



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MIGORI**

**CIVIL APPEAL NO.7 OF 2016**

**COUNTY GOVERNMENT OF MIGORI.....APPELLANT**

**-VERSUS-**

**INB MANAGEMENT IT CONSULTING LIMITED.....RESPONDENT**

***(Being an Appeal from the Public Procurement Administrative Review Board Delivered On 15<sup>th</sup> January 2016)***

**RULING**

1. The Appellant filed an appeal against the decision by the Public Procurement Administrative Review Board (hereinafter referred to as '**the Board**') on 12/02/2016. On 18/02/2016 the Appellant filed a Notice of Motion dated 17/02/2016 under Certificate of Urgency seeking a '*Conservatory Order be issued staying the enforcement and or implementation of the decision of the Public Procurement Administrative Review Board dated 15<sup>th</sup> January, 2016 (Review No. 65 of 2016) in respect of Tender No. MC/49/2013-2014 for proposed Supply Customization, Installation and Implementation of Revenue Collection Cash Flow Management and Funds Requisition System in Migori County*' (hereinafter referred to as "**the Tender**").

2. The matter was however stayed by the consent of the parties pending the outcome of a Judicial Review application filed by the Respondent herein in Nairobi seeking the enforcement of the decision of the Board. That matter, this Court is reliably informed, was determined at the High Court and there is now an appeal pending at the Court of Appeal. With that development, this Court ordered that this matter do proceed.

3. Directions were taken and a Preliminary Objection filed by the Respondent herein was ordered to be canvassed first. The objection was on the jurisdiction of this Court to hear and determine the appeal. This ruling is therefore on that objection. Parties filed their respective submissions and referred to various decisions in support to their rival positions. The Respondent relied on the decisions in **Riley Services Limited vs. The Judiciary (2015) eKLR** and **Republic vs. Central Bank of Kenya & Another ex parte Horsebridge Networks Systems (E.A.) Ltd (2014) eKLR** whereas the Appellant relied on **Master Power Systems Limited -v- Public Administrative Review Board & 2 Others [2015] eKLR**, **Kenya Ports Authority -v- Auto Express Limited & 2 Others** and **Republic -v- Public procurement Review Board EX-parte Kenya Power & Lighting Company Limited [2009] eKLR**.

4. The objection is hinged on **Section 175(1)** of the **Public Procurement and Asset Disposal Act of 2015** (hereinafter referred to as '**the 2015 Act**'), which provides that:

**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.**

5. It is on that score that the Respondent submitted that this Court has no jurisdiction in this matter and it should down its tools. The Respondent prayed that the appeal be struck out *in limine* with costs.

6. Opposing the objection, the Appellant submitted that the objection was misconceived as the law allowed an appeal to this Court as well. The Appellant relied on **Section 100(2)** of the repealed **Public Procurement and Disposal Act of 2005** (hereinafter referred to as '**the 2005 Act**') which provided that:

**Any party to the Review aggrieved by the decision of the Review Board may appeal to the High Court and the decision of the High Court shall be final.**

7. As the issue under consideration was raised by way of a Preliminary Objection, it will be in order for me to have a look at the law on preliminary objections. **Law, J.A.** in the much-celebrated case of **Mukisa Biscuits Manufacturing Company Limited -vs- West End**

Distributors (1969) EA 696 had the following to say: -

*So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which raises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration.....*

8. My brother *Mwita, J.* in the case of John Musakali vs. Speaker County of Bungoma & 4 others (2015) eKLR put the foregone legal position in clearer terms when he stated that: -

*The position in law is that a Preliminary Objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the Preliminary Objection should have the potential to disposing of the suit at that point without the need to go for trial. If, however, facts are disputed and remain to be ascertained, that would not be a suitable Preliminary Objection on a point of law.*

9. Before I leave this discourse, my attention has been drawn to the words of **Hon. Ojwang, J** (as he then was) in the case of Oraro vs- Mbaja (2005) KLR 141 where after quoting the statement of **Law, JA.** in the Mukisa Biscuits case (supra) went on to stay that: -

*A 'Preliminary Objection' correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection, 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. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point....*

*Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.....*

10. The jurisdictional point raised by the Respondent herein clearly meets the foregone criteria being a pure point of law. That, jurisdiction is everything is a well settled principle in law. My Lordship **Ibrahim, JSC** in Supreme Court of Kenya Civil Application No. 11 of 2016 Hon. (Lady) Justice Kalpana H. Rawal vs. Judicial Service Commission & Others when in demystifying jurisdiction quoted from the decision in Supreme Court of Nigeria Supreme Case No. 11 of 2012 Ocheja Emmanuel Dangana vs. Hon. Atai Aidoko Aliusman & 4 Others where **Walter Samuel Nkanu Onnoghen, JSC** and expressed himself as follows: -

*...It is settled that jurisdiction is the life blood of any adjudication because a court or tribunal without jurisdiction is like an animal without blood, which means it is dead. A decision by a court or tribunal without requisite jurisdiction is a nullity - dead - and of no legal effect whatsoever, That is why an issue of jurisdiction is crucial and fundamental in adjudication and has to be dealt with first and foremost...*

11. The Court of Appeal more recently in the case of Kakuta Maimai Hamisi -vs- Peris Pesi Tobiko & 2 Others (2013) eKLR had the following to say on the centrality of the issue of jurisdiction: -

*So central and determinative is the jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings in concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cui-de-sac. Courts, like nature, must not sit in vain.*

12. On the source of a Court's jurisdiction, the **Supreme Court of Kenya** in the case of Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & others (2012) eKLR stated as follows: -

*A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings ... where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.*

13. Having laid the legal foundation appurtenant to the objection, I will now deal with the objection in issue. There are some settled facts in this matter. They include that the enactment of **the 2015 Act** repealed **the 2005 Act** and that **the 2015 Act** was assented to on 18/12/2015 and commenced on 17/01/2016. It is also not in doubt that the Appellant first advertised the Tender through the Standard Newspaper Edition of Wednesday, 19<sup>th</sup> March 2014.

14. **Section 183** of **the 2015 Act** provided for the application of the transitional provisions under the **Third Schedule. Clauses 1(1)** and **(2)** of the **Third Schedule** provides as follows: -

**1.(1) Procurement proceedings commenced before the commencement date of this Act shall be continued in accordance with**

**the law applicable before the commencement date of this Act.**

**(2) For purposes of sub paragraph (1), procurement proceeding commences when the first advertisement relating to the procurement proceeding is published or, if there is no advertisement, when the first documents are given to persons who wish to participate in the procurement proceeding.**

15. There is no doubt that any procurement proceedings commenced before the enactment of the 2015 Act were to be continued in accordance with the 2005 Act. The question which now begs an answer is whether the procurement proceedings herein were commenced before the enactment of the 2015 Act on 17/01/2016. **Clause 2(2) of the Third Schedule** answered that question by clarifying when procurement proceedings are deemed to commence; that it is on the first publication of the advertisement on that procurement or, if there is no advertisement, when the first documents are given to persons who wish to participate in the procurement proceeding. The law is that clear.

16. Given that the first publication of the advertisement on the procurement in issue was on 19/03/2014 through the Standard Newspaper and **the 2015 Act** came into operation on 17/01/2016, then the procurement proceedings herein were commenced before the commencement date of **the 2015 Act** and as such they must be continued in accordance with **the 2005 Act** which allowed a party aggrieved by the decision of the Board to appeal to the High Court.

17. The Appellant was therefore within its legal rights to lodge an appeal to the High Court. The objection is hence misconceived and is for rejection.

18. As the appeal has been pending since 2016 this Court shall give directions towards the disposal of the same. As I come to the end, I must apologize for the delay in delivery of this judgment which was caused by factors beyond my control and my involvement in a Multi-Judge bench in Mombasa.

19. The following final orders shall henceforth issue: -

**(a) The Preliminary Objection dated 26/02/2016 and filed on 29/02/2016 be and is hereby dismissed with costs.**

**(b) The appeal shall be heard by way of written submissions. To that end, the Appellant shall file and serve its written submissions within 14 days of today and the Respondent shall file and serve its written submissions within 14 days of service.**

**(c) Highlighting of submissions on 14/03/2019.**

**(d) Time is of essence and any defaulting party shall suffer the consequences.**

Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 14<sup>th</sup> day of February, 2019.**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered in open Court and in the presence of:**

**Mr. Marvin Odera** Counsel instructed by Messrs. Okong'o Wandago & Company Advocates for the Appellant.

**Mr. Gitonga Mureithi** Counsel instructed by Messrs. Gitonga Mureithi & Company Advocates for the Respondent.

**Evelyne Nyauke** – Court Assistant.