Aprim Consultants v Parliamentary Service Commission & another (Civil Appeal E039 of 2021) [2021] KECA 1090 (KLR) (8 October 2021) (Judgment)

Neutral citation: [2021] KECA 1090 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E039 OF 2021

PO KIAGE, HM OKWENGU & F SICHALE, JJA

OCTOBER 8, 2021

BETWEEN

APRIM CONSULTANTS ..... APPELLANT

AND

PARLIAMENTARY SERVICE COMMISSION ..... 1ST RESPONDENT

THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD ..... 2ND RESPONDENT

(An appeal from part of judgment and decree of the High Court of Kenya at Nairobi (Hon. Nyamweya, J.) dated 15th January, 2021 and delivered on 18th January, 2021 in HC NAIROBI JUDICIARY REVIEW CASE NO. 117 OF 2020)

JUDGMENT

1. On 3rd March 2021 we rendered our decision in this appeal pursuant to Rule 32(4) of the *Court of Appeal Rules*. Our decision was that the judgment of the High Court (Nyamweya, J.), as she then was) dated 15th January 2021 was a nullity by reason of having been rendered outside of the mandatory timelines set in section 175 of the *Public Procurement and Assets Disposal Act*. We reserved the reasons for our said decision which we now give.

2. We are keenly and uncomfortably aware that these reasons have been much delayed, which is regretted. We had scheduled them for 7th May 2021 but for reasons beyond our immediate control we were not able to render them. Nor could we given them within a reasonably short time thereafter due to yet more reasons including the full and extended involvement of all three of us in the recently concluded and decided *BBI appeals* (C.A. No. E291 of 2021).

3. By the impugned judgment, the learned judge reversed the decision of the Public Procurement Administration Review Board (the Board), the 2nd respondent herein made on 21st May 2020 at

the instance of the Parliamentary Service Commission (PSC) which is the first respondent in this appeal. The Board had before it an application by Aprim Consultants (Aprim) the appellant herein seeking a review of the decision of the Parliamentary Joint Services, PSC with respect to RFP No. PJS/RFP/001/2019 – 2020 for the provision of Consultancy Services for Preparation of a Master Plan, Preliminary and Detailed Design, Tender Documents and Construction Supervision of the Proposed Centre for Parliamentary Studies and Training on LR No. 28172. PSC had by that decision, communicated by letters to bidders dated 30th April 2020, terminated the said tender pursuant to section 63(1) (a) (l) of the Act on account of having been overtaken by operation of law.

4. The Board upheld Aprim's request for review and, at the end of its reasoned decision, made the following final orders against PSC, which was the Procuring Entity;

> " 1. The Procuring Entity's Letters of Notification of Termination of Procurement proceedings dated 30th April 2020 with respect to RFP. No. PJS/RFP/001/2019-2020 for the Provision of Consultancy Services for Preparation of a Master Plan, Preliminary and Detailed Design, Tender Documents and Constructions Supervision of the Proposed Centre for Parliamentary Studies and Training on L.R. No. 28172 addressed to the Applicant herein and all other bidders who participated in the subject tender, be and are hereby cancelled and set aside.
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> 2. The Procuring Entity's Professional Opinion dated 27th April, 2020 is hereby cancelled and set aside. For avoidance of doubt, the Procuring Entity's Evaluation Report dated 23rd April 2020 recommending an award to the Applicant is hereby upheld.
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> 3. The Procuring Entity is hereby directed to complete the procurement process to its logical conclusion including issuance of notification letters of the outcome of RFP. No. PJS/RFP/001/2019-2020 for the Provision of Consultancy Services for Preparation of a Master Plan, Preliminary and Detailed Design, Tender Documents and Construction Supervision of the Proposed Centre for Parliamentary Studies and Training on L.R. No. 28172 in accordance with the Request for Proposal Document, the Act and the Constitution, within fourteen (14) days from the date of this decision, taking into consideration the Board's finding in this case."

5. In reversing those orders on the judicial review proceedings before her, the learned judge issued an order of certiorari that removed into the High Court and quashed the decision of the Board, and issued a declaration that the letters of termination were valid which she proceeded to uphold and reinstate.

