



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: KARANJA, MUSINGA & SICHALE, JJ.A)

CIVIL APPEAL NO. E011 OF 2021

BETWEEN

THE KENYA PORTS AUTHORITY.....1ST APPELLANT

ACCOUNTING OFFICER-KENYA PORTS AUTHORITY....2ND APPELLANT

AND

RHOMBUS CONSTRUCTION COMPANY LIMITED.....1ST RESPONDENT

PUBLIC PROCUREMENT

ADMINISTRATIVE REVIEW BOARD.....2ND RESPONDENT

REPUBLIC.....3RD RESPONDENT

(Being an appeal against the Judgment and Decree of the High Court at Mombasa, Judicial Review Division, (J.N. Onyiego, J.) delivered on 5th March 2021 in JR Case No. E002 of 2021)

JUDGMENT OF THE COURT

1. This appeal came up for hearing before us on 26th April, 2021 when parties were represented by learned counsel Mr. Ngoya for the appellant while Mr. Gikandi and Mr. Omollo appeared for the 1st respondent. The office of the Attorney General, which appears for the 2nd and 3rd respondent, though served with the Record of Appeal and also with the hearing notice did not file any documents or appear for the hearing. In view of the statutory timelines involved, the decision had to be rendered immediately. The Court therefore invoked Rule 34(2) of the Rules of this Court and reserved the reasons for decision to be communicated later. The reasons for the said decision are encapsulated in this judgment.

2. The appeal revolves around the decision of the 2nd respondent made on 6th January, 2021 following a Request for Review application, PPARB Review 150 of 2020, filed by the 1st respondent as against the 1st and 2nd appellants regarding **Tender No. KPA/073/2019**, (herein after referred to as the subject tender).

3. A brief background of this appeal is that on 15th January, 2020, the 1st appellant invited sealed bids, from eligible tenderers, for the subject tender for the supply and commissioning of 12 new Reach Stackers. A total of nine

(9) bids, including the 1st respondent's, were received and following several evaluation processes, all other bidders were disqualified leaving only two bidders at the final stage i.e., the Financial Evaluation Stage. Ultimately, the 1st appellant's Evaluation Committee (hereinafter referred to as the Committee) made a finding that among the two bidders, the 1st respondent was the lowest evaluated bidder for the subject tender at the quoted price of USD 5,628,207.01/= on the basis of CIF hence awarding it the tender.

4. The findings and recommendations of the Evaluation Committee were subsequently reduced into a report which was availed to the Ag. Head of procurement and supplies on 10th June, 2020 who also by way of a Letter of Professional Opinion dated 29th July, 2020, recommended to the 2nd appellant that the subject tender be cancelled on account of inadequate budgetary provision.

5. On 6th August, 2020, the 1st and 2nd appellants' acting Managing Director approved the professional opinion and the

recommendation by the Ag. Head of Procurement and Supplies for the cancellation of the subject tender. By a letter dated 10th August, 2020 and pursuant to Section 63(1)(b) of the Public Procurement and Assets Disposal Act, 2015 (hereinafter referred to as the "Act"), all tenderers were notified of the cancellation of the subject tender due to inadequate budgetary provision. Section 63 of the Act

provides as follows:-

"63. Termination or cancellation of procurement and asset disposal proceedings

(1) An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies: -

(a) the subject procurement have been overtaken by —

(i) operation of law; or

(ii) substantial technological change;

(b) inadequate budgetary provision;

(c) no tender was received;

(d) there is evidence that prices of the bids are above market prices;

(e) material governance issues have been detected;

(f) all evaluated tenders are non-responsive;

(g) force majeure;

(h) civil commotion, hostilities or an act of war; or

(i) upon receiving subsequent evidence of engagement in fraudulent or corrupt practices by the tenderer.

(2) An accounting officer who terminates procurement or asset disposal proceedings shall give the Authority a written report on the termination within fourteen days.

(3) A report under subsection (2) shall include the reasons for the termination.

(4) An accounting officer shall notify all persons who submitted tenders of the termination within fourteen days of termination and such notice shall contain the reason for termination."

6. Challenging the said cancellation, the 1st respondent successfully moved the 2nd respondent vide a Request for Review, PPARB Review Number 119 of 2020 on grounds that the said letter of cancellation was null and void as the 1st respondent had met the award criteria as provided for in the tender document. Consequently, on 7th September, 2020 the 2nd respondent set aside the letter of cancellation of 10th August, 2020 for reasons that the authority had failed to terminate the subject procurement in accordance with Section 63 of the Act.

7. Despite such findings, the 2nd respondent gave orders that the 1st appellant proceed with the procurement process and conclude the same within a period of 14 days from the date of the decision. Further, that it ought to have engaged the 1st respondent on a competitive negotiation process under the provisions of Section 131 of the Act which provides as follows: -

"131. Competitive Negotiations

An accounting officer of a procuring entity may conduct competitive negotiations as prescribed where —

(a) there is a tie in the lowest evaluated price by two or more tenderers;

(b) there is a tie in highest combined score points;

(c) the lowest evaluated price is in excess of available budget; or

(d) there is an urgent need that can be met by several known suppliers."

8. Consequentially, the Ag. Head of Procurement and Supplies reviewed the 2nd respondent's decision in PPARB Review Number 119 of 2020. Vide a Letter of Professional Opinion dated 17th September, 2020, he made a recommendation to the 2nd appellant expressing himself

in the following manner: that it disagreed with the 2nd respondent that the 1st respondent's bid was within the budget price; that competitive negotiation was not viable as the same was a method that had never been used by the appellants before in awarding tenders and moreover that there was not enough time left within the tender validity period to carry out competitive negotiation in the subject procurement; and that the 1st respondent's bid did not comply with the tender requirements as it did not indicate all taxes applicable hence that it was incomplete.

9. Having received and approved the Letter of Professional Opinion, the 2nd appellant, vide his letter dated 21st September, 2020, again notified all the tenderers of cancellation of the subject tender citing inadequate budgetary allocation.

10. Dissatisfied the 1st respondent again moved the 2nd respondent vide **PPARB Review Number 131 of 2020**. The 2nd respondent once again heard the parties in the review citing the sole issue before it to be whether the procuring entity (1st appellant) complied with the orders of the board issued on 7th September in **PPARB Review Number 119 of 2020**. It rendered its decision on 23rd September, 2020 where it held that the reason employed by the 1st appellant to cancel the subject tender was unjustifiable as the issue of the 1st respondent's bid being incomplete had never been raised prior and that the same was unprocedural as the aforementioned orders were not complied with.

11. Consequently, the letter of cancellation dated 21st September, 2020 was quashed and the 1st appellant was ordered to comply with the 2nd respondent's orders in PPARB Review 119 of 2020. Resultantly, the subject tender validity period was extended for a further period of 30 days from the date of expiry.

12. In compliance with the said orders, the appellants undertook to engage the 1st respondent in competitive negotiation by requesting the 1st respondent and M/S Kalmar Reach stacker, the second lowest bidder, to submit their best possible bids for the subject tender bearing in mind the budgetary provision. Again, the 1st respondent was successful and the subject tender was yet again awarded to it.

13. However, the 1st respondent declined to issue a notification of the award of the subject tender to the 2nd respondent citing allegations raised against it in a letter dated 26th November, 2020 by concerned members of the public to the Directorate of Criminal Investigations and one dated 10th December, 2020 from the Authority that the documents lodged by the 1st respondent in the bidding process were allegedly forged. Further, that the said issues of forgery affect the integrity of the subject procurement process and therefore that the appellants were in the process of terminating the subject tender pursuant to section 63(1)(e) of the Act.

14. Following the said complaints and subject to section 9 of the Act and Article 227 of the Constitution, the 2nd respondent reached a decision to terminate the subject tender. Conversely, before the same could be terminated, the 1st respondent moved the 2nd respondent vide a Request for Review application, PPARB Review 150 of 2020, challenging the 2nd respondent's decision on grounds that the authority had failed to issue it with a notification of award of the subject tender despite the fact that only one day had remained before expiry of the tender validity period.

15. Upon hearing the Request for Review, the 2nd respondent rendered a decision on 6th January, 2021 ordering inter alia that the 1st respondent be furnished with a status report confirming compliance with the orders issued on 7th September in PPARB Review Number 119 of 2020. In addition, the 2nd respondent ordered that the tender validity period be extended for a further period of 30 days from 7th January, 2021.

16. Aggrieved, the appellants herein instituted judicial review proceedings before the High Court challenging and seeking *inter alia* to quash the entire decision issued by the 2nd respondent on 6th January, 2021 on grounds that the said decision was unlawful; ultra vires since the 2nd respondent's order of an extension of the tender validity period of the subject tender for a further 30 days was contrary to the provisions of Section 88(3) of the Act; and unreasonable as it was substantively based on the complaint from the Public Procurement Regulatory Authority relating to the alleged forgery of documents which allegedly raised governance issues within the meaning of Section 63(1)(e) of the Act and that the same had already been forwarded to the Directorate of Criminal Investigations.

17. The key issues which fell for determination before the learned Judge were; whether the 2nd respondent's decision to re-extend the validity period of the tender was illegal and ultra-vires; and whether the decision of the 2nd respondent to compel the 1st respondent to continue with the procurement process despite the alleged glaring governance issues was irrational and unreasonable.

18. After hearing the matter, by a judgment dated 5th March, 2021 the subject matter of this appeal, the learned Judge issued orders in favour of the respondent in the following terms:-

“61. In view of my analysis and findings on the issues discussed above, the only conclusion which becomes irresistible to make is that, I do not find any basis to fault the Respondent's findings on extension of the validity period of the subject tender and refusing to uphold the termination of the subject tender on account of material governance issues (forgery of documents). I wish to reiterate that orders issued by the Respondent on 23/10/2020 and 6/01/21 be complied with by the ex-parte Applicants.

62. In the premises, I find that the Applicant's Notice of Motion dated 26/1/2021 is not merited, and accordingly the same is hereby dismissed. Parties to bear own costs.”

19. Aggrieved by the aforesaid orders, the appellants appealed against the entire ruling, raising 5 grounds of appeal being that the learned Judge erred in fact and law by making a finding that the 2nd respondent's impugned decision to extend the validity period of the subject tender was not illegal, ultra vires and/or irrational; by failing to make a finding that the 2nd respondent lacked jurisdiction to extend the validity period of the subject tender; by failing to make a finding that the 2nd respondent acted unlawfully by ordering the 1st appellant to engage in competitive negotiations; by failing to make a finding that the 2nd respondent acted irrationally and unreasonably by directing the appellant to proceed with the tendering process despite the existence of material governance issues; and by failing to make a finding that the 2nd respondent had usurped the powers and mandate of the appellant during the tendering process.

20. During the plenary hearing, the parties were represented by counsel and arguments were canvassed through written submissions.

21. Urging the Court to allow the appeal, counsel for the 1st and 2nd appellant submitted that the learned Judge failed to take into account the fact that the 2nd respondent was unreasonable: in ordering the appellants to comply with the orders issued in PPARB Review Number 131 of 2020 despite the fact that there were governance issues raised concerning the award of the subject tender to the 1st respondent and considering the fact that investigations on the same were already underway.
22. Further, that the 2nd respondent's decision was unreasonable as it was mandated by virtue of Section 63(1)(b) of the Public Procurement and Assets Disposal Act, 2015 to cancel the tender upon receiving the allegations of forgery as levelled against the 1st respondent.
23. Counsel maintained that the learned Judge erred by failing to find that the 2nd respondent acted contrary to Section 63(1)(b) of the Public Procurement and Assets Disposal Act, 2015 which allows the procuring entity to cancel a tender where the bids received are outside the procuring entity's budgetary allocation for that subject tender. Moreover, that it was unreasonable for the 2nd respondent to direct the 1st appellant to engage in competitive negotiations with the 1st respondent pursuant to section 131 of the Act yet the subject tender was for the supply of goods and not for procurement of consultancy/professional services.
24. Buttrressing the foregoing arguments, he urged the Court to be guided by the case of **Republic v. Public Procurement Administrative Review Board & 2 others Ex-Parte Higawa Enterprises Limited (2017) eKLR.**
25. Counsel submitted that the 2nd respondent's decision was illegal as it was contrary to section 88(1) of the Act which provides that the power to extend the validity period of a tender is the preserve of the 1st appellant and not the 2nd respondent. Further, that the residual powers given to the 2nd respondent under section 173(a) of the Act, to direct the accounting officer of a procuring entity on anything to be done or re-done in a tender evaluation process, cannot then be said to override the express provisions of section 88(1) of the Act. That, therefore, the 2nd appellant acted outside its jurisdiction. (See: **Republic v. Public Procurement Administrative Review Board & 2 others Ex-Parte Masinde Muliro University of Science and Technology (2016) eKLR** and **Republic v. Public Procurement Administrative Review Board & 2 others Ex-Parte BRITAM Life Assurance Company (K) Limited (2018) eKLR.**)
26. Citing **Railway Corporation v. Sefu (1971) E.A 327** counsel argued that the learned Judge improperly exercised his discretion by failing to invoke the court's supervisory jurisdiction to quash the 2nd respondent's decision which was an error of law hence illegal.
27. Opposing the appeal, Counsel for the 1st respondent submitted that the appellants herein do not fall within the meaning of "persons aggrieved" in law and therefore lack the *locus standi* to prosecute the instant appeal.
28. Placing reliance on the case of **James Oyondi t/a Betoyo Contractors & Another v. Elroba Enterprises Limited & 8 Others (2019) eKLR,** counsel maintained that the appellants ought to have pleaded and demonstrated that they had suffered a legal grievance as a result of the orders of the trial court.
29. Counsel submitted that given that what was before the trial Court were judicial review proceedings, the learned Judge was being called upon to exercise his discretionary powers. It was submitted, therefore, that this Court cannot interfere with the trial court's decision unless it is satisfied that its decision is clearly wrong, because it has misdirected itself, or because it has acted on matters on which it should not have acted upon, or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.
30. Counsel maintained that the learned Judge did not find reason in faulting the 2nd respondent's decision in extending the tender validity period as he observed that the restriction to extend the tender validity period only once as imposed on the accounting officer of the tendering entity under section 88 of the Act was to ensure that it does not misuse its power through unnecessarily tampering with a tender process. Further, that the 2nd respondent is mandated under section 173(a) of the Act, to direct the accounting officer of a procuring entity on anything to be done or re-done in a tender evaluation process hence in doing so in the instant case, the 2nd respondent was acting well within its powers.
31. On the issue of illegality of the 2nd respondent's decision, counsel submitted that the learned Judge found that the 1st appellant failed to furnish the 2nd respondent with any evidence to show that the outcome of the investigations on the alleged forgery of documents by the 1st respondent that would warrant cancellation of the tender award; and that the 1st respondent's right to fair administrative action as enshrined under Article 47 of the constitution and section 4(3) of the Fair Administrative Act had been infringed as it was neither furnished with the full information on the said allegations nor an opportunity to be heard on the same. Therefore, that the appellants were guilty of contravening the rules of natural justice.
32. In view of the forgoing, he submitted that the learned Judge was properly guided in holding that in determining the matter before him, the court was not concerned with the merits of the material governance issues alleged by the Appellants for termination of the tender process but is concerned with the process through which the decision to terminate the procurement process was arrived at.
33. In sum, he submitted that the appellants failed to demonstrate why this Court ought to interfere with the decision of the High Court hence this appeal lacks merit.
34. It is trite that judicial review reliefs are discretionary reliefs. Therefore, having considered the parties' pleadings, the evidence before this Court and rival submissions by counsel it is apparent that the sole issue falling for determination before this Court is whether the trial judge properly exercised his discretion in dismissing the appellant's application for orders of certiorari seeking to quash the impugned decision of the 2nd respondent.
35. The principles guiding this Court in determining whether a Judge properly exercised his discretion are as settled in the case of **Mbogo and Another v. Shah (1968) E.A. 93** where it was held thus:

“...that this court will not interfere with the exercise of...discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

36. From its submissions, it is clear that the appellant faults the learned Judge’s decision on grounds that he erred: by failing to find that the 2nd respondent acted *ultra vires* by extending the validity period of the subject tender as it had no powers to do so under the law. Further, that such power was a preserve of the 1st respondent as provided for under section 88 of the Act; by failing to find that the 2nd respondent’s decision and resultant order was illegal as the extension of tender validity period was contrary to section 88 which only allowed for such extension to be done once; by failing to find that the 2nd respondent’s decision was unreasonable as it disregarded the allegations of forgery levelled against the 1st respondent which were pertinent governance issues.

37. From a close perusal of the learned Judge’s decision, it is clear that the learned Judge extensively expressed himself on the issue of the extension of the tender validity period as follows: -

“39. The crux of the issue in controversy is whether the Respondent (Review Board) has powers in law to order or direct the Accounting officer of the Ex-parte Applicant as a procuring entity to extend the validity period of the subject tender more than once. Section 88 of the Act(PPADA) provides for the extension of the tender validity period.....

40. What was the intention of the drafters of this legislation and in particular the inclusion of Section 88? In my view, this provision was intended to guard against any possible mischief or abuse of office or power by accounting officers especially where uncontrolled timelines will give them a free hand to temper with the tendering process to favour their friends or closely related persons. In other words, once the already extended validity period for a period of 30 days lapses, the tendering process in respect of that tender becomes moot or rather it extinguishes. Upon lapsing, the Procurement entity is at liberty to re-advertise for fresh tendering and the process then follows the full circle like it was never tendered for before.

