



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Misc Civ. Appli. 386 of 2008**

REPUBLIC ..... APPLICANT

V E R S U S

THE PERMANENT SECRETARY, MINISTRY OF STATES FOR DEFENCE,

THROUGH THE HON. ATTORNEY GENERAL..... RESPONDENT

AND

THE DIRECTOR GENERAL PETER MWARA

NANCY NYAMBURA MWARA both trading as ..... INTERESTED PARTY

**J U D G M E N T**

Before me is a Notice of Motion dated 30<sup>th</sup> June, 2008 filed by Musinga Munyithia & company advocates on behalf of the ex-parte applicants **PETER MWARA** and **MARY NYAMBURA MWARA t/a M/s DANCA TRADERS & PENAL DEALERS**. The respondents are named as **THE PERMANENT SECRETARY MINISTRY OF STATE FOR DEFENCE, THROUGH THE ATTORNEY-GENERAL**. There is also an interested party **THE DIRECTOR GENERAL**. There is also an interested party **THE DIRECTOR GENERAL**.

The orders sought are as follows-

1. ***An order of certiorari removing to the High Court and quashing the decision of the Respondent, the Permanent Secretary, Ministry of State for Defence made on 16<sup>th</sup> May, 2008 to cancel three contracts namely-***
  - (a) ***Contract Number MOD/423 (162) 20-07/2008 for supply of fresh vegetables, fruits and potatoes to Manda Base by Danca Traders.***
  - (b) ***Contract Number MOD/423(002) 2007/2008 for supply of fresh vegetables, fruits and potatoes to Mombasa units by Danca Traders.***
  - (c) ***Contract Number MOD/423 (173)/2007/2008 for supply of unfertilized chicken eggs to Mombasa units by Danca Traders.***
2. ***An order of certiorari removing to the High***

***Court and quashing the decision of the Respondent, the Permanent Secretary, Ministry of State for Defence made on 16<sup>th</sup> May, 2008 to debar the Ex-parte Applicant from participating in future tendering process in accordance to section 115 of the Public Procurement Act, 2005.***

***3. An order compelling the Respondent, the Permanent Secretary, Ministry of State for Defence to comply with the terms of the contract for the remainder of the duration namely-***

***(a) Contract Number MOD/423(162) 2007/2008 for supply of fresh vegetables, fruits and potatoes to Manda Base by Danca Traders.***

***(b) Contract Number MOD/423 (002) 2007/2008 for supply of fresh vegetables, fruits and potatoes to Mombasa units by Danca Traders.***

***(c) Contract Number MOD/423 (173)/2007/2008 for supply of unfertilized chicken eggs to Mombasa units by Penan Dealers.***

***3. Costs of this application be proved for.***

The application was filed under certificate of urgency. It was grounded on the **STATEMENT** dated 26<sup>th</sup> June, 2008 filed with the Chamber Summons for leave, and a **VERIFYING AFFIDAVIT** sworn on 25<sup>th</sup> June, 2008 by **PETER MWARA DANIEL** also filed with the Chamber Summons for leave.

The grounds of the application which are in the **STATEMENT** and the **VERIFYING AFFIDAVIT** are that the two applicants were traders in Mombasa. That the applicants have had a long history as suppliers of commodities such as foodstuffs to Government Departments, and in particular the Department of Defence for a period of 10 years. However, in 2007 there was a dispute in the procurement process with the Department of Defence, that the applicants complained to the Procurement Review Board, which complaint was upheld. Though the applicants continued and supplied the Department of Defence, there was reluctance noticed from officials from the Department of Defence until; 16<sup>th</sup> May, 2008, that the Department of Defence purported to cancel a supplies contracts and debarred the applicants from participating from future procurements. This action of canceling the three contracts, is what has elicited this present application.

In response to the application, the respondents filed a **REPLYING AFFIDAVIT** sworn on 21<sup>st</sup> July, 2008 by Col. Daniel Kivuva Muvaa. In the replying affidavit it is deponed that the contracts were terminated because the applicants had committed several breaches of the terms of contract. It was also deponed that the termination was per the terms of the written contract, and the applicants were given a chance to rectify, and that the said termination was not subject to Judicial review. The respondent also filed grounds of opposition. It is averred in the grounds of opposition that the application was misconceived, bad in law and an abuse of the court process, that it was devoid of merits, and that the orders sought were not tenable.

The ex-parte applicants filed written submissions. The respondents also filed written submissions.

It was averred in the written submissions of the applicants that the applicants had been supplying foodstuffs to the Department of Defence for more than 10 years. That in 2007 there arose a tender dispute that led the applicants to file an appeal to the Public Procurement Complaints Review and Appeals Board (Review Board), which was decided in favour of the ex-parte applicants. It was averred that though an order was made for the respondents to re-advertise the tender, they did not do so until towards mid 2008. In the meantime, though the ex-parte applicants performed their part of contract for contracts already awarded for supply of foodstuffs to Manda and Mombasa units, the respondents on 29<sup>th</sup> May, 2008 wrote a letter to the ex-parte applicants terminating the said contracts, without any prior notice or warning.

It is averred that under the provisions of the Public Procurement Act, that once a contract was signed, if

there were difficulties the procuring entity was required to provide the Public Procurement Oversight Authority as the Director General could order investigations and if satisfied of breach, may cancel the contract. Therefore the respondents acted *ultra vires* and in excess of their powers. With regard to debarment from participating in future procurements, it was averred that under section 115(1) of the Act, only the Director-General could debar with approval of the Advisory Board. The person to be debarred also is entitled under Section 116 of the Act, to be granted an opportunity to make presentations to the Director-General, which the applicants were not given.

Several court cases were cited and relied upon. These cases were the case of **REGINA –VS- SECRETARY OF STATE – EX PARTE ASIF MOHAMMED KHAN (1984) IWLK 1337; R -Vs- ATTORNEY GENERAL – EX PARTE BIWOTT (2002) IKLR 668; R- Vs- CHAIRMAN ADVOCATES DISCIPLINARY COMMITTEE – EX PARTE JAFFERSON NYONGESA (2005) eKLR; PETER BOGONKO –VS- NEMA (2006) e KLR; and the case of WAKU INVESTMENTS LTD –Vs- CITY COUNCIL OF NAIROBI (2007) eKLR.**

The respondent, on the other hand, in their written submissions in their grounds of opposition. It was their contention that the issues raised by the applicants were premised on contract and were not within the purview of Judicial Review. It was contended that they should have tried to enforce the contract by way of private law remedies. Reliance was placed on the case of **FRIDA OKOTH RAWA –VS- PERMERNENT SECRETARY MINISTRY OF LANDS AND HOUSING – NAIROBI HIGH COURT MISCELLANEOUS APPLICATION NO. 544 OF 2005.** It was averred that the applicant had not pointed to any statute that the respondent had breached. Reliance was also placed on the case of **ZAKHEM CONSTRUCTION (K) LTD –VS- PERMERNENT SECRETARY MINISTRY OF ROADS AND PUBLIC WORKS** – Civil Appeal No. 244 of 2006 (unreported) for the contention that public law remedies did not lie in cases of breach of terms of a contract.

In addition, it was averred that the applicants were asking the court to determine the merits of the termination of contract, while judicial review is concerned only with the procedure, not the merits. Reliance was placed on the case of **REPUBLIC –VS- JUDICIAL SERVICE COMMISSION – EX PARTE PARENO – HC Misc.** Civil Application No. 1025 of 2003. Besides, it was argued that the court could not impose terms of contract for the parties.

It was averred that a judicial review court, cannot compel a party to comply with terms of a contract for the remainder of the duration. Judicial review orders were also discretionary. Reliance was placed on the case of Kenya National Examination **Council -Vs- Republic – Ex-Parte Gathenji.** It was contended that the court should not issue certiorari against the order of 16<sup>th</sup> May, 2008 debaring the applicant from participating in future tendering process. This court was asked not to exercise its discretion to grant judicial review remedies. It was stressed that the contract document had an arbitration clause for resolution of disputes which the applicants should have invoked for redress.

When the matter came for hearing before me, Mr. Wameyo appeared for the applicant, while Ms. Murithia appeared for the respondent. Both counsel addressed me, highlighting their submissions and other documents filed.

I have considered the application, documents filed, and submissions both written and verbal by counsel for the parties. Several legal arguments have been put before me. However, the main arguments are whether the termination of contract is a matter covered under the Public Procurement and Disposal Act No. 3 of 2005, or a private contractual matter which does not fall within the Judicial Review jurisdiction. The other issue is whether the procuring entity had the authority to debar the ex-parte applicant from participating in other procurements.

The main facts do not appear to be in dispute. It is not in dispute that there was an award of contract to the ex-parte applicant to supply foodstuffs to the Kenya Navy at Manda and Mombasa. It is not in dispute that the said contract was terminated before its expiry date.

Indeed, judicial review is concerned with the procedure adopted rather than the substantive merits of a

particular decision. It is an inquiry whether an institution performing a public duty has acted within its powers or breached the principles of natural justice. There is no dispute that **PERMANENT SECRETARY FOR DEFENCE** is a public officer, and there is no dispute that this particular procurement has always been governed by the Public Procurement and Disposal Act – No. 3 of 2005.

### TERMINATION OF CONTRACT

The ex-parte applicant has argued that the respondents could not terminate the contract, because under the Act, that power was vested in the Director –General on the advise of the Review Board. Reliance is placed on Part VIII of the Act, and especially sections 101 and 104 and 105 of the Act. The respondents argue that, there was sufficient justification in terminating the contract, and that the contract was governed by private law and the respondent had powers to so terminate.

As I have said earlier, this court in Judicial Review is not concerned with the merits or otherwise of the reason for termination, but whether the respondents had powers to terminate, and whether proper procedures were followed. In my view, the Act does not assist the applicant. The provisions of Part VIII clearly relate to the process of procurement. This is borne by the provisions of section 102 (1) which provides-

102(1) The Director-General may order an investigation of procurement proceedings for the purpose of determining whether there has been a breach of this Act, the regulations or any directions of the Authority.

The sections of the Act that follow under Part VIII deal with the investigations and the powers of the Director-General following receipt and consideration of the report from the investigation. The powers of the Director-General on considering the investigation report are clearly spelt out under section 105 (1) of the Act, which provides-

105 (1). If, after considering the report of an investigator, the Director General is satisfied that there has been a breach of this Act, the regulations or any directions of the Authority, the Director-General may, by order, do any one or more of the following:-

- (a) direct the procuring entity to take such actions as are necessary to rectify the contraventions;**
- (b) cancel the procurement contract, if any;**
- (c) terminate the procurement proceedings; or**
- (d) prepare and submit a summary of the investigator’s findings and recommendations to the procuring entity and to the Kenya Anti-Corruption Commission established under the Anti-Corruption and Economic Crimes Act from the above, 2003”**

Clearly, the Director-General has powers to cancel the procurement contract, if any, of course subject to subsection (2) which requires the Director-General to give interested parties an opportunity to make presentations. However, in my view, the above powers of the Director-General are restricted to situations where there are investigations relating to the procurement process. In our present case the above provisions are not applicable.

In my view, the tendering process, which is governed by the Act, between the parties ends with the signing of the contract, as required under section 68 of the Act, which provides-

**68(1) The person submitting the successful tender**

**and the procuring entity shall enter into a written contract based on the tender documents, the**

**successful tender, any clarifications under section 62 and any corrections under section 63.**

**(2) The written contract shall be entered into within the period specified in the notification under section 67 (1) but not until at least fourteen days have elapsed following the giving of that notification.**

**(3) No contract is formed between the person submitting the successful tender and the procuring entity until the written contract is entered into.”**

In my view, once the written contract is signed, the procuring proceedings is ended, and what remains is fulfilling the contractual obligations under the signed written contract. The Director-General may terminate that written contract only after investigations regarding the proceedings for the procurement, after investigations and giving the parties an opportunity to present their sides of the story. However, between the contracting parties, each one is bound by the terms of the signed written contract, like any other private contract.

In our present case clause 8 of the signed written contract deals with determination of contract. It provides-

**8(i) In case the contractor shall be in breach of any of the terms and conditions of this Agreement or on any occasion fail in the due and punctual supply of any of the articles to (b) supplied under the contract, or shall repeatedly offer any article of inferior quality to that contracted for, or at any time fail to replace such articles when properly rejected, the contractor shall be deemed to have failed in the due performance of the contract and the Government shall be at liberty by notice in writing or otherwise to deter mine the contract, but without prejudice to the Government’s rights of retention and recovery in respect of any loss or damage sustained.**

**(ii) Should the contractor be prevented from fulfilling the contract owing to a contingency such as force majeure, lock out, enemy action, hostilities, riots or civil commotion or any other circumstance (whether or not a similar nature to the foregoing) over which the contractor has no control the duty of the contractor to supply and deliver the said articles shall be suspended until such circumstances shall have ceased.**

**Provided that at any time during the period of such suspension either party may serve upon the other one month’s notice of termination in writing unless the contractor shall have resumed the supply and delivery of the said articles before the expiration of such notice this agreement shall terminate in accordance with such notice.”**

In my view, once this agreement was entered into, what applied between the parties were the principles of the law of contract. Therefore the termination of the contract by any of the parties is outside the purview of Judicial Review proceedings. It is a matter to be sorted out through the applicable laws of contract. It is therefore my finding that the termination of contract herein, is not a subject of judicial review reliefs, and therefore orders of certiorari are not available to the applicant. I decline to grant certiorari orders.

I now turn to the issue of debarment. This is clearly not an item that was covered in the written contract. It would also not be possible to cover it in the contract, as there are specific legal provisions on the same under the Act, which are so specific that they cannot be affected by a written contract. If the contract provided for debarment, such a clause would be illegal as it would be illegal as it would have flown in the face of the contrary legal provisions under the Act.

Debarment is covered under Part IX of the Act, especially section 115, which provides-

**115(1) The Director –General, with the approval**

**of the Advisory Board, may debar a person from participating in procurement proceedings on the ground that the person.**

- (a) *has committed an offence under this Act;*
- (b) *has committed an offence relating to procurement under any act;*
- (c) *has breached a contract for procurement by a public entity;*
- (d) *has in procurement proceedings, given fake information about his qualifications; or*
- (e) *has refused to enter into a written contract as required under section 68.*

2. *The Director-General, with the approval, of the*

*Advisory Board, may also debar a person from participating in procurement proceedings on a prescribed ground.”*

It is clear from the above that only the Director-General has powers to debar a person from participating in procurement proceedings. A procuring entity has no authority to debar a person from participating in procurement proceedings. Therefore the decision of the procuring entity through the Permanent Secretary herein to debar the applicant is illegal; null and void. I will issue certiorari orders to quash that decision.

The applicant has asked for orders to compel the applicant to comply with the terms of contract. The reliefs available in Judicial review are listed under section 8 of the Law Reform Act (Cap. 26). They are three, that is an order for certiorari, and order for prohibition, and an order for mandamus. There is no order for compelling compliance with terms of a contract under Judicial Review. Such an order is not known to Judicial Review reliefs. It must fail. I will not grant that order.

The applicant has asked that costs be provided for. I will grant costs to the applicant, since one of the prayers has succeeded.

Consequently, and for the above reasons, I order as follows-

1. *I decline to quash the decision to cancel the three contract.*
2. *I hereby issue an order of certiorari removing to this court and quashing the decision of the Permanent Secretary, Ministry of Defence made on 16<sup>th</sup> May, 2008 to debar the Ex-parte Applicant from participating in future tendering process, and the same is hereby quashed.*
3. *I decline to grant a compelling order.*
3. *The respondent will bar applicant's costs of the application.*

Dated and delivered at Nairobi this 27<sup>th</sup> November, 2008.

George Dulu

Judge.

**In the presence of-**

Mrs. Musinga for ex-parte applicant

Ms. Murithia for respondent.