Republic v Kenya Electricity Generating Company PLC; Association of Insurance Brokers of Kenya (Ex parte) (Application E064 of 2024) [2024] KEHC 13836 (KLR) (Judicial Review) (20 October 2024) (Ruling)

Neutral citation: [2024] KEHC 13836 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

APPLICATION E064 OF 2024

J NGAAH, J

OCTOBER 20, 2024

BETWEEN

REPUBLIC ..... APPLICANT

AND

KENYA ELECTRICITY GENERATING COMPANY PLC ..... RESPONDENT

AND

ASSOCIATION OF INSURANCE BROKERS OF KENYA ..... EX PARTE

RULING

1. Before this Honourable Court is the applicant's motion dated 27 May 2024 filed under Articles 10 and 47 of *the Constitution*, Sections 8 and 9 of the *Law Reform Act* Cap. 26; Sections 7, 8, 9, 10 and 11 of the Fair Administration Action Act, 2015 and Order 53 rules 1(1), (2) and (4) of the Civil Procedure Rules. The orders sought have been couched as follows:

> "a) An Order of certiorari quashing the decision by the Respondent contained in Tender Documents for Tender No.KGN-LEG-004-2024 Tender for the Provision of Insurance Services - Underwriters for the Years 2024-2026 and Tender No.KGN-LEG-005-2024 Tender for the Provision of Insurance Brokerage Services for the Years 2024-2026.
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> b) An Order of Prohibition, prohibiting and stopping the Respondent, from implementing the decision contained in Tender No. KGN-LEG-005-2024 Tender for the Provision of Insurance Brokerage Services for the Years 2024-2026.

c) An Order of Mandamus compelling the Respondent to republish another restricted Tender where all policies in Tender No.KGN-LEG-004-2024 Tender for the Provision of Insurance Services - Underwriters for the Years 2024-2026 are withdrawn and instead transferred to Tender No.KGN-LEG-005-2024 Tender for the Provision of Insurance Brokerage Services for the Years 2024-2026 for pre-qualified insurance brokers to bid and participate in."

2. The application is based on a statutory statement dated 20 May 2024 and an affidavit sworn on even date by Mr. Eliud Adiedo, verifying the facts relied upon. Mr. Adiedo has introduced himself in the affidavit as the chief executive officer o No.KGN-LEG-004-2024 Tender for the Provision of Insurance Services - Underwriters for the Years 2024-2026 f the applicant which he has described as "the umbrella trade association for all insurance brokers in Kenya."

3. According to the affidavit and the pleadings filed by the applicant, the Respondent floated tenders for provision of insurance brokerage services. The tenders were advertised in the Month of May, 2024 and they were more particularly described as "Tender No.KGN-LEG-004-2024 Tender for the Provision Of Insurance Services - Underwriters Only for the Years 2024-2026" and "Tender No. KGN-LEG-005-2024 Tender for the Provision Of Insurance Brokerage Services for the Years 2024-2026".

4. Several members of the Applicant participated in the pre-qualification for the Tender exercise at the end of which sixteen of these members were prequalified for the tender.

5. The applicant has described the tenders as "a collusion" orchestrated to lock out insurance brokers from participating in Tender No. KGN-LEG-005-2024 Tender for the Provision of Insurance Brokerage Services for the Years 2024-2026. In the past, it has been sworn, the Respondent procured insurance services through the brokers for all the policies and, as far as I understand the applicant, Tender No.KGN-LEG-004-2024 Tender for the Provision of Insurance Services - Underwriters for the Years 2024-2026 is such a Tender where insurance services were procured through insurance brokers.

6. Further, the Public Procurement Regulatory Authority published a circular, no. 03/2023 which, according to the applicant, provides that eligible and qualified insurance service providers shall be given equal opportunity to bid. It follows that, any tenders that purports to locks out insurance brokers is not fair, equitable, transparent, competitive and cost effective and is, in any event, contrary to Article 227 (1) of *the Constitution* and Section 3 of the Public Procurement and Assets Disposal Act, 2015 (hereinafter also referred to as "the Act").

7. Mr. Adiedo has been advised by his counsel on record, which advice he verily believes to be true, that the impugned tenders do not conform to sections 9, 58, and 70 of the Pubic Procurement and Asset Disposal Act which enjoins procuring entities such as the respondent to adopt standard Tender documents developed and issued by the Public Procurement Regulatory Authority(hereinafter also referred to as "the Authority"). The applicant's contention is thatthe provisions in the impugned Tender Documents are inconsistent with the provisions of the Standard Tender Documents provided by the Public Procurement Regulatory Authority.

8. The applicant contends that as drafted, the impugned Tender documents allow the underwriters to submit bids that are lower than those submitted by insurance brokers and the ripple effect of this is to edge the applicant's members out of the insurance industry. This will also stifle fair competition and, therefore, is contrary to Article 227 of *the Constitution*.

9. According to the applicant, not all stations for the Procuring Entity are included in the impugned tenders as part of the risks to be covered. The risks for the omitted stations are alleged to be a reserve of the underwriters to exclusion of the applicant's members.

10. The applicant also claims that the Respondent's action of splitting policies into categories was not communicated to the Insurance Bidders during the pre-qualification process and, for this reason, the entire Tender process is opaque, lacking in fairness and is inequitable.

11. On the 16 May 2024, the applicant wrote to the Respondent to have the respondent address the applicant's concerns before the Tender submission closing date of 23 May 2024. The Respondent responded vide its letter dated 21 May 2024. However, the applicant found the respondent's response not to be satisfactory and it is for this reason that the applicant has opted to file the instant suit.

12. The respondent has opposed the motion and a replying affidavit to this effect has been sworn by Mr. Daniel Kitili Nzioka who has introduced himself as the insurance manager of the respondent. According to Mr. Nzili, on 5 March 2024, the Respondent advertised for Prequalification for Provision of Insurance Services - Underwriters only for 2 years (2024-2026); this was in Tender Number KGN-LEG-001- 2024. The eligibility for prequalification was what has been described as "Open National". On even date, the Respondent by Tender Number KGN-LEG-002- 2024 also advertised for Prequalification for Provision of Insurance Brokerage Services for 2 years. The eligibility was for "Citizen Contractors & AGPO firms".

13. The bids for both tenders were submitted and closed on 21 March 2024 and were opened on the same date at 10.30 a.m. The Respondent went through the required processes and letters dated, 19 April 2024, of award and regret in respect of Tender Number KGN-LEG-002-2024 for Prequalification for Provision of Insurance Brokerage Services were issued. The letters, dated 24 April 2024, for award and regret in respect of Tender Number KGN-LEG-001-2024 for Prequalification for Provision of Insurance Brokerage Services (Underwrites only) were also issued.

14. On 13 May 2024, the Respondent sent to the prequalified firms, the Tender for the Provision of Insurance Brokerage Services for the years 2024-2026 (RESTRICTED TENDER) KGN-LEG-004-2024. On the same date, the Respondent also sent to the prequalified underwriters the Tender for the Provision of Insurance Services (Underwriters Only) Restricted Tender for the years 2024-2026 KGN-LEG-005-2024. The closing date for both tenders was 23 May 2024.

15. The respondent has admitted that by a letter dated 16 May 2024, the Applicant wrote to the Respondent, seeking the respondent's intervention and review of the Tender documents for the reasons stated in the letter. In a letter dated 20 May 2024 the Respondent replied to the Applicant's letter. By an email dated 21 May 2024, the applicant wrote to the Public Procurement Regulatory Authority indicating that that its members were not satisfied with the response of the Respondent and, therefore, sought the assistance of the Authority.

16. The respondent contends that the applicant has failed to disclose to this Honourable Court that it sought the intervention and assistance of the Public Procurement Regulatory Authority and, therefore, this suit is mala fides. Further, the respondent has been informed by its Advocates on record which information the respondent verily believes to be true that the Applicant, having sought the intervention and assistance of the Public Procurement Regulatory Authority, this Honourable Court is deprived of jurisdiction to entertain the instant suit. The applicant, it is contended, ought to pursue a remedy for the alleged grievances from the Authority.

17. It is also contended on behalf of the respondent that the applicant has deliberately failed to disclose Tender No KEG-LEG-001-2024 and that the invitation for prequalification was restricted to

Underwriters only. The respondent has also urged that it has been advised by its Advocates on record that the Applicant has no standing to initiate the instant proceedings because the impugned tenders were tenders restricted to prequalified firms and the Applicant is not prequalified for provision of insurance brokerage services or an underwriter and, therefore, lacks the requisite locus to file these proceedings.

18. The Respondent received bids for the tenders for provision of Insurance Brokerage Services as well as provision of Insurance Services (Underwriters only) and proceeded to evaluate the bids received from the prequalified bidders. The Respondent has also issued the bidders for the Tender for Provision of Insurance Services (Underwriters) with the letters of intention to Award as well as regret letters. The evaluation process having been completed, the respondent contends that this suit has been overtaken by events.

19. Considering that this Honourable Court's jurisdiction to entertain and determine the instant motion has been questioned by the respondent, I invited parties to make submissions on this issue before proceeding any further towards disposal of the applicant's application. Whenever an issue on jurisdiction of the court to dispose of a matter is raised, it is necessary that the issue is determined in limine since the determination may as well dispose of the matter.

20. According to the respondents, since the applicant had sought the intervention of the of the Public Procurement Regulatory Authority to address what it considered as its grievances against the impugned tenders, the applicant was bound to exhaust alternative dispute resolution mechanisms in accordance with the *Public Procurement and Asset Disposal Act*, 2015 before moving this Honourable Court. In this submission, the applicant cited section 9 of the *Fair Administrative Action Act* which, among other things, provides that this court shall not review an administrative action or decision under that Act unless the mechanisms, including internal mechanisms for appeal or review and all remedies available under any other written law, are first exhausted. This provision of the law espouses the doctrine of exhaustion and it is said to have been applied by this Honourable Court in Republic v Independent Electoral and Boundaries Commission (IEBC) Ex Parte National Super Alliance (NASA) Kenya & 6 others (2017) eKLR) and by the Court of Appeal in the Speaker of National Assembly vs Karume (1992) KLR 21.

21. According to the respondent, the applicant's alleged grievances could properly have been disposed of by the Public Procurement Regulatory Authority under sections 8, 9, 35 and 38 of the *Public Procurement and Asset Disposal Act*. The respondent has urged the Public Procurement Regulatory Authority is the forum that would normally deal with issues relating to procurement issues that are not subject to review by the Public Procurement Administrative Review Board.

22. The applicant's response to the question that applicant has no locus standi is that Article 258(1) of *the Constitution* takes away the notion of locus standi which meant that only an aggrieved party demonstrating damage or harm, can approach the court seeking legal remedy. The applicant submits that under Article 258(2)(c) and (d) of *the Constitution*, the Applicant is within its right to institute the instant motion on behalf of its members to ensure respect, upholding and defence of *the Constitution* and the law. The applicant has also invoked Article 22(1) (2) of *the Constitution* to the effect that any person can institute proceedings claiming the violation of rights and fundamental freedoms, on behalf of another person, or on behalf of a group or in the public interest. In support of this argument the applicant cited the Supreme Court decision in case Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others (2014) eKLR, and urged that the suit has been filed to advance and protect the interest of the Applicant's members who participated in the Tender process so that the continued violation of their respective constitutional rights can be stopped.

23. In response to the respondent's argument that the applicant had initiated alternative dispute resolution mechanisms at the Public Procurement Regulatory Authority, the applicant has urged that its access to justice is guaranteed under Article 48 of *the Constitution* notwithstanding the applicant's communication to the Authority. In any event, the applicant's claim is based on violation of *the Constitution* which claim would be outside the province of the Authority.

24. The applicant has further urged that Section 28(1) (a) and 167(1) of the *Public Procurement and Asset Disposal Act* does not oust this Honourable Court's jurisdiction to hear and determine matters respecting violations of *the Constitution* in public procurement because the Public Procurement Administrative Review Board's mandate is limited to review, hearing and determination of tendering and asset disposal disputes between a candidate or a tenderer and a procuring entity.

25. The applicant has relied on Republic versus Kenya Maritime Authority Exparte Okiya Omtatah Okoiti (Miscellaneous Application No. 339 of 2019) where it was held that the High Court may, in exceptional circumstances, find that the exhaustion requirement would not serve the values enshrined in *the Constitution* or law and permit the suit to proceed before it.

26. I must say at the outset that, having considered the application and the submissions filed by the respective parties, I find the applicant's application rather intriguing. I say so because as much as the applicant complains that the Tender documents in respect of the impugned tenders are couched in such terms as to lock the applicant's members, it has been sworn in the affidavit verifying the facts relied upon that the applicant's members who opted to participate in the Tender not only participated but sixteen of them were prequalified. This fact is borne out in paragraph 6 of the affidavit where it has been sworn as follows:

> "6. A number of members of the Applicant participated in the pre-qualification by the Respondent carried out in Prequalification For Provision Of Insurance Brokerage Services For Two YearS (2024-2026) advertised in the month of March 2024 and 16 brokers were prequalified for the restricted Tender as above.

