



**ADK Technologies Ltd in Consortium with Computer Technologies Ltd
v Public Procurement Administrative Review Board & 4 others (Civil
Appeal E598 of 2021) [2022] KECA 407 (KLR) (4 March 2022) (Judgment)**

Neutral citation: [2022] KECA 407 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL E598 OF 2021
S OLE KANTAI, KI LAIBUTA & K M'INOTI, JJA
MARCH 4, 2022**

BETWEEN

**ADK TECHNOLOGIES LTD IN CONSORTIUM WITH COMPUTER
TECHNOLOGIES LTD APPELLANT**

AND

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

**PRINCIPAL SECRETARY NATIONAL TREASURY & PLANNING 2ND
RESPONDENT**

NATIONAL TREASURY & PLANNING 3RD RESPONDENT

**KINGSWAY BUSINESS SYSTEMS LTD IN CONSORTIUM WITH KOBBY
TECHNOLOGIES LTD & INPLENION EAST AFRICA LTD . 4TH RESPONDENT**

ADK TECHNOLOGIES LIMITED 5TH RESPONDENT

*(Appeal from the Judgment and Decree of the High Court of Kenya
(Ngaah, J.) dated 9th April 2021 in (HCJR Case No. E027 of 2021))*

JUDGMENT

1. At the hearing of this appeal, a question arose whether this Court has jurisdiction to hear an appeal arising from the Public Procurement and Asset Disposal Act (“the PPAD Act”) after the expiry of 45 days from the date of the decision appealed from. As was explained in *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1*, a question of jurisdiction is a threshold question and may be raised by a party or by the court on its own motion and must be decided forthwith on



the evidence before the court. We are therefore obliged to determine the jurisdictional point before we proceed any further with consideration of the merits of the appeal.

2. The appellant, who describes itself as ADK Technologies Ltd in Consortium with Computer Technologies Ltd., was an unsuccessful bidder for “Tender No. TNT/049/2019-2020 Tender for the Provision of Outside Support for IFMIS E-Procurement and Independent Integrated Financial Management System for Semiautonomous Government Agency (SAGA) Lot1” floated by the 3rd respondent, the National Treasury and Planning. The appellant was aggrieved by the 3rd respondent’s decision not to award it the tender and on 8th February 2021 applied to the 1st respondent, the Public Procurement Administrative Review Board (PPARB) to review the decision of the 1st respondent.
3. On 1st March 2021, the PPARB struck out the appellant’s request for review after the same was disowned by the 5th Respondent, ADK Technologies Ltd, in whose name it had been made. The appellant further was aggrieved and commenced judicial review proceedings in the High Court for an order of *certiorari* to quash the decision of the PPARB, an order of *prohibition* to stop the award of the tender and an order of *mandamus* to compel the PPARB to hear its request for review.
4. A preliminary objection was taken by the 4th respondent Kingsway Business Systems Ltd in Consortium with Lobby Technologies Ltd & Inplenion East Africa Ltd, who were the successful bidders, on the basis that the application was defective for want of authority to plead and lack of verifying affidavit. After hearing the objection, the learned judge sustained the same and struck out the application in a judgment dated 9th April 2021, the subject of this appeal.
5. From the record the appellant lodged its notice of appeal on 13th April 2021 and the record of 17th October 2021, some 191 days from the date of the decision of the High Court. At the hearing of the appeal on 2nd March 2021, the Court requested the parties to address the question whether it had jurisdiction to hear this appeal in view of the provisions of section 175(4) and (5) of the PPAD Act.
6. Mr. Kiprono, learned counsel for the appellant, submitted that the appeal was filed in time in accordance with the Court of Appeal Rules. He contended that once the appeal is filed, time stops running for purposes of section 175 (4). In his view, nothing stops this Court from hearing and determining the appeal because section 175(4) is not cast in stone. Counsel added that it was not clear whether the 45 days are to be computed from the date of the judgment of the High Court or from the date of the filing of the appeal.
7. Ms. Chilaka, learned counsel for the 1st, 2nd and 3rd respondents who appeared and introduced herself virtually, left the virtual platform soon thereafter and she was not available to make submissions when she was called upon to do so. On her part, Ms. Waiganjo, learned counsel for the 4th respondent, submitted that the prescribed time for hearing the appeal had lapsed and that the Court did not have jurisdiction to entertain it. She referred to section 5 of the PPAD Act which provides that in case of any inconsistency between the Act and any other legislation on matters of procurement and assets disposal, the PPAD Act shall prevail. On the basis of that provision, she disagreed with the appellant that the appeal was validly before the Court under the Court of Appeal Rules. Lastly, we heard Ms. Mukua, learned counsel for the 5th respondent, who associated herself with the 4th respondent’s submissions.
8. We have carefully considered the question of our jurisdiction in this appeal. Section 175 of the *Public Procurement and Asset Disposal Act* provides as follows:

“175 (1) A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board’s



decision, failure to which the decision of the Review Board shall be final and binding to both parties.

(2) The application for a judicial review shall be accepted only after the aggrieved party pays a percentage of the contract value as security fee as shall be prescribed in Regulations.

(3) The High Court shall determine the judicial review application within forty-five days after such application.

(4) A person aggrieved by the decision of the High Court may appeal to the Court of Appeal within seven days of such decision and the Court of Appeal shall make a decision within forty-five days which decision shall be final.

(5) If either the High Court or the Court of Appeal fails to make a decision within the prescribed timeline under subsection (3) or (4), the decision of the Review Board shall be final and binding to all parties___. (Emphasis added).

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

(7) Where a decision of the Review Board has been quashed, the High Court shall not impose costs on either party.”

9. Section 175 has been the subject of consideration by this Court in *Aprim Consultants v. Parliamentary Service Commission & Another*, CA. No. E039 of 2021 (“the Aprim case”) and in *The Consortium of TSK Electronica Y Electricidad S.A. & Ansaldoenergia v. PPARB & 3 Others*, CA. No. E012 of 2022 (“the TSK Electronica case”). Indeed, the last decision was delivered barely three days ago, on 28th February

10. In the Aprima case, the Court stated that section 175 was couched in mandatory terms. The Court expressed itself thus:

“A perusal of section 175 of the Act reveals Parliament’s unmistakable intention to constrict the time taken for the filing, hearing and determination of public procurement disputes in keeping with the Act’s avowed intent and object of expeditious resolution of those disputes.

Parliament was thus fully engaged and intentional in setting the timelines in the Section. But it did not stop there. In one of the rarer instances where all discretion is totally shut out, Parliament expressly enacted a consequence to follow default or failure to file or to decide within the prescribed times: the decision of the Board would crystallize and be invested with finality.

Our reading of the Act is that the High Court was under an express duty to make its determination within the time prescribed. During such time did its jurisdiction exist, but it was a time-bound jurisdiction that ran out and ceased by effluxion of time. The moment the 45 days ended, the jurisdiction also ended. Thus, any judgment returned outside time would be without jurisdiction and therefore a nullity, bereft of any force or effect in law. ___” (Emphasis added).



11. The same reasoning applies with equal force to section 175(4) which addresses procurement appeals in this Court. In the TSK Electronica case the Court agreed with the reasoning in the Aprim case, and stated thus:

“Our appreciation of section 175(4) is that a person aggrieved by a decision of the High Court arising from a judicial review decision in a procurement matter under this Act and who desires to prefer an appeal to this Court must do so within a period of 7 days from the decision of the High Court. Thereafter, this Court must hear and make a determination of the appeal within 45 days from the date of its filing. These timelines are cast in stone and cannot be varied. The strict time frames under this section underscore the intention of Parliament to ensure that disputes relating to Public Procurements and Assets Disposal are disposed of expeditiously.” (Emphasis added).

In this appeal, the delay has been occasioned by the appellant itself. It filed the appeal 191 days from the date of the decision of the High Court rather than within the seven days prescribed by the PPAD Act. Even if one were to be charitable, for which there is no basis, and agree with the appellant that computation of the 45 days starts from the date of filing the appeal, 45 days from 17th October 2021 elapsed more than one year ago.

12. Taking into account all the foregoing, and the consistent decisions of this Court on the point, we are satisfied that this Court no longer has jurisdiction to hear and determine this appeal. The appeal is accordingly struck out with costs to the respondents. It is so ordered.

DATED AT NAIROBI THIS 4TH DAY OF MARCH, 2022

K. M'INOTI

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

DR. K. I. LAIBUTTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

