



**REPUBLIC OF KENYA  
HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Misc Appli 299 of 2008**

**REPUBLIC.....APPLICANT**

**Versus**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD.....RESPONDENT**

**EX-PARTE: CITY COUNCIL OF NAIROBI**

**AND**

**SORRENTO LIMITED.....1<sup>ST</sup> INTERESTED PARTY**

**LITTLE JOE RESTAURANT.....2<sup>ND</sup> INTERESTED PARTY**

**GOODTIMES INVESTMENT.....3<sup>RD</sup> INTERESTED PARTY**

**KIMSON COMMERCIAL AGENCIES.....4<sup>TH</sup> INTERESTED PARTY**

**METROFIL BAR & RESTAURANT.....5<sup>TH</sup> INTERESTED PARTY**

**TRANSMILLENIA INVESTMENT LTD.....6<sup>TH</sup> INTERESTED PARTY**

**BUFFET PARK LIMITED.....7<sup>TH</sup> INTERESTED PARTY**

**JUDGMENT**

Before me is the Notice of Motion dated 27<sup>th</sup> May 2008 in which the ex parte Applicant, City Council of Nairobi seeks an order of certiorari to remove into this court and quash the ruling of the Respondent made on 9<sup>th</sup> May 2008 in application No. 15/08 (Sorrento Ltd. v City Council of Nairobi) inter alia nullifying the award of the Tender No. CCN/CE/T/014/2007-08 by the Applicant in favour of the 7<sup>th</sup> Interested Party and directing the Tender Committee to adopt the recommendations of its Valuation Committee by awarding the tender to the 1<sup>st</sup> Interested Party. The Applicant also asks that costs be in the cause.

The Respondent is the Public Procurement Administrative Review Board set up under the Public Procurement and Disposal Act, 2005 while the Interested Parties were Sorrento Ltd., Little Joe Restaurants, Goodtimes Restaurant, Kimson Commercial Agencies, Metrofil Bar & Restaurant,

Transmillenia Investment, Ltd. and Buffet Park Ltd. – 1<sup>st</sup> to 7<sup>th</sup> Interested Parties.

The application was premised on a statement of facts dated 22<sup>nd</sup> May 2008 and a verifying affidavit of Mary Ngethe, Director of Legal Affairs of the Applicant, dated 22<sup>nd</sup> May 2008 and a further affidavit sworn by the same Mary Ngethe on 20<sup>th</sup> November 2009. Mr. Omotti Advocate filed submissions on 15<sup>th</sup> September 2009. The Application was opposed and Mr. Edward Amoth, the Secretary to the Review Board swore an affidavit dated 4<sup>th</sup> July 2008 and submissions were filed by Mr. Meso, litigation Counsel for Attorney General for the Respondent. Though served, only the 6<sup>th</sup> Interested Party entered appearance but filed no reply. None of the other Interested Parties appeared nor did they file their replies to the Notice of Motion.

The brief facts of this case are that on 27<sup>th</sup> October 2007, the Applicant invited bids from firms with experience in Hotel and Restaurant Management to lease, on a Rehabilitation-operate – Transfer basis, the premises known as Park Restaurant in the City of Nairobi. Seven firms responded to the invitation, were evaluated and bids forwarded to the Applicant's Tender Committee for consideration. The 1<sup>st</sup> Interested Party emerged as the most responsive bidder. However, the Tender Committee recommended a re-evaluation and gave reasons for it. The tender was re-evaluated and the 7<sup>th</sup> Interested Party was found to have offered the best bid. The 1<sup>st</sup> Interested Party was aggrieved by that decision and lodged an appeal with the Respondent on 9<sup>th</sup> April 2008. The Respondent nullified the Tender Committee's decision and awarded the Tender to the 1<sup>st</sup> Interested Party. The grounds which the Respondent relied upon in making the award were that the Tender Committee had no legitimate authority to incorporate their recommendations into the final report of the Evaluation Committee. The Applicants brought this application on the following grounds, based on that the Respondents decision there is;

- (a) an error in law;
- (b) That the Respondent failed to consider relevant factors and instead has taken into account irrelevant considerations factors;
- (c) That the Respondents decision is un authorized by law;
- (d) That the decision of the Respondent was unreasonable

On the first ground the Applicant urged that the Respondent should have found the 1<sup>st</sup> Interested Parties bid to be null ab initio as it submitted documents belonging to another company, Salongo Ltd which was not being evaluated.

