



Case Number:	Miscellaneous Civil Application 338 of 2016
Date Delivered:	21 Mar 2018
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	George Vincent Odunga
Citation:	Republic v Kenya Airports Authority Ex-Parte Seo & Sons Limited [2018] eKLR
Advocates:	Miss Maina for Mr Wandabwa for the Applicant
Case Summary:	-
Court Division:	Constitutional and Judicial Review
History Magistrates:	-
County:	Nairobi
Docket Number:	-
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Case Outcome:	Application Allowed.
History County:	-
Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO. 338 OF 2016

IN THE MATTER OF ARTICLES 24, 40, 47, 50 OF THE CONSTITUTION

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT 2015

AND

IN THE MATTER OF THE PUBLIC PROCUREMENT AND ASSET

DISPOSAL ACT, NO. 33 2015, and THE PUBLIC PROCUREMENT

AND ASSET DISPOSAL REGULATIONS, 2006

AND

IN THE MATTER OF TENDER NO.KAA/ES/WARGADUD/983/C.

CONSTRUCTION OF MANDERA WARDADUD AIRPORT (PHASE 1)

AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

KENYA AIRPORTS AUTHORITY.....RESPONDENT

EX-PARTE: SEO & SONS LIMITED

JUDGEMENT

Introduction

1. By an amended Notice of Motion dated 15th August, 2016, the ex parte applicant herein, **SEO & Sons Limited**, seeks the following orders:

1. An order of Prohibition do issue against the Respondent prohibiting them from exercising power under Section 66(2), (3) and Section 83 of the Public Procurement and Asset Disposal Act to terminate the award for construction of Mandera-Wargadud Airport (Phase 1) - Tender No. KAA/ES/WARGADUD/983/C awarded to the Applicant.

2. An order of Prohibition do issue against the Respondent prohibiting them from stopping the ongoing works being undertaken by the Applicant for the Construction of Mandera-Wargadud Airport (Phase 1) Tender No. KAA/ES/WARGADUD/983/C or for advertising a tender or accepting any bids for the Construction of the Mandera-Wargadud Airport (Phase 1).

3. An Order of Certiorari to remove to this Honourable Court and quash the decision of the Respondent contained in the letters dated 20th July, 2016 and 25th July 2016 terminating the award given to the Applicant for the Construction of Mandera-Wargadud Airport (Phase 1) Tender No. KAA/ES/WARGADUD/983/C and a stoppage of all site activities therein.

Ex Parte Applicant's Case

2. According to the applicant, it bid for the qualification for provision for the construction of the Mandera Wargadud Airport Phase 1 as advertised by the Respondent pursuant to an advertisement in the daily newspaper of the 17th February 2016 in which advertisement it was stated that there would be a pre-bid site meeting on 22nd February 2016, at Mandera Airstrip. In the Bid document, it was a mandatory requirement that the bidders must have in attendance an Engineer on their behalf.

3. According to the applicant, on its part, the said pre-bid meeting was attended by its Engineer, namely **Eng. Albert Onchiri** while the only other firms that sent Engineers were **Hamden Limited**, and **Lakole Building Construction Limited**. It was averred that after the said site meeting, the applicant received a letter dated 29th February, purporting to amend the bid document in effect dropping the mandatory requirement for attendance by an Engineer. Subsequently there was no other site visit.

4. It was averred that after the applicant put in its bid it received a letter dated 11th April 2016 on the 15th of April 2016 from the Respondent informing the applicant that it had rejected the Applicant's bid for having failed to comply with various mandatory requirements. The applicant contended that the rejection of its bid on the basis that it did not meet the required threshold of Kshs. 300,000,000/= annual turnover for the three years required was unjustified and without basis, and arrived at based on computations, which were not known. Further, the Rejection of the Company's bid on the grounds that one of its corporate Directors did not provide its National Identity Card, was also irregular and unfair and a violation of the law relating thereto.

5. The applicant insisted that it duly complied with all the requirements of the tender document.

6. Being aggrieved by the Respondent's rejection of its bid, the applicant preferred a review of the said decision to the Public Procurement Review and Appeals Board (herein after referred to as the "Board") which after hearing the said Review ordered *inter alia* as follows;

a. The decision of the Procuring Entity declaring the Applicant's bid as unsuccessful via its letter dated 11th April, 2016 be set aside and the procuring entity is directed to re-admit the Applicant's tender for technical and financial evaluation.

b. The procuring entities decision to declare the successful tender as successful is set aside and the successful bidder's tender be and is hereby declared as non-responsive.

c. The procuring entity shall carry out the technical and financial evaluation of the Applicants tender and complete the entire process within seven (7) days from the date of this decision.

7. Being aggrieved by the said decision the then Successful Bidder **Messrs. Alwahab Enterprises Limited** filed a Judicial Review Application, to wit **Misc. Civil Application No. 232 of 2016**, which the Court dismissed after which **Alwahab** filed a Notice of Appeal therefrom. In the meantime the Respondent had evaluated the tender, and issued the applicant with a notification of award, declaring it as the successful bidder.

8. Upon the notification of the award as aforesaid, the applicant was informed by the Respondent that the said project was scheduled to be commissioned by the President and his Deputy on the 19th May 2016, by reason of which the Company was required to immediately, and with due dispatch go to the site and commence works to enable the said commissioning of the project. Pursuant thereto the applicant immediately mobilized its heavy equipment labour and immense resources and moved onto the site and the said project was then commissioned by the President and his Deputy on the 19th May 2016. Subsequently the Contract was signed between the Parties herein and the said works have proceeded in earnest and the bush clearing is almost complete.

9. The applicant averred that whilst the aforesaid work was proceeding in earnest, **Alwahab** wrote to the Director of the Public Procurement Oversight Authority and copied the said letter to the Ethics and Anti-Corruption Commission, Kenya Airports Authority and the Directorate of Criminal Investigations alleging that the documents annexed by the applicant in support of its bid, and particularly those from the Kenya National Highway Authority were fraudulent. However, neither the Procurement Oversight Authority (herein after referred to as "POA") nor the Kenya Airports Authority have forwarded the said letter to the applicant.

10. That notwithstanding, on the 14th of July 2016 **Alwahab** withdrew the said complaints, and the Notice of Appeal it had filed in respect of the subject ruling. Be that as it may, by its letter dated 20th of July 2016, KAA informed the Company as follows;

"Upon receipt of a report on further due diligence, a decision has been made to terminate the award based on misrepresentation in respect of your qualification for the award of tender; constituting an offence under Section 66(2), (3) and 83 of the Public Procurement and Asset Disposal Act."

11. Further by its letter dated 25th July 2016, the KAA requested the Applicant to stop any further works on the site.

12. It was the applicant's case, based on legal advice, that the Respondent in terminating the said contract relied on the provisions of section 66(2), (3) and 83 of the **Public Procurement and Asset Disposal Act**. However the said provisions make the Contract voidable, where the Bidder, the Applicant in this case, has been involved in fraudulent practice. It was therefore contended that in exercising its statutory powers as aforesaid, the Respondent has done so in total abrogation of the Applicant's rights as enshrined in Articles 24, 40, 47 and 50 of the Constitution since the Respondent has not notified the Applicant of any complaint it may have received regarding its conduct in the said procurement process and the Respondent has not afforded the Applicant an opportunity to be heard on the said allegations. Further, no reasons have been given to the Applicant on the Respondent's assumption that the Applicant has been involved in any fraudulent practice.

13. It was contended that the Respondent in purporting to carry out a due diligence on the Applicant after it has entered into contract with the Applicant is an abrogation of S. 83 of the **Public Procurement and Asset Disposal Act** by reason whereof the Respondent has acted without jurisdiction, and its conduct is *ultra vires* the **Public Procurement and Asset Disposal Act**. The Applicant further contended that under the provisions of S. 35 of the **Public Procurement and Asset Disposal Act**, the power to undertake investigations into the conduct of a bidder, as in this case is vested in the Procurement Oversight Authority and in this case no charge has been levelled against the Applicant by POA, nor has the Applicant been investigated, nor has the applicant been found culpable by POA of any fraud, as would inform the Respondent to terminate the subject contract in the manner that it has.

14. It was therefore the applicant's case that the Respondent's conduct of terminating the subject contract is premature, made without jurisdiction, is *ultra vires* and made in abrogation of the Applicants right to its presumption of innocence.

15. The applicant lamented that it had expended vast amounts of money, in the region of approximately the sum of Kenya Shillings Eighty Million Six hundred and Sixty two thousand two hundred and sixty one (**Kshs 80, 669, 261.00**), which amount currently stands imperilled by the Respondent's actions, with the effect that the Applicants propriety rights as guaranteed by Article 40 of the Constitution stand to be infringed upon. By reason thereof the Respondent is by reason or Article 47 of the Constitution and the provisions of the Fair **Administrative Actions Act** enjoined to act fairly, lawfully, reasonably and in a procedurally fair manner, and which it has not done.

16. In a rejoinder to the Respondent's response, the applicant averred that the Respondent did not need a typed copy of the Ruling of the Public Procurement Review Appeals Board in order to comply with it and if they wished for more time, they should have requested for more time to comply with the Ruling from the Board. It was the Applicant's case that the Respondent sought to introduce further reasons than those adduced in their letter terminating the Company's Contract in a bid to sanitize its illegal and unprocedural actions of terminating the contract. It was disclosed that:

- a. Notification of the Award was done via a letter dated 18th of May 2016.
 - b. A performance bond being 10% the value of the contract was given by the Applicant to the Respondent as a prerequisite for signing the contract.
 - c. The contract was entered into on 27th of June 2016.
 - d. The Applicant requested for the handover of the site by the Respondent through their letter dated 4th July 2016.
 - e. **Alwahab Enterprises Limited** did file a Judicial Review Application being Nairobi *Misc. Civil Application Number 232 of 2016, Republic –vs- Public Procurement and Administrative Review Board & Ano, Ex –Parte Alwahab Enterprises* in which the Respondent herein was the Second Respondent.
 - f. In JR 232 of 2016, the Court did grant the prayer for leave to operate as stay of the orders which had been issued by the Public Procurement and Administrative Review Board in its decision of 11th May 2016 and the decision of the Respondent herein contained in its letter dated 18th May 2016 pending *inter partes* hearing.
 - g. The Court did therefore effectively stay any contractual relations between the Applicant and the Respondent until the Ruling in JR 232 of 2016 was delivered on 21st June 2016.
 - h. Handover of the site was done around the month of July 2016 as is evidence by the letter from the Applicant dated 4th July 2016.
 - i. At page 250 in the Applicant’s bundle is a letter from the Applicant to the Respondent dated 19th July 2016 requesting the Respondent to send their engineers to verify and certify the work done.
 - j. On 20th of July 2016, the Respondent herein wrote to the Applicant, terminating the award and effectively terminating the contract leading to these judicial review proceedings.
 - k. As such the statement and averments which are propagated by the Respondent that it could not take a period in excess of 3 (three) months to clear a thin layer of vegetation is misleading at best as the Applicant had less than 15 contractual days.
17. Based on legal advice, the applicant believed that judicial Review proceedings do not deal with the merit of the decision but rather the process taken in arriving at the impugned decision. Therefore the allegations contained in Paragraphs 11, 12, 13 & 14 cannot be taken into account in these proceedings.
18. It was the Applicant’s case that he had never been invited to show cause why the contract should not be terminated on the basis of fraud. In failing to afford it the opportunity to know the allegations levelled against it which have ultimately led to the cancellation of the contract, and to respond to them, the Respondent breached its Constitutional right to be heard and has acted as the complainant, judge and executioner. It was its position that sections 66 (2), (3) and 83 of the **Public Procurement and Asset Disposal Act** do not negate its Constitutional Rights and do not preclude the Respondent from following due process.

Respondent’ Case

19. The application was opposed by the Respondent.
20. According to the Respondent, though the Public Procurement Review Appeal Board did make its decision, it is important to note that:
 - (a) The respondent was not given time to make any comprehensive financial and technical re-evaluation of the applicant’s bid as the Tribunal’s directive was for the re-evaluation to be done within seven (7) days of the date of the decision made on 11th May 2016 yet the typed copy of the ruling was availed to the parties on or about 17th May 2016 as the chairman of the Review Board had reportedly not signed the same.

(b) The Respondent in the face of the Review Board's decision was left with little option as the only tender it was to re-evaluate was that by the applicant herein and it is on that basis that the letter alluded to at paragraph 17 "exhibit OS 4" was done.

21. It was averred that save for the basic machinery to clear the top vegetation which machinery had apparently been taken to the site by the applicant to impress the presidential delegation, nothing much took place thereafter up to the time the contract was terminated and that this slow pace but which had no influence in the termination of the contract legitimately brings into question the applicant's financial and technical ability to undertake the project.

22. While admitting that a contract was indeed executed by the applicant and in part by the respondent, it was the Respondent's case that the parties are not only governed by the *Public Procurement and Asset Disposal Act* but the contract. It is also worth appreciating that the following provisions are relevant to the matter at hand in particular the termination of the contract as per annexure "OS-10";

a) Clause 12 (b)-on termination of the contract as a result of fraudulent practices by the applicant which includes misrepresentation of facts in order to influence a selective process or the execution of a contract to the detriment of the Authority.

b) Clause 12(c)-The right of the respondent to procure the services of another contractor after termination of the contract to the applicant as per (a) hereinabove.

c) Clause 20(2.1) - circumstances under which the respondent would or would not be held liable for damages

d) Clause 74 of the FIDIC conditions of contract which run from page 183-214 with relevant clause being at page 212 of annexure "OS-6".

23. It was contended that despite the time limitation and schedule of events/work plan, the applicant abandoned the site with currently no machinery or human traffic activities in sight and the applicant cannot be heard to talk of any loss being suffered. Indeed, if its true the applicant had brought heavy machinery on site in May 2016, it surely would not take a period in excess of three (3) months to merely clear a thin layer of the top soil/vegetation for a specified area to cover the single runaway and the other basic provisions.

24. Based on the contents of paragraph 23 and 24 annexures exhibited relating to "OS.8", the Respondent averred that it clearly shows that the clarification done to the entities mentioned in the said letter was not done in secrecy or with malice and that the applicant was privy to them otherwise its not disclosed how the applicant got into possession of the said letters and there is also no law that compels a whistle blower, so to speak, to notify the "suspect" of a complaint made against such a suspect.

25. The Respondent contended that though it is not privy to the reasons behind the withdrawal of Misc. Application No.232 of 2016 it is apparent as per letter dated 14th July, 2016 that:-

a) The letter talks of withdrawal of a specific court matter not the complaint made in the letter which complaint related to fraud committed by the applicant in respect of the contents specified in the letter written by M/s Issa & Co. Advocates and the reply thereto dated 8th June 2016 by Kenya National Highways Authority.

b) The withdrawal of the notice of appeal was after this Court vide its ruling delivered on 21st June 2016 dismissed the judicial review application (Misc.232 of 2016) instituted by ALWAHAAB ENTERPRISES LTD the client/applicant represented by Issa & Co. Advocates.

c) The Respondent on receiving the letter at page 271 and which showed a clear case of fraud and criminal culpability on the part of the applicant took the issue very serious and sought to quietly follow up the issue and did in fact confirm that the documents submitted by the applicant and which had allegedly been issued by the Kenya National Highways Authority and which touched on the applicants experience and ability to take up the project were indeed fraudulent as confirmed by the said authority.

d) The issue of the fraud committed by the applicant having come to the respondent's knowledge and other investigative bodies' attention, the issue which banded on criminality could not be wished away and even assuming the letter dated 14th July 2016 at Pa 276 intended to withdraw the Criminal Complaint (but which withdrawal is disputed), it would in law be inconsequential. The

party directly wronged by the applicant's fraudulent acts was not AL WAHAAB ENTERPRISES LTD but rather the respondent and by extension the Kenya Government and Kenyans at large as the tax-payers. It is trite law that any contract furthering an illegality (assuming there was any agreement between the applicant and AL WAHAAB ENTERPRISES LTD to drop the criminal complaint for whatever considerations) is in law null and void ab initio.

26. It was averred that the respondent was satisfied that the award of the tender to the applicant was flawed on the basis of the fraudulent documents submitted by the applicant terminated the contract in accordance with provisions of section 60(2), 3 and 83 of the PP&AD Act, 2015 as read together with the contract in force between the parties. It was accordingly reiterated that:-

a) For all intents and purposes, the respondent complied with the law as the Provisions of S.66 (2) and (3) are self-explanatory on the consequences where fraud is detected after the award of a tender. That did not require going back to the Review Board and/or a re-hearing.

b) The contents of paragraph 33 are self-defeating in that the applicant has in its custody the self-explanatory letter from the Kenya National Highways Authority dated 8th June 2016 at page 274 as well as the respondent's termination letter dated 20th July 2016 the latter which sets out the reasons behind the termination.

c) In invoking the Provisions of Articles 24, 40, 47 and 50 of the constitution as per paragraph 30 and/or contending that the respondent acted without jurisdiction, the applicant is deliberately avoiding to concede that as at the time it signed the contract dated 27th June 2016, it was aware of the said provisions yet contracted for the termination of the contract on occurrence of certain events. This is purely a commercial contract and there is no constitutional breach whatsoever. Further, the agreement specified who the parties of the contract were and who had the powers to do what and the contention of lack of jurisdiction by the respondent to terminate the contract is untenable in both law and fact.

d) The contents of paragraph 36 have no legal basis as there is no law that provides for the involvement of the Procurement oversight Authority in a scenario like where the respondent had to terminate the tender/contract after it had been awarded.

27. While conceding that the criminal element of investigations on the fraud is certainly not on the respondent but rather the police and/or anti-corruption authority, it was averred that for purposes of the fraud envisaged under the contract and indeed the Act under Section 66, the letter by the Kenya Highways Authority Act is sufficient. It was noted that:-

a) Even after the respondent issued the letter of termination dated 20th January 2016 the applicant did not challenge or respond to the same which is itself can be termed as an act of guilt.

b) Even as the applicant approaches the court for the orders sought, it has not satisfied that it has come to court with clean hands rebutting by evidential proof, the contents of the letter from the Kenya Highways Authority i.e by proving that contrary to the averments in the said letter, it did in fact undertake the works/tenders in issue. This would be a critical aspect in the applicant's bid to satisfy the court that the respondent's decision was irrational, baseless and based on untruths.

28. To the Respondent, the issue of the applicant's submission of fake/fraudulent documents cannot be taken lightly as on the basis of the evidence before the court the applicant:-

a) Submitted fraudulent documents and cannot seek justice and/or protection of the law having breached the very same law with sheer impunity

b) The project at hand involves an Airport and which construction requires a qualified person/entity as any construction by an unqualified persons not only puts into doubt the quality of final works but also endangers the intended users of the Airport not forgetting the fact that for aircrafts to land at the intended Airport, the works and facilities must meet certain internationally accepted standards. If the quality of the works by the applicant are to come into focus at time of completion, it will be too late to cancel the contract and this will be yet another of the white elephant projects in Kenya where hundreds of millions of tax-payers hard earned money is spent on shoddily undertaken public projects.

c) The Airport is being constructed with the Kenya tax-payers monies and if the final works are unsatisfactorily as has happened in many projects in Kenya it will mean more delays disruptions and more expenses in terms of repairs and/or construction.

29. It was therefore contended that the applicant had not met the legal threshold for the granting of the judicial remedy orders sought.

Determination

30. I have considered the application, the affidavits in support thereof, the replying affidavit, the submissions on record and the authorities in support thereof.

31. The crux of the applicant's case is that the Respondent's decision to terminate the award of the tender to the applicant violated the rules of natural justice. That a violation of the rules of natural justice is one of the grounds for granting judicial review reliefs was restated in **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**, in which the Court while citing **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478 at 479** held that:

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety....Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality....Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards....Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”

32. With respect to procedural impropriety, *Blackstone's Civil Practice 2006* at page 961 (74.21) states that:

“Procedural impropriety is concerned with the procedure by which a decision is reached, not the ultimate outcome. In order to prove procedural impropriety, the applicant must show that the decision was reached in an unfair manner. If there is no statutory framework which expressly stipulates the relevant procedural requirements, there are two applicable common law rules under this head, namely;

(a) the rule against bias, which requires the public body to be impartial and to be seen to be so; and

(b) the right to a fair hearing whereby those affected by a decision of a public body are entitled to know what the case is against them and to have a proper opportunity to put their case forward.”

33. In this case it is clear that vide a letter dated 20th July, 2016, the Respondent herein terminated the award of the subject tender while expressing itself *inter alia* as hereunder:

Upon receipt of a report on further due diligence, a decision has been made to terminate the award based on misrepresentation in respect of your qualification for the award of tender; constituting an offence under section 66(2), (3) and 83 of the Public Procurement and Asset Disposal Act.

Kindly note that the aforementioned Award is hereby terminated.

34. For avoidance of doubt the legal provisions that were relied upon provide as hereunder:

66 (1) A person to whom this Act applies shall not be involved in any corrupt, coercive, obstructive, collusive or fraudulent practice; or conflicts of interest in any procurement or asset disposal proceeding.

(2) A person referred to under subsection (1) who contravenes the provisions of that sub-section commits an offence.

(3) Without limiting the generality of the subsection (1) and (2), the person shall be—

(a) disqualified from entering into a contract for a procurement or asset disposal proceeding; or

(b) if a contract has already been entered into with the person, the contract shall be voidable.

83. (1) An evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act.

(2) The conduct of due diligence under subsection (1) may include obtaining confidential references from persons with whom the tenderer has had prior engagement.

(3) To acknowledge that the report is a true reflection of the proceedings held, each member who was part of the due diligence by the evaluation committee shall—

(a) initial each page of the report; and

(b) append his or her signature as well as their full name and designation.

35. It is clear that section 83 of the Act can only be invoked after tender evaluation but before the award of the tender. In this case, it is contended that the tender had in fact been awarded and the work had in fact commenced. Therefore section 83 was improperly invoked.

36. As regards section 66, it is clear that the same can only be invoked where it is found that a person to whom an award of a tender is given is involved in any corrupt, coercive, obstructive, collusive or fraudulent practice; or conflicts of interest in any procurement or asset disposal proceeding.

37. The question that arises is whether in taking disciplinary action against the applicant, the Respondent was taking an administrative action. It must be appreciated that the Article that specifically deals with judicial review of administrative action is Article 47 of the Constitution. Pursuant to the said Article, Parliament enacted the *Fair Administrative Action Act, 2015* which in section 2 thereof defines “administrative action” to include:

(i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or

(ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;

38. The same section defines “administrator” as “a person who takes administrative action or who makes an administrative decision.” Section 3 on the other hand provides:

(1) This Act applies to all state and non-state agencies, including any person

(a) exercising administrative authority;

(b) performing a judicial or quasi-judicial function under the Constitution or any written law; or

(c) whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates. [Underlining Mine].

39. It is clear that the Respondents decision to terminate the award of the tender to the applicant affected the contractual legal rights or interests of the Applicants. It is therefore my view and I so hold that pursuant to the provisions of Article 47 as read with the

provisions of the *Fair Administrative Action Act, 2015*, judicial review orders may where appropriate issue against the decisions of the Respondent. This must be so because it is now appreciated that judicial review is an important control, ventilating a host of varied types of problems. The focus of cases may therefore range from matters of grave public concern to those of acute personal interest; from general policy to individualised discretion; from social controversy to commercial self-interest; and anything in between. In my view where the issue of enjoyment of fundamental rights and freedoms under the Constitution calls for determination, that removes the matter from purely a private affair as it then becomes a matter of “acute personal interest.” This must be so because Article 19(1) of the Constitution recognises that the Bill of Rights is an integral part of Kenya’s democratic state and is the framework for social, economic and cultural policies.

40. It is now clear that judicial review remedies can be granted on grounds of *ultra vires*, jurisdictional error, misdirection in law, errors of precedent fact such as fundamental factual errors or findings devoid of evidence, abdication of or fettering discretion, insufficient inquiry or failure to consider material or relevant facts, considering irrelevant facts, bad faith or improper motive, frustration of the legislative purpose, substantive or procedural fairness, inconsistency in decision making, unreasonableness, lack of proportionality, bias and failure to give reasons for the decision. See *Judicial Review Handbook* 6th Edition by **Michael Fordham**.

41. Therefore substantive unfairness is a ground for grant of judicial review orders. However this ground must be distinguished from a decision on merit. According to *Judicial Review Handbook*, 6th Edition by **Michael Fordham**, page 537;

“Once associated with procedure, basic fairness operates also as a standard applicable to substantive acts. Substantive unfairness is a concept which overlaps with abuse of power and legitimate expectation. Whether conduct is conspicuously unfair or abuse of power depends ultimately on whether, in all the circumstances, strong disapproval is called for.”

42. According to **R vs. North and East Devon Health Authority, exp Coughlan [2001] QB 213**, fairness test for justification in breaching a substantive legitimate expectation. Similarly in **R vs. Secretary of State for Home Department, exp Hindley [2000] 1 QB 152 at 163D**, Lord Woolf, MR had this to say:

“The principle of due process is not confined to procedure. It can have effect on the substance of what is happening in carrying out the sentence...it can result in substantive benefits; due process; basic fairness as a constitutional fundamental; basic fairness and the principle of legality; disregard of an established and relevant fact as unfairness.”

43. That was the same position in **R. vs. Secretary of State for Home Department, exp Pierson [1998] AC 539** in which it was held that:

“The rule of law in its wider sense has procedural and substantive effect; the rule of law enforces minimum standards of fairness, both substantive and procedural...The State is bound by considerations of substantive fairness...the presumption must be that he will exercise his powers in a manner which is fair in all the circumstances. What fairness demands depends on the context in which the power is being exercised.”

44. The Applicants in this application contend that their rights to be heard before the award to them was terminated were violated as they were not given an opportunity to answer to the allegations which were levelled against them. *Halsbury’s Laws of England*, 5th Edn. Vol. 61 page 539 at para 639 states:

“The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the *audi alteram partem* rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court. Moreover, even in the absence of any charge, the severity of the impact of an administrative decision on the interests of an individual may suffice itself to attract a duty to comply with this rule. Common law and statutory obligations of procedural fairness now also have to be read in the light of the right under the Convention for the Protection of Human Rights and Fundamental Freedoms to a fair trial which will be engaged in cases involving the determination of civil rights or obligations or any criminal charge.”

45. The minimum ingredients of fair hearing are provided in Article 47 of the Constitution. I say the minimum because under Article 20 of the Constitution every person is entitled to enjoy the rights and fundamental freedoms in the Bill of Rights to the

greatest extent consistent with the nature of the right or fundamental freedom and in applying a provision of the Bill of Rights, a court is enjoined *inter alia* develop the law to the extent that it does not give effect to a right or fundamental freedom and to adopt the interpretation that most favours the enforcement of a right or fundamental freedom. The said Article 47 provides:

(1) *Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.*

(2) *If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.*

46. It is my view that fair hearing must be meaningful for it to meet the constitutional threshold. On this aspect, *Halsbury's Laws of England*, 5th Edn. Vol. 61 page 545 at para 640 states:

“The *audi alteram partem* rule requires that those who are likely to be directly affected by the outcome should be given prior notification of the action proposed to be taken, of the time and place of any hearing that is to be conducted, and of the charge or case they will be called upon to meet. Similar notice ought to be given of a change in the original date and time, or of an adjourned hearing... The particulars set out in the notice should be sufficiently explicit to enable the interested parties to understand the case they have to meet and to prepare their answer and their own cases. This duty is not always imposed rigorously on domestic tribunals which conduct their proceedings informally, and a want of detailed specification may exceptionally be held immaterial if the person claiming to be aggrieved was, in fact, aware of the nature of the case against him, or if the deficiency in the notice did not cause him any substantial prejudice... Notification of the proceedings or the proposed decision must also be given early enough to afford the person concerned a reasonable opportunity to prepare representations or put their own case. Otherwise the only proper course will be to postpone or adjourn the matter.” [Underlining mine]

47. In Geothermal Development Company Limited vs. Attorney General & 3 Others [2013] eKLR it was held that:

“20. Article 47 enshrines the right of every person to fair administrative action. Article 232 enunciates various values and principles of public service including “(c) responsive, prompt, effective, impartial and equitable provision of services” and “(f) transparency and provision to the public of timely, accurate information.”

28. As a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against it. Elementary justice and the law demands that a person be given full information on the case against him and given reasonable opportunity to present a response. This right is not limited only in cases of a hearing as in the case of a court or before a tribunal, but when taking administrative actions as well. (See *Donoghue v South Eastern Health Board [2005] 4 IR 217*). Hilary Delany in his book, *Judicial Review of Administrative Action, Thomson Reuters 2nd edition, at page 272*, notes that, **“Even where no actual hearing is to held in relation to the making of an administrative or quasi-judicial decision, an individual may be entitled to be informed that a decision which will have adverse consequences for him may be taken and to notification of the possible consequences of the decision.”**

29. Fair and reasonable administrative action demands that the taxpayer would be given a clear warning on the probable consequences of non-compliance with a decision before the same is taken; in this case, the Company should in no uncertain terms have received information as to the implication of the letter and the consequences of its failure to make good the payments demanded in the notice. (See Supreme court decision in *TV3 v Independent Radio and Television Commission [1994] 2 IR 439*).

30. In many jurisdictions around the world, it has long been established that notice is a matter of procedural fairness and an important component of natural justice. As such, information provided in relation to administrative proceedings must be sufficiently precise to put the individual on notice of exactly what the focus of any forthcoming inquiry or action will be. (See *Charkaoui v Canada [2007] SCC 9, Alberta Workers' Compensation Board v Alberta Appeals Commission (2005) 258 DLR (4th), 29, 55 and Sinkovich v Strathroy Commissioners of Police (1988) 51 DLR (4th) 750.*”

48. Section 4(3) of the *Fair Administrative Action Act, 2015* provides as follows:

(3) *Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the*

administrator shall give the person affected by the decision-

- (a) prior and adequate notice of the nature and reasons for the proposed administrative action;*
- (b) an opportunity to be heard and to make representations in that regard;*
- (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;*
- (d) a statement of reasons pursuant to section 6;*
- (e) notice of the right to legal representation, where applicable;*
- (f) notice of the right to cross-examine or where applicable; or*
- (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.*

49. In this case it is clear that the Respondent's decision was not arrived at after hearing the Applicant's position on allegation which were very serious in nature. This Court is not concerned with whether or not the Respondent was correct in terms of merit in taking the decision it did. Rather the Court's concern is the process through which the decision was arrived at. Once it is shown that the applicant's right to be heard was violated, that is the end of the matter.

50. This was the position in **Onyango Oloo vs. Attorney General [1986-1989] EA 456** where the Court of Appeal expressed itself as follows:

"The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard....There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice....A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at....It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided....In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings....It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated....Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair....Denial of the right to be heard renders any decision made null and void ab initio." [Emphasis mine].

51. This was a restatement of Lord Wright's decision in **General Medical Council vs. Spackman [1943] 2 All ER 337** cited with approval in **R vs. Vice Chancellor JKUAT Misc. Appl. No. 30 of 2007** that:

"If the principles of natural justice are violated in respect of any decision, it is, indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principles of justice. The decision must be declared as no decision."

52. In **Ridge vs. Baldwin [1963] 2 All ER 66** at 81, Lord Reid expressed himself as follows:

“Time and again in the cases I have cited it has been stated that a decision given without the principles of natural justice is void.”

53. Having considered the material placed before me it is my view that the applicant’s case is merited.

Order

54. Consequently, I hereby issue an order of certiorari removing into this Court for the purposes of being quashed the decision of the Respondent contained in the letters dated 20th July, 2016 and 25th July 2016 terminating the award given to the Applicant for the Construction of Manderu-Wargadud Airport (Phase 1) Tender No. KAA/ES/WARGADUD/983/C and a stoppage of all site activities therein and the same are hereby quashed. Having done so it is no longer necessary to issue the order of prohibition in the manner sought.

55. As the parties failed to comply with the Court’s directions to furnish soft copies, there will be no order as to costs.

56. Orders accordingly.

Dated at Nairobi this 21st day of March, 2018

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Maina for Mr Wandabwa for the applicant

CA Ooko



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