



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW CASE NO. 281 OF 2019**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND MANDAMUS AND**

**IN THE MATTER OF THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT 2015**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD.....RESPONDENT**

**AND**

**NAIROBI CITY COUNTY.....1<sup>ST</sup> INTERESTED PARTY**

**ERDERMANN PROPERTY LIMITED.....2<sup>ND</sup> INTERESTED PARTY**

**EXPARTE: LORDSHIP AFRICA LIMITED**

**RULING**

**Introduction**

1. Lordship Africa Limited, which is the *ex parte* Applicant herein (hereinafter “the Applicant”), is a private company incorporated under the Companies Act, Cap 486 of the Laws of Kenya. On 25<sup>th</sup> September 2019, the said Applicant applied for, and was granted leave by this Court on 29<sup>th</sup> September 2019 to commence judicial review proceedings, with respect to a decision made on 3<sup>rd</sup> September 2019 by the Public Procurement Administrative Review Board (hereinafter “the impugned decision”). The Public Procurement Administrative Review Board is sued as the Respondent herein, and is established under section 27 of the Public Procurement and Asset Disposal Act 2015 to review, hear and determine public tendering and asset disposal disputes.

2. The impugned decision was with respect to the award of Tender No. NCC/UR&H/RFP/526/2018-2019 - Redevelopment of Ngong Road Phase 2 Estate Within Nairobi City County Through Joint Venture Partnership (Re-Tender), which was awarded by the Nairobi City County to Edermann Properties Limited. The Nairobi City County and Edermann Properties Limited are joined as the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties respectively to this suit.

3. On 1<sup>st</sup> October 2019, the Applicant consequently filed a substantive application by way of a Notice of Motion dated 30<sup>th</sup> September 2019, seeking the following orders:

- a. An order of certiorari to issue to remove into the High Court for purposes of being quashed, the Respondent’s decision dated 3<sup>rd</sup> September 2019 as delivered in PPARB Application No. 89 of 2019-Lordship Africa Limited vs The Accounting Officer, Nairobi City County & Another.

b. An order of Certiorari to issue to remove into High Court for purposes of being quashed, the decision on the Nairobi City County of 23<sup>rd</sup> July 2019 to award Tender No. NCC/UR&H/RFP/526/2018-2019 -Redevelopment of Ngong Road Phase 2 Estate Within Nairobi City County Through Joint Venture Partnership (Re-Tender) to Edermann Property Limited.

c. An order of Certiorari to issue to remove into the High Court for purposes of being quashed, the entire procurement proceedings with respect to Tender No. NCC/UR&H/RFP/526/2018-2019 - Redevelopment of Ngong Road Phase 2 Estate Within Nairobi City County Through Joint Venture Partnership (Re-Tender).

d. An order of Mandamus to issue to compel the Nairobi City County to commence a fresh procurement process with respect to Tender No. NCC/UR&H/RFP/526/2018-2019 - Redevelopment of Ngong Road Phase 2 Estate Within Nairobi City County Through Joint Venture Partnership (Re-Tender).

e. Costs and further incidentals of this Application be provided for.

4. The application is supported by a statutory statement dated 25<sup>th</sup> September 2019, and a verifying affidavit sworn on the same date by Andrew Tirop, an Architect employed by the Applicant.

5. The Respondent and 2<sup>nd</sup> Interested Party thereupon filed replying affidavits in response to the application, while the 1<sup>st</sup> Interested Party filed a Notice of Preliminary Objection dated 14<sup>th</sup> October 2019. The 1<sup>st</sup> Interested Party is seeking orders that the Applicant's application be dismissed *in limine* with costs, on the ground that the proceedings before this Court are fatally and incurably defective and irregular, as the same have been commenced in violation of section 175(1) as read with section 3(e)&(h) of the Public Procurement & Asset Disposal Act, No. 33 of 2015, section 9(1),(2)&(3) of the Law Reform Act, and Order 53(2) of the Civil Procedure Rules, 2010.

6. On 23<sup>rd</sup> October 2019, this Court directed that the 2<sup>nd</sup> Interested Party's Notice of Preliminary Objection would be heard and determined first by way of written submissions. The Applicant thereafter filed an application by way of a Notice of Motion dated 16<sup>th</sup> December 2019 seeking among other orders, enlargement of time to bring judicial review proceedings. On 17<sup>th</sup> December 2019 this Court directed that the said Notice of Motion would await the outcome of the Notice of Preliminary Objection. The instant ruling on the Preliminary Objection was also reserved on that date.

#### **The Submissions**

7. CM Advocates LLP, who are on record for the 1<sup>st</sup> Interested Party, filed submissions dated 20<sup>th</sup> November 2019, while Mucheru Law LLP Advocates, the Advocates on record for the 2<sup>nd</sup> Interested Party filed submissions dated 8<sup>th</sup> November 2019 in support of the Preliminary Objection. Ms. Chimau, the counsel for the Respondent informed the Court that she would rely on the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties submissions. Mohammed Muigai LLP Advocates, who are on record for the Applicant, filed submissions dated 16<sup>th</sup> December 2019.

8. The 1<sup>st</sup> Interested Party submitted that it is not contested that the Applicant lodged a Request for Review No PPARB 89 of 2019 before the Respondent which was determined on the 3<sup>rd</sup> of September, 2019. Further, that despite notice of this decision and subsequent receipt of the decision on 11<sup>th</sup> September, 2019, the judicial review proceedings herein were lodged on 25<sup>th</sup> September, 2019, being seven (7) days out of the statutory time. The 1<sup>st</sup> Interested Party in this respect cited the decisions on jurisdiction of courts in **Owners of Shipping Vessel Lilian S V Caltex Oil (Kenya) Ltd C.A. 50 of 1989** and **Seven Seas Technologies Limited v Eric Chege [2014] e KLR**.

9. According to the 1<sup>st</sup> Interested Party, the jurisdiction of this Court to adjudicate over the dispute lodged by the Applicant obtains from the jurisdiction granted to the High Court by Article 165(3) (e) of the Constitution, and from section 175(1) of the Public Procurement and Assets Disposal Act, which provides that a person displeased by a decision of the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board's decision. Further, that this jurisdiction is also provided for in section 9(1), (2)and(3) of the Law Reform Act as read with Order 53(2) of the Civil Procedure Rules with respect to judicial review proceedings.

10. The 1<sup>st</sup> Interested Party contended that the Public Procurement and Assets Disposal Act does not anticipate any extensions of this statutory timeline, especially not where an applicant was aware of the subject decision, received within the statutory timelines but elected not to lodge the application within time. Furthermore, that a request has not been made for extension of time within which such leave for the orders of judicial review sought may be pursued, notwithstanding that this Court's authority to consider such request is not available in law.

11. The Interested Party relied on the decisions in **Republic vs Public Procurement Administrative Review Board and Another ex-parte Teachers Service Commission [2015] eKLR**, **Raila Odinga vs IEBC and Others [2013] eKLR**, and **Republic vs Public Procurement Administrative Review Board and Another ex-parte Wajir County Government [2016] eKLR** for its submissions that the Applicant's application was time barred, and that this non-compliance was one which cannot be cured.

12. The 2<sup>nd</sup> Interested Party on its part reiterated that the Respondent's ruling which is the subject of the judicial review proceedings was delivered on 3<sup>rd</sup> September 2019, and that 14 days period within which to file the application for judicial review was due to expire on 17<sup>th</sup> September 2019. Further, that the Applicant claims that it received the ruling on 11<sup>th</sup> September 2019, well within time to meet the deadline. Therefore, that the Applicant filed the judicial review proceedings out of time and the same ought therefore to be struck out. The 2<sup>nd</sup> Interested Party also submitted that there is not provision for extension of time under the Public Procurement and Assets Disposal Act.

13. The 2<sup>nd</sup> Interested Party relied on the decisions in **Rosaline Tubei & 8 Other vs Patrick K. Cheruiyot & 3 Others [2014] eKLR**, **Republic v Commission for University Education & another ex parte Genco University [2017] eKLR**, and **Republic vs Kiambu Land Dispute Tribunal & 2 other Ex parte Wambui Chege Macharia & 2 Others [2016] eKLR** for its submissions.

14. The Applicant in response submitted that it is not in dispute that the Respondent rendered its decision on 3<sup>rd</sup> September 2019. Further, that it is not in dispute that the decision was made available to the parties on 11<sup>th</sup> September 2019, and that this position is supported by the letter by the Applicant's advocates to the Respondent dated 10<sup>th</sup> September 2019 which was received on even date, and which was annexed to its application for leave. Further, that the issue of the Respondent's delay in availing its decision to the parties and/or parties' advocates was expressly canvassed in the said application, and is uncontested and undisputed by the Respondent and 1<sup>st</sup> Interested Party.

15. The Applicant further submitted that it was, and continued to be entitled to a period of 14 (fourteen) days to file its judicial review following the decision by the Respondent. That in applying the computation formula, this period lapsed on or about 17<sup>th</sup> September 2019, and that the said decision having being made available to the parties on 11<sup>th</sup> September 2019 reduced this period to about 8 (eight) days only, within which period the Applicant's advocates were required to peruse the same, advise the Applicant and receive the substantive instructions to challenge the said decision.

16. Additionally, that the unreasonable delay by the Respondent in furnishing parties and/or their advocates with its decision has not been explained, and the Public Procurement and Assets Disposal Act does not have provisions which prescribes the timelines within which a decision by the Respondent is to be made available to the parties in a review before it. As such, there is a reasonable apprehension that a party such as the Applicant herein can be unfairly locked out of the judicial review process where the said decision is delayed or withheld by the Respondent for unknown reasons, or intentionally withheld to frustrate and/or deprive an applicant of its right to challenge the decision.

17. The Applicant relied to the decisions in **Republic v Public Procurement Administrative Review Board & another ex parte Wajir County Government [supra]** and **Republic v Kenya Revenue Authority Ex-Parte Stanley Mombo Amuti [2018] eKLR** where the Courts addressed the issue of the delay by the Respondent in availing its decisions to parties, and for the submission that the delay goes against the spirit of the Applicant's rights to fair administrative action and access to justice as guaranteed by Articles 47 and 48 of the Constitution.

18. In conclusion, the Applicant opined that Articles 47 and 48 of the Constitution must therefore prevail to guarantee that it is protected from prejudice which has been occasioned not by itself, but solely by the Respondent without any reasonable and justifiable basis. Further, that sections 175(1) of the Procurement Act, sections 8 and 9 of the Law Reform Act and Order 53 Rule 2 of the Civil Procedure Rules, 2010 ought not be interpreted and applied to defeat the ends of justice.

#### **The Determination**

19. 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.

20. A preliminary objection cannot therefore be raised if any fact requires to be ascertained. In the case of **Oraro -vs- Mbaja (2005)1KLR 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.

21. 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. I will first address the ground raised about this Court not having jurisdiction to entertain the Applicant's application.

22. Whether or not a Court has jurisdiction is a pure question of law, and this position is best explained in the often cited decision of the Court of Appeal in **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1** 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. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given”**

23. 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 asked in exercise of this supervisory jurisdiction, to review the lawfulness of an enactment, or a decision, action or failure to act. In this respect the Respondent was clearly acting in a quasi-judicial capacity as it was hearing and determining a review filed by the Interested Party.

24. 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.

25. The 1<sup>st</sup> Interested Party objection is that the Applicant's application is time barred in light of the requirements of section 175(1) of the Public Procurement and Asset Disposal Act 2015 which provides as follows:

**“(1) A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board's decision, failure to which the decision of the Review Board shall be final and binding to both parties.”**

26. The time of filing of judicial review proceedings in this Court by an applicant in public procurement disputes is thus clearly regulated by the law, and if not complied with, can oust the jurisdiction of this Court as explained by Nyamu J. (as he then was) in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati [2008] KLR 728**. In the present case, it is not in dispute that the decision of the Respondent was delivered on the 3<sup>rd</sup> September 2019, and that the Applicant's Chambers Summons for leave to commence judicial review proceedings was filed in Court on 25<sup>th</sup> September 2019. Had matters ended there, it would have been evident that a pure point of law had been raised by the 1<sup>st</sup> Interested Party that needed consideration by the Court.

27. However, additional facts raised in the preliminary objection make it difficult to reach such a conclusion. It is in this regard the averment by the Applicant that the Respondent availed its decision to it on 11<sup>th</sup> September 2019. This averment has not been disputed by the Respondent in its replying affidavit and by the Interested Parties. It is in this regard my view and finding, as also held in **Republic v Public Procurement Administrative Review Board & another Ex parte Wajir County Government (supra)**, that the provisions of section 175(1) are clear that time for purposes of filing an application for judicial review starts to run from the date of the Respondent's decision, not from the date the decision is availed to an Applicant. Therefore, time started to run for purposes of filing an application for judicial review on 3<sup>rd</sup> September 2019, when the Respondent delivered its decision.

28. This finding notwithstanding, it is also my view that the effect of a delay by the Respondent in availing its decision to parties is a material factor in a Court's decision as to whether or not to assume jurisdiction, and introduces the element of the exercise of this Court's discretion. As stated by Odunga J. in **Republic v Public Procurement Administrative Review Board & another Ex parte Wajir County Government (supra)**:

**“20. The recurrent delays by the Respondent in supplying parties with copies of its decision was lamented by this Court in Republic vs. Public Procurement Administrative Review Board & 2 Others Ex-parte Coast Water Services Board & Another [2016] eKLR where this Court expressed its sentiments thereon as follows;**

**“A complaint was raised with respect to the delay in supplying the parties with typed copies of the proceedings and decision. This complaint I must say with respect to the Board is a recurring complaint in many applications. In my view efficiency in procurement processes not only demands speedy determination of the disputes but also encompasses speedy and timely availability of the decisions to the parties so as to enable them decide on their next course of action. It is therefore my view that to unreasonably delay in furnishing proceedings and decisions to the parties amounts to unfair administrative action... The Board is therefore advised to put into motion the necessary steps to rectify this problem. Where the Court finds that the period between the furnishing of the proceedings and the decision and the last day for filing the request for review was too short to enable the party challenge the decision, the Court may well be entitled to find that such action was meant to deprive the said party of the opportunity to challenge the said decision hence would amount to a violation of the letter and/or spirit of Article 47 of the Constitution as read with section 6 of the *Fair Administrative Action Act, 2015.*”**

29. It is also instructive that the 1<sup>st</sup> Interested Party has argued that even after taking into account the delay by the Respondent in availing the decision, the Applicant is still out of time as the application was filed outside 14 days after receipt of the decision. A consideration of this argument invites the exercise of this Court's discretion to decide whether time can start to run from the date of receipt of a decision, and whether it can assume jurisdiction on account of such delay.

30. It is thus my finding that the grounds raised by the 1<sup>st</sup> Interested Party cannot therefore be effectively and legally decided in a preliminary objection, as they entail the calling of evidence, arguments thereon by the parties and exercise of this Court's discretion, and can therefore only be addressed in the context of a full hearing on merits.

31. In the premises, this Court finds that the 1<sup>st</sup> Interested Party's Notice of Preliminary Objection dated 14<sup>th</sup> October 2019 has no merit, and it is accordingly dismissed with costs to the Applicant.

32. Orders accordingly.

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

**P. NYAMWEYA**

JUDGE