Republic v Public Procurement Administrative Review Board; Managing Director, Kenya Power & Lighting Company PLC & another (Interested Parties); Sharpcut Designers Limited (Exparte) (Application E104 of 2024) [2024] KEHC 7727 (KLR) (Judicial Review) (28 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7727 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

APPLICATION E104 OF 2024

J NGAAH, J

JUNE 28, 2024

BETWEEN

REPUBLIC ..... APPLICANT

AND

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD ..... RESPONDENT

AND

MANAGING DIRECTOR, KENYA POWER & LIGHTING COMPANY PLC ..... INTERESTED PARTY

CREDIBLE TECHNICAL WORKS LIMITED ..... INTERESTED PARTY

AND

SHARPCUT DESIGNERS LIMITED ..... EXPARTE

JUDGMENT

1. Before court is the applicant's motion dated 16 May 2024 seeking judicial review reliefs of certiorari, mandamus and prohibition. The prayers have been couched in the following terms:

    1. An Order of Certiorari to remove to the High Court the proceedings and the decision of the Respondent dated 2nd April, 2024 (sic) for the purposes of its being quashed and remitting with directions the Request for Review No. 31 of 2024 to the Respondent for reconsideration.

2. An Order of Prohibition to prohibit the 1st Interested Party from entering into Contract for Supply of Emergency Restoration Towers (ERTs) and Galvanised Steel Structures for Implementation of Premium Customers Schemes and for Various Primary and Secondary Substations (Tender No. KP1/9A.3/OT/12/23-24) with the 2nd Interested Party.

3. An Order of Mandamus to compel the Respondent to review, hear and determine on merit the Ex Parte Applicant's Request for Review No. 31 of 2024 dated 9th April, 2024."

The applicant has also asked for costs of the application.

2. The application is expressed to be brought under Article 23(3)(f) and 165(6)(7) of *the Constitution* and Order 53 Rule 3 of the Civil Procedure Rules. It is based on a statutory statement dated 9 May 2024 and an affidavit verifying the facts relied upon sworn on even date by Ms. Naomi Njoroge, the applicant's managing director.

3. According to Ms. Njoroge, sometime in October, 2023, the 1st interested party floated a tender, more particularly described as "Tender No. KP1/9A.3/OT/12/23-24, for Supply of Emergency Restoration Towers and Galvanised Steel Structures for Implementation of Premium Customers Schemes and for various Primary and Secondary substations". On 13 November 2023, the applicant submitted to the 1st interested party its bid for the tender at the tender sum of Kshs. 269,175,844.72.

4. On 28 March 2024, the 1st interested party got an email sent to it by the 1st interested party on 27 March 2024 notifying the applicant the 1st interested party's intention to award the tender. According to this notification, the applicant was informed why its tender was unsuccessful. To be precise, the applicant was informed as follows:

> " Historical contract performance default form 3.2 was not duly filled. A bidder was supposed to state/specify any unresolved cases/litigations, in case the answer was yes in the parts above this requirement. However, you stated yes in the said part of the form but failed to state cases/litigations as required in the tender."

5. Applicant was aggrieved by this decision and, therefore, it initiated a request for review before the respondent. No doubt, this was in exercise of its right under section 167 (1) of the *Public Procurement and Asset Disposal Act*, 2015 according to which a candidate or tenderer aggrieved by the decision of a procuring entity may lodge a request for review before the respondent. This section reads as follows:

> 167. Request for a review
>
> (1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.

6. The applicant's request for review was registered before the respondent as application no. 31 of 2024. It was filed on 11 April 2024. However, on 2 May 2024, the applicant received the respondent's decision striking out in lime the applicant's request for review, apparently because it was filed out of time. It is for this reason that the applicant has approached this Honourable Court for the judicial review reliefs which have already been set out verbatim in this judgment.

7. According to the applicant, the respondent's decision was based on the fact that email communication is instantaneous and therefore the applicant is deemed to have received the notification of the award on 27 March 2024 when the email to this effect was sent and not on 28 March 2024 when the applicant received the email. The applicant complains that no evidence was adduced as to the instantaneous communication of emails and, therefore, the respondent erred in basing its decision on this fact.

8. In any event, it has been sworn on behalf of the applicant, 10 April 2024 which the respondent established as the last date by which the applicant ought to have filed its application was a public holiday and, therefore, 11 April 2024 was the deadline for filing of the request for review.

9. By insisting that the applicant ought to have filed its request for review by 10 April 2024 in these circumstances and, therefore, striking out the applicant's application, the respondent's decision is faulted on grounds of illegality and irrationality.

10. Mr. James Kilaka, the respondent's acting secretary swore a replying affidavit basically defending the respondent's decision and, in particular, affirming the respondent's position that the applicant having received the notification of the award on 27 March 2024, it was bound to file the request of review on or before 10 April 2024.

11. The 1st interested party also opposed the application. A replying affidavit to this end was sworn on its behalf by Michael Nyagate Basweti who states that he is the 1st interested party's supply chain officer. The depositions in that affidavit are in defence of the procuring entity's decision to award the tender to the 2nd interested party and explaining why the applicant's tender failed at the preliminary evaluation stage. The 1st interested party has agreed with the respondent that the time for filing of the request for review started to run on 28 March 2024 and, therefore, it ought to have been filed by 10 April 2024.

12. The 2nd interested party has opposed the application, more or less, in the same terms as the respondent and the 1st interested party. Its affidavit replying to the application has been sworn by Mr. Ernest Kingi Gateri who has stated that he is a director of the 2nd interested party.

13. I have considered the respondent's decision with a view to ascertaining whether it is tainted, as submitted by the applicant, on grounds of illegality and irrationality. In considering these grounds my attention has been drawn to paragraph 98 of the respondent's decision where it reads as follows:

> " 98. When computing time when the applicant ought to have sought administrative review before the Board, 27th March 2024 is excluded as per section 57 (a) of the IGPA being the day that the applicant received the notification of intention of award. This means time started to run on 28thMarch 2024 and lapsed on 10th April 2024. In essence, the applicant had between 27th March 2024 and 10th April 2024 to seek administrative review before the Board. The instant request for review was filed on 11th April 2024 which was the date when the filing fees was paid and which was also 1 day after the lapse of 14 day's filing timeline. Consequently, this ground of the preliminary objection succeeds."

14. Section 57 of the Interpretations and General Provisions Act, cap. 2 to which the respondent made reference reads as follows:

> 57. Computation of time.
>
> In computing time for the purposes of a written law, unless the contrary intention appears—

(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;

(b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;

(c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;

(d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time. (Emphasis added).

15. If it is accepted, as the respondent concluded, that the last date by which the applicant ought to have filed its request for review was 10 April 2024 then, the applicant was enjoined to consider section 57(b) in view of the fact that 10 April 2024 was a public holiday and which, for this very reason, would be excluded in computing the time within which the request for review ought to have been filed.

16. It was never, and of course it could not be contested that 10 April 2024 was a public holiday and, therefore, by ignoring this fact in computation of time, the respondent can properly be said to have failed to consider matters relevant to its decision. It can also be said that by flagrantly disregarding the provisions of section 57(b) of the Act, the respondent's decision is tainted on the ground of illegality. The decision is also irrational because no reason has been given why the respondent ignored the fact that the last day was a public holiday and, therefore, the next following day which was 11 April 2024 was the last day by which the applicant ought to have filed its application.

17. These judicial review grounds of illegality and irrationality have been explained in the English case of Council of Civil Service Unions versus Minister for the Civil Service (1985) A.C. 374,410. In that case, Lord Diplock set out the three heads which he described as "the grounds upon which administrative action is subject to control by judicial review". These grounds are illegality, irrationality and procedural impropriety. For purposes of determination of this application, his explanation of the grounds of illegality and irrationality would suffice. He spoke of these grounds as follows:

> "By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
>
> By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious

explanation in Edwards v. Bairstow [1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review."

18. The respondent selectively applied parts of section 57 of the Interpretations and General Provisions Act. It failed to consider and give effect to other pertinent parts of the section with respect to what the law defines as "excluded days" when it ignored that 10 April 2024 was a public holiday. Accordingly, it arrived at the wrong decision. And since 10 April 2024 was gazetted as a public holiday and, therefore, an excluded day, by ignoring this fact in its decision, the decision can properly be described as being so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

19. In the ultimate I allow the applicant's application in the following terms:

    1. An Order of Certiorari to remove to the High Court the proceedings and the decision of the Respondent made on 2 May 2024 but erroneously dated 2nd April, 2024 for the purposes of its being quashed is hereby granted and the decision quashed accordingly.

    2. An order of mandamus is hereby granted compelling the respondent to determine the applicant's Request for Review No. 31 of 2024 on merits on or before the elapse of twenty-one days from the date of this judgment.

    3. An Order of Prohibition is hereby granted prohibiting the 1st Interested Party from entering into Contract with the 2nd Interested Party for Supply of Emergency Restoration Towers (ERTs) and Galvanised Steel Structures for Implementation of Premium Customers Schemes and for Various Primary and Secondary Substations (Tender No. KP1/9A.3/OT/12/23-24).

    4. Parties will bear their respective costs.

It is so ordered.

SIGNED, DATED AND DELIVERED ON 28 JUNE 2024

NGAAH JAIRUS

JUDGE