



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

Civil Suit 1060 of 2005

JAMBO WORLD LTD.....PLAINTIFF

VERSUS

CITY COUNCILDEFENDANT

RULING

Early in the year 2005 the Defendant placed an advert in a local daily inviting tenders for the lease and Rehabilitation of Uhuru Park TC/CE/2 2005 which is owned by the defendant. The plaintiff purchased the tender documents from the Defendant for a non refundable fee of Shs.10,000/= complied with all the requirements of the tender aforesaid and returned the said documents in time to the Defendant. The plaintiff's bid was Shs.250,000/= in terms of monthly rent for the Lease of the Restaurant and Shs.3,343,167/= for the rehabilitation work. On the 17th June 2005 the plaintiffs representatives attended the tender opening meeting which revealed that there were ten tenders who presented their bids as follows:

Lease Amount

(i) Buffet Park	Sh.150,000/=
(ii) Little Jon Restaurant	Sh.120,000/=
(iii) Jambo World Ltd	Sh.250,000/=
(iv) Zam West Investment Ltd	Sh. 85,000/=
(v) Vieyard Holdings Ltd	Sh.235,000/=
(vi) Joint Commercial Supplies	Sh. 75,000/=
(vii) Legent Bar & Butchery	Sh. 20,000/=
(viii) Dimken Kenya Ltd	Sh.130,000/=
(ix) Ibis Hospitality	Sh. 40,000/=

(x) Link Ways Holdings

Sh. 95,000/=

On or about the 22nd June 2005 the Defendants Tender Evaluation Committee held its meeting and recommended that the plaintiff be awarded the tender at a lease amount of Shs.250,000/= per month and construction amount of shs.3343,167/= and a completion period of 10 weeks on or about the 18th July 2005 the

Defendant's Tender committee met and resolved that the tender under reference in this suit be re-advertised for fresh bids and that tender documents be supplied to the tenders free of charge.

The plaintiff on learning of this new development filed this application by way of Chamber Summons under Order XXXIX Rules 1 and 2 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking orders:

That the Defendant through its agents, officers and servants be restrained by a temporary injunction from advertising for retendering and reinviting bids in respect of Rehabilitation and Lease of Uhuru Park Restaurant or in any other way interfering with the plaintiff's winning bid for Rehabilitation and Lease of Uhuru Park Restaurant pending the hearing and final determination of the main suit.

That the Defendant through its agents, officers and servants be compelled by a mandatory injunction to comply with the provisions of the Exchequer and Audit Act in respect of tender number TC/CE/2/2005 (Rehabilitation and Lease of Uhuru Park Restaurant) and sign a formal contract with the plaintiff forthwith.

The defendant admits that it had placed an advert in a local daily inviting tenders for the lease and rehabilitation of Uhuru Park being reference number TC/CE/2/2005, that the plaintiff purchased the tender document forms at a non refundable fee of Shs.10,000/=, that the applicants attended the tender opening meeting on 17th June 2005 and the plaintiff emerged the winner, that on 22nd June 2005 the defendant tender evaluation committee held its meeting and recommended that the plaintiff be awarded the tender at a lease of Shs.250,000/= per month and reconstruction amount of shs.3,343,167/= and a completion period of 10 weeks. But on 27th June 2005 one of the tenderers Buffet Park who had quoted Shs.150,000/= wrote a letter to the Town Clerk complaining that there were some irregularities in awarding the tender to the plaintiff JAMBO WORLD LTD. The letter read:

27th June 2005

The Town clerk Nairobi City council

P.O. Box 30075

NAIROBI.

Dear Sir,

RE: IRREGULARITY TENDER NO. TC/CE/2/2005 REHABILITATION AND LEASE OF UHURU PARK RESTAURANT

We wish to inform you that we attended the official opening of the above tender on 17th June 2005 and wish to note the following:

1. Various representatives from the tenderers attended the opening including the undersigned.
2. Jambo World Ltd did not include the lease amount they wished to offer. The same was announced by M/S Ngethe in front of all the bidders' representatives and the same was noted by her and the committee. Engineer Wamugunda has also indicated Nil as lease offered by Jambo World Ltd on page 19

and 20 of the document.

3. The technical committee has proceeded to recommend Jambo World Ltd at a Lease of Sh. 250,000/=.
4. Going from the above, the Lease offered by Jambo World Ltd was inserted after the closure of the deadline – which is irregular.
5. We appeal that the Technical evaluation recommendation be revoked or we will challenge the award to Jambo World Ltd in a court of law.

Yours faithfully

George Ndegwa

For: Buffet Park Ltd

Acting on this complaint on 18th July 2005 the Defendant's Tender Committee met and resolved that the tender under reference in this suit be re-advertised for fresh bids and that tender documents to be supplied to the tenderers free of charge. Mr. Mugo counsel for the defendant further submitted that the alleged action being challenged by the plaintiff had not been communicated to applicant and therefore the suit is premature since the offending decision of the defendant has not been communicated to the plaintiff.

The minutes of the second meeting were wrongly and fraudulently obtained and therefore they cannot be relied upon, that the applicant is challenging a process which is not complete, that matters arising from Public Tenders are governed by the Exchequer Act, that the applicant should have appealed to the Appeal Board. Mr. Muigua submitted that the action of the Defendant's Officers who sat on 18th July 2005 and recommended that the tender under reference in this suit be re-advertised for fresh bids and that tender documents be supplied free of charge after 3 committees had accepted the plaintiff's offer was mischievous, illegal and malicious for the reasons that no irregularities existed nor experienced in the tendering process because the tender opening committee did not detect any irregularities, that the Tender Committee itself on 23rd June 2005 approved the winning bid to be that presented by the plaintiff; that none of the tenderers has filed a complaint with the Public Procurement (complaints) Review and Appeal Board pointing out any irregularities, that the decision by the Defendant to recommend and order retendering is illegal and in contravention of Principles and Regulations of the Procurement by Public Bodies in that the confidentiality of the tendering process has already been exposed and new bidders would tender for higher figures than already been tendered for and this would be tantamount to extortion by the defendant and unfair enrichment.

The issues raised in this application is whether or not there was a valid contract between the parties enforceable at law. But before I consider it, it would be appropriate at this stage to refer to the relevant provisions of the Exchequer Act which were referred to me by both parties. Section 15 provides for Rejection of all tenders, proposals and quotations.

Section 33 provides for notification of award and signing of contract. Section 44 provides for Review by Appeals Board.

The tenders were opened on 17th June 2005 by the Technical Committee in the presence of all the tenderers. The Committee recommended tender of the plaintiff. On 23rd June 2005 the defendant's tender evaluation committee awarded the tender to the plaintiff. At this stage the defendant had to comply with the provisions of Section 33 of the Exchequer Act i.e. Notify the successful tenderer that its tender has been accepted and shall simultaneously notify the other tenderers of the fact, and the notification of award to the successful tenderer shall specify the time, not being less than 21 days within which the contract must be signed and the notification of award shall constitute the formation of a contract between the parties and the existence of a contract shall be confirmed through the signature of a contract document incorporating all agreements between the parties and such contract shall be signed by

the duly authorized representative of the procuring entity and the successful tenderer.

Any unsuccessful tenderer ought to have requested for administrative review by complaining to the Appeals Board through the Secretary. The defendant's committee which sat on 18th July 2005 after receiving a complaint by one of the tenderers through the Town Clerk had no legal authority to recommend that the tender under reference be readvertisement.

Once the defendant's tender evaluation committee had awarded the tender to the plaintiff the defendant's next step was to comply with the Provisions of Section 33 of the Exchequer Act.

There was no any other way.

For the reasons stated above the plaintiff's application succeeds in terms of Prayer 4 of the Chamber Summons dated 26th August 2005 and I herein order that the defendant do comply with the provisions of Section 33;

(1) and (2) of the Exchequer Act.

The plaintiff is also entitled to the costs of this application. It is so ordered.

Dated at Nairobi this 14th day of March 2006.

J.L.A. OSIEMO

JUDGE