



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, MUSINGA & GATEMBU, JJ.A.)

CIVIL APPEAL NO. 170 OF 2015

BETWEEN

HOGGERS LIMITEDAPPELLANT

VERSUS

PUBLIC PROCUREMENT ADMINISTRATIVE BOARD1ST RESPONDENT

SUZAN GENERAL TRADING JLT 2ND RESPONDENT

KENYA AIRPORTS AUTHORITY3RD RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Odunga, J.) delivered on 18th May, 2015

in

Misc. Application No. 477 of 2014)

JUDGMENT OF THE COURT

1. Sometimes in January 2014 the 3rd respondent advertised in the print media a tender for development and management of an international brand fast food outlet at Jomo Kenyatta Airport, Nairobi. The appellant and the 2nd respondent were among those who submitted bid documents. The bids were subjected to a preliminary, technical and financial evaluation and the tender was awarded to the appellant.
2. Being aggrieved by the 3rd respondent's decision to award the said tender to the appellant, the 2nd respondent filed an appeal to the 1st respondent vide **Review No. 16 of 6th May, 2014**. The 1st respondent nullified the award of the tender and directed a re-evaluation of the three most competitive bidders on both technical and financial terms in accordance with the criteria set out in the tender documents.
3. Upon re-evaluation the appellant emerged the winner but the 2nd respondent appealed to the 1st respondent. The request for review by the 2nd respondent was made on 19th June, 2014 which was within the period prescribed by **section 93(1)** of the **Public Procurement and Disposal Act, 2005** (hereinafter referred to as "**the PPD Act**").

4. Subsequent to the filing of the request for review, the 2nd respondent filed supplementary grounds of review on 3rd July, 2014, which the appellant contended was outside the seven days period stipulated under

Regulation 73(2) (c) under the PPD Act.

5. The appellant and the 3rd respondent objected to the supplementary grounds of review and urged the 1st respondent to reject the same. The 1st respondent granted the request and struck out the supplementary grounds and dismissed the request for review. It further directed that the procurement process proceeds to its logical conclusion.

6. The 2nd respondent filed a judicial review application before the High Court, arguing that the dismissal of the request for review was in violation of the rules of natural justice as it was not afforded a chance to be heard before the supplementary grounds were struck out.

7. The High Court agreed with the 2nd respondent and quashed the 1st respondent's decision and further directed that the request for review be heard *de novo*.

8. Upon re-hearing the request for review; the 1st respondent held that the supplementary grounds were in fact not new or fresh grounds and neither did they seek to introduce a new cause of action as had been alleged by the appellant. The 1st respondent further observed that the grounds were premised on issues already contained in the initial grounds that had been filed in time by the 2nd respondent. Subsequently, the tender was awarded to the 2nd respondent.

9. The appellant was dissatisfied with that decision and filed judicial review proceedings in the High Court seeking an order to quash the 1st respondent's decision allowing the 2nd respondent's request for review and award of the tender.

10. The High Court (Odunga, J.) dismissed the application. In his judgment, the learned judge observed that since the 1st respondent had held that the supplementary grounds were not new grounds, the court could only interfere with that finding if it was satisfied that the finding was incorrect. It could not however do so as that would amount to a merit determination of the issue.

11. Citing this Court's decision in **Municipal Council of Mombasa v Republic and Umoja Consultants Limited, Civil Appeal No. 185 of 2001**, the learned judge reiterated that judicial review is concerned with the decision making process and not with the merits of the decision.

12. As to whether the supplementary grounds of review had any adverse effect to the appellant's case, the learned judge stated:

“Even if the court was to find that the supplementary grounds ought not to have been entertained on the ground that they were filed out of time, the finding by the respondent that the supplementary grounds for review were neither new/fresh grounds nor did they seek to introduce new cause of action would not take the applicant's case any further. If the supplementary grounds did not introduce any fresh matters, it would follow that even without the supplementary grounds the respondent would have arrived at the same decision all things being equal. Accordingly, it would serve no useful purpose to quash the decision merely on that score unless the court was to proceed and find that the supplementary grounds raised totally fresh matters not covered in the initial grounds.”

13. Being aggrieved by the High Court's decision, the appellant preferred an appeal to this Court. In its memorandum of appeal, the appellant argued that the learned judge erred in law and in fact in failing to appreciate that the issue whether the supplementary grounds for review were admissible or not was a jurisdictional question governed by **Regulation 73** of the **PPD Regulations (2006)** and not a merit

question. It further contended that the learned judge erred in law and in fact in failing to appreciate that the repealed decision was grossly unreasonable; that the appellant had made sufficient basis for exercise of judicial discretion in its favour and that the learned judge erred in failing to sufficiently appreciate the appellant's submissions.

14. When the appeal came up for hearing all the parties relied on their written submissions which they briefly highlighted. **Mr. Ng'ang'a Mbugua**, learned counsel for the appellant, submitted that admissibility of the supplementary grounds of review was a jurisdictional question and not a merit one as held by the learned judge. Consequently, an issue of jurisdiction can be contested by way of judicial review. Counsel cited this Court's decision in **Kenya National Examinations Council v Republic exparte Geoffrey Gathenji Njoroge and 9 Others [1997] eKLR**.

15. Counsel further submitted that the 1st respondent had no jurisdiction to extend the prescribed period for seeking administrative review as prescribed under **section 93** of the **PPD Act** and **Regulation 73** thereof. In support of that submission he cited **Republic v Public Procurement Administrative Review Board and 2 Others [2015] eKLR** where the court held:

“The Board has no jurisdiction to hear anything filed outside 14 days. In fact, the time for filing an application for review was reduced to seven days by an amendment introduced by Regulation 20 of the Public Procurement and Disposal (Amendment) Regulations, 2013 LN No. 106 of 2013.”

16. Mr. Mbugua further submitted that the learned judge had, in an earlier decision, pronounced himself the importance of the supplementary grounds of review, and having done so, it was unreasonable for him to trivialize the importance of the same.

17. Counsel submitted that it was grossly unreasonable for the 1st respondent to state in its decision that the supplementary grounds were not new grounds and proceed to admit them. He faulted the learned judge for failing to find that the 1st respondent's holding was grossly unreasonable. He cited **Associated Provincial Picture House Limited v Wednesbury Corporation ALL ER [1947] 223** where the court considered the standard of unreasonableness that will expose the decision of an administrative body to review by the court. Counsel concluded by stating that the learned judge did not exercise his discretion judiciously.

18. **Mr. Bitta** for the 1st respondent, **Mr. Ngaca** for the 2nd respondent and **Miss Nyambati** for the 3rd respondent, opposed the appeal. Counsel submitted, *inter alia*, that in the judicial review proceedings the court was being invited to exercise its discretion to vary the decision of the 1st respondent. The appellant had, however, not satisfied the Court that there were reasonable grounds for interfering with the learned judge's decision.

They cited this Court's decision in **Mrao Limited v First American Bank Limited and 2 Others [2003] KLR 125** where the Court held that it could only interfere with the exercise of discretion by a High Court judge if it was satisfied that; (a) the judge misdirected himself in law; or (b) the judge misapprehended the facts; or (c) the judge took account of considerations of which he should not have taken; or (d) the judge failed to take account of consideration of which he should have taken; or (e) his decision, albeit a discretionary one, was plainly wrong.

19. Counsel for the respondents further submitted that the learned judge was right in finding that the appellant was questioning the merits of the decision by the 1st respondent rather than the decision making process.

They discounted the appellant's argument that the 1st respondent's decision was unreasonable and argued that the supplementary grounds of review were rightly admitted as they were not new grounds, they only supplemented grounds that had been timeously filed.

20. Lastly, the respondents' counsel submitted that there was no dispute that on 28th January, 2016 a contract was entered into between the 2nd and 3rd respondents awarding the tender for management of the fast food outlet to the 2nd respondent. That was done in furtherance of a court order from the judicial review proceedings. That being the case, the appeal had been overtaken by events, Ms. Nyambati added.

21. In response to that submission, Mr. Ng'ang'a submitted that the execution of the contract was deliberately designed to defeat an application for stay of execution that had been filed by the appellant on 1st July, 2015 but which had not been heard and finalized. In his view, the 2nd and 3rd respondents stole a march against the appellant and that cannot be a bar to this Court allowing the appeal as doing so would quash the contract between the 2nd and 3rd respondents.

22. We have carefully perused the submissions by all the parties. The first issue for our determination is whether the admission of the supplementary grounds for review by the 1st respondent was a jurisdictional or a merit question. As earlier stated, in admitting the supplementary grounds, the 1st respondent pronounced itself as follows:

“Upon examining the original grounds and the supplementary grounds the Board finds that the supplementary grounds are not new or fresh grounds and neither do they seek to reintroduce a new cause of action as argued. The Board further observes that the grounds were premised on the issues already contained in the initial grounds filed by the applicant in its request for review. The supplementary grounds deal with issues of technical re-evaluation which issue was extensively raised in ground 3 of the original Request for Review. The Board will therefore allow the applicant to rely and will consider the said grounds having found that they are not new grounds and that they merely elaborate the original ground 3 of the grounds in the request for review.”

23. The 1st respondent further observed that **Article 152 (d)** of the **Constitution** enjoins it to do justice to all, and that justice should be done to all without undue regard to procedural technicalities.

24. Further the 1st respondent held that it has wide powers to allow amendment of pleadings under the provisions of **section 98 (a) (b) and (d)** of the **PPD Act**. It cited its decision in **Premier Medical Operation Limited v Procurement and Chain Management Consortium, Application No. 10 of 2010.**

25. Having so held, the Board considered all the oral and written submissions made by the parties including the supplementary grounds and arrived at the decision that the tender ought to have been awarded to the 2nd respondent. In the circumstances, it appears to us that the admission of the supplementary grounds of review was both a jurisdictional and merit issue. The 1st respondent was satisfied that the supplementary grounds for review were admissible, and they contributed to the reasons for the Board's decision to order that the tender be awarded to the 2nd respondent. Whether that was right or not, any party who was dissatisfied with that decision their remedy lay in an appeal but not an application for judicial review. We therefore agree with the learned judge that the appellant's application before the court was not well premised in law as the appellant was questioning not only the decision making process but also the merits of the decision.

26. We do not equally agree that the learned judge erred in law in failing to find that the impugned decision was grossly unreasonable. In **Associated Provincial Picture Limited v Wednesbury Corporation** (supra) it was held that:

“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.”

27. The 1st respondent, having considered all the material before it arrived at a decision that it was satisfied was right. The appellant did not sufficiently demonstrate that the impugned decision was arbitrary or unreasonable.

28. Lastly, it is not in dispute that on 28th January, 2016 a contract was signed between the 2nd and 3rd respondents awarding the tender to the 2nd respondent. While it is true that the appellant had filed an application before this Court seeking stay of further procurement proceedings including an order for stay of implementation of the impugned decision, no such order had been granted. It cannot therefore be said that the 2nd and 3rd respondents stole a march as against the appellant. The signing of the contract was consequential to the judicial review proceedings instituted by the 2nd respondent. There was an order directing the 3rd respondent to award the tender to the 2nd respondent and subsequently the contract. The 3rd respondent therefore acted in obedience to that order.

29. We agree with the respondents that in the circumstances aforesaid this appeal not only lacks merit but has also been overtaken by events. Consequently, it is dismissed in its entirety. The appellant shall bear the costs of the appeal as well as costs of the High Court proceedings.

Dated and Delivered at Nairobi this 23rd day of June, 2017.

H.M. OKWENGU

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIrb

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR