



**Lattice Security Group Limited v Director General, Public Procurement Regulatory Authority; Thika Water and Sewerage Company Ltd (Interested Party) (Judicial Review Application E021 of 2023) [2023] KEHC 23924 (KLR) (19 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23924 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
JUDICIAL REVIEW APPLICATION E021 OF 2023  
PM MULWA, J  
OCTOBER 19, 2023**

**BETWEEN**

**LATTICE SECURITY GROUP LIMITED ..... APPLICANT**

**AND**

**DIRECTOR GENERAL, PUBLIC PROCUREMENT REGULATORY  
AUTHORITY ..... RESPONDENT**

**AND**

**THIKA WATER AND SEWERAGE COMPANY LTD ..... INTERESTED PARTY**

**JUDGMENT**

**Introduction**

1. By a notice of motion dated September 5, 2023, the *ex-parte* applicant herein Lattice Security Group Limited seeks the following orders:
  - i. An order of *certiorari* to bring to this court and quash the decision to terminate the procurement proceedings of the Director General Public Procurement Regulatory Authority on tender No Thiwasco/053/DNGS/2022-2023 for the provisions of day and night guarding services through the open tender method and any decision to interfere with or to terminate the contract between the applicant and the interested party.
  - ii. An order of prohibition stopping the respondent from barring or interfering with the contract between the applicant and the interested party arising from the tender No Thiwasco/053/DNGS/2022-2023 for the provision of day and night guarding services and further from adopting, effecting, executing,



enforcing or causing the adoption, effectuation, execution and enforcement of any report or recommendations targeting tender No Thiwasco/053/DNGS/2022-2023.

- iii. All necessary and consequential orders that meets the ends of justice in the circumstances.
  - iv. Costs of the application.
2. The motion is supported by the statutory statement of facts dated September 1, 2023 and the verifying affidavit sworn on even date by Henry Kinyanjui Muroki, the Director of the *ex-parte* applicant.
  3. According to the deponent the *ex-parte* applicant participated in a procurement process and was awarded tender No. Thiwasco/053/DNGS/2022-2023 (hereinafter 'the tender') for the provisions of day and night guarding services through an open tender method by Thika Water and Sewerage Company Limited and a contract was made. That by a letter dated August 31, 2023 the Director General Public Procurement Regulatory Authority, terminated the procurement proceedings emanating from the tender which decision the *ex-parte* applicant contended was illegal, *ultra vires* and contrary to section 38(2) of the Public and Procurement and Asset Disposal Act, 2015. That the respondent failed to give the applicant an opportunity to make presentations contrary to section 3(a) of the Fair Administrative Action Act, 2015. No adequate notice was given to the applicant informing it of the respondents acts and the latter failed to respond to the applicant's letter dated August 28, 2023. The Applicant contended it has been greatly prejudiced having made significant investments to perform the services at the contract price of Kes 15, 651,936/=.
  4. Availled were copies of the contract entered between Thika Water Sewerage Company Limited and Lattice Security Group, the Public Procurement Regulatory Authority letter dated August 31, 2023 and the demand notice dated August 28, 2023.
  5. The respondent opposed the application in a replying affidavit sworn on September 19, 2023 by Philip Okumu, the Principal Compliance Officer, Investigation Department.
  6. According to the respondent, on July 11, 2023 it received an anonymous complaint against the interested party regarding the evaluation and award of 'the tender' herein. The complaint was that the applicant did not possess a valid license from the Communication Authority of Kenya (CAK) which was a mandatory requirement as per clause 9 of the tender document. That the respondent having conducted investigations, found the applicant did not have a valid license with the CAK, and communicated these findings to the interested party *vide* a letter dated August 31, 2023 instructing terminate the subject procurement proceedings and re-tender in strict adherence with the law.
  7. It was averred for the respondent belief that no legal right would be affected by the orders since no contract arising from the procurement proceedings had been entered into at the time of commencing the investigations as the interested party had been directed to put on hold the proceedings when the complaint was being investigated.
  8. The respondent denied any breach of the provisions of the Fair Administrative Actions Act, as the investigations were procedurally conducted and the court need not interfere. That the *ex-parte* applicant's demand notice was received and acted upon when the instant suit was filed and hence was overtaken by events.
  9. The interested party filed its replying affidavit sworn by Dr. Moses Kinya, the Managing Director, who gave a chronology of occurrence of the events that led to the filing of the suit and he appreciated the



mandate of the respondent under the law. It was averred that the interested party acted reasonably and within the confines of the law in so far as the proceedings are concerned.

