REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

APPLICATION NO. E088 OF 2021

REPUBLIC.....APPLICANT

-VERSUS-

PUBLIC PROCURMENT ADMINISTRATIVE

REVIEW BOARD.....1ST RESPONDENT

THE ACCOUNTING OFFICER

KENYA MEDICAL SUPPLIES AUTHORITY.....2ND RESPONDENT

KENYA MEDICAL SUPPLIES AUTHORITY.....3RD RESPONDENT

NUFLOWER FOODS &

AUTHORITY PVT LIMITED.....4TH RESPONDENT

Ex parte:

TECHNO RELIEF SERVICES LIMITED

JUDGMENT

There are two applications before court the first of which is a motion by the *ex parte* applicant dated 2 July 2021 seeking in the main judicial review orders of certiorari and prohibition. These prayers have been framed as follows:

"1. That the honourable court be pleased to grant judicial review order of certiorari to remove into this Honourable Court and quash the decision of the 1st respondent dated 24th of June, 2021 in Review Case number 34 of 2021; Techno Relief Services Limited vs- The Accounting Officer of Kenya Medical Supplies Authority, Kenya Medical Supplies Authority and Nuflower and Nutrition PVT Limited.

2. That the honourable court be pleased to grant judicial order of prohibition to remove into this Honourable Court and prohibit the 3rd and 4th respondents from entering into a binding contract in respect of Tender No. GF ATM HIV and NFM- 20/2021-01T FOR supply of nutritional supplements by the Kenya Medical Supplies Authority that form the subject tender of this application.

3. That this Honourable Court can be pleased to grant such further and other reliefs that this honourable court may deem just and expedient to grant.

4. That costs of this application be provided for."

The application is filed under Sections 8 and 9 of the Law Reform Act, Order 53 Rules 1(1), (2), (3) and (4), 3(1) of the Civil Procedure Rules, and Section 4, 7, 9 (1), 10,11 and 12 of the Fair Administrative Action Act, 2015. It is based on the statement of facts dated 6 July 2021 verified by an affidavit sworn by Ketan K. Goswami on 5 July 2021.

The second application is by the 2nd and 3rd respondents. It is dated 6 September 2021 and it seeks to have the *ex parte* applicant's motion dismissed on the ground that it has not been disposed of within forty-five days of the date of filing the application contrary to the provisions of section 175 of the Public Procurement and Asset Disposal Act and the decision by Court of Appeal in **Civil Appeal No. E039 of 2021, Aprim Consultants vs Public Service Commission & Others.**

Owing to the very nature of this second application and, considering it questions the jurisdiction of this honourable Court to determine the *ex parte* applicant's application outside the forty-five-day period, it should be the ideal point from which to start. (see the **Owners of the Motor Vessel Lilian "S" vs. Caltex Kenya Limited (1989) KLR**.

Section 175 of the Public Procurement and Asset Disposal Act provides the legal basis upon which a party dissatisfied with a decision of the Public Procurement Administrative Review Board may question that decision by way an application for judicial review in this honourable Court.

The Board is established under section 27 of the Act to, among other things, review, hear and determine tendering and asset disposal disputes. (see section 28(1) (a) of the Act). Its jurisdiction is normally invoked under section 167 (1) of the Act, when a candidate or a tenderer, who claims to have suffered or risks suffering, loss or damage due to the breach of a duty imposed on a procuring entity by the Act, or the regulations made thereunder, seeks the Board's intervention, by way of review, to remedy the alleged breach.

Apart from providing the foundation upon which the application for judicial review may be made, section 175 of the Act also sets timelines within which the application has to be determined. It is this aspect of limitation period that is at the center of the 2nd and 3rd respondent's application. For better understanding, it is necessary that I reproduce the entire section here; it states as follows:

175. Right to judicial review to procurement

(1) A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board's decision, failure to which the decision of the Review Board shall be final and binding to both parties.

(2) The application for a judicial review shall be accepted only after the aggrieved party pays a percentage of the contract value as security fee as shall be prescribed in Regulations.

(3) The High Court shall determine the judicial review application within forty-five days after such application.

(4) A person aggrieved by the decision of the High Court may appeal to the Court of Appeal within seven days of such decision and the Court of Appeal shall make a decision within forty-five days which decision shall be final.

(5) If either the High Court or the Court of Appeal fails to make a decision within the prescribed timeline under subsection (3) or (4), the decision of the Review Board shall be final and binding to all parties.

