



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Miscellaneous Civil Application 53 of 2010

REPUBLIC..... APPLICANT

VERSUS

**THE PUBLIC PROCUREMENT AND
ADMINISTRATIVE REVIEW BOARD..... RESPONDENT**

AND

KENYA ELECTRICITY GENERATING COMPANY LTD..... 1ST INTERESTED PARTY

**SHENGLI OIL FIELDS HIGHLANDS PETROLEUM
EQUIPMENT COMPANY LTD.....2ND INTERESTED PARTY**

**CHINA PETROLEUM TECHNOLOGY &
DEVELOPMENT LTD..... 3RD INTERESTED PARTY**

EX-PARTE: ZHONGMAN PETROLEUM & NATURAL GAS GROUP COMPANY

LIMITED

JUDGMENT

By the Notice of Motion dated 8/3/10, Zhongman Petroleum and National Gas Group Company Ltd is challenging the decision for the Public Procurement Administrative Review Board (the Board) in relation to the tender advertised by the Kenya Electricity Generating Company (procuring entity – 1st Interested Party) for the supply of drilling rigs and associated equipment. The Applicant lost the bid. The Applicant seeks the following orders:-

1. An order of certiorari directed at the Respondent to remove and quash the decision of the Board dated 8/2/2010 to uphold the Preliminary Objection raised by the 1st Interested Party and declining to hear the Applicant's request for review on the grounds that it was filed out of the prescribed time period.
2. An order of mandamus directed to the Respondent Board to compel it to hear the Applicants request for review application No.2 of 2010 on merit.

The application was opposed and the issues that arise are:-

- (1) Whether the application for review was filed within time.
 - (i) What time was the request for review lodged with the Board.
 - (ii) When is a document deemed to be lodged.
- (2) Whether the Board erred and hence denied itself jurisdiction.

(3) Whether the Applicants right to a hearing was breached.

The Notice of Motion was supported by a verifying affidavit of Shailesh Patel, the proprietor of Africa Infrastructure Development Company, the authorized agent of Zhongman. The Applicant was one of the bidders in a tender advertised by the 1st Interested Party on 28/8/09. The bids were evaluated and by letter dated 24/12/09, the Applicants tender was rejected. The letter of notification was received by the Applicant in Shanghai China on 28/12/09 by courier. The letter was not addressed to the correct contact person Martin Han and as a result, it reached the contact on 30th December 2009. That instead of the letter being dispatched by e-mail or fax it was dispatched by courier. That though the 2nd Respondent's bid was not responsive, the tender was awarded to it. The Applicant believes that it was best qualified and thus requested for review of the decision on 11/1/2010. The document was duly stamped by the Board, was assigned a number, 2/2010 and dated 11/1/2010 and a bankers cheque of 82,000/= was paid and the same was duly stamped and received. That a receipt was issued on 12/1/2010. However, the Board refused to accept the Applicant's documents alleging that they were not properly paginated whereas they were duly paginated. The clerk was asked to take back the documents for pagination yet there is no legal requirement for pagination and the clerks have no authority to decline to accept the request for review. That the receipt was indicated as having been issued on 12/1/2010 and so were the documents and when the deponent sought clarification, he was informed that the documents would be deemed to have been duly filed on 12/1/10. The 1st Interested Party raised a Preliminary Objection to the request for review on 15/1/2010 to the effect that the Board had no jurisdiction to hear the request the same having been filed out of time. The same was argued. It is the Applicant's argument that the request was filed within the statutory period of 14 days which time started to run from 30/12/09 when the Applicant's agent received the notification. The Applicant and 3rd Interested Party objected to the Preliminary Objection on the basis that the issues raised could not be determined by way of Preliminary objection. A decision was rendered by the Board on 8/2/2010 upholding the 1st Interested Parties' Preliminary Objection and directed the 1st Interested Party to proceed with the procurement proceedings. The Board's decision was not made available to the Applicant till 6/2/2010. It is the Applicant's contention that the said decision breached the Applicant's right to a hearing and failed to consider relevant issues raised during the hearing and the fact that not all bidders were notified of the award, made the decision irregular and that the Board also erred in denying the jurisdiction to hear the request for review. That the Board's decision was meant to give leeway to the 1st Interested Party to sign the contract in favour of the 2nd Interested Party.

Mr. Ombwayo, counsel for Attorney General did not file any reply nor did he take any sides in this proceedings. He urged the court to consider when the documents were received by the Board, was it on 11th or 12/1/2010 and whether the Board exercised its discretion fairly and reasonably.

