REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Misc Civ Appli 1260 of 2007

IN THE MATTER OF THE PUBLIC PROCUREMENT AND DISPOSAL ACT 2005

AND

IN THE MATTER OF THE PUBLIC PROCUREMENT AND DISPOSAL REGULATIONS 2006

AND

IN THE MATTER OF TENDER NO KCCA/16/2006/2007: MODERNISATION AND UPGRADING OF AIR NAVIGATION EQUIPMENT BY THE KENYA CIVIL AVIATION AUTHORITY

AND

IN THE MATTER OF A DECISION AND RULING BY THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD IN APPLICATION NUMBER 59 OF 2007 DATED THE 19H DAY OF NOVEMBER 2007

AND

IN THE MATTER OF AN APPLICATION BY SELEX SISTEMI INTEGRATI FOR ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

BETWEEN

SELEX SISTEMI INTEGRATI.. APPLICANT

AND

THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD ....1ST RESPONDENT

AND

THE KENYA CIVIL AVIATION AUTHORITY .... 2ND RESPONDENT

EX-PARTE .... SELEX SISTEMI INTEGRATI

RULING

This matter relates to proceedings, decision and ruling made by the 1st Respondent in ***PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD APPLICATION NO. 59 OF 2007*** on the 19th day of November, 2007.

Briefly, the Applicant who had been awarded a tender NO KCCA/16/2006/2007: Modernisation and Upgrading of Air Navigation Equipment by the 2nd Respondent, has moved the court by instituting a judicial review application dated 20th December 2007 and filed on 21st December 2007. The application is centred on the alleged failure on the part of the 1st Respondent first, to appreciate the meaning of, inter alia, sections 36(1),(6) and 93(2)(b) of the Public Procurement and Disposal Act, 2005. Secondly failures by the 1st Respondent to take into account the guiding principles in the interpretation of ouster clauses. Thirdly, the unlawful termination of the Applicant's tender No. KCAA/16/2006/2007: Modernisation and Upgrading of Air Navigation Equipment by the 2nd Respondent which has been upheld by the 1st Respondent and finally, contravention of the principles of natural justice. The 1st Respondent is a quasi judicial body performing adjudicative functions while the 2nd Respondent is the Kenya Civil Aviation Authority. An order of Certiorari has been sought to remove to the High Court to quash the record, proceedings, decision and ruling of the 1st Respondent made on the 19th November, 2007 upholding the termination of the Applicant's tender No. KCAA/16/2006/2007: Modernisation and Upgrading of Air Navigation Equipment on 8th October, 2007. An order of Prohibition has also been sought to restrain the 2nd Respondent, its officers, servants or agents from revoking, canceling, terminating and or awarding tender No. KCAA/16/2006/2007: Modernisation and Upgrading of Air Navigation Equipment. The Applicant has finally sought an order of Mandamus to compel the 2nd Respondent to award Tender No. KCAA/16/2006/2007: Modernisation and Upgrading Air Equipment.

On 20th December, 2007 the court vide a ruling of the same date granted leave to the Applicant to seek Judicial review orders. The application like all other judicial review applications is based on Order LIII of the Civil Procedure Rules and Sections 8 of the Law Reform Act Cap 26 Laws of Kenya.

When the application for judicial review came up for hearing on 21st April 2008, the Court's attention was drawn to a Notice of Preliminary Objection dated 1st February, 2008 and filed in Court on the same date by the Advocates for the 2nd Respondent. The Notice of Preliminary Objection states:

1. "**The Notice of Motion dated 20th December, 2007 is fatally defective and is time barred in accordance with section 100(4) of the Public Procurement and Disposal Act No.3 of 2005 as judicial review was not declared by the High Court within 30 days from the date of filing**

2. **The matter having been filed on 3rd December, 2007 became statutory time barred on 3rd January 2008."**

The Objector has heavily relied on section 100(4) of the Public Procurement and Disposal Act, 2005 which states;

"**If judicial review is not declared by the High Court within thirty days from the date of filing, the decision of the Review Board shall take effect."**

The Objector contends that the spirit behind section 100(4) of the Public procurement and Disposal Act, 2005 is to ensure that the public interest is served in the least amount of time possible and that projects are carried out expeditiously by making sure that judicial review applications are heard within 30 days from the date of filing the application. The aim is to ensure that there are no delays in finalizing the tenders intended to improve the welfare of Kenyans and that funds are disbursed expeditiously to commence the project hence the limitation of time on judicial review process which guarantees that the process is quick and efficient.

The 2nd Respondent contends that the application is time -barred and has quoted a description of statutes of limitation from Black's Law Dictionary 6th Edition:

"**Statutes ... setting maximum time periods during which certain actions can be brought or rights enforced ... declaring that no suit shall be maintained on such causes of action ... unless brought within a specified period of time after the right accrued.**"

The 2nd Respondent further contends that this Honourable Court was meant to announce clearly an opinion or resolution over this matter within 30 days after filing of the application by the Applicant. The period of 30 days began running from the date of filing the application for leave and stay by the applicant on 3rd December, 2007 and expired on 3rd January, 2008 which makes the instant application time barred and it cannot be heard and determined by this Court.

The 2nd Respondent has also relied on the Interpretation and General Provisions Act Chapter 2 laws of Kenya. Section 57 states:

"**In computing time for the purposes of a written law, unless the contrary intention appears -**

(a) a period of days from the beginning of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event or the act or thing is done."

The 2nd Respondent has also quoted Halsbury's laws of England, 4th Edition volume 45 at paragraph 1134 which addresses the aspect of a period within which an act must be done:

"**The Court has no power to extend a period of time limited by statute for doing an act unless the statute provides**"

The 2nd Respondent argues that the Public Procurement and Disposal Act, 2005 does not allow for extension of time and the Preliminary Objection should be allowed and the Notice of Motion dismissed with costs.

The Applicant has opposed the Preliminary Objection and urges the court to consider the principle laid down by Lord Denning in his book, The Discipline of Law 1979 London Butterworth at page 12:

"**Whenever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise, and, even if it were, it is not possible to provide for them in terms free from all ambiguity ... The English language is not an instrument of mathematical precision. It would certainly save judges trouble if Acts of Parliament were drafted with divine precision and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsman ... he must supplement the written word so as to give force and life to the intention of the legislature.**"

The Applicant contends that the proceedings herein arose because of the manifest defects in the Public Procurement and Disposal Act, 2005 sections 36 and 100(4). Section 36 provides:

(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.

(7) A public entity that terminates procurement proceedings shall give the Authority a written report on the termination.

(8) A report under subsection (7) shall include the reasons for the termination and shall be made in accordance with any directions of the Authority with respect to the contents of the report and when it is due."

The Applicant further argues that the 1st Respondent failed to appreciate that, the defects in the aforesaid sections, in the circumstances of this instant dispute, led not only to injustice but also a violation of the intention of Parliament as set out in section 2 of the Act. Section 2 of the said Act states:

"**The purpose of this Act is to establish procedures for procurement and the disposal of unserviceable obsolete or surplus stores and equipment by public entities to achieve the following objectives -**

(a) to maximize economy and efficiency;

(b) to promote competition and ensure that competitors are treated fairly;

(c) to promote the integrity and fairness of those procedures;

(d) to increase transparency and accountability in those procedures; and

(e) to increase public confidence in those procedures;

(f) to facilitate the promotion of local industry and economic development."

According to the Applicant, the raising of the preliminary objection by the 2nd Respondent is an attempt to perpetuate the manifest defects, injustice and vitiation of the intention of the Parliament to the detriment of the Applicant.

For the purpose of this ruling the Court prefers not to go into the arguments touching on section 36(1) and (6) of the Public Procurement and Disposal Act 2005 for the reason that this is a matter raised in the Notice of Motion for judicial review, and therefore any comments might prejudice the hearing on merit. However the Court wishes to observe that these two provisions are also in the nature of ouster clauses.

The Applicant further contends that the section 100(4) of the Public Procurement and Disposal Act, 2005 is unconstitutional. Neither the Constitution of Kenya, the Law Reform Act nor order LIII of the Civil Procedure Rules, put a time limit on when the High Court should determine an application for judicial review. The Applicant argues that the public interest served by the judicial review as expressed in section 65(2) of the Constitution is to ensure that inferior Courts, tribunals and administrative bodies act lawfully, fairly, transparently and reasonably and upholding the preliminary objection would defeat that

very reason.

The Applicant contends that section 100(4) of the Public Procurement and Disposal Act, 2005 is vague and meaningless. The High Court after hearing a judicial review application either grants the orders sought or dismisses the same but does not declare judicial review as the orders available in judicial review proceedings are not declaratory as anticipated by section 100(4) of the Public Procurement and Disposal Act, 2005. It therefore follows that the aforesaid section is vague and cannot oust the jurisdiction of the Court.

The Applicant contends that the Public Procurement and Disposal Act, 2005 does not govern the court's procedure in judicial review proceedings. The issue of the time within which a court must determine a suit is an issue of procedure set out under order LIII of the Civil Procedure Rules which does not make any time limits on the period within which the High Court should make a decision. Section 100(4) of the Public Procurement and Disposal Act, 2005 only provides a right to relief by way of judicial review but not the procedure to be followed in judicial proceedings.

The Applicant argues that section 100(4) aforesaid is absurd, oppressive, unjust and contrary to public policy because the decision of the 1st Respondent is challenged, not on time considerations but because it is manifestly unlawful, irrational, unjust and antithetic to he public interest and no effluxion of time would give it, the qualities of lawfulness, rationality or reasonableness.

The Applicant further contends that the said section 100(4) purports to give effect to an otherwise unlawful decision and as such the section is defective, unjust, oppressive and absurd. On the issue of injustice, absurdity and oppressiveness of a statutory provision, Lord Denning set out the correct position in the case of ***NOTHMAN v BARNET COUNCIL [1978] I WLR 220*** where he stated;

"**It [literal interpretation] is the voice of strict constructionists. It is the voice of those who go by the letter. It is the voice of those who adopt the strict literal grammatical construction of words, heedless of the consequences. Faced with staring injustice, the judges are, it is said, impotent, incapable and sterile. Not with us in this court. The literal method is now completely out of date. It has been replaced by the approach which Lord Diplock described as the "purposive approach." In all cases now in the interpretation of statutes we adopt such a construction as will "promote the general legislative purpose" underlying the provision ... It is no longer necessary for the judges to wring their hands and say: "There is nothing we can do about it". Whatever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy .. by reading words in, if necessary - so as to do what Parliament would have done, had they the situation in mind."**

The defect that appears in a statute cannot be ignored by the judge, he must set out to work on the constructive task of finding the intention of the Parliament. The judge should not only consider the language of the statute but also the social conditions which gave rise to it, and supplement the written word so as to give "force and life" to the intention of the legislature. The intention of Parliament in enacting the Act is contained in section 2 which was earlier quoted. The Applicant maintains that the termination of a tender after it having been awarded to it and the subsequent vindication of the termination by the 1st Respondent is a grave misdirection in law on the intention of Parliament as set out in section 2 of the said act.

The Applicant has also stated that in the instant case, determination of the judicial review proceedings within thirty days has been impracticable and as such section 100(4) of the said Act does not apply to situations where it is impracticable to complete judicial review proceedings within thirty days. In view of case backlog, it is exceptionally difficult, if not impractical for the court to hear and determine a case in thirty days. The instant case could not be heard and determined as a result of the Courts Christmas vacation which ran from 21st December, 2007 to 14th January, 2008 and also because of the political crisis which rocked our country in the month of January 2008.

In the view of the court, considering the preliminary objection raised by the 2nd Respondent and the

submissions made by the counsel for the respective parties, the real issues that need to be determined are as follows:

(1) Does the Public Procurement and Disposal Act, 2005 s 100(4) oust the Jurisdiction of the Court in Judicial Review?

(2) Does the Public interest of finality in Procurement Procedures outweigh judicial adjudication?

(3) Is section 100(4) of the above Act unconstitutional for limiting the jurisdiction of the courts to thirty days?

(4) Is section 100(4) of the said Act in tandem with the applicable law as regards the procedure in Judicial review proceedings?

(5) What is the public interest in the circumstances.

Perhaps, before dwelving into the above issues for determination, it would be prudent to establish the basis of judicial review and where the court derives its jurisdiction. Judicial review plays an important role in our society which is to check excesses, omnipotence, arbitrariness abuse of power and also accountability and maintenance of constitutionalism and the rule of law. As Chief Justice Marshall powerfully argued in the Case of ***MARBURY v MADISON 5 us 137 (1803)***, judicial review provides the best means of enforcing the peoples will as declared in the written Constitution, without resort to the drastic remedy of revolution. He warned that, without judicial review, the legislative branch would enjoy a practical and real omnipotence and would reduce to nothing what is deemed the greatest improvement on political institutions - a written constitution. The concerns raised in the Marbury case are still relevant and applicable in our jurisdiction. It should be observed that Constitutional Judicial review is the cornerstone of the doctrine of separation of powers and the principle of the rule of law. On the clear provisions of the Constitution, the High Court is the principal interpreter and guardian of the Constitution. Section 65(2) of the Constitution states:

"The High Court shall have jurisdiction to supervise any civil or criminal proceedings before a subordinate court or court-martial, and may make such orders, issue such writs as it may consider appropriate for the purpose of ensuring that justice is administered by those courts."

The High Court also has powers of judicial review arising from the An Act of Parliament namely the Law Reform Act and a 1938 English Act, and the supporting Order LIII of the Civil Procedure Rules. This jurisdiction is distinguishable from the constitutional judicial review. The matter before the Court falls squarely under latter ordinary judicial review.

Judicial review is a tool used by the High Court to ensure that public institutions exercise power in accordance with the law. It is still within the jurisdiction of the High Court to review legislation in order to establish whether it complies with the Constitution. Judicial review also enables the High Court to review acts, decisions and omissions of public authorities in order to establish whether they have exceeded or abused their power.

Professor Sir William Wade, an authority in Administrative Law has also captured the essence of judicial review and has posited as follows:

"The powers of public authorities are essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge but in law this does not affect his exercise of power. In the same way a private person has absolute power to allow whom he likes to use his land ... regardless of his motives. This is unfettered discretion. But a public body may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. The whole conception of unfettered discretion; is inappropriate to a public authority which possess powers solely in order that it may use them for the public good."

Michael Fordham in his book, Judicial Review Hand Book (1994) has argued that judicial review allows the High Court to supervise the activities of public bodies. It brings to the judicial forum a wide range of subject-matter and enjoys an increasing prominence in the English legal system. The foregoing is equally true to the Kenyan scenario.

I now wish to examine the issues for determination. The first issue is whether the Public Procurement and Disposal Act, 2005 s 100(4) ousts the jurisdiction of the court in judicial review? That question can be answered by a close scrutiny of section 36(6) of the said Act which provides:

"**A termination under this section shall not be reviewed by the Review Board or a court.**"

In the literal sense, section 36(6) quoted above purports to oust the jurisdiction of the court. The Applicant has challenged the jurisdiction of the 1st Respondent to uphold the termination of its tender by the 2nd Respondent as the 1st Respondent usurped the judicial function of the court to determine issues of the law of contract. The Applicant wishes to urge the ground of jurisdiction at the main hearing of the application for judicial review. As earlier, noted, the High Court's jurisdiction in judicial review matters inheres from the Law Reform Act and also under the Constitution - see s 65(2) and s 123(8) of the Constitution. The Constitution is the Supreme law of the land and is superior to all Acts of Parliament. Section 3 of the Constitution states:

"**This Constitution is the Constitution of the Republic of Kenya and shall have force of law throughout Kenya and, subject to section 47, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of inconsistency, be void.**"

As observed from the Constitution, any law that is in conflict with it is void to the extent of the inconsistency. However, it is interesting to note that section 100 of the Public Procurement and Disposal Act, 2005 again submits the decisions of the Review Board to judicial review by the High Court but imposes a time bar.

The courts guard their jurisdiction jealously, but recognize that it may be precluded or restricted by either legislative mandate or certain special contexts. Legislative provisions which suggest a curtailment of the courts' power of review give rise to a tension between the principle of legislative mandate and the judicial fundamental of access to courts. Judges must search for critical balance and deploy various techniques in trying to find it. The Court has to look into the ouster clause as well as the challenged decision to ensure that justice is not defeated. In our jurisdiction, the principle of proportionality is now part of our jurisprudence. In the case of ***SMITH v EAST ELLOE RURAL DISTRICT COUNCIL [1965] AC 736 Lord Viscount Simonds*** stated as follows:

"**Anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the court, whether in order that the subject may be deprived altogether of remedy or in order that his grievance may be remitted to some other tribunal.**"

It is a well settled principle of law that statutory provisions tending to oust the jurisdiction of the Court should be construed strictly and narrowly. This rule was propounded in the landmark decision in ***ANISMINIC v FOREIGN COMPENSATION COMMISSION [1969]*** I ALL ER 208 where Lord Reid stated:

