



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 154 OF 2016

**IN THE MATTER OF: AN APPLICATION BY THE APPLICANT, KENYA ELECTRICITY GENERATING
COMPANY LIMITED (KENGEN) FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY WAY OF
ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS DIRECTED TO PUBLIC
PROCUREMENT ADMINISTRATIVE REVIEW BOARD.**

AND

**IN THE MATTER OF: THE PUBLIC PROCUREMENT AND DISPOSAL ACT 2005, THE PUBLIC PROCUREMENT
AND ASSET DISPOSAL ACTS 2015 AND THE PUBLIC PROCUREMENT AND DISPOSAL REGULATIONS 2006.**

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA, 2010.

AND

IN THE MATTER OF: THE FAIR ADMINISTRATION OF JUSTICE ACT, 2015.

BETWEEN

**KENYA ELECTRICITY GENERATING
COMPANY LIMITED (KENGEN).....APPLICANT/RESPONDENT**

VERSUS

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD.....RESPONDENT
RENTCO EAST AFRICA LIMITED, LANTECH & TOSHIBA.....1ST INTERESTED PARTY
OJSC POWER MACHINES LIMITED,
TRANCENTURY LIMITED, AND CIVICON LIMITED (ACTING JOINTLY
AS A CONSORTIUM/JOINT VENTURE THAT SUBMITTED A BID IN
TENDER NO. KGN-GRD-09-2015).....INTENDED 2ND INTERESTED PARTY/APPLICANT**

RULING

Introduction

1. By a Notice of Motion dated 20th May, 2016, the applicants herein, **OJSC Power Machines Limited, Transcentury Limited, and Civicon Limited**, (hereinafter referred to as "Civicon") seeks the following orders:

1. **THAT** the Applicant be and is hereby granted leave to be enjoined as the 2nd Interested Party in this suit.
2. **THAT** this Honourable Court do give all necessary and proper directions as shall be necessary for the conduct of this suit.
3. **THAT** the costs of this Application be in the cause.

Intended 2nd Interested Party/Applicant's Case

2. The application was based on the ground that by a Chamber Summons dated 31st March 2016 and filed herein on even date, the *ex-parte* Applicant, Kenya Electricity Generating Company Limited (hereinafter referred to as "**KENGEN**") instituted this suit seeking *inter-alia* leave to file an Application for Judicial Review Orders against the respondent herein, Public Procurement Administrative Review Board (hereinafter referred to as "the Board") which was granted on 31st March 2016 by the **Honourable Mr. Justice Korir**.

3. According to Civicon, having reviewed the pleadings herein together with all the relevant documents in this suit, it has become manifestly clear that it is necessary to enjoin Civicon to these proceedings.

4. According to Civicon, on the invitation of KENGEN, Civicon submitted a bid in response to Tender No. KGN-GRD-09-2015 for Leasing of 50MW Wellheads Geothermal Power Generation Units at Olkaria Geothermal Field on Build, Lease, Operate and Maintain Basis. The Request for Proposals provided for a staged evaluation process, to include, a first stage evaluation to check for responsiveness, then an evaluation of the technical and commercial proposals and a second stage evaluation of the financial proposal. It was averred that the Request for Proposal provided that only firms with proven technology would have their guaranteed output and availability factor passed to the financial evaluation stage and Civicon passed the first stage evaluation and its bid was passed to the second stage, that is, evaluation of financial proposal.

5. Upon evaluation of the tenders, KENGEN awarded the tender to the 1st Interested Party herein, **Rentco East Africa Limited, Lantech & Toshiba** (hereinafter referred to as "Rentco") and by a notification letter dated 16th July 2015, KENGEN notified Civicon that it was not successful in the Tender as it was supposedly not the lowest evaluated. Being dissatisfied with the award made by KENGEN to Rentco, Civicon filed Request for Review being Application No. 38 of 2015 of 22nd July 2015 and upon hearing Civicon's Request for Review, the Board delivered a decision dated 21st August 2015 in which it dismissed the Review Application aforesaid and confirmed the award of the tender to Rentco.

6. Civicon then filed an Application in the High Court being **Nairobi H.C JR Misc. Appl. No. 284 of 2015; OJSC Power Machines, Transcentury Limited & Civicon Limited vs. Public Procurement Administrative Review Board, Kenya Electricity Generating Co. Ltd & Rentco East Africa Limited, Lantech & Toshiba** which was heard and dismissed by this Court on 19th January 2016 thereby affirming the Board's decision in Review Application No. 38 of 2015 aforesaid. Being dissatisfied with the said High Court decision Civicon filed an appeal in the Court of Appeal being **Nairobi Civil Appeal No. 28 of 2016; OJSC Power Machines, Transcentury Limited & Civicon Limited vs. Public Procurement Administrative Review Board, Kenya Electricity Generating Co. Ltd & Rentco East Africa Limited, Lantech & Toshiba** which is yet to be heard and determined. Together with the appeal, Civicon also filed a Notice of Motion Application under certificate of urgency in the Court of Appeal being **Nairobi Civil Application NAI No. 40 of 2016; OJSC Power Machines, Transcentury Limited & Civicon Limited vs. Public Procurement Administrative Review Board, Kenya Electricity Generating Co. Ltd & Rentco East Africa Limited, Lantech & Toshiba** which has been certified urgent but is yet to be heard and determined.