The 1st Interested Party opposed the Notice of Motion and Dennis Onwonga, the Legal Services Manager with KENGEN swore an affidavit dated 4/3/2010, submissions were filed on 10/3/2010 and list of authorities. Onwonga deponed that after the tender process, the Applicant filed a request for review on 12/1/2010 which was out of the time allowed under the Act. A Preliminary Objection was raised by the 1st Interested Party and the request for review was dismissed. A contract was signed on 9/1/2010 and the implementation is on course. Mr. Kiragu, counsel for 1st Interested Party submitted that the Board was obligated to hear the Preliminary Objection in accordance with Reg.77 and was entitled to reach a decision which it did. That the Board was entitled to reach a decision whether right or wrong which can only be attacked on appeal under S 100 of the Public Procurement and disposal Act. (PPD Act). That if the Board had declined to hear the Preliminary Objection, that is, when it would have been deemed to have denied its jurisdiction and therefore amenable to Judicial Review. That all the grounds contained in the statement call for an appeal, not Judicial Review. That there is an allegation at Para 22 that rules of natural justice were breached but that a hearing does not necessarily mean how the Applicant wanted to be heard, and a hearing can take the form of a Preliminary Objection. That the Board heard the parties and reached a finding that the request for review was filed on 12/1/2010 and that can only be challenged on appeal.

Counsel also submitted that the stamp on the request for Review shows it was lodged on 11/1/2010 after 5.00 p.m. which is after working hours. That as per Reg. 78 (3) of the Regulations made under the PDD Act, working hours are 8.00 a.m. to 5.00 p.m. Counsel relied on the case of *KAMANDA V BISHOP WANJIRU C/A 221 OF 2008*. According to counsel a document is deemed to be lodged when it paid for. That the issue of time can only be resolved through an appeal but not Judicial Review. Counsel urged that Order 49 Civil Procedure Rules on time does not apply to Judicial Review but under S 57 (b) of the Interpretation and General Provisions Act Cap 2, Christmas is not one of the days excluded from computation of time.

As regards signing of the contract, counsel urged that it had to be signed during the tender validity period, in terms of S 67 of the Act, that under S 93 (1) once the contract is signed, the Board has no jurisdiction to entertain a review application. The 2nd Interested Party also opposed the Notice of Motion and relied on the affidavit sworn by Onmwaga for the 1st Interested Party and that of Simon Maara Chege the country manager of the 2nd Interested Party, and submissions filed in court on 10/3/2010.

I am in agreement with Peter Kaluma's view in his article Judicial Review Law Procedure and Practice on the scope of Judicial Review. He observes at page 36:

“The remedy of Judicial Review is radically different from those of review and appeal. Judicial review is not an appeal from a decision, but a review of the decision making process and the legality of the decision itself. When determining an appeal, the court is concerned with the merits of a decision. Conversely, in Judicial Review, the court's exclusive concern is with the legality of the administrative act of decision in question. Thus, instead of substituting its own decision for that of some other body, as happens when an appeal is allowed, the court in an application for Judicial Review is concerned only with the question as to whether or not the action under attack is lawful and should be allowed to stand or be quashed.”

The above quote explains the scope of Judicial Review. In **HOTEL KUNSTE V THE COMMISSIONER OF LANDS (2006) I KLR 249**, the Court of Appeal also ably set out the scope of Judicial Review. I need not go further than that. This court will now investigate whether the Applicant is challenging the merits of the decision as alleged by the 1st Interested party and 2nd Interested Party or is it challenging the decision making process..

To ascertain whether the time within which the Applicant filed request for review was properly computed, one needs to go back to when the Applicant was notified of the award of tender. The Act does not state when notification of tender is deemed to occur. In the ruling of the Board, the 1st Interested Party had submitted that the notification was received on 28/12/09 though the Applicant contended that the person authorized to receive the notification received it on 30/12/09 and that is when the 14 days window of appeal started to run. The Board found that the time for purposes of appeal started to run on 25/12/09, and the last day of lodging of appeal was 7/1/2010.

In its ruling the Board found that the notification was sent out on 24th December 2009 and therefore the notification took place on 25/12/09. 25/12/09 is Christmas day and even though Christmas day would not be one of the days exempt from computation of time, for purposes of fairness, Christmas period is a time when most offices are closed and not much activity goes on in that period. It would be unfair for the Board to find that time started to run on 25th December, 2009. In any event, that computation ran contrary to the Board's previous computation of time.

