



**IN THE HIGH COURT AT NAIROBI**

**AT MILIMANI LAW COURTS**

**JUDICIAL REVIEW DIVISION**

**JR. MISC. APP. NO. 337 OF 2013**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**AND**

**THE PUBLIC PROCUREMENT**

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

**AND**

**KENYATTA NATIONAL**

**HOSPITAL .....1<sup>ST</sup> INTERESTED PARTY**

**BOC KENYA LIMITED ..... 2<sup>ND</sup> INTERESTED PARTY**

***EXPARTE***

**NOBLE GASES INTERNATIONAL LIMITED**

**RULING**

**Introduction**

1. The matter before the court is the decision of the Procurement Appeals Review Board (“the Board”) concerning a tender issued by the procuring entity, Kenyatta National Hospital (“the Hospital”).

2. By the Notice of Motion dated 27<sup>th</sup> September 2013 (“the application”), the *ex-parte* applicant (“Noble Gases”) moved the court for the following orders;
1. *An order of certiorari to remove to this Honourable Court to be quashed the decision of the Public Procurement Administrative Review Board signified through its Decision dated 16<sup>th</sup> September 2013 in Review No. 31/2013 of 5<sup>th</sup> September 2013 (In the matter of Tender No. KNH/T/43/2013-2013 for the supply and delivery of Medical Gases) conveyed to the Applicant and purporting to annul the award of the tender to the Applicant in respect Medical Liquid Oxygen, directing the 1<sup>st</sup> interested party to re-evaluate all the bids in respect with Item No. 3 (Medical Liquid Oxygen) in accordance with the Act, the Regulation and the Tender Document and further directing the said 1<sup>st</sup> Interested party to ensure that the process is complete within the next fifteen days in accordance with Legal Notice No. 106 of 18<sup>th</sup> June 2013 and within the Tender validity period.*
2. Costs.

### **Objection and arguments**

3. When the matter came up for directions on 3<sup>rd</sup> October 2013, counsel for the Hospital drew the court’s attention to a letter dated 30<sup>th</sup> September 2013 addressed to the Noble Gases stating as follows;

**Ref: KNH/SCM/ADM.43**

**30<sup>th</sup> September 2013**

*The General Manager*

*M/S Noble Gases International Limited,*

*P. O. Box 43863-00100,*

**NAIROBI – KENYA**

**RE: NOTIFICATION OF CANCELLATION OF AWARD FOR MEDICAL LIQUID OXYGEN ON TENDER NO. KNH/T/432013-2014**

*Please refer to the above named tender in which you participated.*

*We wish to inform you that the re-evaluation of item No, 3 (Medical Liquid Oxygen) as was resolved by Public Procurement Oversight Authority (PPOA) has been finalized and the re-evaluation recommended cancellation of award of item No. 3. This has been done and you are hereby notified of the same.*

*Thank you for your interest in doing business with us.*

*Yours faithfully.*

**R M Njoroge (Mrs)**

**FOR: CHIEF EXECUTIVE OFFICER**

4. Mr Muriuki, counsel for the Hospital, submitted that in light of the said letter dated 30<sup>th</sup> September 2013, the Notice of Motion has been overtaken by events as the direction of Board has been implemented. Counsel submitted that the Hospital acted in accordance with the Board’s decision and proceeded to re-evaluate item No. 3 of the tender as directed by the Board and a decision was made to cancel the award in that respect and the parties duly notified. In the circumstances, counsel urged, there was no further determination to be made by this court.

Counsel also submitted that there was nothing in **section 100** of the **Public Procurement and Disposal Act** (“the Act”) which prevented the procuring entity from implementing the Board’s decision as filing of the judicial review proceedings did not act as a stay of the decision of the Board. The only recourse for the applicant was to challenge afresh the decision before the Board.

5. The 2<sup>nd</sup> interested party, represented by Ms Malik, supported the position of the Hospital. Counsel submitted that **section 100** of the Act does not operate as an automatic stay hence the necessity to apply for stay *ex-parte* when filing an application for judicial review. She further submitted that the procuring entity has complied with the Board’s decision and as such the *ex-parte* applicant’s recourse was to the Board itself.
6. Counsel for Noble Gases, Mr Obok, vigorously opposed the submissions by the interested parties. He emphasised that there was no provision under the Act for the procuring entity to cancel an award as it purported to do as notified by the letter dated 30<sup>th</sup> September 2013. According to him, the matter before the Court is the Board’s decision which was sought to be quashed and in terms of the said decision there was no room for the procuring entity to cancel the award and its act was illegal. Counsel further argued that the intervening act of the procuring entity did not affect the decision of the Board which was the one being challenged before the Court. On the whole the *ex-parte* applicant’s position is that the matter must be heard on its merits.

### **Determination**

7. The issue for determination is whether the application has been overtaken by events as a result of the implementation of the decision of the Board as evidenced by the letter dated 30<sup>th</sup> September 2013 which notified the parties of the Hospital’s decision to cancel the award. This matter is to be approached from a reading of **section 100** of the Act which provides as follows;

*100. (1) A decision made by the Review Board shall, be final and binding on the parties unless judicial review thereof commences within fourteen days from the date of the Review Board’s decision.*

*(2) Any party to the review aggrieved by the decision of the Review Board may appeal to the High Court, and the decision of the High Court shall be final.*

*(3) A party to the review which disobeys the decision of the Review Board or the High Court 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 shall be null and void.*

*(4) If judicial review is not declared by the High Court within thirty days from the date of filing, the decision of the Review Board shall take effect.*

8. I disagree with the position adopted by the Hospital and 2<sup>nd</sup> interested party that the filing of a judicial review application under **section 100** of the Act does not operate as a stay and that it is up to the party moving the court to make an application and justify to the Court why a stay should be granted. Odunga J., whilst addressing a similar issue in the case of **Republic v The Public Procurement Administrative Review Board ex-parte Avante International Technology Inc Nairobi JR Misc. Appl. No. 451 of 2012** had this to say:

*[15] The next issue is whether the contract having been signed between the Commission and the interested party herein the orders sought are still capable of being granted. Section 100(1) of the Act provides that a decision made by the Review Board shall, be final and binding on the parties unless judicial review thereof commences within fourteen days from the date of the Review Board’s decision. The respondents contend that since there was no stay granted by the Court and the said contract was entered into the orders sought herein are incapable of being granted. The action is justified on the ground that the Commission’s action*

*is dictated by the timelines for the conduct of the elections and therefore it had to proceed with the contract. That may be so, however, if the Commission decides to enter into a contract during the pendency of judicial review proceedings filed within the stipulated period, it does so at the risk that the Court may nullify the process leading to the tender and it would be no excuse that the tender had been entered into since it is clear that where the judicial proceedings are commenced within 14 days, the decision of the procuring entity is not final in which event the court would be properly entitled to nullify the procurement.” [Emphasis mine]*

9. I agree with the above holding and would add that the fourteen days period is a window availed to serve the purpose of limiting the time frame within which a review against the Board’s decision can be lodged in the High Court for purposes of expediency and conclusiveness of the Board’s decision as these activities are time bound and the procurement process ought not be held hostage to indefinite proceedings.
10. More importantly, **subsection (4) of section 100** indirectly requires the High Court to pronounce itself within thirty days from the date of filing of the judicial review. For emphasis, the subsection states, “(4) *If judicial review is not declared by the High Court within thirty days from the date of filing, the decision of the Review Board shall take effect.*” Although this section has been declared unconstitutional, in the case of ***Republic v Public Procurement Administrative Review Board and Another ex-parte Selex Sistemi Integrati Nairobi Misc. Appl. 1260 of 2007 [2008]eKLR***, in so far as it limits the time in which the High Court is to render a decision, the decision of the Board after the application for review has been filed remains subject to the Court directions and decision.
11. This provision answers the core question in contention, that is, whether the filing of judicial review proceeding before the High court within the prescribed 14 day-period acts as an automatic stay. I take the position that **section 100** of the Act implies that the Board’s decision is to be kept in abeyance until the court makes its final decision. The use of the term, “*shall take effect*” discloses the legislative purpose and intent. For all practical purposes, the Board’s decision was ‘frozen’ so to speak until such a time as the High court issued an order of judicial review contemplated under the section over the decision or after the lapse of the 14 day period whichever comes first. I find and hold that the provision is a statutory stay.
12. In its decision dated 16<sup>th</sup> September 2013, the Board directed the Hospital to re-evaluate all bids in respect of Item No. 3 (Medical Liquid Oxygen) in accordance with the Act, Regulations and Tender Documents and the Hospital acted accordingly and in its re-evaluation cancelled the tender. I agree with Mr Obok that the intervening act of the procuring entity, through its letter dated 30<sup>th</sup> September 2013 has not affected the decision of the Board being challenged before the Court. In terms of **section 100(1)**, the decision of the Board could not take effect as long as the proceedings had been filed within time and were pending in the High Court.
13. An application for judicial review, having been lodged in this court within the stipulated period of fourteen days meant that the Board’s decision was not final within the meaning of **section 100(1)** of the Act. It is therefore not correct to state that the Notice of Motion has been overtaken by events. The letter of the procuring entity dated the 30<sup>th</sup> September 2013 is inconsequential in as far as the present application goes. To accede to the interested party’s position would be to read into the Act a proviso that stipulates that implementation of the Board decision in the 14 day interim period shall act as a bar to an application for judicial review to the High Court, a position I reject.
14. The duty of the court, when faced with such a situation is to adopt an interpretation that best preserves the essence of the statutory provision in question rather than one that destroys it. In this case, adopting the opposing parties’ stance that the only option available to the *ex parte* applicant was to apply for review to the Board in effect negates the very right of review over the Board’s decision that the **section 100** of the Act is intended to secure. Such an interpretation would in the long run risk rendering its provisions redundant.

15. Finally the right to apply for review is a statutory right and in light of the right of access to justice enshrined in **Article 48**, the court has the obligation in concert with **Article 20** to give the fullest effect to that right.

### **Conclusion**

16. In conclusion I find and hold that a reading of **section 100** of the **Public Procurement and Disposal Act** leaves no doubt that the legislative intention was that the Board's decision would not be final and binding and would remain in abeyance until the expiry of the 14 day period provided for appeal under subsection (1) or remain subject to the proceedings of the High Court. The fact that the decision of the Board which forms the substratum of this suit has now been implemented is irrelevant. The letter of 30<sup>th</sup> September 2013 cannot undermine the applicant's right to a statutory remedy.

17. For these reasons, I decline to strike out the Notice of Motion dated 27<sup>th</sup> September 2013 and direct that the same shall proceed to be heard and determined on its merits.

18. The costs of the objection shall be borne by the 1<sup>st</sup> interested party.

**DATED and DELIVERED at NAIROBI this 4<sup>th</sup> day of October 2013**

**D.S. MAJANJA**

**JUDGE**

Mr Obok instructed by Mang'erere Bosire and Associates Advocates for the *ex-parte* applicant.

Mr Sirai, Litigation Counsel, instructed by the State Law Office for the respondent.

Mr Muriuki instructed by Mulondo, Oundo, Muriuki and Company Advocates for the 1<sup>st</sup> interested party.

Ms Malik instructed by Kaplan and Stratton Advocates for the 2<sup>nd</sup> interested party.