



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL CASE NO. 10 OF 2020**

**JAMES KARAYA T/A KAJAMU ENTERPRISES.....PLAINTIFF**

**VERSUS**

**KENYA PORTS AUTHORITY.....DEFENDANT**

**RULING**

1. This **Ruling** is in respect of the **Notice of Preliminary Objection** dated **23<sup>rd</sup> October, 2020** as raised by the Defendant that this court lacks jurisdiction to determine the suit herein, as the same has been filed contrary to the provision of **Section 167(1)** of the **Public Procurement and Asset Disposal Act No. 33 of 2015**.

2. The **Preliminary Objection** arises from the suit filed by the Plaintiff on **10<sup>th</sup> February, 2020** in which he alleges breach of contract between itself and the Defendant on **Tender No.KPA/105/2018-2019/PSM-Disposal of Stores and Boarded Assets** under the category Disposal of Steel Rails and Steel Sleepers.

3. The Defendant in its **Preliminary Objection** contests the jurisdiction of the court on the basis of the doctrine of exhaustion. The Defendant believe that the matter herein is one that should be before the Public Procurement Administrative Review Board as provided for under **Section 167(1)** of the **Public Procurement and Asset Disposal Act No. 33 of 2015**.

4. The **Preliminary Objection** was canvassed by way of written submissions and Counsel for the Plaintiff filed their written submissions on the **15<sup>th</sup> November, 2020**, while the Defendant filed their written submissions on **20<sup>th</sup> November, 2020**.

**Analysis and determination**

5. Having considered the pleadings and the written submissions of the parties, the only issue that arises for determination is whether this court has jurisdiction to determine the suit herein as filed by the Plaintiff.

6. The *locus classicus* case on jurisdiction is the case of **Owners of the Motor Vessel "Lillian S" ..Vs.. Caltex Oil (Kenya) Ltd [1989]KLR 1**, where Justice Nyarangi of the Court of Appeal (As he then was) held as follows: -

***"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."***

7. The Defendant has raised a jurisdictional objection based on the doctrine of exhaustion. The Defendant claims that the Plaintiff has not exhausted the alternative dispute mechanism which is available under **The Public Procurement and Asset Disposal Act No. 33 of 2015**.

8. The Plaintiff has averred that the suit herein is way past the tendering process. The Plaintiff states that the Defendant advertised for the tender **No.KPA/105/2018-2019/PSM - Disposal of Stores and Boarded Assets** under the category Disposal of Steel Rails and Steel Sleepers, and upon emerging the successful bidder and/or tenderer he was sent various letters of notification of the award dated **22<sup>nd</sup> July, 2019** and **26<sup>th</sup> August, 2019**. The Plaintiff sent a letter of acceptance on the **26<sup>th</sup> July, 2019** and paid the requisite consideration of **Kshs.10,117,000.00/=** indicated on the notification of award dated **22<sup>nd</sup> July, 2019**.

9. In the performance of his duty as per the letter of award dated **22<sup>nd</sup> July, 2019**, the Plaintiff has complained of various setbacks that he

claims have amounted to a breach of contract.

10. The Plaintiff, thus contends that it is rightfully before this court as the Public Procurement Administrative Review Board does not have jurisdiction to entertain breach of contract claims. The Plaintiff states that the powers of the Public Procurement Administrative Review Board are limited to the tendering process.

11. It is now trite law that once the constitution or statute confers jurisdiction upon a Court, Tribunal, Person or Body or any Authority, that jurisdiction must be exercised in accordance with Constitution or Statute.

12. In the case of **Samuel Kamau Macharia & Another ..Vs.. Kenya Commercial Bank Limited & 2 Others [2012]eKLR**, the Supreme Court stated that: -

*“...A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law...”*

13. The Defendant states that the Plaintiff has not exhausted provisions of **Section 167(1)** of the **Public Procurement and Asset Disposal Act No. 33 of 2015**, which provides that: -

*“ 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.”*

14. The Plaintiff in his submission states that there is a contract and they are not bound by the provisions of **Section 167(1)** of the **Public Procurement and Asset Disposal Act No.33 of 2015**. The Plaintiff and Defendant in their pleadings have not attached any contract that was signed between the parties. All that is before the Court are letters of notification from the Defendant dated **22<sup>nd</sup> July, 2019** and **26<sup>th</sup> August, 2019** respectively to the Plaintiff and a letter of acceptance from the Plaintiff dated **26<sup>th</sup> July, 2019** to the Defendant.

15. **Section 87(1), (2)** as read with **sub-section (4)** of the **Public Procurement and Asset Disposal Act No.33 of 2015**, provides *inter alia* that: -

*1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.*

*2) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.*

*3) .....*

*4) For greater certainty, a notification under subsection (1) does not form a contract nor reduce the validity period for a tender or tender security.*

16. As it stands, the Plaintiff is a Successful bidder and/or tenderer under the provisions of **Section 87(4)** of the **Public Procurement and Asset Disposal Act No.33 of 2015** as there is no written and signed contract placed in the records of the court.

17. In the case of **EPCO Builders Ltd ..Vs.. County Government of Kilifi [2017] eKLR** the court stated that: -

*“...The plain meaning of section 87 (4) is that a notification for an award to the successful bidder cannot be taken to be a binding contract...”*

18. One is only exempted from proceeding at the Public Procurement Administrative Review Board as provided for under **Section 167(4)** **Public Procurement and Asset Disposal Act No.33 of 2015** that provides:-

*4) The following matters shall not be subject to the review of procurement proceedings under subsection (1): –*

*(a) the choice of a procurement method;*

*(b) a termination of a procurement or asset disposal proceedings in accordance with Section 62 of this Act; and*

*(c) where a contract is signed in accordance with Section 135 of this Act.*

19. There being no written and signed contract annexed by either party, the exemption under **Section 167(4)(c)** does not apply to the Plaintiff. The Plaintiff having fulfilled conditions set on the letter of notification as sent by the Defendant does not amount to being a

contract. The Contract must be in writing as provided for under **Section 135(4) Public Procurement and Asset Disposal Act No.33 of 2015** that:-

***(4) No contract is formed between the person submitting the successful tender and the accounting officer of a procuring entity until the written contract is signed by the parties.***

20. The only parties who have *locus* under **Section 167 (1)** before the Public Procurement Administrative Review Board to challenge an award or alleged breach on the part of a procuring entity or disposal entity are a candidate or a tenderer. The terms “*candidate*” and “*tenderer*” are defined under Section 2 of the said Act as follows:

***“..candidate” means a person who has obtained the tender***

***documents from a public entity pursuant to an invitation notice by a procuring entity..”;*** and

***“tenderer” means a person who submitted a tender pursuant to an invitation by a public entity”***

21. The Plaintiff herein is neither a candidate nor a tenderer but a successful bidder and/or tenderer who has already been awarded tender **No.KPA/105/2018-2019/PSM-Disposal of Stores and Boarded Assets** under the category Disposal of Steel Rails and Steel Sleepers, hence the provisions of **Section 167(1)** of the **Public Procurement and Asset Disposal Act No.33 of 2015** do not apply.

22. From the above analysis, I find that the **Preliminary Objection** dated **23<sup>rd</sup> October, 2020** is not merited. Accordingly, the same is dismissed with costs to the Plaintiff/Respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 10TH DAY OF MARCH, 2021.**

**D. O. CHEPKWONY**

**JUDGE**

**10/3/2021**

**Order**

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15<sup>th</sup> March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all Judgments and Rulings be pronounced in open Court.

**JUSTICE D.O. CHEPKWONY**