



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
Misc Civil Appli 75 of 2004

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY KEEN

KLEENERS

R U L I N G

By Notice of Motion dated 20.2.04 the applicant seeks to quash a decision of Public Procurement Complaints and Review and Appeals Board [the Board] delivered on 12.1.2004. Leave to apply for Judicial Review was granted by this court.

The matter arises out of Exchequer at Audit Act Cap 412 and Regulations made there-under concerning the award of Tender Committee of the Kenya Ports Authority [KPA] No. KPA/43/2003 pm.

The statements of facts shows that KPA invited bids for tender KPA/43/2003 PM and this tender was awarded to the applicant. Later Blue Services Ltd filed an appeal to the Board.

At the hearing the Board proceeded in its ruling to quash the award of the tender to the interested party without giving the applicant a chance to be heard. It is submitted that the said decision is bad in law contrary to the provisions of the regulations defective not reasonably justifiable and in breach of rules of natural justice. It is also submitted that the Applicant has suffered irrecoverable loss and damage.

The verifying affidavit shows that a letter-dated 23.12.03 was received on 8.1.2004 inviting information and arguments on 8.1.2004 (notice of 3 days.) On 12.1.2004 a representative of the Applicant appeared before the Board with instructions to apply for adjournment which was rejected. The Board proceeded to make the decision complained of.

An affidavit has been filed by the KPA through their officer J.G. Ngure who has raised issues on the manner of seeking leave for Notice of Motion was made. He insists that the Applicant was given an opportunity of being heard by the Board see Regulation 30(8) and that the matter of tender was a private matter between KPA and tenderer and not concerning the public.

The application was consolidated with Miscellaneous 61 of 2004 which was also challenging the Board's powers under Section 42. See Section 32 where negotiations should not have taken place after opening the tenders. In the statutory statement Blue Sea Services Ltd bid for zone 5 and 6.

The tenders were awarded ;

Zone 5 – Keen Kleeners Ltd

Zone 6 – Ngarisha Enterprises

That the awards for Zone 5 went to Keen Kleeners 3rd lowest tender and not the Applicant, after negotiating with them and requesting them to reduce their tender sum. The Board wrongly ordered KPA to re-tender afresh.

The Board having found for the Applicant in all grounds of appeal was by law bound to direct the awards to the applicant as the successful tenderer.

The relief sought is therefore to quash the appeals Board decision and order the Board to direct that the tenders to go to Applicant as successful bidder.

I have perused the appropriate regulations. The State Counsel submitted that the Notice of Motion has no merit. The court is being asked to substitute its decision for that of the Board. This is not the purpose of Judicial Review Process.

Regarding Application Miscellaneous 61/04 it is not correct to state that the Applicant was not given opportunity to be heard. Rules of natural justice were followed. He also submitted that the application as brought without following the prescribed form. Ms Gudka also made submissions saying the Board had discretion. Also that a procedure of tendering was a devise to reach contract and no legal rights were conferred.

On considering the provisions and regulations governing the operations of the Tribunal I am satisfied that the issue disputed is of administrative nature and not amenable to Judicial Review.

I dismiss both this application and also that in application numbered Miscellaneous 1. No order as to costs.

Dated 29th July 2005.

J N KHAMINWA

JUDGE