



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OUKO (P), KOOME & MUSINGA, JJ.A)

CIVIL APPEAL NO. 132 OF 2018

BETWEEN

KIVUKU AGENCIES.....APPLICANT

AND

KENYA AIRPORT AUTHORITIES.....1<sup>ST</sup> RESPONDENT

ACCOUNTING OFFICE

KENYA AIRPORT AUTHORITY.....2<sup>ND</sup> RESPONDENT

*(Being an appeal from the ruling and order of the High Court at Mombasa (Ogola, J.) dated 10<sup>th</sup> April, 2018*

in

**Msa. Jud. Rev. Case No. 60 of 2017)**

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**JUDGMENT OF THE COURT**

1. On 18<sup>th</sup> April, 2017 *Kenya Airport Authority* (the 1<sup>st</sup> respondent) advertised an invitation for tender **No. KAA/388/2017** for provision of cleaning services for washrooms at *Moi International Airport*. The closing date for the said tender was 26<sup>th</sup> April, 2017 and the tenders were opened on 4<sup>th</sup> May, 2017. The bids were supposed to be subjected to three stages of evaluation, the preliminary being compliance, then technical and financial. *M/s Kivuku Agencies* (the appellant) tendered and according to their claim, upon the opening of the bids, which was at the preliminary stage, they were the lowest bidders at Kshs.19,411,788. That notwithstanding, the appellant was not awarded the tender, it was given to the second lowest bidder *M/s Monder International Limited*, whose bid was for Kshs. 20,880,000. The reason given by the respondents was that the appellant had not submitted the CR 12 certificate. The appellant contended that it was registered under the business name and therefore there was no way it could produce the said certificate and that the said request was unfair because the tender document had called for bids from sole proprietors and partnerships.

2. The appellant was convinced that the request for the CR 12 certificate was unreasonable and unlawful. Thus, the appellant challenged the award given to the second lowest tenderer before the Public Procurement Administrative Review Board (Board) in **Application No. 73 of 2017**. The Board considered whether the appellant's tender was unfairly declined on account of failure to provide the CR 12 certificate. Vide a decision dated 31<sup>st</sup> August, 2017 the Board issued the following orders;

***“1. The request for Review dated 5<sup>th</sup> August, 2017 and which was filed by the applicant with the Board on 10<sup>th</sup> August, 2017 in respect of Tender No. KAA/338/2016-2017 for provision of cleaning services for Washrooms at Moi International be and is hereby allowed.***

***2. The award of subject tender to the successful tenderer be and is hereby annulled.***

***3. The procuring entity, having regard to the tender validity, is instructed to:-***

***a) Reinstate the applicant in the tender process and evaluate its tender alongside other tenders that made it past the preliminary***

*evaluation stage and complete the process, including the making of an award, within fourteen days from the date of this decision, or,*

*b) If the evaluation committee of the procuring entity finds that the tender validity period of the subject tender lapsed and the same was not extended the procuring entity to start the procurement afresh within fourteen days of this decision.*

*c) Since the applicant will have another opportunity at the subject tender the Board orders that each party shall bear its own costs of this request for review.”*

3. Following the aforesaid decision, the respondents terminated the said tender and re-tendered afresh which matter aggrieved the appellant further and this time filed suit by way of judicial review before the High Court at Mombasa. The appellant sought an order of *certiorari* to quash the decision of the respondent terminating tender **No. KAA/338/2016-2017** which was, in the appellant’s view in violation of the decision of the Procurement Administrative Board and an order of *mandamus* to compel the respondents to reinstate the appellant in the tender process as well as cost of the suit.

4. The matter was heard by **Ogola, J.** who in a well-reasoned opinion found that the appellant filed the review application on 10<sup>th</sup> August, 2017 and the decision of the Board was issued on 31<sup>st</sup> August, 2017 thus the tender validity which was for ninety (90) days had already lapsed. This is what the learned Judge stated in his own words: -

*“This court has found that the respondents would not reinstate the ex-parte applicant to the tender process as the validity period of the tender had already lapsed. Therefore the decision by the respondents to this effect cannot be said to be unreasonable and with*

*“wednesbury’s unreasonableness”. The order of certiorari can therefore not issue to quash the decision of the respondents to terminate the tender and re-tender a fresh.*

*As regards the order of mandamus, the same is issued when the court is satisfied that the respondent was actually bound by law to perform a particular duty ad that duty has become due...*

*...The respondents were under a duty to start the tender process in accordance with the orders and/or directions of the Review Board. The Review Board under section 171 of the Public Procurement and Asset Disposal Act has the power to terminate the procurement process and commence a new procurement process. The respondents did not discharge their duty effectively as they started the procurement process outside the period specified by the Review Board. This being the case, this court while exercising its discretion quashes the decision by the respondents to advertise the tender afresh on 17<sup>th</sup> October, 2017 and further compels it to start afresh the procurement process for sanitation services.*

*For the foregoing reasons this application succeeds partly; orders are issued as follows;*

*a) An order of certiorari be and is hereby issued quashing the decision by the respondents to advertise the tender afresh on 17<sup>th</sup> October, 2017.*

*b) An order of mandamus be and is hereby issued compelling the respondents to start the procurement process for the sanitation services within 14 days from the date hereof.*

*c) The ex-parte applicant is at liberty to place a bid on the tender (sic) is advertised and its bid considered based on its merits.*

*d) Each party shall bear own costs of the application.”*

5. Unrelenting, the appellant has appealed against the above decision raising six grounds of appeal. Some grounds are repetitive, therefore we summarize them to wit; - that the learned Judge erred in law and fact for holding that tender no. KAA/338/2017-2017 had lapsed and could not be reinstated; not finding the period of validity ought to have been determined from the time the award was made that was on 26<sup>th</sup> July, 2017 and not from the date of issue and for failing to award the appellant costs of the suit.

6. During the hearing which was conducted virtually via “Go to Meeting” platform due to COVID 19 Pandemic, both counsel for the appellant and respondent relied on their written submissions and each made some oral highlights. **Mr. Gikandi**, learned counsel for the appellant, submitted that the appellant was the lowest tenderer but her bid was rejected because the respondents placed an unreasonable and unlawful requirement to provide the CR 12 certificate which was found to have been unnecessary and was set aside by the Board. The respondents purported to cancel the tender and advertised afresh while arguing that the tender validity period of ninety (90) days had lapsed. According to counsel, time started running from the time of tender opening up to the time the respondents awarded the tender to the successful bidder. That according to the provisions of the **Public Procurement and Assets Disposal Act** (the Act), it does not provide for a validity period given for matters that have been ordered to be re-evaluated by the Board, therefore the respondents were supposed to proceed to award the tender to the appellant. Counsel submitted that given that the Board had annulled the award of tender, the court was supposed to determine when the award was made as the date of validity and not the date when the tender was issued because this was a re-evaluation. Counsel also faulted the Judge for not awarding the appellant costs which ordinarily follow the event.

7. The appeal was opposed by **Prof. Kindiki**, learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents who also relied on the written submissions and made some oral highlights. Counsel advanced the argument that the tender was advertised on 4<sup>th</sup> April, 2017 for a period of ninety (90)

days, meaning that it expired on 4<sup>th</sup> August, 2017 and by the time the appellant filed an application for review on 10<sup>th</sup> August, 2017 the validity period of that particular tender had expired and the only way it could have been extended was according to the provisions of **Section 88** of the Act. In appreciating this predicament, the Tribunal gave two options either to reinstate the tender or re-tender; that the court did not order the respondent to award the tender to the appellant but the appellant did not re-tender, therefore it did not participate in the repeat process and therefore it was the appellant to blame, not the respondents who were merely implementing the order by the Board. Counsel pointed out that the tender was for provision of sensitive services at an airport which attracts thousands of travellers every day and therefore touches on public health matters. On costs counsel made reference to the provisions of **Order 27** of the **Civil Procedure Code**, that an order for costs is discretionary and that aside, each party had a measure of their success in the High Court. Therefore, the order that each party was to bear their own costs was the correct one in the circumstances of the matter.

8. We have considered the appeal, the rival submissions and authorities cited from which we discern two issues; whether the Judge should have ordered the appellant to be re-instated to the tender process and its tender subjected to an evaluation alongside other tenders that had made it past the preliminary evaluation stage, and whether the appellant was entitled to an order for costs.

9. The impugned orders were made pursuant to the Judge's exercise of judicial discretion in determining whether there was illegality or irregularities in the manner the respondents decided to cancel the tender. The decision by the Judge as he posited was hinged on the orders made by the Board that annulled the award of the tender to the interested party but gave orders in the alternative. We find that the orders made by the Board were central in the determination of the suit before the court below and we therefore produce them here below verbatim once more;-

***“4. The procuring entity, having regard to the tender validity, is instructed to:-***

***d) Reinstate the applicant in the tender process and evaluate its tender alongside other tenders that made it past the preliminary evaluation stage and complete the process, including the making of an award, within fourteen days from the date of this decision, or,***

***e) If the evaluation committee of the procuring entity finds that the tender validity period of the subject tender lapsed and the same was not extended the procuring entity to start the procurement afresh within fourteen days of this decision.***

***f) Since the applicant will have another opportunity at the subject tender the Board orders that each party shall bear its own costs of this request for review”***

Instead of complying with the first segment of the order, the respondents went for the alternative that was directing them to start the whole process afresh. The respondent's reasons for re-starting the process was based on the alternative order and they also argued the subject tender validity period had lapsed. Unfortunately, the appellant did not re-tender, arguing that the tender validity period had not lapsed therefore the respondents were not supposed to start a fresh process.

10. In dealing with this issue, the learned trial Judge properly guided his mind on the *Wednesbury's* principle of unreasonableness. The appellant had sought an order of *certiorari* and *mandamus*, therefore the appellant had a duty to demonstrate that the decision made by the Board to re- start the procurement afresh was tainted with illegality, irrationality and procedural unfairness. See the case of; **Emfil Limited vs. Registrar of Titles Mombasa & 2 others** [2014] eKLR where this Court relied on the case of **Pastoli vs. Kabale District Local Government Council and Others** [2008] 2 EA 300 to delimit the application of judicial review, thus:-

***“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety***

***...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality”.***

We are also conscious that paradigms have shifted as stated in the case of **Suchan Investment Limited vs Ministry of National Heritage & Culture & 3 Others** (2016) eKLR 51. That **Articles 22, 23** and **47** of the Constitution read with the grounds for review set out under **Section 7** of the **Fair Administrative Action Act**, allows a fusion of the traditional common law grounds of review to include some merit review in an administrative act, although the court cannot usurp the decision making power of the administrative body but merely quash the errors.

11. That said, the question still remains whether the respondents committed an illegality by calling a fresh tender. The Board gave the orders in the alternative because it must have been aware of the validity period of the tender. Counsel for the appellant argued that the respondents should have considered the validity date from the date the award was made, that is 26<sup>th</sup> July, 2017 and not from 4<sup>th</sup> May, 2017 when the tender closed. In answering this question, the learned Judge stated as follows in a pertinent paragraph of the judgement: -

***“This court has found that the validity period of the tender was 90 days which lapsed on 4<sup>th</sup> August, 2017. The decision by the Board was issued on 31<sup>st</sup> August, 2017. It is therefore clear to this court that the respondents would not have reinstated the ex-parte applicant to the tender process and considered his tender alongside those of others that had made it past the preliminary stage as the tender period had already lapsed. I should think that the Review Board had envisioned this situation and that is the reason the board ordered that if the evaluation committee of the procuring entity found that the validity period of the subject matter had lapsed and had not been extended the procuring entity should start the procurement process afresh. How then can the decision by the respondents not to reinstate the ex-parte applicant be termed as unlawful and unreasonable? The ex parte applicant has not tendered any evidence to support this assertion. To me, the respondents were simply complying with the***

*orders of the Board.”*

12. We take note of the submissions made by counsel for the appellant who made reference to the provisions of **Sections 87 and 88** of the Act. We unfortunately find the said provisions do not advance the appellant’s case in any way as **Section 87** makes provisions for notification of intention to enter into a contract and requires the accounting officer to notify the successful bidder before the expiry of the period during which the tender remained open. Whereas **Section 88** provides for an extension of tender validity, the provision is not couched in mandatory terms; it leaves it to the discretion of the accounting officer to decide whether to extend the validity. This is what it states: -

**Section 88 (1) of the Act;**

**“Before the expiry of the period during which tenders shall remain valid the accounting officer of a procuring entity may extend that period.”**

Just like the trial Judge, we cannot fault the respondents for not extending the period of validity or for not construing the period of validity was from 26<sup>th</sup> July, 2017 given that the tender document indicated it was valid for ninety (90) days from the date of issue. Furthermore, there was no request made by the appellant following the decision of the Board to the accounting officer to extend the validity period. So, we do not have any reasons to fault the respondent for opting for a fresh tender.

13. On the issue of costs, it is trite that in awarding costs, a judge exercises discretion which must be based on good reason. In this case the Judge found each party had a measure of success as he set aside the fresh tender issued on 17<sup>th</sup> October, 2017 which gave an opportunity to the appellant to bid and its bid was to be considered on merit. To us, the orders given were purely predicated on a different reason altogether and not what was pleaded by the appellant. The Judge found that although the respondents were ordered by the Board to re-tender afresh within fourteen (14) days, on 31<sup>st</sup> August, 2017 they did not do so until 17<sup>th</sup> October, 2017 which was outside the fourteen (14) days. Did the Judge exercise his discretion wrongly for not awarding costs to the appellant? The jurisdiction of this Court to either award costs or interfere with an award of costs made by a court appealed from is donated by **rule 31** of the rules of this Court. It provides as follows: -

**“31. On any appeal the Court shall have power, so far as its jurisdiction permits, to confirm, reverse or vary the decision of the superior court, or to remit the proceedings, to the superior Court with such directions as may be appropriate, or to order a new trial, and to make any necessary incidental or consequential orders, including orders as to costs.”**

14. Our construction of this rule is that as a general rule, an award of costs on appeal follows the event, and a successful litigant will be awarded costs so as to recoup the costs he has undergone in the course of the litigation. In **Edward Sargent vs. Chotabha Jhaverbhat Patel [1949] 16EACA 63**, it was held that an appeal does lie to an appellate court against an order made in the exercise of judicial discretion, but the appeal court will interfere only if it be shown that the discretion was exercised injudiciously. The principles that guide the appellate court in the exercise of this mandate were set by the predecessor of this Court in **Mbogo & Another vs. Shah [1968] E.A. 93**, where it was held at page 96 that:-

**“An appellate Court will interfere if the exercise of the discretion is clearly wrong because the Judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate Court should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result, there has been injustice.”**

15. In the light of the above principles, the factors we are enjoined to consider when deciding whether to interfere or otherwise with the award of costs made by the trial court resulting in this appeal are not limited to the conduct of the parties in the actual litigation, but also to matters which triggered the litigation, and the contribution of the party in whose favour the order of costs was withheld, to the causation of those factors. In the instant appeal, there is a very thin line to draw regarding the wrongs that were committed by the respondents hence the conclusion by the Judge that the appeal succeeded partially, albeit not on the grounds that were advanced by the appellant.

16. Who was the successful party before the High court? Counsel for the respondents argued that both parties succeeded because the trial Judge set aside the re-tender advertisement that the respondents had fixed for 17<sup>th</sup> October, 2017 and ordered them to re- advertise within 14 days. Because the re advertisement would have given the appellant a further opportunity to participate in the tender this is why it was argued that each party had a measure of success. Given that the appellant had an opportunity to participate in the fresh re- tender, and there was no finding that the respondents had flouted the procurement procedure, we are not inclined to interfere with the Judge’s exercise of discretion in declining to award costs to the appellant.

17. We find no merit in this appeal and dismiss it, but again decline to award the respondents costs of the appeal for reasons that they too benefited from the clarification given by the High Court. Consequently, we order that each party bears its own costs.

**Dated and delivered at Nairobi this 9<sup>th</sup> day of October, 2020.**

**W. OUKO, (P)**

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**JUDGE OF APPEAL**

**M. K. KOOME**

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**JUDGE OF APPEAL**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**