



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI HIGH COURT**

**CIVIL SUIT NO 131 OF 2014**

**EOTECH LIMITED & 225 OTHERS.....PLAINTIFF**

**VERSUS**

**KENYA POWER & LIGHTING CO. LTD.....DEFENDANT**

**RULING**

1. For the determination of the Court was the Notice of Preliminary Objection dated and filed on 15<sup>th</sup> May 2014 by the Defendant. The Defendant intended to be heard on the following issues, namely;
  1. ***The honourable Court lacks jurisdiction to hear and determine the suit and application herein pursuant to the provisions of Section 25, as read together with Section 93 of the Public Procurement and Disposal Act and the regulations there under.***
  2. ***This Court lacks the jurisdiction to hear and determine the suit and the application as the suit concerns public procurement which is governed by the provisions under the Public Procurement and Disposal Act 2005 and the various regulations made thereunder which provisions provide for dispute resolution mechanisms including Sections 25, 36, 53, 93, 102 and 105.***
  3. ***This honourable Court lacks the jurisdiction and/or mandate to grant the prayers sought in the suit and application.***
2. In its submissions in support of its objection, the Defendant submitted that the issue of jurisdiction was pertinent, and that in the event there were provisions for alternative methods of resolution of any dispute that may arise between the parties, then the Court would cede its authority to determine the dispute and refer the same to the body or institution mandated to resolve such issues.
3. In summation, the Defendant reiterated that the Plaintiffs were pre-qualified candidate who would tender with the Defendant, and that therefore there not being a contract between them, the dispute between the parties would be referred to the Public Procurement Administration Review Board (hereinafter referred to as PPARB) as provided under **Section 25** the Public Procurement and Disposal Act. It was the Defendant's contention that the PPDA provided and mandated the PPARB to resolve any dispute arising between the parties, and that these mechanisms ought to be exhausted before the jurisdiction of the Court could be invoked.
4. The Defendant relied on the case of **S K Macharia v Kenya Commercial Bank Ltd & 2 Others**

**(2012) eKLR** in which the Supreme Court held that jurisdiction is conferred by law and statute, and that without jurisdiction, the Court has no power for the continuation of proceedings before it, as determined in **Owners of Motor Vessel SS Lilian v Caltex Oil (K) Ltd (1989) KLR**. In further contending that the power to resolve any dispute between the parties lay with the PPARB, the Defendant relied on the cases of **Tom Kusienya & 8 Others vs. Kenya Railways Corporation & 3 Others, Constitutional Petition No. 353 of 2012** and **Petition No 159 of 2012, International Centre for Policy & Conflict & 5 Others vs. The Honourable Attorney General & 4 Others (2013) eKLR** and **Diana Kethi Kilonzo & Another vs. The Independent Electoral & Boundaries Commission & 10 Others (2013) eKLR**.

5. As aptly stated in the case of the **Owners of Motor Vessel SS Lilian vs. Caltex Oil (K) Ltd** (supra), jurisdiction is everything, without which the Court has no mandate to continue proceedings in which it cannot exercise its jurisdiction over, and has therefore, not alternative but to lay down its tools. Further, if there is provided an alternative mechanism for dispute resolution accorded to parties, such as the PPARB, then it is for the Court, in exercise of its mandate under **Article 159(2)(d)**, as read together with **Article 165** of the Constitution, to allow for these alternative forms of dispute resolution to be employed, so long as they comply with the legislation and the Constitution.
6. In **Civil Appeal No 13 of 2014 Plan B Holdings Ltd & 10 Others vs. Kenya Power & Lighting Co Ltd**, which matter before the Court of Appeal was similar to the instant suit and application, the Court of Appeal on the issue of jurisdiction rendered itself thus;

***“The appellant’s contention was that the tendering process had been completed and there was a contract between them and the respondent and therefore the Review Board lacks jurisdiction. We disagree. The appellants did not demonstrate that any contract had been signed between them and the respondent as contemplated under Section 68 of the Act. The learned Judge was therefore perfectly right in his finding that the parties had not entered into any contract. The tendering process having not been completed, we also concur with the learned Judge that the nature of the dispute between the appellants and the respondents could only be addressed before the Review Board.”***

7. This Court is in agreement with the cases cited of the Court of Appeal and the Supreme Court and is further bound by them. Before invoking the jurisdiction of the Court, the Plaintiff had to refer any dispute between them and the Defendant before the PPARB as provided under the Public Procurement and Disposal Act, and more particularly **Sections 25 and 93** thereof. The Plaintiffs came to this Court seeking to invoke its original jurisdiction, which jurisdiction may not be exercised at this juncture, and during the existence of a legal, relevant and statutory mandated PPARB. The Court will lay down its tools, and refer the parties back to the PPARB to resolve the dispute between them, if any.
8. The upshot is that the application by the Plaintiffs dated 3<sup>rd</sup> April 2014 is dismissed, with costs awarded to the Defendant. The suit is also struck out, with costs thereof awarded to the Defendants.

**Dated, signed and delivered in court at Nairobi this 16<sup>th</sup> day of December, 2015.**

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**C. KARIUKI**

**JUDGE**



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