6. Aggrieved by that decision Aprim has by this appeal raised two grounds of appeal in its memorandum of appeal namely;

> 1. That the learned judge erred in law in failing to render a decision within 45 days as contemplated by Section 175(3) of the *Public Procurement and Asset Disposal Act*.
>
> 2. That the learned judge erred in law in making a finding that the evaluation period is computed to include any extraneous processes done after the evaluation report has been made by the evaluation committee."

7. We shall confine our reasons to the 1st ground, as it is the basis upon which we allowed the appeal, and it turns on the construction and meaning we attach to the timelines for determination of judicial review proceedings brought in challenge to the decisions of the Board and the consequences of failure to determine such proceedings within the prescribed time.

8. Section 175 is in the following terms;

> 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.
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> 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.
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> 3. The High Court shall determine the judicial review application within forty-five days after such application.
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> 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.
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> 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.
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> 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.
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> 7. Where a decision of the Review Board has been quashed, the High Court shall not impose costs on either party."

9. We were alive to the above provision, particularly sub-section (4) thereof, when we rendered our decision aforesaid. We noted that the record of appeal had been lodged on 1st February 2021. As the Sub-section commands that this Court "shall make a decision within forty five days" on such appeal, we were cognizant of the need to render our decision within such time, which we did. It is fortuitous that under our Rules, it is perfectly permissible to render a decision but reserve the reasons therefor to a later date. Rule 32(5), set within the context of the entire rule which deals with the time and manner of giving of judgments, provides as follows:-

> 32(5) Notwithstanding sub-rule (1), the Court may at the close of the hearing of an application or appeal, give its decision but reserve its reasons and in such a case the reasons may be delivered in court or deposited in the Registry or sub-registry in the place where the application or appeal was heard within ninety days and where the reasons are so deposited, copies thereof shall be available to the parties and they shall be so informed."

10. Having rendered our decision under that sub-rule on March 3, 2021, we acted within the 45-days timeline imposed by the Act. There was therefore no contradiction, less still infirmity, in our having

reserved the reasons for 7th May 2021 because the 45-day period was no longer applicable its command having been obeyed by the issuance of our decision within the stated timeline. While admitting the anxiety that our failure to render our reasons on the date stated may have caused a party or parties and perhaps the court below, the board, practitioners and other stakeholders in public procurement, we do not apprehend that real prejudice has been caused. This is especially so when our decision, by dint of sub- section 4 aforesaid, is final, so that the risk of time running out for further appeals, while reasons are awaited, does not arise. We were fortified by this provision as we set the date for the rendering of these reasons.

11. Turning now to the crux of this appeal, it is not in dispute that Nyamweya J's judgment of 18th January 2021 was delivered some 185 days outside and beyond the 45 days set by the statute for the determination of the judicial review application. It was filed on 2nd June 2020 and should have been determined on or before July 17, 2020. What is in dispute in this appeal is whether, as contended by the appellant, the failure to render its determination within time by the High Court rendered the decision of the Board final and binding on all parties. The PSC's position is that the argument made by the appellant is a non-starter because it;

> " --- is based on a law that has been found, time without number, to be over-ambitious, impractical and is likely to lead to miscarriage of justice considering the circumstances of the superior courts and indeed this honourable Court. The Courts have only fallen short of declaring the said provision of the law as unconstitutional. It is trite that expedition cannot override justice."

12. PSC went on to cite excerpts from the judgments of Odunga, J. in *Republic v Kenya Revenue Authority Ex Parte Webb Fontaine Group Fz-llc & 3 Others* [2015] eKLR and Aburili, J In *Republic v Public Procurement Administrative Review Board & Anor Ex Parte Kleen Homes Security Services Ltd* [2017] eKLR in which the judges expressed themselves as possessed of jurisdiction to continue with and decide judicial review proceedings beyond and outside of the statutory timelines. Aburili, J. expressed the view that notwithstanding the clear intention of Parliament, the 45 days set for the determination of judicial review proceedings was impracticable and impedes the fair trial rights under Article 50 of the *Constitution* and the Fair Administrative Action Act, itself anchored on Article 47.

