



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT MOMBASA**

**JUDICIAL REVIEW DIVISION**

**JUDICIAL REVIEW APPLICATION NO. 67 OF 2018**

**IN THE MATTER OF: THE LAW REFORM ACT CAP 26**

**AND**

**IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015**

**AND**

**IN THE MATTER OF: THE PUBLIC PROCUREMENT AND ASSETS DISPOSALS ACT NO. 33 OF 2015**

**AND**

**IN THE MATTER OF: AN APPLICATION BY KENYA PORTS AUTHORITY FOR THE JUDICIAL REVIEW ORDER OF CERTIORARI AGAINST THE DECISION OF THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD MADE ON 25<sup>TH</sup> SEPTEMBER, 2018 IN RESPECT OF REQUEST FOR REVIEW APPLICATION NO. 115 OF 2018**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**PUBLIC PROCUREMENT BOARD**

**ADMINISTRATIVE BOARD.....RESPONDENT**

**AND**

**KENYA PORTS AUTHORITY.....EX-PARTE APPLICANT**

**AND**

**SIMBA PHARMACEUTICALS LIMITED.....1<sup>ST</sup> INTERESTED PARTY**

**AND**

**LABOREX KENYA LTD.....2<sup>ND</sup> INTERESTED PARTY**

**RULING**

**The Application**

1. Pursuant to the leave granted by this court on 5<sup>th</sup> October, 2018, the ex-parte Applicant filed the Notice of Motion herein dated 18<sup>th</sup> October, 2018 praying for the following orders:

(a) The application be certified urgent and heard and determined within the statutory timelines of 45 days from the date of filing this application, in line with the statutory timelines provided by Section 175 (3) of the Public Procurement and Asset Disposal Act, 2015.

(b) This Honourable Court be pleased to grant an order of Certiorari to remove to this Honourable Court for purposes of quashing the entire decision of the Public Procurement Administrative review Board, the Respondent herein, made on 25<sup>th</sup> September 2017 under the Request for Review Application No. 115 of 2018 – Simba Pharmaceuticals Limited vs. the Managing Director, Kenya Ports authority & another regarding the tender No. KPA/121/2017 – 18/MS – supply of Drugs.

(c) Any and other further orders as this Honourable Court may deem fit to grant.

(d) That each party bears its own costs in line with the provisions of Section 175 (7) of the Public Procurement and Asset Disposal Act, 2015.

2. The application is premised on the grounds set out therein, being that on 8<sup>th</sup> May, 2018, the Applicant, being the procuring entity advertised the Tender No. KPA/121/2017 – 18/MS – Supply of Drugs with a tender validity period of ninety (90) days. Upon the preliminary evaluation of the bids received, the Interested Party's bid was found to be unresponsive having failed to meet the mandatory requirements of the tender. Its bid was therefore disqualified preliminarily. On 4<sup>th</sup> September, 2018, the Interested Party filed the Request for Review Application No. 115 of the 2018 before the Respondent on grounds that the deviations in its bid were minor and should not have affected the responsiveness of its bid. The Respondent delivered its Ruling on 25<sup>th</sup> September, 2018, allowing the Interested Party's application, giving the following Orders:

(a) That the Procuring Entity (the Applicant herein) is directed to readmit the Interested Party to the procurement process

(b) That the Procuring Entity proceeds with the technical and financial Evaluation of the Interested Party's bid within Fourteen (14) days from the date of the decision.

3. It is the Applicant's case that the Respondents aforesaid decision was unreasonable, irrational, illegal, capricious and in excess of jurisdiction for failure to consider relevant facts as particularized in the Statutory Statement and Verifying Affidavit filed herewith. The Applicant states that if the Respondent's Award is not quashed within 45 days of filing this application as set out in Section 175 (4) of the Public Procurement and Asset Disposal Act 2015, then the decision will become binding and the ex-parte Applicant will be bound to implement the impugned decision.

#### **The Response**

4. The Respondent oppose the application on grounds of Law and filed submissions to that effect.

#### **The Interested Parties**

5. There are two interested parties. The 1<sup>st</sup> Interested Party is Simba Pharmaceuticals Limited who oppose the application. The 1<sup>st</sup> Interested Party was the Successful applicant in the Review before the Public Procurement Administrative Board. In opposition to the application, 1<sup>st</sup> Interested Party filed a Replying Affidavit sworn on 16<sup>th</sup> November, 2018 by Kalithodi Ravinder Menon who describes himself as the Chief Executive Officer of the 1<sup>st</sup> Interested Party. The 1<sup>st</sup> Interested Party states that the application does not have merit and is disguised as a Review and does not challenge the decision making process but rather focusing on the merits of the case. The 1<sup>st</sup> Interested Party states that the Ex parte Applicant has completely failed to demonstrate how the decision of the Respondent is unreasonable, illegal or ultra vires. The 1<sup>st</sup> Interested Party's case is that the issues of Tax compliance Certificate and Taxpayers Registration Certificate were widely canvassed before the Board and reintroducing it at this juncture is tantamount to inviting this court to undertake a merit review or appeal of the decision of the Board. The Interested Party contends that the tender process was meant to lock it out as the notification was issued on 23<sup>rd</sup> August 2018, 14 days before the expiry of the tender validity period. Therefore, the decision of the Board was rational, reasonable, logical, lawful, impartial and in line with public policy and public interest and the intention of Parliament in enacting the Public Procurement and Disposal Act, 2005 (PP&DA).

6. The 2<sup>nd</sup> Interested Party was admitted to these proceedings on 22<sup>nd</sup> November, 2018. The Second Interested Party was the successful tenderer in the impugned tender process. The 2<sup>nd</sup> Interested Party supports the Ex-part Applicant's application through a Replying Affidavit sworn on 23<sup>rd</sup> November, 2018 by Dr. Sara Agak who describes herself as the Operations Director of the 2<sup>nd</sup> Interested Party.

7. The 2<sup>nd</sup> Interested Party's case is that it was declared the winner for Tender No. KPA/121/2017 – 2018 MS for supply of drugs in a fair and transparent process. In the said process, the 2<sup>nd</sup> Interested Party's case is that the 1<sup>st</sup> Interested Party was disqualified at preliminary stage for failure to submit mandatory documents. The 2<sup>nd</sup> Interested Party states that the said disqualification was lawful and was in order pursuant to Tender documents. It was not a mere technicality to be cured under Article 159 (2) (d) of the Constitution or under Section 79 of the Public Procurement and Asset disposal Act.

8. It is the 2<sup>nd</sup> Interested Party's case that the Respondent's purported decision to re-admit the 1<sup>st</sup> Interested Party to the tender process is unlawful, unreasonable and unenforceable, first, because the Respondent did not take into consideration that the Ex-parte Applicant's financial bid and the tender security had been returned to the 1<sup>st</sup> Interested Party. Second, the Ex-parte applicant was not in a position to evaluate tender documents which were not in its possession or control and it was impossible to authenticate that the 1<sup>st</sup> Interested Party did not open or alter the financial bid after it was returned by the Ex-parte Applicant. Third, the decision was made long after expiry of the tender validity period of 90 days. Fourth, the Respondent acted *ultra-vires* by attempting to extend the tender validity period as the 1<sup>st</sup> Interested

Party could not be evaluated when the tender validity period had lapsed and there was no extension. Fifth, the Respondent's decision was based on unverified and mistaken assertion that the 1<sup>st</sup> Interested Party's failure to provide proper tax compliance certificate and tax registration certificate was occasioned by Kenya Revenue authority. Sixth, the basis of the Respondent's decision that the Ex-parte Applicant and the 1<sup>st</sup> Interested Party had previously entered into a contract on strength of tax documents in issue was irrational and unreasonable as there was no evidence presented to support the claims.

9. The 2<sup>nd</sup> Interested Party claims that the 1<sup>st</sup> Interested Party's bid was disqualified at the preliminary stage for non-adherence to a mandatory requirement and was therefore declared non-responsive.

### **Submissions**

10. Parties filed submissions which I have carefully considered. The Ex-parte applicant submits that the Respondent acted *ultra vires* in determining that the 1<sup>st</sup> Interested Party's bid submissions were preliminary responsive. The ex-parte applicant argued that as per Section 80 of the Public Procurement and Asset Disposal Act 2015, the role of evaluation of tenders in order to determine their responsiveness is the sole preserve of a tender evaluation committee appointed by the accounting officer of a procuring entity. In conducting an evaluation, the committee is guarded by the criteria stipulated in the tender document. The tender evaluation committee in this matter found the 1<sup>st</sup> Interested Party's bid to be preliminarily unresponsive having failed to comply with the mandatory requirements set out in the tender document. The bid was therefore dismissed preliminarily. Therefore, in finding that the deviations in the 1<sup>st</sup> Interested Party's tender were minor, the Respondent actually re-evaluated the 1<sup>st</sup> Interested Party's tender and substituted the decision of the tender Evaluation committee therefore acting in excess of powers conferred upon it under Section 173 Public Procurement and Asset Disposal Act No. 33 of 2015 and equally usurped the powers of the tender evaluation committee.

