



**REPUBLIC OF KENYA**

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

**MISC. APPLICATION NO. 171 OF 2020**

**TRIDENT INSURANCE COMPANY LIMITED.....APPLICANT**

**-VERSUS-**

**ACCOUNTING OFFICER COUNTY**

**ASSEMBLY OF NYAMIRA.....1<sup>ST</sup> RESPONDENT**

**THE AG. CLERK COUNTY**

**ASSEMBLY OF NYAMIRA.....2<sup>ND</sup> RESPONDENT**

**RULING**

1) The subject matter of this ruling is the chamber summons dated 30<sup>th</sup> April, 2020 taken out by Trident Insurance Company Ltd, the applicant herein whereof it sought for the following orders:

*i. THAT this application be certified urgent and its service be dispensed with in the first instance.*

*ii. THAT an order of committal to be made against the Ag. Clerk of the County of Assembly of Nyamira to prison for the statutory term set out in Section 176 of the Public Procurement and Asset Disposal Act 2015 being 4 years or as this honourable court may deem fit and just in that the said Ag. Clerk of the County Assembly of Nyamira, has disobeyed the order made herein by the Public Procurement Administrative Review Board on the 11<sup>th</sup> December of December 2019.*

*iii. THAT an order be made against the Ag, Clerk of the County Assembly of Nyamira to pay the statutory fine set out in Section 176 of the Public Procurement and Asset Disposal Act 2015 being kshs.4,000,000 or the amount this honourable court may deem fit and just in that the said Ag, clerk of the County Assembly of Nyamira, has disobeyed the order made herein by the Public Procurement Administrative Review Board on the 11<sup>th</sup> of December 2019.*

*iv. THAT an order be made the County Assembly of Nyamira to pay the statutory fine set out in Section 176 of the Public procurement and Asset Disposal Act 2015 being kshs.10,000,0000 or the amount this honourable court may deem fit and just in that the said County Assembly, has disobeyed the order made herein by the Public procurement Administrative Review Board on the 11<sup>th</sup> of December 2019.*

*v. THAT this honourable court be pleased to grant further orders and/or directions as it deems fit and expedient in the circumstances.*

*vi. THAT the costs of this application be borne by the respondents.*

2) The summons is supported by the verifying affidavit sworn by Emily Ndirangu. When served, the respondents filed the replying affidavit sworn by Duke Onyari to oppose the summons. The applicant filed a further affidavit sworn by Emily Ndirangu to respond to the replying affidavit. This court issued orders directing the parties to file and exchange written submissions.

3) It is appropriate at this stage to set out in brief the background of this dispute. The applicant filed an application to review **Tender no. CAN/T/02/2019-2020 PROVISION OF MEDICAL INSURANCE COVER FOR HON. SPEAKER MEMBERS OF COUNTY ASSEMBLY (MCA), COUNTY ASSEMBLY SERVICE BOARD MEMBERS AND MEMBERS OF STAFF** before the Public Procurement Administrative Review Board (hereinafter referred to as the **BOARD**). After hearing the review application, the Board ordered the respondents **to award the subject tender to the lowest evaluated bidder and to complete the procurement process within 14 days from the date of ruling vide its ruling delivered on 11<sup>th</sup> day of December 2019.** The respondents have not complied with the orders

issued by the Board prompting the applicant to take out the current summons.

4) I have considered the grounds stated on the face of the summons plus the facts deponed in the affidavits filed in support and against the application. I have also considered the rival written submissions together with the authorities cited by the parties. It is the submission of the applicant that the Board in its ruling directed the respondents to complete the procurement process.

5) It was pointed out that the order of the Board were clear and unambiguous. The applicant submitted that the respondents' excuse that the Covid 19 pandemic prevented it from complying with the Board's decision cannot be true since the pandemic broke out after 14 days given to them to comply had lapsed.

6) The applicant pointed out that the respondents were aware of the issuance of the orders of the Board but they decided to willfully disobey the same. It is also pointed out that the respondents admitted vide the replying affidavit of Duke Onyari having failed to complete the procurement process to its logical conclusion within the 14 days window given by the Board. For the above reasons this court was urged to punish the respondents by granting the orders sought in the summons.

7) The respondent opposed the application arguing that they did not disobey any court orders therefore the application is unnecessary. They further submitted that for the contempt to exist there must be orders made by a court of competent jurisdiction that have been disobeyed by the respondents.

8) It is averred that there must be proof that one has actually disobeyed the court order and not orders made by Public Procurement Administrative Review Board. The respondents pointed out that the Public Procurement Administrative Review Board is a quasi-judicial body and its decisions can only be valid and enforceable by law if the same are first adopted as judgments or orders of the court which is not the case in this matter.

9) The respondents further argued that this court lacks jurisdiction to punish the respondents for contempt of orders that originated outside this court. They submitted that the orders which are before this court for enforcement are mere administrative orders that must first be adopted before a court of competent jurisdiction.

10) The respondents further argued that the applicant has not demonstrated that the respondents willfully failed, refused and or neglected to obey any court order.

11) Having considered the material placed before this court, it is clear that two issues have arisen for the determination of this court. **First**, is whether this court has jurisdiction to entertain the application. **Secondly**, whether the applicant has established that the respondents were contemptuous of the Board's decision.

12) It is appropriate to first determine the question of jurisdiction. I have already set out the arguments of the parties over the above issues. In short the respondents are of the submission that this court cannot entertain an application for contempt in respect of a decision of the Board which has not been adopted as the order of the court. Section 5 of the Judicature Act provides as follows:

**“The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England and that power shall extend to upholding the authority and dignity of subordinate courts.”**

13) The Constitution under Article 169(1) lists subordinate courts as follows

**a) The magistrates courts**

**b) The kadhis courts**

**c) The court martial and**

**d) Any other court or local tribunal as may be established by an Act of Parliament, other than the court established as required by article 162(2).**

14) The question is whether the Public Procurement Administrative Review Board can be categorised as a tribunal as contemplated under Article 169(1) (d) of the Constitution of Kenya 2010? In order to answer this question, it is important to examine the meaning of the word tribunal. According to **Black's Law Dictionary 10<sup>th</sup> Edition**, a tribunal is described *inter alia* as follows:

**“A court of justice or other adjudicatory body.”**

In the same dictionary **“Administrative Tribunal”** is described *inter alia* as follows:

**“A court like decision making authority that resolves disputes especially those in which one disputant is a government agency or department, an administrative agency exercising a quasi-judicial function.”**

15) The Board whose decision is alleged to have been disobeyed is a statutory body established under the Public Procurement and Assets

Disposal Act, 2015. In my view the Board is a quasi judicial body which falls under the category of **Administrative Tribunals**. In my view it is one of the local tribunals contemplated under Article 169(1) (d) of the Constitution of Kenya ,2010. It is not therefore a most for the decisions of the Board to be adopted first before one can proceed to enforce. The High Court therefore has jurisdiction to entertain an application for contempt of the orders or decisions arising from the Board. The preliminary objection put forward by the respondents cannot stand, the same is overruled.

16) The second issue is whether the respondents are guilty of the contempt. I have already stated the arguments put forward by both sides. It is not in dispute that the Board made its decision on 11<sup>th</sup> December 2019 whereof it directed the respondents to complete the procurement process within 14days from the date of the decision. The respondents do not deny knowledge of the decision. They however aver that they were prevented from complying with the Board's decision by the breakout of Covid 19 pandemic. The applicant pointed out that Covid 19 pandemic was first reported in Kenya in the month of March 2020, three months after the delivery of the decision of the Board.

17) With respect, I am persuaded by the applicant's argument that the reason advanced by the respondents to justify their failure to comply with the Board's decision is not genuine but a makeup story to continue defying the Board's decision. The Board's decision is clear and unambiguous. There is no application for review of the decision of the Board as contemplated under Section 175 of the Public Procurement and Assets Disposal Act.

18) In the end, I am satisfied that the applicant has established that the respondents were aware of the decision of the Board and that they willfully disobeyed the said orders by failing to complete the procurement process to its logical conclusion as directed by the Board within 14 days. Consequently, the 1<sup>st</sup> and 2<sup>nd</sup> respondents are hereby convicted for contempt. They are hereby directed to appear before this court on **20/11/2020** to mitigate to enable this court mete out the appropriate sentence.

**Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 6<sup>th</sup> day of November, 2020.**

.....

**J. K. SERGON**

**JUDGE**

**In the presence of:**

.....**for the Applicant**

.....**for the 1<sup>st</sup> Respondent**

.....**for the 2<sup>nd</sup> Respondent**