



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW APPLICATION NO. 252 OF 2019**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**PUBLIC PROCUREMENT ADMINISTRATIVE**

**REVIEW BOARD.....1<sup>ST</sup> RESPONDENT**

**DEPARTMENT OF DEVELOPMENT OF ARID**

**AND SEMI ARID REGIONS (DASAR).....2<sup>ND</sup> RESPONDENT**

**AND**

**WASO RESOURCE DEVELOPMENT AGENCY.....INTERESTED PARTY**

**EX PARTE: PASTORALISTS INITIATIVE FOR DEVELOPMENT AND ADVOCACY**

**RULING**

**The Application**

1. Pastoralists Initiative for Development and Advocacy (hereinafter “the Applicant”) filed an application by way of Notice of Motion dated 5<sup>th</sup> September 2019, after being granted leave to do so by this Court. The application is with respect to the procurement process for a request for expressions of interest for the Kenya Development Response to Displacement Impacts Project in Turkana, Wajir and Garissa Counties - KE-DASAR-14313-QCBS-RFP, in respect of Wajir South Sub County. The procuring entity was the Department of Development of Arid and Semi- Arid Regions (DASAR), a department in the Office of the President, which is sued as the 2<sup>nd</sup> Respondent herein.
2. Upon award of the tender by the 2<sup>nd</sup> Respondent, the Applicant filed a Request for Review with the Public Procurement Administrative Review Board, which is the 1<sup>st</sup> Respondent herein. The 1<sup>st</sup> Respondent rendered a decision on 28<sup>th</sup> March 2019 allowing the Request for Review and cancelled the award, and further ordered for a re-evaluation of the tender. After re-evaluation, the 2<sup>nd</sup> Respondent awarded the tender to the Waso Resource Development Agency, which this Court joined as an Interested Party.
3. The Applicant thereupon filed the instant application in which he is seeking the following orders:
  - a) That an order of Certiorari do issue to remove to this for purposes of the same being quashed, the entire decision of Department Of Development of Arid and Semi- Arid Regions (DASAR) in the Re Evaluation of KE-DASAR-14313-QCBS-RFP in respect of Wajir South Constituency by the 2<sup>nd</sup> Respondent herein.
  - b) That this Court be pleased to grant an order of Mandamus to compel the 2<sup>nd</sup> Respondent to terminate the procurement process, and make the procurement process and the tender documents compliant with the law.
  - c) That all and necessary consequential orders be made by this Court to meet the ends of justice in the circumstances of this case.

**d) That cost of this application be provided for.**

4. The Applicant's grounds are in a statutory statement dated 5<sup>th</sup> September 2019 and a supporting affidavit sworn on the same date by Abdulahi Ibrahim Mohamud, its Chief Executive Officer. The main grounds for the application are that the decision of the 2<sup>nd</sup> Respondent is dated the 6<sup>th</sup> August 2019 but reached the Applicant via email on the 8<sup>th</sup> August 2019 in violation of the orders of the 1<sup>st</sup> Respondent issued on the 28<sup>th</sup> March 2019, which stipulated that the re-evaluation and award takes place within fourteen (14) days.

5. Further, that the 2<sup>nd</sup> Respondent continues to violate the provisions of section 4 of the Fair Administrative Action Act by not affording the Applicant the right and opportunity to be informed of the results of the review process and grounds for its disqualification and the winner of the aforesaid process. Likewise, that the 2<sup>nd</sup> Respondent has violated section 55 of the Public Procurement and Asset Disposal Act as some of the organizations that were considered were not compliant with the tender requirements. Lastly, that the 1<sup>st</sup> Respondent violated section 80 (6) of the Public Procurement and Asset Disposal Act by taking more than the timeframe provided of thirty days to conclude the process.

6. The Interested Party subsequently filed a Notice of Preliminary Objection and Grounds of Objection dated 28<sup>th</sup> October 2019, in which it contested this Court's jurisdiction to entertain the Applicant's application on the following grounds:

a) That by dint of Section 27, 28, 167 and 175 of the Public Procurement and Asset Disposal Act, 2015, a specific mechanism has been provided for resolution of disputes arising from tendering process.

b) That by dint of Section 175(1) of the said Act, the Applicant's application is time barred.

c) The Applicant's application does not impugn the decision of the 1<sup>st</sup> Respondent and therefore their application does not lie under section 75 of the Act.

d) The Applicant's grievance lies in the manner of compliance with the 1<sup>st</sup> Respondent's decision dated 28<sup>th</sup> March 2019 by the 2<sup>nd</sup> Respondent, and the right forum for their grievance is therefore the 1<sup>st</sup> Respondent and not an appeal by way of judicial review to this Court.

