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| Judge: | Jairus Ngaah |
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| Case Summary: | - |
| Court Division: | Judicial Review |
| History Magistrates: | - |
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| Docket Number: | - |
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**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**JUDICIAL REVIEW DIVISION**

**APPLICATION NO. E175 OF 2021**

**REPUBLIC.....APPLICANT**

**-VERSUS-**

**PUBLIC PROCUREMENT ADMINISTRATIVE**

**REVIEW BOARD.....1ST RESPONDENT**

**JUBILEE MEDS LIMITED.....2ND RESPONDENT**

**AND**

**CAPERINA ENTERPRISES LIMITED.....1ST INTERESTED PARTY**

**ALEXANDER HEALTHCARE LIMITED.....2ND INTERESTED PARTY**

***ex parte:***

**1. ACCOUNTING OFFICER, KENYA MEDICAL SUPPLIES AUTHORITY**

**2. KENYA MEDICAL SUPPLIES AUTHORITY**

**JUDGMENT**

A substantive motion filed under Order 53 Rule 3(1) presupposes that leave has been granted for that motion to be made for the prerogative orders of mandamus prohibition and certiorari. That rule reads in part as follows:

"***3. (1) When leave has been granted to apply for an order of mandamus, prohibition and certiorari, the application shall be made within 21 days by notice of motion to the High Court…"***

Thus, the motion to be filed is for the substantive orders and not for leave.

In the motion before court, leave was granted on 22 December 2021. On that date, the applicants were directed, *inter alia*, to file and serve the motion for the substantive orders within three days of that date.

The applicants eventually filed the motion, more particularly dated 22 January 2021. The motion is said to have been made under sections 8 and 9 of the Law Reform Act and Order 53 Rules 1, 2, 3 and 4 of the Civil Procedure Rules, 2010. However, rather than seek for the substantive orders, the applicants, once again, sought for leave to file a substantive motion in the same terms as in the chamber summons they had previously filed and which summons, as noted, had been allowed and leave granted. For the avoidance

of doubt, the prayers sought in the motion were couched as follows:

***"1. Leave be granted to the applicants to apply for an order of certiorari to remove to this Honourable Court and quash the proceedings and the decision of the 1st respondent delivered on 7th December 2021 in PPARB Review Application No. 138 of 2021.***

***2. Leave be granted to the Applicants for an order of prohibition restraining the 1st and 2nd respondents from acting upon and/or executing the directions made by the 1st respondent against the applicants in the said decision on 7th December 2021.***

***3. Leave do (sic) operate as stay of execution of the said decision of the 1st respondent delivered on 7th December 2021.***

***4. Costs of this application be provided for."***

This was obviously erroneous and, inevitably, the 2nd respondent took up the matter in in its response to the application urging that the orders sought were spent and that the court could not grant orders that ought to have been sought but were not prayed for. The 2nd respondent urged that the applicants are bound by their pleadings and the court cannot come to their aid to rectify their application and alter the prayers. To the extent that applicants are asking for the prayers which have already been granted, it was urged that the application is incompetent.

Mr. Kamau, the applicants' learned counsel, did not contest the deficiency in the application and when the matter came up for highlighting of submissions, he conceded that indeed an error had been made in the substantive motion but that it was inadvertent. He proceeded to make an oral application to amend the motion. The application was opposed by Mr. Omolo, the learned counsel for the 2nd respondent. Ms. Nderitu, the learned counsel for the interested party, did not oppose the application. The 1st respondent did not participate in the proceedings.

I rejected the application mainly because applications for judicial review under section 175 (1) and (3) of the Public Procurement & Asset Disposal Act must be resolved within rather rigid timelines, failure of which the entire proceedings would be rendered null. (See the **Court of Appeal decision in Civil Appeal No. E039 of 2020 Aprim Consultants versus Parliamentary Service Commission & Others**).

Ordinarily, applications for amendment of any pleading would be allowed at any stage of proceedings but before judgment rendered; however, if I was to allow the application for amendment in this case, it would have been incumbent upon the court to revise the timelines so that, among other things, the amended motion would be filed and served and the respondents would have been to be given opportunity to respond to the amended motion after which parties would file and exchange written submissions and eventually highlight them.

The revision of timelines to cater for all these activities would ultimately leave the court with little or no time to write and render its judgment within the prescribed timelines. And as it has been held in the Aprim Consultants case (supra), if a judgment was to be rendered outside the prescribed period, that judgment would of course be a nullity and certainly, no party other than the court itself would stand accused for the undesired result.

I am minded that in **Republic versus Public Procurement Administrative Review Board & Others, ex parte Techno Relief Services Limited (2021) eKLR,** which is a case I determined in the wake of the Court of Appeal decision in the ***Aprim Consultants*** case ***(supra),*** I held that, in exceptional circumstances, courts, as repositories for justice, should not interpret the law in such a way as to render themselves helpless to such an extent that they cannot dispose of disputes brought before them. Where, for instance, due to some unforeseen or unavoidable circumstances, a decision cannot be rendered within the statutory prescribed timelines, there should be nothing wrong in the court delivering the decision outside those timelines. The right to access to justice under Article 48 of the Constitution, among other things, enjoins courts to resolve disputes brought before them and not to abandon them midstream only because they have been caught out by time. If they were to do so, that would be tantamount to abdication of their core responsibility, which is, to dispense justice.

But the circumstances in the instant application cannot be said to be anywhere near exceptional. As matter of fact, the learned counsel never suggested them to be; his clients' application was not of the nature that I referred to in the Techno Relief Services

Limited case. As I understand it, his case is simply that he was less diligent as a result of which he ended up filing an application that had initially been granted instead of filing the substantive motion orders of judicial review.

The end and obvious result is that there is no application for judicial review orders before court for determination. To the extent that the application before court seeks orders that have been granted, it is bad in law; it is incompetent and, it is also an abuse of the process of this Honourable Court.

Even assuming the applicant's application was competent, I am not persuaded it would have gone very far. I say so because I have had the opportunity to consider the 1st respondent's impugned and I have not find any fault with it.

It is apparent from this decision that the 1st respondent considered the application for review brought before it in the request for review Application No. 168 of 2021.

The application was initiated by Jubilee Meds Limited, the 2nd respondent in the present application and the major point of contention in that matter was whether Jubilee Meds Limited could be said to have been fairly disqualified from a procurement process on a criterion that was not among those prescribed in the tender document.

The procurement in question was initiated by the 2nd respondent and was more particularly described in the tender document as *'KEMSA/ONT03/2021-2023-Supply of Health Technologies'*. It was a tender '*for the Supply of Health Technologies (surgical Gloves, Cannulas, Administrative sets and Syringes.*' I will refer to it as simply 'the tender'. It was advertised on 29 June 2021 and was closed on 22 July 2021.

The tender was made up of eighteen lots which were reserved for disadvantaged groups from qualified and eligible tenderers. At the end of the procurement process, the tender comprising lot 10 was awarded to Caperina Enterprises Limited, the 1st interested party in these proceedings.

The 1st respondent allowed the 2nd respondent's application and determined that the 2nd respondent's tender was unfairly disqualified. According to the 1st respondent, the 2nd was not evaluated in accordance with clause 2 and 3(c) Product Evaluation of Specific Evaluation Criteria read with section VII-Schedule of Requirements of the Tender Document and Section 80(2) of the Public Procurement and Asset Disposal Act.

The 1st respondent held that since the 2nd respondent's tender complied with all other requirements of the technical evaluation stage, it ought to have been admitted for evaluation at the financial evaluation stage. The 1st respondent therefore nullified the award of the tender together with all the notices issued with respect to lot 10 and directed fresh evaluation of the tenders, including the 2nd respondent's which, in the 1st respondent's view, qualified for evaluation at the financial stage.

This is the decision that would have been the subject of this judgment had the applicants filed the appropriate motion.

The pertinent question before the 1st respondent in the request for review was whether the tender document contained a requirement for labelling of the secondary packaging for items to be supplied in lot 10. The 1st respondent considered the requirements in the tender document and on this particular requirement of labelling, it came to the following findings and conclusions:

***"We note that the provisions of Section III – Evaluation and Qualification criteria at pages 32 to 41 read with Section VII. Schedule of Requirement at pages 107 to 118 of the Tender Document do not provide for labelling of a secondary package with respect to the sample of 10 pieces required to be submitted with respect to evaluation of Lot 10 of the subject tender. In fact, Clause 4.1 of Section VII – Schedule of Requirements at page 116 of the Tender Document indicates that a unique identification, the word KEMSA, needs to be imprinted on the primary, secondary and tertiary packaging of products at pre-delivery and full consignment by the successful tenderer and imprinting of the word KEMSA on primary, secondary and tertiary packaging is not applicable to the tender sample.***

***We however note that it is only during delivery of products by a successful tenderer of Lot 10 of the subject tender that the secondary and tertiary package of products being delivered by a successful tenderer to the 2nd respondent is required to be labelled with the manufacturers name, address, country of origin, batch No, date of manufacture and expiry as outlined in the***

