REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
MISC. CIVIL CAUSE NO. 50 OF 2004

REPUBLIC ……..... APPLICANT

VERSUS

THE PUBLIC PROCUREMENT COMPLAINTS,

REVIEW AND APPEALS BOARD .....…… RESPONDENT

AND

KENATCO LIMITED (IN RECEIVERSHIP) ....…… AN INTERESTED PARTY

EXPATE: THE KENYA AIRPORTS AUTHORITY

JUDGMENT

The Applicant's Chamber Summons Application dated 16th January, 2004 for Leave to institute these proceedings for Judicial Review came up before Justice Ransley on 16th January, 2004. The Learned Judge on that occasion granted the orders sought i.e. excused the Applicant from the requirement, under Order LIII, Rule 3 of the Civil Procedure Rules, of service of Notice to the High Court registrar, prior to initiating such proceedings; and granted leave to file a substantive Motion for Judicial Review.

Pursuant to the Leave so granted, the Applicant on 27th January, 2004 filed the substantive Notice of Motion and sought one substantive prayer to wit:

> ***"An order of Certiorari to remove into the High Court and quash the entire proceedings, Rulings, Decisions and Orders of the Public Procurement Complaints, review and Appeals Board (Hereinafter referred to as ("the Board") made in Application No 29 of 2003 between Kenatco Taxis Ltd. ("Original Applicant") and the Kenya Airports Authority ("Procuring Entity").***

The other prayer was of course for costs.

No grounds forming the basis of the Application were stated in the body of the Application. However the Applicant stated in the Application that the Application was grounded upon the matters set out in the statutory statement and Affidavit already filed in Court upon the Application for Leave and upon further and other grounds and reasons to be adduced at the hearing hereof.

The genesis of the dispute is that on or about 31st July, 2003, the Applicant invited by Newspaper Advertisement all those interested in undertaking at Jomo Kenyatta International Airport (hereinafter referred to as JKIA) the operation and management of Taxi Services to tender. Following the said

invitation a total of fourteen firms, including Kenatco Taxis Ltd (in receivership), the interested party herein, submitted tenders. Upon evaluation of the tender documents, three firms that included the interested party were found not to have met the mandatory requirements of the tender and were accordingly disqualified.

The tender was eventually awarded to Jatco taxis & Tours Ltd, Crosslynx Kenya Ltd, JKIA Taxi Services Ltd and New Jambo Taxi Agencies.

The interested party being aggrieved by the disqualification of its tender lodged an appeal with the Respondent being Application Number 29 of 2003 citing breaches of various procurements rules and regulations by the Applicant. In response to the appeal, the Applicant raised three grounds of objection being:

1. **THAT** the Respondent lacked jurisdiction to entertain the Appeal.

2. **THAT** the interested party was properly disqualified for failure to submit mandatory documents and,

3. **THAT** the interested party being in receivership was by law disqualified from participating in the tender in question.

The Respondent heard the Appeal on 15th December, 2003 and delivered its ruling on 17th December, 2003. In its ruling the Respondent upheld the Appeal, annulled the tender award and ordered a re-tender under the supervision of the public procurement directorate. It is against this decision that the Applicant has initiated the present proceedings seeking an order of Certiorari.

The grounds relied on by the Applicant in support of this Application are to be found in the statutory statement as well as the verifying Affidavit sworn by John Joseph Tito on 16th January, 2004. The said grounds can broadly be reduced into two to wit:

(a). The Respondent did not have jurisdiction to hear and determine the appeal and,

(b). The Respondent committed serious error of Law, violated rules of natural Justice and acted capriciously and unreasonably in disregarding the Applicant's argument based on receivership status of the interested party.

The Application was duly served on the Respondent and interested party and those that were eventually awarded the tender. The Respondent in response filed a replying Affidavit sworn by one Kenneth N. Mwangi who is the secretary to the Respondent. In the said Affidavit, Mr. Mwangi depones that the Respondent is mandated to, interalia, hear appeals from dissatisfied Applicants in tender awards, that the interested party sought redress from the respondent challenging the decision of the Applicant rejecting its tender, that at the commencement of the proceedings, the Applicant raised the issue of lack of jurisdiction by the Respondent to entertain the Appeal but was overruled and proceeded to hear presentation by both parties. That ultimately the Respondent upheld the Appeal by the interested party and ordered for a re-tendering under the supervision of the procurement directorate. The Respondent maintains that the said tender fell within its jurisdiction and mandate and that the decisions of the Respondent was correct.

