



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW CASE NO. 142 OF 2018**

**IN THE MATTER OF AN APPLICATION FOR LEAVE**

**TO APPLY FOR JUDICIAL REVIEW ORDERS**

**AND**

**THE MATTER OF ARTICLES 10, 22, 23(3) (3)(f), 47(1), 50(1) AND**

**165(6) & (7) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT**

**AND**

**IN THE MATTER OF SECTIONS 8&9 OF THE LAW REFORM ACT**

**AND**

**IN THE MATTER OF ORDER 53(1) OF THE CIVIL PROCEDURE RULES**

**AND**

**IN THE MATTER OF SECTION 175(1) OF THE PUBLIC**

**PROCUREMENT AND ASSET DISPOSAL ACT 2015**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**PUBLIC PROCUREMENT ADMINISTRATIVE**

**REVIEW BOARD.....RESPONDENT**

**LEEDS EQUIPMENTS AND**

**SYSTEMS LIMITED.....INTERESTED PARTY**

**EXPARTE:**

**KENYA VETERINARY VACCINES PRODUCTION INSTITUTE**

## RULING

### The Application

1. The *ex parte* Applicant herein (hereinafter “the Applicant”) is the Kenya Veterinary Vaccines Production Institute, a parastatal established under Chapter 446 of the Laws of Kenya, and which was the Procuring Entity in a restricted tender for the Supply, Installation, Training and Commissioning of Laboratory Equipment (hereinafter “Tender No. KVVPI/T/1/2017-18”). The Respondent, the Public Procurement Administrative Review Board, on the other hand 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. The Interested Party, Leeds Equipment And Systems Limited, is a company registered to carry on business in Kenya and participated in Tender No. KVVPI/T/1/2017-18.

2. On 3<sup>rd</sup> April 2018, the Applicant filed an application by way of a Chamber Summons dated 29<sup>th</sup> March 2018, seeking the following substantive orders:

**a) The *ex parte* Applicant be granted leave to apply for an order of certiorari to remove to the High Court for purposes of quashing the Respondent’s decision dated 16<sup>th</sup> March, 2018 pending the hearing and determination of the Notice of motion for the judicial review orders**

**b) The leave granted do operate as a stay of implementation of the respondents decision dated 16<sup>th</sup> March 2018 pending the hearing and determination of the notice of motion for the judicial review orders.**

**c) Costs of the suit be provided for.**

3. The application is supported by statement and verifying affidavit of the same date sworn by Dr. Jane Wachira, the Applicant’s accounting officer. In summary, the grounds for the application are that the Applicant intends to automate its vaccine production plant, and planned, budgeted for, and procured the said plant through Tender No. KVVPI/T/1/2017-18. That after bids were opened on 11<sup>th</sup> December 2017, the lowest evaluated bid’s prices were above the approved budget, and the tender was consequently terminated, and the tenderers notified of this decision and the reasons thereof.

4. The Interested Party thereupon challenged the decision to terminate the tender at the Respondent Board, in Request for Review No. 34 of 2018. The Respondent in a decision delivered on 16<sup>th</sup> March 2018 annulled the decision to terminate the tender, and directed the Applicant to award the same to the Interested Party. The Applicant claims that the Respondent failed to take into consideration that it is unable to pay the Interested Party’s bid price; that Interested Party’s technical bid was unresponsive; that the evaluation report was at variance with the Interested Party’s bid; and failed to distinguish between evaluation criteria and award criteria. The Applicant thus seeks to have the Respondent’s decision quashed.

### The Preliminary Objection

5. On 11<sup>th</sup> April 2018, the Interested Party filed a Preliminary Objection of the same date, seeking that the Applicant’s application be struck out on the following grounds:

a) The application is time barred pursuant to section 175(1) of the Public Procurement and Asset Disposal Act (2015), there being no request for extension and/or enlargement of time.

b) The Court lacks the jurisdiction to alter the grounds used to terminate the tender proceedings, and the application here in is an abuse of the court process.

6. The application was also opposed by the Interested Party through a Replying Affidavit sworn on 11<sup>th</sup> April 2018 by Geoffrey Koech, its Director. This Court on 12<sup>th</sup> April 2018 directed that the Interested Party’s Preliminary Objection be heard and determined first, and that the same be canvassed by way of written submissions, which the parties duly filed in Court. Since this ruling is on the Preliminary Objection, I will not delve into the details of the Interested Party’s substantive response, which will have to await the outcome of its preliminary objection.

7. On the ground raised of limitation of time, Cheboi, Kiprono Advocates for the Interested Party submitted that the procurement dispute is a time bound process, and that section 175(1) of the Public Procurement and Asset Disposal Act 2015 provides that a person aggrieved by the decision of the Respondent may seek review by the High Court within 14 days from the date of the review board’s decision, failure to which the Review Board’s decision shall be final and binding to both parties. Reliance was placed on the decisions in **Al Ghurair Printing And Publishing LLC vs Coalition For Reforms And Democracy and 2 Others (2017) eKLR**, and **Master Power Systems Limited vs Public Procurement Administrative Review Board and 2 Others (2015) e KLR** for this position.

8. According to the Interested Party, judicial review proceedings are commenced by Notice of Motion and not Chamber Summons, and they cited the case of **Christopher Musau vs Attorney General, (2013) eKLR**. Therefore, that the judicial review application was commenced on the 9<sup>th</sup> April 2018 upon filing the Notice of Motion dated 5<sup>th</sup> April 2018 when the review board’s decision had already become final and binding.

9. In addition, that filing an application outside the stipulated time period is not a mere procedural technicality curable by Article 159 of the Constitution, and the same cannot oust the mandatory provisions of law which allows the application of any other written law with regard to limitation of time for instituting judicial review proceedings. Reliance was placed on the case of **R vs Public Procurement Review Board**

**and 2 Others ex parte County Assembly Of Busia, Misc App 647 of 2017** for this position.

10. The Applicant on the other hand submitted that its application was not time barred, as section 175 of the Public Procurement And Asset Disposal Act 2015 does not provide for its commencement of the 14 days period, and that under section 9(1) of the Law Reform Act and Order 53 Rules 1 of the Civil Procedure Rules, an application for judicial review is made with leave of the court.

11. Reliance was also placed on section 57 of the Interpretation and General Provisions Act for the submission that the 16<sup>th</sup> March 2018 when the decision was made is excluded from the time computation and the 1<sup>st</sup> day of computation was 17<sup>th</sup> March 2018, while the 14<sup>th</sup> day was 30<sup>th</sup> March 2018. Further, that that 30<sup>th</sup> March 2018 was a public holiday and was excluded for purposes of computation of time. That the next three days were also excluded for being public holidays, and the last day to seek judicial review was therefore 3<sup>rd</sup> April 2018.

12. The Applicant also relied on the decisions in **Republic vs Public Procurement and Disposal Administrative Review Board and 4 Others ex parte J Knierem BV (2016) eKLR**, **Republic vs Public Procurement Administrative Review Board and Three Others Exparte Syner-Chemie Limited (2018) eKLR**, **Duncan Wainaina vs Samuel Mbugua (2011) eKLR**, and **Republic vs Bernard Kungu Kariuki, (2009) eKLR** for the position that section 57 of the General Provisions and Interpretations Act applies to the timelines under the Public Procurement and Public Disposal Act, and that its application was within the timelines.

13. The Interested Party also raised the ground of this Court's jurisdiction in its Preliminary Objection, and submitted that the Applicant's allegations that the Interested Party had not met the technical specification of the tender document was an invitation to the Court to look at the evidence as opposed to the decision making process. They further submitted that under the applicant is introducing new grounds which had not been the reason for terminating the tender proceedings under the guise of justifying why the tender proceedings were cancelled.

14. The Interested Party relied on the case of **R vs Public Procurement Administrative Review Board and 2 Others exparte OJSC Powered Machines Limited and Others**, Misc. Civil Application No 284 of 2015 where the court considered the parameters of judicial review set out in **Municipal Council of Mombasa vs Republic and Umoja Consultants LTD (2002) e KLR**.

15. It was the Interested Party's submission that the present judicial review application seeks to call upon the court to substitute its decision with that of the Respondent which is outside of the court's jurisdiction as the court is not an appellate court to reevaluate the evidence presented before the Board.

16. The Applicant on its part submitted that the Respondent is a specialised body and cannot be heard to be making errors of precedent. Reliance was placed on the decision in **Republic vs Public Procurement Administrative Review Board And Another ex parte Uto Creations Studio Limited (2013) eKLR** for the position that the Respondent is entitled to conduct a review not only the allegations made in the application for review before it but also review of the entire procurement process to see that it complies with the prescribed procedures and ensure that objects of the Act are fulfilled.

17. In addition, that sections 7 and 11 of the Fair Administrative Actions Act empower the court to delve into merit review of the Respondent's impugned decision and relied on the case of **Judith Anyango Elizabeth Oyugi vs Independent Electoral And Boundaries Commission(IEBC) and 3 Others (2017) eKLR** in this regard.

### **The Determination**

18. 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.

19. 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.

20. The issues for determination herein therefore are whether the grounds raised in 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.

21. 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”

22. 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 an determining a review filed by the Interested Party.

23. 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. The Applicant is one such aggrieved person and this Court clearly has jurisdiction to hear and determine judicial review applications as demonstrated by the foregoing provisions of the Constitution and cited statutes.

24. The Interested Party’s arguments are that the grounds raised by the Applicant are not amenable to judicial review as they are of a technical nature and will lead to introduction of evidence, which he is of the view this Court sitting as a judicial review Court is not equipped to deal with. This is not a jurisdictional question, but a factual question as it entails the Interested Party having to first demonstrate and prove what the technical and evidential issues alleged by the Applicant are, and the reasons why they are not amenable to review.

25. This ground as crafted by the Interested Party cannot therefore be raised in a preliminary objection, as it entails the calling of proof and exercise of this Court’s discretion in finding in its favour, and can only be addressed in the event that a hearing of the judicial review proceedings is held. His objection that this Court has no jurisdiction therefore has no merit for the foregoing reasons.

26. On the second ground as regards the Applicant’s application being time barred, it is not in dispute that the decision of the Respondent was delivered on the 16<sup>th</sup> March 2018. It is also not disputed that the Chambers Summons for leave to commence judicial review proceedings was filed in Court on 3<sup>rd</sup> April 2018. The applicable law as to the time within which the decision of the Respondent ought to be contested is 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.”**

27. The time of filing of judicial review proceedings in this Court by an in procurement disputes is thus clearly regulated by the law, and if not complied with 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 Nairobi HCMA No. 1260 of 2007 [2008] KLR 728**.. This is thus a pure point of law that has been raised by the Interested Party.

28. The point of departure by the Applicant and Interested Party is on the interpretation of the said provisions as regards the action that commences judicial review proceedings, and the computation of time in the event of public holidays. It is the Interested Party position that judicial review proceedings are commenced by way of Notice of Motion and not the Chamber Summons seeking leave to institute judicial proceedings. The Applicant argues otherwise, and submits that under Order 53 of the Civil Procedure Rules, judicial review proceedings commence by way of an application for leave.

29. Order 53 Rule 1 provides as follows in this regard:

**(1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.**

**(2) An application for such leave as aforesaid shall be made *ex parte* to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.**

30. Once leave has been granted, Order 53 (3) of the Rules then on applications by Notices of Motions then becomes applicable and provides as follows:

**(1) When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty-one days by notice of motion to the High Court, and there shall, unless the judge granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion and the day named therein for the hearing.**

31. There can thus be no Notice of Motion that can exist independently of a Chamber Summons application for judicial review proceedings, and as all judicial review proceedings are dependant of leave being granted by the Court, judicial proceedings by law commence at the time of filing of the application for leave. The decision in **Christopher Musau vs Attorney General, (supra)** relied upon by the Interested Party in this respect is also distinguished, as it was addressing the form of filing the substantive application for judicial review orders which it was held was by way of Notice of Motion and not Originating Summons. The decision thus did not address the issue at hand of when judicial proceedings are deemed to commence.

32. Once an application for leave has been filed when does time then start to run for purposes of section 175(1) of the Public Procurement and Asset Disposal Act 2015? Article 259(5) of the Constitution in this regard provides that:

**“ in calculating time between two events or any purpose under this constitution, if the time is expressed;**

**(a) as days, the day on which the first event occurs shall be excluded, and the day by which the last event may occur shall be included,....”**

33. This position is also restated in section 57 of Interpretation and General Provisions Act, which provides as follows as regards computation of time:

**“ In computing time for the purposes of a written law, unless the contrary intention**

**appears—**

**(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;**

**(b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;**

**(c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;**

**(d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.”**

34. Order 50 Rule 8 of the Civil Procedure Rules also stipulates that:

**“ In any case in which any particular number of days not expressed to be clear days is prescribed under these rules or by an order or direction of the court, the same shall be reckoned exclusively of the first day and inclusively of the last day.”**

35. Therefore, in the instant application, time started to run on 17<sup>th</sup> March 2018, and the 14<sup>th</sup> day thereafter was on 30<sup>th</sup> March 2018. It is not contested that 30<sup>th</sup> March 2018 to 2<sup>nd</sup> April 2018 was the Easter holiday, and the two days were therefore excluded for purposes of computing time, as the time provided for in section 175(1) of the Public Procurement and Asset Disposal Act exceeds 6 days. Thus, 3<sup>rd</sup> April 2018 was legally the 14<sup>th</sup> day and deadline for filing judicial review proceedings, and the Applicant at the time of filing the Chamber Summons on that date was therefore within time.

36. In the premises I find that the Interested Party's Preliminary Objection dated 11<sup>th</sup> April 2018 is not merited and it is accordingly dismissed with costs to the Applicant.

37. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 12<sup>TH</sup> DAY OF JULY 2018**

**P. NYAMWEYA**

**JUDGE**