IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KIAGE, JJ.A)

CIVIL APPEAL NO. 131 OF 2018

BETWEEN

1. JAMES OYONDI T/A BETOYO CONTRACTORS

2. JOHN KIVUNZI T/A JONA PESTCON.....APPELLANTS

AND

1. ELROBA ENTERPRISES LIMITED

2. SUBISA COMMUNICATIONS LIMITED

3. NORGEN ENTERPRISES LIMITED

4. OLLREGGY INVESMENTS

5. DIGITAL SANITATION SERVICES ROOKEN ENTERPRISES

6. HANDIBO SERVICES

7. THE MANAGING DIRECTOR, KENYA PORTS AUTHORITY

8. KENYA PORTS AUTHORITY

9. PUBLIC PROCUREMENT

ADMINISTRATIVE REVIEW BOARD.....RESPONDENTS

(An appeal from the Judgment of the High Court of Kenya at

Mombasa (E. Ogola, J.) dated 11th July, 2018

in

HC Petition No. 57 of 2017)

****

JUDGMENT OF THE COURT

By this appeal, the appellants **James Oyondi** and **John Kivunzi**, who trade as **Betoyo Contractors** and **Jona Pestcon**, respectively, challenge the decision of the High court of Kenya (Ogola, J.) delivered on 11th July, 2018 by which it quashed the record, proceedings

and decision of the **Public Procurement Administrative Review Board** (the Board) in application numbers 76 and 77 of 2017. The Board had by its determination rendered on 7th September, 2017 allowed a review application by the appellants herein and annulled tender awards made by Kenya Ports Authority (KPA) in favour of various entities who are the 1st to 6th respondents herein. Those tenders were for the provision of clearing and landscaping services and for caretaker services. We need not go into the details of those tenders and ensuing contracts as they are not material to the determination we shall make herein.

Following the annulment of those awards, the 1st to 6th respondents herein (hereinafter 'the Petitioners') filed a petition at the High Court against the appellants herein, KPA, its managing director and the Board in which they complained that the KPA and its managing director had, illegally and in breach of the Constitution and the **Public Procurement and Asset Disposal Act** (PPADA) extended the contracts for the provision of those services by the appellants herein after they lapsed without fresh tendering processes carried out openly, transparency and in an accountable manner as contemplated by ***Article 10*** of the Constitution. They charged that by engaging the said services of the appellants herein, the managing director had acted without due process, inequitably and in breach of the rule of law, good governance, transparency and accountability and was moreover unreasonable, irrational and unfair, granting the appellants herein preferred beneficial interest.

KPA eventually did invite tenders for provision of Housekeeping services through Tender No. **KPA/113/2016/17/ADM** and for provision of Clearing and Landscaping services through **Tender No. KPA/111/2016-17/MO** in which the appellants as well as the petitioners in the court below participated as tenderers. The appellants were, however, disqualified at the preliminary stages whereupon they filed the aforementioned proceedings before the Board to challenge the procurement process. Their challenge was based on the tender validity period, even though it was not the basis upon which they were disqualified at the preliminary stages of the tender.

The Board, as we have stated, allowed the appellants' review applications thereby annulling the awards made to the petitioners and others, and ordered that the procurement process commence afresh within ***fourteen (14)*** days of its decision. It was alleged in the petition that the Board had committed fundamental errors or breaches of law captured in paragraphs 25 to 27 as follows;

> ***"25. The petitioners state that in arriving at the aforementioned decision the Board [5th respondent] committed a fundamental error of law particularly as relates to the interpretation of section 170 as read together with the majority of the sections of the Public Procurement & Asset Disposal Act No. 33 of 2015 as to which party should be sued within fourteen (14) days of notification of award or date of occurrence of alleged breach as contemplated under section 167 of Act No. 33 of 2015.***
>
> ***26. The petitioners further state that the 5th respondent committed a fundamental breach of law in its aforementioned decision particularly in relation to interpretation of section 167 of Act No. 33 of 2015 – Public Procurement & Asset Disposal Act which presupposes that a candidate or tender's locus to institute proceedings is on account of having suffered or risk suffering, loss or damage due to a breach of a duty imposed on a procuring entity by the Act or the regulations thereunder.***
>
> ***27. The petitioners state that the 5th respondent lacked jurisdiction to entertain the Review proceedings under Application No. 76 and 77 of 2017 aforementioned the proceedings therein not having been instituted against the Accounting officer [3rd respondent] within fourteen [14] days from the date of Award and there having been no allegation by the 1st and 2nd respondents that they had suffered or risked suffering loss or damage arising out of the procurement process in which their tender was disqualified at preliminary stages and petitioners awarded after their tender undergoing the whole procurement process/procedures."***