27. If by the applicant's own admission its members participated in the impugned Tender I am not satisfied that I have found an answer to the primary question in the applicant's application that the Tender documents or the terms thereof were couched in such a way as to exclude the applicant's members from participating in the Tender or tenders.

28. A related question whose answer does not come out from the material before court is why the applicants' members who participated in the Tender or Tender could not take advantage of section 167(1) of the *Public Procurement and Asset Disposal Act* and request for review of the procuring entity's decision to float the Tender or tenders in the form and manner in which was floated. This provision of the law clothes a candidate or tenderer who has either suffered or risks suffering loss or damage as a result of a breach of duty on the party of the procuring entity to seek reprieve from the Public Procurement and Administrative Review Board. It reads as follows:

> 167. Request for a review
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> (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 infra 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.

29. This provision of the law is fairly clear that the applicant's members who qualified as candidates or tenderers in the impugned tenders need not have waited for the applicant's intervention to address their grievances against the procuring entity. They had every right to take the matter into their own stride and request for a review before the Public Procurement Administrative Review Board.

30. Yet even in the face of the clear provisions of section 167(1) of the Act, the applicant submits that it had to step in and file suit, to protect the interests of its members who participated in the impugned tenders. for the avoidance of doubt, the applicant submitted as follows:

> "4. Flowing from above and as clearly stated in the pleadings as filed by the Applicant, this suit has been filed to advance and protect the interest of the Applicant's members who participated in the Tender process so that the continued violation of their respective constitutional rights can be stopped. The locus standi of the Applicant can therefore not be challenged given the clear provisions of *the constitution*."

31. All I can say is that this submission clearly flies in the face of section 167(1) of the Act according to which, as noted, a candidate or tenderer is entitled to seek an appropriate remedy before the Public Procurement Administrative Review Board if there is any breach of duty on the part of the procuring entity.

32. This, however, does not in any way suggest that the applicant cannot intervene and protect its members' rights whenever they are violated or threatened with violation in a procurement process. A window for the applicant's or any other person's intervention in such circumstances is open in section 35 (1) and (2) of the *Public Procurement and Asset Disposal Act*. The two subsections in section 35 read as follows:

> 35. Investigations
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> (1) The Authority, may undertake investigations, at any reasonable time, by among other things examining the records and accounts of the procuring entity and contractor, supplier or consultant relating to the procurement or disposal proceeding or contract with respect to a procurement or disposal with respect to a State organ or public entity for the purpose of determining whether there has been a breach of this Act or the Regulations made thereunder.
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> (2) An investigation under sub-section (1) may be initiated by the Authority or on request in writing by a public institution or any other person.

33. The authority referred to is, of course, the Public Procurement Regulatory Authority established under section 8(1) of the Act. According to section 9 (1) (a) and (h) of the Act, its functions include monitoring, assessing and reviewing the public procurement and asset disposal systems to ensure that they respect the national values and other provisions of *the Constitution*, including Article 227 and make recommendations for improvements. The Authority also has the function of investigating and acting on complaints received on procurement and asset disposal proceedings from procuring entities, tenderers, contractors or the general public that are not subject of administrative review.

34. Once a request for investigations has been made and investigations undertaken in accordance with section 35 (1) and (2) as read with section 9 of the Act, a report on the investigations is made under section 37 of the Act. And according to section 38, upon considering the report, the Director General may make an order after giving the procuring entity and any other opportunity to be heard. The section reads as follows:

38. Order by the Director-General

(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.

35. Section 39, on the other hand , accords the procuring entity and any other person entitled to make representation the right to seek judicial review reliefs against the Director General's order. The section reads as follows:

39. Request for a Judicial review

The procuring entity and any other person who was entitled to be given an opportunity to make representations under section 38 (2) may request for Judicial Review against an order of the Board to the High Court within fourteen days after the order is made.

36. All these provisions go to show that subject to section 40 of the Act which prohibits investigation of an issue that has been determined or is pending for determination before the Public Procurement Administrative Review Board, there is an elaborate scheme laid out in the Act through which any person, including the applicant or its members who participated in the procurement process could invoke for redress of the sort of grievances which the applicant now seeks this Honourable Court to interrogate in the instant application. Most importantly, and for purposes of determination of the issue at hand, section 39 leaves no doubt on when the applicant or any other person including, as noted, the applicant's members who participated in the procurement process can move the court for judicial review.

37. Irrespective of whether it is the applicant, its members, whether or not they participated in the procurement process as candidates or tenderers, this court can only be moved for judicial review relief after a due process culminating in an order by the Director General. The only caveat is that the Public Procurement Regulatory Authority route is only open if the question before the Authority has not been determined by the Public Procurement Administrative Review Board or is not pending for determination before the Board.

38. Against this background, there should be no doubt that the applicant was always bound by section 9 of the *Fair Administrative Action Act* and, accordingly, enjoined to follow the appellate or review

mechanisms spelt out in the Act before approaching this court. Section 9 (2), in particular, provides in rather peremptory terms that 'the High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.'

39. There is uncontroverted evidence that indeed the applicant, by its communication to the Authority dated 21 May 2024, had initiated the process of investigation of its complaints by the Authority in line with the scheme laid out in the Act for resolution of the kind of complaints that have now been escalated to this Honourable. Rather than pursue that process to its logical conclusion, the applicant sought to institute parallel proceedings in this Honourable Court.

40. It is, of course, trite that the existence of an alternative remedy is never enough to oust jurisdiction in judicial review (see Leech versus Deputy Governor of Parkhurst Prison (1988) AC 533 per Lord Bridge at 562D). However, it has been held in R versus Inland Review Commissioners, ex p Preston (1985) AC 835 that:

> " A remedy by way of judicial review is not to be made available where an alternative remedy exists...Judicial review is a collateral challenge: it is not an appeal. Where parliament has provided by statute appeal procedures, as in taxing statutes, it will only be very rarely that the courts will allow the collateral process of judicial review to be used to attack an appealable decision..."

41. Addressing the same issue in R versus Peterkin, ex p Soni (1972) Imm AR 253 Lord Widgery CJ had this to say:

> " Where Parliament has provided a form of appeal which is equally convenient in the sense that the appellate tribunal can deal with the injustice of which the applicant complains this court should in my judgement as a rule allow the appellate machinery to take its course. The prerogative orders form the general residual jurisdiction of this court whereby the court supervises the work of inferior tribunals and seeks to correct injustice were no other adequate remedy exists, but both authority and common sense seem to me to demand that the court should not allow its jurisdiction under the prerogative orders to be used merely as an alternative form of appeal when other and adequate jurisdiction exists elsewhere."

42. The Court of Appeal has held in the *Speaker of the National Assembly v. Karume, Civil Application No. NAI 92 OF 1992* that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.

43. Thus, both the statute and precedent point to the conclusion that it is pertinent for an aggrieved party to embrace alternative remedies including appellate procedures before moving court for judicial review remedies. The reviewing courts will always be conscious that in considering whether a public body may have abused its powers, they must not abuse their own by entertaining matters which they otherwise ought not to have entertained.

44. I am minded that section 9(4) of the *Fair Administrative Action Act*, provides a window for exemption from the requirement to invoke what the Act describes as the "internal mechanisms for appeal or review" and seek for other available remedies under any other written law before moving the court for judicial review reliefs. This section is properly understood in the context of the entire section 9; the section reads as follows:

9. Procedure for judicial review.

(1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of *the Constitution*.

(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

(5) A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal. (Emphasis added).

45. It is apparent in section 9(4) that the exemption would be granted on condition that, first, an applicant's case presents what, in the eyes of the law, are "exceptional circumstances" and, second, that it is in the interest of justice that the applicant need not exhaust the available alternative remedies. In the applicant's case no attempt for the application of exemption has been made and, therefore, the question whether there are exceptional circumstances or that it is in the interest of justice that the applicant need not exhaust available remedies does not even arise.

46. for the reasons I have given, I have to reach the inevitable conclusion that the applicant's application is misconceived and an abuse of the due process of the law. It is hereby struck out, not necessarily because of want of jurisdiction by this Honourable Court, but out of deference to the body or tribunal to which parliament has entrusted the task of addressing the applicant's grievances, in the first instance. The respondent will have costs of the application. Orders accordingly.

SIGNED, DATED AND UPLOADED ON THE CTS ON 20 OCTOBER 2024

NGAAH JAIRUS

JUDGE