On the 2<sup>nd</sup> ground, the Respondent considered irrelevant matters by taking into account recommendations based on error that Sorrento was the same Company as Salongo.

Lastly, that the decision was unreasonable in that the Committee evaluated a company whose documents were never evaluated and no reasonable person could have made such a decision. In the further affidavit sworn by Mary Ngethe, it was deponed that in fact the 1<sup>st</sup> Interested Party could not be traced for service of the application as the company had since closed their business and the process server Tarracio Kinyua Thurania swore an affidavit to that effect (MNN1). It is dated 11<sup>th</sup> November 2008. That the sale of the business by the 1<sup>st</sup> Interested Party renders the decision of the Respondent a nugatory.

The Applicant's Counsel submitted that the 1<sup>st</sup> Respondents did not qualify for the tender because it failed to satisfy the criteria as provided under S. 31 of the Public Procurement and Disposal Act 2005 because it submitted documents belonging to another entity purportedly to demonstrate its expertise in the management of a restaurant. Secondly Counsel urged that the Respondent based its decision to nullify the Applicant's Tender Committee's decision on reasons that the Tender Committee had no authority to review the decision of the Evaluation Committee which was wrong because the Tender Committee is

empowered under Regulation 11 (b), 52 (1) and (2) of the Regulations to act as it did. According to the Applicants, the fact that Sorrento Ltd, the 1<sup>st</sup> Interested Party shared a directorship with Salongo Company Ltd does not merge them nor transfer liability of one to another but that each is a distinct legal entity in absence of an agency contract. Reliance was made on the case of **EBBW VALE VPC V WALES TRAFFIC AREA 1951 2 KB 366 CA** which held that even subsidiaries are distinct legal entities.

In opposing the Notice of Motion, Mr. Amoth the Secretary to the Board deponed that the Board found that the Tender Committee exceeded its mandate contrary to Regulation 11 (2) of the Regulations, 2006 and that the 1<sup>st</sup> Interested Party had been found to be responsive. That the decision of the Board is consistent with the objects and provisions of the Act and that those findings of the Board can only be challenged on appeal but not by way of Judicial Review. Though aware of the hearing date Mr. Meso, Counsel who had been on record for the Respondents did not turn up. However, he had filed submissions which this court has considered. As to whether the Board considered irrelevant facts by considering Salongo Ltd. which had not bidded, the Board found no evidence of any documents submitted by Salongo Co. Ltd. on behalf of Sorrento Ltd (1<sup>st</sup> Interested Party).

On the illegality of the Board's decision, the Respondent's submission is that the Applicant has not shown which provision in the Company's Act has been infringed and that the Board merely made findings of fact which are only appealable.

As regards the decision being unreasonable, the Respondent has submitted that the basis for the decision has been explained as mandated under S. 98 of the Public Procurement and Disposal Act, 2005 and the Applicant has not demonstrated the absurdity of the decision. Lastly, on the question whether the decision was based on an error of law, the Respondent's submission is that the Board merely interpreted the provisions of Regulation 11 (1) and (2) of the Public Procurement and Disposal Regulations, 2006 and gave effect to them.

I have now considered all the pleadings in this matter and the submissions filed herein. I do remind myself at this stage that the remedy of Judicial Review is about reviewing the process by which the decision was arrived at. It does not look to the merits of the decision. In so doing, the three broad grounds upon which an application for Judicial Review will lie are whether there is no illegality, procedural impropriety or irrationality.