"**It is a well established principle that a provision ousting the ordinary jurisdiction of the Court must be constuced strictly meaning, I think, that, if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the Court.**"

In this instant Case, it can be argued that sections 100(4) of Public Procurement and Disposal Act, 2005 cannot possibly be effective in ousting the jurisdiction of the Court. The court must look at the intention of Parliament in section 2 of the said Act which is inter alia, to promote the integrity and fairness as well

as to increase transparency and accountability in Public Procurement Procedures. To illustrate the point, failure by the 2nd Respondent to render reasons for the decision to terminate the Applicant's tender makes the decision amenable to review by the Court since the giving of reasons is one of the fundamental tenets of the principle of natural justice. The Applicant argues that section 36(6) of the said Act is a plain ouster and it amounts to unfettered discretion to the 2nd Respondent which defeats the intention of Parliament found in section 2 of the said Act and also denies the Applicant the benefit of a contractual common law principle which is also fundamental in contract law.

However it is not the function of this court at this stage to consider and determine the alleged ouster in s 36(6) of the Act for the reason set out above. It suffices, to find that the ouster Sections in the Public Procurement and Disposal Act, 2005 are designed in the context of ensuring fairness, transparency and accountability in the procurement procedure.

The second issue is whether the public interest of finality in procurement procedures outweigh the judicial adjudication? Section 2 of the Public Procurement and Disposal Act, 2005 is elaborate on the purpose of the Act and top on the list, is to maximize economy and efficiency as well as to increase public confidence in those procedures. The Act was legislated to hasten or expedite the Procurement Procedures for the benefit of the public. Indeed, sections 36(6) and 100(4) of the Act which are ouster clauses, were tailored to accelerate finality of Public Projects. The intention of efficiency is noble and must be appreciated if the development agenda is to be achieved. The Court cannot ignore that objective because it is meant for a wider public good as opposed to an individual who may be dissatisfied with the procuring entity. However the Court must put all public interest considerations in the scales and not only the finality consideration.

The said Act also has other objectives namely to promote the integrity and fairness of the procurement procedures and to increase transparency and accountability. Fairness, transparency and accountability are core values of a modern society like Kenya. They are equally important and may not be sacrificed at the altar of finality. The Court must look into each and every case and its circumstances and balance the public interest with that of a dissatisfied applicant. Adjudication of disputes is a constitutional mandate of the Courts and the court cannot abdicate from it.

Speed is the hallmark of judicial review and even an application for leave is filed under certificate of urgency. The law also sets out the period within which to file the application for substantive orders, failure of which the orders granted at leave stage automatically lapse. It is therefore arguable that finality is the very nature of judicial review. It is also arguable that whenever, a party comes to court for redress in public Procurement Cases, finality cannot outweigh judicial adjudication as there may be other issues such as integrity, transparency and accountability which are also in public interest and if adjudicated upon by the court, may maximize economy and increase public confidence in the procurement procedures. Perhaps, if finality is overemphasized at the expense of other equally important core values in the said Act, the very intention of the Parliament captured by section 2 will substantially fail.

The third issue is whether section 100(4) of the said Act is unconstitutional for limiting the jurisdiction of the courts to thirty days? As earlier stated the basis of the court's power of judicial review is both the Constitution and the Law Reform Act. Section 77(9) of the Constitution states:

"**A court or other adjudicating authority prescribed by law for determination of the existence or extent of a civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by a person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time."**

It is clear that the Constitution envisages hearing of a case within a reasonable time with due regard to practicality. A reasonable time is not defined but it is an issue of construction by the judge who presides over a case. A reasonable time would depend on the circumstances of the case and other relevant factors that the court must consider. Perhaps thirty days may be reasonable to the 1st Respondent but due to lack of information on the reality on the ground and the courts' calendar, the period may be unreasonable and

impracticable. The reasonable period for the hearing and determination of a judicial review case where there is a proper judge/population, ratio eg in the United Kingdom, is three months (3).

The Court appreciates that one of the objects of the said Act in section 2(a) is to maximize economy and efficiency. However, while time is of essence in carrying out projects, speed cannot override justice and an illegality cannot be countenanced by the court merely because the offending party is overzealous to complete a project. It is also one of the objects of the said Act, to promote integrity and fairness of procurement and disposal procedures. The law acknowledges the need for speedy certainty as to the legitimacy of target activities and requires applicants for judicial review to act promptly to avoid frustrating a public body whose decision is challenged, particularly because of public interest. However, limiting or specifying that the court must deal with judicial review within thirty days may be impractical and may lead to denying justice to deserving Applicants.

It is arguable if or not section 100(4) of the Public Procurement and Disposal Act, 2005 offends section 77(9) of the Constitution. Further, the legislature and the Executive have failed to appreciate the constitutional doctrine of separation of powers. The Legislature by providing that the Court must hear and determine a judicial review case within 30 days and the enthusiastic implementation of the same by the 2nd Respondent which is part of the Executive, is a deliberate encroachment to the strictly operational independence of the Judiciary which is an independent arm of the government.

Finally, the fourth issue is whether section 100(4) of the Public Procurement and Disposal Act, 2005 is the applicable law as regards the procedure in judicial review proceedings? Applications filed in court for judicial review are brought under sections 8 and 9 of the Law Reform Act Cap 26 Laws of Kenya and Order LIII of the Civil Procedure Rules. The Applicant strongly argues that any other procedure apart from the abovementioned has no force of law and would amount to a fatal defect and incompetence. According to the Applicant,

the Public Procurement and Disposal Act, 2005 cannot purport to introduce any other procedure apart from what is known in law and practice. Ordinarily, the law can limit the period of filing a suit but the period within which the case must be determined before courts should be a preserve of the courts due to different circumstances such as case backlog, vacation among others where an applicant may have no control.

The Preliminary Objection was substantially raised on the basis of section 100(4) of the Public Procurement, which clause is vague, ambiguous and indefinite. Professor Sir William Wade in his authoritative work, Administrative Law, 8th Edition at page 708 has captured the failure of Parliamentary draughtsman:-

“**Parliament is mostly concerned with short term considerations and is strangely indifferent to the paradox of enacting law and then preventing courts from enforcing it. The judges, with their eye on the long term and the rule of law, have made it their business to preserve a deeper constitutional logic, based on their repugnance to allowing any subordinate authority to obtain uncontrollable power. Needless to say, they have maintained throughout that they are correctly interpreting Parliament’s true intentions.”**

The 2nd Respondent also seems not to appreciate the ordinary procedure in judicial review applications. It is a misconception that time starts to run as purported by the 2nd Respondent when a chamber summons seeking leave is filed. Once leave is granted to apply for judicial review orders, the applicant is granted 21 days within which to file the notice of motion seeking substantive orders. The notice of motion unless the judge otherwise directs at the time of granting leave is to be heard at least eight clear days between the service of the same and the day named therein for hearing. Considering the Christmas vacation, this case would have been determined on 18th of January 2008 if the said Act is to be Applicable. The 2nd Respondent alleges that thirty days expired on 3rd January 2008 but on the said date the court was still on vacation.

The Procedure for judicial review set out by the Public Procurement and Disposal Act 2005 is in conflict with that laid down by the Law reform Act and Order LIII of the Civil Procedure Rules. According to section A 100(1) of the said act, judicial review must be commenced within fourteen days from the date of the Review Board while under Order LIII, the Applicant must file the same within 21 days after leave is granted. It is arguable that the novel procedure introduced by the Public Procurement and Disposal Act, 2005 is impractical and may lead to miscarriage of justice. Sometimes it is very difficult to deal with judicial review applications expeditiously because of the weighty issues that need to be determined. Most of the applications even in the area are bucky and complex and the Court cannot pay lip service to serious issues that come before it for determination merely to beat a deadline set by a stranger to the court process.

ANALYSIS AND FINDINGS

With the above arguments and authorities in view, as the ouster sections refer to the right of "appeal" and declaration of judicial review both of which are extremely vague, impressive and ambiguous in the context of judicial review matters, which in Kenya are solely governed by the Constitution, Law Reform Act cap 26 section 8 and 9, and Order 53 of the Civil Procedure Rules, I find and hold that a vague and ambiguous ouster provision namely section 100(4) even on its wording cannot take away the right of adjudication or determination by way of judicial review. In addition the ouster clause/provision does not make a distinction between the two stages of judicial review proceedings. At most, the ouster subsections can only take away the right of appeal. It will be recalled that an aggrieved party at the level of the Review Board commences judicial review proceedings in two stages:

(i) An application by way of a Chamber Summons seeking leave to commence a judicial review application for the grant of judicial review orders.

(ii) When leave is granted with or without stay he files a Notice of Motion. The Notice of Motion must be filed within 21 days of the grant of leave as a matter of law - see both the Law Reform Act and Order 53. The Notice of Motion is in my view the starting point yet the Procurement Act provides for filing within 14 days which is clearly in conflict with the statutory limitations which are 21 days under Law Reform Act, and Order 53 and a further 8 days before the appointment of a hearing date. These provisions constitute the substantive and procedural law in judicial review.

For the same reasons I find that the Preliminary objection, as argued by the applicant is misconceived in that it purports to suggest that time (30 days) should start to run from the leave stage as above, namely the filing of the Chamber Summons and not upon the filing of the Notice of Motion. There cannot be any final determination in judicial review without the filing and hearing of the Notice of Motion. It is therefore clear to the court that the objection was prematurely filed and greatly contributed to the delay in having this matter finalised within 30 days because in any event it had to be disposed of first. The ouster clauses which attempt to prevent the judicial determination where the targeted body has no jurisdiction or acted in excess of jurisdiction are incapable of ousting judicial review jurisdiction of the Court. ***ANISMINIC LTD v FOREIGN COMPENSATION COMMISSION [1969] 2WLR 163 Lord Reid*** made the same point in these words:-

"**It is well established that a provision ousting the ordinary jurisdiction must be construed strictly - meaning in turn, that if such a provision is** ... **capable of having two meanings that meaning shall be taken which preserves the ordinary jurisdiction of the court...."**

Related to the above finding of the court concerning the misconception of the Preliminary objection, is that although a genuine preliminary point must be on a clear point of law on undisputed facts this is not the case here. The vagueness and ambiguity of the clause is also a ground for the Court finding that even on this ground the ouster provision would not be effective in ousting this court's jurisdiction. Moreover as is evident from this ruling, there is no clear point here, instead, the Court is faced with a novel, untested and complex situation to unravel and perhaps arising for the first time and without precedent. With respect, both the Legislature and the draughtsman appear to have had in view only the interest of speed, expediency, efficiency and finality in procurement matters at the expense of justice and the clear

objectives set out in section 2 of the Procurement Act. For this reason the preliminary objection flies in the face of the celebrated findings of Sir Charles Newbold in the case of ***MUKISA BUSCUITS v WESTEND [1970] EA 469*** where he held inter alia that a preliminary point must be on a clear point of law based on undisputed facts. Whether or not s 100(4) is effective as an ouster provision raises complex questions of law unsuitable for preliminary objection.

The other reason why this Court cannot blindly apply the so called ouster clauses is that, unlike the English position where judges must always obey, or bow to what Parliament legislate, is, because Parliament is the supreme organ in that legal system. Even there judges have refused to blindly apply badly drafted laws and have in some cases filled the gaps in order to complete or give effect to the intention of the legislature. In the case of Kenya it is our written Constitution which is supreme and any law that is inconsistent with the Constitution is void to the extent of the inconsistency (see s 3). Our first loyalty as judges in Kenya is therefore to the Constitution and in deserving cases, we are at liberty to strike down laws that violate the Constitution. It follows therefore that the authorities cited by the Objector Counsel are not entirely relevant to the Kenya situation. Thus, any time limit clauses must for example, withstand the provisions of s 77(9) of the Constitution which reads:

"**A court or other adjudicating authority prescribed by law for the determination of the existence or extent of a civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by a person before such a court or other adjudicating authority the case shall be given a fair hearing within a reasonable time."**

In the exercise of judicial review jurisdiction the Courts have tried to cope and give rulings and judgments within a reasonable time. However due to the disproportionate ratio of judges vis a vis the population, to achieve the ideal of a timed determination of sometimes complex procurement matters whose documents are invariably voluminous and also accompanied by complex technical data giving, a determination within 30 days, could have been achieved at the expense of other matters before the Court. In the long run in the interest of the overriding objectives of case management, no group of litigants no matter how privileged are entitled to more judicial time than any other. Judicial time is an expensive resource which must be apportioned fairly to the entire spectrum of the work in the Court. Every file is important. For courts to continually inspire confidence of the Court users and litigants, they must have a very sharp sense of proportionality, fairness and equity in the allocation of judicial time. The ouster clauses fly in the face of the above principles. It must in addition, not be forgotten that the ouster clause in question, has been imposed in the face of a backlog in the courts (which although being tackled with vigour and determination) still averages between 3 to 10 years.

This Court is of course not oblivious to the fact that procurement matters demand efficiency, speed and finality in their determination because of the very nature of procurements. But the answer to this is to leave the matter in to the individual discretion of a judge. On my part, I have severally held that speed and expedition are the hallmarks of judicial review given the courts have no right to hold to ransom, decision makers unless they can do so within a reasonable time.

Finally an ouster clause such as the one relied on, cannot oust the court jurisdiction even after 30 days where the substance of the review is lack of jurisdiction by the Procurement Board for example. This is on the high authority of the ***ANISMINIC*** case cited above. Where jurisdictional issues are involved ouster clause, no matter how tightly worded would not prevail and the Court has the jurisdiction to declare any decision as nullities. Thus in the case of the ***Goldenberg Judicial Commission v Republic ex-parte JACKSON MWALULU Misc Civil Application No. 102 of 2006*** the Court held that nullities could be attacked whenever they are raised. However principles of good public administration and the public interest must be taken into account and the major consideration must be the attainment of a speedy determination, but not to prevent a judicial determination on merit.

Looking at the application before the Court there are issues which touch on the jurisdiction or lack of it, on the part of the Board and I find that the ouster clause cannot prevent the Court from making a determination on merit in the matter before the Court. Counsel have cited s 65(1) and (2) of the

Constitution, which provide for appointment of courts other than the High Court where special jurisdiction is conferred, since the courts' constitutional jurisdiction is limited, the High Court cannot take away or encroach on the special jurisdiction, except where the special court acts outside the special mandate as specified in section 65 (1). The judiciary too is not above the constitution. Its organs are subject to the fundamental rights provisions of the constitution. Any other view infringes the constitution and is also against international human rights law. Nothing supersedes vindication of fundamental rights. (A lesser jurisprudence or better still gutter jurisprudence unacceptable to this court. The guard of the guards is the constitution.

Even the English who do not have a written Constitution are not oblivious to the need to achieve a constitutional balance.

The famous writer of Administrative Law, Wade wrote of the ***ANISMINIC*** decision as under:

"**The net result was that (the law lords) disobeyed the Act, although normally they were merely construing it in a peculiar but traditional way ... The judges appreciate, much more than does Parliament that to exempt any public authority from judicial control is to gave it dictatorial power, and that this is so fundamentally objectionable that Parliament cannot really intend it ... There can be abuse of legislative power, indeed in the legal sense, but in a distinct constitutional sense, for example if Parliament were to legislate to establish one party government, or a dictatorship, or in some other way, were to attack the fundamentals of democracy. To exempt a public authority from the jurisdiction of the courts of law is, to that extent, to grant doctorial power. It is no exaggeration, therefore, to describe this as an abuse of power of Parliament speaking constitutionally. This is the justification for the strong, it might even be rebellious, stand which the courts have made against allowing Acts of Parliament to create pockets of uncontrollable power in violation of the rule of law. Parliament is unduly addicted to this practice giving too much weight to temporary convenience and too little to constitutional principle. The law's delay together with its uncertainty and expense, tempts governments to take short cuts by elimination of the courts. But if the courts are prevented from enforcing the law, the remedy becomes worse than the disease" (Wade 1980 pp 65-6).**

In a way, the allocation of judicial time in advance by other organs of government, constitute usurpation of judicial function and power and/or amount to sharing of judicial function, and this is therefore clearly unconstitutional. In the case before me, the applicant is only a few days out of time taking into account the Christmas vacation 2007-2008 and the subsequent unhappy unrest which can only be said to have subsided in March. Using a 30 days rule of thumb, to prevent the applicant from accessing the courts, in my view, violates the constitutional balance as outlined above, - and not allowing the court to have a discretion even in the case of explained delays such as in this constitutes.

Unacceptable usurpation of the judicial function. Under s 77(9) it is the court which determines what a reasonable time is for any judicial task or function although we appreciate that the same question could be a policy one for Parliament - but where this is necessary, Parliament would do well not to ignore judicial function constraints, granted that the ouster clause in this matter, is a statutory one, where the Court, has been given 30 days to make a "declaration "or" to declare judicial review." In other words the facts, are as in the six weeks limit imposed in the ***EAST ELLOE*** case. Thus the Procurement Act did not oust the jurisdiction of the court altogether unlike in the ***ANISMINIC*** where the Act ousted the court's jurisdiction altogether notwithstanding that the Commission had on the facts no jurisdiction to make the decision.

The Court could have been tempted to walk the ***EAST ELLOE*** case, but taking into account the practical reality as described above and the vagueness of the clauses which prescribe the time limitation in the current case, I opt to walk the ***ANISMINIC*** way, more so, because of the jurisdictional issues for determination, and which have been raised in the application and also the constitutional requirement to allocate reasonable time. Under s 65(1) if the established Court or courts stick to the special jurisdiction, this Court, in my view would have no constitutional right to intervene under the section. It would be entitled to interfere only, if the court fails to stick to the mandate or acts in excess of that mandate. If a

mistake or error happens or occurs in fulfillment of the mandate, this is a matter of appeal. Where provided, and not for judicial review. I hold that the court must be left to allocate sufficient time to do justice in every case including procurement cases before the court. As acknowledged by the objector, the courts have given top priority, and in some cases fast tracked procurement matters both before the time limitation provision was imposed and after the time limitation provision. The balance which the court must be allowed to strike or achieve was very well put ***GRAVELLS `978 pp 383-4*** as follows:

"**It is arguable that (this) is a fundamental issue underlying much modern administrative law ... Ultimately every challenge to administrative action can be seen to represent a conflict between, on the one hand, the constitutional priorities of fairness and the rule of law, and on the other hand, the administrators' priorities of expediency and finality. Since however there is in reality no typical administrator, it follows that the resolution of those conflicting priorities will tend to vary with the particular process in question; different considerations will apply in different contexts and the reliance of the same considerations will apply in different contexts and the relevance of the same consideration will vary according to circumstances. In other words there can be no such thing as a general solution: rather there must be a series of particular solutions."**

There are situations in which the court must of necessity allow expediency and principles of good administration to apply such as in the ***OSTLER*** case, but I must find that the decision has to be made by the Court, on the facts before the Court, and this cannot be substituted by a 30 days rule of thumb-imposed without consultations whatsoever and without regard whatsoever, to the current law requirements on Judicial review proceedings or to the principles of constitutional balance.

Allowing decisions of the Procurement Board to automatically apply after 30 days, does not make the decisions correct even on matters as fundamental as on jurisdiction for example. This cannot possibly be right. The way to get things right, is to hold that no court or tribunal has any jurisdiction to make an error of law on which the decision of the case depends. If it makes such an error, touching on jurisdiction and it goes outside its jurisdiction then certiorari will lie from the court to correct it even after the 30 days, whether or not the matter before the court is a procurement matter.

In the case of Kenya there is no such thing as Parliamentary supremacy and every legislation is subject to the Constitution. The courts are the guardians of the Constitution. There cannot therefore be any allegation of the courts disobedience of Parliament. Where Parliament itself, purports to restrict or curtail the powers allocated to the Court by the Constitution the court must promptly intervene. Constitutional power once allocated cannot be shifted by either by the Legislature or the Executive under the banner of policy.

Prof. Wade's defence in the Constitutional Fundamentals 1980 of ***ANISMINIC*** brings out the constitutional fundamentals which are relevant to the English position without a written Constitution in these words:-

...."**For judicial control particularly over discretionary power, is a constitutional fundamental. In their self defensive campaign the judges have almost given us a Constitution, establishing a kind of entrenched provision to the effect that even Parliament cannot deprive them of their proper function. They may be discovering a deeper constitutional logic than the crude absolute of statutory omnipotence!"**

In the case of Kenya, the Constitution clearly vests the judicial power in the court to adjudicate on obligations and rights within a reasonable time.

However, the above notwithstanding, there are matters where the predominant factor is policy and public interest in which case, an individual's interest may be subordinated to the public interest hence the need to respect and uphold time limited ouster clauses and one example is where considerable time has elapsed and steps have been taken to implement the impugned decision or act. In such situations, it would be contrary to public policy to disregard the operation of the effectiveness of the ouster clause, due to the large public interest reflected in the maintenance of the status quo. For example in the English case

of ***SMITH v EAST ELLOE RURAL DIST COUNCIL (1956) AC 736*** it was contended that the time limit of six weeks was pitifully inadequate as an allowance of time where, bad faith may involve concealment or deception is thought to be present. Although in form, the jurisdiction of the court was not absolutely ousted, in substance it was all the same effectively ousted, by a pitifully inadequate time limit. All the same the majority of the House of Lords, held that the action against the Council and the Government Department could not be proceeded with by the reason of the plain words of the ouster in para 16. Obviously the inordinate delay in moving the Court was the predominant factor due to possible rights of third parties. In our case, under similar situation the public interest consideration must be Constitutionally compliant.

Again in the case of ***R v ENVIRONMENT SEC Exp OSTLER*** all the judges of the Court of Appeal held that the EAST ALLOE CASE was good and binding on them. They held that the ouster provision was justified on the ground of public interest.

However in the matter before me there are many hurdles for the ouster clause/provision to overcome and it has failed to do so.

(1) The ouster provisions are not in clear words at all.

(2) The delay in finalizing the matter is negligible and is only two weeks or so hence there are no known public interest considerations that are likely to suffer in finalizing the judicial review application on merit after a full hearing.

(3) There is a specific constitutional provision which allows reasonable time for the judicial function.

(4) While speedy finality is certainly the main objective in the time clause ouster, the major objectives of the Procurement are as set out above, and the speed and finality criteria are not the overriding objectives of the Act.