(6) A party to the review which disobeys the decision of the Review Board or the High Court or the Court of Appeal shall be in breach of this Act and any action by such party contrary to the decision of the Review Board or the High Court or the Court of Appeal shall be null and void.

(7) Where a decision of the Review Board has been quashed, the High Court shall not impose costs on either party. **(Emphasis added)**

The forty-five-day period is introduced by subsection (3) that this honourable Court shall determine the judicial review application "within forty-five days after such application."

It is not so clear what the words "after such application" entail considering that an application for judicial review is ordinarily preceded by an application for leave; it is only after the leave has been granted that the substantive application for judicial review orders is filed.

The question that then arises is this: does time start running when, by an application for leave, an aggrieved applicant sets in motion the process for judicial review orders or when the substantive motion itself is filed" The Act is not that clear on the answer to this question but I would suppose the 'application' referred to in the words "*after such an application*" refer to the substantive motion for judicial review order or orders, in which event the clock starts ticking only after the substantive motion is filed. I say so because the application for leave serves a specific purpose for grant of leave and once leave is granted (or refused), the application is spent and serves no other useful purpose and, for this reason, it is of no consequence in computation of time.

The *ex parte* applicant's motion was filed on 12 July 2021; this is as far as I gather from the e-filing portal. The hard copy of the motion in the court file does not bear a court stamp.

When I granted leave on 9 July 2021 I directed that the substantive motion be filed within three days of that particular date. I also issued directions on when the respondents would file their responses and when all the parties would file and exchange their written submissions. I set 20 July 2021 as the date of highlighting the submissions.

A few days before 20 July 2021, the Government declared this date a public holiday and, inevitably, the court could not sit on that day and so all matters on the cause list of this particular date, including the applicant's motion, were rescheduled and allocated alternative dates at the registry after 20 July 2021.

Oblivious of the urgency attending to the applicant's application, the registry staff reallocated the mention of this matter to 12 October 2021, obviously outside the forty-five limitation period within which the matter ought to have been resolved; forty-five days from 12 July 2021 would have lapsed on or about 26 August 2021 and therefore 12 October 2021 was way off the deadline.

I only learnt of the delay and the lapse of time after the 2nd and 3rd respondents filed their application to dismiss it on 13 September 2021.

As the 2nd and 3rd respondents have rightly pointed out, the Court of Appeal **in Civil Appeal No. E039 of 2021 Aprim Consultants versus Parliamentary Service Commission & Others** has, more or less, ruled that the timelines set by section 175 of the Act are cast in stone, leaving little room to manoeuvre; to quote the court:

"***That said, is it open for the High Court, no matter how reasonable its premises, to nonetheless go on and flout the timeliness or proceed as if they did not exist" Are the timelines a question such as leave the Courts with a degree of discretion, or are they to be construed as being inflexibility binding"***

We think, with respect, that the provisions of section 175 are couched in terms that are plain and unambiguous, admitting to no interpretive wriggle room."

After considering several decisions of this Honourable Court on this same subject the Court of Appeal continued:

"Whereas judges of the High Court have questioned, and with good reason, the wisdom and practicality of the particular timelines in the statute, the position of this Court has been an express endorsement of their constitutionality."

The Court went on:

"We accept that to be the proper approach a court must take when faced with clear statutory commands, no matter how much they may appear to be burdensome. Inconvenience or difficulty of compliance will never be an excuse for a court to go against the clear language of Parliament. The most a court can do is point out the difficulties created by such requirements and timelines and perhaps make proposals for reform, but as long as the law remains etched, in plain language, it is the province of the courts to interpret and give effect to its express language."

An aspect of an applicant's case under section 175 of the Public Procurement and Asset Disposal Act and which, apparently was not brought to the attention of the Court of the Appeal by any of the parties before it and, probably for that reason it was not discussed in the Aprim Consultants' case, is the right of access to justice under Article 48 of the Constitution. That Article reads as follows:

48. The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.

To put in its proper perspective, this is one of the inalienable rights contained in the Bill of Rights in Chapter 4 of the Constitution. Simply put, it is a right that cannot be derogated from; it is an entitlement. It is, I suppose, partly, if not solely, for this reason, that the state is enjoined to ensure access to justice for all persons. And if that be the case, any action by the state or any of the three arms of the government that would appear to derogate from this right should be considered as subservient to the Constitution.

Coupled with this article is Article 159 (1) (2) which reads as follows:

159. (1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(a) justice shall be done to all, irrespective of status;

When these two articles are considered either in isolation or read together, the irresistible conclusion that one is bound to make is that nothing can stand in the way of a court of law to dispense justice whenever approached to do so. For the court to tell a party who, as in the present case, has filed its application within the prescribed time and complied with all the directions necessary for determination of its application, that a determination on the application cannot be made because of lapse of time as a result or errors or mishaps that cannot be attributed to the applicant or any of the other parties before court, would not only require some courage but it would also be a clear case of impeding access to justice.

When viewed from the perspective of these provisions of the Constitution, it should be easy to appreciate the futility of the implied restrictions imposed by section 175 of the Public Procurement and Asset Disposal Act on the jurisdiction of this honourable Court to dispose of a dispute brought before it; it must be borne in mind that the jurisdiction which section 175 of the Act purports to tamper with has its roots in no other place than Article 165 (3) (a) of the Constitution.

I must not be mistaken to be questioning the decision and the reasoning of the Court of Appeal in the Aprim Consultants case; going by the doctrine of *stare decisis* this court must not only follow but it is also bound by the decisions of the Court of Appeal on any particular issue which the appellate court has determined. As matter of fact, except for this one particular application which finds itself in rather unfortunate circumstances, I have endeavoured to hear and dispose of applications filed under section 175 of the Act within the prescribed timelines in the wake of the Court of Appeal decision. Inevitably, I have had, at times, to hear and deliver judgments in these sort of cases when I am not officially in session. It is not uncommon and indeed it is now a norm to hear applications and dispose of these applications while I am on leave or during the court recess; at other times I have had to juggle between resolving these case and attending to other official duties that I have been assigned from time to time all in an endeavour to abide by the Court of Appeal decision. In short my fidelity to the doctrine of *stare decisis* and in particular, the recognition of the binding nature of the Court of Appeal decision in the Aprim Consultants case is unmistakable.

All I am concerned about and which I am saying is this: that if Article 48 of the Constitution on the individual's right of access to justice had been brought to the Court's attention, it probably would have arrived at a different conclusion.

I totally agree that a legislative intervention by way of, say, amendment to the Act may be necessary to cater for a myriad of circumstances which the Court of Appeal itself has acknowledged, in agreement with this honourable Court, that may hinder disposal of applications for judicial review filed under section 175 of the Public Procurement and Asset Disposal Act within the forty-five-day period. In my humble view, once it is acknowledged that there are exogenous factors that may, in one way or the other, interfere with the statutory timelines for determination of applications filed under section 175 of the Act, there should be no debate on whether, in those circumstances, the Court has or does not have jurisdiction not to determine those matters that fall on the wrong side of the limitation period. Taking each case on its peculiar circumstances, the provisions of the constitution relating to the right to access to justice should prevail. At any rate, an existential constitutional right should not be held in abeyance pending a legislative action.

I must hasten to add that there is nothing wrong in the legislature prescribing timeliness within which particular matters should be disposed of. I suppose, the rationale behind the prescription of the time within which public procurements under the Act should be concluded and the period within which any dispute arising from these processes should be resolved, including, for instance, the forty-five-day limit, in the determination of applications against decisions of the Public Procurement Review Board has a lot to do with the time-bound implementation of government projects or securing of goods and services for a particular purpose. Some of these things may only be done within a particular financial year or a budgetary circle failure of which they could be overtaken by events. They may also be tied to budgetary allocations which may not be available in the subsequent budgetary cycle depending on the government priorities and of, course, the availability of revenue. It is partly for this reason that the fate of procurement processes for the implementation of these projects and for acquisition of goods and services must be certain at the earliest opportunity possible and to this extent, it was always reasonable for the legislature to set timelines within which any particular procurement process must be concluded and disputes arising from the procurement process resolved.

But it does not necessarily follow that the constitutional right of an individual to access justice must thereby be compromised. This right cannot be sacrificed at the altar of expediency.

Without purporting to define the phrase ‘access to justice’ I would suppose that it is a concept that connotes not only the ability and the availability of the necessary infrastructure for an individual to approach the courts for redress of any grievance or alleged grievance but it is also about the determination of the grievance or alleged grievance. In other words, ‘access to justice’ does not end with, say, the filing of a suit; rather, this right is only actualised if the filed suit culminates in a determination, regardless of whether it is a determination based on merits, founded on appreciation of the facts and the applicable law, or on a point of law only.

It is a right that largely depends on two fundamental aspects; first, the availability of infrastructure and the process to get a resolution to a dispute and second, the availability of the resolution itself.

A ‘fair hearing’ would be a component of the process and a hearing, in this sense, without a determination would not be what one would regard as ‘fair’.

That said, courts must, of course, strive to conclude disputes brought before them within the prescribed timelines, and certainly this is possible, everything else being constant; however, at no occasion should a litigant be waved away from the seat of justice merely because his petition could not, for one reason or the other, not attributable to him or any of his adversaries, be disposed of within the statutory limitation period. While parties are bound to comply with the particular timelines in taking particular actions set by law, courts cannot be bound in the same terms in dispensing justice. Where it is clear that despite its intention or even efforts to meet the deadline and conclude a particular matter, a court of law should not be rendered helpless and leave a litigant without an answer to his grievances. To do so would amount to courts abdicating their core responsibility which is dispensation of justice; any interpretation of the law that suggests otherwise may only elicit a narrow view.

Turning to the present case, it was set for highlighting of submissions on 20 July 2021. It was not, of course, the only case set for one action or the other on the material date. Nobody knew that date was going to declared a public holiday and as usual, whenever such an eventuality arises, the affected matters would be given fresh dates depending on in their availability in the court diary. It was not therefore abnormal for the cases initially coming up on 20 July 2021 to be allocated fresh dates. Unbeknown to the registry staff, the *ex parte* applicant’s application could not just be allocated any date like any of the rest of the matters coming up on 20 July 2021.

The error of fixing the date for submissions on 12 October 2021 instead of an earlier date was, no doubt, the court’s but as

circumstances would show, it was unintended or inadvertent. It is an error that arose from unforeseen circumstances.

The applicant had an option of moving the court at the earliest opportunity, perhaps by means of an application under a certificate of urgency to have the matter rescheduled for action on an earlier date than that given by the registry; however, it cannot be condemned for not doing so. The respondents' counsel attempted this by posting a letter addressed to me on the e-portal but this was certainly on the wrong presumption that I browse the portal and peruse hundreds of files on a day-to-day basis to check whether there was any communication from the parties or their counsel in their respective cases.

Would the court be deprived of the jurisdiction to determine the applicant's application and effectively deprive the applicant of its constitutional right to access justice in these circumstances" I reckon not. To do so would amount to unduly elevating a statutory provision over an entrenched constitutional right; I highly doubt that this could have been the intention of the legislature in enacting the Public Procurement and Asset Disposal Act or any of the provisions in that Act, in particular section 175 thereof.

All I have said points to the conclusion that the 2nd and 3rd respondents' application dated 6 September 2021 has no merits and it is hereby dismissed.

I now turn to the *ex parte* applicant's main motion.

The Request for Review was made against the backdrop of a procurement process arising from the 3rd respondent's invitation for sealed bids for supply of nutritional supplements more particularly described as Tender No. GF ATM HIV NFM-20/21-01T-011 for Supply of Nutritional Supplements. The tender was published on 3 November 2020. It was closed on 11 November 2020 which was the same date that was it was opened.

Eleven companies, including the applicant and the 4th respondent submitted their bids. The tenders were to be evaluated at three different stages; the preliminary stage, the technical evaluation and the financial evaluation stages.

At the preliminary evaluation, all the tenders were found to be responsive and therefore they all qualified for technical evaluation. At this stage, only the 4th respondent and Equatorial Nut Processors Limited, one of the eleven bidders who submitted their tenders, qualified for financial evaluation. The rest of the bidders were found to be nonresponsive.

When it came to the financial evaluation stage, the 4th respondent was found to be the lowest evaluated bidder for the supply of the ready-to-use therapeutic food or 'RUTF' and the ready-to-use supplemental food also referred to as 'RUSP'. It was, therefore, recommended for the award of the tender for the supply of the two items at the tender price of US Dollars 2, 506, 429.46 and 1,479, 768.43 respectively.

Equatorial Nut Processors Limited, on the other hand, was recommended for the award of the tender for supply of fortified blended flour or 'FBF'.

The applicant was not satisfied with the procurement process and, of course, the award of the tender. It therefore lodged a request for review of the 3rd respondent's decision, no doubt in exercise of its rights under section 167 (1) of the Public Procurement and Asset Disposal Act. In particular, the applicant sought for the nullification of the procuring entity's decision or, in the alternative, the termination of the procurement process and commencement of the process afresh. It also sought for the order for costs.

By its decision rendered on 29 January 2021, the 1st respondent dismissed the request for review. The applicant then moved this honorable Court by way of judicial review in exercise of its right under section 175 of the Act; this was in Judicial Review application number E049 of 2021. It sought, among other prayers, a quashing order against the decision of the 1st respondent; an order of mandamus compelling the 1st respondent to hear afresh the applicant's application for review; and, an order for prohibition to prohibit the 3rd and 4th respondents from entering into a contract in respect of the subject tender.

The application was allowed and this honorable Court (Nyamweya, J. as she then was), in its decision rendered on 25 May 2021, ordered as follows:

"I. An order certiorari be and is hereby issued to remove into this court for purposes of quashing, the decision of the 1st respondent dated 29th of March, 2021 PPARB Case Number 34 of 21- Techno Relief Services Limited vs The Accounting Officer of Kenya Medical Supplies Authority, Kenya Medical Supplies Authority and Nuflower Foods and Nutrition PVT Limited.

II. An order of Mandamus be and is hereby issued to compel the 1st respondent to re-hear PPARB Case Number 34 of 21- Techno Relief Services Limited vs The Accounting Officer of Kenya Medical Supplies Authority, Kenya Medical Supplies Authority and Nuflower Foods and Nutrition PVT Limited and to consider all the pleadings and submissions filed therein and served by all the parties, including the ex parte applicant's written submissions, list of authorities, further affidavit, replying affidavit to the 2nd and 3rd respondent's grounds of opposition and the ex parte applicant's written submissions to the 2nd and 3rd respondents grounds of opposition.

III. An order of prohibition and is hereby issued to prohibit the 3rd and 4th respondents from entering into a binding contract in respect of tender number GF ATM HIV NFM-2021- 01T-011 for supply of nutritional supplements to Kenya Medical Supplies Authority, pending the re-hearing and determination of the ex parte applicant's Request for Review PPARB Case Number 34 of 21- Techno Relief Services Limited vs The Accounting Officer of Kenya Medical Supplies Authority, Kenya Medical Supplies Authority and Nuflower Foods and Nutrition PVT Limited. IV. The ex parte applicant's Request for Review in PPARB Case Number 34 of 21- Techno Relief Services Limited vs The Accounting Officer of Kenya Medical Supplies Authority, Kenya Medical Supplies Authority and Nuflower Foods and Nutrition PVT Limited be and is hereby remitted to the 1st respondent for the hearing and determination, within 30 days of the date of this judgment.

V. Each party shall bear its own costs of the Notice of Motion dated 23rd of April 2021."

Following this judgment, the 1st respondent heard the applicant's application for review afresh and dismissed it for the second time. Undeterred, the applicant has for a second time moved this honorable Court for orders against the 1st respondent's decision in the instant motion.

It is the applicant's case that the 1st respondent acted irrationally, illegally and unreasonably by taking into account irrelevant considerations and thereby reaching wrong factual conclusions. To quote the applicant, in paragraphs 4 and 5 of its statement of facts:

"4. Moreover, the 1st respondent made an error in law in making an irrational and unreasonable finding that "the applicant failed to satisfy the criterion provided in ITT clause 6.3 (a), (c) and (g) of section 11. Tender data sheet of the Tender Document. This is because; the applicant provided a sample for item 1 RUTF with Batch No. K2024701 which is different from Batch No. 20247001 indicated on the certificate of analysis for item 1, RUTF at page 93 of its original bid from Nutriset, further, the test report dated 31st of October 2020 from Fare Labs found on page 125 applicants original bid makes reference to item 1, RUTF with a Batch Number in the RUTF sample and the Batch Number in the certificate of analysis for item 1 RUTF from Nutriset.

5. The respondent's findings in (4) above is totally different from the reasons given by the 3rd respondent in declaring the applicant's bid as non-responsive thus laced with unreasonableness, bias and irrationality."

The applicant argues that the impugned decision did not consider and appreciate the requisites of a responsive tender in accordance with section 79(1) of the Public Procurement and Asset Disposal Act and Article 227 of the Constitution and the basic tenets of Justice.

The application is opposed and to this end the 2nd and 3rd respondents filed replying affidavits and written submissions in support of their position.

When I consider the affidavits filed either in support of or in opposition to the application, I find that the basic facts leading to the award of the tender are not contested.

It is not contested, for instance, that the 3rd respondent invited bids for the tender in which the applicant, among other tenderers, participated; it is also not in dispute that the applicant's bid was disqualified at the technical stage; again, it is not in dispute that the tender was eventually awarded to the 4th respondent and Equatorial Nut Processors Ltd.

The applicant's central quest is whether its bid was responsive at the technical evaluation stage and whether, for that reason, it ought to have proceeded to the next stage of financial evaluation. According to the applicant, its bid was responsive and were it not for the fact that the 1st considered matters which it ought not to have considered in its decision, the procuring entity's decision could have been overturned and the applicant's bid declared responsive.

It is for the same reason of the 1st respondent considering matters that ought not to have been considered that the applicant contends that the decision is tainted by all the three grounds of judicial review of illegality, irrationality and procedural impropriety.

Even as the applicant contends that the 1st respondent considered irrelevant matters in the impugned decision paragraph 10 of the verifying affidavit has captured my attention on whether indeed the 1st respondent fell into this particular error as suggested by the applicant. While deposing to the fact of whether the 1st respondent complied with this honourable court's orders in its earlier decision in Application No. E049 of 2021, the Ketan Goswami swore as follows:

"10. That in compliance with the court final orders the 1st respondent considered all the parties (sic) pleadings and submissions filed therein and served by all the parties, including the ex parte applicant (sic) written submissions, list of authorities, further affidavit, replying affidavit to the 2nd and 3rd respondents (sic) grounds of opposition and the ex parte applicant's written submissions to the second and third respondents grounds of opposition and rendered its verdict on 24th of June 2021 by dismissing in its entirety the ex parte applicant (sic) request for review dated 9th March 2021."

The deposition is, in effect, an admission and which, for this very reason, betrays the applicant's assertion that the 1st respondent considered matters which it ought not to have considered or may have ignored those matters that it ought to have taken into account in making the impugned decision. The deposition is clear that the decision was consistent with the court's orders and, in particular, orders II and IV thereof.

Narrowing down to the specific issues and on which the applicant's application revolves, the applicant contends that the 1st respondent findings were radically different from the reasons given by the 3rd respondent in declaring the applicant's bid non-responsive. These reasons can be found in the procuring entity's letter dated 24 February 2021; they were captured in the following terms:

"

- ***Batch No. in the certificate of analysis from farelabs (421020) does not match Batch No. on the same sample provided(K20247001).***
- ***You provided a wrong product made for children of six months and older instead of the age of 5 years and above."***

I have carefully read the 1st respondent's decision and noted that it addressed these issues relatively extensively and, to a greater degree, formed the basis of its decision in dismissing the applicant's request for review.

In considering these issues, the 1st respondent was guided by this honorable Court's specific findings particularly in paragraphs 51,53 and 54 thereof where it had noted as follows:

51. On the second limb of the issue as to whether the 1st respondent's decision is unreasonable on account of the deviation in the required specifications for the RUSF for the children of 5 years and above not being material, the 1st respondent's decision and reasoning in this respect was at pages 21 to 27 of its ruling. At page 21 to 22, the 1st respondent observed as follows:

'The board is mindful of the applicant's assertion that failure to provide RUSF product for children above 5 years was a minor deviation that ought to have been cured by section 79(2) (a) of the Act. The said provision states as follows:…

one of the technical specifications of the RUSF at page 66 of the tender document, provided in the mandatory terms that "the product shall be free of lumps and of large coarse particles and suitable for consumption by children above five years and adults". This raises the question of whether a mandatory requirement can be classified as a minor deviation.'

52. After considering various decisions on the importance of mandatory requirements in procurement processes in determining the responsiveness of a tender, and the provisions of the tender document in this regard, including clarifications sought thereon, the 1st respondent proceeded to conclude as follows at page 27 of the ruling:

'Given the nature of the products being procured by the procuring entity, there was no discretion on tenderers to pick and choose the mandatory requirements to comply with and ignore others. The RUSF products will be supplied to children with the moderately acute malnutrition in the age group above five years, in adolescents and in adults. The board, in the circumstances has no choice but to find that the applicant failed to comply with the requirements specified in the tender document when it proposed to provide RUSF products for children of 6 months.'

53. A consideration of whether this funding was reasonable requires a qualitative examination of evidence and arguments that were before the 1st respondent as regards the specifications of the RUSF products provided by the ex parte applicant, that is beyond the remit of this Court's judicial review jurisdiction as explained in the foregoing. It is also notable in this regard that the provisions of section 28 and section 173 of the Public Procurement and Asset Disposal Act bestow upon the 1st respondent the jurisdiction and power to hear a tender dispute and review a tender, where an issue is raised as to whether the tender is responsive in accordance with section 79 of the Act, or whether it was evaluated in accordance with section 80 of the Act. It was also observed by the Court of Appeal in Kenya Pipeline Company Ltd vs Hyosung Ebara Company Limited & 2 Others (2012) eKLR that the 1st respondent has wide powers in this regard.

54. Therefore, the 1st respondent's finding that the specifications of the RUSF products in the subject tender were mandatory and material cannot be faulted as being unreasonable, as the legal basis and evidence supporting the finding was explained in the ruling, and the 1st respondent had jurisdiction to examine its nature and application of the specification. The option available to the ex parte applicant is appeal in the said finding, if it is of the view that it was a wrong decision."

My understanding of the learned judge's holding in the quoted paragraphs is that the learned judge was in agreement with the 1st respondent's decision that the applicant did not meet the mandatory tender requirements. Having been found to have missed this important step in the tender process, there is nothing more the applicant could achieve before the 1st respondent and ultimately this honourable Court. In my humble view, if the court held as it did, that the 1st respondent was right in holding that applicant did not meet mandatory tender requirements, the fate of its application for review either before the 1st respondent or before this honourable court was sealed and could not change irrespective of the number of times the applicant appeared before the 1st respondent. The applicant should count itself lucky for having had a second bite at the cherry; its application could properly have been dismissed at the very first instance in which event a rehearing of the request for review and subsequently, the need for the present application would have been found unnecessary.

Be that as it may, the 1st respondent noted that the issues that arose for determination revolved around item 1 which was ready to use therapeutic food in relation to the criteria set out in ITT Clause 6.3(e) and (g) of section II of the tender document.

The 1st respondent also noted that the applicant's concern of the procuring entity's finding on its failure to furnish a complete analysis of RUTF. It noted further the applicant's contention that the certificate of analysis from Farelab Food Analyses and Research Laboratory on the applicant's original bid had discrepancies in batch numbers.

The 1st respondent also took into consideration the applicant's submissions to the effect that the request for review revolved around two issues which were whether the procuring entity took into account irrelevant considerations not captured in the tender document in declaring the *ex parte* applicant's bid non-responsive and whether the applicant bid was responsive for providing RUSF for children from 6 months old and above as opposed to the bid requirement of 5 years and above.

On this first issue, the 1st respondent made reference to specific clauses in the tender document and noted that the bidders were required to provide a sample for evaluation under separate cover on or before the tender submission deadline. It further noted that the sample provided was to be clearly labelled with the tenderer's name, the tender reference, identification of the product and submitted in accordance with the technical specifications.

It also noted that it was mandatory for the sample to represent the product that was to be supplied.

Again, it noted that the bidders were to provide laboratory analysis certificates from Kenya Accreditation Services (KENAS) accredited laboratories and also have an ISO certification.

The 1st respondent noted discrepancies in the information provided by the applicant in this regard. For instance, it noted, amongst others, that the batch number appearing on the sample provided by the applicant for item 1 RUTF was different from that given in the certificate of analysis.

These discrepancies were noted by the procuring entity and replicated in the letter of notification of the unsuccessful bid.

Although the applicant attempted to explain away the discrepancies, the explanation, noted the 1st respondent, came long after the closure of the tender. It held that since the information was not provided in the applicant's original bid, the evaluation committee could not be faulted for finding that the applicant's bid was non-responsive.

Taking all these factors into account, the 1st respondent came to the conclusion that there was no evidence that the procuring entity failed to satisfy the constitutional threshold in Article 227(1) of the Constitution while evaluating the applicant's bid for supply of RUTF.

On the question whether the applicant provided the right product which met the definition of RUSF for the second item of the subject tender, the applicant admitted that indeed the tender document directed bidders to provide ready-to-use supplemental food with the target population being age 5 years old and above but that it provided the product for persons of 6 months old and above.

It was the applicant's case that the non-conformity was curable under section 79(2) (a) of the Act and that the declaration by the 1st respondent that the bid was not responsive was unreasonable.

On this point, the 1st respondent noted that this honorable Court had not found any fault in the 1st respondent's determination of the question whether the applicant had complied with the mandatory tender requirements.

The first respondent studied the confidential files submitted to it by the procuring entity and observed that the procuring entity responded to several questions raised by the bidders, including the applicant, on the tender requirements and observed the procuring entity responded to these questions and as far as the applicant is concerned, the procuring entity was consistent in its responses that the product to be supplied under item 2 was meant for the population target of 5 years old and above.

Despite these answers, the applicant proceeded to provide a sample called 'plumpy sup' for persons of age 6 months old and above arguing that this was a minor deviation.

The 1st respondent concluded that having sought clarification from the procuring entity, the applicant was well aware that it was mandatory to provide products for children of 5 years and above, adolescents and adults. And the applicant having opted to participate in the procurement process with full knowledge of the mandatory requirements and yet it chose to ignore them, it was the author of its own misfortune.

With the foregoing evidence, I am not satisfied, as the applicant has suggested, that the 1st respondent's decision was tainted by illegality, irrationality or procedural impropriety. These grounds were explained in **Council of Civil Service Unions versus Minister for the Civil Service (1985) A.C. 374,410** where Lord Diplock stated as follows:

"My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have

mentioned will suffice.

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.

I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all."

It is apparent to me that the 1st respondent understood correctly its decision making power under section 173 of the Public Procurement and Asset Disposal Act and gave effect to it in its determination of the applicant's request for review. I am also persuaded that it apprehended and correctly applied the relevant provisions of the Act more particularly section 79 thereof on the responsiveness of tenders and whether the applicant's bid met the mandatory requirements in the tender documents.

I am also persuaded that the 1st respondent's decision is nowhere near being 'outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.'

As far as propriety of the process is concerned, the applicant cannot be heard to complain that he was not given a fair hearing. Instead, it should count itself lucky that it had a second chance to present its case before the 1st respondent for a second time despite the fact that the 1st respondent was held to have acted within its legal bounds in its determination that the applicant had failed to meet the mandatory tender requirements as prescribed in the tender document.

It was never alleged, and indeed there was no evidence, that in the conduct of the proceedings and in reaching its determination, the 1st respondent did not observe procedural fairness towards the applicant.

Taking this point further, it is necessary to state it does not matter that given the facts, this honourable Court could, perhaps, have reached a decision different from that which the 1st respondent arrived at. It is worth remembering that this is not an appeal that would go into interrogation of the merits of the decision; it is a judicial review and all the judicial review court would be interested in is the process by which the decision was arrived at. This points have been emphasised in Secretary **of State for Education and Science v Tameside Metropolitan BC [1976] 3 All ER 665 at 695, [1977] AC 1014 at 1064** where Lord Diplock noted:

"The very concept of administrative discretion involves a right to choose between more than one possible course of action on which there is room for reasonable people to hold differing opinions as to which is to be preferred."

Thus, courts may intervene to review a power conferred by statute on the ground of unfairness but only if the unfairness in the purported exercise of the power be such as to amount to an abuse of the power. See **Preston v IRC [1985] 2 All ER 327, [1985] AC 835, per Lord Templeman.**

And in **Chief Constable of the North West Police vs Evans (1982) 3 ALL ER 141 at 154** it was held that:

"Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power."

It was held further in this case that:

"The remedy by way of judicial review under RSC…, vastly increased in extent, and rendered, over a long period in recent years, of infinitely more convenient access than that provided by the old prerogative writs and actions for a declaration, is intended to protect the individual against the abuse of power by a wide range of authorities, judicial, quasi-judicial, and …administrative. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner…and not to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. The function of the court is to see that lawful authority is not abused by unfair treatment and not to attempt itself the task entrusted to that authority by the law." (Per Lord Hailsham at 1160E-H).

But even if the merits of the 1st respondent's decision was to be considered, it is quite apparent, and the applicant has admitted as much, that it did not comply with certain requirements in the tender document which, for all intents and purposes, were mandatory and which, for that reason, could not be resiled from.

In the final analysis, I find no merit in the applicant's motion dated 12 July 2021. It is dismissed. I make no order as to costs. Orders accordingly.

SIGNED, DATED AND DELIVERED ON 29TH OCTOBER 2021

Ngaah Jairus

JUDGE

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