The petitioners then sought various orders including declaration that the aforementioned extension of contracts since the year 2014 were unlawful, null and void; prohibiting the appellant from offering or providing services under the challenged extended contracts; prohibiting KPA and its managing director from payment to the appellants for services rendered on those contracts; directing the appellants to refund all public funds paid to them under the said contracts and, finally;

> ***"(e) An order of certiorari be and is hereby issued removing to the High Court for the purposes of being quashed the record, proceedings, decision of the 5th respondent given on 7th September, 2017 in Public Procurement Administrative Review Board Application Numbers 76 and 77 of 2017.***
>
> ***(f) The 3rd and 4th respondents be directed to execute in favour of the successful tenderers the contracts for awards in respect of Tender Numbers KPA/111/2016-17/MO – provision of Clearing and Landscaping Services and KPA/113/2016-17/ADM-provision of Housekeeping or Caretaking services.***
>
> ***(g) The costs of these proceedings be provided."***

The petition was factually and evidentially supported by the affidavit of **Regina Mbithe Kithuku,** the proprietor of the 4th petitioner on behalf of the rest and it repeated, on oath, the facts founding the petition and attached documents in evidence thereof.

The appellants filed a response to petition dated 2nd October, in which they denied the allegations of constitutional and statutory violations contained in the petition and, with regard to the final part the same, stated that the non-joinder of the accounting officer was not fatal. They

described the petition as *"without any factual basis and amount (sic) to a total waste of the Court's time*." The response was supported by the affidavits of the appellants **John Oyondi** and **John Kivunzi,** both sworn on 2nd October, 2017, to which were attached various documents related to the tenders in question.

On their part, KPA and its managing director filed a joint response dated 2nd October, 2017. They stated that the initial tenders under challenge were awarded in line with the procurement regulations then in force and that after they lapsed they were extended only to ensure the operations of KPA were not curtailed by the non-availability of essential services, pending the resolution of impediments and encumbrances to the awarding of contracts to replace them. After those issues, which had in fact been raised by the **Public Procurement Oversight Authority**, were resolved, KPA advertised the two 2016-17 tenders, in which the petitioners as well as the appellants herein participated but the latter were disqualified at the preliminary stages of the tender evaluation process. The appellants' subsequent recourse to the Board challenging the procurement process led to further delays which necessitated KPA's further extension of the initial contracts for the same reasons of ensuring the continued provision of the caretaker services as well as clearing and landscaping services during the pendency of review proceedings. It asserted that it acted properly within its powers and mandate and prayed that the petition be dismissed with costs.

That response was supported by the affidavit of Johnson Gachanja, KPA's Principal Procurement Officer in charge of contracts and he swore to the matters in the response and attached various documents in evidence of the averments.

After the matter was urged before the learned Judge, he indentified three issues as falling for determination stating them thus at paragraph 28 in his judgment;

> ***"(a) Whether the proceedings before the 5th respondent were a nullity as the accounting officer of the 4th respondent has not been enjoined.***
>
> ***(b) Whether the 1st and 2nd respondents lacked locus standi to appear before the 5th respondent as they had not demonstrated that they had suffered loss or were likely to suffer loss.***
>
> ***(c) Whether the petitioners should be granted the orders sought."***

The learned Judge's findings on those issues is captured in his

final orders on the petition as follows;

> ***"48. (a) An order of certiorari be and is hereby issued removing to the High Court for the purposes of being quashed the record, proceedings, decision of the 5th respondent given on 7th September, 2017 in Public Procurement Administrative Review Board Application Numbers 76 of 2017 and 77 of 2017.***
>
> ***(b) The 3rd and 4th respondents are hereby directed to execute in favour of the successful tenderers the contracts for awards in respect of Tender Numbers KPA/111/2016-17/MO – provision of Cleaning and Landscaping Services and KPA/113/2016-17/ADM- provision of Housekeeping or Caretaking services.***
>
> ***(c) The costs of these shall be for the petitioners and shall be paid in equal measure by all the respondents."***

That judgment aggrieved the appellants who, by their memorandum of appeal, complain that the learned Judge erred by;

- ***Failing to determine whether the awards it ordered KPA and its managing director to execute in favour of the successful tenderers were made in compliance with the law***
- ***Directing the execution of tenders that were based on an illegality the tender validity having previously lapsed and***
- ***Failing to take into account that the appellants were notified of their bids' non-success after the process was complete.***
- ***Holding that the appellants did not have locus to institute the review proceedings before the Board***
- ***Failing to find that the petitioners did not follow the proper procedure for appealing against the Board's decision***
- ***Granting the order of*** *certiorari* ***on the basis of non-joinder of KPA's accounting officer***
- ***Directing that the appellants pay the petitioners' costs.***

The parties through their advocates filed written submissions which were highlighted by their learned counsel, **Ms. Murage** holding brief for **Mr. Gikandi** for the appellants; **Mr. Mogaka** appearing with **Mr. Mutisya** for the 1-6th respondents (the petitioners) and **Mrs. Ikegu** for the 7th and 8th respondents. The Board did not participate in the appeal.

Ms. Murage announced that she would highlight the first couple of grounds focusing on the tender validity period as the basis for the appellants' request for review before the Board, and which was a live issue before the learned Judge. She criticized the learned Judge for not addressing himself to the issue, yet it had a bearing on whether the challenged tender was valid. The Board had dealt with the issue and the

petitioners did not challenge its decision on it. Counsel contended that the tender validity period had already lapsed by the time KPA purported to extend the same and the awards were therefore null and void, with the result that the High Court was in error to direct the execution of the contracts flowing therefrom.

Citing two Privy Council decisions, ***MINISTRY AMAR SINGH vs. KULUBYA [1963] EA 21*** and ***BENJAMIN LEONARD MACFOY vs. UNITED AFRICA CO. LTD [1961] 2 ALL ER 1169,*** counsel contended that the petitioners could not benefit from an illegal act.

On the question of whether the appellants had the *locus standi* to file the review before the Board, **Ms. Murage** submitted that they did as under **section 167(1)** of the **Public Procurement and Asset Disposal Act**,(PPADA) administrative review proceedings could be filed by bidders and tenderers. Moreover, they had a further right to file the review proceedings as they were trying to stop the payment of public funds for an illegal purpose.

Mr. Mogaka, in opposing the appeal first asserted that as parties are bound by their pleadings, it was not open to the appellants to introduce the issue of alleged misuse of public funds when the issue was never raised in the application for review before the Board and the responses made thereto. He made reference to this Court's decision in ***IEBC vs. STEPHEN MUTINDA MULE & 3 OTHERS [2014] eKLR*** to the effect that parties are not allowed to depart from their pleadings. He next addressed the issue of *locus* and asserted that it was a requirement of **section 167** of the PPADA that for one to file a review, he had to have been a candidate and to have suffered loss in a procurement process. He referred to the holding of the English Court of Appeal in ***R vs. SECRETARY OF STATE FOR SOCIAL SERVICES & ANOR EX PARTE CHILD POVERY ACTION GROUP & OTHERS [1989] 1 ALL ER 1047*** to the effect that the question of *locus standi* goes to the jurisdiction of the court and not even by consent of the parties could such absent jurisdiction be conferred.

As to who the proper parties to review proceedings before the Board are, **Mr. Mogaka** submitted that **section 170** of the **PPADA** required that the accounting officer of a procuring entity be a respondent. It was therefore mandatory for the Managing Director to be joined in the review proceedings. It was not open to the Board to sidestep the issue by resorting to the law of principal and agent. Jurisdiction was a threshold issue that the Board should have dealt with upfront once it was raised in line with this Court's decision in

THE OWNERS OF THE MOTOR VESSEL 'LILLIAN S' vs. CALTEX **OIL (K) LTD [1989] KLR 1.**

Regarding the procedure that was adopted to challenge the decision of the Board by filing a constitutional petition as opposed to a judicial review as envisaged in the PPDA, **Mr. Mogaka** first posited that the appellants' counsel had abandoned objection on that point in the court below and so they could not raise it before this Court as that would amount to approbating and reprobating which they could not be allowed do. He cited in aid ***BEHAN & OKERO ADVOCATES vs. NATIONAL BANK OF KENYA [2007] eKLR***, decision of this Court sitting in Kisumu. He went on to state that the procedure adopted was in any case sound as under **Article 23** of the Constitution one of the reliefs the High Court may grant is a judicial review order. The same is also available to be granted under **Article 165** in exercise of the High Court's supervisory power. Finally, as the appellants never raised the issue of procedure in their responses at the High Court, they could not purport to raise the same for the first time in their submissions.

On the question of costs, it was counsel's view that the preponderance of jurisprudence in the area of public procurement is to the effect that under **section 175(6)** of the PPADA there should be no imposition of costs and each party should bear its own. In every other respect he urged us to dismiss the appeal.

For KPA and its managing director, **Mrs. Ikego's** view on the tender validity period was that it was not specifically provided for in the tender documents, and could only be arrived at by implication having regard to the period of the tender security, which was 120 days. The period was extended once by notice and all the processes were completed within the period as extended. Indeed, the bidders were specifically requested to extend their tender security, which many did, but the appellants did not do so. The appellants and other bidders had been advised to regularly check KPA's website and therefore had no basis for their complaints about non-notification.

On the issue of *locus standi*, **Mrs. Ikegu** submitted that the appellants did not state the loss they suffered or were likely to suffer, for they suffered none, and were not likely to suffer any having been properly eliminated at the very initial stages. They did not even make it to the technical evaluation stage. She sought to distinguish Odunga J's decision in ***CENTRAL BANK OF KENYA vs. OKIYA OMTATAH OKOITI & 6 OTHERS [2018] eKRL*** on the basis that it was a public interest suit while the appellants here were pursing private interests and were bound by **section 167** of the PPADA.

Counsel also urged that the appellants' failure to enjoin the Accounting Officer of KPA in the review proceedings was fatal, but on costs agreed that no party ought to be condemned in public procurement related proceedings.

To those submissions **Miss Murage** responded that the appellants' failure to enjoin the accounting officer was not fatal since the procuring entity had been made a party and that the defect was fully cured when the petitioners joined the accounting officer in the proceedings at the High Court. Returning to the tender validity period, counsel contended that it was not synonymous with the tender security period and stood at 90 days, not the latter's 120 days.

We have carefully read and considered all the submissions made before us and the authorities cited by the various parties. We have also perused the record of appeal. The matters we are called upon the decide lie in the discretion of the learned Judge. We do pay due regard to a first instant judge's exercise of discretion and are slow to disturb unless the same was not exercised judicially and in a judicious manner. In the oft-cited case of ***MBOGO & ANOR vs. SHAH [1968] EA 93***, Sir Charles Newbold, P. said the law, which has since followed quite faithfully, as this; (at page 96);

> ***"We come now to the second matter which arises on this appeal, and that is the circumstances in which this court should upset the exercise of a discretion of a trial judge where his discretion, as in this case, was completely unfettered. There are different ways to enunciating the principles which have been followed in this court, although I think they all more or less arrive at the same ultimate result. For myself I like to put it in the words that a Court of Appeal 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 in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."***

See, also, ***CHOITRAM vs. NAZARI [1984] KLR 327***; ***MWANGI vs. KENYA AIRWAYS LTD [2003] KLR 486***.

In the case before us, the learned Judge determined the petition before him principally on two issues that went to the jurisdictional competency of the review proceedings that were before the Board. We think that this appeal also turns on the same two issues. The first relates to the legal consequences of non-joinder of KPA's accounting officer in the review proceedings. The appellants complain that the learned Judge was wrong to hold that the omission rendered the proceedings incompetent, null and void, and argue that so long as KPA, as the procuring entity, had been joined as respondent, the non-joinder of the accounting officer could not invalidate the proceedings. The argument by the petitioners as well as KPA and its managing director is to the contrary end that the requirement is mandatory and goes to the root of the proceedings.

Now, **section 170** of the PPADA is in rather straight-forward terms;

> ***"The parties to a review shall be-***
>
> ***(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."*** (Our emphasis)

This issue was fully engaged before the Board and, disallowing the objections based on the non-joinder of the accounting officer, it rendered itself as follows;

> ***"It is common knowledge that the Procuring Entity is a state corporation with perpetual succession. As a state corporation the procuring entity discharges its functions through it employees, including the accounting officer. Employees of the procuring entity when perfuming their duties in accordance with their terms of is the one to be sued and not the agent. The accounting officer acts on behalf of the procuring entity but the procuring entity does not act on behalf of the accounting officer. It is the firm view of the Board that the Procuring Entity is the party in this request for review and was properly sued and, equally, was properly represented in the proceedings."***

The learned Judge rejected that reasoning and drew a clear distinction between **section 170** of the PPADA and the statute it replaced, namely the **Public Procurement and Disposal Act 2005** (repealed) which provided at **section 96**, as follows;

> ***"96. The parties to a review shall be-***
>
> ***(a) the person who requested the review;***
>
> ***(b) the procuring entity;***
>
> ***(c) if the procuring entity has notified a person that the person's tender, proposal or quotation was successful, that person; and***

(d) Such other persons as the Review Board may determine."