The applicant relied on two cases where the Board has made a determination on when time for the 14 days window of appeal starts to run. In **VESTERGAARD FRANDSEN (SA) V THE PROCUREMENT AND SUPPLY MANAGEMENT CONSORTION MINISTRY OF HEALTH. APP NO.140/2007**, the court held as follows:-

“The Board has consistently held that time for the appeal window began to run upon communication of award or communication of failure to be awarded. The Applicant has stated that it received the letter of the notification on 21/6/2007. This has not been challenged. The fourteen days appeal window would therefore have begun to run on that day. Therefore, the Board finds that the appeal was filed within time, and this objection fails.”

In another case, **POSTMASTER GENERAL V POSTAL CORPORATION OF KENYA – AM NO. 43/09**, the Board held thus,

“The Board has held severally that the burden of proof on the issue of notification lies on the Procuring Entity which has a duty under section 67 of the Act, to notify – in view of the above, the Board holds that time stated being on the 15th October 2009, when the Applicants representative collected a notification letter from the Procuring Entity”

The above decisions of the Review Board have held that the 14 days appeal window starts to run when notification is received. The Board fell into error and acted unfairly when it computed the time and found it to have started running on 25th December, 2009.

The Board then considered the alternative, if notification of award was on 28/12/2009 in accordance with the applicants submission.

In light of the earlier decisions of the Board which I find to represent the correct position, the time started to run on 29/12/2009 when the Applicant's office in Shanghai received with the notification on 28/12/09. The Board found in the alternative that if they were to accept 28th as date of notification, the time for the window of appeal started to run on 29/12/2009 and ended on 11/1/2010. This court agrees with that computation.

It is noteworthy that some days are not included in computation of time. I do agree with Mr. Kiragu's submission that Order 49 Civil Procedure Rules on computation of time, does apply to Judicial Review Proceedings, the only applicable law being Order 53 Civil Procedure Rules and Section 8 and 9 of the Law Reform Act. Under the Interpretation and General Provisions Act Cap 2, Laws of Kenya Section 57 thereof, provides for computation of time. That section reads as follows:

“57(a) a period of days from the happening of an event or the doing of an act or things shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;

(b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;

(c) where an act of proceeding is directed or allowed to be done or taken on a certain day, then, if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;

(d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.”

The 28th December 2009, fell on a Monday. That day is excluded from computation of time according to the above section (S 57 (a)). Time therefore started to run from 29/12/2009 and the 14th day fell on 11th January 2010. 11th January 2010 is the last day that the Applicant could have filed the request for review.

The next question then is whether the request for review was lodged on 11th and 12th January 2010. In my view, a document is deemed to be lodged when it is presented, paid for, acknowledged as received by stamping and allocated a number. Mr. Kiragu relied on **KAMANDA V BISHOP WANJIRUS's** case (*Supra*) where the court of Appeal considered the issue of lodging of documents with the Registrar in Election Petitions. In the Election Petition Rules, the Registrar is mandated to endorse documents which are lodged out of time, mark them as such and that rule also provides that fees is payable upon lodging of documents. According to Mr Kiragu, in the instant case the documents were lodged after close of business on 11/1/2010 as indicated on the stamp of the Board on the documents. And that it was therefore after the 14 days Appeal window. Reg.73 of the Public Procurement and Disposal Regulations, 2006 provides for procedure of filling matters at the Board Reg.73 (1) (e) provides that a request for review shall be made in Form RBI as set out in the Fourth Schedule and it shall be accompanied by the fees set out in Part II, 4th Schedule which shall not be refundable. Reg.73 (3) and (4) Reads:-

“(3) Every request for review shall be filed with the Secretary of the Review Board upon payment of the requisite fee;

(4) The Secretary shall acknowledge filing of the request for review “

In the instant case, the request for review is dated 11/1/2010 and the stamp indicates that it was received about 5.00 pm, cheque for payment of the review is also stamped the same date though the time seems to be after 5.00 pm but before 6.00 pm. The request and cheque must have been received simultaneously and without evidence to the contrary, the time should be the same. The Board did not file any affidavit to confirm what time the filing was done. The presumption is that, having been received and stamped on 11/1/2010 and allocated a number, the request was filed within office hours. Reg.78(3) provides that the business of the Review Board is between 8.00 am and 5.00 p.m on normal working days unless otherwise agreed to by the Secretary. The Board accepted the Applicant's documents on 11/1/2010, received, allocated a number, 2/2010, stamped and the payment by cheque was received on the same date. There is no evidence from the Board, that it was irregularly accepted. In the ruling of the Board, it was observed that there had been an attempt to lodge the documents on 11/1/2010 but due to failure to comply with Reg.73 the Applicant went away with the documents for rectification. In his affidavit Shailesh Patel depones that his agent, one Ogotu, who went to file the request for review informed him that the clerks declined to accept the documents after it was found that the annexures were not paginated. It is not denied that the report was filed but rejected for reasons that the annexures were not paginated. Reg.73 which deals with procedures for review which include the filing of request for review provides as follows:-

“73(2) the request referred to in paragraph (1) shall –

- (a) State the reasons for the complaint, including any alleged breach of the Act or these Regulations.***
- (b) Be accompanied by such statement as the Applicant considered necessary in support of this request:-***
- (c) Be made within fourteen days of***
 - (i) The occurrence of the breach complained of when the request is made before the making of an award ;***
 - or***
 - (ii) Notification under section 67 or 83 of Act;***
- (d) Be submitted in fifteen bound copies and a soft copy pages of which shall be consecutively numbered;***
- (e) Be accompanied by the fees set out in part II of the fourth schedule which shall not be refundable.***

Indeed Reg.73 (d) does require that the documents be paginated but there is nowhere that it is provided that the annexures be paginated and so a request cannot possibly be rejected on that ground. In the Board's ruling it is merely stated in one sentence that the request was rejected on 11/1/2010 for failing to comply with Reg.73. The Board did not bother to consider the nature of the omission, whether the omission was so grave as to make the Board deem the request to have been incompetent and only filed on 12/1/2010 after rectification or it was curable so that what was filed on 11/1/2010 could have sufficed.

Besides if it is only a question of pagination, a whole request for review could not merely be locked out for want of pagination because that is accruable defect. It can even be done on the spot. It cannot be the basis for locking a person out of the seat of justice especially taking into account the fact that the request was made on the final day of the window of appeal and this was a tender involving colossal sums. Section 2 of the PPD Act 2008 sets out the objectives of the Act and they include promoting competition and ensuring that competitors are treated fairly, promoting integrity and fairness of procedures, increased transparency and ascertainability in the procedures, increase in public confidence in the procedures and facilitating the promotion of local industry and economic development. Striking out a party's application to challenge the tendering process because of a defect in the pagination of the documents is not fair. The courts and equally tribunals are expected to act fairly in dealing with the persons that come before them and be keen to consider the substantive issues rather than dwell on procedural defects.

Counsel for the Applicant urged that they raised the issue of when the request was filed and made elaborate arguments but in its

ruling, the Board totally disregarded to consider the said arguments and merely stated that the Applicant had been sent off with the application but failed to comply with Reg. 73. The Board did not expound on how the Applicants failed to do so. They should have analysed the submissions to demonstrate why the omission by the Applicant was so substantive that they could not consider the filing of the request or was the omission curable? The Board should have been seen to act fairly and do substantial justice to both parties to the tender. The Board did not consider relevant facts and therefore flouted the rules of natural justice and that renders the decision of the Board a nullity. The request had been presented and accepted, along with the payment in form of a cheque and allocated a number. Even if the secretary was not present to issue a receipt, all the necessary documents were with the Board on 11/1/2010 and his payment. Considering all the circumstances of the case, the Board failed to consider relevant facts which ultimately affected its ruling on the Preliminary Objection. The issue at hand was a tender involving colossal sums and of great public interest as it affects Electric power supply in Kenya and it would be expected that the Board in its adjudication process do give all parties a fair chance to compete in the process.

According to the 1st Interested Party and 2nd Interested Party, the contract was signed on 9/2/2010 after the decision of the Board was rendered on 8/2/2010 and therefore the Board is barred from reviewing the decision. It means that even if this court were to quash the decision of the Board, it would serve no purpose as the contract has been signed. According to the Interested Parties, the contract had to be signed within the tender period in accordance with S 68 (1) which provides that a contract has to be signed in accordance with the tender documents. However, Ss 94 and 100 seem to provide otherwise. Under S 94, once the request for review made under S 93 is received, the secretary to the Board has to notify the procuring entity of the pending review and the suspension of the procurement proceedings. After the review Board renders its decision, S 100 then comes into play. S 100 of the PPD Act, gives the Applicant a right to Judicial Review or Appeal to the High Court within 14 days of the Board's decision. The Board's decision was rendered on 8/2/2010 and the Applicant moved to court on 22/2/2010 which was on 14th day after making the Board's decision and hence within time. Having moved this court for Judicial Review, S 100 (4) provides that the court had 30 days within which to make its decision. S 100 (4) provides as follows:-

“If Judicial Review is not declared by the High Court within thirty days from the date of filing, the decision of the Review Board will take effect.”