(5) The ouster provisions cannot satisfy the corferia of reasonableness and proportionality.

I have endevoured to analyse all possible view points concerning the legal position of the ouster clauses. It is however quite evident from my findings herein that what demolishes the ouster clauses or the biggest hammer that squeezes them out of existence is when they are in conflict is the Constitution. I started off, by stating that the first loyalty of the court is to the Constitution and I must therefore conclude this ruling by making reference to it. The reason for this is that if the ouster clauses owe their existence to the need to uphold public interest, the Constitution is in my view the highest public interest. A constitution is the highest expression of the peoples will. Thus in the REFERENDUM CASE 2005 this court claimed perhaps the greatest jurisdictional territory in order for this country to give birth to a truly homegrown Constitution. Poor legal services and advice, including the much feared ghosts which always demanded the amendment to s 47 of the Constitution before a new Constitution was enacted, literally held this country captive in her quest to renew herself. The REFERENDUM CASE chased the ghosts or better still, declared that they never existed in the first place. It identified the beacons pointing towards the ultimate birth some day of a new Constitution. Yes, the territory claimed by this Court was that the touchstone of validity of a new Constitution is the people and not s 147 of the Constitution.

In the recent case of ***SIMON MBUGUA v THE ECK & ANOTHER Misc Civil Application No. 13 of 1998*** this court restated the place of Constitutional judicial review by the Court, over all persons and authorities under s 123(8) of the Constitution. Both claims to such vast jurisdictional territory may be said to be extravagant.

It is however important for this court to highlight the fact that it is not itself omnipotent. It has its limits whose origin is the principle of maintaining constitutional balance. It is itself a creature of the Constitution, and therefore subject to the Constitution and therefore its jurisdiction can also be limited by the Constitution.

Thus under s 60 of the Constitution the High Court has unlimited original jurisdiction in both civil and criminal matters. The collorary

to this omnipotence, in civil and criminal matters is that in other matters not expressed, the jurisdiction of the High Court may specifically limited by the Constitution. To illustrate the point I will give two examples of constitutional limitation of this Court's jurisdiction. First is s 65(1) where Parliament may establish other courts and give them special jurisdiction. Under s 65(2) the supervisionary jurisdiction is confined to subordinate courts and only in civil and criminal matters. Thus, this Court cannot in my view constitutionally claim the special jurisdiction of any other lower court unless that court goes outside its express constitutional mandate under s 65(1). Second, under s 84, the Constitution confers limited original jurisdiction in this Court, on all matters touching on fundamental rights and freedoms i.e. (Chapter 5 Bill of Rights) whose only limitation is the expressed right of appeal under the Section. It is important to note that this Original jurisdiction is not unlimited unlike the jurisdiction under s 60 of the Constitution. Section 84 original jurisdiction is limited all the same.

The reason for the above analysis is to emphasise that in constitutional matters even this Court has limitations, and must confine itself to constitutional limits or delineations. The Court does not have a blank cheque to fill, in the name of the exercise of raw power or under the guise the principle of finality or hierarchy. The other example of the limitation of the court's jurisdiction as regards fundamental right is that all persons, authority and organs of governmental are subject to the enforcement jurisdiction and nothing can supersede these rights.

With the above analysis it is important to note that procurement matters are substantially contractual and therefore civil, and under s 60 this Court has unlimited jurisdiction in civil and criminal matters and therefore neither Parliament nor the Executive can limit this jurisdiction by ouster clauses whether based on time or expressed as certiorari ouster clauses. S 60 allows no such limitations at all.

Finally the restriction cannot be done under the cover of the public interest because the unlimited jurisdiction under s 60 specifically granted to this court is the highest expression of the public interest namely the vesting of judicial function and power in the Court.

It is with the above provisions in view, that I hold that the section 100(4) relied on cannot oust this court's jurisdiction, and I have just stopped shot of striking the section down for the sole reason that this was not a constitutional application seeking the relevant declaration or order.

Finally by way of a restatement I find and hold that our Constitution, gives access to the courts and such access cannot be denied or restricted save where expressly provided for in the Constitution. Indeed the right of hearing has no limitation at all - see section 77. In the case before me the restriction on the right of hearing is by a provision in an Act of Parliament and the provisions relied on are not free from ambiguity. Even where a restriction is permissible by statute such ouster clauses or restriction would only be effective if clear statutory words are used which is not the case here. It is wrong for the executive to literally allocate themselves administrative finality in matters that are at the core business of the courts - namely the judicial function of adjudication. Operational independence, of the Courts is part of the wider principle of the independence of the courts. They should be stopped in their tracks as I have here.

To recap the preliminary objection cannot be upheld for the following reasons:-

(1) The ouster clause section 100(4) of the Procurement Act is not entirely clear and the court must therefore resolve the dispute by upholding its jurisdiction instead of its ouster.

(2) The ouster section is not in tandem with the other laws on judicial review namely the Law reform Act and Order 53 and the section was inserted in obvious ignorance of the Judicial review laws.

(3) An ouster section cannot be effectivce where it is inconsistent with the main objectives of the Act.

(4) An ouster section is void where it violates provisions of the constitution.

(5) Ouster clauses are usually grounded on public interests consideration and good administration, and there cannot be greater public interest than that expressed in the constitution. In this regard ouster clauses will be ineffective unless they pass the test of reasonableness and proportionality.

(6) Ouster sections or clauses are ineffective in the face of jurisdictional issues.

With the above analysis in view, I have no hesitation whatsoever in dismissing the objection with costs to be paid by the interested party objector. I shall appoint a hearing date for the application.

DATED at Nairobi this 2nd day of May 2008.

J.G. NYAMU

JUDGE

Advocates

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Allen Gichuhi for Interested Party Objector