11. Further, the ex-parte Applicant submitted that the Respondent acted unreasonably in arriving at its decision. First, in directing the Ex Parte Applicant to readmit the 1<sup>st</sup> Interested Party to the procurement process and to process and to proceed with the evaluation of its technical and financial bids within fourteen (14) days from the date of the decision, the Respondent acted unreasonable since it failed to consider the fact that the unopened financial bid submissions of the 1<sup>st</sup> Interested Party had already been returned after its preliminary disqualification. It is therefore impossible to authenticate and ascertain whether the returned financial submissions indeed remained unopened while in the 1<sup>st</sup> Interested Party's possession.

12. The Ex-parte Applicant submitted that the Respondent's decision to have the 1<sup>st</sup> Interested Party's tender evaluated within 14 days from the date of delivery of the decision was an illegality since the subject tender was advertised on 8<sup>th</sup> May 2018 with a tender validity period of ninety (90) days and therefore it lapsed on 7<sup>th</sup> August 2018 way before the decision of the Respondent made on 25<sup>th</sup> September, 2018. The Ex-parte Applicant cited the case of **Republic v Public Procurement Administrative Review board & 2 others Ex Parte Higawa Enterprises Limited [2017]eKLR**, where the Court held that:

**“A tender award is vitiated by a process that is not fair and transparent. It was therefore illegal for the Respondent to uphold a tender award done in such an opaque manner without a tender validity period when the law requires that the same be specified.**

**For the foregoing reasons, this Court cannot disregard a decision that is irrational, illogical or fraught with procedural impropriety and allow the same to stand just because the decision-making process cannot be faulted. I therefore find that this Court is properly within its mandate to make a determination on the decision made by the Respondent based on the 3 1's. Further, the illegality of the Tender has been brought to attention of the Court. This Court should not enforce an illegal tender contract, or allow itself to be made an instrument of enforcing the illegal tender. I conclude by borrowing the words of the Court in Olive telecommunication PVT Limited case (supra). By allowing the award of the Tender to stand “this Court would have abetted an illegality. This Court cannot countenance illegalities under any guise since the High Court has a supervisory role to play over inferior tribunals and courts and it would not be fit to abdicate its supervisory role to do so.”**

### **1<sup>st</sup> Interested Party**

13. On its part, the 1<sup>st</sup> Interested Party submitted that the Respondent is empowered by Section 173 of the Act to inter alia substitute the decision of the procuring entity and direct the procuring entity as the board may deem fit.

14. The 1<sup>st</sup> Interested Party stated that the Ex parte Applicant was well aware that an unsuccessful candidate has a non-derogable right to approach the board like the Interested Party did therefore returning the unopened financial bids to unsuccessful candidates was a ploy to arm twist the Respondent to give the process a clean bill of health.

15. On the authenticity of the unopened bid returned to the procuring entity after the decision of the Respondent, the 1<sup>st</sup> Interested Party submitted that evaluation of the technical and financial submissions is a confidential process and as such it would not be aware of what was submitted by the other bidders. Further, the 1<sup>st</sup> Interested Party pointed out that there was no document on record indicating the prices quoted by bidders or other financial details. Therefore, the Ex parte Applicant is precluded from alleging that the Respondent created absurdity by ordering that the 1<sup>st</sup> Interested Party be readmitted.

16. On the issue of Taxpayers registration Certificate and the Tax Compliance Certificate, the 1<sup>st</sup> Interested Party submitted that the Respondent had the benefit of hearing and determining the issue on merit. The Interested Party faulted the Ex parte Applicant for being interested in the merit of the decision and not decision making process.

17. On its part, the Respondent submitted that Section 173 of the Public Procurement and Disposal Act sets out the powers of the Review Board which states as:

Upon completing a review, the Review Board may do any one or more of the following –

- (a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;
- (b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;
- (c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;
- (d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and
- (e) order termination of the procurement process and commencement of a new procurement process.

174. Right to review is additional right. The right to request a review under this part is in addition to any other legal remedy a person may have.

The Respondent opined that it was well guided by the provisions of the above Section in coming up with its decision.

### **The Determination**

18. Section 173 of the Public Procurement and Asset Disposal Act provides for the powers of the Respondent. It reads as follows:

**Upon completing a review, the Review Board may do any one or more of the following—**

- (a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;**
- (b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;**
- (c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;**
- (d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and**
- (e) order termination of the procurement process and commencement of a new procurement process.**

19. Upon completion of the review in this instant, the Respondent directed the Procuring Entity to reinstate the 1<sup>st</sup> Interested Party at the technical and financial stages and evaluate its bid within 14 days from the date of the decision. In my view, the Respondent could not have acted in excess of its powers Section 173, as described above allows the Respondent to give direction to the accounting officer of a procuring entity on anything to be done in the procurement process. The Respondent did not in any way usurp the powers of the tender evaluation committee in re-evaluating the tender. I should think that the Respondent acts as an appeal channel in the procurement process against decisions or complaints against the procuring entity. In **Republic v Public Procurement Administrative Review Board & 3 others Ex-Parte Saracen Media Limited [2018] eKLR**, Mativo J cited the case of **Kenya Pipeline Ltd vs. Hyosung Ebara Company Ltd [2012] eKLR** where the Court of Appeal opined that:

**“The Review Board is a specialized statutory tribunal established to deal with all complains of breach of duty by the procuring entity. From the nature of powers given to the Review Board including annulling, anything done by the procurement entity and substituting its decision for that of the procuring entity that the administrative review envisaged by the Act is indeed an appeal”.**

20. In determining the review before it by the 1<sup>st</sup> Interested Party, the Respondent had to reevaluate the tender by the 1<sup>st</sup> Interested Party vis-a-vis the mandatory procurement requirements set by the ex-parte applicant to ensure that the ex-parte applicant was justified in disqualifying the 1<sup>st</sup> Interested Party at the preliminary stage. It must be noted that it is not within the realm of judicial review proceedings to examine the merits of the decision but rather the process of the decision making. This was stated in **Republic vs. Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji [2014] eKLR** as follows:

**“Judicial review applications do not deal with the merits of the case but only with the process. In other words judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard**

**before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved”.**

21. Accordingly therefore, this court cannot delve into the issue whether the decision of the Respondent was right or wrong. The court can only examine the procedure by which the Board reached the decision and in this case the Respondent did not act in excess of its powers.

22. As to whether the decision was unreasonable, the ex-parte applicant contended that unopened financial bid had been returned to the 1<sup>st</sup> Interested Party after disqualification. The ex-parte applicant was apprehensive that the 1<sup>st</sup> Interested Party may have opened and substituted its bid upon return of the bid thus if the same was re-evaluated the ex-parte Applicant would have no way of authenticating the financial bid to be the same one that was sent in by the 1<sup>st</sup> Interested Party at the request for tenders stage.

23. Was the said decision unreasonable on the said grounds? I do not think so. The test as to whether a decision is unreasonable is objective. In **Republic vs. Public Procurement Administrative Review Board & 3 others, Ex parte Olive Telecommunication PVT Limited [2014] eKLR**, the court observed as follows:

**“...with respect to the ground of Wednesbury unreasonableness, it is not mere unreasonableness which would justify the interference with the decision of an inferior tribunal. It must be noted that unreasonableness is a subjective test and therefore to base a decision merely on unreasonableness places this court at the risk of determination of a matter on merits rather than on the process. In our view, to justify interference the decision in question must be so grossly unreasonable that no reasonable authority, addressing itself to the facts and the law would have arrived at such a decision. In other words such a decision would be deemed to be so outrageous in defiance of logic or acceptable moral standards that no sensible person applying his mind to the question to be decided would have arrived at it. Therefore, whereas that the Court is entitled to consider the decision in question with a view to finding whether or not the Wednesbury test of unreasonableness is met, it is only when the decision is so grossly unreasonable that it may be found to have met the test of irrationality for the purposes of Wednesbury unreasonableness”.**

24. I have looked at the grounds upon which this application is premised. The decision by the Respondent could not have been unreasonable in light of those grounds. The Respondent directed that the 1<sup>st</sup> Interested Party be reinstated back for the technical and financial evaluation stages. In order to do this, the ex-parte applicant would have to evaluate the financial bid that it had returned to the 1<sup>st</sup> Interested Party. There is no evidence to show that the 1<sup>st</sup> Interested Party could have attempted or had indeed tampered with its initial financial bid. Therefore, the decision of the Respondent could not have been grossly unreasonable.

25. On the issue of illegality, the ex-parte applicant argues that the decision of the Respondent was illegal as the tender validity period of 90 days had already lapsed therefore the 1<sup>st</sup> Interested Party could not be reinstated into the procurement process. I have carefully read through the application and the annexed tender documents. As I understand it, the tender No. KPA/121/2017-18/MS for the supply of drugs was advertised on 8<sup>th</sup> May, 2018. The parties do not dispute that the tender validity period was 90 days. This would mean that the tender validity period lapsed on 7<sup>th</sup> August, 2018. Section 88 of the Public Procurement and Asset Disposal Act provides for the tender validity period:

**(1) Before the expiry of the period during which tenders shall remain valid the accounting officer of a procuring entity may extend that period.**

**(2) The accounting officer of a procuring entity shall give in writing notice of an extension under subsection (1) to each person who submitted a tender.**

**(3) An extension under subsection (1) shall be restricted to not more than thirty days and may only be done once.**

**(4) For greater certainty, tender security shall be forfeited if a tender is withdrawn after a bidder has accepted the extension of bidding period under subsection (1).**

26. In this case, the ex-parte applicant did not demonstrate that the tender validity period was at any moment in the procurement process extended. Therefore, the validity period remained to be that of 90 days. There seems to be a controversy on the validity period of the tender. The 1<sup>st</sup> Interested Party averred that it was informed of its disqualification from the procurement process on 23<sup>rd</sup> August, 2018. The 1<sup>st</sup> Interested Party has never complained that this date fell outside the tender validity period. The ex-parte applicant, also, through its actions believed the date of 23<sup>rd</sup> August, 2018 to be well within the tender validity period. The court, however, notes that the tender was opened on 28<sup>th</sup> May, 2018. It can only be presumed that the parties herein calculated the 90 days from the 28<sup>th</sup> May, 2018. Accordingly, the parties presumed that the tender validity period lapsed on 27<sup>th</sup> August, 2018.

27. Be that as it may, the decision of the Respondent was made on 25<sup>th</sup> September, 2018. Was the period outside the tender validity period? The 1<sup>st</sup> Interested Party suggested that by lodging the review the tender validity period was extended. Section 168 of the Public Procurement and Asset Disposal Act provides that “Upon receiving a request for a review under section 167, the Secretary to the Review Board shall notify the accounting officer of a procuring entity of the pending review from the Review Board and the suspension of the procurement proceedings in such manner as may be prescribed”. In my view, the lodging of a review with the Respondent suspended the procurement proceedings including the validity period. However, in this case it appears that the review was lodged well after the tender had lapsed on 7<sup>th</sup> August, 2018. It would then follow that the decision of the Respondent could not have been implemented if there was no valid tender in the first place. The Respondent in allowing the review ought to have considered the validity period of the tender so as to avoid issuing orders in

vain.

28. In line with this finding, the tender award made on 23<sup>rd</sup> August 2018 to the 2<sup>nd</sup> Interested Party also appears to have been made outside the validity period.

29. However, that is a presumption this court cannot take without concrete evidence because it has the impact of immediately rendering the award made on 23<sup>rd</sup> August, 2018 illegal. This court cannot make such assumption without concrete evidence. None of the parties raised that particular concern, and no evidence was led to show that any party contested the validity of the said award on issue of tender validity. What is however clear is that the decision of the Respondent to admit the 1<sup>st</sup> Interested Party to the tender process was made outside the tender validity period and cannot stand for that reason.

30. It therefore flows that a judicial review order can be issued in this case to cure the illegality of the decision issued by the Respondent.

31. Accordingly, orders are issued as follows:

a) An order of Certiorari be and is hereby issued to remove to this Honourable Court for purposes of quashing the entire decision of the Public Procurement Administrative review Board, the Respondent herein, made on 25th September 2018 under the Request for **Review Application No. 115 of 2018 – Simba Pharmaceuticals Limited vs. the Managing Director, Kenya Ports authority & another** regarding the tender No. KPA/121/2017 – 18/MS – supply of Drugs.

b) There shall be no order as to costs.

**Dated, Signed and Delivered in Mombasa this 3<sup>rd</sup> day of December, 2018.**

**E. K. O. OGOLA**

**JUDGE**

In the presence of:

M/S Kamau holding brief Cheruiyot for Ex Parte Applicant

Mr. Mureithi for 1<sup>st</sup> Interested Party

Mr. Mureithi holding brief Muturi for 2<sup>nd</sup> Interested Party

Mr. Wachira for Hon. Attorney General

Mr. Kaunda Court Assistant