



**Hemmys Way Enterprises Ltd v Kenya Electricity Generating Company PLC (Kengen)
(Civil Suit E298 of 2021) [2022] KEHC 14469 (KLR) (Civ) (13 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14469 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL SUIT E298 OF 2021
JN MULWA, J
OCTOBER 13, 2022**

BETWEEN

HEMMYS WAY ENTERPRISES LTD PLAINTIFF

AND

**KENYA ELECTRICITY GENERATING COMPANY PLC
(KENGEN) DEFENDANT**

RULING

1. The plaintiff Hemmys Way Enterprises Limited filed this suit *vide* a plaint dated November 11, 2021 against the defendant Kengen. The cause of action arose from an advertised tender by the defendant for supply and delivery of assorted chemical items for the defendant to youth groups through local media on its website on the May 3, 2019, being a tender for a three-year contract.
2. The plaintiff claims to have been the lowest bidder, but the defendant never responded to the fate of the tender for 2 years, save that in May 2021, the plaintiff alleged to have received a local purchase order for supplies from Kengen Sondu Power Station for supplies as per the order, and was duly paid. Upon enquiry as to the effect of the tender cited above, the defendant responded as alleged, that the tender had been terminated due to expiry of its validity.
3. Being disappointed with the turn of events, the plaintiff filed this suit seeking damages for loss incurred out of its legitimate expectation, as a result to what it stated to be breach by the defendant in numerous modes particularized thereunder.
4. The defendant filed a statement of defence dated January 14, 2022, denying all allegations in total, and raised issues that the plaintiff was seeking to enforce private law rights without any basis, that *Public Procurement And Disposal Act* 2015 (PPAD) post-contract notifications of awards; that under the Act, unless a contract has been executed by the parties, no contract can arise for enforcement, and that the



- only relief envisaged under the Act is administrative review, citing several provisions of the said Act. The defendant therefore sought a dismissal of the suit with costs.
5. The defendant also filed a notice of preliminary objection dated January 14, 2022. It is this preliminary objection (details appearing here below that is the subject of this ruling.)
 6. The preliminary objection dated January 14, 2022
 - a. The suit is an abuse of the process of the court, since the plaintiff seeks to enforce contractual obligations where no contract existed as provided in section 135(4) PPAD Act 2015. In addition to this, the defendant extended the tender validity in line with section 88(1) & (2) of the PPADA, 2015. Section 88(3) provides that, tender validity extension is limited to a maximum thirty (30) days hence no further extension could be made to facilitate contract sign-off.
 - b. The issues raised in the suit are incompetent and time barred as the plaintiff had another statutory dispute resolution avenue being the Public Procurement Administrative Review Board (as established under section 125 of the *Public Procurement & Asset Disposal Act, 2015* (PPAD Act 2015) vested with the jurisdiction to determine the dispute therein as provided by section 167(1) PPAD Act 2015.
 - c. The suit is fatally and incurably defective as it offends the provisions of section 170 (b) PPAD Act 2015 and as such cannot be ventilated before this honourable court since the correct parties in this case, the accounting officer of the public entity have not been enjoined.
 7. The plaintiff filed a replying affidavit in opposition to the preliminary objection sworn on the January 24, 2022 by the plaintiffs Director Dickson Ndung'u Emu, as well as written submissions dated May 19, 2022 and a list of authorities. The defendant too filed its written submissions dated May 16, 2022 and a list of authorities which have all been carefully considered.
 8. The issues raised in the plaintiff's replying affidavit are ably captured in its submissions, as well as in the legal underpinnings deponed to being sections 125, 167 and 174 of the PPAD Act, 2015.