***Delivery Schedule Specification at page 87 of the Tender Document. This to our mind cannot form part of the criteria for the following reason (sic). First, delivery of products can only be done after a successful tenderer has been awarded and not during evaluation of tenders. Secondly, the Delivery Schedule Specification requiring labelling of secondary packaging does not form part of the criteria for evaluation stipulated under Section III – Evaluation and Qualification criteria at pages 32 to 41read with Section VII – Schedule of Requirements at pages 107 to 158 of the Tender Document.***

***Accordingly, there is no specific technical evaluation criteria that required tenderers to provide labelled secondary packaging with respect to Lot 10 of the subject tender, and no specifications are given as a criteria (sic) on how secondary packaging would be labelled. If the respondents intended for the sample of the secondary package to be labelled then nothing would have been easier than to indicate much in the criteria for evaluation in the Tender Document...."* (see pages 30 to 32 of the decision)".**

Having established the fact of the requirement of labelling and when it applied, the 1st respondent came to the conclusion, as earlier noted, that the 2nd respondent tender was not evaluated in accordance with Clause 2 and 3 of the Evaluation criteria Section III – Evaluation and Qualification criteria as read with Section VII – on the Schedule of Requirements of the Tender Document.

So, the 1st respondent considered the evidence before it and came to a finding that, in its view, was the correct finding.

It is not for this court to evaluate afresh the evidence with which the 1st respondent was presented and, perhaps, come to its own conclusion. Again, it does not matter that faced with the same facts, the court could probably have reached a different conclusion from that which the 1st respondent reached unless, of course, the decision is, on the face of it, so bizarre that it cannot stand to reason or common sense.

It is trite that a judicial review court does not exercise appellate jurisdiction in the determination of judicial review application. It cannot, for instance, substitute its own decision for that of the tribunal. It is more concerned with the process than with the decision itself.

In **Energy Regulatory Commission versus S G S Kenya Limited & 2 others [2018] eKLR**, the substratum of the in Court of Appeal was the tender award by the Energy Regulatory Commission (appellant) for tender No. ERC/PROC/4/3/16-17/119. It was alleged that on the 18 April 2017, the appellant advertised an open tender inviting bids for the "*provision of marking and monitoring of petroleum products"* under tender No. ERC/PROC/4/3/16-17/119 in which the respondent and two other bidders participated. On 30 June 2017, after evaluating both the technical and financial bids placed by the bidder, the respondent's bid was found to be the lowest evaluated bid and therefore the appellant's technical committee recommended that the tender be awarded to the respondent. Nonetheless, while recommending the award, the committee made a general observation that there is in existence, in the market, a new technology that could detect jet fuel in motor fuel.

Acting on this general observation of the tender committee, the tender awarded to the respondent was terminated by the appellant and the tender process re-started with a requirement that the new technology changes be incorporated in the bid documents. The decision to terminate the tender was communicated to all bidders including the respondent and the Public Procurement Regulatory Authority.

Aggrieved by the termination, the respondent in the appeal filed an application challenging the decision for review of the tender award, at the Public Procurement Administrative Review Board and in the decision made on 1 August, 2017, the Review Board dismissed the application for review stating that the appellant was at liberty to re-advertise the tender without notice to any bidder, including the respondent.

Dissatisfied with the Review Board's decision, the respondent filed a judicial review application in this court and in a judgement delivered on 25 September 2017, Mativo J. granted the prayers sought and quashed the decision of the Review Board and ordered the appellant to proceed with the implementation of tender No. ERC/PROC/4/3/16-17/119.

Aggrieved by this court's decision, the appellant lodged an appeal to the Court of Appeal and the court considered the issue whether the learned judge erred in forming a view of the evidence and improperly substituting the decision of the Board with his own. While allowing the appeal, the Court of Appeal faulted this court for determining a judicial review matter as if it was an appeal, and for going into the merits of a decision already taken. The appellate Court held it to be improper for this court to make value judgment

regarding the evidence; to weigh the same, and to minutely examine it, to determine whether it reached a certain standard of acceptance. The Court found that this honourable court had occasioned room for abuse of its power, by usurping the competences of the Public Procurement Administrative Review Board.

It was further held that in a judicial review matter, the court's mandate is limited to procedural improprieties, and extends not to the merits of a decision. The Board had been duly mindful of its own earlier decision in **Avante International INC v. IEBC (Review No. 19 of 2017)** where it took into consideration the nature and weight of the opinion on technological change, which the procuring entity had acted upon. The Board's reasoning exhibited a fidelity to practicality and to good sense. Consequently, the learned judge ought to have shown greater deference to the Board's decision, bearing in mind the specialisations of the Board.

