



**Galana Oil Kenya Limited v Rubis Energy Kenya PLC & another (Civil Appeal E066 of 2023) [2023] KECA 372 (KLR) (31 March 2023) (Judgment)**

Neutral citation: [2023] KECA 372 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL E066 OF 2023  
HA OMONDI, KI LAIBUTA & A ALI-ARONI, JJA  
MARCH 31, 2023**

**BETWEEN**

**GALANA OIL KENYA LIMITED ..... APPELLANT**

**AND**

**RUBIS ENERGY KENYA PLC ..... 1<sup>ST</sup> RESPONDENT**

**PUBLIC PROCUREMENT REVIEW BOARD ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the entire Judgment and Decree of the High Court of Kenya (Constitutional & Judicial Review Division) at Nairobi, (Ngaah, J.) dated 3rd February 2023 in HCJR No. E 188 of 2022)*

**JUDGMENT**

1. The 1<sup>st</sup> respondent, Rubis Energy PLC, was aggrieved by the decision of the Public Procurement Administrative Review Board, the 2<sup>nd</sup> respondent, dated December 22, 2022 arising from a request for review filed by the appellant in relation to a procurement process conducted by the 3<sup>rd</sup> and 4<sup>th</sup> respondents. The 2<sup>nd</sup> respondent had awarded the tender to the appellant, which was contested by the 1<sup>st</sup> respondent. By a Notice of Motion dated January 4, 2023, the 1<sup>st</sup> respondent moved the High Court for Judicial Review seeking orders to quash the decision of Public Procurement Administrative Review Board made on December 22, 2022; and an order of mandamus to compel Kenya Power and Lighting Company (KPLC) and its accounting officer, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents herein, to actualize with the 1<sup>st</sup> respondent the contract of supply and delivery of low Sulphur diesel to off grid power stations.
2. The reason for these prayers was informed by the 1<sup>st</sup> respondents contention that it was the successful bidder in respect of a tender by the 2<sup>nd</sup> respondent for the supply and delivery of low Sulphur diesel; and that the chair of the board who presided over the application was alleged to be the managing partner in a firm of advocates whose clients included the procuring entity.



3. The 2<sup>nd</sup> respondent's reacted to the issue regarding the chairperson's questioned status arguing that the chairperson had not been served, was adversely mentioned and, as such, no orders could be made against her without a hearing; and that the chairperson of the respondent did not receive any briefs from the 2<sup>nd</sup> interested party, Kenya Power & Lighting Company PLC, while the request for review was pending determination.
4. By a judgment dated February 3, 2023, the trial court, having considered the parties pleadings, testimony, and evidence on record, quashed the 2<sup>nd</sup> respondent's decision, pointing out that the allegation of bias was a critical issue, which would have vitiated the respondent's decision under the grounds of illegality and procedural impropriety. The learned Judge pointed out that the claim that the chairperson of the 2<sup>nd</sup> respondent who sat in that capacity in the proceedings culminating in the impugned decision was the managing partner of the firm of advocates, was not controverted; further that relationship between the procuring entity and the chairperson of the 2<sup>nd</sup> respondent was available on the said firm's website which had the portfolio of its clients, and which included the 2<sup>nd</sup> respondent; that in light of these uncontroverted facts, it would be legitimate to conclude that the chairperson of the respondent had some degree of interest in the proceedings before her to the extent that one of her clients was a respondent in those proceedings, and that being the case, she ought to have declared this interest at the earliest convenience under Regulation 212 of the [PPAD Regulation 2020](#).
5. The trial court further concluded that the chairperson not only failed to declare her interest, but also participated in the decision making process, thus bringing into question the legality of the decision that was made; that further, considering that the chair was linked to one of the parties in a client-advocate relationship, it was difficult to accept that the procedure in which the impugned decision was arrived at was fair, and the process smirking of procedural impropriety. It was the trial Judge's holding that the decision could not stand because it was not possible to read the mind of the decision maker as much as he/she may not be conscious of his interest in the matter, but that what was of concern was what the 'right minded' people may think. The decision was thus quashed, and the 2<sup>nd</sup> respondent directed that the Board considers afresh the appellant's request for review, in an exercise that would exclude the chairperson.
6. Aggrieved by the decision of the trial court, the appellant filed its memorandum of appeal challenging the judgment of the High Court on 5(five) grounds of appeal which revolve around the issue of procedural impropriety leading to quashing of the 2<sup>nd</sup> respondent's decision. For the sake of precision, we have thus condensed and reframed these to the effect that the decision is challenged; that there was no basis for quashing the impugned decision of the 2<sup>nd</sup> respondent on the basis of illegality and procedural impropriety, as there was no evidence to support that conclusion; and that regulation 212 of the [PPADR](#) was inapplicable.
7. The appellant prays that the appeal be allowed, and the judgment dated February 3, 2023 be set aside; and that the 1<sup>st</sup> respondent's application dated January 4, 2023 to the High Court be dismissed with costs.
8. Opposing the appeal, the respondent submits that the appeal is otiose as the 2<sup>nd</sup> respondent herein has complied entirely with the judgment of the trial court and published its decision on February 23, 2023. We are thus urged to dismiss the appeal, which is described as moot, and, at best, a mere academic exercise.
9. Whereas the appellant concedes that the 2<sup>nd</sup> respondent has given effect to the orders issued by the trial court, it is argued that the matter relating to the issue as to whether the trial court ought to have granted the relief sought by way of judicial review orders of certiorari remains alive.



10. We take note of the respondent’s position that the appeal has been overtaken by events as the appellant has already complied with the impugned judgment and a re-hearing of the request for review has been conducted, thereby rendering the appeal moot.
11. Black’s Law dictionary 8<sup>th</sup> Edition defines a moot case as a matter in which controversy no longer exists. This Court in *Okuya Omtatab Okoiti & 2 Others v Attorney General & 4 Others* [2020] eKLR agrees with the findings of Mativo J, in *Daniel Kaminja & 3 Others (Suing as Westland Environmental Caretaker Group) v County Government of Nairobi* [2019] eKLR, on the definition of mootness. See also *National Assembly of Kenya & Another v Institute for Social Accountability & 6 Others [2017] eKLR*.
12. Given those parameters in the above quoted authorities, is this appeal moot? It is not in contention that the 2<sup>nd</sup> respondent had complied with the judgment being appealed from. The decision dated February 23, 2023 states:
 

“in compliance with the decision of Honorable Justice Jairus Ngaah of February 3, 2023... the board will proceed to reconsider the subject review in accordance with the directions issued by the board...and taking into consideration the findings in the judgment.”

The Board now proceeds to reconsider the instant request for review.
13. This means that the rehearing proceeded minus the named chair, and a decision has already been rendered by the 2<sup>nd</sup> respondent, no magic wand can reverse that. While we acknowledge that the chairperson of the board is not a party to the suit and is trying to introduce new evidence at the appellate stage, we cannot be blind to the fact that she had an opportunity to request to be enjoined earlier, but used a proxy to defend her position, she cannot therefore cry wolf at this point in time.
14. Accordingly, this Court finds that the appeal herein is incompetent and is hereby struck out with costs to the 1<sup>st</sup> respondent.

**Dated and delivered at Nairobi this 31<sup>st</sup> day of March, 2023.**

**H. A. OMONDI**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA**

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**JUDGE OF APPEAL**

**ALI-ARONI**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original*

*Signed*

**DEPUTY REGISTRAR**

