REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: W. KARANJA, KOOME & G.B.M KARIUKI, JJ.A)

CIVIL APPEAL NO. 69 OF 2015

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION.....APPELLANT

AND

HORSEBRIDGE NETWORKS SYSTEMS (EA) LTD..... 1ST RESPONDENT

CENTRAL BANK OF KENYA....……..…….....…. 2ND RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi (Korir, J.) dated 25th September, 2014

in

JR Misc. Appl. No. 87 of 2014)

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JUDGMENT OF THE COURT

[1] This appeal is against the decision of the trial court in judicial review proceedings wherein Horsebridge Network Systems (EA) Ltd, (1st respondent) sought orders in the nature of mandamus, compelling the Central Bank of Kenya (2nd respondent) to execute a contract in respect of a tender for supply and commissioning of an integrated system (ISMS) as directed by the Public Procurement Administrative Review Board on the 4th January 2013.

[2] The genesis of this dispute that escalated to the present appeal can be traced to the tender made on the 14th May 2012 by the 2nd respondent inviting bids for the supply, installation and commissioning of an ISMS, vide tender no. CBK/46/2012/2012 (herein after referred to as the tender). In response thereto, only six entities submitted their bids within the requisite time frame. The said bids were opened on 3rd July, 2012 and were subjected to an evaluation by the 2nd respondent's Evaluation Committee. The 1st respondent was the lowest evaluated bidder and the Evaluation Committee recommended that the tender be awarded to it.

[3] When considering the said recommendation, the Tender Committee was convinced that two bids from Indra Limited and Engineered System Solutions were disqualified for minor deviations. For that reason, the Tender Committee directed the Evaluation Committee to re-evaluate the bids which it did, and once again, the 1st respondent emerged as the lowest evaluated bidder and the Evaluation Committee recommended that it be awarded the tender. However, before the outcome of the evaluation and/or the decision of the Tender Committee on the process, it was disclosed to the bidders or it became public knowledge, that the 1st

respondent applied for a review by the Public Procurement Administrative Review Board (herein after referred to as the Review Board) being Review No. 51 of 2012 (hereinafter referred to as the 1st review).

[4] In the said review the 1st respondent prayed for:

> ***The decision of the Tender Committee rejecting the recommendations of Evaluation Committee and directing the evaluation of bids which did not satisfy the mandatory requirements to be set aside.***
>
> ***Directions that the Tender Committee do adopt the decision of the Evaluation Committee and award the tender.***

It is unclear how the 1st respondent came across the foregoing information which at that stage was considered confidential. Be that as it may, the Review Board in its decision dated 6th November, 2012 directed that-

> ***"The procuring entity (the 2nd respondent herein) through its Tender Committee to consider the recommendation of the Evaluation Committee and proceed to finalize the award in accordance with the Act and the Regulations within the next thirty (30) days from the date of this decision."***

[5] Subsequently the Tender Committee met on 29th November, 2012 to deliberate on the above mentioned directions. It is then that it occurred to the Tender Committee that it had previously decided to terminate the entire tender process in a meeting held on 26th September, 2012. The Tender Committee resolved to implement the said decision and communicated the same to all the bidders in a letter dated 30th November, 2012. Disgruntled with the decision taken, the 1st respondent once again approached the Procurement Review Board vide Review Cause No. 65 of 2012 (herein after referred to as the 2nd review) wherein it sought the following orders:-

> ***The decision of the procuring entity be declared illegal, unlawful and a nullity in law and be set aside.***
>
> ***The procuring entity be directed to award the contract to the applicant.***

The Review Board by its decision dated 4th January, 2013 allowed the prayers sought in the terms set out herein below;

> ***The decision of the procuring entity made on 29th November, 2012 and communicated under the letter dated 30th November, 2012 is hereby set aside and lieu thereof the Board substitutes the same with the an order that this tender be and is hereby awarded to the lowest evaluated bidder, Horsebridge Networks Systems (EA) Ltd., the applicant herein.***

[6] In compliance with the Procurement Review Board's decision, the 2nd respondent awarded the tender to the 1st respondent on 24th February, 2013. Thereafter, on 8th March, 2013, pursuant to the terms of the tender, the 1st respondent provided a performance guarantee in favour of the 2nd respondent. Negotiations on the terms of the contract commenced on 20th March, 2013 and were concluded by the

respondents executing the negotiation report on 3rd April, 2013. All that remained was the execution of the formal contract which was agreed would be done three days later. It seemed as if the whole process would have sailed smoothly from thereon; however the formal contract was not executed within the aforementioned time frame. Upon inquiring, the 1st respondent was informed by the 2nd respondent that the whole process had been halted due to investigations that were being carried out by Ethics and Anti-Corruption Commission (appellant) over the entire tendering process.