On its part, the interested party upon service of the motion did not bother to file any replying Affidavit but only filed grounds of opposition. The interested party took the view as can be gathered from the grounds of opposition that:

(1). **THE** Application was misconceived, incompetent and does not lie.

(2). **THAT** the order granting leave was fatally defective and cannot therefore be the basis of the instant Application.

(3). **THAT** the Application is in breach of mandatory requirements under Order LIII of the Civil Procedure Rules.

(4). **THAT** the Respondent had jurisdiction to hear and determine Application number 29 of 2003 between Kenatco Taxi and the Kenya Airports Authority.

(5). **THE** Receivership status of the interested party is not the same as that which was envisaged under regulation 13 (1)(c).

Those that won the tender though served did not file any papers in response nor did they appear at the hearing.

When the matter came up for hearing before us, all parties save those who won the tender had filed their skeletal arguments. This greatly assisted the Court and had effect of reducing the time taken in hearing the substantive Application. The Court is grateful to the Counsels for the zeal and industry in that regard.

From the pleadings herein the issues that this Court has to grapple with are:

1. Whether the Respondent had jurisdiction to entertain and determine the Appeal.

2. Whether the Respondent was right in disregarding or rejecting the Applicants defence based on the receivership status of the interested party.

3. Whether or not the Application is incompetent.

We shall now deal with the aforesaid issues in the order as enumerated above.

1. WHETHER THE RESPONDENT HAD JURISDICTION TO ENTERTAIN AND DETERMINE THE APPEAL.

Mr. Keriako Tobiko, learned Counsel for the Applicant submitted that the Respondent was established by the Minister for Finance under regulation 41 of the Exchequer and Audit (Public Procurement) regulations to deal with Appeals submitted by candidates in accordance with the Regulation. It was Tobiko's submissions that the Respondent had jurisdiction only over Complaints in respect of tenders to which the regulations apply; and that the regulations apply to Public Procurement by public entities. Counsel referred the Court to the definition of the ***"Procurement"*** as contained in the interpretation Section of the Exchequer and Audit Act. The word Procurement is therein defined as ***"……. The purchasing hiring or obtaining by any other contractual means of goods, construction and services"*** A Public Procurement is also defined in the same Section as:-

"Procurement by procuring entities using public funds……"

It was Counsel's submission that for the regulation to apply to and for the Respondent to assume jurisdiction, there must be a procurement, that the procuring entity is a ***"Public entity"*** and finally the goods or services are purchased hired or otherwise obtained and or procured out of public moneys or using public funds within the meaning of Section 5A (1) of the Exchequer and Audit Act. According to Mr. Tobiko these three prerequisites form the jurisdictional facts.

These facts must exist before jurisdiction is triggered. On the issue of jurisdictional fact, Learned Counsel referred the Court to ***"The Applicant's guide to Judicial Review"*** authored by Lee Bridges & others wherein at page 11 it is stated that ***"…… here, a vital fact has to be established which will trigger the body's power…… A Court must be satisfied that he precedent fact is established before the exercise of the powers are lawful……."*** Mr. Tobiko conceded that the Applicant was a Public Body. Other than that the other two prerequisites were not met.; there was therefore no procurement by the Applicant within the meaning of regulations 2 of the Exchequer and Audit (Public Procurement) regulations hereinafter

referred to as ***"the Regulations."*** Neither was there purchase or hire by the Applicant. Learned Counsel further submitted that under the tender in question, the successful candidate was to be granted a licence by the Applicant to carry on Taxi business at JKIA , that the Taxi Services were to be provided not to the Applicant but to passengers and members of the public using the Airport, as a consideration for such Licence the successful candidates would be required to pay the Applicant a concession fee of not less than Kshs.5,000/- per vehicle per month. This was a contract for service in which the Applicant would receive rather than pay our monies to the successful candidates for the provision of Taxi Services at JKIA.

