



Risk Africa Innovatis Limited v Smartmatic International Holdings B.V.A & 3 others (Civil Appeal (Application) E008 of 2022) [2022] KECA 427 (KLR) (4 March 2022) (Ruling)

Neutral citation: [2022] KECA 427 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E008 OF 2022
DK MUSINGA, RN NAMBUYE & F SICHALE, JJA
MARCH 4, 2022**

BETWEEN

RISK AFRICA INNOVATIS LIMITED APPELLANT

AND

SMARTMATIC INTERNATIONAL HOLDINGS B.V.A 1ST RESPONDENT

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD 2ND
RESPONDENT**

**THE INDEPENDENT ELECTORA & BOUNDARIES COMMISSION 3RD
RESPONDENT**

**SHAILESH PATEL T/A INFRASTRUCTURE DEVELOPMENT
COMPANY 4TH RESPONDENT**

(An appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (J. Ngaah, J.) delivered on 26th October, 2021 in Misc C.A Judicial Review No. E134 of 2021)

RULING

1. The background to the ruling is that the appeal on which the application is anchored arises from the judgment of the High Court dated 26th October 2021 where the Court issued orders of certiorari quashing the entire decision of the Public Procurement Administrative Review Board (“2nd respondent”) which had been made on 1st September 2021.
2. The brief background to this appeal is that the appellant had filed an application before the 2nd respondent challenging Tender No. IEBC/OIT/001/2020/2021 that had been awarded to the 1st respondent by the 3rd respondent. The tender was for the supply, delivery, installation, testing, commissioning, support and maintenance of the Kenya Integrated Elections Management System prevalently known as KIEMS.



3. The 2nd respondent allowed the application and nullified the tender issued to the 1st respondent. The 3rd respondent who was the procuring entity for the tender was directed to readvertise the tender within 30 days of the decision.
4. The 1st respondent, although not a party to the proceedings before the 2nd respondent, was dissatisfied by the decision of the 2nd respondent and challenged it before the High Court by way of a judicial review application, to wit, Misc C.A Judicial Review No. E134 of 2021. The argument by the 1st respondent was that the 2nd respondent had in rendering its decision acted ultra vires and that its decision was irrational and illegal.
5. The High Court vide its judgment dated 26th October 2021 issued orders of certiorari quashing the entire decision of the 2nd respondent made on 1st September 2021. The learned judge made a finding that the 2nd respondent did not understand the relevant provisions of the Public Procurement and Asset Disposal Act, 2015 (hereafter “the PPAD Act”) that regulates its decision-making power. In particular, that the 2nd respondent had misapprehended the provisions of section 2 of the PPAD Act on who a candidate is and whether the appellant was such a candidate capable of instituting a request for review before it under section 167(1) of the Act. The learned judge held that the 2nd respondent had unreasonably entertained a party who was no more than a busy body in the proceedings and further, that it had assumed jurisdiction which it did not have.
6. The appellant was dissatisfied with the decision of the High Court and lodged a notice of appeal on 28th October 2021 before the High Court, evincing the intention to appeal against the entire decision of the High Court. The appellant filed the appeal on 12th January 2022.
7. When the appeal came before us for hearing on 22nd February 2022, we were confronted with an application by way of notice of motion dated 8th February 2022 by the 1st respondent challenging the jurisdiction of this Court to hear and determine the appeal and/or any proceedings incidental thereto.
8. The gist of the application is that this being a time bound appeal, the Court has no jurisdiction to hear and determine the appeal on account of effluxion of time. Accordingly, the appeal ought to be struck out for want of jurisdiction.
9. Dr. Munabi, learned counsel for the 1st respondent, submitted that the High Court delivered judgment on 26th October 2021 and by dint of sections 175 (4) and (5) of the PPAD Act the jurisdiction of this Court to hear and determine the appeal and any incidental proceedings thereto lapsed on 17th December 2021 on account of effluxion of time. Learned counsel referred us to previous decisions of this Court in *Aprim Consultants vs. Parliamentary Service Commission & Another*, Civil Appeal No. E039 of 2021 and *Al Gburair Printing and Publishing LLC v Coalition for Reforms and Democracy & 2 others* [2017] eKLR, Civil Appeal No. 63 Of 2017, where this Court (differently constituted) held that the provisions of section 175 of the PPAD Act are plain and unambiguous and the timelines set therein are straight and tight.
10. Mr. Obura, learned counsel for the 3rd respondent, supported the arguments by the 1st respondent and added that the appellant did not in any way participate in the tender process and was therefore a busy body who stood to suffer no loss in the tender being awarded to the 1st respondent. He urged us to accordingly strike out the appeal as prayed by the 1st respondent.
11. Ms. Masai, learned counsel for the appellant, submitted that upon delivery of the impugned judgment by the High Court on 26th October 2021, her client filed a notice of appeal on 28th October 2021 and requested for certified copies of typed proceedings on the same date. She conceded that the appeal was filed on 12th January 2022.



12. She submitted that the PPAD Act does not oust the *Appellate Jurisdiction Act* and that pursuant to the provisions of the latter Act, the appeal was filed in time. When we asked counsel to comment on this Court's decision in the Aprim Consultant's matter, (supra), regarding the timelines imposed by section 175 of the PPAD Act, she indicated that the decision only addressed the issue of time for delivery of judgments by the High Court in procurement matters, but did not deal with the issue of timelines for filing of appeals to this Court.
13. Ms. Masai further submitted that by listing this appeal for hearing, the Court had created a legitimate expectation that her client's appeal would be heard and be determined on merit.
14. In his rejoinder, Mr. Munabi stated that in the Aprim Consultant's matter this Court properly explained the provisions of section 175 of the PPAD Act regarding all aspects of time in filing and determination of procurement matters. And on the issue of legitimate expectation, counsel submitted that legitimate expectation cannot operate contrary to the law.
15. We have carefully considered the application, the affidavits on record as well as submissions by counsel. Jurisdiction is everything, it is what gives a court or a tribunal the power, authority and legitimacy to entertain a matter before it. A decision made by a court of law without jurisdiction is a nullity ab initio, and such a decision is amenable to setting aside ex debito justitiae.
16. The locus classicus case on jurisdiction or want of it is the celebrated case of *Owners of the Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Ltd* [1989] KLR 1 in which Nyarangi, J.A., (as he then was), relying, inter alia, on a treatise by John Beecroft Saunders titled "Words and Phrases Legally Defined" held as follows: -

"...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."
17. In *Samuel Kamau Macharia and Another v. Kenya Commercial Bank Limited & 2 others* [2012] eKLR, Application No. 2 of 2011, the Supreme Court held as follows on jurisdiction:

"[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 itself jurisdiction exceeding that which is conferred upon it by law."
18. The pertinent provisions of section 175 of the PPAD Act upon which the application to strike out the appeal is predicated reads as follows:

" 175.

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



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

19. The above cited provisions give both the High Court and this Court strict timelines within which to hear and determine an appeal filed in the respective courts. This Court in the *Aprim matter (supra)* considered the effect of the timelines set out under section 175 and whether the Court could exercise its discretion as far as the applicability and practicality of the provisions are concerned. The Court (Okwengu, Kiage & Sichale, JJ.A.) held, inter alia, as follows:

“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 seek judicial review of the Board’s 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.

All these timelines are patently tight. They also greatly constrict the usual timelines for the filing and determination of proceedings.”

20. In the *Al Ghurair case (supra)*, Gatembu, J.A. expressed himself thus:

“[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 after 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.”

21. The issue of the timelines provided for under section 175 is therefore not novel to this Court. We fully associate ourselves with the findings of the Court both in the *Aprim matter (supra)* and the *Al Ghurair case (supra)*.

22. It is not contested that the appeal herein was filed on 12th January 2022. Pursuant to the provisions of section 175(4), the appeal should have been filed within 7 days from 26th October 2021, viz, by 2nd



November 2021. As at the date the appeal was filed, the 7 days' period within which the appeal should have been filed had already lapsed. The appeal then ought to have been heard and determined within 45 days from 2nd November 2021, that is to say by 17th December 2021. It follows, therefore, that as at the time of filing the appeal, to wit, 12th January 2022, the period within which this Court had to hear and determine the appeal had already lapsed. We agree with the 1st respondent that pursuant to the provisions of section 175(4) of the PPAD Act this Court had a time-bound jurisdiction to hear and determine the appeal. When the 45 days' period ended, the Court's jurisdiction also came to an end by way effluxion of time.

23. We do not agree with the appellant's counsel assertion that the mere listing of the appeal for hearing created a legitimate expectation that the appeal would be heard and determined on its merits. It is trite law that legitimate expectation cannot operate contrary to the law. See *Communications Commission of Kenya 5 Others v Royal Media Services & 5 Others* [2014] eKLR.
24. Having held that we are bereft of jurisdiction, the only logical thing for us to do is to down our tools, as we hereby do. Accordingly, we allow the 1st respondent's application dated 8th February 2022 and strike out this appeal and award costs thereof to the 1st and 3rd respondents. The 2nd respondent neither attended court nor filed any submissions in this appeal.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF MARCH, 2022.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

