



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: KOOME, SICHALE & KANTAL, JJA]

CIVIL APPEAL NO. 281 OF 2016

BETWEEN

ERNIE CAMPBELL & COMPANY LIMITED.....APPELLANT

AND

THE NATIONAL HOUSING CORPORATION.....RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Nairobi (Korir, J)

dated 31st March, 2016 **In Judicial Review Misc. Application No. 48 of 2016)**

JUDGMENT OF THE COURT

This is an appeal against the judgment of **Korir, J dated 31st March, 2016**. A brief background will give this appeal context.

On **21st (or 23rd) December, 2013**, the National Housing Corporation (the respondent herein) advertised an open tender being tender No. **NHC/TECH/422/2013** in the Daily Nation Newspaper for the construction of residential flats and shops on L.R. No. 62/216 Kibera. Ernie Campbell & Company Limited, the appellant herein submitted its bid and according to it, by a letter dated **27th August, 2015**, the respondent informed the appellant that it was the successful bidder. However, in a letter dated **26th January, 2016**, the respondent purported to nullify the letter of award of **27th August, 2015** by invocation of the provisions of Section 36 of the Public Procurement and Disposal Act, 2005 (the repealed Act). The appellant was aggrieved by the respondent's action and in a Notice of Motion dated **5th February 2016** sought the following orders:

“

- a. That an order of certiorari be issued to remove into this court and quash the decision of the national Housing corporation contained in the letters dated **26th January, 2016** and **12th January, 2016** purporting to terminate the tender proceedings and purporting to nullify the letter of award dated **27th August, 2015** issued to the applicants in respect of tender No. **NHC/TECH/422/2013**, the Proposed Mixed Development at Kibera, Nairobi.
- b. That an order of prohibition be issued against the respondent restraining it, its officers, and servants and or agents from awarding tender No. **NHC/TEC/422/2013**, the Proposed Mixed Development at Kibera Nairobi, or any other similar tender over the same subject matter, to any person or entity other than the appellant herein.
- c. That an order of mandamus be issued against the respondent compelling it to execute a contract with the appellant herein in accordance with the law, the letter of award and the provisions of the Tender Document relating to Tender No. **NHC/TECH/422/2013**, the Proposed Mixed Development at Kibera Nairobi.
- d. Such other or further orders, writs and or directions as this Honourable Court may deem just and expedient.
- e. The costs of and incidental to this application be provided for”.

In the Statutory Statement and the Supporting affidavit of **Gopal Vagjiani**, the Managing Director of the appellant, sworn on **4th February, 2016**, it was reiterated that the respondent's purported cancellation of the tender awarded to the appellant was illegal, unlawful, null and *void ab initio* and that the tender contract having been awarded pursuant to section 66 of the repealed Act was not available for recall; that Section 36 of the repealed Act was irregularly invoked; that the said Section 36 had been repealed by the Public Procurement & Asset Disposal Act, 2015 (the Act); that no reasons were given for the cancellation; that the respondent's actions have violated the appellant's legitimate expectations; that the respondent had acted irrationally and unreasonably; that the respondent's actions are unfair; that the respondent failed to take into account guiding principles in the interpretation of ouster clauses; that the respondent's decision is ultra vires its mandate and finally, that the respondent's decision is contrary to public policy in purporting to arbitrarily start, terminate and restart a tender process.

In a lengthy affidavit of 41 paragraphs sworn on **24th February, 2016** in opposition to the motion by the respondent's Senior Legal Officer, **Kennedy Nyariki Nyabare**, it was deponed *inter alia*, that in the Tender Evaluation Report of **11th March, 2014**, the bidder recommended for award was Dickways Construction Company Limited; that although the Evaluation Committee comprised of five (5) members, the report was executed by four (4) members; that the said evaluation report of **11th March, 2014** was reviewed by another committee of three (3) members who in their report of **12th March, 2015**, recommended that the contract be awarded to the appellant; that subsequently, in a Tender Committee Meeting held on **26th August, 2015**, it was resolved to award the tender to the appellant, hence the letter of **27th August, 2015** informing the appellant that it was the successful bidder; that the Public Procurement and Asset Disposal Act, 2015 was assented to on **18th December, 2015** and came into operation on **7th January, 2016** and hence was inapplicable; that although the appellant was informed vide the letter of **27th August, 2015** that it was the successful bidder, the award of tender was subject to contract and finally, that the appellant did not request for reasons for termination as per Section 36 (3) of the repealed Act. **Korir, J** who was seized of the motion and in a judgment rendered on **31st March, 2016** rendered himself as follows:

“It is also noted that the respondent acted within the law by notifying the Public Procurement Oversight Authority of the termination. The applicant never bothered to ask for the reasons for the termination of the procurement process. The law as it stood required a bidder to ask for the reasons for the termination. The respondent therefore fully complied with Section 36 of the PP & DA, 2005.

I therefore find that the termination of the procurement proceedings was done in compliance with the law. As such, the jurisdiction of this court is ousted by Section 36 (6) of the PP & DA, 2005. The applicant cannot therefore rely on the doctrine of legitimate expectation to overthrow decisions that were lawfully reached by the respondent.

Before I conclude, I must point out that if the applicant actually believed that the respondent's action of terminating the tender was illegal, it ought to have first approached the Review Board before seeking a review by this Court. No contract had been signed in accordance with Section 68 of the PP & DA, 2005 and the jurisdiction of the Review Board had thus not been ousted by Section 93 (2). The applicant was therefore supposed to submit to the jurisdiction of the Review Board first before approaching this court.

In view of my finding that the respondent's actions were lawful, reasonable and in compliance with the rules of natural justice, the appellant's case fails. The same is therefore dismissed with an order directing the parties to meet their respective costs”.

The appellant was aggrieved by the said outcome and in a Memorandum of Appeal dated **2nd December, 2016** listed seven (7) grounds of appeal in which the learned judge was faulted for not finding that the purported termination of the tender was illegal; that section 63 of the Act was flouted as a tender proceedings cannot be terminated after the award of the tender is communicated; that the judge affirmed the respondent's invalid reasons for terminating the procurement process; that he erred in finding that the award made to the appellant could not be sustained on account of influence peddling; that he erred in visiting upon the appellant the respondent's internal inactions and finally, that his exercise of discretion was plainly wrong.

On **8th July, 2019**, the appeal came up before us for plenary hearing. **Mr. Mumia**, learned counsel for the appellant wholly relied on the appellant's submissions and its list of authorities both filed on **20th March, 2019**. It was the appellant's contention that the provisions of Section 63 of the Act provide that no tender proceedings could be terminated after an award of tender is communicated; that the Judge considered irrelevant matters in reaching his decision; that the reasons for the purported termination were invalid; that the Judge erred in imputing influence peddling in absence of any evidence; that it is wrong to have the respondent's wrongful internal actions visited upon the appellant and finally, and as stated above, that the judge's exercise of discretion was plainly wrong.

In the written submissions, the appellant concluded that:

“ From the foregoing, it is the ex parte applicant's case that there exists unlawful behavior and illegality in the actions of the respondent, that there is breach of the rules of natural justice, that the actions are unreasonable, that there exists unfair treatment of the ex parte applicant and that the applicant's legitimate expectation was desecrated”.

In opposition to the appeal, **Mr. Ngatia**, learned counsel for the respondent highlighted the respondent's submissions filed on **19th June, 2017**. It was the respondent's position that after a tender evaluation process, the Evaluation Committee issued its report dated **11th March, 2014** which was signed by four (4) members as opposed to all the five (5) members; that in the report of **11th March, 2014**, it was recommended that Dickways Construction Company Limited be awarded the tender; that by a letter dated **5th February, 2015**, the Chief Procurement Officer, asked that the report of **11th March, 2014** be reviewed; that after the review, a report dated **12th March, 2015** was issued; that this report was signed by only three members contrary to regulation 16 (2) of the repealed Act; and that in the report of **12th**

March, 2015, the recommended bidder was Ernie Compbell & Company Limited. The recommendations in the report of **12th March, 2015** were ratified by the Tender Committee in its meeting of **26th August, 2015** and a letter of **27th August, 2015** was issued. However, an incoming Management team terminated the procurement proceedings pursuant to section 36 of the repealed Act, given the fact that the reports of **11th March, 2014** and that of **12th March, 2015** had identified different successful bidders.

We have considered the record, the rival submissions, both written and oral submissions, the authorities cited and the law.

It is not disputed that by a letter dated **27th August, 2015**, the respondent notified the appellant of the outcome of the evaluation of tender No. **NHC/TECH/422/2013**. The letter stated:

“We intend to award you the tender subject to seven (7) days window period as per the Public Procurement and Disposal Act, 2015”

However, there was no contract that followed and the respondent cancelled the tender under section 36 of the repealed Act. Section 36 (6) of the repealed Act provided as follows:-

“A termination under this section shall not be reviewed by the Review Board or a Court”.

The PP & AD Act, 2015 came into operation on **7th January, 2016**. The procurement proceedings, the subject of this appeal commenced before **7th January, 2016** and hence, the applicable law was the Public Procurement & Disposal Act, 2015. The transitional provisions in section (1) provided that:

“Procurement proceedings commenced before the commencement date of this Act shall be continued in accordance with the law applicable before the commencement date of this Act”.

There was no written contract as envisaged under section 68 (3) of the repealed Act. It provides:

“68 (3) No contract is formed between the person submitting the successful tender and the procuring entity until the written contract is entered into”.

Further, we note that the tender was re-advertised on **29th November, 2016** and the appellant submitted its bid. On **22nd February, 2017**, the tender was awarded to M/s Endeavours Construction Company Limited. The contract having been awarded to M/s Endeavours Construction Company Limited, the prayers sought in the applicant’s notice of motion of **5th February, 2016** are clearly overtaken by events.

In **Tanzania Roads Agency vrs. Kondan Singh Construction Limited & Another [2013] eKLR** this Court stated:

“... since this appeal was to be determined either way, by either dismissing it or allowing it, and since the appeal for all intents and purposes has been overtaken by events, the best result that commends to us in this appeal is to have it dismissed”

Similar sentiments were expressed in **Alcon International Limited vs. Standard Chartered Bank of Uganda & 2 others, Appeal No. 3 of 2013**, wherein the East African Court of Justice at Arusha stated:

“The abstract exposition of the law is the province of academics and not Courts of Justice and hence the use of the adjective “academic” to describe such endeavours”.

In the Ugandan case of the **Environment Action Network Ltd vrs. Joseph Eryau, Civil Application No. 98 of 2005, the Court of Appeal stated:**

“The reliefs which the respondent is seeking on appeal cannot be granted because there is no live dispute between the parties. Courts do not decide cases for academic purposes because court orders must have principal effect and must be capable of enforcement. The determination of Miscellaneous No. 39/01 by the High Court drove the Respondent into a limbo of legal mootness.”

In our view, to grant the appellant the orders sought will be futile and tantamount to an academic exercise.

For the foregoing reasons, we find no merit in this appeal. It is dismissed with costs to the respondent.

Dated and Delivered at Nairobi this 20th Day of December, 2019

M. KOOME

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR