



M/S Joint Venture of Zamara Actuaries, Administrators and Consultants Limited and Minet Kenya Financial Services Limited v CPF Financial Services Limited; Public Procurement Administrative Review Board & 2 others (Interested Parties) (Civil Appeal E509 of 2022) [2022] KECA 983 (KLR) (9 September 2022) (Judgment)

Neutral citation: [2022] KECA 983 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL E509 OF 2022
DK MUSINGA, LK KIMARU & GWN MACHARIA, JJA
SEPTEMBER 9, 2022**

BETWEEN

M/S JOINT VENTURE OF ZAMARA ACTUARIES, ADMINISTRATORS AND CONSULTANTS LIMITED AND MINET KENYA FINANCIAL SERVICES LIMITED APPELLANT

AND

CPF FINANCIAL SERVICES LIMITED RESPONDENT

AND

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD INTERESTED PARTY

BOARD OF TRUSTEES PUBLIC SERVICE SUPERANNUATION FUND INTERESTED PARTY

ACTING CHIEF EXECUTIVE OFFICER, PUBLIC SERVICE SUPERANNUATION FUND BOARD OF TRUSTEES INTERESTED PARTY

(Being an appeal from the Judgment and Orders of the High Court of Kenya at Nairobi (Ndung'u, J.) delivered on 29th July 2022 in Judicial Review Misc. Application No. E086 of 2022)

JUDGMENT

1. On June 1, 2021, the Public Service Superannuation Fund advertised a Tender No. PSSS/003-2020-2021 for procurement of a Fund Administrator for the Public Service Superannuation Scheme Fund, ('the procuring entity'). Among the bidders of the tender were the



- appellant, Liaison Financial Services Limited and CPF Financial Services Limited, the respondent herein.
2. On July 19, 2021, the respondent was notified that its bid had passed the technical evaluation and was invited to attend the opening of financial proposals. The respondent was the only bidder who managed to get to the financial proposals opening stage of the tender evaluation process attaining a technical score of 95.2%.
 3. The tendered documents contained a clause that required the procuring entity to conduct due diligence on a successful bidder. On July 22, 2021, the procuring entity sent its representatives to visit the offices of the respondents for purposes of carrying out the due diligence, which they did.
 4. Nearly five months thereafter, the respondent having received no response from the procuring entity filed a Request for Review No. 148 of 2021 with the Public Procurement Administrative Review Board ('the Board'), the 1st Interested Party.
 5. On December 28, 2021, the Board delivered its decision directing an Evaluation Committee to carry out a technical evaluation and submit a report on July 13, 2021. From that evaluation report, it was only the respondents bid that was responsive having attained a score of 95.2%. The procuring entity to, *inter alia*, ensure that the procurement proceedings of the tender proceeded to its logical conclusion within 14 days of the decision. The procuring entity was also directed to extend the validity period of the tender with effect from January 11, 2022.
 6. On January 7, 2022 the respondent sent to the procuring entity a letter extending the Tender validity period for a period of 30 days with effect from January 11, 2022 in accordance with the Board's decision. The respondent also extended its bid security for a similar period. However, on January 10, 2022 the procuring entity requested the respondent to extend its tender validity period for a period of 30 days with effect from January 20, 2022 which the respondent did. The procuring entity did not proffer any reason for that request, which was beyond the effective date set by the Board. Before the expiry of the extended period, on February 15, 2022 the procuring entity wrote to the respondent requesting for yet a further extension of the tender validity for a period of 30 days with effect from February 19, 2022 to March 20, 2022, which the respondent promptly did. That notwithstanding, the procuring entity failed to conclude the tender procurement for no stated reason.
 7. The conduct of the procuring entity caused the respondent to file a second request for review, to wit, Request for Review No. 16 of 2022. The Board in its decision dated March 17, 2022 held, *inter alia*, that the Tender validity period had lapsed on January 11, 2022. This set the stage for the filing of Judicial Review Application No. E037 of 2022 by the respondent.
 8. In its application, the respondent sought a multiplicity of orders which included: an order of *Mandamus* compelling the procuring entity to comply with the Ruling and Orders issued by the Board on December 28, 2021 in Application No. 148 of 2021; an order of *Mandamus* compelling the procuring entity to award it the Tender; and an order of *certiorari* to bring into the High Court, to be quashed, the Board's decision delivered on March 17, 2022 in Public Procurement Administrative Review Board Application No. 16 of 2022.
 9. By a notice of motion dated February 22, 2022, the appellant sought to be joined in the judicial review proceedings. In view of the strict timelines that govern the disposal of public procurement matters, it was agreed that the issue of joinder be addressed together with the substantive matter.
 10. Upon hearing the parties, the High Court (Ndung'u, J.) delivered its judgment on May 6, 2022. The orders issued by the Court were, *inter alia*, an order of *certiorari* for purposes of quashing, the Board's decision delivered on March 17, 2022 in Public Procurement Administrative Review Board



- Application No. 16 of 2022; an order of *mandamus* compelling the Board to re-hear/re-consider Public Procurement Administrative Review Board Application No. 16 of 2022 within 30 days, taking into account the findings contained in the judgment of the Court.
11. The Board re-heard the matter as directed by the High Court and rendered its decision on June 6, 2022. The findings by the Board were, *inter alia*, that the tender validity expired on January 11, 2022 and could not be extended.
 12. The respondent in yet another judicial review application, to wit, [*Judicial Review Misc. Application No. E086 of 2022*](#), argued, *inter alia*, that the decision of the Board was contrary to the rule of law, the doctrine of precedent and the hierarchical structure of our country's judicial system. The respondent sought, *inter alia* an order compelling the procuring entity to award the Tender to it.
 13. The appellant opposed the application and filed a replying affidavit on June 29, 2022 contending, *inter alia*, that they only became aware of the re-hearing proceedings in Request for Review No. 16 of 2022 as well as the applications that had been heard there before through the High Court's judgment in Judicial Review Application No. E037 of 2022. The appellant further stated that the tender validity having expired, the law required that a fresh procurement exercise be conducted.
 14. When the respondent's judicial review application came up for hearing, the respondent argued that the appellant had no locus standi under section 170 of the [*Public Procurement and Asset Disposal Act, 2015 \(PPAD Act\)*](#) in the proceeding and whatever grievances it had were statute barred.
 15. In response the appellant, argued that pursuant to section 170(d) of the [*PPAD Act*](#) the Board has discretion to allow any person who it deems fit to participate in review proceedings and since it had been permitted to participate in the proceedings that were before the Board, it had *locus standi* to be joined as a party to the judicial review proceedings before the High Courts.
 16. On the issue of locus standi, the learned judge held that section 170 of the [*PPAD Act*](#) defines parties to a review as:
 - a. The person who requested the review
 - b. The accounting officer of a procuring entity.
 - c. The tenderer notified as successful by the procuring entity; and
 - d. Such other persons as the Review Board may determine.”
 17. Regarding parties who are supposed to be notified by the Board about a request for review, the learned judge cited rule 105 (5) of the [*Public Procurement Asset Disposal Rules*](#). The sub-rule requires Review's Board Secretary to notify “all other parties to the review upon receipts of such documents from a procuring party under paragraph (3)”.
 18. The learned judge then delivered himself as hereunder:
 60. The law as stipulated above is clear on who is to be notified of the filing of a request for review, what action is to be taken by the respective players and the mandatory parties to a review. In the instant case the Interested Party (the appellant herein) was not the tenderer pronounced as the successful by the procuring entity. The interested Party did not lodge a Request for Review with the 1st Respondent (the Board). A proper reading of section 170 of the [*PPAD Act*](#) readily shows that the fact of submitting a tender does not necessary make a



tenderer a party in a request for review lodged under section 167 of the PPAD Act

61. I agree with the submission by counsel for the applicant (the respondent) that the Act envisages that any party unhappy with the outcome of a procurement process shall promptly lodge a request for Review with the 1st Respondent (the Board) within 14 days of the act or omission complained of. The Interested Party (the appellant) did not lodge a Request for Review to ventilate the issues that it belatedly wishes to canvass being illegal extension of the tender validity, failure of notification of the 2nd Request for Review as well as the 1st Request for Review.
 62. Lastly on this question, this court in its judgment dated May 6, 2022 gave directions which were specific to the parties then before it. The Board was directed to re hear the matter based on the material that had been presented before it, material that was presented to this court in the judicial review application and applying directions given to it by this court in its supervisory role. The Board had no mandate at all to overturn the orders of this court and proceed to enjoin other parties in the proceedings and entertain new issues that had not been placed before this court. The joinder of the Interested Party (the appellant) in those re- hearing proceedings was irregular. Consequently, for this and other reasons stated above the Interested Party (the appellant) is not a proper party before this court and is struck out.”
19. Having struck out the appellant as a party to the judicial review proceedings, the court granted the orders of certiorari quashing the decision of the Board dated June 3, 2022 in Review Application No. 16 of 2022, a *mandamus* directing the Board to re-admit the respondent’s Review Application No. 16 of 2022 and issue appropriate and effective relief, taking into consideration the court’s judgment delivered on May 6, 2022 within 30 days. The court also prohibited the 2nd and 3rd interested party from terminating, advertising or awarding the subject tender to any external administrator other than the respondent.
 20. Being aggrieved by the aforesaid decision, the appellant preferred this appeal. The respondent filed a Preliminary Objection to the appeal stating that the appellant has no locus standi to institute the appeal and that the appeal is statute barred.
 21. The appellant’s Memorandum of Appeal raises a total of 6 grounds of appeal which the appellant condensed into three (3) issues as hereunder:
 - i. Whether the preliminary objection is sustainable in law;
 - ii. Whether the learned judge erred in law and in fact in striking out the appellant as a party to the proceedings;
 - iii. Whether the learned judge erred in law and in fact abused his discretion in allowing the judicial review application.
 22. The appeal raises more or less the same issues as those contained in Civil Appeal No. E510 of 2022, the Chief Executive officer, The Public Superannuation Fund Board of Trustees versus CPF Financial Services Limited, and The Public Procurement Administrative Review Board and The Board of Trustees, The Public Service Superannuation Fund except for the issue of striking out of the appellant herein as a party to the judicial Review Application No. E086 of 2022 that was before the High Court.