10. The motion herein was canvassed through written submissions which all parties filed.

#### **Ex-parte Applicant's submissions**

11. Mr. Kimani, counsel for the Applicant submitted that the only issue for determination is whether the decision of the Respondent in its letter dated August 31, 2023 was *ultra vires*, illegal and contra-statute. It was submitted that this court ought to limit itself to the process and manner in which the impugned decision was arrived at, and not interrogate the contents and or justification thereof. The case cited was *Edwin Harold Dayan Dande & 3 others vs the Inspector General, National Police Service & 5 others* Petition No 6 (E007 of 2022) where the supreme Court held " if a party files a suit under the provision of order 53 of the *Civil Procedure Rules*...then the court can only limit itself to the process and manner in which the decision complained of was reached or action taken and not the merits of the decision."
12. Mr. Kimani submitted the impugned decision was made contrary to section 38(2) of the *Public Procurement and Disposal Act* which required the *ex-parte* applicant be allowed to make a representation. That the wording of section 38(2) is mandatory.
13. It was further submitted that the letter dated July 18, 2023 reached the interested party on July 25, 2023, after the contract had been signed between the parties and therefore, the applicant being an affected party ought to have been served with the said letter.

#### **Respondent's submissions\*\***

14. Mr. Ngalatu, counsel for the respondent submitted that the impugned investigations were conducted in strict compliance with the law, to wit section 35 of the Act which allows the Authority to undertake investigations at any reasonable time by examining the records, accounts of the procuring entity and contractor, supplier or consultant relating to procurement or disposal proceedings.
15. It was submitted for the Respondent that specialised bodies should not be interfered with in the exercise of statutory mandate and the court will only exercise its supervisory role over them if the decision or administrative action is tainted with illegality, irrationality or procedural impropriety (see *Kenya Pipeline Company Limited v Hyosung Ebara Company Limited & 2 others* (2012) eKLR).

#### **Interested Party's submissions**

16. Mr. Kimaiti, counsel for the interested party uploaded submissions with missing pages. Only pages 1 and 3 were received. He submitted that judicial review is not concerned with the merit but the process and procedure of arriving at the decision. That the interested party upheld the rule of law by conforming to the principles of public procurement.

#### **Analysis and determination**

17. I have considered the notice of motion application dated September 5, 2023, the affidavits both in support and in opposition thereto together with the submissions by learned counsel. The issues for determination are;
  - i. whether the orders sought are merited?
  - ii. who bears the costs?



18. Article 227 (1) of the *Constitution* provides that “When a state organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.”
19. The respondent argues the interested party failed to act in strict adherence to the law in securing the successful bidder of the tender herein as a result of which an anonymous complaint was made and that invoked the respondent’s mandate to investigate and communicate the findings vide the letter of August 31, 2023.
20. On the Other hand, the applicant contends that the respondents decision was illegal, *ultra-vires* and contra-statute and hence the judicial review proceedings.
21. An order of certiorari nullifies an unlawful decision or enactment, while an order of prohibition restrains a public body from acting in the manner specified in the order to restrain a threatened or impending unlawful conduct.
22. The judicial review orders sought call for the court to review the manner in which the decision by the Respondent was made.
23. The circumstances under which orders of certiorari and prohibition can be issued were stated by the Court of Appeal in *Republic v Kenya National Examinations Council ex parte Gathenji & others*, [1997] eKLR where the court held: - “Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal or a wrong decision on the merits of the proceedings...Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”
24. Sections 4 (3) and (4) of the *Fair Administrative Actions Act* 2015 provides:
  - (3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-
    - a. prior and adequate notice of the nature and reasons for the proposed administrative action;
    - b. an opportunity to be heard and to make representations in that regard;
    - c. notice of a right to a review or internal appeal against an administrative decision, where applicable;
    - d. a statement of reasons pursuant to section 6;
    - e. notice of the right to legal representation, where applicable;
    - f. notice of the right to cross-examine or where applicable; or



- (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.
  - (4) The administrator shall accord the person against whom administrative action is taken an opportunity to-
    - a. attend proceedings, in person or in the company of an expert of his choice;
    - b. be heard;
    - c. cross-examine persons who give adverse evidence against him; and
    - d. request for an adjournment of the proceedings, where necessary to ensure a fair hearing.
25. Further sections 38(1) and (2) of the *Public Procurement and Asset Disposal Act*, 2015 provide: -
- (1) If, after considering the report of an investigator, the Director-General is satisfied that there has been a breach of this Act, the Regulations or any directions of the Authority, the Director-General may, by order, do any one or more of the following—
    - a. direct the procuring entity to take such actions as are necessary to rectify the contravention;
    - b. terminate the procurement or asset disposal proceedings;
    - c. prepare and submit a summary of the investigator's findings and recommendations to the relevant authorities for action; or
    - d. require the procuring entity to transfer procuring responsibilities of the subject procurement to another procuring entity.
  - (2) Before making an order under subsection (1), the Director-General shall give the following persons an opportunity to make representations—
    - a. the procuring entity; and
    - b. any other person whose legal rights the Director-General believes may be adversely affected by the order.
26. The above provisions are very clear on what the respondent ought to have done, the procedure is well laid out and ought to be followed. The concern of this court is whether the said procedure was followed. It is evident that the applicant was a successful party to the bid and was a party who was to be directly affected by the decision of the respondent. The respondent was therefore obligated to serve a notice to the Applicant and require it to make presentations in the cause of investigations.
27. The Respondent argued that it felt there was no party that would be affected by its decision as it had halted further proceedings with the tender and had acted in due compliance with the law.
28. From the record, it is evident the respondent's letter dated July 18, 2023 reached the Interested Party on July 25, 2023, well after the interested party and the applicant had executed the contract of service. The letter by the respondent was thus not disobeyed as the contract was already in place and thus any adverse decision by the Respondent would affect the applicant.



29. Article 47(1) and (2) of *the Constitution* provides as follows:
1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
  2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
30. This court finds the applicant was not accorded a right to be heard before the respondent irrationally made its decision.
31. An order of *certiorari* is issued where a public authority has acted without or in excess of its jurisdiction; where the decision is based on some illegality or where the authority relied on irrelevant matters in reaching the decision. In *Republic v Public Procurement Administrative Review Board & 2 others* [2019] eKLR Mativo J. held that “the power of the court to review an administrative action is extraordinary and is exercised sparingly, in exceptional circumstances where illegality, irrationality or procedural impropriety has been proved...”
32. In the instant case, the remedies of *certiorari* and prohibition are merited, to quash the decision of the respondent *vide* the letter dated August 31, 2023 and prohibit the respondent from proceeding with the illegal decision.
33. In the upshot, this court finds the *ex-parte* notice of motion dated September 5, 2023 is meritorious and make the following orders:
- i. An order of *certiorari* be and is hereby issued that the decision to terminate the procurement proceedings by the respondent *vide* letter dated August 31, 2023 on tender No. THIWASCO/053/DNGS/2022-2023 for the provision of day and night guarding services, and any decision to interfere with or to terminate the contract between the *ex-parte* applicant and the interested party, is hereby removed into this court and quashed.
  - ii. An order of prohibition be and is hereby issued stopping the respondent from barring or interfering with the contract between the *ex-parte* Applicant and the interested party arising from tender No. Thiwasco/053/DNGS/2022-2023 for the provision of day and night guarding services.
  - iii. Each party to bear their own costs.

Orders accordingly.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU**

**THIS 19TH DAY OF OCTOBER 2023.**

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**P. MULWA**

**JUDGE**

**In the presence of:**

Duale – Court assistant

Ms. Kanyoni h/b for Mr. Muchiri - for the Ex-parte Applicant



Mr. Ngalatu - for the Respondent

Ms. Nyongesa h/b for Mr. Kimaiti - for the Interested Party