7. It was averred that the proposed joinder of Civicon in these is necessary in order to enable this Honourable Court effectually and completely adjudicate upon and settle all questions involved in the suit. Further, the proposed joinder of Civicon arises out of the same facts or substantially the same facts in respect of which relief is claimed by the *ex-parte* Applicant in this suit and in view of the pending appeal as well as the Application aforesaid in the Court of Appeal on common questions of law and fact. In addition, as the proposed joinder will not occasion any prejudice to the parties herein, it is in the interests of justice that the Applicant be granted leave to be joined as a party to this suit.

Ex Parte Applicant's Case

8. The Application was opposed by KENGEN. According to it, whereas Regulation 75 of the **Public Procurement and Disposal Act**, 2005 requires that all parties be served with a hearing notice, section 96 thereof set out who the parties to an application for review are. In this case, Civicon the applicant herein does not say whether it was served with any papers by the Board in the Request for Review Application No. 14 of 2016 and that it would in any event have not been a proper party.

9. According to KENGEN, these proceedings have nothing to do with Judicial Review Application No.38 of 2015 where the decision was the subject matter of Judicial Review number 284 of 2015. It was in view that there are no issues whatsoever that

concern the applicant in this suit which challenges the decision making process in Request for Review Application No. 14 of 26. It was therefore contended that Civicon had sought to mix up two different decisions of the Board.

Interested Party's Case

10. The application was similarly opposed by Rentco. According to it, Civicon submitted a bid in response to KENGEN's Tender No. KGN-GRD-09-2015 where Rentco was the successful bidder. Civicon, being dissatisfied with the award to the Interested Party filed a Request for Review at the Board being **Review Application No. 38 of 2015** which Review was heard and dismissed. Civicon then challenged the Board's decision before this Court in Judicial Review Application No. 284 of 2015 which was heard and dismissed. Being dissatisfied by this Court's decision, Civicon appealed to the Court of Appeal vide Civil Appeal No. 28 of 2016 which appeal is yet to be heard. Accordingly, the decision of the High Court in Misc. Appl. No. 284 of 2015 is still in place as the appeal arising out of the said decision is yet to be determined.

11. In Rentcom's view, Civicon's claim was heard and adjudicated upon by the Respondent herein and thereafter the High Court which is a court of competent jurisdiction and Civicon has not demonstrated any new issue that needs to be adjudicated upon and in any event the appeal in the Court of Appeal is yet to be heard.

12. Rentco disclosed the suit herein relates to the alleged termination of the tender award by KENGEN to Rentco which is what prompted Rentco to file a Request for Review before the Board herein being Application No. 14 of 2016. However, KENGEN being dissatisfied with the Board's decision commenced the instant proceedings. It was averred that Civicon was not a party to the said Request for Review which was determined by the Respondent and hence its presence in these proceedings would not be necessary. Further, Civicon has not demonstrated that it has any interest that is likely to be prejudiced. In any event any claims by Civicon shall be heard and determined in the Court of Appeal which is a court of competent jurisdiction to hear and determine the issues before it.

13. It was therefore Rentco's position that Civicon had not put any material on record to sufficiently show that it is a necessary party to these proceedings to enable the court make full adjudication of this suit. To the contrary, any issue Civicon intends to raise have already been raised by it in the suits stated above and the issues are yet to be determined before the Court of Appeal hence any claim by it should be raised therein. According to Rentco, the issues before the Board in Application No. 14 of 2016 are totally different from the issues under Civil Appeal No. 28 of 2016 and the questions of law in these two suits are very different and distinct. It was therefore asserted that Civicon's presence in these proceedings is not necessary owing to the fact that KENGEN has not sought a remedy that is capable of being enforced against Civicon.

14. Rentco reiterated that the issue before this Court touches on the alleged termination of the award to Rentco by KENGEN and the same does not touch on Civicon and the reliefs sought by Rentco in the Request for Review No. 14 of 2016 and the Orders granted by the Board thereon were directed against the KENGEN solely.

15. Rentco averred that since in judicial review proceedings the High Court is only concerned with the procedure followed by the quasi-judicial body in making its decision in question and not the merits of the case, the decision of this Honourable Court shall not whether directly or indirectly affect the Civicon hence the application ought to be dismissed.

Determination

16. I have considered the foregoing.

17. Order 53 rule 3(2) and (4) of the **Civil Procedure Rules** provides:

(2) The notice shall be served on all persons directly affected, and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein, the notice of motion shall be served on the presiding officer of the court and on all parties to the proceedings.

(4) If on the hearing of the motion the High Court is of the opinion that any person who ought to have been served therewith has not been served, whether or not he is a person who ought to have been served under the foregoing provisions of this rule, the High Court may adjourn the hearing, in order that the notice may be served on that person, upon such terms (if any) as the court may direct.

18. Therefore whereas subrule (2) of Order 53 rule 3 aforesaid restricts persons who should be served to those who are "**directly affected**", subrule (4) on the other hand gives the Court wide discretion to order that the application be served on any other person notwithstanding that that person ought to have been served under subrule (2) or not and the Court's decision to do so is only subject to ***such terms (if any) as the court may direct***. It is therefore my view that unlike under subrule (2) the Court has unfettered powers under subrule (4) and in my view this power is meant to ensure that justice is done. Therefore where the Court is of the view that a person ought to be joined to the proceedings the Court is properly entitled to direct that that person be joined notwithstanding that such a person has not made an application to Court. Under such circumstances a formal application is not necessary

19. However where an application is made under subrule (2), it is incumbent upon a person who alleges that he or she ought to have been served to show how the proceedings directly affect him or her. The mere fact, however that a person has made such an application does not preclude the Court from invoking its unfettered discretion under subrule (4) to have such a person joined to the proceedings even if the applicant does not satisfy the Court that the person is directly affected thereby. The word "direct"

is defined by ***Black's Law Dictionary***, 9th Edn. page 525 as "straight; undeviating , a direct line, straightforward, immediate." It must be kept in mind that judicial review orders are concerned with the decision making process rather than the merits of the decision. Therefore judicial review proceedings ought not to be modified into a vehicle through which matters which ought to be ventilated in other forums are determined. This was the position in **John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003**, where it was held that for the Court to require the alternative procedure to be exhausted where the alternative procedures are more convenient and appropriate prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort. Similarly, in **The Republic vs. The Rent Restriction Tribunal and Z. N. Shah & S M Shah Ex Parte M M Butt Civil Appeal No. 47 of 1980** the Court of Appeal held that if there is an equally convenient, beneficial and effective remedy available a Court will generally decline to exercise its discretion in favour of an applicant for a prerogative order.

20. Since judicial review orders are concerned with the decision making process rather than the merits of the decision, a party who contends that he or she is directly affected by the proceedings ought to bring himself or herself within the ambit of the judicial review jurisdiction and ought not to apply to be joined thereto with a view to transforming judicial review proceedings into ordinary civil litigation. In my view, for a party to be joined to the proceedings under Order 53 rule 3(2) aforesaid the applicant ought to disclose to the Court how he is directly affected. The Court cannot be expected to act in the dark by joining such a person with a view to satisfying itself as to the effect of the orders sought on the applicant at a later stage of the proceedings.

21. However, the decision whether or not to join a party is an exercise of discretion and if no substantial purpose or benefit will be gained by the joinder of a person to the proceedings and where the said joinder will militate against the expeditious disposal of the said proceedings which by their nature ought to be heard and determined speedily, the Court will be reluctant to join the intended party to the proceedings.

22. It is not enough in judicial review to simply cite enabling legal proceedings in an application of this nature but the applicant ought to adduce some material upon which the Court can determine whether the applicant is directly affected by the proceedings.

23. I have considered Civicon's case. Whereas its claim arises from the same subject matter of these proceedings, the cause of action cannot be said to be the same. A "cause of action" it has been held means every fact which it would be necessary for the party to prove, if traversed, in order to support his right to the judgement of the court. See **Vallabhai P Patel vs. Central African Commercial Agency [1959] EA 903**.

24. In these proceedings, the cause of action is whether KENGEN was justified in terminating the award to Rentco. Civicon's case on the other hand is whether KENGEN was entitled to award Rentco the tender. That is a matter which is the subject of the pending appeal. It cannot be the subject of these proceedings. It would therefore not be proper to join Civicon in order to enable it argue the matter pending before the Court of Appeal which matters this Court has determined. To join Civicon into these proceedings will have the effect of reopening the matters which this Court had determined and which are the subject of the pending appeal before the Court of Appeal.

25. Having considered the issues raised before me it is my view that the consortium comprising of **OJSC Power Machines Limited, Trancentury Limited, and Civicon Limited**, is not a proper party to be joined to these proceedings.

Order

26. It follows that the Notice of Motion dated 20th May, 2016 fails and is dismissed with costs.

27. It is so ordered.

Dated at Nairobi this 8th day of July, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Mwiti for Mr Kiragu Kimani the applicant

Mr Muganda for the 1st interested party

Mr Ogutu for Mr Nyachoti for the 2nd interested party

Cc Mwangi