When the two appeals came up for hearing on August 15, 2022, the Court directed that they be heard back to back.

23. We shall limit our determination of this appeal to the issue of striking out of the appellant as a party to the High Court proceedings, having made a determination of all the other issues in Civil Appeal No. E510 of 2022.
24. Arguing the Preliminary Objection, Dr. Muthomi Thiankolu, learned counsel for the respondent, submitted that the appellant lacks locus standi under section 170 of the *PPAD Act* and that, it was a stranger to the proceedings in Judicial Review Application No. E086 of 2022 considering that it had not participated in the following matters:
 - i. Public Procurement Administrative Review Board Application No. 148 of 2021 (the first Administrative Review Proceedings);
 - ii. Public Procurement Administrative Review Board Application No. 16 of 2022 (the second Administrative Review Proceedings);
 - iii. High Court Judicial Review Application No. E037 of 2022 (the first Judicial Review proceedings); and
 - iv. High Court Judicial Review Application No. E086 of 2022 (the second Judicial Review proceedings).
25. Counsel further submitted that the appellant did not submit a responsive tender as evident from the third decision of the review Board after re-hearing the second Administrative Review proceedings. Further, the appellant did not file any request for review within the (fourteen)14 days' period set out in section 167(1) of the *PPAD Act*; it only belatedly purported to do so by irregularly latching on to the second Administrative Review proceedings and in the aforesaid circumstances its grievances before the Board and the High Court were statute barred.
26. Mr. Brian Onyango and Mr. Nyarangu appeared for the appellant and relied on their written submissions which were briefly highlighted by Mr. Onyango. The appellant submitted that the Preliminary Objection was not properly raised considering the principles propounded in *Mukisa Biscuits Manufacturing Company Limited v West End Distributors Limited [1969] EA 696*; that rule 77 of this Court's Rules enables any person aggrieved by a decision of the High Court to challenge it on appeal; that under section 170(d) of the *PPAD Act*, the Board exercised its discretion to allow it to participate in the review proceedings and therefore the learned judge erred in law in striking it out as a party to the High Court proceedings.
27. In addition, the appellants submitted that it only became aware of the re-hearing proceedings in Application No. 16 of 2022 and the applications that preceded the same through the judgment of the High Court in Judicial Review Application No. E037 of 2022 dated May 6, 2022. This, they said, is contrary to practice on the conduct of the review applications before the Board where all bidders that have participated in a tender are usually notified by the Board of any applications filed, considering the fact that the outcome of such applications usually affect such bidders. The appellant added that the orders sought by the respondent, particularly the award of the subject tender would adversely affect it and other bidders that participated in the tender. For those reasons we were urged to find that the learned judge erred in law and in fact abused his discretion in striking out the appellant as a party in the proceedings that were before him and in quashing the decision of the Board and granting most of the orders sought by the respondent.



- 28. We have considered the submissions by counsel and the relevant law. The tender validity period as advertised by the procuring entity was 180 days with effect from 1st June 2021. Under section 80(6) of the PPAD Act a procuring entity should complete evaluation of tenders within a maximum of 180 days from the date of the opening /closing of the tender which was June 23, 2021 and it was to expire on December 19, 2021. According to the appellant’s affidavit sworn by Anthony Wambua Kilavi, there were five(5) bidders, but it was only the respondent’s bid that was responsive. The tenders were opened on July 21, 2021 and therefore the appellant was well aware that its bid was found to be non-responsive. It is therefore no wonder that it was only the respondent that kept on pursuing the issue of the tender when it did not receive any notification after the procuring entity visited its office to conduct due diligence.
- 29. Under section 167 of the PPAD Act, a candidate or a tenderer who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed upon a procuring entity, may seek administration review with the board within fourteen (14) days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process. In our view, the appellant knew or ought to have known that its bid was not responsive and if it was aggrieved in any manner by the decision that was made by the procuring entity, it ought to have raised it within fourteen (14) days from the tender opening date.
- 30. The High Court gave specific directions to the Board in its judgments dated May 6, 2022. The Board was to re-hear the matter, haste on the material that was presented before it and we agree with the High Court that it was not appropriate to join the appellant as a party to the review proceedings so late in the day since its bid had been found to be unresponsive. Although under section 170(d) of the PPAD Act, the Board has power to add as a party review proceedings before it, in this particular instance, the appellant’s joinder was improper for the aforesaid reasons. Consequently, we uphold the High Court’s finding regarding the Preliminary Objection that was raised by the respondent to the effect that the appellant had no locus standi. In view of the foregoing, this appeal must fail and it is hereby dismissed with costs to the 1st respondent.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY SEPTEMBER, 2022.

D. K. MUSINGA (P)

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

Deputy Registrar

