IN THE MATTER OF: THE PUBLIC PROCUREMENT AND DISPOSAL ACT

AND THE REGULATIONS THEREOF

AND

IN THE MATTER OF: THE PUBLIC PROCUREMENT ADMINISTRATIVE

REVIEW BOARD DECISIONS

AND

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI TO BRING TO THIS COURT FOR QUASHING THE DECISION OF THE PUBLIC PROCUREMENT REVIEW BOARD DATED 20TH FEBRUARY 2009, IN APPLICATION NUMBER 2 OF 2009 BETWEEN DELTA GUARDS LIMITED, GUARD FORCE SECURITY SERVICES (K) LIMITED –VS- THE KENYA POWER & LIGHTING COMPANY LIMITED

BETWEEN

REPUBLIC ……..……..……..……..…… APPLICANT

VERSUS

PUBLIC PROCUREMENT REVIEW BOARD …….....….……..... RESPONDENT

EXPARTE

KENYA POWER & LIGHTING COMPANY LIMITED .....……EXPARTE APPLICANT

DELTA GUARDS LIMITED ……...…….. 1ST INTERESTED PARTY

GUARDFORCE SECURITY SERVICES LIMITED ……..…….…. 2ND INTERESTED PARTY

BOB MORGAN SECURITY SERVICES ……..……..... 3RD INTERESTED PARTY

BASEIN SECURITY SERVICES LIMITED …….……...….. 4TH INTERESTED PARTY

BRINKS SECURITY SERVICES LIMITED …….……..….. 5TH INTERESTED PARTY

CAVALIER SECURITY SERVICES LIMITED ……...…...…. 6TH INTERESTED PARTY

G4S SECURITY SERVICES KENYA LIMITED ……..... 7TH INTERESTED PARTY

INTER SECURITY SERVICES LIMITED ……..……. 8TH INTERESTED PARTY

KENYA SHILED SECURITY LIMITED ……..……..…… 9TH INTERESTED PARTY

RACE GUARDS LIMITED ……..…… 10TH INTERESTED PARTY

RILEY FALCON SECURITY SERVICES LIMITED ……..... 11TH INTERESTED PARTY

TOTAL SURVEILLANCE LIMITED ……..…… 12TH INTERESTED PARTY

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RULING

Before Court is the Notice of Motion dated 23rd April 2009 brought by Kenya Power and Lighting Company the Ex-parte Applicants, seeking orders of certiorari to quash the decision of the Public Procurement Review Board dated 20th February 2009 in **Application No. 2 of 2009 between Delta Guards Limited, Guard Force Security Services (K) Ltd – vs- The Kenya Power and Lighting Company Ltd** . By way of this Notice of Motion the ex-parte applicant seeks orders of certiorari to quash the decision of the Public Procurement Review Board in **Application No. 2 of 2009** on the ground that the decision was (1) illegal (2) ultra vires and (3) was against the rules of Natural Justice. The application was supported by the affidavit of one Mr. Awuor Owiti legal officer employed by the Ex-parte Applicant. The Respondent through their secretary Mr. Cornel Rasanga Amoth opposed this application by way of a replying affidavit dated 10th June 2009. Mr. Joseph Munyithya Advocate appeared for the Applicants whilst Mr. Mwangi Njoroge Principal State Counsel appeared for the Respondent. Mr. Njuguna appeared for the 1st and 2nd Interested Parties who were Delta Guards Limited and Guard Force Security Services. By consent it was agreed that all parties file written submissions for consideration. Whereas the court did receive the written submissions filed on behalf of both the Ex-parte Applicant and the Respondent no submissions were filed on behalf of the 1st and 2nd Interested Parties. No reasons were advanced for this omission.

Be that as it may I have had the opportunity to carefully peruse the written submissions of both the Ex-parte Applicant and the Respondent as well as the authorities annexed thereto.

