



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
JR CASE NO. 339 OF 2014

REPUBLIC.....APPLICANT

VERSUS

KENYA AIRPORTS AUTHORITY.....RESPONDENT

EX-PARTE

SUZAN GENERAL TRADING JLT

RULING

This application for leave to commence judicial review proceedings is premised on the decision of the Public Procurement Administrative Review Board (the Review Board) in Request for Review Nos. 46, 47, 48 and 50 all of 2013. In the decision delivered on 20th December, 2013 the Review Board at page 57 states that:

“In view of the fact that the three Requests for Review have succeeded while only one has failed, the Board, pursuant to Section 98(b) of the Act, orders as follows:

- 1. That the tender by Kenya Airports Authority to develop and manage Duty Free Retail Concessionaire at Jomo Kenyatta International Airport (Tender Number KAA/193/2013-2014) awarded to M/s Nuance Group AG is hereby Annulled.**
- 2. That Kenya Airports Authority Being the Procuring Entity in this matter is directed to re-tender afresh the tender and ensure in doing so (a) Make use of the Standard Tender Document as prepared by PPOA, and (b) enlarge the specifications to make them more inclusive.**
- 3. That the Board makes no orders as to costs.”**

The Procuring Entity, Kenya Airports Authority (KAA), the Respondent herein commenced the procurement afresh as directed by the Review Board. Suzan General Trading JLT, the Applicant herein faults the fresh tender and through the chamber summons application dated 9th September, 2014 prays for orders:

“1. THAT this application be certified urgent and the same be heard *ex parte* in the first instance.

2. **THAT** the Applicant be granted leave to apply for orders of CERTIORARI to remove into the High Court and quash:-

2.1. The entire re-Tender process in respect of Tender No KAA/193/2013-2014 (For The Development & Operation Of Duty Free Shops Under A single Master Licence At The New Jomo Kenyatta International Airport, Terminal Unit 4); and/or

2.2 Any award of tender in Tender No KAA/193/2013-2014 (For The Development & Operation Of Duty Free Shops Under A Single Master Licence At The New Jomo Kenyatta International Airport, Terminal Unit 4); and/or

2.3 Any and all contracts or agreements entered into between Kenya Airports Authority consequential to KAA's award of TENDER NO KAA/193/2013-2014 (For The Development & Operation Of Duty Free Shops Under A Single Master Licence At The New Jomo Kenyatta International Airport, Terminal Unit 4); and/or

3. **THAT** the Applicant be granted leave to apply for orders of MANDAMUS directed at and requiring Kenya Airports Authority to re-tender For the Development & Operation Of Duty Free Shops Under A Single Master Licence At New The Jomo Kenyatta International Airport, Terminal Unit 4, in a manner that complies with the directions of the Review Board issued on 20th December, 2013 in P.P.A.R.B. APPLICATION NOS. 46, 47 & 48 of 2013.

4. **THAT** being an application raising issues incidental to and/or arising under the Public Procurement & Disposal Act, 2005, the attendant Motion be certified urgent and be admitted for a priority hearing during the summer vacation of the High Court under the High Court Vacation Rules (Practice Note No. 1 of 1978);

5. **THAT** the Court be at liberty to make such further directions for an expedited disposal of the attendant Motion on its merits.

6. **THAT** until ordered otherwise, the leave so granted do operate as a stay of any or further implementation of the award of TENDER NO KAA/193/2013-2014 For The Development & Operation of Duty Free Shops Under A Single Master Licence At The New Jomo Kenyatta International Airport, Terminal Unit 4, including the signing and/or implementation of any contract signed under Section 68 of the Public Procurement and Disposal Act, 2005 between KAA and the successful bidder.

7. **THAT** Costs of and/or incidental to this application be provided for.”

