



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

Judicial Review 109 of 2009

REPUBLICAPPLICANT

AND

COFFEE BOARD OF KENYARESPONDENT

**EX-PARTE:
SPARTA HOLDINGS LIMITED**

JUDGMENT

The brief facts of this case are that the **COFFEE BOARD OF KENYA** ('the Board') did publish an advertisement in the Daily Nation Newspaper of 17/6/2008, calling for calling for tenders for the lease of its Kahawa House in Nairobi, being tender No. CBK/1/2007-2008. The tender opening session was held on 9/7/2008 in its boardroom. Though ten had tendered, only six including **SPARTA HOLDINGS LIMITED** ('the company'), attended the ceremony, but after evaluation, the Board realized that the validity period of the tender had expired, and on seeking guidance from the Public Procurement Oversight Authority, it was advised to re start the procurement process. The tenderers were six were then notified of the termination.

Being aggrieved by the said decision, and having obtained leave to apply for the order of certiorari and mandamus **SPARTA HOLDINGS LIMITED**, which I shall now refer to as 'the ex parte applicant', moved this court seeking the following orders against directed at the board which I shall otherwise refer to as 'the respondent':

- **THAT** this court be pleased to issue an order of certiorari bringing to this court and quashing the decision of the respondent to terminate the respondent's tender.
- **THAT** this court be pleased to issue an Order of Mandamus directed to the respondent and commanding or ordering it to communicate to the ex parte applicant it's award of its said tender to it.

It also prays for cost.

The company which claims to have been awarded the tender on 14/7/2008, bases it application on grounds that having been so awarded, and though it was incumbent upon the respondent to communicate to it the award of the said Tender to it, the respondent instead purported to terminate the tender, and that in the circumstances, the said termination was unprocedural and illegal.

The respondent however avers that exercise of its statutory powers, it did not commit an illegality or irregularity or anything sinister, and that in any event, the bidders including the ex parte applicant were put on the necessary notice and that they were very much aware of the stipulations and or provisions contained in the Tender documents.

I have considered this application and the submissions by counsel. Though the ex parte applicant claims to have been awarded with the tender, it has not availed proof, such failure is fatal. I am however convinced that non was awarded for there is no doubt that the parties did not enter into any contract. It is also clear that the tender was terminated because it was no longer valid.

In my view, the respondent acted in compliance with the requirements of section 36 of the Public procurement and Disposal Act 2005, which it was duty bound to comply with and which clearly provides that:

'(1) A procuring entity may, at any time, terminate procurement proceedings without entering into a contract.

(2) The procuring entity shall give prompt notice of a termination to each person who submitted a tender, proposal or quotation or, if direct procurement was being used, to each person with whom the procuring entity was negotiating.

(3) On the request of a person described in subsection (2), the procuring entity shall give its reasons for terminating the procurement proceedings within fourteen days of the request.

(4) If the procurement proceedings involved tenders and the proceedings are terminated before the tenders are opened, the procuring entity shall return the tenders unopened.

(5) The procuring entity shall not be liable to any person for a termination under this section.

(6) A termination under this section shall not be reviewed by the Review Board or a court.

In view of the above provisions, I find that the respondent exercised its powers lawfully, rationally and reasonably. It cannot be faulted.

But that is not all for in view of sub section (6) above, this court would not have the jurisdiction to deal with matters pertaining to termination of tenders, and in the circumstances, I find that this application lacks in merit and I dismiss it accordingly.

The respondents shall also have the costs of this application.

Dated and delivered at Nairobi this 4th day of May 2010.

JEANNE GACHECHE

Judge

Delivered in the presence of:

For the ex parte applicant – No appearance

For the respondent- Mr. Ochieng.