Briefly the facts that have given rise to this present application are as follows: The Ex-parte Applicant floated a tender No. KPLC1/IC/5/3/34/08 for the provision of security services to its offices and installations countrywide. The evaluation process was completed on 8th January 2009 after which all the tenderers were notified of the out-come of the evaluation process. Notification was given to those who qualified as well as those who did not qualify. Following and pursuant to that notification the 1st and 2nd Interested Parties filed an application No. 2 of 2009 before the Public Procurement Review Board [hereinafter referred to as the Board]. The Board Application No. 2 did proceed for hearing on 17th and 19th February 2009. On 20th February at 4.30 p.m. or thereabouts the Board delivered its decision in which it did allow certain grounds of the application while disallowing others. After ascertaining the contents of the Board ruling the Ex-parte Applicant moved to court seeking leave to commence judicial review proceedings by way of certiorari in order to quash the decision of the Board. The Applicant in their present application raise three main grounds as the basis for quashing the Boards decision -

(1) It is illegal

(2) It is Ultra Vires

(3) It offends the rules of Natural Justice

I will proceed to look at each ground individually. The jurisdiction of the High Court of Kenya in matters

of Judicial Review is derived from S.8(1) and (2) of The Law Reform Act Cap 21 Laws of Kenya. S.8(2) provides as follows:-

"***8(2) In any case in which the High Court in England is by virtue of the provisions of section 7 of the Administration of Justice (Miscellaneous Provisions) Act 1938, of the United Kingdom empowered to make an order of mandamus, prohibition or certiorari, the High Court shall have power to make a like order"***

O. 53 of the Civil Procedure Rules lays down the procedure to be followed in bringing Judicial Review Proceedings before the High Court.

In his submissions Mr. Munyithya for the Applicant argues that the Board in breach of the law failed to avail to the Applicant a typed copy of its ruling until after a period of 23 days has elapsed. He argues that due to this delay the Applicants were not able to file their present application within the time specified in S.100(1) of the Public Procurement and Disposal Act 2005. As a result the Applicants were denied an opportunity to seek prompt legal advise and further were denied the opportunity to be heard within the time specified in the Act. This Act of the Board he argues amounted to their denying the Applicants a fundamental tenet of natural justice – the right to be heard within the period provided for under the Act. S.100(1) of the Public Procurement and Disposal Act provides that:-

"***100(1) A decision made by the Review Board shall be final and binding on the parties unless judicial review thereof commences within fourteen days from the date of the Review Board's decision"***

The fact of the matter is that this delay did not result in the barring of or the failure by the Applicant to file their application for judicial review in the high court. The record in this file clearly indicates that the Applicant's prayer for Judicial Review was heard and leave to commence judicial review proceeding was granted on 6th April 2009. Thereafter the Applicant proceeded to file this their substantive application for orders of certiorari to quash the decision of the Board. I fail to see what prejudice has been suffered by the Applicants as a result of this action by the Board. Their motion was filed was allowed and is now being heard. The argument that the Applicant was unable to obtain proper legal advice has no basis. Mr. Munyithya Advocate has at all times been on record for the Applicants. Infact even after receiving a copy of the typed decision of the Board on the Applicant took a further 17 days to file this present application. In my view this 17 day period was adequate time for them to seek and obtain proper legal advice which clearly they did. The Applicants did not have only one avenue of redress. S.100(2) of the Public Procurement and Disposal Act provides as follows:-

"***100(2) Any party to the Review aggrieved by the decision of the Review Board may appeal to the High Court and the decision of the High Court shall be final".***

Therefore it is quite apparent that apart from the option of filing for Judicial Review the Applicants also had a legal right to file an appeal against the decision of the Board. On this no time limit was provided and the door was not closed to them to exercise either option. I am satisfied that despite the delay in providing a typed copy of its ruling by the Board this did not amount to a breach of the Applicants' right to a fair trial. There has been no resultant breach of Natural Justice. The Applicants were not rendered unable to file these judicial review proceedings. I find that this ground of this application has no merit and it is hereby dismissed.

