



Emerging Business Technology Limited v Teachers Service Commission (Application E160 of 2023) [2025] KEHC 1 (KLR) (Judicial Review) (2 January 2025) (Ruling)

Neutral citation: [2025] KEHC 1 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
APPLICATION E160 OF 2023
J NGAAH, J
JANUARY 2, 2025**

BETWEEN

EMERGING BUSINESS TECHNOLOGY LIMITED APPLICANT

AND

TEACHERS SERVICE COMMISSION RESPONDENT

RULING

1. Before court is the applicant's summons dated 18 October 2023 expressed to be brought under section 3A of the *Civil Procedure Act*, cap. 21 and Order 53 rule 3 (1) of the Civil Procedure Rules. It seeks the following orders:

“

- “1. That pending hearing and determination of this application, the Honourable Court be pleased to grant a temporary injunction staying the signing of contract in respect to the irregularly awarded tender No.TSC/01/2023-2026 for outsourcing /leasing of printing 7 photocopying services at the TSC Headquarters,7 Regional & 47 County Offices: Three(3)years Framework Contract.
2. That this Honourable Court be pleased to grant leave to the ex-parte applicant to institute judicial review proceedings seeking for an order of mandamus against the Respondent to compel him (sic) to cancel the irregularly awarded tender No.TSC/01/2023-2026 for outsourcing /leasing of printing 7 photocopying services at the TSC Headquarters,7 Regional & 47 County Offices: Three (3) years Framework Contract and award it to the Exparte Applicant.”



The applicant has also sought for an order on costs.

2. The application is based on an undated statutory statement and an affidavit verifying the facts relied upon sworn on 18 October 2024 by Mr. Philip Roger Mutungi.

Mr. Mutungi has sworn that he is “the founder, managing director & CEO of Emerging Business Technologies Limited” and that the applicant participated in what I understand to be a public tender described as “tender no. TSC/f/01/2023-2026 : OUTSOURCING / LEASING OF PRINTING & PHOTOCOPYING SERVICES AT THE TSC HEADQUARTERS, 7 REGIONAL & 47 COUNTY OFFICES”.

3. According to Mr. Mutungi, “during the public tender opening, the applicant was the lowest and further, was duly compliant with the tender requirements”. However, Mr. Mutungi has sworn, the award of the tender was “irregularly” made to a company called Copy Cat Limited. Being dissatisfied with the award, the applicant appealed to the Public Procurement Administrative Review Board in application no. 63 of 2023. The application was made on 6 September 2023.
4. The decision of the Public Procurement Administrative Review Board is not exhibited to Mr. Mutungi’s affidavit but from what I gather, the application was dismissed. The respondent, which was the procuring entity, was directed to proceed with the award of the tender.
5. The applicant was apparently aggrieved by this decision and it is for this reason that he has filed the instant application in which, as the prayers suggest, the applicant seeks leave to file a substantive motion for what it failed and could not achieve before the Public Procurement Administrative Review Board.
6. Before considering whether or not to grant leave, I invited the respondent to respond to the applicant’s application. Indeed, the respondent responded and filed a preliminary objection in which the following grounds have been raised:

- “ 1) This Court lacks jurisdiction to hear and determine the Application herein as the same offends Section 175 of the Public Procurement and Asset Disposal Act.
- 2) The said Suit is bad in law, frivolous, vexatious and amounts to gross abuse of the Court process.”

Both parties filed submissions with respect to the preliminary objection.

7. All that a judicial review court would ordinarily be concerned with in an application such as the present one would be whether the applicant has made out an arguable case; in other words, whether it is a case which upon consideration may merit the grant of all or any of the judicial review orders that the applicant is seeking. The leave stage of the proceedings is not meant to determine whether or not the applicant’s case will succeed but whether it is arguable.
8. In IRC V National Federation of Self-Employed and Small Businesses Ltd (1982) 617, (1981) 2 ALL ER 93) Lord Diplock as explained the need for leave as follows:

“Its purpose is to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived.”



9. Thus, the purposes identified for leave are one, to save the court's time and, two, so as not to leave public authorities in a state of uncertainty as to whether they can safely proceed with their operations.
10. In the same case, Lord Scarman saw the need for leave as 'an essential protection against abuse of legal process'. In his words "It enables the court to prevent abuse by busybodies, cranks and other mischief makers". (see pages 653 and 113).

On his part, Woolf LJ referred to the need for leave, in the same case, as 'the unique statutory means by which the court can protect itself against abuse of judicial review'.

11. In order to guard against delving into the merits of the case, Lord Diplock, IRC V National Federation of Self-Employed and Small Businesses Ltd (supra) suggested the following approach.

"If, on a quick perusal of the material then available, the court thinks the application discloses what might on further consideration turn out to be an arguable case in favor of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief."

Thus, on this basis, the applicant only has to show not that it is, but that it might turn out to be, an arguable case.

12. There is no doubt that in questioning the procuring entity's decision before the Public Procurement Administrative Review Board in application no. 63 of 2023 to award the tender in issue, the applicant invoked section 167(1) of the *Public Procurement and Asset Disposal Act*, No. 33 of 2015. This section reads as follows:

167. Request for a review

- (1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.

13. According to section 171 (1) of the same Act, the Public Procurement Administrative Review Board ought to give its decision on the request for review within twenty-one days of the date of filing of the request. No doubt, the Review Board rendered its decision within the stipulated period. Section 175(1) says that a person aggrieved by a decision of the Review Board may file an application for judicial review, challenging the decision, within fourteen days of the date of delivery of the decision. The section reads as follows:

175. Right to judicial review to procurement

- (1) A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board's decision, failure to which the decision of the Review Board shall be final and binding to both parties.

14. It follows that if the applicant was aggrieved by the decision of the Review Board, as appears to be the case in this application, it ought to have filed the application for the decision's review within fourteen days of the date of delivery of the decision.



15. For some reason, the applicant has neither attached the impugned decision to the affidavit filed on its behalf nor disclosed when it was rendered. However, in the submissions filed on behalf of the respondent, the decision is said to have been delivered on 27 September 2023. If that is the case, and in the absence of any evidence to the contrary, the applicant's application which, according to the case tracking system portal was filed on 19 October 2023, was filed out of time. In short, the application was filed contrary to the provisions of section 175(1) of the *Public Procurement and Asset Disposal Act*. On this ground alone leave would be denied.
16. The second reason why the applicant's bid for leave would fail is because, although it is the decision of the Public Procurement Administrative Review Board that is effectively being challenged, the applicant has not exhibited it in its application. In the absence of the decision, it is impossible to interrogate it on any of the grounds of judicial review. Without the decision, the court cannot tell whether the decision is tainted by illegality, irrationality or procedural impropriety.
17. Finally, assuming the decision was exhibited, this Honourable Court cannot make any order affecting the Review Board unless it is named as a party to the proceedings. It is apparent from the applicant's application that the applicant has not joined the Review Board as the respondent, or in any other capacity, in these proceedings. The Review Board cannot be condemned unheard.
18. For these reasons, there is no basis upon which I can exercise my discretion and grant the applicant leave to file the substantive motion for judicial review reliefs. Leave is declined and the applicant's application dismissed with costs. It is so ordered.

DATED, SIGNED AND UP[LOADED ON THE CTS ON 2 JANUARY 2025

NGAAH JAIRUS

JUDGE