13. Reasoning that the Constitution has not set a time limitation for determination of Public Procurement matters, she took the position that the timelines imposed by Parliament could not hold given the court diaries and the number of such matters that are filed by aggrieved persons.

14. Without a doubt, there are serious practical difficulties with meeting the timelines set by the Act, and it may well be that given the sheer numbers of such judicial review matters that get filed before the relevant division of the High Court; the limited number of judges to handle them; and numerous other matters. Besides, as public procurement is but one of the areas in administrative law that spawns judicial review applications, the wisdom of so short a timeline may be fairly questioned. One may wonder whether a situational analysis or any other scientific, data-based research was done to determine the reality on the ground and inform the time that is practical to effectuate the legitimate desire for timeliness in disposal of public procurement and disposal disputes. It would seem to us quite basic that before imposition of timeliness of the sort in section 175 of the Act, there should have been a robust engagement with stakeholders, foremost of whom would be the Judiciary leadership and specifically the judges and registrars of the relevant division. We very much doubt that such engagement did occur given the patently unrealistic timelines in the provision.

15. 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?

16. 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. The Section sets strict timelines for applicants, the High Court and this Court in a sequential manner;

    1. A person aggrieved must file seek judicial review of the Boards' decision within 14 days.

    2. The High Court must determine the judicial review application within 45 days.

    3. A person aggrieved by the decision of the High Court must appeal to the Court of Appeal within 7 days

    4. The Court of Appeal must make a decision within 45 days.

17. All of these timelines are patently tight. They also greatly constrict the usual timelines for the filing and determination of proceedings. For this Court, for instance, ordinary appeals are initiated by filing of a notice of appeal within 14 days of the decision appealed from. This is followed by a lodging of the record of appeal some 60 days thereafter. There is no set time within which an appeal is to be heard. It is the decision following hearing of the appeal that is required to be rendered within 90 days by dint of rule 32(1), but the Court may still deliver its judgment outside that period for reasons to be recorded.

18. That case management and disposal scheme is totally upended by section 75 of the Act which requires that what would ordinarily take 6 months at a minimum must be filed, heard and decided within 45 days, which is a tall order indeed. The High Court also has but those 45 days to hear and determine the judicial review application with the same or greater challenges. It is also worth noting that the Board itself is required to decide a review application within 21 days of receiving it.

19. 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. In *AL Ghurair Printing and Publishing LLC v Coalition for Reforms and Democracy & 2 others* [2017] eKLR, Gatembu, JA rendered himself thus on this point;

    36. Section 175 of the Act as a whole provides for an elaborate time bound process for escalating the dispute from the Review Board (which must complete its review within 21 days after receiving the request), to seeking judicial review to the High Court (which must be done within 14 days from the date of the decision of the Review Board): to the High Court (which has 45 days such application to make its decision). A person aggrieved by the decision of High Court may appeal to the Court of Appeal within 7 days of the High Court decision. The Court of Appeal shall make a decision within 45 days which decision shall be final.

    37. The importance of the timelines is buttressed by Section 175(5), which provides that the decision of the Review Board shall be final and binding to all the parties should the High Court or the Court of Appeal fail to make a decision within the prescribed timelines.

    40. In my view, there is nothing in the elaborate provisions under Section 175 of the Act that goes against the Constitution or that is inimical or likely to lessen or adversely affect or undermine the constitutional underpinning of the remedy of judicial review. Nyamu, J (as he then was) in *Republic v Public Procurement Administrative Review Board & Another Ex-parte Selex Sistemi Integrati* [2008] KLR 728 opined that the elaborate provisions and ouster clauses in the then

Public Procurement and Disposal Act, 2005 "were tailored to accelerate finality of public projects."

20. We are, respectfully, of the same view, as it represents the proper position in law.

21. We also endorse and approve the reasoning of Odunga, J. in *Republic v Public Procurement Administrative Review Board & Anor, Ex Parte Wajir County Government* [2016]eKLR. In determining a preliminary objection raised against judicial review proceedings challenging the decision of the Review Board filed outside of the 14 days stipulated in section 175(1), the learned judge first referred to section 9(3) of the *Law Reform Act* Cap 26, Laws of Kenya, which provides that an application for an order of certiorari shall not be granted unless made not later than 6 months after the date of the decision sought to be quashed "or such shorter period as may be prescribed under any written law." He then proceeded to reason thus;

> 15. Therefore for the purposes of judicial review, an enactment may perfectly provide a shorter period within which challenge to a decision of the Review Board may be taken and if not taken that decision would be final. That is exactly what section 175 of the *Act* provides. A provision limiting the time for making an application for judicial review is therefore perfectly in order and cannot therefore be termed as being unconstitutional.
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> ...
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> 16. It is not for this Court to interpret legislation in a manner that completely alters the legislative intent of the enactment. Where there is a lacuna I law as contended by the ex parte applicant herein the recourse is to move Parliament to correct the same and not to urge this Court to in effect amend the same. It is not competent to any court to proceed upon an assumption that Parliament has made a mistake, there being a strong presumption that Parliament does not make mistakes. If blunders are found in legislation, they must be corrected by legislature, and it is not the function of the Court to repair them. Thus while terms can be introduced into a statute to give effect to its clear intention by remedying mere defects of language and to correct obvious misprints or misnomers no provision which is not in the statute can otherwise be implied to remedy an omission. See *Italframe Ltd v Mediterranean Shipping Co.* [1986] KLR 54; [1986-1989] EA 174.
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> 17. In this case what the applicant is asking the Court to do is not just to correct mere defects of language or obvious misprints or misnomers but to substantially alter the legislative intent as enacted in section 175 of the *Act* by inserting a clause therein whose effect would amount to the extension of time as enacted by the Legislature. That, in my mind this Court cannot do."

22. 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.

23. A perusal of section 175 of the Act reveals Parliament's unmistakable intention to constrict the time taken for the filing, hearing and determination of public procurement disputes in keeping with the Act's avowed intent and object of expeditious resolution of those disputes.

24. Parliament was thus fully engaged and intentional in setting the timelines in the Section. But it did not stop there. In one of the rarer instances where all discretion is totally shut out, Parliament expressly

enacted a consequence to follow default or failure to file or to decide within the prescribed times: the decision of the Board would crystallize and he invested with finality.

25. Our reading of the Act is that the High Court was under an express duty to make its determination within the time prescribed. During such time did its jurisdiction exist, but it was a time-bound jurisdiction that ran out and ceased by effluxion of time. The moment the 45 days ended, the jurisdiction also ended. Thus, any judgment returned outside time would be without jurisdiction and therefore a nullity, bereft of any force or effect in law.

26. That legal conclusion remains irrespective of the avowed reasons, no matter how logical, sound, reasonable or persuasive they may be. No amount of policy, wisdom or practicality can invest a decision made without jurisdiction with any legal authority. In the words of the Supreme Court in *Samuel Macharia & Anor v Kenya Commercial Bank Limited & 2 Others* [2012] eKLR.

> 68. A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within the authority to prescribe the jurisdiction of such a court or tribunal by statute law."

27. It seems clear to us that the jurisdiction of the High Court in public procurement judicial review proceedings is expressly limited in terms of time and is not open to expansion by that court. To step out of time is to step out of jurisdiction and any act or decision outside jurisdiction is, by application of first principles a nullity.

28. These then are our reasons.

29. As no party can be said to have been at fault for the fate that befell the impugned judgment of the High Court, we order that each party do bear its own costs of this appeal and of the High Court proceedings.

30. We direct that certified copies of the judgment and these reasons be served upon the Hon. Attorney General and on the Hon. Speakers of the two Houses of Parliament.

Order accordingly.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF OCTOBER, 2021.

HANNAH OKWENGU

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JUDGE OF APPEAL

O. KIAGE

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JUDGE OF APEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR