



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

JUDICIAL REVIEW NO. 1 OF 2017

REPUBLIC.....APPLICANT

BETWEEN

NAKURU COUNTY GOVERNMENT.....1ST RESPONDENT

NAKURU COUNTY EXECUTIVE COMMITTEE MEMBER –

DEPARTMENT OF ENVIRONMENT,

NATURAL RESOURCES, ENERGY AND WATER.....2ND RESPONDENT

CHIEF OFFICER, MEMBER – DEPARTMENT OF ENVIRONMENT

NATURAL RESOURCES, ENERGY AND WATER.....3RD RESPONDENT

AND

LEONARD MBOGO MUTUTHO (SUING AS THE CHAIRPERSON OF

THE WIPER SANITARY DISPOSERS)..... 1ST EXPARTE APPLICANT

BENAR OWINO ONYANGO T/A

TAKA VENTURES2ND EXPARTE APPLICANT

MEDRINE KARIUKI WANJERI (SUING AS THE CHAIRPERSON OF

THE HADASSAH WOMEN GROUP) 3RD EXPARTE APPLICANT

ESTHER NAINI MALOI T/A BIDII TETU

ENTERPRISES..... 4TH EXPARTE APPLICANT

AND

GEORGIADIS BYRON OWINO1ST INTERESTED PARTY

ERNERST NJENGA MBUGUA 2ND INTERESTED PARTY

JOHN NJOROGE CHEGE..... 3RD INTERESTED PARTY

JOHN KIMANI GITAU..... 4TH INTERESTED PARTY

SIMON KIMANI KABARABARA..... 5TH INTERESTED PARTY

SOLOMON MWANGI..... 6TH INTERESTED PARTY

MARTIN MUGWE.....	7TH INTERESTED PARTY
BETH NDEGWA.....	8TH INTERESTED PARTY
ESTHER MBITHIA.....	9TH INTERESTED PARTY
SAMUEL NDUATI.....	10TH INTERESTED PARTY
EDWIN KAGO.....	11TH INTERESTED PARTY
STEPHEN ODHIAMBO.....	12TH INTERESTED PARTY

JUDGMENT

1. After duly obtaining the leave of the Court, the *Ex Parte* Applicants herein filed the present substantive Judicial Review Application seeking the following prayers:

- 1) *That An order of certiorari to remove into this honourable Court for the purpose of it being quashed the decision by the 2nd Respondent to renege on the terms of the tender awarded to the ex-arte Applicants*
- 2) *That an order of prohibition to restrain the Respondent from further acting on the letter dated 2/11/2016 ordering the ex parte Applicants to forfeit their zones.*
- 3) *That the interested parties be restrained by an order of injunction from interfering with the ex parte Applicants’ operations, from collecting garbage within the zones awarded to the ex parte Applicants.*
- 4) *That a declaration that the decision by the Respondents to award tenders to person who never participated in the bidding process is illegal, egregious and unlawful hence void and of no effect.*
- 5) *An order for costs.*

2. The 1st Applicant is the Chairperson of a registered business entity known as Wiper Sanitary Disposers. The 2nd Applicant is the sole proprietor of the business entity known as Taka Ventures. The 3rd Applicant is the chairperson of the business entity known as Hadassah Women Group. The 4th Applicant is the sole proprietor of the business entity known as Bidii Yetu Enterprises.

3. The 1st Respondent is a public entity created under Article 176 of the Constitution and the County Governments Act, 2012. The 2nd Respondent is a member of the County Executive Committee of the 1st Respondent. The 3rd Respondent is responsible to the 2nd Respondent for the running and administration of the county department.

4. Briefly, the facts of the case are as follows:

5. The 1st Respondent advertised a tender opportunity in the Daily Nation of 30/11/2015. The advertisement invited qualified individuals and/or companies to be awarded contracts for solid waste collection, transportation and disposal services.

6. The four Applicants duly bid for the tenders as advertised. *Vide* letters dated 29/08/2016, each of the four Applicants were duly informed by the 3rd Respondent, on behalf of the 1st Respondent, that they had been awarded the tenders as follows:

- a. The 1st Applicant was awarded the tender for Naivasha Sub-county Zone 1 covering Industrial Area, Hope Well Site and services to the Council Estate.
- b. The 2nd Applicant was awarded the tender for Naivasha Sub-county Zone 3 covering Lake View, Suberico, and Kihoto.
- c. The 3rd Applicant was awarded the tender for Naivasha Sub-county zone 6 covering Mai Mahiu and Longonot.
- d. The 4th Applicant was awarded the tender for Naivasha Sub-county Zone 5 covering Kayole, Maryland, Kinamba to National Youth Service, Kinungi and Ihindu.

7. Upon receiving the letters, the Applicants signed binding agreements with the 1st Respondent outlining the terms and conditions of the Solid Management Contracts. All the Agreements are dated 12/09/2016.

8. Despite signing the contracts awarding them the contracts, the Applicants say that they were unable to commence their operations as per the contract as a result of hostile interference by the Interested Parties who made it impossible for the Applicants to carry out their duties under the contracts. The Applicants wrote to the 1st Respondent raising the issue.

9. The 1st Respondent seemingly responded to the Applicants’ letters by summoning them through the 2nd Respondent for a meeting. The Applicants say that they duly went to the 2nd Respondent’s office for the meeting to resolve the issue. However, they say that no resolution

was attempted; instead, much to their astonishment, they were handed over “already typed and undated meeting resolutions directing [them] to forfeit [their] zones....”

10. These resolutions were officially sent to the Applicants in a letter dated 02/11/2016. In pertinent part, the letter stated that:

Following the zoning and awarding of solid waste in Naivasha (sic) several complaints arose from the youth and people with disabilities. These groups have been volunteering to do the work hence complained, (sic) that they were locked out necessitating several consultative meetings between them and those who won the tenders.

To avoid conflicts, after a meeting held in my office on 1st November, 2016 the resolution are as the attached minutes....

11. The resolutions attached to the letter are the ones the Applicants say had been handed to them earlier. The purported effect of the resolutions is to carve off areas of service awarded to the Applicants in their signed contracts after the tender process to certain third parties.

12. The Applicants were persuaded that the resolutions were contrary to their tender awards and they duly protested vide several letters written to the 2nd and 3rd Respondents. When they received no responses, the Applicants commenced this suit after duly obtaining leave from the Court.

13. The Applicants had initially asked that the leave granted operate as stay and the Judge then handling the matter took submissions under advisement for consideration. There was a mishap, however, because upon being transferred from the station, the Judge, due to inadvertence, wrote a final judgment instead of a ruling on the question of stay. By consent, all the parties to the suit agreed to set aside that judgment. The parties agreed to re-argue the main suit since the purposes of the stay and interlocutory orders had been overtaken by events.

14. Despite new directions being given on filing of court papers and submissions, the Respondents never filed any substantive responses to the Judicial Review Application.

15. The Interested Parties filed a Replying Affidavit but no submissions. The Replying Affidavit seems to take aim at the tendering process that was used to award the tenders to the Applicants claiming that the same was done in a discriminatory way and against the rules of natural justice. They also claim that the zones awarded to the Applicants were too big for one entity and that the Procurement Committee decided to revise the allocations. The Interested Parties did not contest that they did not participate in the Tender Process as required by law. Neither did they contest the factual account given by the Applicants.

16. I should, at the outset, put paid to this line of defence offered by the Interested Parties. Even assuming their complaints are truthful, the procedure used to challenge the tender awards to the Applicants was improper and could not lawfully lead to legitimate variation of the Applicants’ contracts with the 1st Respondent. If the Interested Parties had legitimate complaints about the tendering process, their recourse lay in before the Public Procurement Administrative Review Board. Under section 165 of the Public Procurement and Disposal Act, anyone who has a grievance against the award of a tender by a public body is required, first, to file his grievance before the Public Procurement Administrative Review Board created under that statute. If the party with a grievance fails to do so, he has no recourse to the Courts.

17. In the present case, the Interested Parties say that they were aggrieved by the tendering process. However, they admit that instead of following the laid down procedures for challenging it, they approached the authorities to re-negotiate with those who had been awarded the tenders. Needless to say, this is precisely the horse- trading that the transparent structures and processes in PPDA were aimed at curbing.

18. Should the Applicants have used the alternative forum also when their contracts were un-procedurally varied by the Respondents? In a word, no. The Public Procurement Administrative Review Board deals with grievances arising from the procurement process. The

Applicants’ grievances arise from the unfair and unlawful interference of their awarded tenders and contracts by the Respondents. The unlawful interference were achieved through the alleged exercise of public authority held by the Respondents. Hence, the use of Judicial Review to challenge the decisions so made was eminently proper.

19. Turning to the decisions made by the 2nd and 3rd Respondents varying lawfully-concluded contracts duly entered after unchallenged tender awards to the Applicants were decidedly un-procedural and unlawful. It is telling that there has been no attempt whatsoever to justify the actions of the 2nd and 3rd Respondents. That must be because the Respondents must have known that their actions were unlawful. They were so for at least three reasons:

a. *First*, the actions by the Respondents are substantively illegal. Once, a tender has been awarded under the PPDA, no variation can be done to the contract completed as a result of the tendering process in order to benefit a third party who had not won the tender.

b. *Second*, the actions by the Respondents were procedurally unfair. Even assuming that the Respondents were acting in good faith and on legitimate public interest grounds as they claim in their letters to the Applicants, they ought to have given an opportunity to the Applicants to be heard before the decisions were made. According to the Applicants, this did not happen and no evidence has been placed before the Court to show that administratively fair hearing occurred. It appears, instead, the 2nd and 3rd Respondents made politically expedient decision to thwart off what they saw as a political crisis.

c. *Third*, the decisions made by the Respondents in the instant cases were outright irrational. The reasoning given in the letter dated 02/11/2016 that the Interested Parties ought to be given a share of the business because they had previously participated as volunteers in solid waste services smirks of outright irrationality. These may have been factors which could have been advertised and considered at the award stage of the tenders but could not be introduced to vary already awarded tenders and contracts.

20. In the end, whichever way you slice it, the decisions by the Respondents in this case – whatever their motivations – were eminently unlawful. The only question that arises is what to do about them more than four years since the decisions were made. The contracts were for the period ending in 2019. The question that arises is whether the remedies sought by the Applicants should be issued now, and the implications for the grant of such remedies after the contractual period has expired.

21. It is an inexorable rule of law that the Court does not knowingly and advertently act in vain. So what would be the impact of quashing the decisions varying the contracts awarded to the Applicants after the contractual period has already expired? Or what would be the legal sense of issuing a prohibiting the Respondents from requiring the Respondents to forfeit their contractually awarded zones when the contractual period has already expired? Or issuing an order restraining the Interested Parties from interfering with the Applicants’ contractual performance yet the contractual period has already expired?

22. In my view, the grant of the reliefs of *certiorari* and prohibition in the circumstances is imprudent. Judicial Review remedies are public law remedies and they must be calibrated to suit the circumstances of each case while enhancing the ideal of the Rule of Law. They should not be issued when their impact would be legal absurdity or the subliminal undermining of the Rule of Law. In my view, the issuance of *certiorari* and prohibition orders in the present case would effete the Rule of Law and the public nature of judicial review remedies in this way.

23. In the present circumstances, the only remedy consonant with the role and nature of Judicial Review remedies is to issue a declaration that the actions by the Respondents were illegal. This is the only bespoke remedy the Court can come up with in view of Article 23 of the Constitution. The task of determining the legal and practical utility of that declaration will be incumbent on the Applicants who have pursued the suit despite the expiration of the contractual period.

24. The orders of the Court, then, are as follows:

a. A declaration hereby issues that the actions of the Respondents reneging on the terms of the tenders awarded to the Applicants culminating in the letter dated 02/11/2016 by the 2nd Respondent ordering the Applicants to forfeit some of their zones for solid waste collection, transportation and disposal services as awarded in their respective contracts, were illegal and unlawful.

b. The Respondents and Interested Parties will jointly and severally pay the costs of this suit to the Applicants.

25. Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 23RD DAY OF SEPTEMBER, 2021

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JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic.