REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

Misc Civ Appli 1015 of 2006

IN THE MATTER OF AN APPLICATION BY UNIKEN MARKETING SERVICES

LIMITED FOR LEAVE FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE LOCAL GOVERNMENT ACT, THE EXCHEQUER AND AUDIT ACT AND THE EXCHEQUER AND AUDIT (PROCUREMENT) REGULATIONS 2001

AND

REPUBLIC…….……...APPLICANT

AND

THE MINICIPAL COUNCIL OF MOMBASA…….....…..1ST RESPONDENT

THE MINISTER FOR LOCAL GOVERNMENT…..…..…….. 2ND RESPONDENT

ADOPT-A-LIGHT LIMITED…….…..…..……1ST INTERESTED PARTY

ALLIANCE MEDIA KENYA LIMITED…….....….2ND INTERESTED PARTY

COMMUNICATION EXTRA LIMITED…….....…….3RD INTERESTED PARTY

NASPA AGENCIES MARKETING AND ADVERTISING..4TH INTERESTED PARTY

CHEVRON INTERNATIONAL…….....…...5TH INTERESTED PARTY

EX-PARTE-UNIKEN MARKETING SERVICES LIMITED

R U L I N G

UNIKEN MARKETING SERVICES LIMITED, the Ex-parte Applicant herein, which has described itself as a stakeholder in the advertising industry and ratepayer in the Republic of Kenya, has by its Notice of Motion dated 9th November 2006 brought under Section 8(2) of the Law Reform Act Chapter 26 of the Laws of Kenya and Order 53 Rule 3 of the Civil procedure Rules sought the judicial review orders of certiorari and prohibition. The order of certiorari is sought to remove into the High Court and quash the decision of the Municipal Council of Mombasa (the Council) made on 19th June 2006 and the contract

signed pursuant thereto on the 26th June 2006 (the Contract) between the Council and Adopt-A-Light Limited, the first Interested Party (the Company) and/or any such contracts signed pursuant thereto between the Council and the other Interested Parties mandating the Company and the Interested Parties to undertake street lighting and advertising in the City of Mombasa. The order of prohibition is sought to prohibit the Minister for Local Government, the second Respondent, (the Minister) from approving the said decision of the Council and the Contract and/or any such said contracts made with the other Interested Parties.

What is the basis or why has the Ex-parte Applicant sought these orders?

The IAAF World Cross Country Championships are scheduled to be held in Mombasa in March 2007. Being the Local Authority charged with and mandated to facilitate and host them the Municipal Council of Mombasa has commenced specific programmes in the City of Mombasa which, it says, are geared towards the beatification of the City as well as lighting up the main streets with a view to improving the security of the participants and the citizenry in general.

To be able to accomplish those tasks the Council thought it wise to partner with private firms. In that connection it did on 13th and 19th December 2005 put out advertisements in the Standard Newspapers of those dates calling for proposals from firms, companies and organizations with the necessary expertise and experience as well as capital to partner with it in various projects.

In the management of outdoor advertising which has a bearing on this application the Council received six bids. After evaluation of them by its Technical Tender Committee it awarded the tender to the Company. Magnate Ventures Limited, one of the tenderers was dissatisfied with that award and lodged an appeal with the Public Procurement Complaints, Review and Appeals Board (the Board) alleging that the tender process had flouted the provisions of the Exchequer and Audit Act chapter 412 and the Exchequer and Audit (Public Procurement) Regulations 2001(the Regulations). In its ruling of 21st March, 2006 the Board found that the tender process was seriously flawed for failure to comply with the Regulations and annulled it.