[7] Believing that the 2nd respondent had no reason for halting the process, the 1st respondent this time approached the High Court by instituting judicial review proceedings and in a nutshell sought to enforce the Procurement Review Board's decision of 4th January, 2013. In particular, it sought *inter alia:*

> ***An order of mandamus compelling the 2nd respondent to engage the 1st respondent so as to conclude the agreement in respect of the tender as directed by the Review Board on 4th January, 2013.***
>
> ***An order of mandamus compelling the 2nd respondent to execute the agreement in respect of the tender as directed by the Review Board on 4th January, 2013.***

[8] According to the 1st respondent, since the 2nd respondent did not prefer an appeal or file judicial review proceedings to set aside the Procurement Review Board's decision, it was legally obliged to seek to enforce the orders made in its favour. Failure to comply with the orders of the Review Board was a flagrant breach of the mandate of the 2nd respondent and also of the provisions of the ***Public Procurement and Disposal Act*** (herein after referred to as ***PPDA)***. As a result, the 2nd respondent's conduct was not only *ultra vires* but also unreasonable.

[9] In reply, the 2nd respondent's position was that its hands were tied and it could not execute the contract; this was because of investigations that were initiated by the appellant on the propriety of the tendering process. In addition, there were allegations of misconduct against the then Governor of the Central Bank, who was the person authorized to execute the said contract on behalf of the 2nd respondent. The said Governor had since filed a constitutional petition being H.C Petition No. 73 of 2014 to block his own prosecution; and that petition was pending before the court. The 2nd respondent also contended that in as much as there was no court order stopping the execution or signing of the contract, in the prevailing circumstances executing the contract would have gone against public interest.

The appellant, who was joined in the proceedings as an interested party, opposed the 1st respondent's application. The basis of its opposition was that it conducted investigations over the entire tendering process following intelligence reports which revealed that the tender process was tainted. The said investigations showed that the 1st respondent had relied on confidential information in filing the 1st review that went before the Procurement Review Board.

[10] In fact, investigations were launched as to whether the said 1st respondent had committed a criminal offence by obtaining such confidential information through unorthodox means. The investigations also revealed some misconduct on the part of the then Governor of the Central Bank with regard to the tender in question in that, he had failed to bring to the Review Board's attention the Tender Committee's decision to terminate the tender during the 1st review. He had also ignored the advice of an in-house counsel who had advised him to prefer an appeal against the Review Board's decision. Moreover, the Tender Committee having terminated the tender process, the jurisdiction of the Review Board to entertain the review before it was ousted by virtue of ***Section 36(6)*** of the ***PPDA*** was non existence. Consequently, the decision it rendered on 4th January, 2013 was a nullity. As such, an order of mandamus could not issue to enforce an illegality according to the appellant.

[11] The trial court in its judgment dated 25th September, 2014 agreed with the 1st respondent and issued the orders sought. The learned Judge directed the 2nd respondent to execute the contract within 30 days of

the said decision. It is that decision that has provoked the instant appeal which is predicated on some 16 grounds. In order to avoid obvious repetition, we have summarized them as follows;- that the learned Judge erred in law and fact in-

Failing to appreciate the implication of the Tender Committee's decision to terminate the tender.

Failing to find that the 2nd respondent was entitled in law to terminate any tender before the award is made.

Finding that the directions issued by the Review Board were statutory commands which ought to have been obeyed by the 2nd respondent.

Failing to find that the Review Board had erred in not ordering an in depth inquiry as to how the 1st respondent got access to the 2nd respondent's confidential information.

Granting the prerogative orders without taking into account the 1st respondent's conduct and the investigations being conducted by the appellant.

