Joint Venture of Lex Oilfield Solutions Ltd & CFAO Kenya Ltd v Public Procurement Administrative Review Board & 4 others (Civil Appeal 022 of 2022) [2022] KECA 424 (KLR) (4 March 2022) (Judgment)

Neutral citation: [2022] KECA 424 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 022 OF 2022

S OLE KANTAI, KI LAIBUTA & K M'INOTI, JJA

MARCH 4, 2022

BETWEEN

JOINT VENTURE OF LEX OILFIELD SOLUTIONS LTD & CFAO KENYA LTD ..... APPELLANT

AND

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

ACCOUNTING OFFICER, KENYA ELECTRICITY GENERATING CO. PLC ..... 2ND RESPONDENT

KENYA ELECTRICITY GENERATING COMPANY PLC ..... 3RD RESPONDENT

H. YOUNG (EAST AFRICA) LIMITED ..... 4TH RESPONDENT

CFAO KENYA LIMITED ..... 5TH RESPONDENT

(Appeal from the Judgement and Decree of the High Court of Kenya at Nairobi (Ndungu, J.) dated 12th January 2022 in Judicial Review Misc. Application No. 156 of 2021)

JUDGMENT

1. The appellant, who describes itself as The Joint Venture of Lex Oilfield Solutions Ltd and CFAO Kenya Ltd was an unsuccessful bidder in "Tender No. KGN-GDD-040-2021 for Improvement of Circulation Water System at Olkaria II Power Station and Compaction Grouting". It will be noted that CFAO, which is described as an appellant, is also listed as the 5th respondent, raising the question of its true status in this appeal. Be that as it may, and aggrieved by the decision of the 3rd respondent, (the Kenya Electricity Generating Co PLC), not to award it the tender, the appellant applied to the 1st respondent, (the Public Procurement Administrative Review Board (PPARB)), for review. By a ruling

dated 7th October 2021, PPARB struck out the request for review on the basis that, although it was purportedly submitted by the consortium, CFAO had disowned the request for review.

2. The appellant was aggrieved and took out judicial review proceedings before the High Court for an order of certiorari to quash the decision of the PPRAB and an order of prohibition to stop conclusion of the tender for the contract. After obtaining leave from the High Court, the appellant filed the substantive application on 19th October 2021. On 16th December 2021, it was drawn to the attention of the court that the forty-five (45) days stipulated in section 175(3) of the *Public Procurement and Asset Disposal Act* (PPAD Act), within which the court must hear and determine the procurement dispute, had already lapsed. The respondents contended that the application was therefore a nullity in view of binding decisions from this Court.

3. In the judgment impugned in this appeal, the learned judge held that the court did not have jurisdiction to continue hearing the application upon expiry of the 45 days and, accordingly, dismissed the application, but directed each party to bear its own costs. The appellant was aggrieved and preferred this appeal on 19th January 2022. Side by side with the appeal, the applicant also took out a motion on notice under rule 5(2) (b) seeking an injunction to restrain the 2nd respondent from awarding the contract pending the hearing and determination of the appeal.

4. The appeal, together with the application were heard through written submissions and oral highlighting. The parties were represented by learned counsel as follows: Mr. Baraza and Mr. Chesoli for the appellant, Mr Munene for the 1st respondent, Mr. Kipkorir for the 2nd and 3rd respondents, Mr. Karani, for the 4th respondent, and Mr. Mumia, for the 5th respondent.

5. Although premised on 16 grounds of appeal, the appellant identified three issues only, namely whether judicial review, which is now constitutionally underpinned, may be ousted by a statutory provision; whether section 175 (3) of the PPAD Act, which is an ouster clause is legally valid, and whether once a provision in a statute is declared unconstitutional, it is still enforceable.

6. On the first issue, the appellant submitted that judicial review has, since the promulgation of the Constitution of Kenya 2010, become a constitutional remedy and therefore cannot be taken away by an Act of Parliament. In support of the transformed nature of the remedy, the appellant cited *IEBC v. NASA & 6 Others [2017] eKLR* and *Child Welfare Society of Kenya v. Republic ex parte Child in Family Focus Kenya [2017] eKLR*. It was further contended that before the High Court the appellant was seeking enforcement of its constitutional rights under Articles 47 and 50(1) and also challenging the decision of the PPRAB for violating Articles 10, 201, 221 and 227 of the *Constitution*.

7. Accordingly, it was submitted that the applicant's application was not an ordinary judicial review application, but was an application for enforcement of constitutional rights which could not be handicapped by section 175, which the applicant decried as an ouster clause interfering with the independence of the Judiciary.

8. Turning to the second issue on ouster clauses, the appellant submitted that there is a firmly established policy against undermining the rule of law by weakening courts. *The appellant cited Anisminic Ltd. v. Foreign Compensation Commission [1969] 1 All ER 208* and contended that the supervisory power of the High Court may not be ousted. The decision in *Nyakinyua & Kangei Framers Co Ltd v. Kariuki & Gathecha Resources Ltd(No.2), CA No. 16 of 1979* was relied on in support of the proposition that ouster clauses must be strictly construed. The appellant further urged that it was repugnant to the rule of law to shield administrative decisions from judicial review.

8. Lastly, the appellant submitted that the High Court erred in upholding section 175 (3) of the PPAD Act whilst the same had been declared unconstitutional by the same court in *Republic v PPRAB &*

Another ex parte Kleen Homes Security Services Ltd [2017] eKLR and in *Republic v PPRAB ex parte Kenya Ports Authority Ltd & 2 Others [2017] eKLR*. It was contended that declaration of a provision of a statute unconstitutional has the effect of annulling it. For all the foregoing reasons, the appellant urged us to allow the appeal and the application with costs.

9. All the respondents opposed the appeal. Their submissions were in tandem and overlapping. In the circumstances it will not serve any useful purpose to repeat the individual contentions. But the main thrust of their submissions was that there are many consistent decisions of this Court that have held that section 175 of the PPAD Act is a valid provision which is in mandatory terms, and must be enforced. They cited the decision of this Court in Aprim Consultants v. Parliamentary Service Commission & Another, CA No. E039 of 2021 ("Aprim case") as one of them.Relying on the decision of the Supreme Court in Samuel Kamau Macharia & Another v. Kenya Commercial Bank Ltd [2012] eKLR, the respondents argued that the jurisdiction of the court flows from the constitution or statute and that, once the 45 days provided in the PPAD Act expired, the High Court no longer had jurisdiction in the matter. It was submitted that the learned judge, therefore, properly disavowed jurisdiction.

10. The respondents further submitted that the problem was one of the appellant's own making because when the High Court set early hearing dates for the hearing, counsel for the appellant objected, claiming that the dates were not convenient, and took dates that were outside the prescribed 45 days. On the alleged unconstitutionality of section 175, the respondents submitted that the appellant did not raise, and the High Court did not determine, any constitutional issues and, therefore, those matters cannot be raised for the first time in this Court because it is not a court of first instance.

11. It was the respondents' further submission that section 175 is not an ouster clause but merely sets the time within which a dispute must be determined, which was informed by valid public policy to balance between justice and expedition in public procurements. The appellants urged us to follow the consistent decisions of this court and dismiss the appeal with costs

12. In its reply, the appellant submitted that we are not bound by previous decisions of this Court, and that we should depart from them because they were made per incuriam, and also because no constitutional issues were raised therein.

13. We have considered the judgment of the High Court, the grounds of appeal, the written and oral submissions by counsel and the authorities cited. In our view, this appeal turns on one issue, namely whether the High Court had jurisdiction to continue to hear the appellant's application after 45 days from when it was filed. It is common ground that by the time the issue was raised before the High Court, 45 days had expired. The respondents blame the appellant for that delay, and for some reasons, the appellant has not denied responsibility for the delay. Be that as it may, we agree with the respondents that this Court has consistently upheld the validity of section 175 of the PPAD Act, the latest occasion being barely two days ago, in The *Consortium of TSK Electronica Y Electricdad S.A. & Ansaldoenergia v. PPARB & 3 Others, CA. No. E012 of 2022*. (TSK Electronica case).

14. The Court addressed the issue at length in the Aprim case, when it concluded that a decision of the High Court rendered outside the time prescribed in section 175(3) was a nullity. In that judgment the Court stated:

> "We think, with respect, that the provisions of section 175 are couched in terms that are plain and unambiguous, admitting to no interpretive wriggle room. The Section sets strict timelines for applicants, the High Court and this Court in a sequential manner."

Ultimately, the Court concluded as follows:

> " 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.
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> 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 he invested with finality.
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> 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).

In the TSK Electronica case, this Court followed the Aprim case as good law and stated further:

> " 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.
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> 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."

15. We do not think there is any basis to ask us to depart from these consistent decisions of the Court without moving the Court in the normal way for an expanded bench, if there is good reason to reconsider the decisions. The issues raised by the appellant were considered and rejected in the above decisions. In the premises,

16. we find that the learned judge did not err when he concluded that he had no jurisdiction to continue to hear the application after expiry of the prescribed 45 days. This appeal is therefore dismissed with costs to the respondents. The application for injunction was pegged on this appeal, that is, pending the hearing and determination of the appeal. With the dismissal of the appeal, the application has no legs to stand on and is equally dismissed with costs. 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

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR