



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**Civil Suit 154 of 2004**

**FIVE STAR AGENCIES LIMITED.....1ST PLAINTIFF**

**KENJORO ENTERPRISES LIMITED.....2ND PLAINTIFF**

**RIFLO TIMBER AND GENERAL LIMITED.....3RD PLAINTIFF**

**POP METAL FABRICATORS & HARDWARE LIMITED.....4TH PLAINTIFF**

**VERSUS**

**EAST AFRICAN PORTLAND CEMENT COMPANY.....1ST DEFENDANT**

**MOHAMED MAHAT.....2ND DEFENDANT**

**ABDUL AZIZ MAHAT.....3RD DEFENDANT**

**RULING**

There are two applications, the first one dated the 17/3/2004 made by the 2nd and 3rd Defendant to strike out the suit against them under O VI Rule 13 (1) (a) and the Second dated the 8/11/2004 by the 1st Defendant to strike out paragraphs 10 to 13 of the plaint and for the suit to be struck out against it under OVI Rule 13 (1) (d). The plaint seeks the following relief:

- (i) General damages.
- (ii) A declaration that the First Defendant's business practice or conduct in relation to the appointment of distributors contravenes the Exchequer and Audit (Public Procurement) Regulations
- . (iii) A declaration that the First Defendant's business practice or conduct contravenes the Restrictive Trade Practices Monopolies and Price Control Act.
- (iv) An order restraining the first Defendant from awarding contracts to any distributor or distributors in contravention of Exchequer and Audit (Public Procurement) Regulations, 2001 and the Restrictive Trade Practices, Monopolies and Price Control Act and restraining the First Defendant from giving any distributor (s) special preferential or different terms and conditions of distribution of cement including discounts, commissions, volume or quantity of cement for distribution, loading or quantity of cement for distribution, loading and dispatch and other rebates and privileges.
- (v) An order directing the First Defendant to conduct its business or operations in accordance with

the law particularly the Exchequer and Audit (Public Procurement) Regulations 2001 and the Restrictive Trade practices, Monopolies and Price Control Act in a fair transparent and nondiscriminatory manner.

(vi) An order directing the First Defendant to base discounts, commissions and rebates on the volume and quality of cement distributed or purchased equitably by each distributor having regard to the law against monopolies and restrictive trade practices.

(vii) Costs of the suit.

(viii) Interest on (i) and (vi).

(ix) Any other or further relief this Honorable Court deems fit and just to grant.

The Plaintiff broadly alleges that the 1st Defendant has either failed to observe or breached the provisions of the Exchequer and Audit (Public Procurement) Regulations 2001 (the Regulations) and the Restrictive Trade Practices Monopolies and Price Control Act (The Act). Mr. Oyatsi who appeared for the 1st Defendant/ Applicant submitted that in the Regulations and the Act, there is a procedure laid down with mandatory provisions for dealing with complaints.

Regulation 40 (1) – (3) states as follows: (1) Subject to the provisions of this Part, any candidate who claims to have suffered, or to risk suffering, loss or damage due to a breach of a duty imposed on the procuring entity by these Regulations may seek administrative review in accordance with the provisions of regulations 41.

(2) The following shall not be subject to the review provided for in Sub- regulation (1)

(a) the choice of a procurement procedure pursuant to Part IV ; and

(b) a decision by the procuring entity under Regulation 15 to reject all tenders, proposals or quotations.

(3) Once the procuring entity has concluded and signed a contract with the successful tenderer, a complaint against an act or omission in the process leading up to that stage shall not be entertained through the administrative review.

“Candidate” is defined as any person invited to take part in public procurement. “Procurement” is defined as the purchasing, hiring or obtaining by any other contractual means of goods, construction services. “Services” is defined as any object of procurement other than works and goods.

Regulation 42 (1) - (7) states as follows:

(1) A request for administrative review of an act or omission by the procuring entity shall be submitted to the Secretary of the Appeals Board.

(2) The request shall state the reasons for the complaint, including the alleged breach of these regulations, and the ensuing loss or damage to the complainant, and shall be accompanied by a registration fee, in cash or in a bankers cheque made out in favor of the Permanent Secretary to the treasury, in such amounts as may from time to time be prescribed by the Minister.

(3) Upon receipt of a complaint, the Public Procurement Directorate, unless it dismisses the complaint on formal grounds, shall promptly give notice of the complaint to the procuring entity and shall call a meeting of the Board within twenty-one days.

(4) The secretary shall also notify interested candidates of the complaint and shall forward to the Board information and arguments received from such candidates and from the procuring entity.

- (5) The Board unless it dismisses the complaint, may grant one or more of the following remedies-
- (a) declare the legal rules or principles that govern the subject- matter of the complaint;
  - (b) prohibit the procuring entity from acting or deciding unlawfully or from following an unlawful procedure;
  - (c) require the procuring entity that has acted or proceeded in an unlawful manner, or that has reached an unlawful decision, to act or to proceed in a lawful manner or to reach a lawful decision;
  - (d) annul in whole or in part an unlawful act or decision of the procuring entity, other than an act or decision bringing the procurement contract into force;
  - (e) revise an unlawful decision by the procuring entity or substitute its own decision for such a decision, other than any decision bringing the procurement contract into force;
  - (f) order that the procurement proceedings be terminated;
- (6) The Board shall, within thirty days, from the date of the notice prescribed under regulation 42(3) issue a written decision concerning the complaint, stating the reasons for the decision and the remedies if any, and the decision shall be rendered in the presence of the parties concerned.
- (7) The decision shall be final unless judicial review action is commenced within thirty days under any existing written law concerning judicial review of administrative decisions.

