Republic v Njeri & another (Application E246 of 2024)
[2025] KEHC 4476 (KLR) (Judicial Review) (7 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4476 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

APPLICATION E246 OF 2024

JM CHIGITI, J

APRIL 7, 2025

BETWEEN

REPUBLIC ..... APPLICANT

AND

JANE NJOKI NJERI ..... 1ST RESPONDENT

KENYA FOREST SERVICE ..... 2ND RESPONDENT

JUDGMENT

Applicant's Case

1. The application before this Court is the Notice of Motion dated 30th October, 2024. The application is brought Section 3A of the *Civil Procedure Act*, Order 53 of the Civil procedure rules, Section 8 & 9 of the *Law Reform Act*, Section 2 & 39 of the Public Procurement and Disposal Act, Article 10, 27, 35, 47, 159, 227 and 232 of *The Constitution* of Kenya and other enabling provisions of law. It seeks the following orders:

    1. That an order of Certiorari to remove into this Honourable court and quash the decision of the Respondent expressed in BID NO. KFS/DISP/28/2024-25 dated September 2024 calling for small, medium and large-scale forest industry investors to apply for tenders in respect to sale of forest plantation materials in Kiambu County.

    2. That an order of Prohibition directed at respondent prohibiting them from any further action by the respondent to actualize the said tender.

    3. That in the event that the tender has been awarded by the respondent, any further action(s) shall be declared null and void until further orders of the honourable court.

4. That an order of Mandamus compelling the respondent to open pre-qualification and registration of prequalified binders for the financial year 2024-2025.

5. That Such further and other reliefs that the Honourable Court may deem just and expedient to grant in the circumstances of this case.

6. That the costs of this application be paid by the respondent

2. The application is supported by a statutory statement dated 30th October, 2024 and a Verifying Affidavit by Jane Njoki Njeri sworn on even date.

3. The Applicant is introduced as a business lady within Kiambu County doing business which deals with forest produce.

4. The Applicant sought leave under HCJR E138 of 2024 Jane Njoki Njeri vs Kenya Forest Service (KFS) and the same granted on 28th October 2024.

5. It is her case that she was informed by a friend that there was a tender no. BID NO. KFS/ DISP/28/2024-25 dated September 2024.

6. The tender under Section II (Tender Data Sheets-TDS), 1.1 (a) thus "Eligible tenderers are I(FS Forest Industry Investors registered in 2021 but limited to materials reserved for respective categories as indicated in this tender document."

7. It is her case that the Respondent provided no explanation as to why the tender was restricted to those registered in 2021 yet their registration was in relation to Tender no. KFS/DISP/01/2021-2022 for financial years 2021/2022 and 2022/2023 and which had no relation to BID NO.KFS/ DISP/28/2024-25 advertised online by the respondent.

8. It is contended that advertisement online by the Respondent was not only done without prequalification as required by law but the medium used does not reach sufficient numbers of the general public thereby locking out those would be interested including the Applicant in the instant suit.

9. According to her the Respondent (KFS) has also not provided the public with any information as to how the decision to limit the eligible tenderers to those registered in 2021 was arrived at and thus it is in the interest of justice, equity and fairness that this honourable court intervenes and grant the orders sort herein.

10. The Applicant canvased their application by written submissions dated 29th November, 2024.

11. It is submitted that since the year 2021 when the last pre-qualification was conducted, the system has never been opened to enable further pre-qualification or registration therefore there were no pre-qualified and or eligible bidders to participate in the said tender of September 2024.

12. It is the Applicant's case that the tendering process was both illegal as it was in contravention with the laws and failed to meet the legitimate expectation of the applicant and/or the public.

13. Reliance is placed in Pastoli V Kabale District Local Government Council & Others (2008) 2 EA 300.

14. It is the Applicant's case that the Respondent in limiting the prequalification of tenderers to those who had registered in 2021 was discriminatory and did not ensure equal enjoyment of rights inclusiveness and competitiveness hence in contravention of Articles 10 to 47 and 227 of *the Constitution* and section 5 of the Fair Administrative Actions Act 2015.

15. It is also submitted that Article 227 (1) of *the Constitution* of Kenya is to the effect that a procurement process should be fair equitable transparent competitive and cost effective however the respondent has not demonstrated that this has been done in connection with a tender KFS/DISP/28/2024-25.

16. They place reliance in the case of PPRB VS KRA Misc Civil Application no 540 of 2008 (2008) eKLR where the court held:

> " To my mind failure by the Respondents to have regard to mandatory provisions of the Act concerning procurement procedures...violated the purpose of the Act which is clearly stated in section 2... I find that any breach of a mandatory statutory provision does prejudice in some way the section 2objectives...Adherence to the applicable law is the only guarantee of fairness in the case of procurement law the only guarantee of attainment of fair competition integrity, transparency, accountability and public confidence. There cannot be greater prejudice to the applicant than failure by the decision maker to comply with positive law. Failure to adhere to applicable law gives rise to presumption of bias and prejudice contrary to the argument put forward by the Respondent's counsel. The job in my view was not complete or done by just coming up with a mathematically lowest tenderer on top of the pile. The integrity of reaching there is equally important to this court. In many cases it is procedural propriety which is the sample of fairness."

17. The Applicant contends that the Respondent failed to observe and comply with the provisions of *the Constitution* and the Public Procurement and Disposal Act, and urges this Honourable court to grant the prayers as sought.

Respondent's case;

18. The Respondents oppose the Application with Grounds of opposition dated 14th February, 2025. It is contended that:

    1. The Notice of Motion Application is an abuse of court process and has no merit.
    2. The application before this Honourable Court is incompetent, misplaced and/or bought prematurely before this Honourable Court.
    3. The application as filed offends the provision of Section 167 (1) of the Public Procurement and Assets Disposal Act 2015.
    4. The application as filed offends the provision of Section 9 (2) of the *Fair Administrative Action Act* 2015.

19. The Respondent also filed a Replying Affidavit by Alex Lemarkoko EBS, 'ndc' (K) sworn on 14th February, 2025. He is introduced as the Chief Conservator of Forests.

20. It is posited that Kenya Forest Service (KFS) registered Forest Industry Investors in October 2021 in accordance with the Public Procurement and Assets Disposal Act. 2015 as well as its subsequent Public Procurement and Assets Disposal Regulations of 2020.

21. It is contended that the pre-qualification registration list to be used for disposal of mature and over-mature forest plantation was via a restricted tender period of two years and in the course of tender period, disposal of mature and over-mature forest plantation through restricted tender, the process was stalled by orders of a petition filed before Court in ELC PET. No. 1of 2022 (Formerly Nakuru ELC Petition No E/9 of 2021).

22. This resulted in KFS not being able to harvest the mature and over-mature forest plantation as well as put to use the list of pre-qualified forest industry investors.

23. When ELC PET. No. 1o of 2022 (Formerly Nakuru ELC Petition No E/9 of 2021) was concluded another petition was filed ELC PET. No. EOOI of 2023; law Society of Kenya V AC, Ministry of Environment, Climate Change & Forestry & Others stalling the process yet again. In the latter matter, Judgment was rendered in favour of KFS and an Order was issued for disposal of forest plantations.

24. It is the Respondent's case that in order to proceed with harvesting of forest plantations, KFS wrote to the Public Procurement Regulatory Authority (PPRA) requesting for an extension for the use of the 2021 registered list for one additional year in view of the lengthy and time-consuming process of qualification of forest industry investors which includes but does not limit physical evaluation/ verification of sawmills across the country.

25. The request was approved on 10th November 2023 allowing KFS to use the 2021 pre-qualification list for one additional one year from the date of approval.

26. According to them KFS in the approval directed that KFS ensures that the process of fresh registration was finalized before expiry of the one year.

27. It is contended that in compliance with the one-year deadline, KFS floated a restricted tender being No. KFS/028/2024-25 on the 25th September 2024 that was set to expire on 15th October 2024 for Sale of forest plantation material in Kiambu County.

28. It is the Respondent's case that the Applicant's allegations that there was no sufficient notice to the general public about the tender baseless and misleading since KFS had advertised the said tender in a national wide circulating newspaper thus this application lacks merit and should be dismissed with costs.

29. Respondents filed written submissions dated 19th February, 2025.

30. It is submitted that Applicant has failed to exhaust the remedies available to them under the *Public Procurement and Asset Disposal Act* 2015(the Act).

31. Reliance is placed in Republic v Kenyatta University Ex parte Ochieng Orwa Domnick & 7 others [2018] eKLR held as follows:

> "Section 9 (2) of the *Fair Administrative action Act* provides that the High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. Also relevant is sub-section (3) which provides that "the High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in sub- section (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1). The use of the word shall in the above provisions is worth noting. The classification of statutes as mandatory and directory is useful in analyzing and solving the problem of what effect should be given to their directions. There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory. The real question in all such cases is whether a thing has been ordered by the legislature to be done and what is the consequence if it is not done. The general rule is that an absolute enactment must be obeyed or fulfilled substantially. Some rules are vital and go to the root of the matter, they cannot be broken; others are only directory and a breach of them can be

overlooked provided there is substantial compliance. It is the duty of Courts of justice to try to get at the real intention of *the Constitution* or legislation by carefully attending to the whole scope of *the Constitution* or a statute to be considered. The Supreme Court of India has pointed out on many occasions that the question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design and the consequences which would follow from construing it in one way or the other.

The word "shall" when used in a statutory provision imports a form of command or mandate. It is not permissive, it is mandatory. The word shall in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation. The Longman Dictionary of the English Language states that "shall" is used to express a command or exhortation or what is legally mandatory. Ordinarily the words 'shall' and 'must' are mandatory and the word 'may' is directory. A proper construction of section 9 (2) & (3) above leads to the conclusion that they are couched in mandatory terms. The only way out is the exception provided by 9 (4) which provides that: - "Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

Two requirements flow from the above sub-section. First, the applicant must demonstrate exceptional circumstances. Second, on application by the applicant, the Court may exempt the person from the obligation. The exparte applicants counsel made a statement that there are exceptional circumstances in this case after the Court drew his attention to the above sections. He however did not provide specific cases that bring this case under the exceptions, except stating that the applicants are young which to me does not fit into the definition of "exceptional circumstances" discussed below.

It is settled that the impugned decision constitutes administrative action as defined in section 2 of the *Fair Administrative Action Act*. Therefore, an internal remedy must be exhausted prior to Judicial Review, unless the appellant can show exceptional circumstances to exempt him from this requirement. What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action in issue. Factors taken into account in deciding whether exceptional circumstances exist are whether the internal remedy is effective, available and adequate. An internal remedy is effective if it offers a prospect of success, and can be objectively implemented, taking into account relevant principles and values of administrative justice present in *the Constitution* and our law, and available if it can be pursued, without any obstruction, whether system icor arising from unwarranted administrative conduct. An internal remedy is adequate if it is capable of redressing the complaint.

This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional Interpretation especially in virgin areas or where an important constitutional value is at stake. Indeed, in this case, no such argument was advanced before me nor can I discern any virgin argument touching on Constitutional interpretation.

The principle running through decided cases is that where there is an alternative remedy or where Parliament has provided a statutory appeal process, it is only in exceptional

circumstances that an order for Judicial Review would be granted, and that in determining whether an exception should be made and Judicial Review granted, it is necessary for the Court to look carefully at the suitability of the appeal mechanism in the context of the particular case and ask itself what, in the context of the internal appeal mechanism is the real issue to be determined and whether the appeal mechanism is suitable to determine it." See also Republic v Firearms Licensing Board& another Ex Parte Stephen Vincent Jobling [2019] eKLR.

32. It is submitted that courts must not be burdened with matters where the law has provided alternative mechanisms for dispute resolution. Further that the court should satisfy itself that such mechanisms have been tried and failed.

33. The Respondent contends that this matter does not meet the requirements of judicial review.

34. It is the Respondent's case that the Applicant has not established that the Respondent has acted unreasonably, irrationally or in excess of its jurisdiction.

35. Peter Kaluma in his book, Judicial Review, Law Procedure and Practice, at page 46 enumerates as follows:

> 'The remedy of judicial review is radically different from those of review and appeal. Judicial Review is not an appeal from a decision but a review of the decision-making process and the legality of the decision-making process itself. When determining an appeal, the court is concerned with the merits of a decision. Conversely, in Judicial Review the courts exclusive concern is with the legality of the administrative action or decision in question. Thus instead of substituting its own decision for that of some other body, as happens in appeals, the court in an application for judicial review is concerned only with the question as to whether or not the action under attack is lawful or should be allowed to stand or be quashed.'

36. In the case of Republic v Commissioner of Customs Services Ex-Parte Africa K-Link International Limited [2012] eKLR where it was held:

> " It must always be remembered that judicial review is concerned with the process a statutory body employs to reach its decision and not the merits of the decision itself. Once it has been established that a statutory body has made its decision within its jurisdiction following all the statutory procedures, unless the said decision is shown to be sound reasonable that it defies logic, the court cannot intervene to quash such a decision or to issue an order prohibiting its implementation since a judicial review court does not function as an appellate court. The court cannot substitute its own decision with that of the Respondent."

Analysis and determination:

37. From the diverse pleadings and the rival submissions as advanced by counsel these are the issues for determination;

    1. Whether this court has jurisdiction.
    2. Whether the applicant has made out a case for the grant of the order sought.
    3. Who shall bear the costs of the suit.

    The first issue is whether this court has jurisdiction, or not.

38. Section 167(1) of the *Public Procurement and Asset Disposal Act* provides "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."

39. Section 2 of the Act defines a "candidate" as a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity.

40. It is the Applicant's case that she was informed by a friend that there was a tender no. BID NO. KFS/DISP/28/2024-25 dated September 2024 and this court is satisfied that she was a candidate having obtained the tender documents which she is relying on in her application. The court finds that the Applicant was a candidate.

41. The Applicant is bound by Section 167(1) of the *Public Procurement and Asset Disposal Act* provides "Subject to the provisions of this Part, a candidate or a tenderer, she 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.

42. She ought to have sought an administrative review within fourteen days of 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.

43. Given that there is no evidence to demonstrate that the impugned tender was awarded the Application is moot and prematurely before this court.

44. All the internal redress mechanisms must be exhausted prior to Judicial Review, unless the applicant can show exceptional circumstances to exempt her from this requirement.

45. The only way out is the exception provided by 9(4) which provides that:

> "Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice."

46. The factors taken into account in deciding whether exceptional circumstances exist are said to be whether the internal remedy is effective, available and adequate. Further that an internal remedy is effective if it offers a prospect of success, and can be objectively implemented, taking into account relevant principles and values of administrative justice present in *the Constitution* and our law, and available if it can be pursued, without any obstruction, whether systemic or arising from unwarranted administrative conduct. An internal remedy is adequate if it is capable of redressing the complaint.

47. The principle running through decided cases is that where there is an alternative remedy or where Parliament has provided a statutory appeal process, it is only in exceptional circumstances that an order for Judicial Review would be granted, and that in determining whether an exception should be made and Judicial Review granted, it is necessary for the Court to look carefully at the suitability of the appeal mechanism in the context of the particular case and ask itself what, in the context of the internal appeal mechanism is the real issue to be determined and whether the appeal mechanism is suitable to determine it.

48. In Mark Ndumia Ndungu -Versus- Nairobi Bottlers Limited & Another (2018) eKLR (supra) the High court cited with approval the case of Dawda K Jawara v Gambia 147/95-149/96 on availability of effective alternative remedies, where it was held that:

> " A remedy is considered available if the petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint... The government's assertion of non-exhaustion of local remedies will therefore be looked at in this light... a remedy is considered available only if the applicant can make use of it in the circumstance of his case." (emphasis added)

49. In Council of County Governors -Versus- Lake Basin Development Authority & 6 Others the Hon. Justice Mativo (as he then was) held as follows; -

> " Given the nature of the complaint in this Petition, I am clear in my mind that the mechanism used as a shield to challenge this court's jurisdiction cannot grant an effective remedy if this dispute were to be subjected to the said mechanism. Put bluntly, *the constitution* is very clear on where the jurisdiction to determine constitutionality of statutes lies, it is vested in the High court. No other body or person in this country has the jurisdiction to determine constitutionality of provisions of a statute."

50. This court is of the view that the suit is moot. In so holding this court is guided by the case of Coalition for Reform and Democracy (CORD) & 2 Others -v- Republic of Kenya; Another HCCP 628 of 2014 [2015] eKLR, the court cited the case of Patrick Ouma Onyango; 12 Others –v- AG; 2 Others Misc. Appl No. 677 of 2005 the court endorsed the doctrine of justiciability as stated by Lawrence H. Tribe in his treatise American Constitutional Law, 2nd Ed. As follows:

> " In order for a claim to be justiciable as an article III matter, it must "present a real and substantial controversy which unequivocally calls for adjudication of the rights asserted." In part, the extent to which there is a real and substantial controversy is determined under the doctrine of standing; by an examination of the sufficiency of the stake of the person making the claim, to ensure the litigant has suffered an actual injury which is fairly traceable to challenged action and likely to be redressed by the judicial relief requested. The substantiality of the controversy is also in part a feature of the controversy itself-an aspect of 'the appropriateness of the issues for judicial decision...and the actual hardship of denying litigants the relief sought. Examination of the contours of the controversy is regarded as necessary to ensure that courts do not overstep their constitutional authority by issuing advisory opinions. The ban on advisory opinion is further articulated and reinforced by judicial consideration of two supplementary doctrines: that of ripeness; which requires that the factual claims underlying the litigation be concretely presented and not based on speculative future contingencies and of mootness; which reflects the complementary concern of ensuring that the passage of time or succession of events has not destroyed the previously live nature of the controversy. Finally, related to the nature of the controversy is the; political question; doctrine, barring decision of certain disputes best suited to resolution by other governmental actors."

51. Having so found, the second issue falls by the way side.

Disposition;

52. The applicant has not made out a case fit for the grant of the orders sought.

Order;

The application dated 30.10.24 is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF APRIL 2025

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J. CHIGITI (SC)

JUDGE