



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 311 OF 2010

**IN THE MATTER OF AN APPLICATION BY RILEY FALCON SECURITY SERVICES
LIMITED FOR**

JUDICIAL REVIEW ORDERS OF CERTIORARI AND MANDAMUS

AND

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

AND

IN THE MATTER OF THE PUBLIC PROCUREMENT DISPOSAL REGULATIONS, 2006

AND

**IN THE MATTER OF PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 50 OF 2010**

BETWEEN

REPUBLIC.....APPLICANT

AND

**THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW
BOARD.....RESPONDENT
THE KENYA ELECTRICITY GENERATING COMPANY LIMITEDINTERESTED
PARTY**

EX PARTE

RILEY FALCON SECURITY SERVICES LIMITED

RULING

The ex parte applicant's application dated 19th October, 2010 seeks the following orders:

- “1. That the honourable court be pleased to grant an order of certiorari to remove into the High Court and to quash the decision of Public Procurement Administrative Review Board in Application No. 50 of 2010 made on 7th October, 2010.**
- 2. That the honourable court be pleased to grant an order of mandamus directed to the Public Procurement Administrative Review Board directing them to hear and determine on merits the ex parte applicant application number 50 of 2010 and filed on 8th September 2010 challenging the award of contract by Kenya Electricity Generating Company Limited in respect of tender for provision of security services for the year 2010-2012.**
- 3. That the court be pleased to give such other or further orders as it may find just and expedient.**
- 4. That the costs of this application be provided for.”**

The application was supported by an affidavit sworn by **Tobias O. See**, the Managing Director of the applicant. He deposed that the interested party invited tenders for provision of security services for the year 2010-2012 and the applicant, who is currently providing services to the respondent in Category A and B, tendered for provision of the said services in the same categories. The interested party had in page 27 of the tender document reserved awards in Category A to bidders who achieve an overall score of 85% and for Category B the bidders who achieve an overall score of 70%. In the technical evaluation the ex parte applicant scored 80.2%.

The interested party awarded contract to various bidders who had scored lower than the applicant, it was alleged. Being aggrieved by the said act the ex parte applicant filed a request for review with the respondent on 8th September, 2010. The said application was filed within 14 days of notification as required by the Public Procurement and Disposal Regulations, the applicant stated. The procuring entity was duly notified of the said request for review and was ordered to suspend further processing of the said procurement and not to sign any contract until the application was heard and determined. The procuring entity filed their response on 15th September, 2010. The respondent then fixed the application for hearing on 4th October, 2010 and served the parties with the hearing notice.

By a letter dated 2nd October, 2010 the respondent re-scheduled the said hearing from 4th October to 8th October, 2010. By a further letter dated 7th October, 2010 and received on 8th October, 2010 the respondent re-scheduled the said hearing from 8th October, 2010 until further notice. To date the ex parte applicant has not been notified of any other hearing date.

The respondent filed its replying affidavit that was sworn by **Cornel Ransanga Amoth**, its Legal Officer, who is also the Secretary to the respondent's Board. He admitted that the ex parte applicant, having lost its bid for the tender for the provision of security services to the interested party, lodged a request for review with the respondent on 8th September, 2010 vide Application No. 50 of 2010. The review was set to be heard on 4th October, 2010 but the hearing did not go on for want of existence of the respondent Board due to its non-constitution. The review was re-scheduled to 8th October, 2010 on condition that by the said date the Board would have been constituted and gazetted. However, that was not to be.

The deponent stated that in his view non-existence of the respondent Board does not constitute a decision capable of being quashed by an order of certiorari. He further stated that an order of mandamus cannot also issue in view of the provisions of **Section 97** of the **Public Procurement and Disposal Act** which limits the hearing and determination of reviews to a period of 30 days from the date of filing the same.

By further affidavit, Tobias O. See deposed that the term of the members of the respondent was to expire on 18th of September, 2010 but was extended for a term of 3 years with effect from 17th September, 2010. Subsequently, the respondent has sat and entertained other applications and delivered rulings. When the ex parte applicant's advocates wrote to the respondent on 21st of October 2010, the respondent replied and stated that they were unable to hear the matter until this court finalized these proceedings.

In his submissions, Mr. Njuguna for the ex parte applicant stated that the respondent was required to hear the matter within 30 days from the date of filing the application for review. Although the respondent's term of office was to expire on 18th September, 2010 the term was extended for 3 years with effect from 17th September, 2010. He referred to Gazette Notice No. 16514 dated 15th December, 2010 and published on 24th December, 2010. However, before issuance of the said gazette notice the Board was still sitting, counsel added. He therefore rubbished the respondent's contention that it could not hear the matter because it had not been constituted and that after extension of its term it could not hear the matter because the 30 days limit set by **Section 97** of the Act had lapsed.

Counsel further submitted that even if it was accepted that the respondent could not hear the review when its term had expired, time could not run when the Board was not properly constituted, it could only begin to run after extension of its term. He added that the conduct of the respondent had breached the applicant's legitimate expectation to be heard.

In response, Mr. Nguyo for the respondent submitted that the letter that is sought to be quashed was for purpose of notification of change of the hearing date. There is therefore no decision that was made vide the said letter.

Mr. Muthomi for the interested party submitted that the decision being challenged is not attributable to his client but to the appointing authority. The Minister concerned should therefore have been joined as a party to these proceedings. He further submitted that an order of mandamus cannot issue as prayed in view of the provisions of **Section 97** of the **Public Procurement and Disposal Act**, which requires reviews to be disposed of within 30 days from the date of their filing. It would therefore create a dangerous precedent if this application were to be granted forcing the respondent to hear the review after passage of such a long time.

I have considered the affidavits on record as well as the submissions by counsel.

With regard to the prayer for an order of certiorari, the respondent's letter dated 7th October was addressed to 30 companies including the interested party. The letter read as follows:

“RE: RE-SCHEDULING OF HEARING OF APPLICATION NO. 50 OF 2010 BETWEEN RELAY FALCON SECURITY SERVICES LIMITED AND KENYA ELECTRICITY GENERATING COMPANY LIMITED”

Please refer to our letter reference Case file 50/2010 (39) dated 2nd October, 2010. This is to inform you that the hearing has been postponed from 8th October, 2010 until further notice. We regret for any inconveniences caused by the change.”

The letter was signed for and on behalf of the Secretary of the respondent.

Although no reason was given for re-scheduling of the review proceedings, it was clarified that the re-scheduling was due to the fact that the term of the Board had expired and a new one had not been constituted.

In the circumstances, it is doubtful whether the said letter amounted to a decision that can be quashed by way of an order of certiorari. Certiorari is used to bring up into the High Court the decision of an inferior tribunal or authority in order to investigate the decision. If the decision is found wanting in law it may be quashed.

Not every letter or communication made by a tribunal or authority is amenable to a review. Certiorari may only be granted in respect of decisive exercise of discretion. A decision is a settlement, a ruling, judgment or a determination that settles a case, an application, matter or question in issue. The respondent's letter of 7th October, 2010 did not determine the ex parte applicant's request for review of the tender award. In this case, the “decision” complained of was the postponement of the review hearing. In my view therefore, the said letter does not contain any decision that warrants an order of certiorari to quash the same. The first prayer in the ex parte applicant's application is dismissed.

As regards the second prayer, where a public body fails, neglects or refuses to perform its public duty, an order of mandamus can issue to compel the public body or tribunal to do so. However, it is a discretionary remedy and the court may refuse to grant it, even when it is otherwise deserved, where, upon consideration of all the relevant factors, the court is of the view that the order ought not to be granted. See **“ADMINISTRATIVE LAW,” 9th Edition, by W.W.R. WADE & C.F. FORYTH at Page 616.** See also **KARINA vs TRANSPORT LICENSING BOARD [2004] 2 KLR 466.**

Initially, the respondent did not consider the ex parte applicant's application for review for the reason that its term had expired. But after extension of the term, the respondent contended that in view of the provisions of **Section 97** of the **Public Procurement Act** it could not review the impugned decision. The aforesaid section stipulates that:

“97. (1) The Review Board shall complete its review within thirty days after receiving the request for the review”.

The request for review was received on 8th September, 2010 and so thirty days were to expire on 8th October, 2010. **Section 97** aforesaid merely provides the time frame within which the respondent ought to complete its review proceedings with a view to ensuring that there is efficiency in disposal of such matters. The section does state that no review should be conducted after expiry of thirty days from the

date of receipt of the same. From the date the Board was re-constituted it had no reason for refusing to consider the review. Its refusal or failure to do so is abdication of statutory obligation and in such circumstances an order of mandamus can rightly issue to compel the Tribunal to perform its public duty.

The review application may or may not have merits. That is not for this court to decide. The provisions of **Section 97** should not have been a bar to proceeding with the review since the only reason that had caused the delay in dealing with the matter was expiry of the term of the Tribunal. No prejudice will be suffered by the respondent or the interested party if the order of mandamus is granted. On the other hand, unless such an order is made, the ex parte applicant will have lost the only opportunity to be heard accorded to him by the law.

Having taken all the relevant factors into consideration, I grant the order of mandamus in terms of prayer 2 of the ex parte applicant's application. The respondent shall bear the costs of this application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF MAY, 2011.

D. MUSINGA

JUDGE

In the presence of:

Nazi – Court Clerk

Mr. Muthomi and holding brief for Mr. Nguyo for the Respondent

Mr. Njuguna for the Applicant