Energy Regulatory Commission v SGS Kenya Limited & 2 others (Civil Appeal 341 of 2017) [2018] KECA 616 (KLR) (11 May 2018) (Judgment)

Energy Regulatory Commission v S G S Kenya Limited & 2 others [2018] eKLR

Neutral citation: [2018] KECA 616 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 341 OF 2017

RN NAMBUYE, W OUKO & PO KIAGE, JJA

MAY 11, 2018

BETWEEN

ENERGY REGULATORY COMMISSION ..... APPELLANT

AND

SGS KENYA LIMITED ..... 1ST RESPONDENT

ADMINSTRATIVE PROCUREMENT ..... 2ND RESPONDENT

INTERTEK TESTING SERVICES (EA) LTD ..... 3RD RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi (Mativo, J.) dated 22nd September, 2017 in Jr. Misc. Appln. 496 of 2017)

JUDGMENT

1. The appellant, the Energy Regulatory Commission is a public body established under the *Energy Act* 2006. Its duties include the regulation of electrical energy, petroleum and related products, renewable energy and other forms of energy. In exercise of its statutory mandate, the appellant in or about 12th May 2017 floated tender number ERC/PROC/4/3/16-17/119 for marking and monitoring of petroleum products, a service meant to curb adulteration of fuel, which attracted 3 bids. These were opened on 31st May 2017 with the responding firms being SILPA SA, Intertek Testing Services (EA) Ltd and SGS Kenya Ltd (SGS).

2. In compliance with section 46 of the *Public Procurement and Disposal Act* 2015 (the Act), the appellant appointed an evaluation committee which duly evaluated the bids under the two heads of technical and financial. It then recommended on 30th June 2017 that the contract for provision of marking and monitoring services be awarded to SGS, at an annual cost of US$2,760,844.72, having attained the highest combined technical and financial score and being the lowest evaluated bidder. Before making

that recommendation, however, the Committee in its evaluation report made the following general observations;

> " General Observations
>
> (i) The increasing need of detection of adulteration by use of Jet A1 ought to have been captured in the terms of reference for this tender. This is so because Jet A1 is never marked unlike illuminating kerosene and there is reliable information that the perpetrators of adulteration have now shifted to the use of jet A1 as an adulterant for diesel. Further, the Commission is now aware of an existing technology that can easily detect presence of Jet A1 in motor fuels.
>
> (ii) The team also noted the need for a detailed explanation of how the test results from the monitoring teams are to be transmitted to the client. To this end the advantage of use of a real time and tamper proof mechanism that would provide more authentic results."

3. Owing to the existence of that technology indicated in the general observations, the applicants Acting Director, Petroleum, gave an option on the 7th July 2017 in which he recommended to the Acting Director General that the procurement process be terminated and re-started with the requirement that the new technological changes be incorporated in the tender for the provision of the marking and monitoring of petroleum services specifically;

> " 1. Provision of technology for the detection of Jet A1 in motor fuels; and
>
> 2. Provision of technology for the automatic transmission of test results to the Commission and any other interested Government agencies as provided in their respective mandates. Such agencies include but are not limited to the Kenya Revenue Authority (KRA) and the Kenya Bureau of Standards."

4. The Ag. Director General duly considered that opinion as well as that of the Head of Procurement to the same effect, and approved the recommendation for termination under section 63(1)(a) of the *Act*. The appellant?s decision to terminate the tender was communicated to all bidders as well as the Public Procurement Regulatory Authority as required by section 63(4) of the *Act*.

5. Aggrieved by that decision to terminate the tender, SGS filed a Request for Review of the same before the Public Procurement Administration Review Board (the Board) seeking orders that the termination of the tender be declared null and void; the appellant be directed to award it the tender; in the alternative, the appellant be directed to proceed with the tender and complete the process including making of an award. It also sought costs and any such further orders in the interests of justice.

6. After hearing SGS, the appellant, and Intertek which was named as an interested party, the Board by its decision dated 1st August 2017 disallowed the request for review. It also ordered that the appellant was at liberty to re-advertise the tender f the provision of the Petroleum Marking Services. Each party was to bear its own costs of the request for review.

7. Further aggrieved by that dismissal, SGS moved to the High Court where it sought and was granted leave to file a judicial review application. In the substantive motion subsequently filed on 16th August 2017 it sought orders of;

> " (a) Certiorari to remove to the High Court and quash the Board's decision.

(b) Prohibition to quash (sic) the decision of the appellant to proceed with the new tender process.

(c) Prohibition to prohibit the appellant from entering into or signing any contract with any third party concerning the new tender.

(d) Mandamus directing the appellant to proceed with the old tender including award of the contract to SGS."

8. The judicial review proceedings were heard by Mativo, J. who, by a judgment dated 25th September 2017 made the following orders;

"(a) An order of certiorari to remove into the High Court and to quash the decision and ruling delivered by the Public Procurement Administrative Review Board on 1st August, 2017 in Application No. 64 of 2017, SGS Kenya Limited vs. Energy Regulatory Commission.

(b) An order of Prohibition to remove into the High Court and quash the decision of the Energy Regulatory Commission to proceed with the tender process in Tender Number ERC/PROC/4/3/17-18/016 for the Provision of Marking and Monitoring Petroleum Products.

(c) An order of Prohibition directed to the Energy Regulatory Commission prohibiting it, directly and/or through its servants and/or agents from entering and/or signing any contract with any third party concerning tender number ERC/PROC/4/3/17-18/016 for the Provision of Marking and Monitoring of Petroleum Products.

(d) An order Mandamus directing the Energy Regulatory Commission to proceed with the tender process in Tender Number ERC/PROC/4/3/16-17/119 for the provision of Marking and Monitoring of Petroleum Products in conformity with the recommendation of its evaluation committee recommending the award of the tender/contract to SGS Kenya Limited.

(e) Each party to bear its costs."

9. Aggrieved by that judgment, the appellant filed a notice of appeal against the whole of it and thereafter filed a memorandum of appeal raising a dozen grounds. They all can be compressed as follows even as we appreciate what counsel for SGS has done in extracting and suggesting the issues for determination are merely four. In paraphrase, the appellant complains that the learned Judge erred by;Acting in excess of jurisdiction under the Act by directing the award of the tender to SGS thereby assuming the powers of the accounting officer.Acting in excess of jurisdiction by directing the award of an invalid tender.Holding that there was no technical or professional opinion before the Board to confirm technical change while there was.Forming a view of the evidence and improperly substituting the decision of the Board with his own.Failing to appreciate the appellant's compliance with the Act and misinterpreting section 139 thereof.Improperly exercising his discretion by acting on matters he should not, failing to act on those he should have and misapprehending the facts.

10. It therefore prayed that the High Court judgment be set aside and be substituted by an order dismissing SGS' judicial review application.

11. The parties filed written submissions which their learned counsel, Mr. Otachi appearing with Mr. Moenga for the appellant and Mr. Musyoka appearing with Mr. Muturi for the SGS highlighted before us. There was no appearance by the Board and Intertek even though service of the hearing notice had been effected on their advocates.

12. Mr. Otachi submitted that the *Act* at section 63 does provide for termination of a tender in progress for various reasons, including discovery of substantial technological change. The contemplated discovery occurs in the course of the tender process.

13. He contended that the appellant terminated the tender with the intention of retendering it so as to include important technological aspects so discovered. SGS were not disqualified and were therefore eligible to participate in the new tender.

14. Contending that the Board was rightly satisfied that the termination was properly carried out, Mr. Otachi criticized the learned Judge for totally ignoring the time-tested principles of judicial review of administrative action. There was no issue of the Board acting beyond jurisdiction or denying fair hearing to SGS. The learned Judge instead fell back on the “controversial” ground of unreasonableness by holding that there was no expert evidence placed before the Board for which he relied, “unfortunately” on a previous decision for the Board itself. The same decision had been cited before the Board and, in counsel's view, it properly found that in the instant case there was a report by experts showing there had been technological advance.

15. The Judge impermissibly and improperly delved into an evaluation of the evidence and substituted that of the Board with his own view of it, as this was not a case of there being no evidence but rather the weight and meaning of such evidence, which the learned Judge ought not to have engaged himself in. The Act itself does not decree that there has to be expert evidence of technological advance and the SGS itself did admit the existence of the new technology. The technology, from the appellants' point of view, was crucial to addressing the problem of fuel adulteration and was therefore beneficial to the public. The incorporation of the new technology was in the public interest.

16. Mr. Otachi spoke of SGS' case having mutated from an initial complaint that no reasons had been given for the termination to a later grouse about the quality of the evidence relied on to justify the termination. He insisted that the Head of Procurement had a statutory duty to review and recommend the evaluation committee's report and then the Accounting Officer would consider that recommendation. The evaluation committee itself had observed that there was need to incorporate the technology in question so that the appellant acted in a commonsensical manner, and not capriciously, in terminating the tender.

17. Counsel complained that the learned Judge usurped the triple roles of the evaluation committee, the Head of Procurement and the Accounting Officer of the appellant in ordering it to award the tender to SGS, something that not even the Board could do. This, in counsel?s view, was a whimsical interference by the learned Judge that set a bad precedent and made nonsense of the powers of the Board which is technically capable of dealing with procurement issues. He rested by submitting that the decision of the Board did not prejudice SGS as it would still participate is the new tender process.

18. For SGS, learned counsel Mr. Musyoka started by submitting that the procurement in question was a public one and by virtue of Article 227 of the *Constitution* it had to be fair, equitable transparent, competitive and cost-effective. The issue of the emerging technology first featured in the course of the evaluation process for the tender. According to him, the technology in question was an added advantage SGS had, and it would be unfair for it to be used to its disadvantage. He then stated that whereas the appellant spoke of emergent technology, what the Act envisages is "substantial"

technological advance and the learned Judge should not be faulted for making that distinction. He asserted that the decision of the Board was irrational because it was not supported by any evidence of what the substantial technological advancement was. He insisted that the prejudice his client would suffer is that it had revealed its strengths which would now be used to its disadvantage. He argued that the termination was too late in the day but conceded, as he had to, that the Act does envisage termination even at that stage. He added, however, that such termination was strictly circumscribed under section 63. To him, the recommendation of the evaluation Committee was final and binding on the appellant and so it was properly compelled by mandamus to award the tender to SGS thereby supporting the order of certiorari quashing the termination.

19. Mr. Otachi replied that the notion substantial technological advance is a matter of fact that was best handled by the appellant as the procuring entity and the Board and since the two were satisfied, it was improper for the learned Judge to override their decision made within jurisdiction.

20. We have given due consideration to the record, the submissions and the authorities cited. It is not in dispute that this appeal calls upon this Court to interfere with the learned Judge's exercise of discretion in granting the judicial review orders that he issued. As a Court of Appeal we are slow to interfere with the exercise of discretion by a judge of the Court below. We do so only in a limited set of circumstances as were aptly enunciated in the oft-cited case of *Mbogo vs. Shah* [1968]EA 93 where Newbold put it thus, at p96;

> " 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 of 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 he misdirected himself in some matter and as a result arrived at a wrong decision; or unless it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and as a result there has been misjustice."

21. The thrust of the appellant's case is that the learned Judge made errors of law and arrived at a decision that was plainly wrong entitling this Court to interfere with his exercise of discretion. The discretion is wide, undoubtedly, but it is a judicial discretion exercisable only on the basis of sound principle, not on caprice in accordance with a judge's personal preferences. In order to decide whether the learned Judge erred in the case at bar, it is worth recalling that the true province of judicial review is to deal with and correct procedural improprieties but not the merits of the decision itself. See *Chief Constable vs. Evans* [1982] 3 ALL ER 141 where Lord Brightman sounded the caution that unless the restriction to process as opposed to merits is observed, "the court will, ...under the guise of preventing abuse of power, be itself guilty of usurping power". He went on make clear that "judicial review is not an appeal from a decision, but a review of the manner in which the decision was made." (At P 155 para C The main basis for the learned Judge's grant of the judicial review prayers was that the Board was wrong to find that there was technological change when no sufficient evidence of the same had been availed by the appellant. The learned Judge put it this way at paragraph 31 of his judgment.

> " 31. In my view, the absence of such crucial evidence raises a valid question on the reasonableness or fairness of the decision. It is my view that there must be clear and cogent evidence in support of the technological change. The

evidence must be substantial, real, and tangible and significant or large and having substance."

He pursued the theme of sufficiency of evidence in paragraphs 36 and 41 as follows;

> " 36. To me, it is not sufficient for the first interested party to seek refuge in the termination clause in the tender award documents. The core ground for the termination was stated as technological change. The termination clause in the tender award documents cannot exonerate the first interested party from providing the Board with sufficient evidence to satisfy the existence of technology change."
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> 41. In order to discharge its burden under section 63 of the *Act*, the interested party must provide evidence that there is real and substantial technological change. The proper approach to the question whether a party invoking the said provision has discharged its burden under section 63 is therefore to ask whether such a party has put forward sufficient evidence for a court to conclude that, on the probabilities, the technological change cited is of such a nature that it renders it imprudent for the contract to proceed on the original terms and the nature of the change and how is substantially affects the contract ought to be clearly stated. To me, that was the intention of the draftsman and the scheme and architecture of the Act so as to prevent or protect innocent bidders form being unfairly disadvantaged or deprived of the tender on flimsy grounds."