....

47. Counsel for the I/Party contends that, Section 88(3) of the Act only limits the Accounting officer and not the Review board who have wide inherent powers under section 173 of the Act. The question begging for an answer is; whether the Review Board is bound by Section 88(3). Section 88(1) & (2) expressly refers to the powers of the Accounting officer in extending time but not the Review Board. Sub-section (3) refers to the accounting officer’s powers of extension of validity period once and not beyond 30days pursuant to subsection (1).

48. From the plain reading of that Section, it is only applicable and binding on the accounting officer and nobody else. Nothing would have been easier than the legislators to include or provide the Review Board’s mandate under that section. To that extent, I do agree with counsel for the I/Party that Section 88(3) of the Act does not bar the Review board from making decisions that are deemed to be necessary for the wider attainment of substantive justice....”

38. Again, on the issue that the 2nd respondent’s decision was unreasonable as it disregarded the allegations of forgery levelled against the 1st respondent which were pertinent governance issues, the learned Judge pronounced himself as follows: -

“58. In this case, it is clear that the ex-parte applicants’ decision to terminate the subject tender on account of material governance issues was not arrived at after hearing the Interested Party’s position on allegation of forgery of documents in the tender document, which was very serious in nature. This Court is not concerned with whether or not the ex-parte applicants were correct in terms of merit in taking the decision they did. Rather, the Court’s concern is the process through which the decision was arrived at. The ex-parte Applicants (procuring entity) being an administrative body ought to have afforded the Interested Party an opportunity to be heard by hearing its side on the allegations of forgery levelled against it by concerned members of the public vide letter dated 26/11/2020 and the letter dated 10/12/2020 from PPR. Secondly, this court is in consonance with the Respondent’s finding that no documentation was furnished and/or adduced by the Ex-parte Applicants demonstrating that the said investigations have been concluded and the outcome of the said investigations verifies the truthfulness, or lack thereof of the allegations levelled against the Interested Party.”

39. From the above excerpts is apparent that the learned Judge extensively addressed the said issues and made pronouncements on the same. Therefore, for this Court to disturb the said pronouncements, the appellants have to demonstrate that the Judge misdirected himself in law; misapprehended the facts; took account of considerations of which he should not have taken account; failed to take account of considerations of which he should have taken account; or the decision, albeit a discretionary one, is plainly wrong. (See: **United India Insurance Co Ltd Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co Ltd vs. East African Underwriters (Kenya) Ltd [1985] eKLR.**)

40. However, from the arguments as canvassed by counsel for the appellants, it is clear that he has not demonstrated how the learned Judge erred in the exercise of his discretion, but merely exhibits dissatisfaction with the learned Judge’s findings. We are satisfied that the learned Judge exercised his discretion judicially in dismissing the appellant’s notice of motion and we find no basis to fault him. Further, as stated in our brief decision delivered earlier, the appellant was not able to demonstrate to us what their grievance was. The Court had just affirmed what the appellants initially wanted when they awarded the 1st respondent the tender in the first place.

41. The appellants’ claim was that they would suffer credibility issues because officers from the Directorate of Criminal Investigations would invade their premises to carry out investigations on the respondent’s alleged forgery of the documents submitted for the tender. With respect, such is in the realm of speculation as the forgery claims against the 1st respondent were not substantiated. We are not persuaded that the appellants qualified to be aggrieved persons as defined in **James Oyondi t/a Betoyo Contractors & Another v. Elroba Enterprises**

Limited & 8 Others (supra).

42. We are not persuaded on the merits of this appeal. Accordingly, we dismiss it with costs to the 1st respondent.

43. On the cross appeal, whereas we agree that that costs are awarded at the discretion of the court, where costs do not follow the event, the court should give reasons, however brief as to why a deserving party is denied costs. In this case, the learned Judge did not explain why the 1st respondent was not awarded costs given the circumstances of the case. We hold the view that the 1st respondent was entitled to costs, or to an explanation as to why it was denied costs. We, therefore, allow the cross appeal with costs to the cross- appellant/1st respondent.

44. Ultimately, we order that the appeal is hereby dismissed with costs while the cross appeal is allowed with costs.

Delivered and dated at Nairobi this 9th day of July, 2021.

W. KARANJA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR