



Republic v Public Procurement Administrative; Galana Oil Kenya Limited & 2 others (Interested Parties) (Application 188 of 2022) [2023] KEHC 483 (KLR) (Judicial Review) (3 February 2023) (Judgment)

Neutral citation: [2023] KEHC 483 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
APPLICATION 188 OF 2022
J NGAAH, J
FEBRUARY 3, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD RESPONDENT

AND

**GALANA OIL KENYA LIMITED INTERESTED PARTY
KENYA POWER & LIGHTING COMPANY PLC INTERESTED PARTY
ACCOUNTING OFFICER KENYA POWER & LIGHTING COMPANY PLC INTERESTED PARTY**

JUDGMENT

- 1 The application before court is a motion dated 4 January 2023 filed under section 175 of the *Public Procurement and Asset Disposal Act*, 2015 and sections 7 and 8 of the *Fair Administrative Action Act*, No 4 of 2015. It seeks orders for judicial review whose prayers have been couched as follows:
1. That an order of certiorari to remove into the High Court for purposes of quashing the decision of public procurement administrative review Board, the respondent here in, made on 22nd December 22;
 - i. nullifying and setting aside the Letters of Notification of Intention to award Tender Number KPI/9A.3/OT/005/22-23 for the supply and delivery of low sulphur diesel



to off-grid power stations dated 2nd December and issued to all tenderers in the subject tender;

- ii. cancelling and/or terminating in their entirety the procurement proceedings of Tender Number KPI/9A.3/OT/005/22-23 for the supply and delivery of low sulphur diesel to off-grid power stations; and
- iii. Ordering the 3rd interested party to readvertise and commence a new procurement process for the supply and delivery of low Sulphur diesel to off-grid power stations within 7 days from the date of making the decision (22nd December 2022);

2. That an order of mandamus do (sic) issue compelling the 2nd and 3rd respondents Kenya Power and Lighting Company plc and the accounting officer, Kenya Power and Lighting Company plc to execute and actualise the performance of the contract for the perform (sic) the contract for the supply and delivery of low Sulphur diesel to off-grid power stations with the Rubis Energy plc, the successful bidder.”

2 The application is based on the statutory statement dated 29 December 2022 and an affidavit verifying the facts relied upon sworn on even date by one Ismael Opande. Opande who has described himself in the affidavit as the commercial and sales manager of Rubis Energy Kenya Plc, the applicant in this application.

3 According to Opande, the applicant was a successful tenderer in respect of a tender by the 2nd interested party for the supply and delivery of low Sulphur diesel. The tender was more particularly described as “Tender Number KPI/9A.3/OT/005/22-23 for the supply and delivery of low Sulphur diesel to off-grid power stations.”

4 The tender was by way of e-procurement and therefore the invitation to tender required of the bidders to visit the procuring entity’s portal from time to time for any information on addendums, tender closing time and such information as was necessary to the tender and the procurement process.

5 The applicant submitted its tender on 22 November 2022. On 2 December 2022, it received notification from the procuring entity to the effect that it had been awarded the tender.

6 The 1st interested party was, however, aggrieved by the decision to award the tender to the applicant. On 1 December 2022, it filed an application before the respondent requesting for the review of the award. The application was registered as no 101 of 2022.

7 In filing the application, the 1st interested party, was no doubt invoking the provisions of section 167 (1) of the *Public Procurement and Asset Disposal Act*, No 33 of 2015 according to which an aggrieved party in the tender process is entitled to seek a review of a decision of the procuring entity, for instance, if he has suffered or is at risk of suffering loss or damage as a result of that decision. This provision of the law 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.



8 According to the decision of the respondent dated 22 December 2022 and which is sought to be impeached in this application, the 1st interested party sought for the following orders:

- a) That the honourable review Board be pleased to determine that having being (sic) locked out from accessing the respondents a procurement web portal for purposes of submitting its tender documents in relation to Tender Number KPI/9A.3/OT/005/22-23 for the supply and delivery of low Sulphur diesel to off-grid power stations on 23/11/2022 before the submission deadline, the applicant was treated unfairly and inequitably.
- b) that the honourable review Board be pleased and set aside in their entirety all the proceedings undertaken by the respondents in relation to Tender Number KPI/9A.3/OT/005/22-23 for the supply and delivery of low Sulphur diesel to off-grid power stations.
- c) That in the alternative the (sic) prayer (b) above, the respondents be and are hereby directed to within such period as the honourable review Board shall set, reconfigure the e-procurement web portal to allow the applicant to submit its bid documents in connection with Tender Number KPI/9A.3/OT/005/22-23 for the supply and delivery of low Sulphur diesel to off-grid power stations and further that the fully facilitate the applicant's access to the said web portal for the foregoing purpose.
- d) That upon grant of prayer (c) above, the honourable review Board be pleased to order and direct the respondents to consider and evaluate the applicant's bid so submitted alongside any other bids that may have been received (sic) Tender Number KPI/9A.3/OT/005/22-23 for the supply and delivery of low Sulphur diesel to off-grid power stations.
- e) That the honourable review Board be pleased to make such other or further orders as it may deem just and expedient.
- f) That the costs of this request for review be borne by the respondents.”

9 As noted, the respondent delivered its decision on 22 December 2022 after hearing the parties. It allowed the 1st interested party's request for review and made the following orders:

1. The letters of notification of intention to award Tender Number KPI/9A.3/OT/005/22-23 for the supply and delivery of low Sulphur diesel to off-grid power stations dated 2nd December 2022 issued to all tenderers in the subject tender during the pendency of the instant request for review be and are hereby nullified and set aside.
2. The procurement proceedings of Tender Number KPI/9A.3/OT/005/22-23 for the supply and delivery of low Sulphur diesel to off-grid power stations be and is hereby cancelled an(sic)/ or terminated in its entirety.
3. The 1st respondent is hereby ordered to re-advertise and commence a new procurement process for supply and delivery of low sulphur diesel to off-grid power stations within seven (7) days of this decision taking into consideration the Board's findings in this request for review.
4. Given the findings herein, each party shall bear its own costs in the request for review.”

10 The applicant complains, among other things, that the respondent made orders that were not sought for. The decision is also said to have been delivered at 8.11 PM on 22 December 2022 after the normal working hours of the board and without any notice whatsoever to the parties. It is also alleged that the board was not properly constituted for lack of quorum.



- 11 One Philemon Kiprop is recorded to have been holding brief for the respondent's secretary in the meeting that heard and determined the request for review. It is the applicant's case that there is no provision for 'holding brief' for any member of the respondent board as their duties are not delegable. Besides this procedural deficiency, the chair of board who presided over the application is alleged to be the managing partner in a firm of advocates whose clients include the procuring entity.
- 12 The application was opposed both by the respondents and the 1st interested parties.
- 13 James Kilaka, the respondent's acting secretary swore a replying affidavit on behalf of the respondent. According to Kilaka, the applicant's application seeks to fault the respondent's decision on the merits and to that extent it is an appeal disguised as an application for judicial review.
- 14 The rest of the affidavit merely chronicled the events in the request for review proceedings culminating in the impugned decision. The decision, it is sworn, was emailed to the parties the same day it was rendered.
- 15 As far as the quorum of the respondent is concerned, Kilaka swore that it was quorate as it constituted three members of the respondent and this was consistent with regulation 207 (3) of the *Public Procurement and Asset Disposal Regulations, 2020*.
- 16 Philemon Kiprop who attended the proceedings on behalf Kilaka, is said to have been part of the respondent's secretariat. He therefore did not constitute the respondent's panel that considered the request for review.
- 17 As far as the allegation that chairperson was the managing partner in a firm of advocates that represents the procuring entity, amongst other entities, Kilaka swore that the source of that information was not disclosed and as such, the deposition in respect of which this allegation was made ought to be expunged from the applicant's affidavit. In any event the chairperson of the respondent had not been served and as such no orders can be made against her without a hearing. Further, Kilaka had confirmed from the 2nd respondent that the chairperson of the respondent did not receive any briefs from the 2nd respondent while the request for review was pending for determination.
- 18 On the question as to the time the decision was rendered, Kilaka has sworn that according to regulation 211 of the Regulations, the secretary and the chairperson of the review board may agree to sit on any day and at such time other than the normal working days and the official business hours of between 8.00 AM and 5.00 PM. Since physical hearings have been dispensed with, the requests for review have hitherto been considered outside the official working hours taking into account that members of the board do not serve on full time basis and also in order to meet the strict timelines set for determination of such requests. The respondent is strained further by the fact that only eight members out of the required fifteen members are available. The term for the rest of the member has expired and, so far, they have not been replaced.
- 19 Kilaka defended the respondent's decision as being reasonable, rational and lawful and, in any event, intra vires the *Public Procurement and Asset Disposal Act*.
- 20 On behalf of the 1st interested party, Jude Nthiwa swore a replying affidavit in which she described herself as the 1st interested party's consumer sales manager.
- 21 Like Kilaka, Nthiwa defended the respondent's decision. On the allegation of the chairperson of the respondent being conflicted, Nthiwa swore that no basis had been given for the information and, in any event, the issue was not raised during the proceedings before the respondent.



- 22 As far as the question of quorum is concerned, she deposed that the secretary to the respondent is not a member of the board because according to section 28(3) and 29 of the *Public Procurement and Asset Disposal Act* the respondent merely provides secretarial and administrative support.
- 23 The replying affidavit on behalf of the 2nd and 3rd interested parties was sworn by Joash Asaya who identified himself as “the manager, procurement”. By and large the two interested parties supported the application.
- 24 As far as accessing the e-portal by the 1st interested party is concerned, Nthiwa swore that on the morning of 23 January 2022, at 9.42 AM, Nthiwa requested the procuring entity to change the 1st interested party’s password on the e-procurement portal. The procuring entity changed the password and the change was communicated through the interested party’s official email address.
- 25 As far as the change of address of the 1st interested party is concerned, it was deposed that there has never been any official communication from the 1st interested party that it changed its address. The information regarding the change of password was sent to the 1st interested party through its email address registered on the 2nd interested party’s e-portal. Accordingly, the 1st interested party was to blame for the technological hitches that arose and therefore could not benefit from mistakes of its own making.
- 26 In considering the application before court, the respective parties’ pleadings, affidavits and submissions, one ground that has stood out and on which this application hinges is what I understand to be the ground of bias. This ground said to have vitiated the respondent’s decision would fall under the judicial review grounds of illegality and procedural impropriety.
- 27 The deposition that the chairperson of the respondent and who sat in that capacity in the proceedings that culminated in the impugned decision is the managing partner in the firm of advocates of Messrs. NOW Advocates LLP has not been controverted. The evidence that the said firm of advocates represents the procuring entity has also not been controverted.
- 30 What has been contested is not whether the respondent’s chairperson’s firm of advocates represents the 2nd interested party but the applicant’s source of such information. I find this to be a rather lame answer to the question of bias for the reason that it would have been easier for the respondent or its chairperson to deny the allegations of their advocate-client relationship, if such relationship does not exist rather than question how the applicant came about this information.
- 31 In any event, it was stated in the applicant’s affidavit that the evidence of the relationship between the procuring entity and the chairperson of the respondent is available on the chairperson’s firm of advocates’ website which has, among other information, the portfolio of its clients. The 2nd interested party has been named as one such client.
- 32 In light of these uncontroverted facts, it would be legitimate to conclude that the chairperson of the respondent had some degree of interest in the proceedings before her to the extent that her clients were the respondents in those proceedings. That being the case, she ought to have declared her interest at the earliest opportunity possible as she was bound to do under regulation 212 of the *Public Procurement and Asset Disposal Regulations*, 2020.
- 33 This regulation reads as follows:
- 212.
- (1) Where any member of the Review Board has a direct or indirect interest in any matter before the Review Board, he or she shall declare his or her interest in the matter and



shall not participate in the hearing or decision-making process of the Review Board in relation to that particular matter.

(2) Such a disclosure shall be recorded in a conflict of interest disclosure register.

34 The chairperson not only failed to declare her interest but she also participated in the decision making process. Breach of regulation 212 of the regulations brings into question the legality of the decision that was thereby made. Considering that the chair was also linked to one of the parties in the proceedings in an advocate-client relationship it is difficult to accept that the process by which the impugned decision was arrived at was fair. The process smacked of procedural impropriety. These two grounds of judicial review of illegality and procedural impropriety were explained by Lord Diplock in the English case of *Council of Civil Service Unions versus Minister for the Civil Service* (1985) AC 374,410 in the following terms:

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.

“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.”

35 I am minded that the decision given was against the respondents but as far as the rule against bias is concerned, it does not matter that the person making the impugned decision may have ruled against the party to which he or she is related. The decision will not stand because it is not possible to read the mind of the decision maker as much as he or she may not be conscious of his interest in the matter. This question was addressed in *Metropolitan Properties Co (F G C) Ltd v Lannon and others* (1968) 3 ALL ER 304.

36 The facts of the case were that three tenants in a block of flats in Oakwood Court, West Kensington, London, applied to the rent officer to register a fair rent for each of the flats under the Rent Act 1965, the landlords having proposed to increase the rents.

37 The landlords objected to the rent officer's determination and applied to the rent assessment committee. The chairman of the committee was a solicitor; he lived with his father, who was a tenant at Regency Lodge, the landlord of which was an associate company belonging to the same group as the landlords of Oakwood Court.

38 The chairman's firm had from time to time acted for other tenants in Regency Lodge who were in dispute with their landlord on matters similar to those of the present case, and the chairman had himself assisted in writing a letter to the rent officer making representations on behalf of this father.

39 The committee fixed as the fair rent in respect of each flat an amount that was not only below the amounts put forward by the experts called at the hearing on behalf of the landlords and the tenants but also below those put forward by the rent officer and those offered by the tenants.



40 On appeal by the landlords from an order of the Divisional Court dismissing their appeal refusing to grant an order of certiorari quashing the committee's decision on the ground of bias on the part of the chairman, the appeal was allowed. It was held that the solicitor ought not to have sat as the chairman of the committee. While addressing the rule against bias in his judgment, Lord Denning noted, page 310, as follows:

A man may be disqualified from sitting in a judicial capacity on one of two grounds. First, a "direct pecuniary interest" in the subject-matter. Second, "bias" in favour of one side or against the other.

"So far as bias is concerned, it was acknowledged that there was no actual bias on the part of Mr Lannon, and no want of good faith. But it was said that there was, albeit unconscious, a real likelihood of bias. This is a matter on which the law is not altogether clear; but I start with the oft-repeated saying of Lord Hewart CJ in *R v Sussex Justices, Ex p McCarthy* ([1923] All ER Rep 233 at p 234, [1924] 1 KB 256 at p 259.):

"... it is not merely of some importance, but of fundamental importance, that justice should both be done and be manifestly seen to be done."

In *R v Barnsley County Borough Licensing Justices, Ex p Barnsley & District Licensed Victuallers' Asscn* ([1960] 2 All ER 703 at pp 714, 715, [1960] 2 QB 167 at p 187.), Devlin LJ appears to have limited that principle considerably, but I would stand by it. It brings home this point; in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless, if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand: see *R v Huggins*; *R v Sunderland Justices* ([1901] 2 KB 357 at p 373.), per Vaughan Williams LJ Nevertheless, there must appear to be a real likelihood of bias. Surmise or conjecture is not enough: see *R v Camborne Justices, Ex p Pearce* ([1954] 2 All ER 850 at pp 8, [1955] 1 QB 41 at pp 48-51.); *R v Nailsworth Justices, Ex p Bird*. There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not enquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking: "The judge was biased." (Emphasis added).

41 So, it does not matter that the respondent may have arrived at what may ultimately be considered to have been a correct decision or that in participating and presiding over the proceedings, the chair was unconscious of a real likelihood of bias or that she was not biased against any of the parties. Of concern is what 'the right minded people' may think.

42 The decision of the respondent cannot stand for the reasons I have given. I am satisfied that the applicant merits the order for certiorari. It is hereby granted and the respondent's decision dated 22 December 2022 is hereby quashed.

43 According to section 11(1) of the *Fair Administrative Action Act*, No 4 of 2015 which the applicant has invoked in its application, one of the orders the court is entitled to make at the conclusion of judicial



review proceedings is to remit the matter back to the administrator or the tribunal, as the case may be, for reconsideration with or without directions. This section reads as follows:

11. Orders in proceedings for judicial review.

(1) In proceedings for judicial review under section 8 (1) (e), the court may grant any order that is just and equitable, including an order-

(e) setting aside the administrative action or decision and remitting the matter for reconsideration by the administrator, with or without directions;

44 Accordingly, I direct the respondent to reconsider afresh the request for review by Galana Oil Kenya Limited. The request for review shall be determined within twenty (21) days of the date of this judgment. For reasons I have given, Ms. Faith Waigwa shall not be eligible to participate in the review proceedings.

45 In view of the decision I have reached, I reserve my comments on the rest of the issues raised in this application for the reason that such comments may preempt or tend to influence the decision that the duly reconstituted review board may come to or what this honourable court may eventually decide if the respondent's decision is challenged afresh.

46 The applicant's application is allowed in the aforementioned terms. Parties will bear their respective costs. It is so ordered.

SIGNED, DATED AND DELIVERED ON 3 FEBRUARY 2023

NGAAH JAIRUS

JUDGE