22. It seems obvious that the learned Judge was here pre-occupied with the sufficiency of the evidence of technological change. Words such as the said evidence being „clear?, „cogent?, „substantial?, „real?, „tangible?, „significant?, and the like, can only mean that the learned Judge was embarking on an exercise of making value judgments regarding the evidence, weighing it and minutely examining or interrogating it to determine whether it reached a certain standard of acceptance. With respect, that approach is far removed from process, the purpose and province of judicial review, and is a delving into the merits of the decision as one would do were he dealing with an appeal.

23. In so doing, the learned Judge fell into error. Our holding on this point is consistent with a long line of decision of this Court including, quite recently, in *OJSC Power Machines Limited, Transcentrury Limited & Civicon Limited (consortium) Vs. Public Procurement Administrative Review Board & 2 Others* [2017] eKLR where it was stated that;

> " Save for a limited scope, which we shall return to later, the court, considering a judicial review application, must never consider its role as appellate court and must avoid any temptation to go into the substance of the impugned decision itself or to ask questions, whether there was or there was no sufficient evidence to support the decision of the public body concerned. It is not for the court or individual judges to substitute their opinion for that of the public body constituted by law to decide the matter in question. See *Republic v Kenya Revenue Authority ex parte Yaya Towers Limited* (2008) Misc. Civil Appl. No. 374 of 2006. In judicial review proceedings, the mere fact that the public body's decision was based on insufficient evidence, or on misapplication of evidence, cannot be a ground granting judicial review remedies. Whether that decision was right or not, the affected party ought to challenge it on appeal. In reaching its determination, it must, however, be recognized that a tribunal or statutory body or authority has jurisdiction to err and the mere fact that in the course of its inquiry it errs

on the merits is not a ground for quashing the decision by way of judicial review as opposed to an appeal. It is only an appellate tribunal which is empowered and in fact enjoined in cases of the first appeal to re-evaluate the evidence presented at the first instance and arrive at its own decision on facts. Whereas a decision may properly be overturned on an appeal, it does not necessarily qualify as a candidate for juridical review. See *East African Railways Corp. v Anthony Sefu Far-Es-Salaam* (1973) EA 327."

See also *Biren Amritlal Shah & Anor v Republic & 3 Others* [2013] eKLR.

24. The learned Judge would only have been entitled to interfere were it the case that there was absolutely no evidence before the Board that would have justified the upholding of the appellant's termination of the tender. In other words, the case should have been so plainly and self-evidently devoid of evidence or basis for termination, as to render upholding of the termination an inexplicable act of capricious irrationality defiant of all logic and reason. It should have been such a decision that no reasonable tribunal, properly directing itself on the case would have arrived at. That is the Wednesbury unreasonableness that would invalidate a tribunal's decision by way of certiorari. That principle was well- enunciated by the English Court of Appeal in *Associated Provincial Picture Houses Ltd vs. Wednesbury Corporation* [1948] 1 KB 223.

25. In the lead judgment, with which Somerville LJ and Singleton J, agreed, Lord Greene M.R. treated of the subject as follows;

> " It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word „unreasonable? in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting „unreasonably?. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J in *Short v. Poole Corporation* [1926] Ch 66, 90, 91 gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another."

26. The Master of the Rolls was quite comphatic that the ultimate arbiter of what is and is not reasonable cannot be the court but the body, authority or tribunal exercising statutory powers. This is because that authority (in this case the Board) is entrusted by the Parliament with the decision on a matter which the knowledge and experience of the authority (the Board) can best be trusted to deal with it. The courts can only interfere if the decision of the authority is so unreasonable that no reasonable authority could ever come to it. He then pointed out, and we readily agree, that "to prove a case of that kind would requires 'something overwhelming'. The body in question needs to have acted in a manner so far removed from which good sense and logic dictate and demand as to amount to an aberration requiring judicial intervention and correction.

27. The learned Judge in the instant case saw in the absence of evidence meeting the standard the Board had set in its earlier decision of *Avante International INC vs. IEBC* (Pboard Review No. 19 of 2017) the something overwhelming to warrant his interference. With respect, the learned Judge appears to have hoisted his own sense of reasonable or unreasonable above that of the Board. It is to be noted that

the Board did not here act in ignorance or disregard of its own decision in Avante. It is plain from the Board's decision that it took into consideration the nature and weight or sufficiency of the opinion on technological change that the appellant acted upon and which had been challenged as insufficient. The Board made the categorical finding that the termination was based on the "General observations" of the appellant's evaluation Committee members who had the necessary technical qualifications for technical evaluation of the tender, they were selected on the basis of those technical qualifications and that the non-inclusion of the new technology in the tender document prejudiced some bidders who had the technology but did not incorporate it. This is because it was not required and that therefore it would be improper to allow some bidders to benefit from a criterion which was not part of the tender documents, to the exclusion of others.

28. Far from being unreasonable in the Wednesbury sense, we find that the Board's reasoning exhibited a fidelity to good sense and sensibility. It was founded on rational considerations including the wider public interest such as follows;

> " The Board has considered the extent of the new technology and finds that the same will provide several advantages to the Procuring Entity as it would eliminate the possibility of interference with evidence through human intervention and also provide an avenue for a quick transmission of test results to various agencies thereby playing a crucial role in maintaining the quality of the petroleum products made available to the public by completely or substantially reducing cases of adulteration of petroleum products."

29. We think that on a proper consideration of the record, the learned Judge's conclusions that the Board's decision was tainted by irrationality or unreasonableness was also erroneous, is unsupportable and is for reversal. He ought to have shown greater deference to the Board's decision and been more circumspect about interfering with its decision bearing in mind the specialization of the Board as was recognized by this Court in *Kenya Pipeline Ltd Vs. Hyosung Ebara Company LTD* [2012] eKLR;

30. The Review Board is a specialized statutory tribunal established to deal with all complains of breach of duty by the procuring entity. By Reg. 89, it has power to engage an expert to assist in the proceedings in which it feels that it lacks the necessary experience. S. 98 of the *Act* confers very wide powers on the Review Board. It is clear from the nature of powers given to the Review Board including annulling, anything done by the procurement entity and substituting its decision for that of the procuring entity that the administrative review envisaged by the *Act* is indeed an appeal. From its nature the Review Board is obviously better equipped than the High Court to handle disputes relating to breach of duty by procurement entity. It follows that its decision in matters within its jurisdiction should not be lightly interfered with."

31. We have said enough to show that this appeal is for granting but there is yet one more reason. In his final order, the learned Judge granted mandamus directing the appellant to proceed with the tender and effect the recommendation that the tender/contract be awarded to SGS. That order was wholly underserved for a number of reasons. We have already indicated that there was nothing perverse or outrageous about the Board?s decision upholding the appellant?s termination of the award, the said termination being statutorily recognized in the *Act* and also expressly stated in the tender documents.

32. Further, and more critical, the appellant did not bear a statutory duty to award the tender to SGS or to any other entity to attract the compulsive force of mandamus. The grant or award of such tenders and contracts are matters that lie within its discretion. Moreover, the recommendation of the tender committee was just that; a recommendation, which did not divest the accounting officer of the appellant of the authority to apply his mind and either accept or reject the recommendation for good cause. To command the award therefore denied the appellant's accounting officer of a right and

discretion flowing from statute and the order was therefore a classic case of the court, in the guise of preventing abuse of power itself engaging in a conspicuous abuse of its powers by usurping those tht belong to other entities. See *Wanyoike vs. Medical Practictioners and Dentists Board & anor* [2017] eKLR; *R vs. Kenya Revenue Authority Ex Parte Yaya Towers Limited* [2008] eKLR.

33. We need only cite this passage from this Court's decision in *Makupa Transit Shade Limited & Anor vs. Kenya Ports Authority & Anor* [2015] eKLR to show that the order of mandamus as issued by the court below was wholly misconceived;

> "What of the Order of mandamus" The general rule is that the issuance of mandamus is limited to where there is specific legal remedy for enforcing it or the alternative legal remedy is less convenient, beneficial and effectual. See *Halsbury Laws of England* 4th ed. Vol. 1. Para 89. Its scope against public bodies is limited to performance of a public duty where statute imposes a clear and unqualified duty to do that act. See *Manyasi v. Gicheru & 3 Others*, [2009] KLR 687. However if the duty is discretionary as to its implementation, then mandamus cannot dictate the specific way the decision will be exercised. See *Halsbury's Law of England*, 4th Ed Vol. 1 in which it is stated that "where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way." The 1st respondent had discretion to refuse or grant permission for the construction of the bridge or even to lease out the plot, this the court cannot dictate upon by issuing the orders sought. The applicant in addition has to show that it has a legal right to the performance of the legal duty by the party against whom it issues."

34. With respect, that reasoning applies mutatis mutandis to this case with the same result of invalidating the mandamus issued by the learned Judge.

35. This appeal ultimately succeeds and is allowed with costs. The orders of the learned Judge are set aside in entirety and substituted with an order dismissing the substantive motion with costs.

36. The appellant shall also have the costs of this appeal.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF MAY, 2018.

R. N. NAMBUYE

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JUDGE OF APPEAL

W. OUKO

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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