There does not seem to have been any other advertisement calling for proposals or tenders from firms interested in partnering with the Council in the advertising or any other project. However, in its Special Meeting of 19th June 2006, on the report of its Town Clerk that five firms had shown interest in assisting the Council to light up the City of Mombasa, the Council passed a resolution (the Resolution) awarding the tender to all the five firms to assist it in street lighting with the Company being allocated the major roads. Pursuant to that Resolution the Council entered in a contract (the Contract) on the 26th June 2006 with the Company to light up the major roads in the City. When the Ex-Parte Applicant got to know of the Resolution and the Contract and after obtaining leave it filed this application which as I have said seeks to quash both the decision of the Council contained in that Resolution and the Contract and any such contracts that the Council may have entered into with the other Interested Parties.

The Application is based on twelve long grounds which can be summarized as follows and for brevity I will hereinafter refer to the impugned decision of the Council as "the Resolution" and the contract with the Company as well as any such contracts entered into between the Council and the other Interested Parties as "the Contracts." The grounds are:

1 That the Resolution and the contracts are *ultra vires* the provisions of section 143 of the Local Government Act and section 36 of the Exchequer and Audit Act requiring the invitations of tenders and competitive bidding for provision of any goods and services to the Council after following the pre-qualification conditions set out in section 36 of the Exchequer and Audit Act.

2 That the Resolution and the Contract with the Company failed to take account of section 5A of the Exchequer and Audit Act and Regulation 13(1) of the Regulations which forbid firms which are, *inter alia*, insolvent from participating in a public procurement and allowed the Company whose insolvency and poor reputation had led to cancellation of similar contracts with the City Council of Nairobi.

3 That the Resolution amounts to a delegation of the Council's powers under sections 148, 162 and 181 of the Local Government Act of regulating advertising and collecting revenue to a private body over which it has no control which powers are themselves delegated to the Council by parliament and are not subject to further delegation.

4 That there is no justification in paying the Company Sh.50 Million when the Council has allocated Sh.121 Million for the same project.

5 That the Contracts will defraud the ratepayers of Sh.121 Million.

6 That the Resolution and Contracts have frustrated public interest and public policy envisaged by both the Constitution and Statute law that the implementation and enforcement or laws and collection and use of taxes are to be undertaken by the Central Government and Local Authorities and not by profit making private companies.

7 That by circumventing the public procurement rules and open tendering the Council denied the Ex-parte Applicant the opportunity to bid for the provision of the services and also denied the ratepayers the benefit of the best service available in the market.

These grounds are repeated and amplified in the statutory statement and the verifying affidavit of Jackson Wanjugu, a director of the Ex-parte Applicant, both of which, as usual, were filed at leave stage.

In response the Council, the Company and the fifth Interested Party caused replying affidavits to be filed on their behalf.

In their replying affidavits Roba Duba the Town Clerk and Esther Muthoni Passaris, the Managing Director of the Company, sworn on behalf of the Council and the Company respectively, denied all the allegations of impropriety and fraud leveled against the Council and the Company. They in particular denied that the Contract entered into between them will defraud the ratepayers of Sh.121 Million or any other sum at all or that such sum has been allocated by the Council for the lighting project; that the Company has or will be paid a sum of Sh.50 Million and averred that to the contrary it is the Company which is to inject that sum into the project and further averred that the allegations of fraud and payment of that sum were intended to colour the court's mind to grant a stay of the implementation of the project; that the Resolution and Contract fouls the provisions of the Exchequer and Audit Act or the Regulations as the Contract is not a "public procurement" as defined by that Act and further averred that section 36 of that Act which is alleged to have been flouted has infact been repealed by the Government Financial Management Act Number 5 of 2004.

As regards the allegation that the Company is impecunious Miss Passaris denied that and averred that the Company is financially stable and enjoys the confidence of many banks and organizations.

Miss Passaris also denied the allegation that the Company has unsurped the Council's role of revenue collection and deponed that the contract does not make provision for any such thing. She stated that the Company will simply pay to the Council the agreed ratio of the advertising license fees for the advertising spaces it will be able to sell to its clients. She further deposed that this application is but one of many cases of harassment that the Ex-parte Applicant has filed against the Company.

In addition to the replying affidavit of its managing director the Company also filed grounds of opposition to the application in which it basically repeated the averments in the replying affidavit. The only additional points raised are that apart from the application being unmeritorious it has been brought by a party who has no *locus standi* in the matter and is for an ulterior motive, to wit, the frustration of a valid contract, that there is no infringement of section 181 of the Local Government Act as the Contract does not undertake the supply of electricity and that the opinion of the Kenya Anti Corruption Commission (KACC), which in any case is not binding on the Council, was issued after the Contract had been entered into.

For his part Charles Murithi the proprietor of Chevron International, the firth Interested Party, deponed that his firm like the four other Interested Parties, sent its proposal to the Council pursuant to the newspaper advertisement. He denied that his firm is guilty of or has been involved in any act of impropriety and averred that it has improperly been dragged into these proceedings.

The second Respondent and the second and fourth Interested Parties though served did not respond and have not participated in these proceedings. Having failed to serve the third Interested Party the Ex-parte Applicant withdrew the claim as against it.

From these pleadings and Counsel's submissions which I will deal with presently three main issues arise for determination. They are whether or not the Ex-parte Applicant has *locus standi* to bring this application, whether or not the Resolution and the Contracts amount to public procurement within the meaning of the Exchequer and Audit Act and if so whether or not the same have flouted the provisions of that Act, the Local Government Act, and the Exchequer and Audit (Public Procurement) Regulations 2001. I will deal with them in that order.

As I have already stated the issue of *locus standi* was raised by the Company not as preliminary point but as part of its grounds of opposition. Its Counsel, Mr. Kiragu Kimani, submitted that this application is incompetent and should be struck out or dismissed, as the Ex-parte Applicant has no *locus standi* in the matter. He contended that the court's power to make the order of certiorari is donated by section 8(2) of the Law Reform Act which provides that: -

"**In any case in which the High Court in England is, by virtue of the provisions of section 7 of he 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."**

The Administration of Justice (Miscellaneous Provisions) Act 1938 of the United Kingdom (hereinafter called "the English Act) in turn provides that the applicant for such an order has to be "a person aggrieved." Although that Act has been amended several times, ours has not and we are therefore stuck with that provision, he said. Relying upon **Paragraph 1346 of 4 Hulsbury's Laws of England, 4th Edition** he further submitted that the court therefore cannot enforce any other test on *locus standi* as it "is not entitled to question the power of parliament to make any statute, or the propriety or wisdom of making it; and may not base its application of an enactment on its view of what parliament ought to have done rather than what it did do."

As to who is "a person aggrieved" Mr. Kimani submitted that he has to be a person whose legal right has been infringed. In this case, he said, the Ex-parte Applicant is a busybody as it did not apply and was turned down.

In response to these submissions Mr. Havi for the Ex-parte Applicant strongly disputed the contention that we should be stuck with the provisions of the archaic English Act of 1938. According to him Kenyan law should develop in tandem with the developments in English law from which ours is borrowed and in this regard the operative law should be current English Act. As authority for this contention, he referred me to sections 11, 13 and 23 of our Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya and the Court of Appeal decision in **Ogendo and Another –VS- Nzioka and Another [1993] LLR 332 (CAK)** which decision he said applied the current English Act to Kenya and urged me to apply the current English law test of "a person with sufficient interest" as opposed to "a person aggrieved" in determining the issue of the Ex-parte Applicant's standing in this matter.

Mr. Havi further submitted that Judicial Review orders being public law remedies we should not even be bothered with the sufficient interest test in determining the issue of *locus standi***.** He said that as was held in the English case of **Regina –VS- Secretary of State for Foreign and Commonwealth Affairs, Ex-Parte World Development Limited [995] 1 W.L.R 386** even a person whose only interest in a matter is the vindication of the rule of law has *locus standi***.** He concluded that in this case there having been no invitations made to the public to tender the Ex-Parte Applicant did not know of the project and cannot

therefore be said to have not been aggrieved.

I have considered these rival submissions. To start with I do not agree with Mr. Havi that amendments to the English Act referred to in section 8(2) of our Law Reform Act automatically apply to Kenya by virtue of sections 11,13 and 23 of the Interpretation and General Provisions Act. Of these sections the relevant ones are section 13 and subsections (1) and (2) and of section 23. For ease of reference let us read them:

" **Section 13. A reference in a written law to another written law or to any provision thereof shall be construed as a reference to that other written law or provision as for the time being amended, if the amendment extends or applies to Kenya.**

Section 23(1). Where in a written law a reference is made to another written law, that reference shall, except where the context otherwise requires, be deemed to include a reference to the last-mentioned written law as it may from time to time be amended.

(2) Where a written law repeals and re-enacts, with or without modification, a provision of a former written law, references in another written law to the provisions so repealed shall, unless a contrary intention appears, be construed as references to the provision so re-enacted."

In my view section 23 must be understood to refer to Kenyan written law referred to in another written law. With regard to written foreign law it is section 13 which applies and it is clear that references to such other foreign written law or provisions as for the time being amended shall only apply to Kenya "**if the amendment extends and applies to Kenya."** I know of no provision extending and applying to Kenya the re-enacted and amended English Act of 1938. Mr. Havi's argument on that point must therefore fail.

Save for the fact that the Ex-parte Applicant's standing in this matter cannot be begged on the re-enacted and amended English Act of 1938 I agree with Mr. Havi that the Ex-parte Applicant has *locus standi* to bring this application for two reasons. The first one is that the law on *locus standi* has generally developed regardless of provisions in any statute to a point that in public law rights any person even one who has not suffered any personal injury or loss but is public spirited and interested in the vindication of the law has *locus standi* to bring an action.

Locus standi is a rule of the English common law, created by judges and not found in any statute. In the early times it confined standing to litigate in protection of public rights to the Attorney Genera. (See **Guriet –VS- Union of Post Office Workers [1978] AC 435**). Whenever a private individual challenged the decision of an administrative body like in this case the question always arose whether or not that individual had sufficient interest in the decision to justify the court's intervention. And what amounted to sufficient interest, as stated in **Wade and Philips, Constitutional Law [1965]** at **page 672,** was "a peculiar grievance which is not suffered in common with the rest of the public." That however started to change from around 1950. In 1951 the decision of the English Divisional Court in **Rex –VS- Northemberland Compensation Appeals Tribunal [951] L ALL ER 268** resurrected the error of law on the face of record as a ground for granting certiorari. The years that followed witnessed a dramatic liberalization of access to courts for purposes of obtaining prerogative orders against persons and bodies exercising governmental powers. In **Rex–VS- Greater London Council,**

Ex-Parte Blackburn [1976] 3 ALL ER 184 Mr. Blackburn who lived in London with his wife who was a ratepayer, obtained an order of prohibition against the Greater London Council to stop it from acting in breach of its statutory duty to prevent the exhibition of pornographic films within its administrative area. Lord Denning MR and Stephenson L J were of the opinion that both Mr. and Mrs. Black had *locus standi* to bring the application. Mr. Blackburn because he lived within the administrative area of the Council and had children who might have been harmed by watching pornographic films and Mrs. Blackburn not only as a parent but also on the additional ground that she was a ratepayer. Lord Denning had this to say at page 92:

"I regard it as a matter of high constitutional principle that if there is a good ground for supposing that a

government department or a public authority is transgressing the law, or is about to transgress it, in a way that offends or injures thousands of her Majesty's subjects, then any one of those offended or injured can draw it to the attention of the courts of law and seek to have the law enforced, and the courts in their discretion can grant whatever remedy is appropriate."

Lord Diplock concurring with that view stated thus in **Inland Revenue Commissioners –VS- National Federation of Self – Employed and Small Business Limited [1981] 2 All ER 93** at page 107:

"It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the Federation, or even a single public spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped."