Based on the foregoing, Mr. Tobiko submitted that there was therefore no procurement as the tender in question did not involve Purchasing, hiring or obtaining of Taxi Services, by the Applicant as the Applicant would not have to pay the successful candidates to provide Taxi Services at JKIA, it could not therefore be said to have purchased, hired or obtained Taxi Services out of or using Public moneys or funds. Mr. Tobiko further submitted that the Respondent seem to have acknowledged the fact that there was no procurement Per se in its ruling. It was further submitted that Respondent in order to go round the issue wrongly invoked the preamble to the Act. The Respondent invoked albeit wrongly the preamble to broaden Section 5 (A) of the Act and the regulations made thereunder. Counsel further submitted that it was wrong on the part of the Respondent to approach the matter in that manner since the preamble of the Act came into force when the Act and indeed the Act was enacted in 1955. Further Section 5(A) that brought in the procurement regime came into force in 2000. That Parliament must have been aware of the preamble but nonetheless, proceeded to narrow the interpretation. He further submitted that it was wrong for the Respondent to have broadened the meaning of a clear and unambiguous provision of the statute. A preamble can only be resorted to as an aid in interpretation where there is ambiguity. For this submission Counsel referred the Court to the case of ***REPUBLIC –VS- GALVIN (1987) 2 ALL E. R. 851*** Finally, Mr. Tobiko submitted that if there are gaps in the provisions of the Act, it is up to the Legislature and not the Respondent to fill those gaps. For this submission, Learned Counsel referred the Court to ***"Judicial Review Handbook by Michael Fordham"*** concluding his submission on this issue, Learned Counsel stated that the Respondent had no jurisdiction whatsoever to entertain the appeal and committed a serious error of Law by conferring on itself a jurisdiction it did not have.

Mr. Aloo, Learned Counsel for interested party in response to the submission by Counsel for Applicant submitted that there was use of Public funds in the tendering process and for that reason the tender came squarely within the purview of the Respondent's mandate.

Counsel further submitted that under Regulation 2, it is not necessary that the procuring entity should pay out some money. That the term procurement is broad enough to include receipt and expenditure of public funds. He further submitted that the Applicant sought to procure an entity that could operate and manage Taxi Services at JKIA. The Applicant had a choice either to directly engage in the service as provided for under Section 8 of the Exchequer and Audit (hereinafter referred to as the ***"Act"***) or contract out the said service. The Applicant opted to contract out the service. The Applicant was therefore hiring out a public facility to a third party for Commercial purposes. The relationship between the Applicant and the hirer was contractual, consideration being the operation of Taxi Services at a fee. To that extent therefore there was a procurement, Mr. Aloo further submitted.

Learned Counsel for the interested Party with regard to reliance on the preamble of the Act by the Respondent to confer jurisdiction on itself submitted that the Respondent invoked the preamble correctly. That the intention of the Act as enacted in 1955 remained the same to date and even the amendment that introduced Section 5(A) to the Act was in furtherance of the same intention. The Respondent was therefore right in giving a broad interpretation when it decided that the tender was covered by the Regulation.

Mr. Sitima, Senior Litigation Counsel on behalf of the Respondent argued that it was not right for the Applicant to restrict the interpretation of the word public procurement to only those situations where goods and services are procured out of public funds. Such an interpretation is very narrow in the regime of public procurement. Mr. Sitima further submitted that the Court must ask itself what the Minister intended to achieve through the promulgation of the Regulations. It was his submission that the Regulations were geared towards achieving certain objectives. Maintenance of order in the procurement

regime, enhance competition among the players and of course enhancement of fair play. He further submitted that the Applicant being a Public entity with the sole mandate to manage our airports, was subject to the regulations that it is now challenging.

As regards the preamble to the Act, Mr. Sitima submitted it interprets and defines public finances not only to include money paid out in acquiring goods and services but also money received by the public entity. Section 2 of the Act defines the term Public Finances to include revenue. That both collections and payments out are concepts and practices that have been well covered by the Act.

As regards the submission by the Applicant that the Act came into force in 1955 and that it was wrong for the Respondent to use the preamble as a tool of ascertaining the intention of the legislature, Mr. Sitima submitted that Public life is about improving on what we have. That the regulations sought to improve on the inadequacies that had existed over time in the procurement regime. He further submitted that even if the definition of procurement was to be limited, in the instant case, there was public expenditure as public funds were used inter alia in placing the tender advertisement in the Newspaper, and payment of the officers who evaluated the tender e.t. c. For this reason, the tender therefore fell within Public Procurement. Mr. Sitima also urged the Court to go beyond the meaning of the words. The Court should go an extra mile and find out the intention of the Minister in promulgating the Regulations.

It was Mr. Sitima's further submission that in making the tender, the Applicant scrupulously observed the fundamental requirements of the regulations, for instance it advertised the tender, formed a tender evaluation committee and the tender was subjected to stringent evaluation. He concluded his submissions on this issue by stating that the Applicant had subjected the process to the regulations it was now attacking.

We have carefully considered the arguments advanced by Counsels on all the aspects in this matter. It is common ground that the Applicant is a public entity. It is also common ground that the Respondent is an inferior tribunal whose decision are liable to Judicial Review Orders of Mandamus, Prohibition and Certiorari issuable by this Court in its supervisory Jurisdiction. As has been stated time and again, orders of Judicial Review are only issuable by the High Court against Courts and tribunals inferior to it. In the instant case we are satisfied that the Respondent herein is one such body and is consequently liable to an order of Certiorari.

The Respondent is established by the Minister for Finance under regulation 41 of the Exchequer and Audit (Public Procurement), Regulation, 2001 whose mandate is ***"…… to deal with complaints submitted by candidates in accordance with these regulations……."*** The mandate of the Respondent is governed by Regulation 3 (1) which provides that ***"these Regulations shall apply to all public procurement by public entities"*** so that before the Respondent assumes Jurisdiction, to entertain the Appeal, it must be satisfied that the matter concerns Public Procurement by a public entity. In the instant case there is no doubt at all that the Applicant is a public entity. Was there however Public Procuring in the instant case? Public procurement has been defined in the interpretation Section of the Regulation to mean ***"procurement by procuring entities using public funds."*** Similarly procurement has been defined to mean"……the purchasing hiring or obtaining by any other contractual means of goods construction and services."

Read together with Section 5(A) of the Act, it would appear that there can be no Public Procurement unless the procurement is made using or by expending Public funds.

It is our view that for the Regulations to apply to any tender and so as to clothe the Respondent with Jurisdiction the following Jurisdictional facts have to be established so as to trigger the Respondent's Power:

(a). There has to be a Procurement meaning that there must be a purchase, hire or obtaining by any other contractual means of goods or services by the procuring entity.

(b). The procuring entity must be a public entity.

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

On the facts and pleadings before Court, we are unable to find that the Applicant purchased, hired or obtained by any other contractual means of goods or services. Under the tender in question, the successful party was to be granted licence to conduct taxi business at JKIA at a monthly fee payable to the Applicant. In a nutshell this was a case where the Applicant would receive rather than pay out any monies. Further the Taxi Services were to be provided to passengers and members of the Public using the Airport and not to the Applicant nor her employees, servants or agents. In these circumstances can it be said that this was public procurement as defined in Regulation 2 of the Regulations? We do not think so.

The Respondent seem to have appreciated this issue when it stated in its ruling ***"…… we would agree that a direct reading of Section 5A of the Exchequer and Audit Act (Cap 412) and Regulations 2 and 3 of the Public Procurement Regulations gives the impression that there can be no Public Procurement unless the Procurement is made using, or expending public funds…… In this case, the board was not clear despite the literal meaning of the legislation whether the issuance by a procuring entity of a licence for a concession for a fee fits squarely into or outside the definition of Public Procurement……."*** To try and overcome this hurdle and wrongly so in our view, the Respondent reverted to the purpose and intention of the Act as could be gathered from the preamble. Similarly in his submission before us Counsel for the Respondent whilst supporting the position taken by the Respondent also urged us in arriving at the decision to consider the question ***"What did the Minister intend to achieve through the promulgation of these Regulation?"***

To his mind the regulations were promulgated to maintain order in the regime of Public Procurement, enhance competition and enforce fair play. This is all good. However, when it come to interpretation of a statute, when is recourse had to the preamble and the intention of the legislature? In our view and as was stated by Lord Lane CJ in the case of ***REPUBLIC –VSGALVIN (1987) 2 ALL E.R. 851:***

> ***"……..One can have regard to the title of a statute to help resolve an ambiguity in the body of it but it is not, we consider, open to a Court to use the title to restrict what is otherwise the plain meaning of the words of the statute simply because they seem to be unduly wide……"***

We may add in our case that the words were unduly restrictive. Much as the argument of the Respondent regarding the looking for the Minister's intention in promulgating the rules may appear sound and attractive, we are however of the considered view that where the wording in the statute is clear and unambiguous regard to the preamble and or title of the statute or the intention of the legislature would be unnecessary. Having perused Sections 5A (1) of the Act and Regulations 2 and 3 of the Regulation we have come to the firm conclusion that the said provisions were clear and unambiguous. There was therefore no need for the Respondent to revert to the title of the Act in Order to enlarge or broaden the meaning and effect of the clear and unambiguous provisions of the statute.