Mr. Munyithya for the Applicant also takes issue with the fact that although the typed decision was availed to the Applicant on 14th March 2009 and back-dating of this decision to 20th February 2009 is both illegal and ultra vires the law. It is not disputed that the Board read out its oral decision in Board Application No. 2 of 2009 on 20th February. It is also not in dispute that the Applicants (despite their best efforts) were not provided with a typed and signed copy of this decision until 14th March 2009. The typed copy was however dated 20th February 2009, the day that decision was reached. Mr. Awuor Owiti the legal officer of the Applicant in his supporting affidavit dated 31st March 2009 at para 11(iii) avers that:-

"***(iii) …. Further since it is true that the Board did not sign or date any written decision on 20th February 2009, the signature thereof is obviously a forgery and unenforceable".***

With respect I fail to follow this logic. The mere fact that a document has been back-dated does not make that document a forgery nor does it render it unenforceable. The Board decision has been duly signed by the Chairman and Secretary respectively. The Applicants have not tendered any evidence to show or prove that the signatures thereon were **not** those of the Chairman and the Secretary. Further as Mr. Njoroge argues in his submissions on behalf of the Respondent it is quite feasible that the typed copy of the Boards decision was actually signed on 20th February 2009 but was not **released** to the Applicants until 23 days later. The Board decision is dated 20th February 2009 simply because that was the day the Board reached its decision. The Board did not reach a decision in March 2009. It is only logical to date a decision for the day on which that decision was made not for the day it could have been typed out. If then the Board released to several different parties several copies of its decision on different dates would this same Board decision bear a variety of different dates depending on when the typed copy is given out. This would amount to an absurdity and would cause great confusion. I find no evidence to support the Applicant's claim of forgery. The back-dating of the typed Board decision (if indeed that is what actually happened) cannot be said to amount to an illegality. In any event such an act has not in any way deprived the Applicant of their right or capacity to file judicial review proceedings. The Board decision bears the date on which that decision was reached and indeed this is as it should be.

Mr. Munyithya for the Applicant also argues that in purporting to interpret the Procurement Act the Board which had no capacity to do so acted ultra vires its powers. With respect, this ground of the application remains vague. The Applicants have not made it clear exactly which section of the Act the Board purported to interpret. The Applicant's assertion that the Board consists only of lay persons who have no capacity to interpret the law in my view holds no water. Firstly they have not proved that the Board consisted exclusively of lay people. Secondly the Board Secretary Mr. C.R. Amoth as submitted by Mr. Njoroge for the Respondent is a trained lawyer and an Advocate of the High Court. Therefore infact the Applicant's assertion is false. There has been no allegation that the Board is comprised of persons not qualified to sit thereon. As Mr. Njoroge for the Respondents points out the Board members were quite at liberty to and could well have consulted with lawyers in interpreting the Act. There would have been nothing illegal or unprocedural in doing this. I find that the Board was properly constituted and exercised their mandate lawfully. As such this ground of the application fails.

Lastly Mr. Munyithya for the Applicants argues that the ruling of the Board more specifically its finding that time runs during the pendancy of an application for review before the Board is bad in law and therefore illegal. I do agree with Mr. Njoroge for the Respondent that to determine this would amount to making a ruling on the merits of the Board's decision. This is not the preview of judicial review whose purpose is to scrutinize the procedure by which a decision was reached. If the Applicants wished to challenge the substantive merits of the Board's decision then the proper avenue would have been to appeal against the Board's decision. This court cannot by way of judicial review seek to substitute its own decision for that of the Board.

Based on the foregoing I find that the Applicants have not convinced the court of the merit of any of the grounds they have raised seeking order of certiorari to quash the decision of the Board. As such I decline to grant the prayers sought. I dismiss this application in its entirety and order that costs be met by the Applicant.

Dated and Delivered at Mombasa this 16th day of October 2009.

M. ODERO

JUDGE

Read in open court in the presence of:

Mrs. Makone holding brief for Mr. Munyithya for Ex-parte Applicant

No appearance by the Respondent

M. ODERO

JUDGE

16/10/2009