7. Additional objections raised by the Interested Party were that by entertaining the Applicant's application, this Court will be usurping the 1<sup>st</sup> Respondent's power and process reserved to it by statute. Further, that the 1<sup>st</sup> Respondent's decision is not challenged and the only grievance the Applicant has is the manner of compliance with the said decision, which jurisdiction squarely and exclusively rests with the 1<sup>st</sup> Respondent. Therefore, that the Applicant's application is inspired by caprice, malice and *mala fides*.

8. This Court directed that the Interested Party's Preliminary Objection be heard and determined first by way of written submissions. Okoth & Company Advocates for the Interested Party filed submissions in Court dated 13<sup>th</sup> December 2019, wherein it reiterated its grounds for objecting to this Court's jurisdiction, and submitted that the Applicant should have gone back to the 2<sup>nd</sup> Respondent for enforcement of its orders, and not filed these proceedings exclusively meant for review of the 1<sup>st</sup> Respondent's decisions.

9. In addition, that as Applicant's application cites no alleged grievance with the decision of the Public Procurement Administrative Review Board as provided under section 175 of the Act, it therefore does not fall under this Court under the Act. Furthermore, that even though the Applicant was justified in commencing these proceedings, the Applicant's application is time barred as section 175(1) provides that an application for review of the 1<sup>st</sup> Respondent's orders ought to be made within 14 days from the date of the decision is made. However, that the application was made over four months after the 1<sup>st</sup> Respondent's decision on 28<sup>th</sup> March 2019.

10. These arguments were echoed by the Respondent, in submissions filed on 8<sup>th</sup> November 2019 by Ms Chilaka Lumiti, a Senior State Counsel in the Office of the Attorney General. The Respondent relied on the decisions in **Owners of the Motor Vessels "Lillian S" vs Caltex Oil (Kenya) Ltd [1989] KLR 1** and **Michael Wachira Nderitu & others vs Mary Wambui Munene & others [2013] eKLR**, for the position that the Applicant must exhaust other mechanisms provided by statute, and this Court therefore has no jurisdiction to hear the matter in the first instance.

11. The advocates on record for the Applicant, K.K. Njenga & Associates, filed submissions dated 4<sup>th</sup> December 2019, in which they urged that the Notice of Preliminary Objection and Grounds of Opposition are not merited and the same ought to be dismissed, as the application filed by the Applicant raises substantive issues for hearing and just determination by this Court as provided for in Articles 10, 47 and 50 of the Constitution.

12. According to the Applicant, a court should not strike out a case if it has chances of success, and it relied on the cases of **Mukisa Biscuit Manufactures Ltd vs West End Distributors Ltd (1969) E.A. 695** and **Transcend Media Group Limited vs Independent Electoral Boundaries and Electoral Commission [2015] eKLR** for this position. Further, that no pure points of law have been demonstrated to this Court, and the effect of upholding a preliminary objection is to summarily dispose of an entire case without giving a party its day in court, which is a power that should be exercised with caution and as a last resort. The Applicant urged the Court to direct itself as per the provisions of Article 159(2) of the Constitution, as dismissing the Applicant's application *in limine* would be detrimental to its quest for justice.

**The Determination**

13. The circumstances in which a preliminary objection may be raised was explained by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**, as follows:

***“a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”***

The effect of a preliminary objection if upheld, renders any further proceedings before the court impossible or unnecessary. Therefore, unlike an application for summary dismissal where the Court has a discretion whether or not to dismiss a suit as alleged by the Applicant, the Court has no such discretion where a preliminary objection is upheld.

14. On the other hand, a preliminary objection cannot be raised if any fact requires to be ascertained. In the case of ***Oraro vs Mbaja, (2005) 1 KLR 141***, the court held that any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. The Court of Appeal also stated in ***Mukisa Biscuit Company -vs- West End Distributors Ltd (supra)*** that a preliminary objection cannot be raised if what is sought is the exercise of judicial discretion.

15. The issues for determination herein therefore are whether the grounds raised in the Interested Party’s preliminary objection raise pure points of law, and if so, whether the said preliminary objection has merit and should be upheld. The Interested Party in this respect states that this Court has no jurisdiction to entertain the Applicant’s application. I am in this respect guided by the case of ***Owners of Motor Vessel “Lillian S” vs Caltex Oil (Kenya) Ltd (1989) KLR 1*** where Justice Nyarangi JA (as he then was) held:

***“I think 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.”***

16. A Court’s jurisdiction flows from either the Constitution or statute or both, and by principles laid out in judicial precedent. It is thus clearly a pure question of law. As to whether the Interested Party’s preliminary objection has merit, it is not in dispute that the Applicant is seeking judicial review proceedings in relation to an award of a tender by the 2<sup>nd</sup> Respondent. This Court’s judicial review jurisdiction in this respect flows from various laws. Article 165 (6) of the Constitution in this regard provides that the High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function. It is notable that in judicial review proceedings such as the present proceedings, the Court is being asked in exercise of this supervisory jurisdiction, to review the lawfulness of the 2<sup>nd</sup> Respondent’s decision to award a tender to the Interested Party.