Defendant's Submissions

9. While admitting having issued the tender subject of these proceedings, the defendant states that, the said tender closed on May 23, 2019, and could not have been evaluated within the statutory 30 days, and therefore, section 88(1) & (2) of the Act, gave written notice of extension of validity on the September 18, 2019 to each of the tenderers, including the plaintiff, and all accepted the extension up to October 19, 2019, which tender remained valid for 120 days, and therefore its validity expired on the September 20, 2019.
10. As to the dispute in regard to the PPAD Act 2015, the defendant submits that the issues raised by the plaintiff are time barred and therefore the only option for the plaintiff is the Public Procurement Administrative Review Board under section 27 thereof which it submits is the body vested with jurisdiction to determine the dispute as provided under section 167(1) PPAD Act; as the claim in its view, is premised upon an alleged breach of duty in which only public law remedies are available, whose functions are stated under section 28 of the Act, part xv – Administrative Review of Procurement and Disposal Proceedings – section 167, 172 and 173 of the Act.

It is therefore submitted that, the plaintiff ought to have approached the review board for its grievances, and not the court, by way of a request for review under regulation 203 of the 2020 regulations, within stated timeline of 14 days upon occurrence of the breach complained of.



11. The defendant thus submits that by virtue of the Act and the regulations, the claim is time barred, and that this court lacks jurisdiction to entertain the suit. Several decisions from the courts have been cited for the proposition that where a dispute resolution mechanism exists outside courts, the same should be exhausted before the jurisdiction of the court is invoked. Among them are:
 - a. *Speaker of the National Assembly v Karume* [1992] KLR 21,
 - b. *Geoffrey Muthinja Kabiru & 2 others v Samuel Munga Henry & 1756 others* [2015] e KLR.
 - c. *Okiya Omtata Okoiti & 2 others v AG & 3 others* [2014] e KLR,
 - d. *Kituo Cha Sberia & another v The Central Bank of Kenya & others* [2014] e KLR.
12. By the above, it is submitted that, a jurisdiction being a pure point of law, the P.O is properly raised and ought to be determined at the first instance. Further, the defendant submits that, the plaintiff's case being based on expectation of a contract following a tendering process, provisions of section 2(1) do not apply – as well as section 135(4) thereof; that provides that no contract formed between the person submitting the successful tender and the accounting officer of a procuring entity until the written contract is signed by the parties the court has therefore been urged to find that it has no jurisdiction and allow the preliminary objection.

The Plaintiff's Submissions

13. The background to the suit has been stated above. it is submitted that the threshold of a preliminary objection as defined in *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696 has not been met by the defendant in that the plaintiff, by the suit, wants to know why there was no contract issued pursuant to section 135(2) of PPAD Act, despite the plaintiff having satisfied all the conditions precedent to signing of a contract;
14. And therefore, a matter that cannot be determined by way of a preliminary objection, citing sections 135(2), 88(2)(a) for the proposition that the plaintiff tendered a successful tender, and being successful, with the lowest evaluated price, ought to have been given the tender. This, it is submitted, the plaintiff had an expectation to be notified of an intention to enter into a contract pursuant to section 87(1) PPAD, and if not, be notified of the reasons, as to the termination of the tender within the 14 days period as provided under the Act.
15. On the alternative dispute resolution mechanism under the PPAD Act, the plaintiff faults the defendant for citing what it terms as wrong provisions under the PPAD Act, and proceeds to state the procedure for resolution mechanism under sections 27, 167(1), 63(4), of the Act.

Citing 167(1), it is submitted that, a tenderer who claims to have suffered or at risk of suffering loss or damage due to breach of a duty imposed on a procuring entity by this Act or the regulations, may seek administrative review within 14 days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, as may be prescribed. It is therefore submitted that, it is only after the notification under section 63(4) that a tenderer can move the administrative body as provided under section 167(1). To that end, the plaintiff submits that, as it was not given the notification in time, it could not seek review mechanism from the review board, as the board did not have jurisdiction to determine the dispute as the remedies stated under section 167(1) were not available to the plaintiff.
16. It is a further submission by the plaintiff that the right to request a review under the Act is in addition to any other legal remedy a person may have, and therefore the plaintiff's right to move to court in the first instance.



17. In view of the above, the plaintiff submits that under section 170(b) of the Act is not applicable in this matter.

Cited in support of the submissions are decisions for the proposition that a preliminary objection ought be raised on matters of law only:

- a. *In Re Estate of Barasa Kaneje Manye* [2002] 1 KLR
- b. *Charles Ouchari Ogoti v Safenzom Limited & another* [2020] e KLR
- c. *Kandara Residence Association & another v Ananas Holdings Limited & others* [2020] e KLR.

At the end, the court has been urged to dismiss the preliminary objection.

18. Issues for determination

- a. Whether this court has jurisdiction to entertain the suit as filed.
- b. If the answer to the above is in the affirmative, whether the suit as filed should be struck out and dismissed.
- c. Costs.

Analysis and Determination

19. The issues framed above are intertwined and shall therefore be canvassed simultaneously. It is trite and well settled that a preliminary objection consists of a point of law which has been pleaded or by implication from the pleadings, and if argued may dispose of the case, as stated in the case *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696, and followed in numerous other cases. To qualify as a preliminary objection, the facts ought to be pleaded and correct, and none ought to be subjected to interrogation so as to ascertain their correctness – *Charles Onchari Ogoti vs Safaricom Ltd & another* (Supra).
20. A careful perusal of the pleadings by both the plaintiff and the defendant show that the facts are substantively agreed upon and correct. The only point of departure is when a dispute allegedly arose, which the defendant denies, by dint of provisions of The *Public Procurement and Asset Disposal Act* 2015(PPAD). It is a common ground that the tender was duly advertised but terminated as it was not evaluated within the statutory 30 days and by dint of section 88(1), (2) of the Act was terminated on the September 20, 2019 before any contract could be executed with the plaintiff or any other tenderer. That being the case, there existed no contractual relationship for enforcement of a breach as provided by the Act, leaving an aggrieved party to the only remedy provided under section 27 and 28, the Public Procurement Administrative Review Board.
21. Section 27(1) states:

“There shall be a Central Independent Procurement Appeals Review Board to be known as the Public Procurement Appeals Review Board to be known as the Public Administrative Review Board as an unincorporated Board.”

Section 28 provides:

“Functions and powers of the board

- 28(1) Reviewing, hearing and determination tendering and disposal disputes, and
(a)



- (b) to perform any other function conferred to the review board by this act, regulations or any other written law.”

22. Further, sections 167(1) 172 and 173 provides for the powers of the board in respect of disputes before the Board.

167: Request for a review

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

23. It is important to note that the plaintiff and tenderers were notified of the cancellation of the tender in question whose validity expired on the September 20, 2019, before any contract could be executed between the plaintiff and the defendant. I am also minded that the defendant never notified the plaintiff of its intention to enter into a contract pursuant to section 87 of the Act, and regulation 203 (2) (c) (iii) of the 2020 regulations. It provides;

87: Notification of intention to enter into a contract

1. Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.
2. For greater certainty, a notification under subsection (1) does not form a contract nor reduce the validity period for a tender or tender security.

24. It is therefore clear that there having been no communication by the defendant to the plaintiff, and the tender validity having expired, there was no contract or at all for enforcement. I do not agree with the plaintiff that having been the lowest bidder gave him automatic right and expectation that it would be the successful party, and would be issued with the notification of intention to enter into a written contract in terms of section 135(a) of the PPDA Act.

25. The PPAD Act provides for reliefs to an aggrieved party by the tendering process prior to, and post contractual relationship, in the name of the public procurement administrative review board established by section 27 and its functions provided under section 28 of the Act, well tabulated above.

Importantly, section 203 of the Act sets out the mode of proceedings upon a request for review, and time lines for the request upon occurrence of a breach, or complaint among others (s. 203 (2) & (3).

In the premises, there are statutory mechanisms available to an aggrieved party, that however are time bound by dint of section 167 of the PPAD Act, being 14 days from the occurrence of the breach complained of, loss, damage or risk of either the loss or damage.

26. The Court of Appeal in the *Speaker of the National Assembly v Karume* [1992] KLR 21; Geoffrey Muthinja Kabiru & 2 others v Samuel rendered itself thus;

“It is imperative that where a dispute resolution mechanism exists outside courts, the same must be exhausted before the jurisdiction of the courts is invoked... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial



consideration of matters to ensure that a party is first of all diligent in the protection of his own interests within the mechanism in place for resolution outside the courts.”

27. The same sentiments are expressed in several Judicial decisions including *Okiya Omtata Ok oiti & 2 others v AG & 3 others*, Nairobi petition No 58 of 2014 [2015] e KLR; *Kituo Cha Sheria & another v The Central Bank of Kenya & others* [2014] e KLR.

28. Whether this court has jurisdiction to entertain this suit.

I place reliance on the decision of the Supreme Court of Kenya in *Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & 2 others* [2012] eKLR where the apex court rendered:-

“A courts jurisdiction flows from either the constitution of legislation, or both. Thus, a court of law can only exercise jurisdiction as conferred by the constitution or other written law... the issue as to whether a court of law has jurisdiction to enter a matter 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...”

29. There is no dispute as to the nature of dispute before the court, it is clearly within the province of the Public Procurement and Administrative Review Board. The plaintiff’s complaints and grievances lie squarely on the board’s jurisdiction upon which, if not satisfied, it would then approach this court by a judicial review or appeal.

Section 170 of the PPAD Act stipulates to persons that ought to approach the review board from relief, among them – 170 (c), the tenderer notified as a successful by the procuring entity and (b) the accounting officer of a procuring entity, among others.

30. I am also guided by the provisions of section 135 of the PPAD Act that provides at 135(4) that no contract is formed between the person submitting the successful tender and the accounting officer of a procuring entity until the written contract is signed by the parties.

31. There is no gainsaying that the plaintiff had no enforceable contract with the defendant; and further that failure to join the accounting officer of the procuring entity, in these proceedings, the Kenya Electricity Generating Company (Kengen) offends the clear provisions of the PPAD Act – at section 170 which provides that, the accounting officer of a procuring entity must be made a party to the proceedings – see *El Roba Enterprises Ltd & 5 others v James Oyondi T/A Betoyo Contractors & 5 others* [2018] e KLR.

32. The court reiterated that parties form an integral part of a trial process and if a party is omitted that ought not be omitted, then the trial cannot be sustained. Section 135 (2) of the PPAD Act is categorical that an accounting officer of a procuring entity shall enter into a written contract with the person submitting the successful tender based on the tender documents and any clarifications that emanates from the procurement proceedings.

Despite the plaintiff being the lowest bidder as alleged, he had a reasonable expectation that a written contract would be executed between itself and the procuring entity, but none was done. That on its own does not translate to a contract by any means that can be enforced against the defendant for the reliefs sought, being damages for loss incurred out of its legitimate expectation, as a result of an alleged breach by the defendant.

33. There being very clear and express provisions as to the process, an aggrieved party in matters touching on public, procurement and disposal, this court’s jurisdiction need not be invoked at the first instance,



but upon review or appeal, as ably stated and held in the numerous judicial pronouncements stated in the body of this ruling, among many others.

34. Referring to the celebrated case *Mukisa Biscuits Manufacturing Co Ltd v West End Distributor Ltd* (Supra), I find that the preliminary objection raised by the defendant is merited, as the same is premised on clear points of law providing the procedure available to a party aggrieved by the decision of the procuring entity, which procedure is clearly spelt out under the provisions of the PPAD Act, and the regulations thereunder.
35. For the foregoing, I find and hold that the preliminary objection has merit, and therefore that this court lacks the requisite jurisdiction to entertain the suit. As dictated by the *Mukisa Biscuit* case, without jurisdiction, whatever a court does, upon realization that it has no jurisdiction amounts to naught.

The preliminary objection is therefore allowed, with the result that the suit as filed is incompetent and an abuse of the court process, and therefore is struck out.

The circumstances pertaining thereto dictates that each party bears own costs.

DATED, DELIVERED AND SIGNED IN NAIROBI THIS 13TH DAY OF OCTOBER, 2022.

J. N. MULWA

JUDGE

