



Kilemi v Public Procurement Regulatory Authority Board; Meru university of Science & Technology (Interested Party) (Miscellaneous Application E139 of 2023) [2024] KEHC 4897 (KLR) (Judicial Review) (26 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4897 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW**

MISCELLANEOUS APPLICATION E139 OF 2023

J NGAAH, J

APRIL 26, 2024

BETWEEN

FRIDAH MUTHONI KILEMI APPLICANT

AND

**PUBLIC PROCUREMENT REGULATORY AUTHORITY
BOARD RESPONDENT**

AND

MERU UNIVERSITY OF SCIENCE & TECHNOLOGY INTERESTED PARTY

RULING

1. The application before court is a motion dated 11 December 2023 expressed to be brought under Article 165 (3) and 165(6) of the *Constitution*; sections 8 And 9 of the *Law Reform Act*, cap. 26; section 42 of the *Public Procurement and Asset Disposal Act*, 2015; and, Orders 51 and 53 Rule 3 of the *Civil Procedure Rules*. The prayers in the motion have been stated as follows:

- “ 1. That this Honourable Court be pleased to extend and / or enlarge the time for filing of an Application to seek leave to file judicial review application out of time against the decision of the Respondent delivered on 12th November 2023 by the Public Procurement Regulatory Board.
2. That this Honourable court be pleased to issue an order for stay of execution of the decision entered and delivered herein against the applicant on 12th November 2023 pending the hearing and determination of the intended application to file leave of a judicial reviews (sic) application out of time.



3. That the costs of the application be provided.
 4. Any other Order that is just and equitable.”
2. The application is supported by the affidavit of Fridah Muthoni Kilemi, the applicant in this application and who has identified herself as one of the directors of a company called Jofrim E.A Company Limited. The other director is the applicant’s late husband, John Mwenda Iringo who passed on in April, 2023.
 3. Ms. Kilemi has sworn that debarment proceedings against Jofrim E.A Company Limited commenced when she was on her maternity leave. She also had a toddler to take care of and two other children who were in school.

Her husband’s sickness worsened in August 2021. He eventually travelled to Dubai and India for treatment. Since the inception of the company, the applicant had been a dormant director and that she only became active upon the demise of her husband.
 4. The company business entailed contracts with the government and other agencies; most of these contracts were awarded to the company through tenders. She has since learned that most of the projects which the company undertook had not been paid for yet the company had borrowed loans to the tune of Kshs. 200,000,000/= to finance the projects.

Since the death of her husband, the applicant has been traversing between Nairobi and her rural home reaching out to the company’s debtors and also searching for the assets of the company.
 5. When the respondent made its decision against the company, the applicant was away in Meru attending to urgent family issues. Consequently, she was not able to instruct her advocates in good time to initiate proceedings against the company.
 6. Moreover, the company has been taken to court by some of its creditors and the legal expenses have added unto the applicant’s burden. This has caused her stress as a result of which she has not been able to give due attention to certain issues that deserve timeous action such as the proceedings she intends to institute against the respondent.

She is apprehensive that the respondent’s impugned decision is likely to have far reaching implications on her personally, yet she was not directly involved in the running of the company.

It is her case that the impugned decision is deficient of merit since it did not consider the various dispute resolution mechanisms embedded in the contracts.
 7. In response to the application, the respondent filed a preliminary objection on the grounds that this Honourable court lacks the jurisdiction to hear and determine the instant application and that the applicant is a stranger to the debarment proceedings sought to be reviewed.

The respondent has pleaded that the decision sought to be impeached was against Jofrim E.A Company Limited but not against the applicant and that the applicant was not even a party to the debarment proceedings out of which the impugned decision arose.

Further, the offences on which the debarment decision was premised were committed by Jofrim E.A Company Ltd and not the applicant.
 8. On jurisdiction, the respondent objects to the hearing of the applicant’s application because of section 42 of the *Public Procurement and Asset Disposal Act*, 2015 which provides that a party to the debarment may seek judicial review within fourteen days of the date of the decision sought to be challenged.



The decision having been rendered on 12 November 2023 the applicant has failed to demonstrate any exceptional circumstances for the delay in filing judicial review proceedings.

9. I have had a chance to look at the decision of the respondent which the applicant intends to challenge if leave is granted. This I have had to do, if not for anything else, to satisfy myself of who the parties in the proceedings before the 1st respondent were.
10. Meru University of Science and Technology is named in the decision as the applicant while Jofrim E.A Company Limited is the respondent. According to this decision, the proceedings were a request by Meru University of Science and Technology for debarment of the respondent because of poor contract performance and falsification of a performance security bond.
11. These proceedings, which were registered as ‘debarment application no. 02 of 2023, were undertaken under section 41 of the [Public Procurement and Asset Disposal Act](#) which provides for circumstances under which one may be debarred from participating in any procurement or asset disposal. The section reads as follows:

41. Debarment

(1) The Board shall debar a person from participating in procurement or asset disposal proceedings on the ground that the person—

- (a) has committed an offence under this Act;
- (b) has committed an offence relating to procurement under any other

Act or Law of Kenya or any other jurisdiction;

(c) has breached a contract for a procurement by a public entity including poor performance;

(d) has, in procurement or asset disposal proceedings, given false information about his or her qualifications;

(e) has refused to enter into a written contract as required under section 135 of this Act;

(f) has breached a code of ethics issued by the Authority pursuant to section 181 of this Act or the code of ethics of the relevant profession regulated by an Act of Parliament;

(g) has defaulted on his or her tax obligations;

(h) is guilty of corrupt or fraudulent practices; or

(i) is guilty of a serious violation of fair employment laws and practices.

(2) Without limiting the generality of subsection (1) the Board may debar a

person from participating in any procurement process if that person—



- (a) has breached the requirements of the tender securing declaration form in the tender documents; or
- (b) has not performed according to professionally regulated procedures.
- (3) The Authority, may also debar a person from participating in procurement or asset disposal proceedings—
 - (a) on the recommendation of a law enforcement organ with an investigative mandate;
 - (b) on grounds prescribed by the Authority in Regulations.
- (4) A debarment under this section shall be for a specified period of time of not less than three years.
- (5) The procedure for debarment shall be prescribed by Regulations.

12. At the conclusion of the proceedings, the respondent came to the conclusion that Jofrim E.A. Company Limited had failed to exonerate itself from the grounds tabled by Meru University of Science and Technology for debarment and that the request for debarment had disclosed a case for debarment of Jofrim E.A. Company Limited for poor performance of contract and falsification of a performance bond. The Board also held that in accordance with the powers bestowed upon it, the company was debarred for a minimum period of three years in accordance with section 41(4) of the Act with effect from the date of the Board’s decision.

13. If dissatisfied with the decision, Jofrim E.A. Company Limited would have been entitled to seek judicial review of the decision under section 42 of the *Public Procurement and Asset Disposal Act*. This section reads as follows:

42. Judicial Review

A party to the debarment may seek Judicial Review from the decision of the Authority to the High Court within fourteen days after the decision is made.

14. But the company did not pursue the judicial review within the prescribed time or at all.

The question this application presents is whether the applicant can, in her personal capacity or as director of Jofrim E.A. Company Limited, take up proceedings envisaged under section 42 against the respondent.

15. A plain reading of this provision of the law shows that it is a party to the debarment proceedings, and not any other person, that may institute the judicial review proceedings. In this case only Jofrim E.A. Company Limited has the locus standi to seek judicial review.

That a company is legal corporate entity independent of its shareholders is not in doubt (see *Salomon v Salomon* (1897) AC 22. As such an independent entity, a company is capable of suing and being sued in its own name. For this reason, and for the reason that the applicant was not party to the debarment proceedings, she has no locus standi to initiate judicial review proceedings against the respondent.

16. It follows that the applicant’s application is an abuse of the process of the court. It is hereby struck out. Parties will bear their respective costs. It is so ordered.



Signed, dated and delivered on 26 April 2024

Ngaah Jairus

JUDGE

4JR. MISC. APPLICATION NO. E139 OF 2023: RULING