17. In addition, this Court is granted power to give judicial review orders by section 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules. Several statutes also specifically provide for redress to aggrieved parties by way of judicial review by this Court, and one such statute is the Public Procurement and Asset Disposal Act 2015, which under section 175 provides that a person who is aggrieved by the decisions of the Respondent may seek judicial review of those decisions in this Court.

18. The Interested Party objection is that this Court is divested of this jurisdiction, as the proper forum to hear the Applicant’s grievances is the 1<sup>st</sup> Respondent, which gave the decision that the Applicant is seeking to enforce. In this regard, section 167 of the Public Procurement and Asset Disposal Act 2015 provides as follows:

***“(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 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.***

***(2) A request for review shall be accompanied by such refundable deposit as may be prescribed in the regulations, and such deposit shall not be less than ten per cent of the cost of the contract.***

***(3) A request for review shall be heard and determined in an open forum unless the matter at hand is likely to compromise national security or the review procedure.***

***(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. Under section 168, the requests for review are to be made to the Public Procurement Administrative Review Board established under section 27 of the Act. The issue of whether or not the said sections ousts the jurisdiction of this court was extensively dealt with by Odunga J. in ***Republic v Independent Electoral and Boundaries Commission & Another Ex Parte Coalition for Reform and Democracy & 2 Others [2017] eKLR*** where the learned Judge held as follows:

***“173. I agree with the IEBC that pursuant to section 167(1) of the Public Procurement and Asset Disposal Act, 2015 administrative review is available only to the candidates or tenderers and that the Applicant was neither a candidate nor a***

tenderer in the subject procurement. Strictly speaking therefore it was not the spirit or text of that law that parties other than candidates or tenderers should be permitted to challenge procurement processes through the procedure provided for under the Act. To that extent I agree that persons who fall within the category of the Applicant herein have no locus to commence proceedings before the Review Board.

174. This does not however mean that a person aggrieved by the action of the Procuring Entity, in such circumstances is left without a remedy. In my view, the remedy in such circumstances is to be found in section 174 of the *Public Procurement and Asset Disposal Act* which provides as follows:

*The right to request a review under this Part is in addition to any other legal remedy a person may have.*

175. In my view a person who would otherwise be locked out from invoking the provisions of the *Public Procurement and Asset Disposal Act* is not barred from seeking alternative remedy under other provisions of the law. This was the position adopted by this Court in Elias Mwangi Mugwe vs. Public Procurement Administrative Review Board & 5 Others [2016] eKLR where the Court expressed itself as hereunder:

“...any person who has no automatic right to participate in the review proceedings may properly resort to other available modes of ventilating his rights.”

176. It is not in doubt that one of the available remedies for challenging a decisions made by the IEBC is to apply for judicial review which is what the *ex parte* applicant sought in these proceedings.”

20. The above decision is distinguished as the *ex parte* Applicant therein was not a tenderer of candidate in the subject tender. In the present case, it is not in dispute that the Applicant was an unsuccessful bidder in the procurement process for the Kenya Development Response to Displacement Impacts Project in Turkana, Wajir and Garissa Counties, KE-DASAR-14313-QCBS-RFP in respect of Wajir South Sub County. Section 167(1) of the Act is therefore applicable to it.

21. It is also not in dispute that the Applicant is aggrieved by the manner in which the decision to award the tender to the Interested Party was arrived at, and specifically states that it was contrary to the provisions of the Public Procurement and Asset Disposal Act 2015. The proper forum for the Applicant to ventilate any non-observance of the provisions of the Act arising from the re-evaluation of the tender by the 2<sup>nd</sup> Respondent is the 1<sup>st</sup> Respondent, by virtue of section 167 of the Public Procurement and Asset Disposal Act 2015.

22. Therefore, while it is the case that this Court has judicial review jurisdiction over the 2<sup>nd</sup> Respondent, the law limits this Court's jurisdiction when it comes to disputes between procuring entities and bidders arising from public procurement processes. In such circumstances, this Court is only seized of jurisdiction to review the 1<sup>st</sup> Respondent's decisions on such disputes under section 175(1) of the Act.

23. It is also notable in this respect that there can be a restriction of a Court's jurisdiction by way of statute, as held in Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [supra] as follows:

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics.”

24. I accordingly find that the Interested Party's Preliminary Objection is merited for the foregoing reasons, and hereby strike out the Applicant's Notice of Motion dated 5<sup>th</sup> September 2019 with no order as to costs.

25. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3<sup>RD</sup> DAY OF FEBRUARY 2020**

**P. NYAMWEYA**

**JUDGE**