



Session Blue Contractors Ltd v Kenya Airports Authority (Commercial Civil Suit E323 of 2022) [2024] KEHC 5474 (KLR) (Commercial and Tax) (17 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5474 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CIVIL SUIT E323 OF 2022**

FG MUGAMBI, J

MAY 17, 2024

BETWEEN

SESSION BLUE CONTRACTORS LTD PLAINTIFF

AND

KENYA AIRPORTS AUTHORITY DEFENDANT

RULING

Background

1. The plaintiff instituted the present suit via a plaint dated 22nd August 2022, based on a tender advertised by the defendant for the Proposed Rehabilitation of Pavements, New Grade Parking, and Construction of a Mezzanine Floor at the Existing Passenger Terminal Building at Kisumu International Airports (Tender No. KAA/OT/ES/KIA/007/202142022) (hereinafter referred to as "the tender").
2. The plaintiff asserts that after accepting the tender award, the defendant reneged on entering into the contractual agreement, prompting the plaintiff to seek redress for losses and damages resulting from this breach.
3. The defendant responded with a statement of defense dated 8th September 2022, to which the plaintiff responded to on 11th November 2022. Subsequently, the defendant filed a Notice of Preliminary Objection dated 21st July 2023, arguing that the plaintiff had failed to exhaust administrative dispute resolution mechanisms as mandated by the *Public Procurement and Asset Disposal Act*, (hereinafter "the Act") thereby rendering the suit premature and outside the jurisdiction of this court.
4. The plaintiff countered the preliminary objection by filing Grounds of Opposition dated 28th July 2023, asserting that the dispute hinges on a breach of contractual terms specifically outlined in Clause



1.6 of Part 3 – Conditions of Contract and Contract Forms of the Tender, governed by Clause 20 and the *Arbitration Act* of 1995. Therefore, the plaintiff contends that the Public Procurement Administrative Review Board lacks jurisdiction over this matter.

5. Both parties have submitted written arguments regarding the preliminary objection.

Analysis and determination

6. Upon carefully considering the pleadings, submissions and evidence filed by opposing parties, the central issue is whether this court is the appropriate forum for the dispute. Despite the plaintiff's arguments, this Court agrees with the defendant that the preliminary objection raises a point of law that is capable of disposing the suit in limine.
7. The locus classicus decision in *Owners of the Motor Vessel "Lillian S" V Caltex Oil (Kenya) Ltd*, [1989] KLR 1, remains sound law on the need for a Court to establish jurisdiction before proceeding in a matter. Guided by that decision and similar jurisprudence, it is incumbent upon this court to assess its jurisdiction at the outset.
8. The defendants have drawn this Court's attention to the provisions of Part XV of the *Public Procurement and Asset Disposal Act* (the Act), emphasizing the legislative intent to have parties utilize designated administrative mechanisms for dispute resolution. In fact, this jurisprudential policy is not disputed by the plaintiff.
9. Both parties have cited decisions that cement the doctrine of exhaustion in legal proceedings. The main issue as raised by the plaintiff is whether the dispute before Court ought to be an exemption for any reason, to the doctrine of exhaustion.
10. Section 167(1) of the Act under part XV provides as follows:

“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.”
11. The Act also provides for appeals to the High Court and the Court of Appeal thereafter. Of importance to the proceedings before this Court is section 175(1) which provides that:

“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.”
12. Section 167(1) is worded in very broad terms so as to include both candidates to a tender process as well as tenderers disputes. The submission by the plaintiff that they do not fall under the intended description of section 167(1) is untenable. Contrary to the plaintiff's position, section 167(1) explicitly encompasses disputes at any procurement stage, including contract finalization, as encountered here.
13. This Court aligns with the submissions made by the defendant that the plaintiff's claim relates to an alleged breach of the law in public procurement process. As far as is discernable from the plaint, the dispute arose at the stage of signing the contract, after an offer of an award had been made to the plaintiff. This certainly falls within 'a stage of the procurement process' as envisaged under section 167(1) of the Act.



14. The decision cited by the plaintiff in *Speaker of National Assembly V James Njenga Karume*, (1992) KLR 21 is therefore irrelevant in this case. The administrative review mechanism was both available and accessible, and the plaintiff has not demonstrated any barriers that would have prevented the exhaustion of these procedures prior to seeking judicial intervention.
15. Furthermore, the issue of whether the arbitration clause in the contract should have been activated is a matter appropriately addressed by the administrative tribunal, not this Court.
16. Given these findings, the question arises as to the appropriate course of action. It is well-established through numerous cited decisions that a court should decline jurisdiction when it is demonstrated that an alternative dispute resolution mechanism was available and should have been utilized by the party initially.

Disposition

17. Consequently, the Notice of Preliminary Objection dated 21st July 2023 is successful with the result that the suit is struck out with costs for want of jurisdiction. The defendant shall have the costs of this application.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 17TH DAY OF MAY 2024.

F. MUGAMBI

JUDGE

