REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NO. 996 OF 2003

IN THE MATTER OF: **AN APPLICATION FOR AN ORDER OF CERTIORARI AND PROHIBITION**

AND

IN THE MATTER OF: **THE DECISION OF THE PUBLIC PROCUREMENT COMPLAINTS REVIEW AND APPEALS BOARD DATED 28TH AUGUST 2003 IN APPEAL APPLICATION NO. 23 OF 2003 OF 6/8/2003 (GETRIO INSURANCE BROKERS LTD VS NAIROBI CITY COUNCIL**

AND

IN THE MATTER OF: **THE EXCHEQUER AND AUDIT (PUBLIC PROCUREMENT) REGULATIONS, 2001 (LEGAL NOTICE NO. 51 OF 30/3/2001), THE LOCAL GOVERNMENT ACT, CAP 265 AND THE EXCHEQUER AND AUDIT ACT CAP 412 OF THE LAWS OF KENYA**

BETWEEN

REPUBLIC …….....APPLICANT

VERSUS

THE PUBLIC PROCUREMENT COMPLAINTS

REVIEW & APPEALS BOARD .....1ST RESPONDENT

EX PARTE.....INVESCO ASSURANCE CO. LTD

JUDGEMENT

Introduction

1. The ex parte Applicant herein, **Invesco Assurance Co. Ltd** by way of a Notice of Motion dated 26th September, 2003, seeks the following orders:

a. **An order of Certiorari do issue to remove into the High Court and to quash the decision of the Public Procurement Complaints Review and Appeals Board dated the 28th August 2003.**
b. **An Order of Prohibition do issue to prohibit the reconstitution of the tender committee of Nairobi City Council for purposes of re-advertising and re-tendering of the insurance services contract 2003/2004 awarded to Invesco Assurance Company under the direction and supervision of the Public Procurement Directorate.**
c. **The costs of this application be paid by the Public Procurement Complaints Review and Appeals Board.**

***Ex Parte* Applicant's Case**

2. The Motion was supported by a verifying affidavit sworn on 26th September, 2003 by **Joseph K Kariuki**, the applicant's Managing Director.
3. According to the deponent, on April 15th, 2003 the **Nairobi City Council** (hereinafter referred to as the Council) advertised for tenders for the supply of insurance services, namely under contract number CT/1/2003-2004 which tender was closed on 15th May 2003. According to him, a total of seventeen bidders responded though only fifteen bought the bid documents and submitted their tenders one of whom was the ex parte applicant.
4. He averred that on 15th May, 2003 the tender opening process was conducted in the committee room of the Council in the presence of the representatives of all the fifteen firms that had bided and according to the minutes of the Tender Committee of the Council, on 21st, 26th and 28th May 2003, the Tender Evaluation Committee and the Council evaluated the tenders culminating into the selection of six firms as the final contenders for the tender. By a letter dated 1st July 2003 the Town Clerk in his capacity as the Chairman of the tendering committee notified the ex parte Applicant of the award of the tender to it, thereby forming the contract between the two per Regulation 33(2) of the ***Exchequer and Audit (Public Procurement) Regulations***, 2001 (hereinafter referred to as the Regulations).
5. Pursuant to the formation of the contract the ex parte applicant executed the contract by incepting insurance cover immediately and issuing renewal debit notes numbers 118526, 118537, 118535, 118535, 118530, 118529, 118533, 120173, 118532, 118527, 118525, 118524, 118534 and 118538 all amounting to Kshs. 45,020,172.00. It was averred that the ex parte applicant was the insurer of the Council on the previous period and at the time of the formation of the contract, it was of paramount importance that insurance cover largely for non-motor insurance business be incepted on 1st July, 2003, the previous cover having lapsed on 30th June, 2003 and for the insurance for the other business to be renewed when the renewal fell due.
6. In his view, the notification of the award constitutes the formation of the contract, and signing of the contract 21 days later simply confirmed the existence of the contract and based on the award the ex parte applicant wholly executed its part of the contract and has since made financial commitments and plans which it must honour and which have exposed it to liabilities which have far reaching negative financial implications if the contract is annulled. He deposed that upon assuming the risk the ex parte applicant entered into an irreversible contract with its reinsurers namely; **African Reinsurance Corporation**, **PTA Reinsurance Company** and **East Africa Re-**

Arab Insurance Corporation for the cessation of the risk to the latter and the ex parte applicant is now bound to meet its obligation to the reinsurers including, remittance of a substantial portion of the premium, failing which it will be liable for an action of damages for breach of contract and other negative consequences in its business relationships since the risk cannot subsequently be split. He deposed that the Council through its notice inviting tenders that was published in the daily press clearly stated that it was not legally bound to accept or reject the lowest or any tender.

