



Republic v Public Procurement Administrative Review Board & 2 others; Mfi Document Solutions Limited (Interested Party); Mal-Mart Enterprises Limited (Exparte) (Application E072 of 2024) [2024] KEHC 9582 (KLR) (Judicial Review) (2 August 2024) (Judgment)

Neutral citation: [2024] KEHC 9582 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
APPLICATION E072 OF 2024
J NGAAH, J
AUGUST 2, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

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

**ACCOUNTING OFFICER, INDEPENDENT ELECTORAL & BOUNDARIES
COMMISSION 2ND RESPONDENT**

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION 3RD
RESPONDENT**

AND

MFI DOCUMENT SOLUTIONS LIMITED INTERESTED PARTY

AND

MAL-MART ENTERPRISES LIMITED EXPARTE

JUDGMENT

1. The application before court is a motion dated 19 June 2024 expressed to be brought under Articles 10, 22, 23, 47(1), 50(1), 159, 165(6) and (7), 227 of *the Constitution*; Section 3A of the *Civil Procedure Act* cap.21; Sections 8 and 9 of the *Law Reform Act*, Cap 26; Sections 7(2) (a) (v) (f) (i) (k) (m), 10,



11 & 12 of the *Fair Administrative Action Act*, 2015 and Order 53 Rule 3 (1) of the Civil Procedure Rules. The applicant seeks the following orders:

- a. That this Honourable Court be pleased to grant for an Order of Certiorari to deliver up to the Court and quash the decision of the Public Procurement Administrative Review Board delivered on 30th May, 2024 dismissing the Ex-parte Applicant's PPARB Application for Review Case No. 40 of 2024;
- b. That this Honourable Court be pleased to grant for Order of Prohibition to prohibit the Independent Electoral & Boundaries Commission from proceeding to reissue fresh letters of termination of Tender No. IEBC/OT/07/23/2023-2024 OF 5TH FEBRUARY, 2024 FOR SUPPLY AND DELIVERY OF TONERS AND CARTRIDGES UNDER THREE (3) YEAR FRAMEWORK CONTRACT;
- c. That this Honourable Court be pleased to grant for an Order of Prohibition to prohibit the Independent Electoral & Boundaries Commission from proceeding to conduct a fresh tender process in place of Tender No. IEBC/OT/07/23/2023-2024 OF 5th February, 2024 For Supply And Delivery Of Toners And Cartridges Under Three (3) Year Framework Contract;
- d. That this Honourable Court be pleased to grant for an Order of Mandamus compelling the 1st Respondent to re-hear PPARB application for Review Case No. 40 of 2024 and to consider all the grounds raised therein by the Ex parte Applicant and the pleadings and submissions filed therein and served by all the parties;
- e. That this Honourable Court be pleased to grant for an Order of Mandamus directing the Independent Electoral & Boundaries Commission to award Mal-Mart Enterprises Ltd the tender for the IEBC/OT/07/23/2023-2024 for Supply and Delivery of Toners and Cartridges at its tender price and to issue a letter of award and complete the entire procurement process therein including the signing of a contract with Mal-Mart Enterprises Ltd within 14 days from date of delivery of judgment and supply this Honourable Court with the evidence of compliance with the directions of this Honourable Court;
- f. That a declaration be issued that the judgement/decision by Public Procurement Administrative Review Board delivered on 30th May 2024 was and is invalid, void, unconstitutional and of no effect;
- g. That a declaration be issued that any contract executed and or awarded in the Tender IEBC/OT/07/23/2023-2024 Of 5th February, 2024 For Supply And Delivery Of Toners And Cartridges Under Three (3) Year Framework Contract to any successful tenderer apart from the Ex-parte Applicant prior to the determination of this suit is invalid and void and of no effect;
- h. That in the meantime there be issued a stay of the decision of the Public Procurement Administrative Review Board made on 30th May 2024 until further orders are given by this Honourable Court prohibiting the 2nd Respondent;



- i. That in the meantime there be issued a stay until further orders are given by this Honourable Court prohibiting the 2nd and 3rd Respondents from conducting fresh tender process, signing any contract and or awarding the in the Tender IEBC/OT/07/23/2023-2024 OF 5th February, 2024 For Supply And Delivery Of Toners And Cartridges Under Three (3) Year Framework Contract to any successful tenderer; and
 - j. Further or in the alternative damages arising from the matters herein and interest thereon.
 - k. Cost of this application be provided for.”
2. The application is based on a statutory statement dated 11 June 2024 and an undated affidavit sworn by Mr. Joseph Mwanzia Malonza verifying the facts relied on. Mr. Malonza has sworn that he is the managing director of the applicant company.

According to Mr. Malonza, the 2nd and 3rd respondents floated a tender more particularly described as “Tender No. IEBC/OT/07/23/2023-2024 OF 5th February, 2024 For Supply And Delivery Of Toners And Cartridges Under Three (3) Year Framework Contract.”
3. The applicant submitted its tender and its bid qualified at the three stages of preliminary, technical and financial evaluations. Similarly, the Interested Party and two other bidders also qualified. Despite having surmounted these evaluation stages, the 2nd and 3rd Respondents terminated the tender citing different reasons for the termination.
4. The applicant was aggrieved by the 2nd and 3rd respondents’ decision as a result of which it invoked section 167 (1) of the *Public Procurement and Asset Disposal Act*, 2015 and requested for review of the decision. Its application was registered before the 1st respondent as no. 40 of 2024.
5. The application for review was, however, struck out on the ground that the 1st respondent was divested of jurisdiction to entertain it. In holding as it did, the 1st respondent upheld a preliminary objection by the interested party to the effect that the applicant had not, in its request for review, pleaded that it had suffered or risked suffering loss and damage as a result of the breach complained of, contrary to section 167(1) of the *Public Procurement and Asset Disposal Act*. According to the 1st respondent’s decision, this provision of the law enjoins an applicant for review to plead that he has suffered or risked suffering loss or damage as a result of a breach on the part of the procuring entity. The rest of the depositions in Mr. Malonza’s affidavit are about what the applicant’s case was before the 1st respondent and, in particular, why it faulted the procuring entity’s decision. As far as the instant application is concerned, the applicant’s case is that its request for review ought to have been determined on merits.
6. The respondents opposed the motion and filed their respective replying affidavits to that end. The 1st respondent’s affidavit was sworn by James Kilaka who introduced himself in the affidavit as a procurement professional and the acting secretary of the 1st respondent. Mr. Kilaka defended the 1st respondent’s decision as having followed the Court of Appeal decision in *James Oyondi t/a Betoyo Contractors & another v Elroba Enterprises Limited & Others (2019) eKLR; Mombasa Civil Appeal No. 131 of 2018* where Section 167(1) of the Act was interpreted to mean that a tenderer or a candidate who claims to have suffered or risked suffering loss or damage on account of breaches by a procuring entity, must plead such damage or loss or risked suffering such damage or loss.



7. Additionally, the applicant's request was not accompanied by a statement as required by regulation 203 of the Public Procurement and Asset Disposal Regulations, 2020. It is the 1st respondent's position that its decision was reasonable, rational and lawful.
8. On behalf of the 2nd and 3rd respondents, Ms Khadija Ramadhan swore a replying affidavit in which she largely laid out the 2nd and 3rd respondent's case before the 1st respondent and, in particular, defending its decision to terminate the tender in issue. In any event, like the 1st respondent, the 2nd and 3rd respondents have contended that the applicant's case failed because it did not plead that the applicant had either suffered loss or damage or was likely to suffer loss or damage as a result of the procuring entity's breach or breaches.
9. I have had the opportunity to consider the submissions by both the applicant and the respondents. I have also considered the 1st respondent's impugned decision. The sole issue upon which the applicant's request for review was struck out was, as noted, failure by the applicant to plead that it had suffered loss or damage or that it risked suffering such loss or damage as a result of the procuring entity's breach of duty imposed upon it.
10. The arguments on this point are, in part, captured in paragraphs 93 and 94 of the 1st respondents decision. They read as follows:

“93. The Interested Party's Preliminary objection was predicated on Section 167(1) of the Act., with Counsel for the Interested Party, Ms. Musangi arguing that the Applicant failed to plead having suffered or being at the risk of suffering loss and damage arising from a breach of a statutory duty on the part of the Respondents. Counsel argued that by the Applicant failing to attach a Statement in support of the Request for Review/ the allegations contained in the Request for Review were unsupported.

94. On its part the Applicant opposed the Preliminary Objection citing it was unmerited. Counsel for the Applicant, Ms. Chamia, argued that the relief section of the Request for Review brought out the wrongs suffered and how they were to be remedied. She equally relied on Article 159(2)(d) of *the Constitution* of Kenya, 2010 beseeching the Board to ignore procedural technicalities.”

11. Thus, it was not contested that the applicant had not pleaded having suffered or risked suffering loss and damage in its pleadings before the 1st respondent. As noted earlier, the latter cited James Oyondi t/a Betoyo Contractors & another v Elroba Enterprises Limited & Others (supra) where the Court of Appeal applied section 167(1) of the Act and held that in an application for review under this provision, the applicant must expressly plead loss and damage, either suffered or anticipated.

It is necessary I reproduce this section here; it 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.



12. On the face of it, it is easy to conclude that there is nothing in this provision of the law that suggests that it is mandatory for an applicant in application seeking administrative review to plead having suffered or risk suffering loss or damage. Contrary to ordinary suits filed in a civil court and which are subject to rules of procedure, some of which require certain claims to be specifically pleaded or particularised, a request for review under section 167(1) would not be subject to such rigours of procedure. The filing of a request for review would, ipso facto, connote a claim against the procuring entity. A procurement process where for, instance, a procuring entity overlooks any of the evaluation stages prescribed in the law or in the tender document will not be sustained. No doubt, tenderers in such a process may suffer some loss or damage as a result of the breach of the duty imposed upon the procuring entity to subject the tenders to the evaluation stages. But the process will be invalidated, not necessarily because the aggrieved tenderers have pleaded loss or damage but because it will be obvious, that by skipping a mandatory evaluation stage, the procuring entity has breached the law with respect to evaluation of tenders, or the particular tender in question. It follows that the Public Procurement Administrative Review Board's determination of whether a request for review should be allowed or not would largely hinge on the material with which it is presented regardless of whether the applicant in such a request for review has pleaded having suffered or is likely to suffer any loss or damage. In short, the Review Board will not close its eyes to an obvious infraction on the part of procuring entity in a procurement process only because the applicant before it has not pleaded loss or damage.
13. Regulation 203 which falls under Part XV of the Public Procurement and Asset Disposal Regulations, 2020 which prescribe the administrative review of procurement and disposal proceedings appears to be in sync with this position. That regulation reads as follows:
- 203.
- (1) A request for review under section 167(1) of the Act shall be made in the Form set out in the Fourteenth Schedule of these Regulations.
Request for a review.
 - (2) The request referred to in paragraph (1) shall—
 - (a) state the reasons for the complaint, including any alleged breach of *the Constitution*, the Act or these Regulations;
 - (b) be accompanied by such statements as the applicant considers necessary in support of its request;
 - (c) be made within fourteen days of—
 - (i) the occurrence of the breach complained of, where the request is made before the making of an award;
 - (ii) the notification under section 87 of the Act; or
 - (iii) the occurrence of the breach complained of, where the request is made after making of an award to the successful bidder.
 - (d) be accompanied by the fees set out in the Fifteenth Schedule of these Regulations, which shall not be refundable.
 - (3) Every request for review shall be filed with the Review Board Secretary upon payment of the requisite fees and refundable deposits.



(4) The Review Board Secretary shall acknowledge by stamping and signing the request filed for review immediately.

14. The regulation is quite clear of what should be contained in a request for review. Of relevance to my humble opinion is that it does not include a pleading of “loss or damage”, whether before or after the breach complained of, as a mandatory requirement or at all. And looking at the standard form in the 14th Schedule to which reference has been made in regulation 203(1), no provision has been made for such a pleading. This form reads as follows:

“Request For Review

I/We ,the above named Applicant(s), of address: Physical
address P. O. Box No Tel. No Email , hereby

request the Public Procurement Administrative Review Board to review the whole/part of
the above-mentioned decision on the following grounds, namely:

By this memorandum, the Applicant requests the Board for an order/orders that:

Signed (Applicant)

Dated on day of / 20 ...

FOr Official Use Only Lodged with the Secretary Public Procurement
Administrative Review Board on day of 20

Signed

Board Secretary”

15. I suppose if the pleading of loss or damage was that mandatory, it would have been included not just in the regulations, but also in this form, perhaps as one of the grounds. It follows that when section 167(1) of the Act is read with regulation 203, striking out a request for review merely because an applicant has not pleaded having suffered or risk suffering loss or damage, yet he has not only set out what he believes to be breaches of duty on the part of the procuring entity but has also asked for specific reliefs to which he would be entitled under the Act, would appear to me, to be a bit drastic; to say the least.

16. But this is all obiter and, may be, academic for the Court of Appeal has held in *James Oyondi t/a Betoyo Contractors & another v Elroba Enterprises Limited & 8 others* (supra) that it is necessary, indeed mandatory, that an applicant must, in his pleadings before the Public Review Administrative Review Board plead loss or damage. In an appeal on a decision of this Honourable Court (sitting at Mombasa) arising from a constitutional petition against the decision of a procuring entity, the court held as follows:

“It is not in dispute that the appellants never pleaded nor attempted to show themselves as having suffered loss or damage or that they were likely to suffer any loss or damage as a result of any breach of duty by KPA. This is a threshold requirement for any who would file a review before the Board in terms of section 167(1) of the PPADA;

The court then quoted section 167(1) and held that:

“It seems plain to us that in order to file a review application, a candidate or tenderer must at the very least claim to have suffered or to be at the risk of suffering loss or damage. It is not any and every candidate or tenderer who has a right to file for administrative review. Were that



the case, the Board would be inundated by an avalanche of frivolous review applications. There is sound reason why only candidates or tenderers who have legitimate grievances may approach the Board. In the present case, it is common ground that the appellants were eliminated at the very preliminary stages of the procurement process, having failed to make it even to the evaluation stage. They therefore were, with respect, the kind of busy bodies that section 167(1) was designed of keep out. The Board ought to have ruled them to have no locus, and the learned Judge was right to reverse it for failing to do so. We have no difficulty upholding the learned Judge.”

17. In the wake of this decision, and, against the background that it is not in dispute the applicant did not plead loss or damage in its pleadings before the Public Procurement Administrative Review Board, the 1st respondent was bound, as I as much I am bound, by the decision of the Court of Appeal, to reach the inevitable conclusion that the applicant’s request for review was fatally defective. That being the case, and for purposes of determination of the instant application, the 1st respondent’s decision cannot be faulted on any of the grounds of judicial review. It is hereby dismissed but I make no orders as to costs. It is so ordered.

SIGNED, DATED AND DELIVERED ON 2 AUGUST 2024

NGAAH JAIRUS

JUDGE

