



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

MISCELLANEOUS APPLICATION 100 OF 2009

REPUBLIC.....APPLICANT

VERSUS

MUNICIPAL COUNCIL OF GARISSA.....RESPONDENT

GAMADID TRADING COMPANY.....INTERESTED PARTY

RULING

The ex-parte Applicant herein is GARISSA MARKET DEVELOPMENT GROUP which is suing through its chairman one PAUL CHEGE MWANGI. It moved the court for leave by way of the Chamber Summons dated 17.06.09. On its face, the said Chamber Summons does not specify the decision it seeks to have quashed. In the statutory statement however, it refers to the decision of the Respondent dated 27.04.09, awarding the management tender to Gamadid Trading Company Limited to manage SUQ MAGDI MARKET at Garissa. The said agreement which is marked 'PCI' is actually not the management agreement but a notice to all stall owners notifying them of the management agreement entered into between the Gamadid Trading Company and the Respondent herein. Leave was granted by the Hon. Justice Dulu in Nairobi but the file was transferred to this court for the hearing of the main notice of motion which is dated 16.07.09. The Notice of Motion seeks 3 orders as hereunder:-

1. An order of certiorari to remove to the High Court and quash the Notice and decision of the Respondent of 27th April 2009 awarding a management contract to Gamadid Trading Company limited to manage Suq Mugdi Market at Garissa. 2. An order of mandamus directed to the Respondent to cancel the Notice dated 27th April 2009 awarding the management of Suq Mugdi Market to Gamadid Trading Company and to undertake afresh the tendering and award of the management Contract in compliance with the Public Procurement and Disposal Act, 2005, and Public Procurement and Disposal Regulations, 2006.

3. An order of prohibition to restrain and prohibit the Respondent handing over the management of Suq Mugdi Market at Garissa to Gamadid Trading Company Limited.

According to the Applicant, the Respondent failed to comply with the Public Procurement and Disposal Regulations, 2006 when awarding the said contract to the interested party. It therefore asserts that the award of the tender was unlawful and irregular and it should therefore be quashed and thereafter the Respondents be ordered to comply with the law when awarding the same.

According to the Applicant, the Respondent's action was malicious and meant to benefit a few undeserving individuals. The decision is also said to be against the Rules of natural justice and that the same is discriminating and against public policy.

In its Replying Affidavit however, the Interested Party through one of its directors one Aden Haji Gamadid, the Application lacks merit, it is an abuse of the court process and it should be dismissed with costs. In paragraph 5 of his replying affidavit, Mr. Aden avers that the Agreement between his company and the Respondent was entered into on 21.12.2007. He has annexed the said agreement which confirms the said date. He avers that even after entering into the said agreement, the Respondent did not issue the requisite notice to the tenants until the interested party moved to court vide HCCC NAIROBI MILIMANI CASE NO. 69 OF 2009.

It was pursuant to this suit that the High Court issued the orders which the notice dated 27.04.09 was seeking to implement. The interested party has annexed as annexure 'GTC1' the management Agreement itself which agreement is dated 21.12.07. Indeed according to the Interested Party, the original agreement was dated 29.09.04 and it was awarded long before the Procurement and Disposal Act came into force. His contention therefore is that no law has been flouted in this matter to warrant this court to exercise its jurisdiction of Judicial Review.

Both Counsel filed written submissions. I have considered the said submissions along with the rival affidavits, annexures thereto and the statement of facts. From the said annexures, it is clear that the Genesis of this matter is not the notice dated 27th April 2009 which is the impugned decision subject to this Judicial Review proceedings. Indeed the said document is not the Agreement itself. It is only a notice to "All Stall Owners Suq Market Garissa" notifying them of the Management Agreement dated 21.12.2007.

There is nothing unprocedural or irregular or illegal about that notice. It is just a communication to the stall owners. Indeed even if the court were to quash it for whatever reason, that would not affect the management agreement dated 21.12.07. Such would therefore be an exercise in futility. Part of the said notice was actually communicating the High Court order issued on 22nd April 2009. That order of the High Court in Nairobi which is a court of concurrent jurisdiction with this court cannot be challenged before this court by way of judicial Review.

I agree with counsel for the Interested Party that the decision which is actually the Genesis of the complaint herein is the one dated 20.04.07. Neither of these decisions can be challenged by way of Judicial Review because that would infringe OLIII Rule 4(2) which provides that an Application to quash a decision, order etc must be brought within 6 months of the impugned decision being made. The decisions or contracts of 2004 and 2007 could not therefore be challenged through this proceeding which was filed in June 2009.

I do not therefore even have the jurisdiction to consider whether the Public Procurement and Disposal Act was complied with in respect of decisions which were made in 2004 or 2007. The submission of counsel for the ex-parte Applicant though well researched and thorough are not relevant at all in the present circumstances.

My conclusion and firm finding is that the Notice of Motion dated 15.07.09 lacks merit. The same is therefore dismissed with costs to the Respondent and interested party.

W. KARANJA

JUDGE

Delivered, signed and dated at Embu this 20th day of July, 2010.

In presence of:- Mr. Musati Counsel for ex-parte Applicant.