I have read the impugned decision that was made by the Respondents. As regards the allegation that the decision of the Respondent was made in error and that it is an illegality, the Applicant alleged that the decision was made in disregard of Regulations 11, 52(1) and 52 (2). Regulation 11 specifically provides the powers of the Tender Committee. That Regulation states as follows;

**“Regulation 11 (1) In considering submissions made by the Procurement unit or Evaluation Committee, the Tender Committee may:-**

- (a) approve a submission; or**
  - (b) reject a submission with reasons; or**
  - (c) approve a submission subject to minor clarifications by the Procurement Unit or Evaluation Committee;**
- (2) The Tender Committee shall not;**
- (a) modify any submission with respect to the recommendations for a contract award or in any other respect**
  - (b) reject any submission without justifiable and objective reasons**

(3) .....

(4) ....."

Regulation 52 then provides as follows:

**“52 (1) Where so indicated in the tender documents, a procuring entity may, prior to the award of the tender, confirm the qualifications of the tenderer who submitted the lowest evaluated responsive tender, in order to determine whether the tenderer is qualified to be awarded the contract in accordance with section 31(1) of the Act.**

**(2) Where so indicated in the tender documents, if the lowest evaluated tenderer is determined under paragraph (1) not to be qualified in accordance with the Act, the tender shall be rejected and a similar confirmation of qualifications conducted on the tenderer who submitted the next lowest evaluated responsive bid.”**

Under Regulation 11(1) the tenderer can approve a submission or reject it with reasons or approve it with minor clarifications but it cannot modify any submission or reject it without good reason. In this case the Tender Committee went ahead to modify and vary the submission which is contrary to Regulation 11 (1) and (2). Under Regulation the tenderer. Can only proceed under Regulation 52 if there is a specific provision in the tender documents that the Tender Committee will have the power to look at the qualifications again before award of tender. If they reject the tender, they can then confirm the best lowest tender. The important requirement under Regulation 52 is that the tender documents must specifically provide for that. Regulation 11 and 52 must be read together for clarity.

The Board found that the Tender Committee could only exercise the functions conferred on it by Regulation 11 (2). That the Tender Committee had exceeded its mandate by reviewing and redistributing the scores of the bidders. The Applicants do admit that the Tender Committee did review the Evaluation Committee's decision and considered the 7<sup>th</sup> Interested Party to have offered the most advantageous bid and then awarded the tender to it. I find that in doing that the Applicant acted contrary to the provisions of Regulation 11 (2). The duties of the Tender Committee under those Regulations are clear. It stipulates what the Tender Committee can do and what it cannot do. The Tender Committee reviewed and varied the submission of the 1<sup>st</sup> Interested Party. If the Tender Committee did not agree with the decision of the Evaluation Committee, all it could have done is to reject the decision with reasons under Regulation 11(1) (b) The Applicant has however not demonstrated that the tender documents provided or allowed the Tender Committee to confirm the most responsive bidder. Had the tender documents allowed for that then they could have gone ahead to reject the evaluation committee's submission and looked at the next lowest tenderer. I find nothing illegal about the Respondent's decision. It was made in accordance with the law.

All the other grounds raised are pegged on whether or not the decision of the Respondent was proper. Having found as above, I find that the Respondents did not consider irrelevant matters but made their decision in accordance with the provisions of the law that have been considered above. Having come to the above conclusion that the decision of the Respondent was made within the law, it cannot be unreasonable nor could it have been made in error. All the grounds upon which this Judicial Review application is brought must fail.

Ms Ngethe filed a further affidavit to the effect that the 1st Interested Party has closed their offices and could not be traced and therefore the decision of the Respondent would be rendered nugatory. Indeed since the Notice of Motion was filed, though the 1<sup>st</sup> Interested Party was served, they never came on record, never filed a reply nor could they be traced. It means the 1<sup>st</sup> Interested Party cannot perform the contract. With the decision of the Respondent in existence, the Applicant will be held captive to it and this court has no alternative but quash that decision of the Respondent. It should be clarified that the decision will be quashed not because it was found to have been an error, nor was it illegal, but because the 1st Interested Party, the winner of the contract, is not available to perform the contract. I therefore quash the Respondent's decision by an order of certiorari but this court directs that the Applicant bears

the costs of this motion.

Dated and delivered this 14<sup>th</sup> day of July 2009.

R.P.V. WENDOH

JUDGE

**Present**

Mr. Omotti for the Applicant

Mr. Meso for the Respondent

Muturi: Court Clerk