Directing the contract to be executed within 30 days yet the Evaluation Committee's recommendations to award the tender to the 1st respondent was subject to a comprehensive due diligence being undertaken

[12] At the hearing of the appeal, Mr. D.K. Ruto appeared for the appellant while Ms. Wangari Kamau holding brief for Mr. Wandabwa and Ms. D. Areri holding brief for Mr. Waweru Gatonye appeared for the 1st and 2nd respondents respectively. Counsel relied on the written submissions which were on record and made no oral highlights urging us to consider the respective submissions and render our judgment. The appellant submitted that the tender proceedings were terminated on 26th September, 2012 way before the 1st review was instituted by the 1st respondent, thus the Review Board had no jurisdiction to consider the 1st and 2nd review. In the appellant's view, the Review Board failed to appreciate that there was nothing to review in light of the termination of the tender process. Towards this end, the appellant cited ***Section 36(6)*** of the ***PPDA*** which provides in part –

"A termination under this section shall not be reviewed by the Review Board or a court."

Section 93(2) (b) of the ***PPDA*** was also cited which provides;

"93 (2) The following matters shall not be subject to the review under subsection (1)-

a) ……

b) a decision by the procuring entity under section 36 to reject all tenders, proposals or quotations;.."

[13] The learned Judge was also faulted by the appellant for failing to appreciate that the said decisions were void hence capable of being set aside. In buttressing that line of argument, reliance was placed on the sentiments of Lord Peace in

Anisminic Limited vs. Foreign Compensation Commission [1969] 2 A.C 147 that:

"Where a decision is found in excess of or without jurisdiction, there is strictly no need to quash it. Since it is a nullity, before issuing a writ of prohibition or mandamus."

The appellant also relied ***in Macfoy vs. United Africa Company Ltd. [1961] 3 ALL E.R 1169*** wherein Lord Denning stated,

"If an act is void, then it is in law a nullity. It is not only bad, but it is incurably bad. There is no need for an order of the court to be set aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

[14] Further, the appellant challenged the findings by the Review Board that termed the minutes of the 26th September, 2012 by the Tender Committee as fake and manufactured. According to them, this was done by the Review Board so as to accord itself jurisdiction to hear the review. As far as it was concerned, the Review Board had no jurisdiction to review the decision of the Tender Committees that had terminated the tender; they contended a decision by Tender Committee was protected under ***Section 36 (6)*** of the ***PPDA***. With regard to the finality of the Review Board's decision as envisioned under ***Section 100 (1)*** of the ***PPDA***, the appellant argued that the same could only apply where such decisions were *intra vires* and not where they are *ultra vires*, such as in this case. The appellant went on to argue that the Review Board erred in entertaining the 1st review despite acknowledging that it was based on confidential information when it was common ground the information was irregularly obtained by the 1st respondent contrary to ***Section 38 (1)*** of the ***PPDA***; thus the Review Board should have rejected that information and found fault with the 1st respondent.

]15] Lastly the appellant submitted that in view of the above flaws and irregularities that were cited especially as against the 1st respondent who irregularly obtained confidential information, the judge should have found the entire tendering process was marred with irregularities and that there was collusion between the 1st respondent and some officers of the 2nd respondent. All in all, the learned Judge did not properly exercise his discretion taking the foregoing into account. Counsel for the appellant urged us to allow the appeal.

[16] On its part, and in its written submissions the 1st respondent referred to ***Section 100*** of the ***PPDA***, and contended that since there was no appeal preferred against the Review Board's decisions, the trial court could not entertain complaints relating to the said decisions. In any event, even if the trial court found that it had jurisdiction to hear the appellant, it could not delve into the merits of the directions issued by the Review Board, but only consider whether the Review Board acted illegally, *ultra vires* or unprocedurally in reaching its decision. On that point, reference was made to the decision in ***Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 Others [2012] eKLR*** wherein it was observed:

"In conclusion, it is manifest that the application for Judicial Review was not well founded. The 1st respondent did not establish that the Review Board had acted without jurisdiction or in breach of the rules of natural justice or that the decision was irrational. The Judicial Review was not confined to the decision making process but rather with the correctness of the decision on matters of both law and fact. So long as the proceedings of the Review Board were regular and it had jurisdiction to adjudicate upon the matters raised in the Request for Review, it was as much entitled to decide those matters wrongly as it was to decide them rightly."

[17] As per the 1st respondent, ***Section 100*** of the ***PPDA*** was couched in mandatory terms, at least as far as the finality of the Review Board's decision is concerned. Therefore, where there was no appeal against the Review Board's decision, as in this case, its decision amounted to a statutory command. The 1st respondent also maintained that the Review Board considered the issue of the confidential information, and made a determination which is not for consideration in a judicial review matter. Similarly, whether or not the Review Board erred in directing that the tender be awarded to the 1st respondent went to merits of the said decision and was not amenable to judicial review remedies but was a matter for appeal. In the 1st respondent's opinion, the appellant had failed to establish that the trial court had not exercised its discretion properly. We were urged to disallow the appeal which, in any event, has been overtaken by events the contract having been executed.

[18] In opposing the appeal, the 2nd respondent submitted that the learned Judge properly exercised his discretion in granting the orders sought. On its part, the Review Board had jurisdiction to entertain the reviews before it. The 2nd

respondent claimed that the provisions of ***Section 36*** of the ***PPDA*** ought to be constructed strictly. In supporting this line of argument, they referred to the case of ***Animistic vs. Foreign Compensation Commission (supra)*** where the court stated as follows;-

> ***"It is a well established principle that a provision ousting the ordinary jurisdiction of the court ought to be construed strictly, meaning, I think, that, if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the court."***

[19] The 2nd respondent's stand is that the Review Board made a strict interpretation of the aforesaid provisions of the law in holding that that termination of the tender could only arise where the same had been communicated to the parties. In this case, the 2nd respondent had not communicated the same to the bidders hence the Review Board correctly found the tender had not been terminated. The 2nd respondent drew guidance from the case of ***Republic vs. Public Procurement Administrative Review Board & 2 Others exparte Selex Sistemi intergrati [2008] eKLR*** wherein the High Court stated,

> ***"It is apparent to me that the more natural interpretation is that the jurisdiction of the 1st respondent and this court is ousted only when termination unilaterally by a procuring entity is before Tender award and communicated to bidders."***

To the 2nd respondent, the appellant's contention that the learned Judge ought to have examined the Review Board's decision on the termination of the tender was absurd. The same amounted to calling upon the learned Judge to interrogate the merits of the said decision on behalf of the parties which was outside the purview of judicial review. The 2nd respondent maintained that ***Section 100*** of the ***PPDA*** was not unconstitutional in as far as it demarcated matters that were to be handled through the Review Board which were outside the jurisdiction of the court; it was clear from the marginal notes that the Act envisioned recourse from the decisions of the Review Board by setting time frames within which certain things should be done. The 2nd respondent also conceded that the instant appeal was overtaken by events since the contract in question was executed.

[20] We have considered the submissions of the parties, the record of appeal and the memorandum of appeal. In our view, the instant appeal turns on whether the learned Judge erred in exercising his judicial discretion in favour of the 1strespondent. In determining this issue, it is imperative to consider the scope of the trial court's jurisdiction in judicial review proceedings. It is trite that judicial review orders are discretionary in nature and whenever this Court is called upon to interfere with the exercise of that judicial discretion the policy is not to interfere with the discretion of the trial Judge unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or it is manifest from the case as a whole that the Judge was clearly wrong in exercising discretion and acted outside the legal parameters. These principles are well articulated in many decisions of this Court including in the case of: ***Coffee Board of Kenya vs. Thika Coffee Mills Limited & 2 others [2014] eKLR***.

The function of the High Court sitting in judicial review proceedings is not to determine issues as if it is an appeal court nor is it to consider the merits of the decision by a public body but rather it is to undertake a consideration of the procedure and processes adopted to arrive at the decision so as to rule out any traits of allegations of procedural malpractices, lack of fair hearing, unreasonableness or other illegalities. This position is demonstrated in the holding in ***Ransa Company Ltd vs. Manca Francesco & 2 others [2015] eKLR*** where this Court expressed itself thus:-

> ***"As we all appreciate, a court sitting on Judicial Review exercises a sui generis jurisdiction which is very restrictive indeed, in the sense that it principally challenges the process, and other technical issues, like excessive jurisdiction, rather than the merits of the case. It is also very***

restrictive in the nature of the remedies or reliefs available to the parties."

Lord Green M.R. while considering the role of judicial review in the often cited case of ***Associated Provincial Picture House vs. Wednesbury Corporation [1948] Vol. 1 KB pg 223*** remarked as follows:

> ***"Decisions of person or bodies which perform public functions will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the Court concludes that the decision is such that no such person or body properly directing itself on a relevant law and acting reasonably could have reached that decision."***

More recently this Court in ***Captain (Rtd) Charles Masinde vs. Augustine Juma 8 others [2016] eKLR*** aptly held that,

> ***"It is therefore important to remember in every case that the purpose of seeking judicial review remedies is to ensure that the individual is given fair treatment by the authority to which he has been subjected. It is not part of the court's mandate to substitute the opinion of the judge for that of the authority constituted by law to decide the matter in question."***

[21] In this case, the remedy of judicial review is questioned on the basis that the 1st and 2nd respondents acted *ultra vires* and unreasonably, by failing to comply with the directions of the Review Board dated 4th January, 2013. It is not in dispute that the 2nd respondent had failed or neglected to execute the formal contract as directed by the Review Board on the ground that there were pending investigations by the appellant regarding the tender process. Precisely what fell for consideration by the trial Judge in the judicial application was whether the 2nd respondent's decision and/or conduct of failing or neglecting to comply with the Review Board's direction was *ultra vires* and unreasonable.

[22] As recapitulated above, what was challenged was the 2nd decision by the Review Board, and all the High Court could consider in as far as the decision was concerned, in our view, was whether the right procedure was followed in arriving at that decision. ***Section 93 (1)*** of the ***PPDA*** empowers a party who is aggrieved by a decision and/or conduct of a procurement entity which it deems in breach of the

entity's duty under the Act to request for review for such decision and/or conduct as the case may be. It is on that basis that the 1st respondent filed the 2nd review. As per the provisions of ***Section 98,*** the Review Board may after hearing a review application do any of the following;-

a) annul anything the procuring entity has done in the procurement proceedings, including annulling the procurement proceedings in their entirety;

b) give directions to the procuring entity with respect to anything to be done or redone in the procurement proceedings;

c) substitute the decision of the Review Board for any decision of the procuring entity in the procurement proceedings; and

d) Order the payment of costs as between parties to the review.

[23] The directions issued by the Review Board were in line with the powers conferred upon it by the above mentioned provisions of the law. As regards the issues relating to whether the Review Board erred in finding the tender proceedings had not been terminated or whether the entire decision as a whole was correct could only be examined in an appeal. In this regard, we are not persuaded that the court erred in declining to delve into the merits of the decision by the Review Board which could have been done by way of an appeal. ***Section 100*** of the ***PPDA*** is quite clear on the finality of the Review Board's decision which was not appealed against or set aside on judicial review. It provides in part as follows: -

"Section 100:

> ***1) A decision made by the Review Board shall, be final and binding on the parties unless judicial review thereof commences within fourteen days from the date of the Review Board's decision.***
>
> ***2) Any party to the review aggrieved by the decision of the Review Board may appeal to the High Court, and the decision of the High Court shall be final.***

In light of **section 100** (supra), since no appeal was filed against the Review Board's decision dated 4th January, 2013 the decision was binding upon the 2nd respondent, and the learned trial Judge was spot on when he declined to interfere with the merit of the decision of the Review Tribunal.

[24] Finally, on whether the learned Judge properly exercised his discretion by issuing the order of mandamus which was at the core of this dispute, we have considered what was stated by this Court in ***National Social Security Fund Board Trustees & 2 others vs. Central Organization Of Trade Unions (K) [2015] eKLR***

while discussing the nature of an order of mandamus. This Court observed;-

> ***"It must also be remembered that an order of mandamus compels a public body or an inferior tribunal to which it is addressed to act in accordance with its duty. The applicant for an order of mandamus must have a legal right to the performance of a legal duty.***

This Court further restated in ***Makupa Transit Shade Limited & another vs. Kenya Ports Authority & another [2015] eKLR*** that,

> "***What of the Order for mandamus? The general rule is that the issuance of mandamus is limited to where there is specific legal right and there is no 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."***

[25] We have examined the overarching objectives of the ***PPDA*** as outlined in ***Section 2***, of the Act. The Act was established to, *inter alia*, provide for procedures for procurement by public entities. To us the 2nd respondent is a public entity that is described by the Act, and it therefore had a statutory obligation to comply with the decision or directions given by the Review Board. The appellant or 2nd respondent could not conjure reasons for circumventing the decision of the Review Board, it could only appeal to the High Court or take out judicial review proceedings against the decision of the Review Board.

[26] We think we have said enough to demonstrate that the learned judge appreciated the nature of the judicial review proceedings before him and the role of the court in the circumstances. He also properly exercised his discretion by upholding the decision of the Review Board. Consequently, we find no justification for interfering with the decision.

The appeal lacks merit and we dismiss it with no order as to costs as we discern from the submissions that the contract was executed between the 1st and 2nd respondents, and hence we would wish to bring this matter to rest.

Dated and delivered at Nairobi this 10th day of March, 2017.

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

G.B.M. KARIUKI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR