



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Misc Civ Appli 397 of 2006

REPUBLIC APPLICANT

VERSUS

THE PUBLIC PROCUREMENT, COMPLAINTS,

REVIEW & APPEALS BOARD.....1ST RESPONDENT

AND

NEW KENYA CO-OPERATIVE CREAMERIES LTD..2ND RESPONDENT

BRINKS SECURITY SERVICES LTD INTERESTED PARTY

EXPARTE - APEX SECURITY SERVICES LTD

JUDGMENT

The applicant seeks orders of certiorari, mandamus and prohibition as per statement filed on 18th July 2005 and the application by way of a Notice of Motion dated 2nd August 2006.

The relief sought is targatted at the Public Procurement Complaints, Review and Appeals, Board made in Application No 25 of 2006 between Apex Security Services Ltd and the New Kenya Cooperative Creameries Ltd (the procuring entity). The application seeks the quashing of the Boards ruling which is in turn related to the issue of the Boards jurisdiction to adjudicate in a matter where there is in existence a contract.

The Applicant claims that the Board had not given him a hearing before reaching its ruling which is the subject matter of this application.

I have considered the grounds set out in the application and the statement, the written skeleton arguments filed by all counsel and their oral submissions.

As my attention has been drawn to the requirements of the new Procurement Act to the effect that on procurement matters this court must give a decision within 30 days failing which the impugned decision shall stand, I shall be deliberately brief (although it is unlikely that the new law has a retroactive effect). For this reason I shall go straight to the heart of the matter i.e. the conduct of the proceedings by the Board and whether in its ruling on the issue of jurisdiction it violated the Rules of natural justice.

In this regard I should at the outset wish to observe that the right of hearing does not prevail in every situation and whether or not it is to be asserted will depend on the circumstances of each case.

Thus this court found that such right did not exist in the case of patently faulty speed governors fitted in the matatus before such matatus are grounded under the relevant Traffic Rules see **R v TRANSPORT LICENCING BOARD Ex parte KARANJA 2004 KLR 466**.

By analogy it would be illogical to demand that where in a hearing before a tribunal an issue of jurisdiction arises it (the Tribunal) cannot raise it on its own motion or entertain the same as a preliminary point raised by a party to the proceedings.

On the facts it is clear to me that the tribunal did identify the issue of jurisdiction by raising relevant questions directed at the Appellant. It is obvious that the questions raised related to the ascertainment as to whether the Tribunal had jurisdiction in relation to the Appeal before it. Following the inquiries and the answers from the Appellant and the other parties the Tribunal went ahead to give a ruling on 29th June, 2006 to the effect that it had no jurisdiction and gave the reasons.

It is not contended that the tribunal has committed an error of law on the point of jurisdiction. In the circumstances I find no procedural impropriety in the Tribunal having determined the issue of jurisdiction upfront. Most judicial bodies are required to do this as a matter of law because they would not have jurisdiction to adjudicate on the other matters if they did not have jurisdiction in the first place. This is why it said that jurisdiction is everything see the Court of Appeal decision in the **"LILIAN'S"**.

I am also indebted to counsel for 2nd respondent for the case of **R v CITY OF LONDON RENT TRIBUNAL ex parte HONG 1951 I ALL ER 195** where the holding is on the point:

"Since it was on the collateral question whether or not a tenancy subsisted that the jurisdiction of the tribunal to determine a reasonable rent depended the tribunal was entitled to decide that collateral question first before proceeding to the main matter under consideration."

Again in **FULHAM HAMMERSMITH AND KENSINGTON RENT TRIBUNAL (1951) I ALL ER 482** it was held:

"the tribunal was entitled to inquire into the facts to decide whether or not it had jurisdiction and, therefore it had power to consider the bona fides of the grant signed by the tenant and certiorari would not issue."

In the case before me it is clear that the Board followed the procedure of inquiries as outlined in FULHAM (above) and went to ascertain whether it had jurisdiction in the first place. My holding is that the inquiries conducted by the Board were adequate and I find no breach of the rules of natural justice since the issue of jurisdiction was quite apparent and the Board could raise it on its own motion or adjudicate on it if raised by the parties. The Board had jurisdiction to rule on its jurisdiction.

For this reason the orders sought in the application for judicial review must fail.

In addition the issue of the merits of the decision of the procurement body does not arise in this court because what is impugned is the Boards decision which turned on jurisdiction. Except in very exceptional cases such as errors of law, abuse of power or legitimate expectations this court is ordinarily concerned with the decision making process of the targated bodies.

The application is dismissed with costs.

DATED and delivered at Nairobi this 30th day of January 2007.

J.G. NYAMU

JUDGE