In a bid to show that public funds were expended in the tender process so as to bring the whole process within the regulation, Counsels for interested party and Respondents submitted that Public funds were expended in advertising the tender in the Daily Newspapers, and in constituting tender evaluation committee whose membership were paid allowances and or salaries from public coffers. In our view no evidence was tendered to back up this claim. There was no deposition in the Affidavits before Court regarding the issue. Tender evaluation committee may have been set up, but there is no evidence that they earned anything more than their normal salaries. We would hold on the materials before us that the Respondents and the interested party have not discharged the burden of showing that public funds were expended in advertising the tender and setting up of the tender evaluation committee. There is also insufficient material upon which this Court can take Judicial Notice of the alleged expenses.

It was also strongly argued by Counsel for the Respondent that in making the tender, the Applicant observed the fundamental requirements of the regulations now under attack; it observed the fundamental requirements of the relations by advertising and setting up tender committee; that being the case, the Applicant should not be heard to challenge the regulations. This submission is obviously misplaced and

has no basis. No evidence was tendered that in subjecting the tender to advertisement and to the tender committee the Applicant was in actual fact following the Regulations. And even if they were following the Regulations they were perfectly entitled to do so as a matter of routine as a public entity and in the interest of transparency and accountability. However, the Applicant cannot be barred from challenging the jurisdiction of the Respondent especially where it is clear that they had no jurisdiction at all in Law.

Whereas we are aware that the Act was promulgated to secure the interest of the public in public procurement so that the public may get the best possible price for the goods and services it procures, in the instant case unfortunately there is no specific provision on the law which has been enacted by Parliament to cover the circumstances of this case. The Respondent could not by creative interpretation of the Act seek to extend the Application of the said Act even in situation where it is obvious that such interpretation could lead to ridiculous results. Nothing would be easier than for the Respondent to request Parliament to legislate on the circumstances as appertains to the specific circumstances of this case.

In the result we hold that the Respondent erred in relying on the preamble provisions of the Act to give purposive interpretation of the statute to confer upon itself a jurisdiction which it did not have. A literal interpretation of the provisions of the statute that were otherwise clear and unambiguous would have sufficed.

2. <u>THE INTERESTED PARTY'S RECEIVERSHIP STATUS:</u>

It was the submissions of Counsel for the Applicant that under Regulation 13 (1) (c) of the Regulations a candidate is not qualified to participate in a Public Procurement if it is insolvent, in Receivership, bankrupt or being wound up or is the subject of legal proceedings for any of the foregoing. That there is no dispute at all that the interested party was and is still under receivership. It was the Applicant's case at the tribunal that the interested party being under receivership was under the Law disqualified from participating in the tendering process. In the premises the interested party could not under regulation 40 (1) validly lodge the complaint with the Respondent.

The Respondent however disregarded the Applicant's argument aforesaid saying that the Applicant should have raised the issue much earlier. It was Counsel for the Applicant further submission that the Respondent's ruling aforesaid was contrary to Law, in breach of the rules of Natural Justice, capricious and unreasonable in that:

(a). The issue whether the interested party's Receivership status disqualified it from participating in the tender in question was one of law.

(b). That there is no estoppel against a provision of statute of Law and therefore the Applicant was not estopped from raising the issue before the Respondent.

(c). That in any event, that issue was specifically pleaded in the Applicant's defence and the Respondent could have chosen to but did not hear the issue as a preliminary point.

Mr. Tobiko further submitted that a point of Law can be raised at any stage of the proceedings. It was his case that an Order of Certiorari should issue in the circumstances of this case as the Respondent exceeded its jurisdiction and gave a decision which was bad in law.

On his part, Counsel for the interested party conceded that the interested party was at the time of tendering under receivership and at the time the Application was argued still under receivership. However that fact alone could not have barred it from participating in the tender. That Regulation 13 provides the criteria for participants in the tender.

The candidate under Regulation 13 (1) can only be disqualified if it is insolvent, or is in receivership, or is bankrupt or whose business is being wound up, second in addition to any of the above conditions such candidate's business activities must have been suspended and thirdly, there are legal proceedings in respect of any or all of the foregoing. It was Counsel's submission that although the interested party was

under receivership there was no contention or allegation that in addition to being under receivership, its business activities had been suspended and that there existed legal proceedings in respect of its receivership status. Counsel further submitted that it was incumbent upon the Applicant to demonstrate that the interested party was caught up by the Regulation 13 (1) a task it failed to discharge. Therefore the Respondent rightly held that this issue ought properly to have been taken at the evaluation stage. As regards the issue of breach of the Rules of natural Justice, Counsel submitted that the issue was duly raised before the board and was heard and a determination made thereon. There was therefore no breach of the rules of natural Justice. Consequently the Respondent acted rightly, fairly and within its jurisdiction in the manner in which it dealt with the issue of the interested party's receivership status.

On this issue, Mr. Sitima on behalf of the Respondent submitted that receivership perse was not an impediment to doing business. This fact was acknowledged even by the Applicant when in the letter to the interested party informing it of its disqualification from the tender ended by saying ***".....we look forward to doing business with you in future……."*** Mr. Sitima asked a rather rhetorical question – How can you do business with a party whom you deem to be unqualified due to its status?

Regulation 13 (1) specifically provide that ***"……in order to participate in Public Procurement, candidates must qualify by meeting the following criteria and such other criteria as the procuring entity considers appropriate under the circumstances."***

(a). ……

(b). ……

(c). That they are not insolvent, in receivership, bankrupt or being wound up, their business activities have not been suspended, and they are not the subject of legal proceeding for any of the foregoing.

(d). …….....

(e). ……..

We understood Counsel for the interested party to be saying that in order for a candidate to be disqualified under the aforesaid provision of the Law, first the candidate must be insolvent, in receivership, bankrupt or whose business is being wound up. Secondly in addition to any of the above conditions such candidates business must have been suspended and there must be legal proceedings in respect of any of the foregoing. So that as in the instant case, apart from the interested party being under receivership, it must also be shown that its business has been suspended and that there are legal proceedings in that regard as well. Our view is that this submission is not sustainable. The provision is very clear. It cannot be dealt with disjunctively as counsel for interested party has attempted to do. To our understanding the regulation provide that for one to participate in the tender one must bring himself within the said provision. One must not be subject to any of those conditions spelt out. The fact that the interested party was in receivership alone was sufficient to knock out the interested party from participating in the tender. That is the message being send out on strict interpretation of the provisions of Regulation 3 (1) (c).

Was the Respondent correct in holding that:

> ***"In our opinion, the matter of receivership of the Applicant should have been raised out either of two earlier stages of this whole process. By the procuring entity at the stage of qualification of tenders for evaluation pursuant to regulation 13 (1) (c) or by Counsel for the procuring Entity at the stage when preliminary objection could be raised in this matter. Our view is that since the procuring entity did not consider receivership at the time of tender evaluation as a bar to the Applicant's qualification, they cannot raise it now. They should not even have considered the Applicant's tender evaluation as they did. Accordingly we disregard the argument an receivership at this case……"***

The issues of the interested party's status was and is a question of Law. And as question of Law it can be raised at any stage during the proceedings. The Respondent ought to have dealt with the issue the moment it was raised and a determination made thereon. In failing to do so the Respondent acted in error. The regulation is very clear. A candidate under receivership cannot participate in the tender. If that be the case then obviously the interested party was even barred from lodging the appeal with the Respondent that has culminated in these proceedings. Had the Respondent made a determination on the issue we are certain that it would have found the appeal incompetent and struck out on the basis of the issue of the receivership status of the interested party.

As already stated the receivership status of the interested party was a matter of Law that could be raised at any stage. Was failure by Applicant to raise it earlier in the course of the proceedings fatal? We do not think so. In any event following a preliminary evaluation of the tenders submitted, three firms including the interested party were found not to have met the mandatory requirements and were therefore disqualified. If the interested party was disqualified at the preliminary stage, where else could the Applicant raise the issue of the receivership status of interested party and for what purpose? It is our view that the Applicant correctly raised the issue with the Respondent and that is where it ought to have been dealt with. Having already been disqualified at the preliminary evaluation of the tenders, no useful purpose would have been served by the Applicant raising the issue of the receivership status of the interested party at any other stage prior to the Appeal. Nor was it in a position to know that the interested party would be lodging an appeal to challenge its disqualification from the tender.

Even if we agree with the Respondent that the Respondent's receivership status ought to have been raised at the earliest possible opportunity, would such failure stop the Applicant from raising it at subsequent stages? In other words was the Applicant estopped from raising the issue of the interested party's receivership status in the appeal before the Respondent even though that issue was not raised at the evaluation stage? We do not think so. It is now settled law that there can be no estoppel against a statute. In Mulla: the Code of Civil Procedure (16th Edition) Volume 1 page 228, the principle is stated thus:-

> ***".....it is a settled principle that there can be no estoppel against a statute, for estoppel cannot supersede the Law of the Land....."***

Similarly in the case of ***TARLOCK SINGH NAYAR & ANOTHER –VS- STERLING GENERAL INSURANCE COMPANY LTD***, it was held that:-

> ***".....the Insurers' conduct in taking over the said Plaintiff's defence amounted to an admission on a point of law and could not found an estoppel in the present action....."***

Finally the Court in KAI NAM (A FIRM) –VS- MAN KAM CHAN (1956) 1 ALL E.R. 783 stated thus:

> ***"It will be convenient first to dispose of the question of Estoppel. On this point their Lordship agree with the Hong Kong Courts that the Landlord is not estoped by having served notices of increase of rent purporting to be made under the ordinance and receiving such increased rent. It is sufficient to observe that if the documents relied on can be regarded as containing representation, such representation are representations of law, not of fact, and cannot be found as an estoppel....."***

Our view therefore having considered the aforesaid authorities is that the Respondent was wrong in declining to entertain the Applicants arguments on the issue of the interested party's receivership status on the basis that the issue ought to have been raised earlier and since it had not the Applicant was estopped from raising the issue before it. The issue was a matter of Law and since there is no estoppel against a provision of statute and or of Law, the Respondent ought to have entertained the issue as a Preliminary point. Moreover it is now trite law that matters touching on jurisdiction must be entertained in priority of everything else and nothing stopped the Respondent moving sui motto on the issue of jurisdiction.

3. <u>WHETHER THE APPLICATION IS INCOMPETENT:</u>

Counsel for the interested party took the view that the order of 20th January, 2004 granting leave to the Applicant to commence these proceedings was defective in that the said order purported to excuse the failure by the Applicant to file and serve Notice to the Registrar as required and secondly that the said order purports to deem the Notice to the Registrar filed herein as properly filed and served. He further submitted that Order LIII Rule 1 (3) of the Civil Procedure Rules require an Applicant for Leave to ***"……. Give Notice of the intended Application for Leave not later than the preceding day to the Registrar……..."*** The Applicant is further required to ***"….. At the same time lodge with the registrar copies of the statements and Affidavits …….. provided the Court may extend this period or excuse the failure to file the Notice of the Application for good cause shown……."*** It was the contention of the Counsel for the interested party that in actual fact, there was no failure by the Applicant to file and served the Notice on the Registrar. The Court record reveals that the Notice was actually filed and served on the Registrar on the same date as the Chamber Summons Application for Leave. He submitted that the Order to excuse ***"failure by the Applicant to file and serve Notice to the Registrar as required was therefore unnecessary."*** Counsel further submitted that the Order purporting to deem the Notice to Registrar filed herein as properly filed and served was an order made without jurisdiction. Order LIII Rule 1 (3) of the Civil Procedure Rules gives the Court two options incase of non-compliance with the requirements for a Notice to the registrar which are:-

(a). Excuse a failure to file a Notice of the Application for good cause shown; or

(b). Extend period within which such Notice had be filed.

Finally he submitted that the foregoing requirements are clothed in mandatory terms and the failure of compliance renders Leave therein granted fatally defective.

On his part Counsel for the Respondent impugned the Notice of Motion for failing to state the grounds in the body of the Application. He submitted that it is now established practice and provision of the Law that an Application brought under Order LIII ought to be properly grounded. The Notice of Motion as drawn by the Applicant did not contain any grounds. This according to Counsel for the Respondent was a fatal omission and consequently the Application ought to be dismissed.

Dealing with the interested party's arguments on this issue, we are of the considered opinion that the objection is without merit and even if it did it would not have led to the dismissal of the Application.

Order LIII Rule 1 (3) of the Civil Procedure provide interalia ***"……. The Applicant shall give Notice of the Application for Leave not later than the preceding day to the Registrar and shall at the same time lodge with the Registrar copies of the statement and Affidavits. Provided the Court may extend this period or excuse the failure to file the Notice of the Application for good cause shown"***

The order issued by Justice Ransley on 16th January, 2004 at the Leave stage was in the following terms ***"THAT failure by the Applicant to file and serve Notice to the Registrar as required by law be excused and the Notice to the registrar filed herewith be deemed to have been properly filed and served….."*** The Applicant to our mind was not seeking to extend time. What the Applicant sought was that the requirement that the Applicant does give Notice of the Application for Leave not later than the preceding day to the registrar be excused. The Judge having listened to the reason advanced by the Applicant granted the Order. We cannot revisit the issue as to do so will be tatamount to sitting on Appeal on a decision of a Judge of concurrent jurisdiction. In any event a party who wishes to challenge an order granting Leave, must file a formal Application which ordinarily ought to be heard by the Judge who granted the Leave. ***<u>See REPUBLIC VS SECRETARY OF STATE, EX-PARTE HARBAGE (1978) 1 ALL E.R. 324</u>*** where it was held thus:

> ***"…….It cannot be denied that Leave should be granted, if on the material available, the Court considers without going into the matter in depth, that there is an arguable case for granting Leave. The appropriate procedure for challenging such Leave subsequently is an***

Application by the Respondent under the inherent jurisdiction of the Court to the Judge who granted, Leave to set aside such Leave……..”

Unfortunately this is not the case here. We also note from the Court record that the Application was filed on the 16th January, 2004 and heard on the same day. Indeed the Notice to the Registrar is dated 16th January, 2004 as well and filed on the same day. It cannot therefore be correct as submitted by Counsel for the interested party that the order to excuse failure by the Applicant to file and serve the Notice to the Registrar was unnecessary as the said Notice and service of the same had not actually been undertaken. There is no such evidence on record. The Rule requires that the Notice of the intended Application be issued, filed and served not later than the preceding day. What this means is that the latest that such notice ought to have been issued and served on the Registrar was 15th January, 2004. This did not happen and in our view the order excusing the Applicant to file and serve the Notice to the Registrar as required under the rules was properly granted. The extension of the said order to include ***“The Notice to the Registrar filed herewith be and is hereby deemed to have been properly filed and served”*** did not in any way purport to extend time nor was it irregular as submitted by Counsel for the interested Party. It cannot in the circumstances be said that such an order was made without jurisdiction.

Turning to the submission by Counsel for the Respondent that failure to include grounds upon which the Notice of Motion was made in the body of the motion rendered the Notice of Motion fatally defective, we are of the respectful view that such an omission is not fatal. Order LIII Rule 3 (1) of the Civil Procedure Rules merely state that once ***“……Leave has been granted to apply for an order of mandamus, Prohibition or Certiorari, the Application shall be made within 21 days by Notice of Motion to the High Court…….”***

No format of the said Notice of Motion has been prescribed within the said order. It has been said that Order LIII is a complete and self-regulating Code or Order. Ideally therefore order L that deals with Motions and other Applications would strictly not apply. However since there is no prescribed format of a Notice of Motion brought under Order LIII, what the litigants have been doing is to adopt the format of the Notice of Motion under Order L. However we hold the view that unlike the mandatory requirement under Order L that ***“Every Notice of Motion shall state in general terms the grounds of the Application.”*** The Notice of Motion in Judicial Review Proceedings need not specifically comply with the aforesaid requirement. As already stated recourse is only had to the format prescribed under Order L for guidance only. For under Rule 4 (1) it is further provided that:-

“Copies of the statement accompanying the Application for Leave shall be served with the Notice of Motion and copies of any Affidavits accompanying the Application for Leave shall be supplied on demand and no grounds shall subject as hereafter provided, be relied upon or relief sought at the hearing of the Motion except the grounds and relief set out in the said statement.”

It would appear from the foregoing that the grounds of the Application ought to be in the statutory statement and it is not mandatory to restate the grounds in the body of the Notice of Motion.

We may observe in passing that in the body of the said Notice of Motion, the Applicant has specifically stated that ***“THIS APPLICATION is grounded upon the matters set out in the statutory statement and Affidavit already filed in Court upon the Application for Leave and upon further and other grounds and reasons to be adduced at the hearing hereof.”*** This to our mind sufficiently answers the concerns of the Counsel for the Respondent and we need not say more.

In the event then, we think we have said enough to show that we should allow the Application herein. Accordingly the decisions of the Respondent dated 15th and 17th December, 2003 respectively are hereby removed into the High Court and are hereby quashed. The Respondent and interested party shall jointly and severally pay the costs of the proceedings to the Applicant.

Dated at Nairobi this 10th day of May 2005.

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J. G. NYAMU

JUDGE

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M. S. A. MAKHANDIA

JUDGE