Kanja t/a M/S Ventone Enterprises v Public Procurement Administrative Review Board & another; Cathan Logistics Limited (Interested Party) (Civil Appeal E513 of 2021) [2022] KECA 61 (KLR) (4 February 2022) (Judgment)

Neutral citation: [2022] KECA 61 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E513 OF 2021

HM OKWENGU, F SICHALE & KI LAIBUTA, JJA

FEBRUARY 4, 2022

BETWEEN

VERONICA NGINA KANJA T/A M/S VENTONE ENTERPRISES APPELLANT

AND

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD .... 1ST RESPONDENT

THE ACCOUNTING OFFICER, STATE DEPARTMENT FOR LIVESTOCK, MINISTRY OF AGRICULTURE, LIVESTOCK, FISHERIES & CO-OPERATIVE ..... 2ND RESPONDENT

AND

CATHAN LOGISTICS LIMITED ..... INTERESTED PARTY

(An Appeal from the Ruling of the High Court of Kenya at Nairobi (Jairus Ngaah, J.) delivered on 27th August 2021 in Milimani High Court Judicial Review Case No E092 of 2021)

JUDGMENT

1. This appeal arises from the Ruling and Order of Jairus Ngaah, J delivered on 27th August 2021 in Nairobi (Milimani) High Court (Judicial Review Division) Case No. E091 of 2021. In this case, the appellant, Veronica Ngina Kanja, had applied for judicial review orders vide her Notice of Motion dated 16th July 2021 seeking –

    a. an order of certiorari to remove to the High Court and quash the final Order No. 3 in the impugned decision of the Public Procurement Administrative Review Board (the 1st respondent herein) dated 29th June 2021 together with all consequential actions, including an order quashing the Communication on

Award dated 5th July 2021 and any/all such letters issued following the orders of the 1st respondent;

b. an order of Mandamus compelling the Accounting Officer in the State Department for Livestock, Ministry of Agriculture, Livestock, Fisheries and Cooperatives (the 2nd respondent) to evaluate the appellant's bid and award Tender No. MOALF & C/SDL/ONT/14/2020-2021 for the supply, delivery and installation of milk analysers to the appellant as the lowest evaluated bid; and

c. that costs be provided for on a full indemnity basis.

2. The appellant's application was made on 8 grounds set out on the face of the Motion, most of which constitute an explanatory statement of the sequence of events, but which we need not reproduce here. In summary, the relevant grounds are that –

a. the decisions of the 1st and 2nd respondents made on 29th June 2021 and 5th July 2021 respectively were in violation of –

i. the Constitution and the enabling statutes;

ii. sections 156, 157 and 175(1) of the Public Procurement and Assets Disposal Act (hereinafter "the Act");

b. in violation of statute law, the 2nd respondent made a decision on 26th May 2021 rejecting the appellant's bid in the sum of KShs. 6,264,000 in favour of a bid in the sum of KShs. 13,170,040;

c. the appellant's request for review dated 8th June 2021 was determined on 29th June 2021 resulting in the impugned decision of the 1st respondent;

d. in its decision on review, the 1st respondent directed that –

i. the Letter of Notification of Communication of Award dated 26th May 2021 in respect of Tender No. MOLF & C/SDL/DlP/ONT/14/2020-2021 for Supply, Delivery and Installation of Milk Analysers, addressed to the appellant and all other unsuccessful bidders, be cancelled;

ii. the Letter of Notification of Communication of Award addressed to M/s. Cathan Logistics Ltd (the interested parties) be cancelled and set aside;

iii. the 2nd respondent do issue new letters of notification of the outcome of the valuation to the successful and unsuccessful bidders within seven days next following the decision; and

iv. the parties to the request for review bear their own costs;

e. the respondents were in violation of Article 10(2) (a) and (b) in disallowing the appellant's "fully responsive and competitive bid";

f. in their action, the respondents perpetuated inequity and systemic denial of fundamental rights and freedoms contrary to Articles 55 (b) and 56 (b) of the Constitution; and

g. in view of the foregoing, it is necessary for the High Court to allow the prayers sought.

3. The appellants Notice of Motion was purportedly supported by the affidavit of Emmanuel Gisemba, learned counsel for the appellant. That affidavit is on record as having been filed in support of the appellant's application for leave to file the Motion in the High Court.

It is said to "... evidence the illegalities and violations of the respondent."

4. The appellant's application for judicial review orders aforesaid was opposed by the respondents as evidenced by the two replying affidavits sworn by –

a. Phillip Okumu, the respondent's 1st acting Secretary, on 22nd July 2021; and

b. Benignas A. Luyera, the Head of Supplies Chain Management Services of the 2nd respondent, on 30th July 2021.

5. Having heard the appellant's application, the affidavit in support thereof, the respondents' replying affidavits, the undated written submissions of learned counsel for the appellant, the written submissions of the learned State counsel dated 12th August 2021, and having examined the court record before him, the learned Judge struck out the appellant's application for reasons that it was "... bad and irredeemable". According to him, it did not deserve more of the court's attention, and the only option open to the court was to strike it out.

6. In his Ruling delivered on 27th August 2021, the learned Judge observed that the affidavit verifying the facts relied upon was sworn by one Emmanuel Gisemba, the applicant's counsel, without evidence of express authority of the appellant to do so. In his considered view, the purported application before the trial court was fatally defective at least in two respects:

a. first, the impugned decision was not exhibited to the affidavit verifying the facts; and

b. secondly, the applicant had not sworn the verifying affidavit.

7. Aggrieved by the decision of Jairus Ngaah, J the Appellant filed this appeal seeking inter alia –

a. the appeal herein be allowed;

b. the Ruling and Order of the High Court (Judicial Review Division) Case No. E091 of 2021 dated and delivered on 27th August 2021 be set aside;

c. an order that the appellant's Notice of Motion dated 15th July 2021 be reinstated and heard on its merits before another Judge; and

d. costs of this appeal be provided for.

8. The appeal is made on 5 grounds set out on the face of the Memorandum of Appeal dated 8th September 2021, but which we need not reproduce in full here. Suffice it to summarise the substantive grounds as follows:

a. that the learned Judge erred in striking out the subject judicial review application on inadvertent curable technical defect that did not go to the root or core of the dispute between the parties;

b. that the trial court erred in failing to consider the merits of the two issues in contention in the application for judicial review;

c. that the learned Judge erred in misapprehending the law on execution of affidavits or pleadings, and by erroneously holding that the appellant had not sworn the verifying affidavit, whereas her advocate, as a lawful agent, had executed an affidavit under oath disclosing the source and accuracy of the information therein;

d. that the learned Judge erred in centering his determination on issues not in dispute, having not been raised by any of the parties in the matter, and in failing to consider the interest of justice by determining the appellant's application on its merits;

e. the learned Judge erred in holding that the appellant had not exhibited the impugned decision to the affidavit verifying the facts, whereas the same was annexed to the supporting affidavit in the application for leave, save for the inadvertent omission of the even pages which occurred during the electronic filing process; and

f. the learned Judge erred by holding the appellant responsible for instances of innocent inadvertence on the part of counsel, and by unduly depriving the appellant the right to be heard on merits on the dispute before the court.

The Parties

9. The Appellant is a business woman trading under the name and style of Ventone Enterprises duly registered as a business name vide the Registration Certificate No. BN/2014/xxxxxx within the Republic of Kenya.

10. The 1st Respondent is a statutory Board established under section 27 of the *Public Procurement and Asset Disposal Act*, 2015 and constituted to, among other functions, receive, hear and determine disputes relating to tendering and asset disposal. The 2nd respondent is the Accounting Officer in the State Department for Livestock, Ministry of Agriculture, Livestock, Fisheries and Cooperatives, and the procuring entity with regard to the subject matter of this appeal.

Dispute, Ruling and Judgment of the High Court

11. From the discernible part of the record before us, the appellant submitted to the 2nd respondent a bid being Tender No. MOALF & C/SDL/ONT/14/2020-2021 for the supply, delivery and installation of milk analysers, which she claimed to have been the lowest evaluated bid. That said, the bid was unsuccessful, and she challenged the procurement process before the 1st respondent pursuant to section 167 of the *Public Procurement and Asset Disposal Act*, 2015. Her application was dismissed. Hence the judicial review application whose impugned Ruling and Order are the subject matter of this Appeal.

12. It is noteworthy that the appellant's Motion for judicial review was purportedly supported by the affidavit of one Emmanuel Gisemba (her advocate) sworn on 13th July 2021. That affidavit was initially made in support of the appellant's Chamber Summons dated 13th July 2021 by which she sought leave to file her substantive application for judicial review. On obtaining leave, the appellant filed the Notice of Motion dated 16th July 2021 and purported to adopt the advocate's affidavit aforesaid in support of the Motion.

13. Even though the aforesaid replying affidavits of Phillip Okumu and Benignas A. Luyera filed in opposition to the appellant's Motion did not take issue with the formal requirements of the application addressed by the learned Judge, pertinent questions arose as to –

    a. the propriety of a verifying affidavit sworn by learned counsel for the appellant without express authority of the appellant; and

    b. the effect of omission to exhibit a complete copy of the impugned decision of the 1st respondent.

14. When this appeal came for hearing on 18th October 2021 on a virtual platform, Mr. Wilfred Lusi represented the appellant while Mr. Maina Wanjohi represented the respondents. Learned counsel for the appellant addressed the Court by highlighting his written submissions and case digest dated 7th October 2021 while, in response, learned counsel for the respondents made oral submissions. Having heard learned counsel for the appellant and learned counsel for the respondents, and having considered the statutory timelines prescribed under section 175(4) and the effect thereof stipulated in subsection (5) of the Public Procurement and Assets Disposal Act, 2015 over and concerning hearing and determination of appeals by the Court under this section, we took note of the fact that –

    a. this Court was mandated under section 175(4) to render its judgment within 45 days from the date of appeal; and

    b. accordingly, this Court's judgment became due for delivery in compliance with that section so as to avoid the effect of subsection (5), which would necessarily follow on 22nd October 2021.

15. In the circumstances, and by consent of the parties, the Court rendered its judgment in summary on 18th October 2021 in the following terms:

    a. "the appellant's appeal be and is hereby dismissed with costs to the respondents;

    b. the Ruling and Order of the High Court of Kenya at Nairobi (Jairus Ngaah, J.) delivered on 27th August 2021 in Milimani High Court Judicial Review Case No. E091 of 2021 be and is hereby upheld;

    c. the Court reserves its reasons for the judgment pursuant to Rule 32(5) of the Court of Appeal Rules; and

    d. the Court shall deliver its reasons on 21st January 2022."

16. Accordingly, it is incumbent upon us to give reasons for our judgment as pronounced in the foregoing terms, regard being had to the state of the affairs in respect of the impugned decision and of the works to which it relates. In particular, this Court sought to establish from counsel for the appellant and counsel for the respondents:

    a. Whether the tender, which was the subject matter of the impugned decision, and this appeal, was ever awarded, and what is the position on the ground?

    b. If the answer to (a) is in the affirmative, what useful purpose would be served by the outcome of this appeal?

c. In the alternative, would this appeal be an exercise in futility?

Appeal and Submissions of Counsel

17. In his oral submissions, Mr. Munene Wanjohi, learned counsel for the respondents, told the court that the tender in issue was awarded to Cathan Logistics Ltd (the Interested Party) and that the works are near completion. In the words of Mr. Wanjohi:

> " I got a copy of the contract that is actually almost in full compliance, that is coming to an end in the next one week. The contract was for 12 weeks, was signed on 15th of July. The work is3/4 done."

18. Mr. Lusi, learned counsel for the appellant, conceded that the works had been contracted with the Interested Party and that the same was near completion. His only plea is that we grant the judicial review orders to accord the appellant a firm foundation on which to lodge a claim for compensation for the violations complained of, assuming that the orders sought are merited. With due respect to learned counsel, we are unable to comprehend what order could issue to undo what has already been done. The award of the tender in issue is water under the bridge and the only remedy available to the appellant is a claim for damages on proof of loss and damage allegedly suffered in consequence of the violations complained of. But that is a matter for a different forum. Indeed, it is not for us to turn the clock back and quash a decision already carried into logical conclusion or, otherwise, mandate the respondents or either of them to undo what has been done or do that which cannot be done, namely to award a tender already awarded to and the related works executed to near completion by a third party.

19. We now turn to the learned Judge's findings on review. Though cognizant of the fact that this appeal has been overtaken by events, it would be remiss of us not to render ourselves on the two main reasons given by the learned Judge for striking out the appellant's Motion, and hence this appeal. At the risk of this being purely an academic exercise, or an exercise in futility at the very worst, we are of the considered view that the learned Judge was correct in holding that the appellant's application was fatally defective on account inter alia of support by an affidavit sworn by her advocate without her express authority, and without exceptional reasons for doing so. To find otherwise would be to constitute the advocate a prospective witness of fact in the proceedings and, at the same time, legal counsel for the appellant. The impropriety of this dual role need not be overemphasised.

20. We agree with the learned Judge in the High Court decision in *Samuel Kinoti v Erastus Kithinji M"Magiri in the Matter of the Estate of M'Magiri M'Mugira (Deceased)* [2005] eKLR where the court observed:

> " It is now trite law that an advocate acting on instructions of his client, should avoid swearing any affidavit in the matter in which he is acting unless the circumstances are such that it is necessary [or] imperative, to require him to swear such an affidavit .... In my view an advocate does not become authorized to swear an affidavit merely because, by virtue of his representation, he becomes knowledgeable of the relevant facts. He still needs to decide whether or not swearing such an affidavit will not bring him in professional conflict with his position as such advocate. He needs to decide whether if he swears such an affidavit he will not place himself in a position where he becomes a potential witness by the sheer nature of the contents of the affidavit. And in my view, even where he finally finds that he indeed has to swear such affidavit because he is the only one who should do so by the nature of things,

he nevertheless, must at the head of the affidavit, clearly reveal that he has been authorized by his client to do so, preferably through a short affidavit by his client to that effect."

21. We find that no affidavit of such authority by the appellant was filed. Neither did her learned counsel disclose any necessary or imperative circumstances that compelled the swearing by him of an affidavit on factual evidence within the appellant's knowledge, and to which only the appellant could testify without the need to constitute her learned counsel a witness in the proceedings. To our mind, merely stating that he "conferred" with his client on the matters in issue is not tantamount to express authority. It is not sufficient to justify his deposition in that regard. Learned counsel for the appellant must elect whether to act as a witness or as a professional adviser, but not both.

22. In his judgment in *Butterfield v Canada (Attorney-General)* 2005 FC p.396, Hargrave, P had this to say:

> " There are at least three good reasons for rejecting affidavits sworn by solicitors and counsel for a party. First, everyone including the speaker has the right and obligation to be perfectly clear about whether he or she speaks as a witness or as a professional adviser. Secondly, is the possibility of conflict with professional responsibility. Affidavits like oral testimony are expressed solemnly upon oath or the legal (if not moral) equivalent thereof. No counsel or solicitor, who is, after all, an officer of the court, ought ever to place himself or herself into the quandary of risking a conflict of interest between remunerative (but yet honourable) advocacy and possibly unpalatable truth sworn on oath. No witness can deal objectively with the weight of credibility of his own testimony. Lawyers for opposing parties ought not to be exigible to cross-examination by each other, for fear of sacrifice of one role for the other, or the lamentable appearance of such sacrifice. Third, unless the solicitor or counsel obtains the previous blanket absolution of the client, then he or she will be obliged to assert the client's solicitor-and-client privilege mentally when formulating the affidavit and, or course, orally only when being cross-examined."

23. We need not say more. Mr. Gisemba's affidavit purporting to be in support of the appellant's application for leave and subsequent Motion for judicial review orders was tantamount to a compromise of roles that this Court cannot freely endorse. The learned Judge was correct in rejecting it. Accordingly, we find no reason to interfere with the learned Judge's finding and decision on this account. That leaves us with the third and final issue – whether failure on the appellant's part to exhibit the impugned decision was fatal or sufficient to justify the dismissal of her Motion. It was.

24. From the record before us, we find, as did the learned Judge, that the impugned decision exhibited in Mr. Gisemba's verifying affidavit was incomplete. The learned Judge was correct in finding that its import was unclear by reason of the fact that all odd pages were omitted. Mr. Lusi's explanation that the error was inadvertent, and his plea that such omission by counsel should not be visited on the appellant merely because it occurred during e-filing, does not of itself cure the anomaly. The technical nature of the impugned decision begged for clarity if the learned Judge were to make sense of the findings. He could not. How then would he have sat on review of an unclear decision? With due respect to learned counsel, such an omission cannot be excused merely because it was inadvertent on the part of the appellant's counsel. Granted, mistakes occur, some of which are fatal as was the case here.

25. The only question that would arise is whether it is, in the first place, mandatory to exhibit a decision which is the subject of judicial review. That would, in our considered view, depend on the nature of the decision in issue. The record shows that there was no dispute that a decision had been made by the 1st respondent, and that the decision existed. Indeed, there was no dispute as to the nature of the impugned decision, save that the appurtenant technicalities that would ordinarily be taken into

account in evaluating bids before award of a tender must be clear enough to enable a court to make an informed decision on review. It is not enough that the parties are in agreement that the appellant was not awarded her tender. It was critical that the learned Judge understands how the impugned decision was reached with regard to both procedure and outcome. In our judgment, it was necessary to examine the technical basis of the award, an exercise that could not have been reasonably undertaken on the review of an incomplete document.

26. We make this finding cognizant of the provisions of Article 159(2)(d) of the *Constitution*, which enjoins courts to administer justice without undue regard to technicalities. But for the nature of the impugned decision, we agree with the High Court decision in *Lempaa Suyianka and 5 others v Nelson Andayi Havi and 14 others, and the Caucus of LSK Branch Chairpersons (interested Party)* [2021] eKLR where the court observed that "... depending on the peculiar circumstances of each case where it is clear, uncontested and definite that a decision has been made and the nature of the decision is not disputed, a court can either take judicial notice of the decision or the parties can by consent record the nature of the decision. In such cases, the need to attach or produce the decision to be quashed can be waived." (see *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 Others* [2017] eKLR. However, the nature of the decision that was subject to the impugned judgment on review is, for good reason, distinguishable from the case of Suyianka v Havi (ibid).

27. In conclusion, we find that Jairus Ngaah, J was not wrong in striking out the appellant's Notice of Motion dated 16th July 2021. Accordingly we order that: –

    a. the appellant's appeal be and is hereby dismissed;

    b. the Ruling and Order of the High Court of Kenya at Nairobi (Jairus Ngaah, J.) delivered on 27th August 2021 in Milimani High Court Judicial Review Case No. E091 of 2021 be and is hereby upheld; and

    c. in view of the public nature of the application that led to the Ruling and Orders from which this appeal arose, we make no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF FEBRUARY, 2022

HANNAH OKWENGU

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR