



Hiba Construction Limited v Kenya Ports Authority (Miscellaneous Application E020 of 2023) [2023] KEHC 21882 (KLR) (28 August 2023) (Ruling)

Neutral citation: [2023] KEHC 21882 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS APPLICATION E020 OF 2023**

OA SEWE, J

AUGUST 28, 2023

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY
FOR ORDERS OF MANDAMUS, CERTIORARI AND
PROHIBITION**

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

AND

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

AND

**IN THE MATTER OF THE PUBLIC PROCUREMENT AND ASSET
DISPOSAL ACT, NO. 33 OF 2015**

BETWEEN

HIBA CONSTRUCTION LIMITED APPLICANT

AND

KENYA PORTS AUTHORITY RESPONDENT

RULING

- (1) The Chamber Summons dated August 8, 2023 was filed by the applicant, Hiba Construction Limited, under Sections 8 and 9 of the [Law Reform Act](#), Chapter 26 of the Laws of Kenya, Section 9(4) of the [Fair Administrative Action Act](#) No. 4 of 2015, Section 10 of the [High Court \(Organization and Administration Act\)](#), No. 27 of 2015, Order 53 Rules 1, 2 and 3 of the [Civil Procedure Rules](#), 2010 and



Rules 15, 16 and 17 of the [High Court \(Organization and Administration\) \(General\) Rules](#), 2016, for the following orders:

- (a) That the application be certified as urgent and service be dispensed with in the first instance during the Court's recess. (Spent)
 - (b) Leave be granted to the applicant to apply for the judicial review orders of *Mandamus*, *Certiorari* and Prohibition. (Spent)
 - (c) That the leave so granted does operate as a stay barring the respondent against continuing with procuring services/procurement proceedings in relation to Tender Nos. KPA/177/2022-23/CE-Framework Agreement for Concrete Works, KPA/178/2022-23/CE-Framework Agreement for Road Works, KPA/179/2022-23/CE-Framework Agreement for Specialized Painting Roads & Yard Marking, KPA/180/2022-23/CE-Framework Agreement for Wharfage & Refendering and KPA/181/2022-23/CE-Framework Agreement for Drainage and Water Reticulation.
 - (d) That the costs of the proceedings be borne by the respondent.
 - (e) That the Court be pleased to grant such other or further relief as it may deem fit in the circumstances.
- (2) The application was premised on the Supporting Affidavit sworn on 8th August 2023 by Nassoro Juma in which it was deposed that the respondent had advertised tenders in respect of Tender No. KPA/177/2022-23/CE-Framework Agreement for Concrete Works, KPA/178/2022-23/CE-Framework Agreement for Road Works, KPA/179/2022-23/CE-Framework Agreement for Specialized Painting Roads & Yard Marking, KPA/180/2022-23/CE-Framework Agreement for Wharfage & Refendering and KPA/181/2022-23/CE-Framework Agreement for Drainage and Water Reticulation, which were scheduled to close between 14th August 2023 and 18th August 2023 in respect of services that had been advertised earlier and awards made to the applicant, among other successful bidders.
- (3) The applicant is now apprehensive that, unless stay is granted as prayed, the respondent will proceed with the ongoing procurement process, thereby rendering the intended judicial review application nugatory. In its Statutory Statement, filed pursuant to Order 53 Rule 1(2) of the [Civil Procedure Rules](#), the applicant explained its journey as one of the bidders in respect of the previous Tenders Nos. KPA/136/2021-22/CE-Framework Agreement for Drainage & Water Reticulation, KPA/137/2021-22/CE-Framework Agreement for Road Works, KPA/138/2021-22/CE-Framework Agreement for Concrete Works, KPA/144/2021-22/CE-Framework Agreement for Wharfage & Refendering and KPA/145/2021-22/CE-Framework Agreement for Specialized Painting for Roads and Yard Marking.
- (4) The applicant explained that it had been issued with a Letter of Award which it accepted; and was thereafter given a draft contract, which it reviewed and returned to the respondent; confirming that all was in order. It thereafter received the fair version of the contract which it signed and returned to the respondent; and that the respondent assured it that the contract had been executed within the tender validity period. The applicant complained that thereafter, in spite of numerous follow-ups and requests to be issued with the executed contract, the respondent went quiet; only to learn that the respondent had re-advertised for the same services.
- (5) The application was filed under a certificate of urgency and presented before the Duty Judge on 15th August 2023 when leave was granted. The respondent thereafter filed Grounds of Opposition dated 24th August 2023 in response to the application, contending that:



- (a) the procurement proceedings in respect of the previous Tenders Nos. KPA/136/2021-22/CE-Framework Agreement for Drainage & Water Reticulation, KPA/137/2021-22/CE-Framework Agreement for Road Works, KPA/138/2021-22/CE-Framework Agreement for Concrete Works KPA/144/2021-22/CE-Framework Agreement for Wharfage & Refendering and KPA/145/2021-22/CE-Framework Agreement for Specialized Painting for Roads and Yard Marking expired due to lapse of the tender validity period before execution of the contracts by its Accounting Officer.
 - (b) No contractual obligations arose from those procurement proceedings; and therefore no contractual relationship exists between the applicant and the respondent arising out of the tenders aforementioned.
 - (c) That the expired and current procurement proceedings for Tender No. KPA/177/2022-23/CE-Framework Agreement for Concrete Works, KPA/178/2022-23/CE-Framework Agreement for Road Works, KPA/179/2022-23/CE-Framework Agreement for Specialized Painting Roads & Yard Marking, KPA/180/2022-23/CE-Framework Agreement for Wharfage & Refendering and KPA/181/2022-23/CE-Framework Agreement for Drainage and Water Reticulation are severally and independently constructed as they are under different procurement plans and financial years.
 - (d) The expired procurement proceedings do not have any bearing on the respondent's subsequent tendering procedures and awards under the current procurement proceedings for the financial year 2022/23; and therefore it is unfair for the applicant to seek the prohibition of the current procurement proceedings as the respondent is in dire need of the services.
 - (e) The application is misconceived, frivolous, vexatious and a total abuse of the court process, offending the provisions of the Constitution Sections 1A and 1B of the *Civil Procedure Act* and the *Public Procurement and Asset Disposal Act*, 2015.
- (6) Accordingly, brief submissions were invited from counsel for the parties on August 25, 2023 limited to the question as to whether or not the applicant is entitled to stay pending the hearing and determination of the substantive judicial review application. Hence, Mr. Kitinya for the applicant reiterated the averments of the applicant that, the applicant having been issued with a letter of award by the respondent in respect of the same services, the current procurement proceedings are irregular. He added that unless the orders sought are granted, the applicant's substantive application will be rendered nugatory. He responded to each of the grounds raised in opposition to the application and urged the Court to find that prayer 2 of the applicant's Chamber Summons dated August 8, 2023 is merited.
- (7) On behalf of the respondent, Mr. Kyandih relied on the Grounds of Opposition filed herein by the respondent and explained that the subject tenders are in the nature of framework agreements and therefore that it would be prejudicial to the respondent to stay the ongoing procurement process. He added that it is common ground that the previous procurement process was terminated due to the lapse of the tender validity period and made reference to paragraph 8 of the applicant's Chamber Summons to confirm that the applicant was all along aware that the ensuing contracts ran the risk of being overtaken by the expiry of the tender validity. He therefore submitted that there was no way the respondent's Accounting Officer could have signed the contracts outside the tender validity period; hence the re-tender.
- (8) I have given careful consideration to the application, and in particular the applicant's prayer that there be stay of the impugned tender proceedings pending the hearing and determination of the substantive judicial review application. In this regard, Order 53 Rule 1 of the *Civil Procedure Rules* provides:



- (1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.
 - (2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.
 - (3) The judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit including cash deposit, bank guarantee or insurance bond from a reputable institution.
 - (4) The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise...”
- (9) The object of stay in judicial review matters was aptly articulated in *Taib A. Taib v The Minister for Local Government & Others* Mombasa HCMISCA. No. 158 of 2006 thus:

“... The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken...”

- 10 Thus, the applicant having been granted with leave to file its substantive application, I am convinced that indeed its substantive application will be rendered otiose unless the ongoing procurement proceedings are stayed.
- (11) In the result, Prayer 3 of the Chamber Summons dated August 8, 2023 is hereby allowed and orders granted as hereunder:
- (a) That the leave granted herein on 15th August 2023 to the applicant does operate as a stay of the procurement proceedings in relations to KPA/177/2022-23/CE-Framework Agreement for Concrete Works, KPA/178/2022-23/CE-Framework Agreement for Road Works, KPA/179/2022-23/CE-Framework Agreement for Specialized Painting Roads & Yard Marking, KPA/180/2022-23/CE-Framework Agreement for Wharfage & Refendering and KPA/181/2022-23/CE-Framework Agreement for Drainage and Water Reticulation pending the hearing and determination of the substantive judicial review application.
 - (b) The costs of the application be costs in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 28TH DAY OF AUGUST 2023

OLGA SEWE

JUDGE

