



REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW MISCELLANEOUS CIVIL APPLICATION NO. 37 OF 2019

IN THE MATTER OF: THE LAW REFORM ACTCAP26

AND

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

AND

IN THE MATTER OF: THE PUBLIC PROCUREMENT AND ASSETS DISPOSAL ACT NO: 33 OF 2015

AND

IN THE MATTER OF: AN APPLICATION BY THE KENYA PORTS AUTHORITY (EX-PARTE) FOR THE JUDICIAL REVIEW ORDER OF CERTIORARI AGAINST THE DECISION OF THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD MADE ON 5TH AUGUST 2019 IN RESPECT OF REQUEST FOR REVIEW APPLICATION NUMBER 75 OF 2019

BETWEEN

THE ACCOUNTING OFFICER

KENYA PORTS AUTHORITY.....EX PARTE APPLICANT

VERSUS

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD.....RESPONDENT

AND

KONECRANES LIFTTRUCKS AB.....1ST INTERESTED PARTY

CARGOTECH FINLAND/KALMAR MIDDLE EAST.....2ND INTERESTED PARTY

JOH ACHELIS & SOEHNE GMBH.....3RD INTERESTED PARTY

RULING

1. By a Notice of Motion dated 20.08.2019 Kenya Ports Authority the *Ex-parte* Applicant herein seeks the following judicial review orders:-

a) An Order of Certiorari be issued to remove to this Honourable court for purposes of quashing the decision of the Public Procurement Administration Review Board, the Respondent herein, made on 5th August 2019 under the *Request for Review Application No. 75 of 2019 –Konecranes Lifttruckers Ab vs. The Accounting Officer Kenya Ports Authority* regarding the tender No. KPA/064/2018-19/TE for the supply and commissioning of four (4) New Reach Stackers, to the extent that the said decision declared the letters of notification null and void for not having been signed by the Accounting officer.

b) That each party bears its own cost in line with the provisions of Section 175 (7) of the Public Procurement and Asset Disposal Act, 2015.

2. The undisputed facts herein are that on 22nd and 23rd January 2019 Kenya Ports Authority, the Ex-parte Applicant advertised on its website as well as on Daily Nation and Standard Newspapers respectively and internationally in the Lloyds List Maritime Publication Tender No. KPA/064/2018-19/TE (hereinafter “the Tender”) for the Supply and Commissioning of Four (4) New Reach Stackers. The Tender opening committee at 1040 hours on 2nd April, 2019 received and opened a total of 8 bids including that of KoneCrane Lifttruck Ab, the 1st Interested Party. On 16th and 18th April 2019, six bids, including that of the 1st interested party, were disqualified failing to comply with mandatory requirement. On 25th June 2019, the Applicant wrote to all bidders therein informing the unsuccessful bidders including the 1st interested party of the reasons for their disqualification as well as informing the winner, if it so wished, to accept the terms of tender in writing.

3. The 1st interested party being aggrieved by this decision filed a Request for Review number 75 of 2019 with the Respondent herein; Public Procurement Administrative Review Board which was disallowed by a decision of 5.08.2019 and the request for review was dismissed. However, the Respondent did not stop there. It went further and nullified the letters of notification issued to all bidders who participated in the Tender. The *Ex-Parte* Applicant has by these proceedings challenged the decision of the Respondent in nullifying the letters of notification seeking that the same be quashed.

4. The grounds for the application are that the board acted ultra vires the powers granted to it under Section 173 of the Public Procurement and Asset Disposal Act No. 33 of 2015 by nullifying suo moto the letters of notification issued to all bidders, even when such order was not sought by either party. This nullification of the letters of notification suo moto without giving the Ex parte Applicant a chance to be heard was contrary to the principles of natural justice which precludes a party from being condemned unheard. The Respondent acted unreasonably considering that the Applicant’s Accounting Officer is by nature of his duty a very busy person with strict timelines considering that this is a function that can be delegated. The Ex parte Applicant states that the Respondent draws jurisdiction from the said letters and its decision created an absurdity. By dismissing the application for review and creating a new ground suo moto, the nullification is tainted with illegality since the board acted on powers not within its mandate contrary to Section 173 of the Public Procurement and Asset Disposal Act.

5. The *Ex-parte* Applicant’s case is that the decision to nullify the letters of notification made by the Respondent without an express prayer from any of the parties, was reached in excess of authority and in breach of the principles of natural justice.

The Response

6. The Respondent and the 2nd Interested Party did not respond to the application.

7. On its part the 3rd interested party in Replying Affidavit sworn on 18.10.2019 by its general manager, Mohammad Siddiqui and filed on 22.10.19 opposed the application stating that the outcome of the Review Board’s decision is supported because the tender validity period had expired and any subsequent order made would have been ineffectual, and that even if this review is allowed, it would still have no effect to the expiration of tender validity period because the applicant requests only part of the ruling to be quashed.

8. The 1st Interested Party opposed the application through a Replying Affidavit sworn by James Murango on 20.8.19. The 1st Interested Party states that it is within the powers of the board to grant the orders annulling the letters of notification and the decision was reasonable and valid. The 1st Interested Party avers that the signing of the letters of notification is a responsibility that rest squarely on the Accounting Officer, unless delegation has been approved in writing to the head of procurement unit but even then, only limited to the making procurement approvals. The 1st Interested Party states that the signing of the notification letters by the Accounts Officer in the instant case is in contravention to the legal maxim “*Delegata potestas non potest delegari*” and an abuse of law and procedure by the Applicant. The 1st Interested Party further states that the Respondent can exercise its powers under Section 173 (a) to the effect of annulling anything that the accounting officer of a procuring entity has done in the procurement proceedings. It is the 1st Interested Party’s contention that the validity of the Tender lapsed on 1st July 2019 and as such the tender process died a natural death which cannot be revived.

Submissions

9. Directions were issued on 22.8.2019 that the application be canvassed by way of written submissions. By the time of writing this Ruling only the *Ex parte* Applicant and the 1st Interested Party had filed their submissions on 24.9.2019 and 18.10.2019 respectively.

10. For the *Ex-Parte* Applicant it was submitted that by virtue of Section 173 of the Public Procurement and Asset Disposal Act the Respondent is clothed with only five powers and could not purport to issue an order which none of the parties prayed for. The Board was limited to determining the issues properly before it. Therefore, the order nullifying the notification letters was made *ultra vires* and illegality. The Applicant referred the Court to ***Republic vs. Public Procurement Administrative Review Board & 4 others Ex parte Britam Life Assurance Company (K) limited [2018] eKLR.***

11. The Applicant contends that the Respondent failed to give audience to any of the parties regarding the issue it introduced suo moto and was therefore in breach of the fundamental principle of natural justice; *audi alterem partem*, requiring no one to be condemned unheard. In ***Republic vs. Public Procurement Administrative Review Board; Shenzhen Instrument Co. Ltd & another Ex parte Kenya Power and Lighting Company [2019]*** it was held that the procedural fairness contemplated by Article 47 and the Fair Administrative Action Act demands a right to be heard before decision affecting a party’s right is made.

12. The ex-parte Applicant further relied on the case of ***Pastoli v Kabale District Local Government Council and others (2008) 2 EA 300,***

to canvass the argument that the decision by the board was so unreasonable and defiance of logic for not appreciating that the letters were signed by the head of the procurement entity on behalf of the accounting officer.

13. On the other hand the 1st interested party draws two issues in its submissions for determination. That is, whether by annulling the letters of notification the Respondent Board acted *ultra vires*, illegally and unreasonably/irrationally; and whether, in the event that the Letters of notification are reinstated, the procurement process would proceed to conclusion within the law. On the first issue it is submitted that the board is clothed with wide authority pursuant to Public Procurement and Asset Disposal Act which powers include annulling anything done by the procuring entity and substituting its decision for that of the procuring entity.

14. It was submitted that the Respondent board is an inquisitorial body which plays an active role in administrative review proceedings and has the authority to point out issues observed from the confidential documents that were before it. In so doing the board was faced with the question whether the Letters of Notification were issued in line with section 87 of the Act. In its ruling the board found that the Procurement head exceeded his powers by purporting to sign the letters of Notification without evidence that there was specific delegation. It is therefore the 1st interested party's submission that such procedural improprieties are an affront to the law as they violate Article 227 on the Constitutional threshold of fairness and transparency, Article 10 and Section 3 which require public entities to be guided by principles of Integrity.

15. On the second issue it is submitted that in determining whether an administrative action is subject to control by judicial review, the ground to be proved are whether the decision was based on illegality, irrationality or procedural impropriety. To buttress its argument the Court was referred to reliance is placed on the dictum of LORD Diplock in *Council of Civil Service Unions vs- Minister for Civil Service [1985] AC 374* as cited with approval in *Republic v Registrar of Companies & another Ex Parte Ukamba Agricultural Institute & 3 others [2015] eKLR*.

16. It was further submitted that the tender validity period of the subject tender had expired and the Ex-parte applicant did not exercise its power under Section 88(1) of the Act to extend the tender validity period. As such the tender effectively died a natural death and cannot be revived. Similarly no contract could be executed under Section 135 since the tender validly lapsed.

Analysis and determination.

17. I have considered all pleadings, affidavits and submissions and case law and statute. In my view, the main issue for determination in this matter is whether the Ex parte Applicant is entitled to the orders sought in the Notice of motion. There are other pertinent issues that the court will endeavour to answer.

18. The first such issue is whether the Review Board committed an error of law when it nullified the letters of notification issued by the Applicant to all bidders. The 1st Interested Party alleges that:

- the notification letters were not signed by the Applicant's accounting officer
- there was no evidence that the Procurement head had express authority to sign the said letter

19. It was the *Ex-parte* Applicant's submission that the Respondent herein acted in excess of its jurisdiction and powers in nullifying the notification letters suo moto, when such prayer was not sought by either of the parties. The Applicant further stated that the board draws its jurisdiction from the said letters and the nullification meant that the proceedings before the board were a nullity. According to the Applicant Section 173 of the Public Procurement and Asset Disposal Act clothes the Respondent with only five powers none of which included the nullification of the notification letters.

20. The Interested Party on its part submitted that the Respondent acted within its powers in reviewing the *ex-parte* Applicant's decision and referred to Sections 173 of the Act which prescribes the scope of the functions and powers of the Respondent.

21. This issue calls for an interrogation of the role and powers of the Review Board when determining a request for review. The powers of the Board when exercising its jurisdiction are prescribed in Section 173 of the Act as hereunder:

“173. 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.”**

22. In view of the above, it is evident that the powers of the board are extensive to cover the issue of scrutinizing the letters of notification

issued by the Applicant. It is however, well settled law that judicial review proceedings are concerned with the decision making process, and not with the merits of the decision itself. This court is mandated to examine the record of the Respondent and satisfy itself that in coming to its decision, the Respondent has not exposed itself to charges of illegality, irrationality and procedural impropriety so as to escape reproach within the parameters set for judicial review.

23. In making the decision on which this review lies, the board had this to say:

“...However, the said letters are signed by one Mr. Aza N. Dzengo, the Acting Head of Procurement and supplies for the mananging director (i.e the Accounting Officer). The board observes that the Acting Head of Procurement and supplies is not the accounting officer for the procuring Entity...”

.....the board studied the confidential file submitted to it but did not find any letter specifically delegating authority to the head of procurement and supplies to sign notification letters on behalf of the Respondent in this particular tender. The respondent in this case did not demonstrate that it donated specific delegated authority, evidenced in writing to the head of procurement and supplies...”

24. It is on this basis that the board nullified the notification letters. The issue now is whether in doing so, the Respondent exposed itself to charges of illegality, irrationality and procedural impropriety.

25. The Applicant’s case is that the impugned decision was made suo moto and therefore it was condemned unheard. **Mwera, J** (as he then was) in **Nagendra Saxena vs. Miwani Sugar Company (1989) Limited (Under Receivership) Kisumu HCCC No. 225 of 1993** while citing **Habig Nig Bank Limited vs. Nashtex International Nig Ltd Nigeria Court of Appeal Kaduna Division CA/K/13/04** and **Playing God: A Critical Look At Sua Sponte Decisions By Appellate Courts** By Adam M Milani and Michael R. Smith, Tennessee Law Review **{VOL. 69 XXX 2002,** dealt with the suo moto procedure extensively as follows:

***“The term suo moto is a Latin term meaning “on its own motion” and it is approximately an equivalent of the term “sua sponte” (Latin) which means, “of one’s own accord”. The term defines one acting spontaneously without prompting from another party. Blacks Dictionary defines “sua sponte” as “of his or its own will or motion, voluntarily and without prompting or suggestion”. In our jurisdiction action “suo motto” or “sua sponte” for the two mean the same thing, a judge or court in a given case takes a course or decision without prior motion or request from the parties. Usually the matter being decided suo motu or sua sponte is not in the pleadings, briefs, submissions, issues and evidence placed before the court for determination. For that is the essence of the adversarial systems where the parties direct the course of the litigation that brought them to court while the judge plays the referee. He/she hears them and makes a decision. In matters suo motu the court usually on perusing the file before it comes by a matter that is of the essence of the case but not raised by the parties. It could be a matter of law or procedure or other. Then that is considered by the judge who rules on it. The better course in matters dealt with sua sponte is to notify the parties to the cause of the point(s) in question, inviting them to submit on it, before a ruling/finding is arrived at. There is no dispute that the fundamental premise of the adversary process is that the advocates do uncover and present more useful information and arguments to the decision-maker than would be developed by a judicial officer acting on his own in an inquisitorial system. Accordingly most lawyers probably never think about a possibility that a court will decide a case or an issue that the court itself raises and which was neither briefed nor argued by the parties. But it happens and it is known as sua sponte. Once a court raises an issue sua sponte the court can go about deciding it in one of two ways. First, it can involve the parties and request that they submit briefs on the issue to assist the court in reaching a decision. In this context, while the issue may be raised sua sponte the decision on the issue is made in accordance with the principles and traditions of the adversarial system. Alternatively, the court can decide the issue on its own without the input from the parties. In this context, the issue is not only raised sua sponte, but is also decided sua sponte. The proper approach to decide sua sponte issues is the former approach – the approach that involves the parties in the decision-making process...It is not in doubt that hearing parties on issues sua sponte or suo motu is better favoured since the parties have been heard before a decision...Even when a court raises a point suo motu the parties must be given an opportunity to be heard on the point particularly the party that may suffer a loss as a result of the point raised. The law is well settled that on no account should a court raise a point suo motu, no matter how clear it may appear to be, and proceed to resolve it one way or the other without hearing the parties...If it does so, it will be in breach of the parties right to fair hearing.”* [Emphasis mine].**

26. The issue of determining matters raised suo moto without hearing parties was also alluded to by the Court of Appeal in **Nakumatt Holdings Limited vs. Commissioner of Value Added Tax [2011] eKLR** where the Court expressed itself as follows:

“In the present case it was the Superior Court which put the appellant in the predicament it finds itself in. It was mistaken on the applicable law. The appellant acted promptly and sought an order reviewing the erroneous order. The court declined jurisdiction with the result that the limitation period expired. If that decision is not reviewed it would not have any remedy. It is hardship of that nature which the review jurisdictions should be exercised to obviate, more so if it is shown that the applicant did not contribute to that state of affairs. The case of Judicial Commission of Inquiry into the Goldenberg Affair & 3 Others vs. Kilach [2003] KLR 249, does not hold that review is not available under Order 53 of the Civil Procedure Rules. It would be oppressive and an affront to common sense in a case like the one before the court where the court precipitated a situation for the same court to turn round and say it lacks jurisdiction to correct what is obviously a wrong decision, more so where, as here, the court was not addressed on the merits or otherwise of the application for leave. The court suo moto raised the jurisdictional issue without asking the applicant’s counsel to address it on the matter.”

27. From the foregoing, the jurisprudence is that a court cannot raise an issue suo moto and determine it suo moto without giving an affected party a chance to be heard on the issue. It is irrelevant whether the Tribunal would have arrived at the same decision even if it had afforded

the parties an opportunity of being heard before making its decision. It must always be remembered that where a party has a right to be heard that right cannot be taken away by the mere fact that the Tribunal considers that the said party's contribution is unlikely to affect the decision. See **Onyango Oloo vs. Attorney General [1986-1989] EA 456**:

“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.....Denial of the right to be heard renders any decision made null and void ab initio.”

28. Similarly in **Pashito Holdings Ltd. & Another vs. Paul Nderitu Ndun'gu & Others** (supra) the Court of Appeal expressed itself as follows:

“An essential requirement for the performance of any judicial or quasi-judicial function is that the decision makers observe the principles of natural justice. A decision is unfair if the decision maker deprives himself of the views of the person who will be affected by the decision. If indeed 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 principle of justice. The decision must be declared to be no decision...The rules of natural justice are minimum standards of fair decision-making imposed by the common law on persons or bodies who are under duty to ‘act judicially’.

29. In **Republic vs. The Honourable The Chief Justice of Kenya & Others Ex Parte Moiyo Mataiya Ole Keiwua Nairobi HCMCA No. 1298 of 2004** this Court held:

“The term natural justice, the duty to act fairly and legitimate expectation have no such difference but are generally flexible and interchangeable depending on the circumstances and the context in which they are used. The rules of natural justice are minimum standards of fair decision-making imposed by the common law on persons, or bodies that are under a duty to act judicially. They were applied originally to courts of justice and now extend to any person or body deciding issues affecting the rights or interests of individuals where a reasonable citizen would have a legitimate expectation that the decision-making process would be subject to some rules of fair procedure. The content of natural justice is therefore flexible and variable. All that is fundamentally demanded of the decision-maker is that his decision in its own context be made with due regard for the affected parties’ interests and accordingly be reached without bias and after giving the party or parties a chance to put his or their case. Whereas some judges prefer to speak of a duty to act fairly rather than a duty to observe the rules of natural justice, often the terms are interchangeable. But it is now perhaps the case while a duty to act fairly is incumbent on every decision-maker within the administrative process whose decision will affect individual interests, the rules of natural justice apply only when some sort of definite code of procedure must be adopted. However flexible that code of procedure may be and however, much the decision-maker is said to be master of his own procedure, the rules of procedure are generally formulated as the rule against bias (*nemo iudex in sua causa*) and in respect of the right to a fair hearing (*audi alteram partem*).”

30. The action suo moto by the Respondent did not just offend the rules of natural justice. It also violated the Applicant's right to fair hearing under Article 50 of the Constitution which provides that:

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body

31. Similarly, Article 47(1) of the Constitution provides:

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

32. In the instant case, there is no doubt that the Respondent Board did not avail an opportunity to the Ex parte Applicant to be heard on the validity of signatures on notification letters and the alleged delegation of authority respecting the signatures to the said letters. It is abundantly clear from the foregoing that the decision of the Respondent Board made on 5.8.19 to the extent that the said decision declared the letters of notification null and void for not having been signed by the Accounting Officer was illegal, irrational and procedurally improper and made in excess of authority and is hereby set aside and quashed by this Court.

Order

33. In the upshot I make the following orders:

a) An Order of Certiorari be and is hereby issued to remove to this Court for purposes of quashing the decision of the Public Procurement Administration Review Board, the Respondent herein, made on 5th August 2019 under the Request for Review Application No. 75 of 2019 –Konecranes Littruckers Ab vs. The Accounting Officer Kenya Ports Authority regarding the tender No. KPA/064/2018-19/TE for the supply and commissioning of four (4) New Reach Stackers, to the extent that the said decision declared the **letters of notification** null and void for not having been signed by the Accounting officer.

b) Parties shall bear their own costs.

It is so order.

Dated, Signed and Delivered in Mombasa this 18th Day of November 2019.

E. OGOLA

JUDGE

In the presence of:

Ms. Ikegu for Ex parte Applicant

Mr. Omondi holding brief Kitoo for 2nd Interested Party

Mr. Kaunda Court Assistant