The case of **OJSC Power Machines Limited, TransCentury Limited, and Civicon Limited (Consortium) v Public Procurement Administrative Review Board Kenya & 2 others [2017] eKLR** was cited with approval. In that case it was held that:

***"Save for a limited scope, which we shall return to later, the court, considering a judicial review application, must never consider its role as appellate court and must avoid any temptation to go into the substance of the impugned decision itself or to ask questions, whether there was or there was no sufficient evidence to support the decision of the public body concerned. It is not for the court or individual judges to substitute their opinion for that of the public body constituted by law to decide the matter in question. See Republic vs. Kenya Revenue Authority ex parte Yaya Towers Limited (2008) Misc. Civil Appl. No. 374 of 2006. In judicial review proceedings, the mere fact that the public body's decision was based on insufficient evidence, or on misapplication of evidence, cannot be a ground granting judicial review remedies. Whether that decision was right or not, the affected party ought to challenge it on appeal. In reaching its determination, it must, however, be recognized that a tribunal or statutory body or authority has jurisdiction to err and the mere fact that in the course of its inquiry it errs on the merits is not a ground for quashing the decision by way of judicial review as opposed to an appeal. It is only an appellate tribunal which is empowered and in fact enjoined in cases of the first appeal to re-evaluate the evidence presented at the first instance and arrive at its own decision on facts. Whereas a decision may properly be overturned on an appeal, it does not necessarily qualify as a candidate for juridical review. See East African Railways Corp. vs. Anthony Sefu Far-Es-Salaam (1973) EA 327."***

While citing the case of **Biren Amritlal Shah & anor vs. Republic & 3 others [2013] eKLR,** the court held further that:

***"The learned Judge would only have been entitled to interfere were it the case that there was absolutely no evidence before the Board that would have justified the upholding of the appellant's termination of the tender. In other words, the case should have been so plainly and self-evidently devoid of evidence or basis for termination, as to render upholding of the termination an inexplicable act of capricious irrationality defiant of all logic and reason. It should have been such a decision that no reasonable tribunal, properly directing itself on the case would have arrived at. That is the Wednesbury unreasonableness that would invalidate a tribunal's decision by way of certiorari."***

All these decisions point to the position that it is not the business of the judicial review court to interrogate the evidence presented at the tribunal to ascertain whether the tribunal arrived at the correct decision. The process, rather than the merits of the decision, is what ought to concern the court.

In the final analysis, none of the grounds upon which the applicant's application would have been based has been proved.

To be precise, it cannot be urged that the 1st respondent exceeded its jurisdiction in the determination of the question of labelling yet that is the very question that was not only presented before it for determination but also is among the question for which the 1st respondent is established to determine in the discharge of its functions.

According to section 167 (1) of the Public Procurement and Asset Disposal Act, a candidate or tenderer has a right to present his grievances to the 1st respondent if, in his opinion, he has suffered or risks suffering loss or damage as a result of breach of duty by the procuring entity; that section reads as follows:

***167. Request for a review***

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

And once the dispute is presented before it, the 1st respondent is enjoined to resolve it and make appropriate orders under section 173 of the Act. That section reads:

***173. Powers of Review Board Upon completing a review, the Review Board may do any one or more of the following—***

***(a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;***

***(b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;***

***(c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;***

***(d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and***

***(e) order termination of the procurement process and commencement of a new procurement process.***

It has not been demonstrated how the 1st respondent may have overstepped its mandate and, in the process, breached this provision of the law in making its decision.

It is worth noting that section 167 (4) of the Act expressly prescribes matters which the 1st respondent cannot deal with whenever it is considering an application for review. That section reads as follows:

***167. (4) The following matters shall not be subject to the review of procurement proceedings under subsection (1)—***

***(a) the choice of a procurement method;***

***(b) a termination of a procurement or asset disposal proceedings in accordance with section 62 of this Act; and***

***(c) where a contract is signed in accordance with section 135 of this Act.***

The applicants have neither provided any evidence nor suggested that the question which the 1st respondent determined falls in any of the categories of matters from which it is barred under section 167. (4) of the Act.

I find the 1st respondent's decision to have been legal, rational and procedurally proper. It is not blemished by any of the grounds for judicial review.

In the ultimate, even if the applicant's application was properly before court, it would still have failed on merits. The application is struck out with costs. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON 4TH FEBRUARY 2022.**

**NGAAH JAIRUS**

**JUDGE**

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