



Republic v Public Procurement Administrative Review Board; Kontariza Technologies Group Limited (Exparte); Managing Director, Kenya Power & Lighting Company Plc & another (Interested Parties) (Application E110 of 2024) [2024] KEHC 8332 (KLR) (Judicial Review) (8 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8332 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
APPLICATION E110 OF 2024**

**J NGAAH, J
JULY 8, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD RESPONDENT

AND

KONTARIZA TECHNOLOGIES GROUP LIMITED EXPARTE

AND

MANAGING DIRECTOR, KENYA POWER & LIGHTING COMPANY PLC INTERESTED PARTY

CREDIBLE TECHNICAL WORKS LIMITED INTERESTED PARTY

JUDGMENT

1. The applicant’s motion dated 24 May 2024 seeks judicial review reliefs of certiorari, mandamus and prohibition. The prayers for these reliefs have been framed, thus:

“ 1. An Order of Certiorari to remove to the High Court the proceedings and the decision of the Respondent dated 8th May, 2024 for the purposes of its being quashed and remitting with directions the Request for Review No. 35 of 2024 to the Respondent for reconsideration.



2. An Order of Prohibition to prohibit the 1st Interested Party from entering into Contract for Supply of Emergency Restoration Towers (ERTs) and Galvanised Steel Structures for Implementation of Premium Customers Schemes and for Various Primary and Secondary Substations (Tender No. KP1/9A.3/OT/12/23-24) with the 2nd Interested Party.
3. An Order of Mandamus to compel the Respondent to review, hear and determine on merit the Ex Parte Applicant's Request for Review No. 35 of 2024 dated 15th April, 2024."

The applicant has also asked for costs of the suit.

2. The application is expressed to be brought under Article 23(3)(f) and 165(6)(7) of *the Constitution* of Kenya, 2010 and Order 53 Rule 3 of the Civil Procedure Rules, 2010. It is based on a statutory statement dated 21 May 2024 and an affidavit verifying the facts relied upon sworn on even date by Mr. James Peter Maina Kiama. Mr. Kiama has sworn that he is the managing director of the applicant company.
3. According to his affidavit, sometime in October, 2023 the 1st Interested Party advertised a tender more particularly described as "Tender No. KP1/9A.3/OT/12/23-24, for Supply of Emergency Restoration Towers and Galvanised Steel Structures for Implementation of Premium Customers Schemes and for various Primary and Secondary substations."
4. On 13 November, 2023 the Applicant submitted its bid at a tender sum of Kshs. 263,688,005.36. On 27 March, 2024 the 1st Interested Party sent an email to the Applicant informing the applicant of the outcome of the procurement process. When Mr. Kiama opened the email the following day on 28 March 2024, he noted that it was addressed to Kontariza Technologies Limited and not Kontariza Technologies Group Limited.
5. On 3 April, 2024 he enquired from the 1st Interested Party about the Applicant's notification of award and it is then that the 1st interested party sent another notification with the applicant's correct name, Kontariza Technologies Group Limited. The corrected version of the notification was sent on 4 April 2024. According to the notification, the tender was to be awarded to the 2nd interested party. In the same notification, the applicant was also informed why its bid failed. In particular, the applicant was informed that it had not discharged an earlier contract, apparently with the applicant, and that the "historical form" had not been filled.
6. Being aggrieved by procuring entity's decision, the applicant lodged a request for review before the respondent being Review No. 35 of 2024 dated 15 April, 2024. The request was opposed by the interested parties. On 8 May, 2024 the Respondent struck out in limine the Applicant's Request for Review and directed the 1st Interested Party to proceed with the subject to its logical conclusion.
7. The applicant comes to this Honourable Court seeking a judicial review of the respondent's decision. According to the statutory statement, the decision is impugned on grounds, illegality, irrationality and procedural impropriety.
8. A document filed by the respondent purporting to be a response to the applicant's application could not be opened. A hard copy of the same document was not filed. Nonetheless, the respondent filed written submissions which, ordinarily, would be useful in countering the applicant's arguments on points of law.



9. The 1st interested party filed a replying affidavit opposing the application. It was sworn by Mr. Michael Nyagate Basweti who has described himself as a supply chain officer in the employment of the 1st interested party company.

Apart from admitting that the 1st interested party floated a tender in which the applicant was one of the bidders and that the applicant initiated a request for review proceedings before the respondent, most of what is contained in the affidavit are arguments on points of law rather than questions of fact.

10. To the specific question of notification of the award, Mr. Basweti has sworn that on the 27 March 2024 the 1st Interested Party relayed to the applicant the notification of intention to award. In the notification, the applicant clearly explained to the applicant, the reason for the applicant's disqualification. The notification was sent to the applicant's e-mail address which was indicated in the applicant's bid documents as info@kontariza.com. The allegation by the applicant that it was informed of the notification by Kontariza Technologies Limited is an attempt to abuse the corporate veil to deny that it had actual or constructive knowledge of the notification.
11. Nonetheless, Mr. Basweti has admitted that there was what he has described as a "typo" in the notice by referring to the applicant as Kontariza Technologies Limited. But the error was corrected in the notification of award sent on 4 April 2024.
12. It is the 1st interested party's position that the applicant was aware of the notification of the award as early as 27 March 2024. Accordingly, the 1st interested party has defended the respondent's decision as just and fair and, in any event, in accordance with section 167(1) of the [Public Procurement and Asset Disposal Act, 2015](#).
13. The 2nd interested party also filed a replying affidavit opposing the applicant's application. The affidavit was sworn by Ernest Kingi Gateri who has identified himself as a director of the 2nd interested company. Like the 1st interested party, the 2nd interested party has defended the respondent's decision as being reasonable, fair and lawful.
14. As noted, the applicant request for review was, struck out in in limine for the reason that it was filed out of time. The foundational fact that informed the respondent's decision was the date the applicant is presumed to have been notified of the intention to award the tender and, in the same notification, informed of why its bid failed.
15. In considering this question the respondent made reference to the 1st interested party's email dated 27 March 2024 addressed to the applicant's email, info.@kontariza.com. In that email, the 1st interested party is said to have written as follows:

"Attached please find a soft copy notification of intension(sic) to award. Your hard copy may be collected from 3rd Floor, Supply Chain-Stima Plaza."
16. The respondent noted that the email address to which the notification was sent is the address that was provided by the applicant. In the attached notification, the respondent also noted that it was addressed to Kontariza Technologies Limited and not Kontariza Technologies Group Limited. The applicant noted the error and by a letter dated 3 April 2024, it brought this error to the attention of the 1st interested party. The interested party in turn acknowledged that there was an error and by a letter dated 4 April 2024, it wrote to the applicant and, among other things, informed the applicant that:

"the notification of intension (sic) to award has now been corrected to read your name Kontariza Technologies Group Limited and is hereby attached."



17. Against this background, the respondent considered the question whether the notification sent to the applicant on 27 March 24 could be deemed to be a “notification” within the meaning of section 87 of the Public Procurement and Asset Act and, therefore, the operative date for purposes of computing time within which to file the request for review. The respondent held in paragraphs 110 to 112 of its decision as follows:
- “ 110. On the face of it the notification was addressed to Kontariza Technologies Limited and not Kontariza Technologies Group Limited, the Applicant herein. The Applicant has stated that it was informed by Kontariza Technologies Limited of the Procuring Entity's intention to award the tender. By the Applicant's own admission during the hearing of the request for review Kontariza Technologies Limited and Kontariza Technologies Group Limited share a common email address, info@kontariza.com, which email address was provided by the Applicant as its official address in its bid document.
111. The Respondent herein demonstrated that on 27th March 2024 it sent a letter of notification dated 25th March 2024 through the official email address of the Applicant. Save for the word "Group" all the particulars of the letter of notification were correct with regard to the name of the Applicant. It is safe to deduce that the omission of "Group" from Kontariza Technologies Group Limited was not so fatal as to make the letter dated 26th March 2024 and emailed through info@kontariza.com an invalid notification to the Applicant. The omission was a minor error which in any event was corrected following an inquiry by the Applicant on 3rd April, 2024.
112. Assuming, even for a moment, that the letter of notification was emailed to a wrong address, the test would be: did the applicant become aware of the outcome of the evaluation process of the subject tender? The answer is yes. The Applicant became aware through Kontariza Technologies Limited, an entity that shares an email address with the Applicant. When did Kontariza Technologies Limited become aware of the outcome of the tender? The Board cannot find any other answer but on 27th March 2024 when the Procuring Entity emailed the letter. It is the Board's considered view that what matters in this case is not how the Applicant became aware but, rather, whether it became aware of the outcome of the tender process. The Applicant was informed through its sister company Kontariza Technologies Limited that its tender was unsuccessful. Knowledge of the notification of intention of award is central towards identifying the benchmark date.
18. In coming to this decision, the respondent also considered the evidence before it, in particular CR-12 forms for Konatriza Technologies Group Limited and Kontariza Technogies Limited and noted that the two companies shared the same directors and the shareholders. These directors and shareholders were named as Freshia Wambui and James Peter Kiama.
19. Upon evaluation of this evidence, the respondent was satisfied that the applicant received the notification on 27 March 2024 when the email was sent and, therefore, the date by which it ought to have file its request for review was 10 April 2024 which is the date that the 14-day window for filing



such applications under section 167(1) of the [Public Procurement and Asset Disposal Act](#) elapsed. 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.

20. Can the respondent's decision be said to be illegal, irrational or lacking in procedural propriety in these circumstances? In order to answer this question, one needs to consider the applicant's own averments or depositions on when it received the notification in issue but before that this evidence it is necessary to appreciate what these judicial review grounds entail. They were defined in the English case of *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374,410 where Lord Diplock explained them as follows:

“My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call “illegality,” the second “irrationality” and the third “procedural impropriety.” That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of “proportionality” which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.

By “illegality” as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By “irrationality” I mean what can by now be succinctly referred to as “Wednesbury unreasonableness” (*Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v. Bairstow* [1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law



by the decision-maker. “Irrationality” by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.

I have described the third head as “procedural impropriety” rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all.

The applicant’s case should be weighed against these grounds.

21. In the affidavit verifying the facts relied upon, Mr. Kiama stated how the applicant came to learn of the notice. He swore as follows:

- “6. THAT on 27th March, 2024 the 1st Interested Party sent an email to the Ex Parte Applicant. Annexed hereto and marked "JK 4" is a copy of email dated 27th March, 2024 at 7.01 p.m.
7. THAT on 28th March, 2024 I opened the email from the 1st Interested Party and noted that it contained a notification of intention to award addressed to Kontariza Technologies Limited. Annexed hereto and marked "JK 5" is a copy of the letter dated 25th March, 2024.
8. THAT Kontariza Technologies Limited was neither a candidate nor a tenderer in respect of the Tender Document in issue.
9. THAT on 3rd April, 2024 I enquired from the 1st Interested Party about the Ex Parte Applicant's notification of award. Annexed hereto and marked "JK 5" is a copy of the letter dated 3rd May,2024 (sic).”

22. If the notification was sent to the ex parte applicant on 27 March 2024 as deposed in paragraph 6 of the affidavit of Mr. Kiama, it is a logical conclusion that the applicant must have been aware, as early as this date, that a tenderer, other than the applicant, had won the tender.

23. Assuming, as the applicant wanted the respondent to believe, that the reasons given for the failure of the applicant’s bid did not apply to the applicant, merely because the notification to award the tender was addressed to an entity separate and distinct from the applicant, nothing stopped the applicant from lodging a request for review on the ground that the award was going to be made yet the applicant had not been given reasons why its bid did not meet the cut.

24. Secondly, having acknowledged that Kontariza Technologies Limited to which the notification was addressed did not participate in the tender, it was unreasonable, on the part of the applicant, to assume that the notification was not directed to Kontariza Technologies Group Limited which participated in the tender particularly when one considers the fact that the two companies share not only the same email address but also directorship and shareholding. Circumstances were that the procuring entity could only have been referring to the applicant in its notification and not Kontariza Technologies Limited. To plead that simply because the two companies were separate legal entities the applicant could not have been aware when the notification was sent and that the notification refer to the applicant in these circumstances would be stretching the concept of corporate veil too far. And in such a case where it is apparent that the applicant is pleading corporate veil to dodge its legal obligation of filing a



request for review within the limitation period, the veil would be lifted to lay bare the uncontroverted fact that the alter egos of the two entities are the same persons.

25. Thirdly, if the applicant was aware as early as 27 March 2024 when the notification was sent that the notification was addressed to a different entity other than the applicant, no reason has been given why the applicant had to wait until 3 April 2024, a week later, to enquire whether the notification was meant for the applicant and not Kontariza Technologies Limited.
26. Finally, there appears to be some dishonesty on the part of the applicant. While in paragraph 6 of the affidavit verifying the facts relied upon the applicant is categorical that it received the notification on 27 March 2024, in the letter dated 3 April 2024 enquiring on the addressee of the notification, the applicant alleges that it only got the information from Kontariza Technologies Limited. This letter, as captured in the respondent's decision read as follows:

“Your reference:

Our Refence: KONTAGRP/ 2024/ 002 The General Manager, Supply Chain

Kenya Power & Lighting Company Limited P.O. Box 30099-00100

Nairobi, Kenya

Dear Sir

TENDER NO KP1/ 9A.3/ 0T/12/23-24

The above tender refers.

Kontariza Technologies Ltd, has informed us that you notified them of your intention to award the Tender and you gave them reasons why they did not qualify.

But to their and our surprise, Kontariza Technologies Ltd have confirmed that they did not participate in the Tender quoted above.

This is to confirm that we participated in the abovementioned Tender as Kontariza Technologies Group Limited and we have our own rights and obligations as a legal person registered as a limited company including those that are related to the above-mentioned Tender.

This is to therefore inform you that you have not notified us of your intention to award the Tender. Legally, under the Public Procurement and Disposal Act; 2015 Section 87, and subsequent subsidiary legislations envisioned in the Act; we have the right to be notified concurrently with other winning and losing bidders We therefore ask you to notify us immediately of our status in this Tender so that we can raise any issue within the stipulated 14 Days. We suppose that this means you have to recall the letters issued to the other bidders for you to be not only compliant to the law but also give us our rightful 14 days' period to lodge a complaint, a situation that we believe cannot be avoided under the prevailing situation.

Further we imagine that you have misled all the participants in believing that Kontariza Technologies Limited participated in this Tender in the letters you sent to them, the more reasons to make you recall the Letters.

Kindly note that the undersigned is not a director of Kontariza Technologies Ltd but is a Director of Kontariza Technologies Group Ltd.

Yours faithfully, Signed



Richard Wanjau, Director. "

27. For the applicant to say, as it has in paragraph 2 of its letter, that it was informed by Kontariza Technologies Limited of the intention to award the tender when, in paragraph 6 of the affidavit of its managing director, it is clear that it was aware of this intention as early as 27 March 2024 when the notification was sent, it smacks of dishonesty on the part of the applicant. In any event, if the two companies share the same email address, the assumption is that each of them has a free access to the mailbox of this address and, therefore, one company need not wait to be informed by the other of any new mail in the mailbox at any given time.
28. In the final analysis, there is no material before me upon which I can conclude that the respondent's decision to strike out the applicant's application in limine is marred on any of the grounds of judicial review. In particular, there is no evidence that the respondent did not understand correctly the law that regulating its decision-making power or that it failed to give effect to it. The respondent's decision cannot also be said to have been so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review. Finally, it is apparent that the applicant was not only given the opportunity to present its case but also that the respondent evaluated the material with which it was presented and applied the law as it understood it before coming to its decision. In other words, there was no evidence of procedural impropriety.
29. Accordingly, I hereby hold that there is no merit in the applicant's application. It is hereby dismissed with costs.

SIGNED, DATED AND DELIVERED ON 8 JULY 2024

Ngaah Jairus

JUDGE

6J.R. NO. E104 OF 2024: JUDGMENT

