



**Burhani Engineers Limited v Public Procurement Administrative
Review Board & 4 others (Judicial Review Application E081 of 2024)
[2024] KEHC 14853 (KLR) (Judicial Review) (7 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 14853 (KLR)

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

JUDICIAL REVIEW APPLICATION E081 OF 2024

JM CHIGITI, J

AUGUST 7, 2024

BETWEEN

BURHANI ENGINEERS LIMITED APPLICANT

AND

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD 1ST
RESPONDENT**

**CHIEF EXECUTIVE OFFICER OF THE RURAL ELECTRIFICATION AND
RENEWABLE ENERGY CORPORATION 2ND RESPONDENT**

FAST CONVEYORS SUPPLIES LIMITED 3RD RESPONDENT

BIG SKY SOLUTIONS LIMITED 4TH RESPONDENT

ALL DAY TECHNOLOGIES LIMITED 5TH RESPONDENT

RULING

Brief background

1. On 7th June 2024 the Applicant instituted the proceedings before the 1st Respondent in PPARB Application No. 50 of 2024(hereinafter “Request for Review”) by filing a Request for Review dated 7th June 2024 in respect of Tender No. RFX No. 1000001030 for Procurement of Design, Supply, Installation,testing and Commissioning of Galana Kulalu Substations and Associated Lines (herein referred to as “subject tender”).
2. The 1st Respondent thereafter considered the Request for Review and through a Decision delivered on 28th June 2024 dismissed the Request for Review as unmerited.



3. Being dissatisfied with the decision, the applicant has moved this court through The application dated 17th July 2024 under Article 48, 50(1) and 159(2)(a)(d) of *the Constitution* of Kenya, 2010; Section 73A, 63e and 95 of the *Civil Procedure Act*; and Order 50 Rule 6 of the Civil Procedure Rules, 2010).
4. The Applicant seeks orders that:
 1. Spent.
 2. Time of filing Chamber Summons dated 11th July, 2024 be enlarged.
 3. Costs of this be in the cause.

The application is supported by the Supporting Affidavit sworn by Eng. Eric Muya on 17th July 202

The Applicant's case:

5. On 28th June, 2024 the 1st Respondent delivered its decision in the Request for Review No. 50 of 2024 which the applicant intends to file a judicial review application to challenge the same.
6. The last day of commencing judicial review proceedings was midnight of 12th July, 2024 according to Section 175(1) of the *Public Procurement and Asset Disposal Act*, 2015.
7. On 12th July, 2024 the Applicant attempted way past midnight to file the Chamber Summons on the Judiciary E-Filing System but he was unsuccessful and the 14 days period lapsed.
8. According to the Applicant the delay was caused by the system outage at the Judiciary which was beyond its control. Further that the Judiciary E-Filing System and did not anticipate or make provision for vagaries of information communication technology glitches that may assail the electronic filing of cases and render deadlines untenable.
9. The Applicant believes that this Court has the inherent jurisdiction to enlarge time of filing the Chamber Summons to temper the hardness of the law and the realities of information communication technology glitches to ensure access to justice.
10. It is the Applicant's case that the Respondents herein will suffer no prejudice as they will have their day in court.
11. The Applicant argues that it can apply for judicial review of the decision dated 28th June , 2024, pursuant to the rights guaranteed under Article 48 and 50(1) of Kenya's Constitution, 2010, and that the court has the power to extend period within which to file. Section 95 of the *Civil Procedure Act* and Order 50 Rule 6 of the Civil Procedure Rules, 2010 it is urged empower the honourable court to enlarge time of filing the application for judicial review. The Applicant refers to the court in Republic v Public Procurement Administrative Review Board Exparte Syner - Chemie Limited [2016] eKLR among other cases on extension of time by the courts.
12. It is the Applicant's case that Section 175(1) did not anticipate the current electronic mode of filing cases and it therefore did not provide for any remedy should the electronic filing be interrupted by circumstances beyond the control of a litigant. Further that It is not disputed by the Respondents that filing of cases is mandatorily through the Judiciary E-Filing System and that the electronic filing of cases was adopted by the Judiciary after disruption of normal life by the COVID 19 pandemic.
13. With respect to whether there was an unreasonable delay the Applicant argues that in filing the application for judicial review and the instant application, the Applicant filed the application within five days of 12th July 2022 which was a Friday and 13th and 14th July 2024 being a weekend, the Applicant