The purported signing of the contract could not be done before the Applicant exhausted their right to challenge the decision of the Board. I find and hold that the said contract is therefore illegal and null *ab initio*. In ***KUSUGU QUARRIES LTD V ADMINISTRATION GENERAL(1999) EAI R 63***, the Supreme Court of Uganda held that a court of law cannot sanction what was illegal or enforce obligations arising out of an illegal contract or transaction. That is the law. What the Interested Parties purported to do on 8th or 9/7/2010 is illegal and a nullity *ab initio* and smacks of bad faith because they seem to have been preempting the filing of these Judicial Review proceedings in the High Court. No contract that can be recognized by law was ever signed on 8/1/00 or 9/1/00 and the purported contract cannot bar the Review Board from considering the request for review by the Applicant.

This court is aware that S 100 (4) of the PPD Act has an ouster clause, that if the Judicial Review is not declared by the High Court within 30 days, the decision of the Board shall take effect. The said clause tends to limit this court's jurisdiction given by the Constitution under Ss 60 and 77 and also offends section 2 of PPD Act which sets out the objects of the Act. S 60 of the Constitution gives the High Court unlimited jurisdiction in civil and criminal matters and any other jurisdiction that may be conferred to it by the law. S 77 on the other hand guarantees one's right to a fair hearing in criminal matters (S 77 (2)) and civil matters (S 77 (9)). The objects have been alluded to earlier as, fairness, integrity and this court would not be confined to the limit of 30 days in which to render its decision. This court is properly seized of this matter and until it renders its decision which it will do within a reasonable time, the procurement process would have to await its decision. I am persuaded by J Nyamu's observations on the ouster under the said section in his decision in ***SELLEX SISTEMI INTERGRATI V THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD AND THE KENYA CIVIL AVIATION AUTHORITY HMIC 1260/07***.

In ANISMINIC LTD V FOREIGN COMPENSATION COMMISSION (1969) 2 WLR 163 Lord Reid had this to say of ouster clauses,

“It is well established that a provision ousting the ordinary jurisdiction must be construed strictly – meaning in turn, that if such a provision is capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the court.”

The meaning of S 100 (4) is not clear as to when the court will declare its decision, at leave stage or Notice of Motion stage.

This court's jurisdiction has to be protected. It would not fetter its jurisdiction with section 100 (4) of the PPD Act but give its decision on the procurement process as and when it can, within a reasonable time. It is appreciated that Judicial Review is supposed to be a speedy process and especially in such cases of public procurement which are supposed to promote economic development, investment, the court will do its best under the circumstances. But fairness, transparency and integrity cannot be sacrificed at the altar of speed. Section 100 (4) should not be a fetter to this court's jurisdiction.

The submission that this court is concerned not with the merits of the decision but the fairness of the decision making process is right. However, some situations justify an attack on the decision especially where a body has completed the task. This court's intervention in the decision of the Board would be properly justified based on the holding of Lord Reid in the ***ANISMINIC CASE (supra)***. He said:

“It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word ‘jurisdiction’ has been used in a very wide sense and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal

being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of inquiry which is of such nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decided a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly”

The Review Board had jurisdiction to enter into inquiry on the request for review. It also had jurisdiction to hear the Preliminary Objection raised by the 1st Interested Party but should have investigated whether the request was lodged on time and whether the alleged breach of Reg.73 was substantive and given reasons for its determination. By failing to consider these relevant issues and failing to give reasons, the Respondent fell into error and breached the rules of natural justice of a fair hearing. Under the provision of Judicial Review and this court has the power to intervene and quash the decision of the Board and direct the Board to hear the application on the merits of their request for review. Judicial Review remedies are discretionary in nature. In this case in exercise of the courts discretion, it has taken into account the fact that procurement matters are meant to be determined without undue delay in order to realize the objects of the PPD Act. However, the bodies charged with decision, making like the Review Board are urged always to bear in mind the objects of the Act, the statutory provisions that gives them power and rules of fairness. This court grants prayers (1) and (2) as prayed in the Notice of Motion dated 8/3/2010.

Costs to the Applicant.

Dated and deliver at Nairobi this 18th day of March 2010.

R.P.V. WENDOH

JUDGE

Present:

Mr. Alibhai for the Applicant

Mr. Ombwayo for the Respondent

Mr. Kiragu for the 1st Interested Party

Ms Irungu for the 2nd Interested Party

Muturi: Court clerk