



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

CASE NUMBER: HCJR/E027/ 2021

IN THE MATTER OF AN APPLICATION FOR THE ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF THE DECISION BY PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD IN APPLICATION NO. 18 OF 2021

AND

IN THE MATTER OF THE FAIR AND ADMINISTRATIVE ACTIONS ACT, 2015

AND

IN THE MATTER OF TENDER NO. TNT/049/2019-2020 TENDER FOR THE PROVISION OF ONSITE SUPPORT FOR IFMIS E-PROCUREMENT AND INDEPENDENT INTEGRATED FINANCIAL MANAGEMENT SYSTEM FOR

SEMI AUTONOMOUS GOVERNMENT AGENCY (SAGA) (HEREINAFTER THE “TENDER”)

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD.....RESPONDENT

THE PRINCIPAL SECRETARY, THE NATIONAL TREASURY AND PLANNING.....1ST INTERESTED PARTY

THE NATIONAL TREASURY AND PLANNING.....2ND INTERESTED PARTY

KINGSWAY BUSINESS SYSTEMS LIMITED IN CONSORTIUM WITH KOBBYTECHNOLOGIES LIMITED AND

INPLENION EASTERN AFRICA LIMITED.....3RD INTERESTED PARTY

EX-PARTE:

ADK TECHNOLOGIES LIMITED IN CONSORTIUM WITH TRANSNATIONAL COMPUTER TECHNOLOGIES LIMITED

JUDGMENT

By a motion dated 8 March 2021 the applicant moved this honourable court for the prerogative orders of certiorari, prohibition and certiorari. The prayers for these orders have been framed as follows:

“1. AN ORDER OF CERTIORARI to bring into this Honourable Court for purposes of being quashed the entire decision of The Public Procurement Administrative Review Board, the Respondent herein in Application Number 18 of 2021, dated 8th February, 2021.

2. AN ORDER OF PROHIBITION to bring into this Honourable Court for purposes of prohibiting and/or restraining the 1st and 2nd Interested Parties from awarding the tender and/or signing any contract with 3rd Interested Party herein in TENDER NO. TNT/049/2019-2020 TENDER FOR THE PROVISION OF ONSITE SUPPORT FOR IFMIS E-PROCUREMENT AND INDEPENDENT INTEGRATED FINANCIAL MANAGEMENT SYSTEM FOR SEMI AUTONOMOUS GOVERNMENT AGENCY (SAGA) (hereinafter the “Tender”).

3. AN ORDER OF MANADAMUS compelling the Respondent to re hear and determine the Request of Review Number 18 of 2021 on merits.”

The applicant also sought for such further order as this court may deem fit to grant and also costs of the application. The motion is based upon Order 53 Rule 3(1) of the Civil Procedure Rules Section 8 and 9 of the Law Reform Act, the Fair Administrative Act No. 4 of 2015, the Public Procurement and Asset Disposal Act, 2015 and Articles 10,22, 23 (f) and 43(1)(f) of the Constitution. The motion was based on the statutory statement and the affidavit verifying facts filed earlier alongside the summons seeking for leave to file the substantive motion.

The verifying affidavit was sworn by **Samuel Haile Nigussie** who described himself as the Project Manager of Transnational Computer Technologies Limited, California, United States of America.

He has sworn that ADK Technologies (ADK) is an Information Technology company incorporated in Kenya, in consortium with Transnational Computer Technology Limited, an Information Technology system integration company registered in Kenya having its headquarters in California, USA.

Sometime in the month of July 2020, the 1st Interested Party published *TENDER NO. TNT/049/2019-2020 TENDER FOR THE PROVISION OF ONSITE SUPPORT FOR IFMIS E-PROCUREMENT AND INDEPENDENT INTEGRATED FINANCIAL MANAGEMENT SYSTEM FOR SEMI AUTONOMOUS GOVERNMENT AGENCY (SAGA) (the “Tender”)* on the Public Procurement Information Portal. According to the description of the Tender, the 2nd Interested Party invited bids for two (2) Lots; Lot I which was for provision of Onsite Support for IFMIS Applications and Enhancement of IFMIS E - Procurement; and Lot II which was for provision of Independent Integrated Financial Management Information System for Semi-Autonomous Government Agency (SAGA) – National Youth Service (NYS).

ADK Technologies Limited and Transnational Computer Technology Limited entered into and formed a consortium that was embodied in a Consortium Agreement dated 5th July 2020 for purposes of collaboration and responding to the bid in Lot 1 of the Tender. According to the Consortium Agreement, ADK Technologies Limited was designated as the lead of the Consortium for purposes of the preparation and submission of the bid documents and for the participation in the Tender. Accordingly, it submitted the Technical and Financial Proposals of the Consortium to the Respondents on 22nd July 2020.

By a letter dated 25th January, 2021 the applicant was informed of its unsuccessful tender and reasons for the failure of its bid.

Being dissatisfied with the procurement process, the applicant filed a request for review at the Public Procurement Administrative Review Board on the 8 February, 2021 and on 1March, 2021 the Board delivered its decision dismissing the request for review. According to Nigussie, the Board’s decision was based on miscomprehension of the law and in violation of the law on the Provisions of the Public Procurement and Assets Disposal Act.

It is this this decision that is the subject of this judgment. Nonetheless, the rest of the affidavit has largely dwelt on faulting the procuring entity in awarding the tender to the 3rd interested party.

According to Nigussie, the rejection of the Applicant’s bid on the ground that its price was above the market rates is unfounded and untrue because there was no standard price given in the tender document nor in the Public Procurement and Regulatory Authority’s website to guide the bidders on the subject tender. He says that he is also aware that the 3rd interested party, Kingsway Business Systems Limited (in consortium with Kobby Technologies Limited and Inplenion Eastern Africa Limited) failed to comply with the said instructions in respect to Lot I of the Tender.

He has been advised by the Applicant’s advocates, which advice he verily believes to be accurate, that the consequence of this non-compliance is that the 3rd interested party’s bid ought to have been determined to be non-responsive and therefore unsuccessful on account of failure to comply with the mandatory requirements for Lot I of the Tender.

The deponent listed other instances of the 3rd interested party’s non-compliance with the tender requirements. In a nutshell, he faulted the evaluation process for the reasons that it was in violation with the Tender Document and the express provision of the law and, as a consequence, the evaluation of the tender was contrary to the objectives of the law and which only ended up with the 3rd interested party scoring higher points than it deserved.

The respondent did not file any form of response. The 1st and 2nd interested parties too did not respond to the applicant’s application. But the

3rd interested party did file a notice of preliminary objection and a replying affidavit. The preliminary objection is on the grounds that first; *“the notice of motion application dated 8th March 2021, the statutory statement and the verifying affidavit dated 3rd March 2021 are fatally defective for want of proper authority to plead or act, in breach of Order 1 Rule 13 of the Civil Procedure Rules 2010”*, and, secondly, the motion itself is not accompanied by affidavits sworn by the applicant verifying the facts relied upon and that, in itself, is in breach of Order 53 Rule 1(2) of the Civil Procedure Rules 2010.

Seth Asuza Changilwa swore the replying affidavit on behalf of the 3rd interested party.

He deposed that upon the evaluation of all the bids the procuring entity undertook the process of evaluation of the tender and by a letter dated 25 January 2021, the 3 interested party was notified that its bid had been accepted. The 3rd interested party in turn accepted the notification award by a letter dated 26 January 2021.

And on the submissions on the preliminary objection the learned counsel for the 3rd interested party cited Order 1 Rule 13 of the Civil Procedure Rules, 2010 which is to the effect that where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding. The authority shall be in writing signed by the party giving it and shall be filed in the case.

He urged that the principle should be applied in judicial review proceedings so that where there are more litigants than one, one of them may be authorized by others to appear, plead or act on their behalf. But such authority must be in writing and must be signed by the party or parties giving it, and must be filed.

The 3rd interested party urged that the applicant having been described as ADK Technologies Limited in consortium with Transnational Computer Technology Limited (two Applicants), there is no written authority displayed by Samuel Haile Nigussie to demonstrate that he could plead on behalf of the applicant. That the documents Samuel Haile Nigussie alleged to be authorising him to file this Application are limited to signing, sealing and submitting proposal documents. None of these documents amount to written authority to file judicial review proceedings. In the absence of authority, there is no proper application before court as the suit offends the mandatory provisions of Order 1 Rule 13. In the same breath the affidavit verifying the facts relied upon in this application was sworn by Samuel Haile Nigussie, is also improper in view of the provisions of Order 53 Rule 1 (2) of the Civil Procedure Rules.

Curiously, and as if to agree with the 3rd interested party’s position, the company named as the applicant filed grounds of opposition to the application; the grounds are dated 29 March 2021. Because of the position it has adopted in what is otherwise its application, it is necessary that I reproduce the grounds here; they have been expressed as follows:

- “1. ADK Technologies Limited did not authorize Transnational Computer Technologies Limited or any of its officers to file a request for review before the respondent to challenge the outcome of the evaluation of the Tender or to file the present proceedings;**
- 2. ADK Technologies Limited does not wish to participate in the present proceedings or in the proceedings before the Respondent.**
- 3. The proceedings herein have been instituted without material disclosure and Transnational Computer Technology Limited has not come to this Honourable Court with clean hands.**
- 4. ADK Technologies Limited did not authorize the firm of Cheboi Kiprono Advocates to act on its behalf in instituting the present proceedings and it did not instruct the firm of Okoth & Kiplagat Advocates to filing the request for review before the respondent on behalf of ADK Technologies Limited.**
- 5. The proceedings before this Honourable Court and before the respondent and as reported in the media sent an erroneous impression that ADK Technologies Limited has filed these proceedings, which position needs to be clarified.**
- 6. The name of ADK Technologies Limited should not be associated with the proceedings if at all Transnational Computer Technologies were to be allowed to engage in litigation over the issues that ADK Technologies Limited is disinterested in.**
- 7. ADK Technologies Limited should not be compelled to participate in or be associated with proceedings that it is disinterested in.**
- 8. The Notice of Motion Application filed herein and dated 8th March 2021 is misconceived, incompetent, unmerited, an abuse of the court process, mischievous, in bad faith and aimed at defeating the ends of justice.**
- 9. It is in the interests of justice that the Notice of Motion Application filed herein and dated 8th March 2021 be dismissed with costs.”**

The applicant also relied on an affidavit it had filed in support of an application to be ‘joined’ to this suit. The affidavit was sworn by NARENDRA KODALI who is a director of ADK Technologies Limited. In the affidavit he swore that he was made aware of the existence of these proceedings through the press publications more particularly in the People Daily and the Star Newspapers published on 17 March 2021. ADK Technologies Limited was never informed of the intention to file these proceedings against the decision of the Respondent either directly or through its Advocates on record.

ADK Technologies Limited was also never informed or made aware of the proceedings before the respondent which ADK Technologies Limited only learnt of through correspondence with the interested parties, despite having placed a bid in consortium with Transnational Computer Technology Limited.

ADK Technologies Limited was the lead bidder in the Tender but never filed the application for review and does not want to be part of the proceedings.

Considering the position adopted by ADK Technologies Limited in this proceedings, Transnational Computer Technology Limited cannot forcefully continue to undertake proceedings in the name of ADK Technologies Limited or purport to be acting at the behest of ADK Technologies Limited. As far as ADK Technologies Limited is concerned, it accepted the Tender outcome and never wished to challenge the outcome through the review proceedings or at all. Its position has not changed despite the filing of the review proceedings before the respondent and the Judicial Review Proceedings before this Court.

Having considered parties' pleadings and affidavits together with their respective submissions, I am convinced there shouldn't be any debate whether there is any or any appropriate motion for prerogative orders of judicial review before court. The purported applicant has come out to disown the application in clear and unambiguous terms. The application was filed without its consent or knowledge; facts that have not been controverted by Samuel Haile Nigussie who has sworn the verifying affidavit in support of the application. In that affidavit he swore, inter alia, as follows:

“I Samuel Haile Nigussie of Post Office Box Number 63436-00619Nairobi, do hereby solemnly make oath and state as follows:

“1. I am the project manager of Transnational Computer Technologies Limited, California, United States of America, which company is in consortium with ADK Technologies Limited, the Applicant herein. I am fully aware of the matters in issue, competent and duly authorised by the Applicant to swear this statement (sic) the (sic) behalf of both ADK Technologies Limited being the Applicant and Transnational Technologies Limited.” (Emphasis added).

It has turned out that ADK Technologies Limited neither filed this application nor authorised Samuel Haile Nigussie to plead or swear any affidavit on its behalf. Had the court been aware of this fact, leave to file the substantive motion would not have been granted.

It is true that ADK Technologies Limited and Transnational Technologies Limited came together at some point for purposes of bidding for a tender floated by the 2nd interested party; but they came together as a consortium for that particular purpose and not as merger in which they would be deemed to have lost their corporate identity. They were and still are two distinct and separate legal persons whose individual actions cannot possibly bind each other except as provided in the consortium agreement. And a consortium agreement is an agreement because the parties that comprise it are at consensus at idem; the moment they take diametrically opposite positions on any particular issue that brought them together, the consortium or agreement is rendered impotent.

But even if such a consortium exists, neither of the parties can approach the court as a 'consortium' not least because this court is not subject to whatever tender rules that there may have been and to which the consortium subscribed. It is governed by law and procedures which also bind parties approaching it for a remedy because of one grievance or the other. While ADK Technologies Limited and Transnational Technologies Limited could respond to the tender floated by the 2nd interested party as a consortium, they can only sue together for a common cause but as separate and distinct entities. Subject to the terms of their agreement none of them can purport to act on behalf of the other without the other's authority or consent.

Samuel Haile Nigussie is a representative of Transnational Technologies Limited and therefore the furthest he could go is to plead as a representative of that company. But the company is not even the applicant, the applicant is ADK Technologies Limited whose director has denied that it ever filed this suit or authorised Samuel Haile Nigussie to file suit in its name or plead or swear affidavits on its behalf.

In the ultimate, I agree with the 3rd interested party and the ADK Technologies Limited that this suit is bad in law and it is an abuse of the process of the court. It is hereby struck out with costs to the 3rd interested party and the ADK Technologies Limited.

SIGNED, DATED AND DELIVERED ON 9TH APRIL 2021

NGAAH JAIRUS

JUDGE