Section 13 of the Act provides for a person aggrieved as a result of a restrictive practice to submit a complaint to the Minister and section 14 gives power to the Commissioner to stigate complaints. Sections 15, 16 and 17 give power to the Commissioner and provide for the holding of a hearing and upon conclusion a report from the Commissioner with his recommendations. The Minister may under Section 18 make an order requiring a person to desist from a restrictive trade practice and any person who fails to comply with the order shall be guilty of an offence. A procedure is laid down in Section 20 for an appeal against the Minister's order. Sections 64 and 65 provide for the establishment of a Restrictive Trade Practices Tribunal and procedure for appeal. Section 66 states the persons entitled to appeal and Section 67 and 68 provides for the hearing of appeals and the powers of the tribunal.

Mr. Oyatsi submitted that in this case jurisdiction of the court is ousted by the provisions set out above.

With regard to the Regulations it is my view, prima facie and without deciding the point that only persons involved in the procurement process have a right of audience to the Public Procurement Complaints, Review and Appeal Board. The Plaintiff if that is the case would not be entitled to invoke the provisions of Regulation 41. So far as the Act is concerned, it may well be that the Plaintiff could have made a complaint to the Minister as envisaged by section 21 of the Act but is that his only remedy?

Mr. Oyatsi relied on the case of **Lloyd & Others Vs McMahon (1987) 1 All. E.R 1118 AT PAGE 1161** Lord Bridge stated:

“In particular, it is well established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness.”

Also **Spackman Vs Plumstead Board of Works (1885) 10 A.C 229** where at page 235 Lord Selbourne LC stated as follows:

“And if the legislature says that a certain authority is to decide, and makes no provision for a repetition of the inquiry into the same, or for a judicial review of the decision by another

tribunal, prima facie, especially when it forms, as here, part of the definition of the case provided for, that would be binding.”

In order to oust the jurisdiction of the court the words of any piece of legislation must make it absolutely clear and certain that it has taken away the court’s jurisdiction to deal with a matter.

It is also the law that where an alternative remedy exists to that of the court, the courts will often require that that alternative remedy be pursued first. The reason is that the remedy is specific to the matter in question and provides a concurrent method of disposing of a matter in dispute.

In this suit the Plaintiff seeks declaration that the 1st Defendant in awarding the contract to the 2nd and 3rd defendants offended the provisions of the Regulations and the Act. Whether or not it did is a matter to be determined at the hearing. Mr. Orengo in reply relied on the cases of **R Vs Inland Revenue Commissioners, ex parte Opman International (1968) 1 All. E. R 328** and **Pyx Granite Co. Ltd Vs Minister of Housing and Local Government and others (1960) AC 261**.

I am of the view that neither the Regulations nor the Act oust the jurisdiction of the court in the circumstances of this case from granting a declaration if the Plaintiff can convince the court that the provisions of either the Regulations or the Act have been contravened. This Application therefore fails with costs to the Respondent.

I now turn to the application of the 17/3/2004. This is based on the ground that there is no reasonable cause of action disclosed against the 2nd and 3rd Defendant. Mr. Ahmednasir for the Applicant relied on **Narok County Council Vs Trans Mara County Council E.A.L.R (2001) 1 CA 161**. He also relied on the cases of **Shueb Adan Ali & 3 Others Vs City Council HCCC 820 of 2003 (Unreported)** and **Agricultural Finance Corporation Vs Lengetia Limited (1985) K.L.R 765**. Mr. Orengo in reply relied on the case of **DT Dobie & Company (Kenya) Ltd Vs Muchina (1982) KLR 1** where the following findings were made:

1. The words “reasonable cause of action” in Order 13(1) means an action with some chance of success, when the allegations in the plaint only are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claim prayed.
2. The words “cause of action” means an act on the part of the Defendant which gives the Plaintiff his cause of complaint.
3. As the power to strike out pleadings is exercised without the court being fully informed on the merits of the case through discovery and oral evidence, it should be used sparingly and cautiously.
4. The application was incompetent as it sought for the suit to be struck out on the ground that it “disclosed no cause of action” whereas the rules provided for striking out on the ground that it discloses “no reasonable cause of action”. The application was further incompetent for failure to comply with the requirements of Sub-rule (2) by not stating concisely the grounds upon which it is made.

Although in the Application the word “reasonable” is not used, I will not strike it out as it is for the court to determine whether there is a reasonable cause of action disclosed or not.

I bear in mind that to strike out a Plaint on the ground that there is no cause of action is to be used only in the clearest of cases. Whether or not there is a reasonable cause of action disclosed is a matter of fact to be determined by looking at the pleading and seeking to see what if anything is alleged against the opposite party.

Having read the Plaint the part that refers to the 2nd and 3rd Defendant appears on paragraph 18. Thereafter they are referred to in paragraphs 19, 20, 22, 24 (e) and (f), 25, 26, 28 (c), (h) (l), 29 (b) (d) and the relief claimed against them is for general damages. Nowhere so far as I can see are the 2nd and 3rd Defendants alleged to have been guilty of any wrong doing. At most they are alleged to have been the recipients of benefits arising from a wrongful act. That in my view does not constitute a wrongful act or

give rise to a reasonable cause of action against them. There is no allegation that as a result of a wrongful act on their part, the Plaintiff has become entitled to general damages. In the result I see no reason for the 2nd and 3rd Defendants to be parties to this suit and strike out the suit against them with costs.

**DATED AND DELIVERED AT NAIROBI ON 28th of JANUARY 2005.**

**P.J. RANSLEY**

**JUDGE**