was appraised of the failure to file its Chamber Summons on the next working day, which was the 15th July 2024 and therefore the five days delay to file the instant application was not inordinate. In support of this position the Applicant refers to the case of *Ivita v Kyumba* [1984] KLR 441 among other cases.

14. The Applicant also argues that the Respondents have not annexed any evidence to demonstrate that they will suffer any prejudice if the extension sought is not granted and in support of this position the cases of *Republic v Public Procurement Administrative Review Board Ex-parte Syner - Chemie Limited* (supra) and *Republic v Speaker of Nairobi City County Assembly & another Ex parte Evans Kidero*[2017] eKLR are cited.

1st Respondent's Case

15. The 1st Respondent through the replying affidavit of James Kilaka sworn on 24 July 2024 opposes the application.
16. It is his case that this Honorable is not divested with the jurisdiction to enlarge any of the statutory timelines under Section 175 of the Act and accordingly, the Applicant cannot purport to seek for this Honourable Court to enlarge the timelines under Section 175 of the Act to enable it to file a time-barred judicial review application.
17. The 1st respondent also contends that whenever there is a technical hitch or maintenance issue with the Judiciary's e-filing system, the Judiciary usually issues notices to members of the public, detailing that the system is experiencing challenges and thereafter a subsequent notice when the system operations have been restored.
18. It is noted that the Applicant does not refer to any notice issued by the Court of any technical challenges with the Judiciary's e-filing platform. The Applicant's allegations are said to remain unverifiable and the late bringing of the instant proceedings can only be blamed on the Applicant.
19. The 1st Respondent states that in the event, the Court finds that the instant Application is merited, the matter be referred back to the 1st Respondent for determination.

2nd Respondent's case

20. On its part, the 2nd Respondent filed Grounds of Opposition in opposition to the Application and it is its case that this Court lacks jurisdiction to hear this application and any other matter that arises from the 1st Respondent's decision issued on 28th June 2024 in Application No. 50 of 2024: *Burhani Engineers Limited vs. Chief Executive Officer of Rural Electrification and Renewable Energy Corporation & 3 others* as the decision became final and binding on the parties upon the lapse of 14 days as per section 175(1) of the *Public Procurement and Asset Disposal Act*.
21. The 2nd respondent also argues that the application fails the test of the extension of time as prescribed by the Supreme Court in *Kenya Revenue Authority & 2 others vs. Mount Kenya Bottlers & 4 others* (Application 12(E021) of 2021) [2022] KESC 3 (KLR) (10 February 2022) (Ruling).
22. It is its case that the Applicant has failed to adduce any iota of evidence to demonstrate the failure of the e-filing system, the attempts to file the Judicial Review Application on the said 12th July 2024 and any subsequent action concerning the filing of the Judicial Review Application.
23. The 2nd respondent also argues that the Tender Contract has already been executed which would result in the intended Judicial Review Application being a mere academic exercise. Further that it will occasion prejudice as the Galana Kulalu project is in the advanced stages of implementation and the



intended Judicial Review Application will cause undue delay, hardship and inconvenience to a crucial project that aims to support food security for the benefit of the public.

3rd Respondent's case

24. On its part the 3rd Respondent in opposing the Application relies on the Replying Affidavit of Widah Nasta who confirms that the 1st Respondent delivered a decision on the 28th June 2024 and that as provided under Section 175(1) of the Public Procurement and Asset Disposal Act (PPADA), the Applicant was required to mount a challenge to the 1st Respondent's decision by the 12th July 2024.
25. The 3rd Respondent argues that there is no provision under the PPADA that grants this Honourable Court the jurisdiction to extend time for lodging a challenge of the decision of the 1st Respondent out of time as a result of which this court lacks jurisdiction to extend this timeline.
26. It is also deponed that the Act's intent and object of expeditious resolution of these disputes is supposed to be achieved by setting the timelines and that Parliament went ahead to spell out expressly a consequence to follow default or failure to file or to decide within the prescribed times which is that the decision of the Board would crystallize and be invested with finality.
27. The 2nd Respondent is said to have already issued the 3rd Respondent an award and parties have subsequently signed a contract. Section 167(4)(c) of the PPADA is said to provide that where a contract has been signed in strict compliance with the law and the PPADA, it shall not be subject of review of procurement proceedings.
28. It is also its case that the Applicant has not placed before this Honourable Court anything that the Court can rely on to exercise its discretion. The extension of time according to the 3rd Respondent is not a right of a party and a party seeking the exercise of this discretion must provide the grounds and reasons for the exercise of the discretion.
29. The Applicant has not placed before the Court any evidence to demonstrate the alleged difficulties experienced on 12th July 2024 in the Applicant's attempt to file the judicial review application.

4th Respondent's case

30. The 4th Respondent opposed the application through the Replying Affidavit of Joseph Ndekei Kamau. The deponent reiterates that the decision of the 1st Respondent was delivered on 28th June, 2024 and 14 days lapsed on 12th July, 2024 as a result of which the 1st Respondent's decision became binding.
31. The 4th Respondent's case is that the timelines found under Section 175 of the Act are cast in stone and cannot be varied and as such the court has no jurisdiction to enlarge the 14 days period.
32. According to the 4th Respondent the Applicant has not demonstrated a good reason for failing to file the application within the time or to demonstrate that there were challenges with the judiciary e-filing system.
33. The 4th Respondent's case is that it has already started the project and is already on-site delivering materials and other equipment's.

5th Respondent's case

34. The 5th Respondent filed grounds of opposition and written submissions which were both dated 23rd July 2024.



35. The 5th Respondent's case just as the 1st to 4th Respondents is that the Applicant has failed to give good or sufficient reasons why it failed to commence judicial review proceedings against the 1st Respondent within the mandatory timeframe stipulated under Section 175(1) of the Public Procurement Act. The 5th Respondent further argues that the Applicant cannot purport to hide behind Article 159(2)(d) of *the Constitution* to circumvent mandatory provisions of the Public Procurement Act.
36. The Applicant is also faulted for failing to annex any affidavit or communication from the judiciary corroborating its assertions that the judiciary's e-filing system was having technical and/or system hitches.
37. It is the 5th Respondent's case that although the law allows for enlargement of time where a limited period within which an act may be done has been fixed, such is not an automatic right and is subject to the Court's discretion. Section 95 of the *Civil Procedure Act* and Order 50 Rule 5 of the Civil Procedure Rules, 2010 are referred to. The 5th Respondent also cites *Rosco Kibara Mangaara v Deputy County Commissioner Tharaka South Subcounty & 3 others; Paul Kirimi Kiria (Interested Party) [2021] eKLR* and *Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR* on extension of time.
38. According to the 5th Respondent timelines ensure that matters are prosecuted expeditiously by the parties and that Courts determine matters expeditiously. However, that be that as it may, it is trite law that there must be an end to litigation. The 5th respondent also urges that as was held by the court in *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR* a party who seek for extension of time has the burden of laying a basis to the satisfaction of the court.
39. It is also the 5th Respondent's case that no evidence has been adduced the Applicant attempted to file the Chamber Summons application manually as was held by the court in the case of *Arale v Independent Electoral and Boundaries Commission & 4 others (Election Petition Appeal E013 of 2023) [2023] KECA 1045 (KLR) (28 July 2023) (Judgment)* where the court observed that where technology fails then parties must lodge their documents physically.
40. The 5th Respondent states that following the 2nd Respondent's decision dismissing the Applicant's Request for Review, the 2nd and 5th Respondents executed the contract pursuant to the Notification of Intention to Award dated 24th May 2024 and Effectively, the 5th Respondent is already executing the contract and that every day that comes without utilization of those resources, is a substantial loss to the 5th Respondent which loss the Applicant is unwilling to compensate.

Analysis and determination;

41. The issue for determination is whether or not the time of filing the Chamber Summons dated 11th July 2024 can be enlarged.
42. Section 175 (1) Public Procurement and Assets Disposal Act of 2015 Right to judicial review to procurement states as follows;
 - (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.
43. It is not in dispute that the decision of the 1st Respondent was delivered on 28th June, 2024 and 14 days lapsed on 12th July, 2024.



44. The application fails the test of the extension of time as prescribed by the Supreme Court in *Kenya Revenue Authority & 2 others vs. Mount Kenya Bottlers & 4 others* (Application 12(E021) of 2021) [2022] KESC 3 (KLR) (10 February 2022) (Ruling) which provides the following principles for extension of time that a court ought to consider:

- i. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
- ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;
- iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
- v. Whether there will be any prejudice suffered by the respondents if the extension is granted;
- vi. Whether the application has been brought without undue delay; and
- vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

45. The Applicant has not demonstrated nor given a good reason for failing to file the application within the stipulated time or demonstrated that there were challenges with the judicial e-filing system.

46. The Applicant did not approach the court physically to request for the assistance of the court in good time.

47. The strict time frames under this section underscore the intention of Parliament to ensure that disputes relating to Public Procurements and Assets Disposal are disposed of expeditiously.

48. The Black’s Law Dictionary, (9th Edition, 2009) at page 1535 defines the ‘standard of proof’ as ‘[t]he degree or level of proof demanded in a specific case in order for a party to succeed’.

49. Section 107(1) of the *Evidence Act* (Cap 80) provides that:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

50. In Civil Appeal No. E039 of 2024; *Aprim Consultants v Parliamentary Service Commission & Others*, the Court of Appeal decreed that the statutory timelines under Section 175 of the Act are incapable of extension:

“A perusal of section 175 of the Act reveals Parliament’s unmistakable intention to constrict the time taken for the filing, hearing and determination of public procurement disputes in keeping with the Act’s avowed intent and object of expeditious resolution of those disputes...”



...It seems clear to us that the jurisdiction of the High Court in public procurement judicial review proceedings is expressly limited in terms of time and is not open to expansion by that court. To step out of time is to step out of jurisdiction and any act or decision outside jurisdiction is, by application of first principles a nullity.

51. The Judiciary usually issues notices to members of the public, detailing that the e-filing system is experiencing challenges and thereafter a subsequent notice when the system operations have been restored.
52. It is my finding and I so hold that the Applicant is guilty of laches. Owing to the nature of public procurement, the fourteen days window is a very critical time. An aggrieved litigant who waits until the last day to move the court cannot be said to be diligent.
53. In any event an enlargement of time which this court cannot allow would serve no purpose given that the horse has already bolted. The 2nd Respondent has already issued the 3rd Respondent an award and parties have subsequently signed a contract.
54. Section 167(4)(c) of the PPADA provides that where a contract has been signed in strict compliance with the law and the PPADA, it shall not be subject of review of procurement proceedings.
55. The court must balance the scales of justice in a manner that also looks at the prejudice that the Respondents will suffer if time is enlarged. An enlargement of time would lead to a breach of contract between the 2nd and 3rd Respondent.

Disposition;

The applicant has not made out a case for the enlargement of time and I so hold.

Order;

Order

The Application is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF AUGUST, 2024.

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J. CHIGITI (SC)

JUDGE