7. Through a letter dated 12th August 2003, the ex parte applicant was notified by the respondent of the filing of an Appeal/Application Number 23 of 2003 of 6th August 2003 by **Getrio Insurance Brokers Ltd** against the Council receipt of which the ex parte applicant acknowledged and indicated to the respondent that it would attend future deliberations on the appeal when required.
8. However the ex parte applicant was thereafter never served with a hearing notice or a notice of the ruling date of the said Appeal/Application by the respondent contrary to the mandatory provisions of Regulation 42 of the Regulations which impose a duty upon the Respondent to notify interested parties and candidates of an appeal, the hearing and date of deciding the Appeal. According to him, the failure to invite the ex parte applicant to the hearing of the appeal and the determination thereof was a grave contravention of the principles of natural justice and the laid down regulations and renders the entire proceedings and decision thereof a nullity.
9. In his view, a contract having been entered into, the respondent was expressly barred from entertaining an appeal against the award of the tender by virtue of Regulation 40(3) of the Regulations hence the respondent acted ultra vires the powers conferred upon it when it entertained the Appeal. Apart from that the appellant in Appeal/Application No. 23 of 2003 was an unresponsive bidder, its bid having been regarded as such during the tender evaluation committee meeting held on 21st May 2003 and as such had no locus standi to bring an appeal since it did not suffer loss or damage through the award of the tender to a successful tenderer and thus had no rights to enforce under administrative review. Further the appeal was based on a falsehood namely that only the ex parte applicant's bid was found to be responsive by the procuring entity, whereas the minutes of the tender evaluation committee show that bids by six firms were responsive.
10. His case was that the respondent misdirected itself when it found that failure to give a schedule of the motor vehicles to be insured was ambiguous thereby rendering the tender invalid, whereas all that the tender sought from the bidders was a quotation of the rate to be charged for insuring motor vehicles, which is the common practice in motor insurance business.
11. To the applicant, Appeal No. 23/2003 of 6th August, 2003, was null and void *ab initio*, the appellant therein having been an unresponsive bidder and the decision delivered on 28th August, 2003 is therefore unlawful. Further, the respondent acted contrary to the provisions of Regulation 42 (d) and (e) which bar the respondent from interfering with an act or decision leading to the formation of a contract and the respondent relied on extraneous matters which had not been set out as grounds of appeal in Appeal No. 23 of 2003 of 6th August 2003 in arriving at the decision that no award had been made by the Council.
12. Similarly, the respondent's decision directing the retendering for new covers within 90 days while at the same time acknowledging that the insurance cover was in place was unlawful. Its decision that a tendering committee by the procuring entity had not been constituted by the time of making the award was unfounded as the membership structure of the tendering committee is set out by the governing statute.

Respondent's Case

13. By my ruling dated 2nd December, 2013, I directed the respondent to serve its replying affidavit which was irregularly filed within 5 days and in default the same to be struck out.
14. Learned Counsel for the ex parte applicant informed this Court that the said order was never complied with. In the absence of evidence to the contrary the said affidavit in hereby struck out.

Determination

15. I have considered the application, the supporting affidavit and submissions of the applicant. The

applicant's case is that it was never given an opportunity of being heard before the Respondent made its impugned decision. In the absence of any evidence that the applicant was duly notified this Court finds that the Respondent in arriving at its decision contravened the rules of natural justice.

16. Article 47 of the Constitution provides:

Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

17. In **Republic vs. The Honourable The Chief Justice of Kenya & Others Ex Parte Moijo Mataiya Ole Keiwua Nairobi HCMCA No. 1298 of 2004** the High Court expressed itself as follows:

"Whereas the rules of natural justice are not engraved on tablets of stones, fairness demand that when a body has to make a decision which would affect a right of an individual it has to consider any statutory or other framework in which it operates. In particular it is well established that when a statute has conferred on a body the power to make decision affecting individuals, the courts will only require the procedure prescribed to be introduced and followed by way of additional safeguards as that will ensure the attainment of fairness. In essence natural justice requires that the procedure before any decision making authority which is acting judicially shall be fair in all circumstances. The right to be heard has two facts, intrinsic and instrumental. The intrinsic value of that right consists in the opportunity which it gives to the individuals or groups, against whom decisions taken by public authorities operate, to participate in the proceedings by which those decisions are made, an opportunity to express their dignity as persons. The ordinary rule which regulates all procedures is that persons who are likely to be affected by the proposed/likely action must be afforded an opportunity of being heard as to why that action should not be taken. The hearing may be given individually or collectively, depending upon the facts of each situation. A departure from this fundamental rule of natural justice may be presumed to have been intended by the Legislature only in circumstances which warrant it and such circumstances must be shown to exist, when so required, the burden being upon those who affirm their existence…….. Although the courts have for a long time supplemented the procedure that had been laid down in a legislation where they have found that to be necessary for that purpose, before this unusual kind of power is exercised, it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of legislation. Additional procedural safeguards will only ensure the attainment of justice in instances where the statute in question is inadequate or does not provide for the observance of the rules of natural justice. The courts took their stand several centuries ago, on the broad principle that bodies entrusted with legal powers could not validly exercise them without first hearing the people who were going to suffer as a result of the decision in question. This principle was applied to administrative as well as judicial acts and to the acts of individual ministers and officials as well as to the acts of collective bodies such as justices and committees. The hypothesis on which the courts built up their jurisdiction was that the duty to give every victim a fair hearing just as much a cannon of good administration is unchallengeable as regard its substance. The courts can at least control the primary procedure so as to require fair consideration of both sides of the case. Nothing is more likely to conduce to good administration. Natural justice is concerned with the exercise of power that is to say with acts or orders which produce legal results and in some way alter someone's legal position to his advantage. As part of a reasonable, fair and just procedure the court has a cardinal duty to uphold the constitutional guarantees, the right to fair hearing which entails a liberal and dynamic approach in order to ensure the rights enjoyed by an individual is not violated because there is no particular safeguards provided under section 62 that deals with the removal of a Judge in instances where there is a complaint against him."

18. Similarly in **Msagha vs. Chief Justice & 7 Others Nairobi HCMCA No. 1062 of 2004 [2006] 2**

KLR 553 the High Court expressed itself as follows:

"The Court observes firstly that the rules of natural justice "*audi alteram partem*" hear the other party, and no man/woman may be condemned unheard are deeply rooted in the English common law and have been transplanted by reason of colonialisation of the globe during the hey-days we of the British Empire. An essential requirement for the performance of any judicial or quasi-judicial function is that the decision makers observe the principles of natural justice. A decision is unfair if the decision-maker deprives himself of the views of the person who will be affected by the decision. If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of justice. The decision must be declared to be no decision.....The rules of natural justice are minimum standards of fair decision-making imposed by the common law on persons or bodies who are under a duty to "act judicially". They were applied originally to courts of justice and now extend to any person or body deciding issues affecting the right or interests of individuals where a reasonable citizen would have a legitimate expectation that the decision-making process would be subject to some rules of fair procedure. The content of natural justice is therefore flexible and variable. All that is fundamentally demanded of the decision maker is that his decision in its own context be made with due regard for the affected parties' interests and accordingly be reached without bias and after giving the party or parties a chance to put his or their case. Nevertheless some judges prefer to speak of a duty to act fairly rather than a duty to observe the rules of natural justice, often the terms are interchangeable. But it is perhaps now the case while a duty to act fairly is incumbent on every decision-maker within the administrative process whose decision will affect individual interests, the rules of natural justice apply only when some sort of definite code of procedure must be adopted, however flexible that code may be and however much the decision-maker is said to be master of his own procedure. The rules of natural justice are generally formulated as the rule against bias (*nemojudex in sua causa*) and in respect of] the right to a fair hearing [*audi alteram partem*]."

19. Accordingly, I hereby grant the order of certiorari removing into this Court the impugned decision of the Public Procurement Complaints Review and Appeals Board dated the 28th August 2003 which decision is hereby quashed. As the applicant conceded that prayer (b) of the Motion had been spent due to effluxion of time nothing turns on that prayer.
20. The Applicant will have the costs of the application.

Dated at Nairobi this day 14th of May 2014

G V ODUNGA

JUDGE

Delivered in the presence of Miss Mwangi for the Applicant