According to the statutory statement dated 9th September, 2014 filed together with the application for leave, the grounds upon which relief is sought are:

“5. The Review Board, in P.P.A.R.B. APPLICATION NOS. 46, 47 & 48 OF 2013, noted and held that the criterion imposed by the procuring entity in TENDER NO KAA/193/2013-2014 for the evaluation of the tender did not meet the threshold set by the Act and the Constitution, and the Review Board therefore directed KAA to re-tender after:-

(a) enlarging the specifications so as to make the tender eligibility and evaluation criteria more inclusive; and

(b) providing for an evaluation criteria in the tender document;

6. The Procuring Entity wilfully and deliberately contravened these directions given by the Review Board under Section 98 of the Act in P.P.A.R.B. APPLICATION NOS 46, 47

& 48 OF 2013, by:-

(a) Failing and/or ignoring to enlarge the specifications so as to make the tender eligibility and evaluation criteria more inclusive, going to the very essence of competitive bidding under Section 2 of the Act; and

(b) Failing and/or ignoring to provide for a clear evaluation criteria in the tender document, which also went to going to the very essence of competitive bidding; (sic)

7. As a result, KAA lacked jurisdiction to re-tender on the basis of the revised tender issued on 18th June, 2014 for being contrary to the directions of the Review Board, and therefore, any and/or all proceedings consequential thereto, including the ultimate tender award, are a nullity for want of jurisdiction by virtue of Section 100(3) of the Public Procurement & Disposal Act, 2005 guided by the well-established principle of law in MACFOY VERSUS UNITED AFIRCA CO. LIMITED (1961) 3AER 1169 that:-

(a) If an act is void, then it is in law a nullity – it is not only bad, but incurably bad - it is automatically null and void without more ado, though it is sometimes, convenient to have the court, declare it to be so; and

(b) every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.

8. KAA failed to appreciate, whether sufficiently or at all, that failure to comply with the mandatory directions given by the Review Board under Section 98 of the Act in P.P.A.R.B. APPLICATION NOS 46, 47 & 48 OF 2013, rendered any consequential actions, including the ultimate tender award, in excess of its jurisdiction to proceed with the re-tender.”

Mr. Arif Hafiz the General Manager of the Applicant swore a verifying affidavit in support of the application. The averments in the affidavit are generally in consonance with the application and the statutory statement.

Some statements in the affidavit, however, need reproduction for purposes of record. At paragraphs 4, 7, 8 and 11 Mr. Arif Hafiz avers:

“4. THAT after award of tender based on this document, aggrieved parties filed in P.P.A.R.B. Application Nos. 46, 47 & 48 of 2013, arising from the initial award of Tender No KAA/193/2013-2014 to Nuance Group in 2013, and after hearing the parties, the Public Procurement Administrative Review Board expressed serious and very genuine concerns in the manner in which KAA had handled the procurement of the Duty Free operator. Indeed, and as can be gleaned from pages 53-57 of its decision, which is attached hereto at pages 45 to 101 of this application, (Appendix 2), the Review Board made several important observations, which form the basis of this Motion:-

4.1. First, the Review Board, and correctly so, held that a procuring entity while exercising the powers conferred upon it by the Constitution and the Procurement Act, exercises such power on behalf of and in trust for the Republic. Both the Constitution and the Act impose on a procuring entity the duty to act fairly, equitably, transparently, so as to promote competition, and in a manner that promotes maximum economy, efficiency and saves costs;

4.2. Second, the Review Board, observed that out of the 10 bidders, only one was found to have met the preliminary mandatory requirements set out in the tender document, and the Board held the firm view that either:-

(a) the tender was set in such a way as it was not clear to most of the bidders; or

(b) an extrinsic evaluation criteria, that was not provided for in the tender document, was introduced at the evaluation stage; and

4.3. Third, having considered the matter before it, the Board noted that the criteria imposed by the procuring entity in the evaluation of the tender did not meet the threshold set by the Act and the Constitution, and the Review Board therefore directed KAA to enlarge the specifications so as to make the tender eligibility and evaluation criteria more inclusive, and also provide for an evaluation criteria in the tender document. No appeal was lodged by KAA against this decision under Section 100(1) or (2) of the Act, and therefore the decision became final and binding on KAA 14 days after this decision was delivered on 20th December, 2013.

5.

6.

7. THAT owing to numerous clarifications sought by potential bidders for purposes of preparing their bids, KAA saw it proper to issue a comprehensively revised tender document, which was released to all potential bidders on 18th June, 2014, with a tender submission deadline of 8th July, 2014. A copy of the revised re-tender document is attached hereto at pages 152 to 197 of this application (Appendix 5).

8. THAT the above notwithstanding, and being an international tender under Section 71 of the Act, the key issues presented for determination through this Motion are:-

8.1. Whether or not, KAA complied with this direction to enlarge the specifications to make them more inclusive; and

8.2 What are the legal consequences of non-compliance with the Board's directions, and whether any post facto justifications can indeed override the law as set out in Sections 100(1) & 100 (3) of the Act;

9.

10.

11. THAT a cursory consideration of the initial tender document (see Appendix 3), the initial re-tender document (See Appendix 4), and the final revised tender (See Appendix 5), reveal 2 serious breaches of the Review Board's direction in P.P.A.R.B Application Nos. 46, 47 & 48 of 2013:-

(a) they all bear the same mandatory technical requirements as those of the original document, and which the Board had asked KAA to enlarge so as to make the tender eligibility and evaluation criteria more inclusive, and it is clear KAA did not make any effort to comply in this regard; and

(b) the document does not contain the scoring criteria/formula and as a result, the evaluation process could be open to manipulation through subjective scores or based on extrinsic evaluation criteria, that was not provided for in the tender document.”

When the application came up for hearing on 10th September, 2014, Mumbi Ngugi, J directed that the same be served for hearing *inter partes*.

The Respondent opposed the application through a preliminary objection dated 26th September, 2014 to wit:

- “1. THAT this Honourable Court lacks jurisdiction to entertain or determine the matters raised in this suit.**
- 2. THAT the suit as filed is in contravention of the provisions of the Public Procurement and Disposal Act and the Civil Procedure Rules, 2010.**
- 3. THAT the Chamber Summons application herein dated the 9th September, 2014 is otherwise an abuse of the process of this Honourable Court and should be dismissed *in limine* with costs.”**

The Respondent also opposed the application through the replying affidavit sworn on 22nd September, 2014 by Katherine Kisila the Corporation Secretary. She averred that after the initial tender was awarded to Nuance Group AG the unsuccessful bidders namely Unifree Duty Free, Suzan Trading JLT (the Applicant herein), Flemingo International (BVI) Limited and Dufry International AG filed Requests for Review Nos. 46, 47, 48 and 50 of 2013 respectively.

On the Applicant’s Request for Review No. 47 of 2013, the Review Board identified two issues for determination namely, whether the Respondent violated Regulations 47 and 48(1) of the Public Procurement and Disposal Regulations, 2006 (the Regulations) and whether it breached Regulation 60 of the Regulations. The Review Board concluded that the Applicant’s bid documents did not contain copies of Concessionaire Agreements as proof of its operation as a master concessionaire and that the Applicant did not submit an Independent Auditor’s Report and Form of Tender which were mandatory documents. As a consequence, the Applicant’s Request for Review was dismissed.

It is the Respondent’s case that the other requests for review were allowed and the Respondent ordered to re-tender afresh which it did by advertising the tender in the media as from 26th March, 2014. The tender closed on 8th July, 2014. Only five bids were submitted by the closing date. At the conclusion of the process Dufry International AG was declared the successful bidder. It is the Respondent’s case that the evaluation was done as per the evaluation criteria set out in the Tender Document using a methodology which meets the necessary threshold of fairness and transparency and complied with the decision of the Review Board.

The Respondent’s case is that this Court has no jurisdiction to hear this matter as sections 93 and 100 of the Public Procurement and Disposal Act, 2005 gives the Review Board jurisdiction for determining complaints arising from procurement by public entities.

On another point, the Respondent asserts that the re-tender was validated by the Review Board through a decision made on 17th September, 2014 after the bidders who had participated in the re-tender but were not successful filed requests for review. It is the Respondent’s case that the Review Board reviewed the entire process, including the technical and financial criteria, and concluded that the Respondent had adhered to its directions and that the procurement process was fair and transparent.

The Respondent asserts that the Director-General of the Public Procurement Oversight Authority (the Authority) considered the Re-Tender Document and through a letter dated 18th June, 2014 gave a go-ahead subject to inclusion of a financial criteria. That as directed by the Director-General the Re-Tender Document was revised and provisions made for financial evaluation criteria.

The Respondent contends that the Tender Document of October, 2013 and the Revised Re-Tender Document of 18th June, 2014 are two different documents and not one and the same thing as alleged by the Applicant. It is the Respondent’s case that the Applicant has attempted to mislead the Court by exhibiting an incomplete copy of the original tender document so as to conceal the fact that the mandatory technical requirements in the original tender are different from those in the Re-Tender Document. The

Respondent therefore urges the Court to dismiss the application on the ground that it is not made in good faith.

In specific response to paragraph 11 of the verifying affidavit the Respondent states that the Applicant's claim that the Revised Re-Tender Document does not contain the mandatory criteria is dishonest and insincere as pages 20 to 23 of the document sets out the summary of the evaluation process for both technical and financial evaluation, and that the same is objective, quantifiable and transparent.

The Respondent claims that the application is an afterthought motivated by malice and grounded on misconceived and dishonest assertions. In support of this statement, the Respondent points out that the applicable requirements and criteria including mandatory technical requirements were set out in the Re-Tender Document from the date of advertisement on 26th March, 2014 and the Applicant never raised any queries, nor sought variation or clarifications in regard to the applicable criteria at any time before the close of the Tender.

The Respondent asserts that all the issues raised with it by the Applicant were addressed by its advocates through a letter dated 8th September, 2014 but the Applicant did not disclose this fact in its application.

The Respondent contends that as the Applicant did not participate in the second tender, it was not entitled to certain documents as those documents were only available to the bidders.

On the issue of grant of leave in judicial review proceedings, the Respondent submits that the purpose of the application for leave is to eliminate at the outset any applications which are either frivolous, vexatious or hopeless and to ensure that an applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration.

As for grant of stay orders, the Respondent submits that such orders are issued at the discretion of the Court but the discretion must be exercised judiciously. The Respondent urges the court not to order stay as the Applicant's case is based on vague speculations. Further, that the application has not been made without undue delay as the fresh tender was first advertised in March, 2014. The Respondent stated that any further delay in the conclusion of this particular procurement will deny passengers and users of the airport essential services.

The question to be considered is whether the Applicant has met the threshold for grant of leave. The threshold for grant of leave is a low one. In **AGA KHAN EDUCATION SERVICE KENYA v REPUBLIC AND OTHERS E.A.L.R [2004] 1 E.A.1 (CAK)**, the Court of Appeal stated that:

“So once there is an arguable case, leave is to be granted and the court, at that stage, is not called upon to go into the matter in depth.”

Therefore once an applicant establishes that it has an arguable case, the Court ought to grant leave. The requirement for grant of leave is to allow the Court assess the application and decide whether the case is on the face of it reasonable.

Where the respondent, like in the case before me, has been invited to have a say before leave is granted, the Court should take into account what the respondent has said before making a decision as to whether to grant leave or not.

The Respondent herein stated that this Court has no jurisdiction to hear this matter. It contends that the Applicant should have taken its complaint to the Review Board. On its part, the Applicant asserts that the Review Board has no jurisdiction to hear its complaint. It asserts that it did not submit a bid and could not therefore file a complaint with the Review Board as it was not a candidate.

On this issue, I need not reinvent the wheel. G.V. Odunga, J was faced with a similar argument in **JIMMY MUTINDA v INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION & 2 OTHERS EX-PARTE SHAILESHKUMARNATA VERBAI PATEL & 2 OTHERS [2013] eKLR**

and he opined that:

“14. That leads me to the issue of the effect of purported limitation and/or restriction of the Court’s jurisdiction. Whereas the existence of the alternative remedy and procedure may not necessarily oust the jurisdiction of the Court as rightly submitted by Mr. Lubulellah, the Court is perfectly entitled to take into account the existence of such a remedy and its efficacy in deciding whether or not to entertain the dispute and may decline to do so not only on the ground of want of jurisdiction but also in order to avoid the abuse of its process where the process is being invoked to achieve some collateral purpose not recognized by the law as genuine. If therefore abuse of the Court process is shown to have happened, it would be wrong to allow the misuse of that process to continue. There is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it. See The King vs. the General Commissioners for the Purposes of the Income Tax Acts for the District of Kensington Ex Parte Princess Edmond De Polignac [1917] KB 486 at 495.

15. That leads me to whether in the present case the Court’s jurisdiction has been limited and/or restricted in respect of the issues in dispute. It is correct that under section 93(1) of the Act subject to the provisions of this Part, any candidate who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by the Act or the regulations, may seek administrative review as in such manner as may be prescribed. The crucial phrase here is “any candidate”. Therefore for one to be entitled to apply for review under the aforesaid section the applicant must be a candidate. A candidate is defined under section 3 of the Act as “a person who has submitted a tender to a procuring entity”. The ex parte applicants’ case is that they are not candidates since they never submitted any tender for the simple reason that they were never given an opportunity to do so. A strict reading of section 93(1) clearly locks out the ex parte applicants from the purview of the review by the Board for the simple reason that if they are not candidates as defined under the Act they cannot invoke the jurisdiction of the Board under section 93 for the resolution of their disputes. Apart from that the ex parte applicants are challenging the choice of a procurement procedure and contend, a contention which has not been disputed that a contract has been signed. They contend that they were unaware of the signing of the contract since the same was between the Commission and the interested party. Under section 93(2)(a) and (c) of the Act it is expressly stated that these two matters are not subject to review by the Board under subsection (1) thereof. It would therefore seem that the ex parte applicants are locked from disputing the decision of the Commission due to lack of locus standi and further on the ground that their disputes do not fall within the jurisdiction of the Board. Can it therefore be said that the ex parte applicants have an effective remedy under the Act? In my view I do not think so. Where a remedy provided under the Act is made illusory with the result that it is practically a mirage, the Court will not shirk from its Constitutional mandate to ensure that the provisions of Article 50(1) are attained with respect to ensuring that a person’s right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body is achieved. As was rightly stated in Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya (supra) it is the responsibility of the Court to ensure that executive action is exercised; that Parliament intended and that the High Court has the responsibility for the maintenance of the rule of law; that there cannot be a gap in the application of the rule of law; that the Court must at all times embrace a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law. Therefore where there is a lacuna with respect to enforcement of remedies provided under the Constitution or an Act of Parliament through the procedure provided under an Act of Parliament an aggrieved party is left with no alternative but to invoke the jurisdiction of the Court and the Court is perfectly within its rights to investigate the allegations. To fail to do so would be to engender and abet an injustice and as has been

held before a court of justice has no jurisdiction to do injustice. See *M Mwenesi vs. Shirley Luckhurst & Another Civil Application No. Nai. 170 of 2000* and *Kenya Industrial Estates Ltd vs. Transland Shoe Manufacturers Ltd. & 2 Others Civil Application No. Nai. 364 of 1999.*

I entirely agree with the learned Judge's opinion. Although the Applicant could have as well complained to the Authority, I find that it also had the option of directly approaching this Court. After all, the Applicant complains of an alleged *ultra vires* act by the Respondent and this Court is the best forum for deciding whether the Respondent acted in contravention of the decision of the Review Board. I therefore find that the Applicant is before the right forum.

The purpose of granting leave in a judicial review application was clearly stated by G. V. Odunga in **LADY JUSTICE N. KHAMINWA v JUDICIAL SERVICE COMMISSION AND ANOTHER [2014] eKLR** as follows:

“16. The rationale for the requirement that leave be sought and obtained is to exclude frivolous vexatious or applications which *prima facie* appear to be abuse of the process of the Court or those applications which are statute barred. However, leave should be granted, if on the material available the court considers, without going into the matter in depth, that there is an arguable case. Leave stage is therefore a filter whose purpose is to weed out hopeless cases at the earliest possible time, thus saving the pressure on the courts and needless expense for the applicant by allowing malicious and futile claims to be weeded out or eliminated so as to prevent public bodies being paralysed for months because of pending court action which might turn out to be unmeritorious. See *Matiba vs. Attorney General Nairobi H.C. Misc. Application No. 790 of 1993*, *Republic vs. Land Disputes Tribunal Court Central Division and Another Ex Parte Nzioka [2006] 1 EA 321*, *Republic vs. The P/S Ministry of Planning and National Development Ex Parte Kaimenyi [2006] 1 EA 353.*”