In other parts of the Commonwealth, notably in India and Canada, a similar, albeit imperceptible, development came to manifest itself in the doctrine of public interest litigation and similarly liberalized one's *locus standi* to litigate in matters of public interest.

In the local scene this view of liberalizing of rule on *locus standi* found expression in the decision of the Constitutional Court in the case of **Albert Ruturi and Another –VS- Minister For Finance and Another [2001] 1 EA 253** in which it was held that:

"… in constitutional questions, human rights cases, public interest litigation and class actions the ordinary rule of Anglo-Saxon jurisprudence, that an action can only be brought by a person to whom legal injury is caused must be departed from."

So in Kenya now, any person, other than an officious intervenor or wayfarer or a crank or other mischief maker meddling in a matter that does not concern him at all is a person with sufficient interest qualified to maintain an action for judicial redress of public injury arising from breach of a public duty or violation of some provision of law and to seek enforcement of such public duty or observance of such legal provision. The right considered sufficient for bringing or maintaining a proceeding of this nature is not necessarily a right in the jurisdic sense. It is enough if one discloses that one has a personal interest alone or with others in the matter, which involves loss of some personal benefit or advantage or curtailment of a privilege, liberty or franchise.

The sufficiency of the interest required to give a person standing is a matter of mixed law and fact to be determined by the court upon due consideration of the facts and circumstances of each case. Commenting on the issue, the Indian Supreme Court in the case **S.P. Gupta and Others –VS- President of India, AIR 1981 (SC) 149** had this to say at Paragraph 19A:

"What is sufficient interest to give standing to a member of the public would have to be determined by the court in each individual case. It is not [possible for]… the court to lay down any hard [and] fast rule or any straightjacket formula for he purpose of defining or delimiting 'sufficient interest.' It has to be left to the discretion of the court."

In this case the Ex-parte Applicant as a ratepayer or even as a public spirited body interested in the vindication of the law has a *locus standi* to bring this application.

Even if I am wrong on the view I hold that the law on *locus standi* has generally developed to a point that any public spirited individual, even without suffering personal injury or loss, has a right to commence legal proceedings and enforce public law rights and it is held that we are to stick to the old English Act of 1938 criterion of a person aggrieved, I still find that the Ex-parte Applicant in this case is such aggrieved person. How is the Ex-Parte Applicant an aggrieved person?

It is the Ex-Parte Applicant's case that it is engaged in the trade and business of advertising and that by circumventing the public procurement rules the Council denied it the opportunity of bidding for the services the Company is rendering to the Council under the Contract. If I find that the project comprised

in the Contract is indeed a public procurement then the failure to comply with the public procurement rules occasioned the Ex-parte Applicant loss of a business opportunity as it did not know about the project and it is therefore "a person aggrieved" perfectly entitled to bring this proceedings.

In the circumstances I find that the Ex-Parte Applicant has *locus standi* to being this application and I accordingly overrule Mr. Kiragu Kimani's preliminary objection on the issue.

Having found that this application is competent and properly before court I now wish to turn to the main issue raised in it which is whether or not the project comprised in the Contract with the Company is public procurement.

The thrust of counsel for the Ex-Parte Applicant's submission on this point is that the Resolution and the project comprised in the Contract with the first Interested Party (the Company) is a public procurement of street lighting in the City of Mombasa. He said it is a contract for Sh.50,000,000/= which will be paid by retention of 50% of the advertising license fees that the Company will collect from the advertisers. As such, he contended, it is a public procurement within the meaning of the Exchequer and Audit (Public Procurement) Regulation 2001 and the Council was obliged to strictly comply with those Regulations and Section 143(4) (a) of the Local Government Act Chapter 265. The forthcoming World Marathon Championships, he further argued, does not provide the Council the reason for the direct procurement.

Mr. Havi further submitted that the Resolution of the Council and the Contract with the Company is also *ultra vires* the provisions of section 148 of the Local Government Act. Under that section Parliament has delegated the power of revenue collection to the Local Authorities within their jurisdictions. He said the Council has no power to further delegate that power. According to him the Contract with the Company is a further deletion of that power to the Company hence *ultra vires*. In support of this argument he cited the English case of **Credit Suisses and Another –VS- Waltham Forest London Borough Council, [996] 4 ALL ER 176** and the Kenyan High Court case of **Republic –VS- the City Council of Nairobi and others HC Misc. Application Number 1406 of 2004, [2005] e KLR** in both of which such further delegations were outlawed.

Counsel further contended that by ceding 50% of the advertising revenue to the Company the Council violated Part XV of the Local Government Act which forbids any expenditure by any Local Authority unless the same is provided for in its annual estimates duly approved by the Council. By allowing the Company to collect 50% of the advertisement fees the public has no way of knowing how the company utilises that amount as a private Company cannot be held to account to the public for its expenditure.

Finally Mr. Havi submitted that the Council's remission of 50% of the advertising revenue is illegal and a criminal offence under Section 45 of the **Anti-Corruption and Economic Crimes Act Number 3 of 2003** and the **Government Financial Management Act number 5 of 2004.** In effect the wondered why the Kenya Anti corruption Commission which advised the Council against entering into the agreement has not taken action in the matter.

In response to these arguments Mr. Kiragu Kimani for the Company, whose submissions Mr. Kibara for the Council associated himself with, submitted that the Resolution and the Contract do not amount to a public procurement within the meaning of the Exchequer and Audit At or the Regulations.

He said that apart from the fact that the Contract is not for the execution of any works within the meaning of section 143 (4) (a) of the Local Government Act or provision of electricity within the meaning of section 160 (P) (1) thereof there is no expenditure of public funds to bring the Resolution and the Contract within the meaning of public procurement.

Mr. Kimani saw this application as founded on a deliberate misrepresentation of facts and omissions intended to mislead the court. He could not, for instance, understand how the Ex-Parte Applicant can assert that the Council had allocated a sum of Sh.121 Million for the lighting of the City of Mombasa and at the same time agreed pay the Company Sh.50 Million for the same project when it is clear from the Resolution and the Contract that no amount has been allocated or paid to the Company for the lighting

project and it is the Company which is to inject Sh.50 Million into the project. He also took issue with the Ex-Parte Applicant's non disclosure that the decision of Public Procurement Complaints, Review and Appeals Board outlawing the Council's partnership with Interested Parties in lighting up the City has been challenged and urged me even on that score alone, to dismiss this application.

Mr. Kiragu further submitted that contrary to the Ex-Parte Applicant's assertion the Company is not insolvent and does not only enjoy the confidence of banks and several organizations but has successfully implemented a project similar to this one in the City of Nairobi.

With regard to the alleged delegation by the Council of its powers to the Company Mr. Kimani said there is no such thing. Under the Contract the Company will pay to the Council 50% of the advertisement fees for the advertising spaces taken by its clients. What it charges its clients is not revenue due to the Council for which it should be called upon to account to anyone.

As I have already said Mr. Kibara for the Council associated himself with Mr. Kimani's submissions. He reiterated the point that both the Resolution and the Contract do not amount to public procurement as there is no expenditure of public funds.

For his part Mr. Kaburu for he fifth interested party submitted that his client has unnecessarily been dragged into this application and has not contravened any law.

I have anxiously considered these submissions and all the authorities cited by counsel for the parties in this matter. As I have already stated the main issue in this application is whether or not the Resolution and the Contracts amount to public procurement. Before I embark on the determination of that issue I wish to point out that failure by the second Respondent and the second and forth Interested Parties to contest this application does not *ipso facto* mean that the application has to automatically be granted against them as contended by Mr. Havi. Judicial Review applications are not like ordinary cases in which judgments are entered in default of appearance or defence. Even without any opposition an applicant for any judicial Review order has to convince the court that he is entitled to the order sought before the same is granted. That equally applies this case.

I also want to discount some claims by the Ex-Parte Applicant which I found unestablished. The Ex-Parte Applicant did not place on record any evidence that the Company is impecunious. The other unsubstantiated allegations are that the Contracts entered into between the Council and the Interested Parties including the Company will defraud the public of Sh.121 million and that the Company has been or will be paid Sh.50 Million. Again no evidence was given on these allegations. As a matter of fact Mr. Havi, in his submissions, steered clear of all those allegations. In the circumstances I dismiss them as infounded.

Turning now to the main issue in this application, it is common ground that the Council is a public entity within the meaning of the Exchequer and Audit (Public Procurement) Regulations 2001. It is also not in dispute that the Council like any other local authority, as stated in section 143(4) (a) of the Local Government Act is obliged:

"…except in those cases provided in subsection (6), before entering into any contract for the execution of any work or the supply of any goods to the value of ten thousand shillings or more, [to] give not less than fourteen days public notice in one or more newspapers or journals of such proposed contract and the purpose and other relevant particulars thereof, and shall, by such notice, invite any person willing to undertake the same to submit a tender thereof by a stated date to such local authority."

What is in dispute in this case however is whether or not there was public procurement.

Regulation 2 of the Exchequer and Audit (Public Procurement) Regulations 2001 defines procurement as:

"…the purchasing, hiring or obtaining by any other contractual means of goods, construction and services."

and public procurement as:

"…procurement by procuring entities using public funds."

Though dealing with a situation slightly different from that obtaining in this case I nonetheless concur with the views expressed by the Judges in **Republic –VS- The Public Procurement Complaints, Review and Appeals Board and Another, Ex-Parte Kenya Airport Authority [2005] e KLR** on the benchmark for determining when there is a public procurement as being where:

(a) There is a purchase, hire or obtaining by any other contractual means of goods or services,

(b) The procuring entity is a public entity

(c) The goods or services are purchased, hired or otherwise obtained out of public funds.

After having carefully examined the facts in this case I have come to the conclusion on that the Resolution and the Contracts amount to a public procurement. What is being procured is not the supply of electricity as contended by the Ex-Parte Applicant but electric poles and the advertising space or infrastructure.

Granted that there is not going to be any payment by the Council to the Company of any amount. Instead the Company will inject into the project a sum of Sh.50 Million by providing electric poles and erecting advertising infrastructure on them and recoup that investment by retaining 50% of the advertising license fees for the advertising spaces taken by its clients. After that the poles and the advertising infrastructure will belong to the Council. That, in my view, is an acquisition of those goods out of public funds.

Though the Regulations have not defined what is meant by the expression "public funds" used in the definition of public procurement, however, taking into account the definition of the term "revenue" in both the Exchequer and Audit Act and the Local Government Act, I have no doubt in my mind that the expression public funds means revenue held or due to public entities. That includes uncollected and any other revenue that will ultimately be due to those entities. The 50% advertisement license fee that the Company will retain to recoup its investment in the project is revenue due to the Council and is part of the public funds of the Council.

The project is also a public procurement for one other reason. Besides the 50% advertising license fees under the Contract the Council will provide the labour required to erect the electric poles and supply electricity to those poles to *inter alia* light up the advertisements. It will also pay for the electricity that will light the advertisements. All that will of course be out of public funds.

I agree with Mr. Kimani that apart from the poles that will be provided by the Company there are and have been other electric poles in the City of Mombasa from which the Council has not been able to generate any advertising revenue. I also agree with him that it requires someone with the requisite technical knowledge not only to put up the advertising infrastructure but to also go out and market the same. That notwithstanding it should, however, be remembered that the Private Public Partnership Policy, under which the Contract in this case was entered into, is a novel concept which can be undertaken by any other firm including the Ex-parte Applicant and I believe many others. The project does not fall within the limited instance where "works or services can be supplied or provided only by one candidate" as provided in Regulation 19(1) of the Regulations. And the issue of national emergency or disaster does not arise and has not been proffered as the reason for direct procurement. The project should have therefore been subjected to the tender process as required by law so that the objective of the competitive open tender process could be achieved.

In support of his argument that there is no public procurement in this case Mr. Kimani cited the case of **Republic -VS- The Public Procurement Complaints, Review and Appeals Board, Ex-Parte Kenya Airports Authority** (Supra) in which it was held that there was no public procurement. Though I have no doubt that that case was properly decided, it is, however, clearly distinguishable from this one. In that

case there was no procurement of goods or services. It involved the regulation by the Kenya Airports Authority (the Authority) of taxi services at Jommo Kenyatta Airport. The services were offered not to the Authority but to passengers and other people using that Airport and that regulation did not involve the expenditure of any public funds. Instead it earned the Authority some revenue.

If I understood Mr. Kimani well he also implied in his submissions that the initial public advertisement in which six proposals were received by the Council should be taken as a public tender in this case. That cannot be as first of all the advertisement did not relate to this project and secondly, even if it did, several other prerequisite steps like the necessity for prequalification to bid were side stepped.

The project does not fall under any of the exceptions in section 143 of the Local Government Act or Regulation 19(1) of the Regulations to which I have already referred, that provide for situations where direct procurement can be resorted to.

In his submissions, Mr. Kibara for the Council referred to the letter dated the 15th June 2006 from the Permanent Secretary, Ministry of Local Government and contended that the Minister for Local Government had approved the project. I did not understand him to mean that that approval dispensed with the open tender process. To the contrary by the Minister requiring the partnership to "address the issue of monopoly and equity to allow other interested parties an equal opportunity to invest" he clearly obliged the Council to subject the project to the open and competitive tender process.

Taking all these factors into account I am of the firm view that the Council decision contained in its Resolution of 19th June 2006 and the Contract made pursuant thereto on the 26th June 2006 with the Company and any other such contracts made with the other Interested Parties amount to a public procurement. As they were not subjected to public tender they are *ultra vires* the provisions of the Local Government Act and the Exchequer and Audit (Public Procurement) Regulations 2001. Consequently I grant the order of certiorari as prayed in the application.

I know that the quashing of the Councils Resolution and the Contracts with the Interested Parties scuttles the Council's beautification programme in preparation for the World Marathon Championship but there is not much anyone can do about it. Where public funds are involved we must all strive to do the right thing. The Council had, as early as July 2006, been warned by the Kenya Anti-Corruption Commission that the Contract with the Company was illegal and some earlier contracts similar to the ones in this case were overturned by the Public Procurement Complaints, Review and Appeals Board. But it chose to ignore all that. It has therefore itself to blame for the quagmire it now finds itself in.

The Ex-Parte Applicant also seeks an order of prohibition to prohibit the Minister from approving the Resolution and the Contracts. The letter of 15th June 2006 from the Permanent Secretary states that the Minister had already approved the project. There is therefore nothing to prohibit.

As was stated by the Court of Appeal in **Kenya National Examinations Council –VS- Republic, Ex-Parte Geoffrrey Gathenji Njoroge and Others Civil Appeal Number 266 of 1996** prohibition looks to the future. It cannot issue to operate retrospectively. Even if there was some other approval required from the Minister, the Resolution and the Contracts having been quashed the substratum of the whole project has collapsed and there is therefore nothing to prohibit. In the circumstances the prayer for prohibition fails.

In the result the Council decision contained in its Resolution of 19th June 2006 and the Contract pursuant thereto entered into with the Company on the 26th June 2006 and any such Contracts with the other Interested Parties are hereby brought into the High Court and quashed. The Ex-Parte Applicant shall have the costs of this application against the Respondents and the Interested Parties jointly and severally.

DATED and delivered this 5th day of January 2007

D.K. MARAGA

JUDGE