REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APPLICATION NO. 491 OF 2016

IN THE MATTER OF AN APPLICATION FOR LEAVE TO COMMENCE JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF THE PUBLIC PROCUREMENT AND DISPOSAL ACT 2015

AND

IN THE MATTER OF DECISION BY THE PUBLIC PROCUREMENT AND DISPOSAL ADMINISTRATIVE REVIEW BOARD IN REGARD TO TENDER NO. KPS/T/10/2015-2016 FOR SUPPLY AND DELIVERY OF MOTORIZED VEHICLE NUMBER PLATE BLANKS AND TENDER NUMBER KPS/T/11/2015-2016 FOR SUPPLY AND DELIVERY OF MOTORIZED VEHICLE NUMBER PLATE HOT STAMPING FOIL

BETWEEN

PUBLIC……...……..APPLICANT

VERSUS

THE PUBLIC PROCUREMENT & DISPOSAL

ADMINISTRATIVE REVIEW BOARD……1ST RESPONDENT

THE MINISTRY OF INTERIOR AND COORDINATION

OF NATIONAL GOVERNMENT……..2ND RESPONDENT

AND

TROPICAL TECHNOLOGY LIMITED…..1ST INTERESTED PARTY

MIG INTERNATIONAL……..2ND INTERESTED PARTY

HOFFMAN INTERNATIONAL GmbH….3RD INTERESTED PARTY

J. KNIERIEM BV……EX-PARTE APPLICANT

RULING

1. By a Notice of Motion dated 27th October, 2016, the ex parte applicant herein seeks an order of certiorari to quash the 1st Respondent's decision delivered on 29th September, 2016 in Review Application No. 46 of 2015; an order of prohibition restraining the 1st and 2nd Respondents from implementing or enforcing the said decision; and order of mandamus compelling the 2nd Respondent to award tender No. KPS/I/10/2015 for the supply and delivery of motorised vehicle number plate blanks and tender number KPS/T/11/2015-2016 for supply and delivery of motorized number plate hot stamping foil to the ex parte Applicant (hereinafter referred to as "the tenders").

2. According to the applicant, in 2015 the applicant participated in the bid for the said tenders. However an unsuccessful bidder filed an application for review in which the 1st Respondent made a decision annulling and setting aside an award of tender no. KPS/T/10/2015-2016 made to Hoffman International Gmbh and directed that the 2nd Respondent award the tender to Tropical Technology Limited.

3. Aggrieved by the said decision on 13th October, 2016 the ex parte applicant filed a chamber summons seeking leave to commence judicial review proceedings herein.

4. On 16th November, 2016, the 1st interested party herein, **Tropical Technology Limited**, filed a notice of preliminary objection dated 16th November, 2016 in which it raised the following points of objection:

> **a. With the review board having delivered its award on 29th September 2016 and with these proceedings having been commenced on 13/10/2016, the present proceedings are time barred by virtue of the provision of Section 175(1) of the Public Procurement and Asset Disposal Act and they ought to be struck out *ex debitojustitae.***
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> **b. The issues raised herein were directly and substantially in issue in High Court Miscellaneous application No. 356 of 2015 consolidated with No. 362 of 2015 between the same parties which was finally and fully determined by this court in its final judgment delivered on 17/8/2016. The present proceedings are therefore *Res judicata*.**
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> **c. The letter of award has already been issued and accepted and the present proceedings are overtaken by events and futile and these is therefore nothing to stay.**
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> **d. The issues raised in the motion, are, in any event, issues that can only be dealt with the 1st respondent and not this honourable court.**
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> **e. The proceedings offend the overriding objective principle of Litigation which dictates finality of litigation.**

5. According to the **Mr Thangei**, learned counsel for the 1st interested party, it is doubt that the award the subject of these proceedings was delivered on 29th September, 2016 while the instant proceedings were filed on 13th October, 2016. It was learned counsel's submissions that section 175(1) of the ***Public Procurement and Asset Disposals Act*** (hereinafter referred to as "the Act"), requires that any judicial review proceedings be filed within 14 days from the date of the Board's decision. It was submitted that in this case, time started running from the date the decision was rendered hence these proceedings ought to have been filed by latest on 12th October, 2016. However, as the proceedings were commenced on 13th October, 2016, it was contended that the same were filed one day late hence were commenced out of time.

6. According to learned counsel, where proceedings are filed out of time, they are a non-starter.

7. It was further submitted that these proceedings are futile as they have been overtaken by events on the ground that the Board directed the Procuring Entity to issue the letter of award of which was duly issued on 11th October, 2016 as there was no order served on the Procuring Entity as at that date. It was contended that as the interested party accepted the award of the tenderer, to the extent that what the Board directed had been done, this Court cannot spend its time on these proceedings.

8. Thirdly, **Mr Thangei** submitted that these proceedings are *res judicata* since the issues herein had already been determined in JR Nos. 356 and 362 of 2015. This is so, according to learned counsel, because the matters herein and in the said matters are essentially the same.

9. Based on the said submissions and the authorities cited, the 1st interested party urged this Court to strike out this application.

10. The 1st interested party's case was supported by **Mr Kinyanjui,** learned counsel for the 2nd interested party, **MIG International.** According to him, following the delivery of the judgement in JR Nos. 356 and 362 of 2015, the parties were referred back to the Board which made a decision the subject of these proceedings. It was however contended that the applicant herein was not a party to those proceedings.

11. According to learned counsel, if the instant proceedings are to be merited, time should start to run from 8th October, 2015 in which case, the time would lapse on 22nd August, 2015. It was therefore submitted that the application herein was filed out of time.

12. According to learned counsel one of the orders being sought herein is to quash the decision made on 8th October, 2016. This decision, it was contended could only be challenged within 6 months pursuant to Order 53 rule 2 of the ***Civil Procedure Rules***.

13. In this case, it was contended that leave was not merited as time had lapsed. In any event, it was submitted the issues raised herein had

been canvassed previously and determinations made.

14. In support of his submissions **Mr Thangei** relied on **Republic vs. Public Procurement Administrative Review Board & 2 Others [2013] eKLR**; **Republic vs. Public Procurement Administrative Review Board & Another exp Teachers Service Commission [2015] eKLR**; **Pop-In (Kenya) Ltd & 3 Ors vs. Habib Bank AG Zurich [1990] KLR 609**, **Vevet EPZ Liited vs. Sameer EPZ Limited & Another Nairobi (Commercial and Admiralty Division) HCCC No. 540 of 2012**; and ***Odunga's Digest on Civil Case Law and Procedure***.

15. On his part **Mr Munene**, learned counsel for the Respondents associated himself with the foregoing positions.

16. On the part of the ex parte applicant, **Miss Kageny**, its learned counsel was of the view that since section 175 of the Act talks of a person aggrieved filing the application for judicial review within 14 days of the decision, pursuant to section 57 of the ***Interpretation and General Provisions Act***, Cap 2 Laws of Kenya, the computation of time excludes the day on which the event happened or the act was done. Therefore the day on which the decision was rendered, according to learned counsel, is excluded in the computation of time. That means that the 14 days in this case lapsed on 13th October, 2016, the very day on which these proceedings were commenced.

17. On the issue whether these proceedings have been overtaken by events, it was submitted that these proceedings are meant to stop the Procuring Entity from entering into the contract which is yet to be issued.

18. On res judicata, it was learned counsel's submissions that the said principle only applies when the parties and issues are the same. The applicant in the instant application was however not a party to the previous matters and as never afforded an opportunity of being heard by the Board. Accordingly the issue the subject of these proceedings has never been determined.

19. It was however contended that the instant applicant was a party to JR No. 28 of 2015 in which the Procuring Entity was directed to undertake a re-evaluation but the applicant was kept in the dark on the same since the notice for the review was received after the date of the proposed hearing.

20. Mr Agwara, learned counsel for the 3rd interested party, Ms Hoffman associated himself with the ex parte applicant's position. In his submissions he reiterated that section 175(1) of the Act as read with section 57 of Cap 2 reveals that these proceedings were commenced within the 14 days prescribed by the law. He also submitted that the issues in these proceedings were never canvassed in the earlier proceedings.

21. In his rejoinder, **Mr Thangei** submitted that section 57 of Cap 2 being an Act of general application is inapplicable to procurement proceedings. According to him, the parties who were sent back to the Review Board for re-hearing were the parties to the judicial review proceedings only.

Determinations

22. I have considered the submissions made by the parties herein.

23. Section 175 of the Act 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.***
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> ***(2) The application for a judicial review shall be accepted only after the aggrieved party pays a percentage of the contract value as security fee as shall be prescribed in Regulations.***
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> ***(3) The High Court shall determine the judicial review application within forty five days after such application.***
>
> ***(4) A person aggrieved by the decision of the High Court may appeal to the Court of Appeal within seven days of such decision and the Court of Appeal shall make a decision within forty-five days which decision shall be final.***
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> ***(5) If either the High Court or the Court of Appeal fails to make a decision within the prescribed timeline under subsection (3) or (4), the decision of the Review Board shall be final and binding to all parties.***
>
> ***(6) A party to the review which disobeys the decision of the Review Board or the High Court or the Court of Appeal shall be in breach of this Act and any action by such party contrary to the decision of the Review Board or the High Court or the Court of Appeal shall be null and void.***
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> ***(7) Where a decision of the Review Board has been quashed, the High Court shall not impose costs on either party.***

24. Section 57(d) of the ***Interpretation and General Provisions Act***, Cap 2 Laws of Kenya provides that:

> ***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.***

25. According to the preamble to the ***Interpretation and General Provisions Act***, it is:

> ***An Act of Parliament to make provision in regard to the construction, application and interpretation of written law, to make certain general provisions with regard to such law and for other like purposes.***

26. It is therefore clear that in the interpretation of any written law, the applicable statute for the purposes of such interpretation is the ***Interpretation and General Provisions Act,*** Cap 2. This must be so because statutes of general application such as the ***Interpretation and General Provisions Act,*** Cap 2, apply across board unless excluded. To make this clear, section 2 of the ***Interpretation and General Provisions Act,*** Cap 2 provides that:

> ***This Act shall not apply for the construction or interpretation of the Constitution, which is not a written law for the purposes of this Act.***

27. Therefore unless this section is repealed expressly or by legal implication, the only legal instrument to which the ***Interpretation and General Provisions Act,*** Cap 2 does not apply is the Constitution. The 1st interested party has not cited to me any express provision of the law that excludes the application of the ***Interpretation and General Provisions Act,*** Cap 2 to the ***Public Procurement and Asset Disposal Act***. With respect to implied repeal, it only applies where there is an inconsistent provision in a latter Act from an earlier one. No such inconsistent provision in the ***Public Procurement and Asset Disposal Act*** has been cited to me.

28. It is therefore my view and I so find that section 57 of the ***Interpretation and General Provisions Act***, applies to the timelines under ***Public Procurement and Asset Disposal Act*** and in particular section 175(1) thereof and hence the date of the decision is excluded from the reckoning of time. As parties are agreed that if the date of the decision is excluded then these proceedings were commenced within the prescribe 14 days, it follows that these proceedings cannot be faulted on that basis.

29. With respect to *res judicata*, in the case of **Lotta vs. Tanaki [2003] 2 EA 556** it was held as follows:

> **"The doctrine of *res judicata* is provided for in Order 9 of the Civil Procedure Code of 1966 and its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgement between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit. The scheme of section 9 therefore contemplates five conditions which, when co-existent, will bar a subsequent suit. The Conditions are: (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit; (ii) the former suit must have been between the same parties or privies claiming under them; (iii) the parties must have litigated under the same title in the former suit; (iv) the court which decided the former suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit".**

30. In the case of **Gurbachan Singh Kalsi vs. Yowani Ekori [1958] EA 450** the former East African Court of Appeal stated as follows:

> **"Where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time…No more actions than one can be brought for the same cause of action and the principle is that where there is but one cause of action, damages must be assessed once and for all… A cause of action is every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."**

31. In the case of **Apondi vs. Canuald Metal Packaging [2005] 1 EA 12 Waki, JA** stated as follows:

> **"A party is at liberty to choose a forum which has the jurisdiction to adjudicate his claim, or choose to forego part of his claim and he cannot be heard to complain about that choice after the event and it would be otherwise oppressive and prejudicial to other parties and an abuse of the Court process to allow litigation by instalments".**

32. However, it is my view that the mere addition of parties in a subsequent suit does not necessarily render the doctrine of *res judicata* inapplicable since a party cannot escape the said doctrine by simply undertaking a cosmetic surgery to his pleadings. If the added parties peg their claim under the same title as the parties in the earlier suit, the doctrine will still be invoked since the addition of the party would in that case be for the sole purpose of decoration and dressing and nothing else. Under explanation 6 to section 7 of the ***Civil Procedure Act***, where persons litigate *bona fide* in respect of a public right claimed in common by themselves and others, all persons interested in such right shall, for the purposes of the section, be deemed to claim under the persons so litigating.

33. In the cases of **Mburu Kinyua vs. Gachini Tuti [1978] KLR 69; [1976-80] 1 KLR 790** and **Churanji Lal & Co vs. Bhaijee (1932) 14 KLR 28** it was held that:

> **"However, caution must be taken to distinguish between discovery of new facts and fresh happenings. The former may not necessarily escape the application of the doctrine since parties cannot by face-lifting the pleadings evade the said doctrine. In the case of *Siri Ram Kaura vs. M J E Morgan Civil Application No. 71 of 1960 [1961] EA 462* the then East African Court of Appeal stated as follows:**
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> **"The general principle is that a party cannot in a subsequent proceeding raise a ground of claim or defence which has been decided or which, upon the pleadings or the form of issue, was open to him in a former proceeding between the same parties. The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceedings is no answer to a defence of res judicata...The law with regard to *res judicata* is that it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in a litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up to the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show you that this is a fact which entirely changes the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have been ascertained by me before...The point is not whether the respondent was badly advised in bringing the first application prematurely; but whether he has since discovered a fact which entirely changes the aspect of the case and which could not have been discovered with reasonable diligence when he made his first application.".**

34. It is therefore clear that parties are not to evade the application of *res judicata* by simply conjuring up parties or issues with a view to giving the case a different complexion from the one that was given to the former suit. See **Pop-In (Kenya) Ltd & 3 Ors vs. Habib Bank AG Zurich [1990] KLR 609.**

35. These proceedings, according to the ex parte applicant, were provoked by the events that took place subsequent to the decision of this Court in JR Nos. 356 and 362 of 2015. In the said judgement the parties were **MIG International Limited** and **Hoffman International GmbH** as the ex parte applicants**; The Public Procurement Administrative Review Board** and the **Ministry of Interior and Coordination of National Government** as respondents; **and Tropical Technology Limited** as the interested party. Clearly therefore the ex parte applicant herein was not a party to the said proceedings. In its judgement, this Court granted *inter alia* the following orders:

> 1. The Respondent Board's decision awarding Tender No. KPS/ICB/T/11/2015-2017 for supply and delivery of motorized vehicle hot stamping foils size 220mm X 305m to the interested party is hereby removed to this Court and is quashed and the decision of the Procuring Entity recommending re-advertisement thereof is hereby upheld.
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> 2. The decisions of the Board in respect of the other two Tenders which were awarded to the interested party is hereby quashed and the Board is directed to ***hear all the parties*** on the issue of the alteration of the forms and whether the interested party's quoted prices were within the funds appropriated by the Procuring Entity towards the said tender and make a determination thereon. Based on the outcome of the said decision, the Board is at liberty to make appropriate orders under section 98 of the Act.
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> 3.The recommendation by the Board to the Director of the Public Procurement Oversight Authority and other investigative Agencies of the Government to carry out an investigation to establish whether there was any impropriety in the Procuring Entity's decision to alter the prices submitted by the parties in their tenders and or in adopting prices and awarding the subject tenders to bidders at prices not set out in the form of tenders, is hereby quashed.

36. I will refrain from determining the phrase "all the parties" in order not to prejudice the pending Motion as the substratum of the applicant's case is that it was never heard by the Board as directed by this Court. It is however clear that the issue cannot be decided on a preliminary objection.

37. It is also clear to me the applicant's position that these proceedings arose from the manner in which the Board handled the proceedings subsequent to the decision in JR Nos. 356 and 362 of 2015. If therefore the Respondent in purporting to comply with the order of this Court did not in fact do so, this Court is empowered to investigate whether its action was in accordance with the decision of the Court.

38. Having considered the submissions of counsel in this case, it is my view and I so hold that the preliminary objections raised herein are unmerited.

39. The same are dismissed with costs.

40. It is so ordered.

Dated at Nairobi this 2nd day of December, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr A. M Mureithi for Miss Kageny for the applicant

Mr Munene for the 1st and 2nd Respondents

Mr Thangei for the 1st interested party

Mr Kinyanjui for the 2nd interested party

Mr Agwara for the 3rd interested party

CA Mwangi