The learned Judge firmly concludes at Paragraph 22 of his judgement that:

“22. What comes out clearly from the foregoing is that the grant of leave to commence judicial review proceeding is neither a mere formality nor a practice of magic. It is not to be granted as a matter of course. Delay is one of the factors which a Court often considers in deciding whether or not to grant leave. The applicant for leave is under an obligation to show to the court that he or she has a *prima facie* arguable case for grant of leave. Therefore whereas he is not required at that stage to go into the depth of the application, he has to show that he has not come to court after an inordinate delay and that the application is not frivolous, malicious and futile.”

The duty of the Court at the leave stage is to consider whether an applicant's case is worth propelling to a hearing on merits.

From the papers filed in Court by the parties, it emerges that the Re-Tender process was concluded and the tender awarded to Dufry International AG. The decision of the Respondent to award the tender to Dufry International AG was challenged in Requests for Review Nos. 34 & 35 of 2014. The requests for review were dismissed by the Review Board and it directed that the Respondent was at liberty to proceed with the procurement.

Although the Review Board did not directly state that its directions in Requests for Review Nos. 46, 47, 48 and 50 of 2013 had been complied with, it is clear that it was aware of the decision it had made in the earlier requests for review. Through the decisions delivered on 17th September, 2014 in Request for Review Nos. 34 & 35 of 2014 the Review Board, whose decision the Applicant alleges was disregarded by the Respondent, gave the thumbs-up to the Respondent's re-tender. It is not wrong to conclude that the Review Board was satisfied that its decision of 20th December, 2013 had been complied with. The Review Board must have been satisfied that the specifications had been enlarged to make them inclusive

and that the Standard Tender Document as prepared by the Authority had been used. The Applicant therefore has no basis for claiming that the earlier decision of the Review Board had not been effected by the Respondent. The Review Board had through its decision of 17th September, 2014 given a stamp of approval to the Re-Tender Document.

Was this application made in good time? Applications for judicial review ought to be made promptly. Undue and inordinate delay in applying for judicial review is a factor for consideration by the Court in deciding whether or not to grant judicial review remedies. Even where an application discloses meritorious grounds for the grant of judicial review orders, the application can be rejected if there is evidence that the person seeking the orders sat on his rights and failed to seek relief in good time and with due diligence. This principle will also apply to an application for leave.

Whoever wants to challenge the action of a public body is therefore expected to move the Court promptly once the decision is made. On this principle, the opinion of Lord Hope of Craighead **REGINA v. LONDON BOROUGH OF HAMMMERSMITH AND FULHAM (RESPONDENTS) AND OTHERS EX PARTE BURKETT AND ANOTHER (FC) (APPELLANTS) [2002] UKHL 23** is persuasive. He stated that:

“On the other hand it has repeatedly been acknowledged that applications in such cases should be brought speedily as possible. Ample support for this approach is to be found in the well-known observations of Lord Diplock in *O’Reilly v Mackman* 2AC 237, 280-281 to the effect that the public interest in good administration requires that public authorities and third parties should not be kept in suspense for any longer period than is absolutely necessary in fairness to the person affected by the decision; see also *R v Dairy Produce Quota Tribunal for England and Wales, Ex p Caswell* [1990] 2AC 738. But decisions as to whether a petition should be dismissed on the ground of delay are made in the light of the circumstances in which time was allowed to pass. As Lord President Rodger put it in *Swan v Secretary of State for Scotland* 1998 SC 479,487:

“It is, of course, the case that judicial review proceedings ought normally to be raised promptly and it is also undeniable that the petitioners let some months pass without starting these proceedings. None the less, in considering whether the delay was such that the petitioners should not be allowed to proceed, we take into account the situation in which time was allowed to pass.”

In *Ex p Caswell* [1990] 2AC 738,749-750 Lord Goff of Chieveley said that he did not think that it would be wise to attempt to formulate any precise definition or description of what constitutes detriment to good administration. As he pointed out, interest in good administration lies essentially in a regular flow of consistent decisions and in citizens knowing where they stand and how they can order their affairs. Matters of particular importance, apart from the length of time itself, would be the extent of the effect of the relevant decision and the impact which would be felt if it were to be reopened.”

What amounts to inordinate delay varies from case to case. The Applicant before this Court has not offered any reason why it did not move to challenge the actions of the Respondent immediately it became apparent that the Re-Tender Document did not comply with the directions of the Review Board. After the close of the tender, the Applicant waited for two months before moving the Court. In the picture are third parties who participated in the new tender. This application does not therefore concern the Applicant and the Respondent alone. It also affects third parties who have not participated in these proceedings.

The Applicant was aware that the tender closed on 8th July, 2014. For two months it did nothing to challenge the validity of the Revised Re-Tender Document. The parties who participated in the fresh tender and the Respondent went on with the process up to conclusion. The Review Board was asked to review the procurement process and it did so. One week before the Review Board was to deliver its decision the Applicant approached this Court. As already noted, the third parties who participated in the

process are not before this Court. The Applicant did not explain why it waited for over 60 days before filing this application. In the circumstances of this case, I find that the Applicant approached this Court too late in the day.

It is also important to remember that of the four requests for review that were filed against the award in the original tender it was only the Applicant's Request for Review No. 47 of 2013 which was dismissed by the Review Board. The reason given was that the Respondent was correct in declaring the Applicant's bid non-responsive. Could that be the reason why it failed to participate in the re-tender?

Does the Applicant have an arguable case? The Applicant's case is that the Respondent did not comply with the decision of the Review Board, as it did not enlarge the specifications to make them more inclusive. It is the Applicant's case that what the Respondent did was to reproduce the original tender document.

The Respondent's counsel took this Court through the two documents and demonstrated that the two documents were different. In particular, the Respondent's counsel pointed out the scores in the Re-Tender Document which were not provided for in the original tender document. Having looked at the two documents I agree that changes were indeed made in the re-tender document. In fact the Applicant's advocate had nothing to say when the changes were pointed out by the Respondent's counsel.

The Respondent also established that it submitted the re-tender document to the Authority for advice and complied with directions given by the Authority. The Respondent exhibited a letter dated 18th June, 2014 addressed to the Managing Director of the Respondent by the Director-General of the Authority. The letter whose reference is **"ADVISE ON TENDER FOR DEVELOPMENT AND MANAGEMENT OF A DUTY FREE RETAIL MASTER CONCESSIONAIRE AT THE NEW JOMO KENYATTA INTERNATIONAL AIRPORT, TERMINAL UNIT 4 RE-TENDER: TENDER UNIT KAA/193/2013-2014"** states in part:

"In view of the above provisions of the Act, it is incumbent upon you to comply with the Board's decision and it would appear from your last letter that you have substantially complied with the decision save for on the issue of financial evaluation.

The Authority therefore wishes to remind you that the award of a tender is premised on the outcome of the evaluation criteria set out in the tender document and therefore it would be desirable that you set out a financial evaluation criteria that also allows competition to take its course as per Section 2 and Section 66(2) of the Act. The financial evaluation criteria should therefore be in addition to the mandatory and the technical requirements.

In conclusion therefore and in view of the decision by the Board which is binding and final, you may now proceed and comply with the Board's orders subject to the above observations on the need for a financial evaluation criteria."

From the said letter it is apparent that the Authority was aware of the new process and made an in-put on the same.

For all the above stated reasons it is my humble view that this case does not meet the threshold for the grant of leave. In short, the Applicant has no arguable case and the best solution is to lay the case to rest at this stage. The chamber summons application for leave is therefore dismissed. There will be no order on costs.

Dated and signed at Nairobi this 14th day of October, 2014

W. KORIR,

JUDGE OF THE HIGH COURT