(Our emphasis)

It is clear that whereas the repealed statute named *the procuring entity* as a required party to review proceedings, the current statute which replace it, the PPADA, requires that *the accounting officer of the procuring entity*, be the party. Like the learned Judge we are convinced that the amendment was for a purpose. Parliament in its wisdom elected to locate responsibility and capacity as far as review proceedings are concerned, on the accounting officer specifically. This, we think, is where the Board's importation of the law of agency floundered. When the procuring entity was the required party, it would be represented in the proceedings by its officers or agents since, being incorporeal, it would only appear through its agents, though it had to be named as a party. Under the PPADA however, there is no such leeway and the requirement is explicit and the language compulsive that it is the accounting officer who is to be a party to the review proceedings. We think that the arguments advanced in an attempt to wish away a rather elementary omission with jurisdictional and competency consequences, are wholly unpersuasive. When a statute directs in express terms who ought to be parties, it is not open to a person bringing review proceedings to pick and choose, or to belittle a failure to comply.

We think, with respect, that the learned Judge was fully entitled to, and did address his mind correctly to the law when he followed the binding decision of the Supreme Court in ***NICHOLAS ARAP KORIR SALAT vs. IEBC [2014] eKLR*** when it stated, adopting with approval the judgment of Kiage, JA;

> ***"I am not in the least persuaded that Article 159 and Oxygen principles which both commands courts to seek substantial justice in an efficient and proportionate and cost effective manner to eschew defeatist technicalities were ever meant to aid in overthrow of rules of procedure and cerate anarchical tree for all in administration of justice. This Court, indeed all Courts must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines are to serve the process of judicial adjudication and determine fair, just certain and even handed courts cannot aid in bending or circumventing of rules and a shifting of goal posts for while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules."***

We have no difficulty holding, on that score, that the proceedings before the Board were incompetent and a nullity, which the learned Judge properly quashed by way of *certiorari*.

That ought to dispose of this appeal but on the second issue as well, the learned Judge cannot be faulted. It is not in dispute that the appellants never pleaded nor attempted to show themselves as having suffered loss or damage or that they were likely to suffer any loss or damage as a result of any breach of duty by KPA. This is a threshold requirement for any who would file a review before the Board in terms of **section 167(1)** of the PPADA;

> ***"(1) subject to the provisions of this part, a candidate or a tender, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed."***

It seems plain to us that in order to file a review application, a candidate or tenderer must at the very least claim to have suffered or to be at the risk of suffering loss or damage. It is not any and every candidate or tenderer who has a right to file for administrative review. Were that the case, the Board would be inundated by an avalanche of frivolous review applications. There is sound reason why only candidates or tenderers who have legitimate grievances may approach the Board. In the present case, it is common ground that the appellants were eliminated at the very preliminary stages of the procurement process, having failed to make it even to the evaluation stage. They therefore were, with respect, the kind of busy bodies that **section 167(1)** was designed of keep out. The Board ought to have ruled them to have no *locus*, and the learned Judge was right to reverse it for failing to do so. We have no difficulty upholding the learned Judge.

Having come to those conclusions on the *locus standi* of the appellants, and having found that the learned Judge properly quashed the Board's proceedings and decision, we think it is only logical that the dispositive orders made by the learned Judge be also upheld. The tendering process was complete and the successful candidates, the petitioners, were known. The process had been delayed by all manner of factors including at the last, the review proceedings filed by the appellants. It was only logical and fair and in the interests of sound management of public resources, that the process be completed, hence the direction by the learned Judge that the contracts be executed. We see no error in that direction.

The last issue for our consideration is costs, and on this we would reverse the learned Judge's order that all the respondents before him were to pay costs to the petitioners. The proper orders, given the nature of the proceedings, would have been that the parties bear their own costs.

The upshot is that this appeal is dismissed. The judgment of the High Court is upheld save as to costs which shall be borne by the respective parties their own.

The parties shall each bear their own costs of this appeal.

Dated and delivered at Mombasa this 7th day of March, 2019

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR