge receipt of your letter Ref. No. GIB/QUOT.KRA/K1802/2010 dated 18<sup>th</sup> February, 2010. This is to inform you that we are reviewing the issues raised in your letter and will revert to you.”**

Up to the date of filing this matter (30<sup>th</sup> July, 2010), the respondent had not given any substantive response to the ex parte applicant’s queries despite a reminder dated 27<sup>th</sup> April, 2010 which also raised various other issues.

On 30<sup>th</sup> June, 2010 the respondent, pursuant to **Section 46(2)** of the Act, published in the **“Daily Nation”** newspaper of the said date, the Kenya Procurement Journal Supplement. The item appearing on page 37 of the said newspaper, that is, **KRA/HQ/NCB-007/09-10**, provision of Insurance Brokerage Services, indicated that the procuring entity had made an award of the said tender to Canopy Insurance Brokers on 16<sup>th</sup> February, 2010 for the tender sum of **Kshs.61,737,451/=**. The ex parte applicant found that to be a distortion of the truth and by a letter dated 12<sup>th</sup> July, 2010 wrote to the respondent seeking clarification as to the correct state of affairs as the ex parte applicant had all along held the view that the award of the said tender was yet to be made. The said letter also raised several weighty issues regarding the tendering process. It appears the respondent did not also respond to the aforesaid letter.

The ex parte applicant further stated that by a tender notice issued on 24<sup>th</sup> March, 2010 the procuring entity invited tenders for the award of Insurance Brokerage Services for KRA’s Staff Pension Scheme, **Tender Number KRA/HQS/TRUSTEES/001/2009-2010**. The notice indicated that the tender will be opened on 21<sup>st</sup> April, 2010 and was intended for the period running from 1<sup>st</sup> July, 2010 to 30<sup>th</sup> June, 2012. The ex parte applicant was one of the four firms that submitted their bids for the above tender. Up to 12<sup>th</sup> July, 2010 the ex parte applicant had not received any communication from the procuring entity regarding its bid. The ex parte applicant wrote to the respondent on 12<sup>th</sup> July, 2010 requesting for investigation into the matter as the ex parte applicant believed that the procuring entity had again awarded the tender without informing the unsuccessful bidders as required under the law. The respondent did not respond to the said letter.

On 21<sup>st</sup> July, 2010 the ex parte applicant received a letter from the procuring entity dated 14<sup>th</sup> July, 2010 informing it that its tender for provision of Insurance Brokerage Services for KRA Staff Pension Scheme was unsuccessful. The ex parte applicant wondered as to when the award was made since the period of insurance was to run from 1<sup>st</sup> July, 2010 yet the award was made on 14<sup>th</sup> July as portrayed by the letter from KRA.

The ex parte applicant believes that the respondent has failed, refused and/or neglected to discharge its mandate to Kenyans as envisaged by Parliament in enacting the Act and the Regulations thereunder as more particularly outlined under **Section 2** thereof.

Faced with the above allegations, the respondent chose not to file any replying affidavit. Instead, it filed grounds of opposition and stated as follows:

**“1. Section 102 of the Public Procurement and Disposal Act provides the Director General of the respondent herein discretion to order investigations to procurement proceedings to determine whether there has been a breach of the said Act.**

**2. The said section further allows the Director General of the respondent authority the latitude and vast discretion of a limitless time scale as to when to institute investigations.**

**3. Judicial review orders do not issue to compel the performance of discretionary functions and/or duties.**

**4. If the ex parte applicant was dissatisfied with the way the impugned procurement process was conducted then its remedy lay in the Appeal’s Board as provided by the Procurement Act.**

**5. These proceedings are by dint of the foregoing misconceived, incurably defective, incompetent and an abuse of due process.”**

The 2<sup>nd</sup> Interested Party entered appearance through P.M. Matuku advocate who told the court that he had been instructed to leave the matter entirely in the hands of the court. The 1<sup>st</sup> Interested Party did not therefore file any replying affidavit and neither did counsel make any submissions at all.

The 1<sup>st</sup> Interested Party, Canopy Insurance Brokers Limited, entered appearance through Mbugwa, Atudo & Macharia Advocates but did

not file any replying affidavit nor make any submissions.

The ex parte applicant filed written submissions which I have carefully perused.

The mandate of the respondent as spelt out in **Section 2** of the Public Procurement and Disposal Act has already been cited hereinabove. It was the intention of Parliament that public procurement of goods and services be done in a manner that is efficient, fair, competitive, accountable, transparent and in a way that inspires public confidence in the procurement procedure. The process is required to be conducted with integrity. The Director-General of the Public Procurement Oversight Authority is the Chief Executive of the Authority (the respondent) and one of the qualifications for his appointment as stated under **Section 10(d)** of the Act is that he must **“be of outstanding honesty and integrity”**. I believe that this is a requirement that is expected of all the other members of the respondent. It is therefore expected that in the discharge of its duties the respondent has to display outstanding honesty and integrity in all its undertakings.

**Section 103** of the Act grants wide powers to the respondent to investigate procurement proceedings and in so doing an investigator has access to all books, records, returns, reports and other documents of the procuring entity or a person who participated in the procuring proceedings. The respondent is by law required to investigate complaints relating to public procurement that are raised by interested parties.

I agree with the ex parte applicant that the respondent ought to have exercised the mandate bestowed on it by **Section 102** of the Act and carried out investigations to ascertain whether the 2<sup>nd</sup> Interested Party breached the provisions of the Act in its award of the various tenders referred to by the applicant. It appears that some of the tenders were not evaluated within a period of thirty (30) days as required under **Regulation 46**. The ex parte applicant’s complaint that it was severally not informed in time or at all that its bids were unsuccessful is meritorious. That is a breach of the provisions of **Section 67(2)** of the Act. By failing to expedite return to the applicant of any tender security, the 2<sup>nd</sup> Interested Party acted in contravention of **Section 57 (4) (c)** of the Act. The section requires the procuring entity to return the tender security as soon as the contract which is the subject matter of the tender is executed.

The ex parte applicant had also raised concern about the manner in which tenders in respect of provision of Insurance Brokerage Services had for several years been given to one insurance broker, the 1<sup>st</sup> Interested Party. The respondent was under a legal obligation to investigate that issue and make an appropriate response to the applicant and to the Minister. Canopy Insurance Brokers Limited may have been winning the said tenders fairly, but once a complaint has been raised about that award, in the spirit of the Act as stated under **Section 2** thereof, the respondent ought to have carried out thorough investigations and responded to the ex parte applicant’s letters. That is the only way of inspiring public confidence in the procurement exercise. In its letter dated 20<sup>th</sup> April, 2010, the respondent informed the ex parte applicant that it was reviewing the issues raised and would revert in due course but that was never to be. There was legitimate expectation on the part of the ex parte applicant that the respondent would undertake investigations as promised and give a feedback. When that did not happen the ex parte applicant was left with no alternative but to move to court.

I will now deal with grounds of opposition raised by the respondent.

**Section 102(1)** of the Act states as follows:

**“The Director-General may order an investigation of procurement proceedings for the purpose of determining whether there has been a breach of this Act, the regulations or any directions of the Authority.”**

The respondent’s contention is that the use of the word **“may”** in the above quoted section implies that the Director-General has discretionary power as to whether an investigation ought to be conducted or not. While I agree that such discretion exists, the discretion must be exercised judicially, rationally and fairly. In **“ADMINISTRATIVE LAW”** by **Sir William Wade & Christopher Forsyth**, 10<sup>th</sup> edition at page 196, the learned authors, in a paragraph headed: **WHEN ‘MAY’ MEANS ‘MUST’**, state as follows:

**“The hallmark of discretionary power is permissive language using words such as ‘may’ or ‘it shall be lawful’, as opposed to obligatory language such as ‘shall’. But this simple distinction is not always a sure guide, for there have been many decisions in which permissive language has been construed as obligatory. This is not so much because one form of words is interpreted to mean its opposite, as because the power conferred is, in the circumstances prescribed by the Act, coupled with a duty to exercise it in a proper case.”**

It has been held that where the performance of a statutory duty by a public entity is discretionary, this court can intervene where the discretion was not exercised judicially or fairly. See **REPUBLIC v THE COUNCIL OF LEGAL EDUCATION ex parte JAMES NJUGUNA & 14 OTHERS [2007] eKLR**.

Where a decision maker fails to exercise his discretion reasonably, the court can intervene in appropriate circumstances. In **PADFIELD & OTHERS v MINISTER OF AGRICULTURE, FISHERIES AND FOOD & OTHERS [1968] AC 997 at 1006**, it was held as follows:

**“It is said that the decision of the Minister is administrative and not judicial. But that does not mean that he can do as he likes, regardless of right or wrong. Nor does it mean that the courts are powerless to correct him. Good administration requires that complaints should be investigated and that grievances should be remedied. When Parliament has set up machinery for that very purpose, it is not for the Minister to brush it on one side, He should not refuse to have a complaint investigated without good reason.”**

Ringera J, as he then was, in **REPUBLIC v CHAIRMAN, ELECTORAL COMMISSION OF KENYA ex parte WELAMONDI (2008) 2KLR (EP) 393 at 402**, held as follows:

**“..... I reject the submission of counsel for the respondent that the court cannot by way of judicial review intervene where the public body is exercising discretionary power. In my judgment, the court would be perfectly entitled to intervene where it is alleged that the discretion is not being exercised judicially, that is to say, rationally and fairly and not arbitrarily, whimsically, capriciously or in flagrant disregard of the rules of natural justice.”**

I respectfully adopt the aforesaid holdings in this matter.

**Article 47** of the **Constitution of Kenya, 2010**, provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The ex parte applicant had a reasonable expectation that the respondent would deal with its complaint in an efficient and fair manner.

As regards the respondent's argument that the ex parte applicant's remedy lies in an appeal to the Appeals Board, it is clear that no decision was made by the respondent and consequently no appeal could be filed by the ex parte applicant.

In conclusion, the court is satisfied that the respondent did not exercise its discretion in a judicial manner as hereinabove stated. The ex parte applicant had raised weighty and very relevant complaints which required thorough investigations. Whether or not such complaints had any validity is not for this court to determine. I am satisfied that the orders of mandamus sought by the ex parte applicant are merited and consequently, I grant the orders as prayed. The respondent shall bear the ex parte applicant's costs of this application. The Interested Parties shall bear their own costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 1<sup>ST</sup> DAY OF APRIL, 2011.**

**D. MUSINGA**

**JUDGE**

**In the presence of:**

**Kajuju – court clerk**

**Mr. Kiprono for the Applicant**

**Mr. Bosire for the Respondent and for Mr. Macharia for the 2<sup>nd</sup> Interested Party**

**Mr. Ng'ang'a holding brief for Mr. Matuku for the 1<sup>st</sup> Interested Party**