



Secureman Services Limited v Public Procurement Regulatory Board; Kisii Teaching & Referral Hospital (Interested Party) (Judicial Review Application E004 of 2022) [2023] KEHC 24725 (KLR) (31 October 2023) (Ruling)

Neutral citation: [2023] KEHC 24725 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
JUDICIAL REVIEW APPLICATION E004 OF 2022
PN GICHOHI, J
OCTOBER 31, 2023**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO COMMENCE PROCEEDINGS
IN THE NATURE OF JUDICIAL REVIEW ORDERS OF CERTIORARI, MANDAMUS
& PROHIBITION AND IN THE MATTER OF ARTICLES 20(3), 21(1), 23(3) (F), 25(C),
27(1), 47(1), 48 & 159 (2) (D) OF THE CONSTITUTION OF KENYA AND IN THE
MATTER OF SECTION 7 OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015**

BETWEEN

SECUREMAN SERVICES LIMITED APPLICANT

AND

PUBLIC PROCUREMENT REGULATORY BOARD RESPONDENT

AND

KISII TEACHING & REFERRAL HOSPITAL INTERESTED PARTY

RULING

1. The background of this matter is that, Secureman Services Limited (herein referred to as the Applicant), and which is a security services company applied for a tender for Security Services which had been advertised on 7th May 2021 by Kisii Teaching & Referral Hospital (herein referred to as the Interested Party) being Tender Number KTRH/19/2021-2023 and which was closing on 21st May 2021. One of the requirements of the tender was that bidders have a valid certificate from Protective Security Industry Association.
2. It is then that the Interested Party sought from Protective Security Industry Association a verification as to the validity of the Certificate supplied by the Applicant in its bid documents. The response by Protective Security Industry Association was that the Certificate provided by the Applicant herein was



not their true record as the Applicant was not a current paid up member. The Interested Party then lodged a complaint requesting Public Procurement Regulatory Board to debar the Applicant.

3. Upon obtaining responses and submissions by parties, the Public Procurement Regulatory Board (herein referred to as the Respondent) Debarment Committee rendered its decision on 15th September, 2021 and debarred the Applicant for a minimum period of three years under Section 41 (4) of the Public Procurement and Asset Disposal (PPAD) Act, 2015.
4. Aggrieved, the Applicant filed a Chamber Summons dated 9th November 2022, through the firm of Ng'etich Chiira & Associates Advocates and pursuant to Articles 22, 47 & 48 of *the Constitution*, Section 7 of the *Fair Administrative Action Act* 2015 and Order 53 Rule 1(2) of the Civil Procedure Rules seeking the following orders: -
 1. Spent.
 2. That the Court be pleased to enlarge time for the Applicant to file Judicial Review Proceedings for the purposes of quashing the decision of the Public Procurement Regulatory Authority's Debarment Committee and all the attendant orders emanating therefrom.
 3. That leave do issue for the ex-parte Applicant to apply for: -
 - a. An Order of Certiorari to remove into this Court for purposes of quashing the decision and orders of the Respondent in Debarment Application No. 11 of 2021 dated 15th September 2021.
 - b. An Order of Mandamus compelling the Respondent to remove the name of the Applicant from its list of Debarred Firms.
 4. That the leave so granted, does operate as stay of the decision of the Respondent delivered in Debarment Application No. 11 of 2021 dated 15th September, 2021, pending the hearing and determination of these Judicial Review Proceedings.
 5. That costs of this Application abide the outcome of the Judicial Review Proceedings.
5. The main grounds on the face of the Application are that the Respondent failed to conduct independent investigations, disregarded evidence and failed to follow mandatory steps in the law before arriving at the decision to debar the Applicant. That the Respondent failed to comply with Regulation 22 of the Public Procurement and Asset Disposal Regulations (PPADR), 2020 and neglected to conduct an oral hearing thereby denying the Applicant its right to a fair trial by declining to hear the Applicant.
6. The Applicant stated that the delay in filing the Application was well explained and excusable in that the Applicant was a sole Director of the Company was diagnosed with prostate cancer midway the proceedings for which he had been advised by his doctors to proceed for specialized treatment, and therefore, the debarment has caused it immense financial and business loss.
7. In support of the Application, the Applicant's Managing Director swore an Affidavit on 9th November 2022 basically reiterating the materials herein and that after being diagnosed with Prostatic Adenocarcinoma "prostate cancer" on 17th August 2021, he travelled to India on 8th September 2021



and back Kenya on 9th October 2021 after which he was put on bed rest and directed not to actively involve himself in the day-to-day running of the Applicant Company.

8. He deponed that the Applicant's main source of business is offering security services to both public and private firms. He termed the Respondent's decision unfair having failed to take into account the prevailing situation of parties before it, particularly the exculpatory evidence by the Protective Service Industry Association.
9. Further, the Applicant termed the decision unreasonable and a violation of its legitimate expectation for a fair hearing in that the Respondent failed to afford the Applicant an oral hearing despite the fact that the issues raised were contested.
10. In its Replying Affidavit sworn on 22nd February 2023 by Patrick K. Wanjuki as the Respondent's Director General, the Respondent deponed that it complied with the procedure laid out in Regulation 22 of the PPADR, 2020 which do not permit it to conduct independent investigations contrary to assertions by the Applicant.
11. He further deponed that the Respondent is a quasi-judicial body and therefore not bound by the strict rules of evidence and procedure and therefore, with annexure PKW1 (Notice of Intended Debarment), the Respondent thought it prudent and notified parties, that the debarment Application be done by way of written submissions as against viva voce evidence in view of the Covid- 19 pandemic.
12. He deponed that both parties filed their respective pleadings and no objection was ever raised with regard to how the matter would be disposed of. He also deponed that the Applicant did not make any request for an oral hearing.
13. While he empathized with the Applicant's Managing Director's malady started during the debarment proceedings, the Respondent deponed that the Applicant could have authorized his Advocates on record to proceed with the matter in his absence and therefore, the Applicant had not established any exceptional circumstances for failing to apply for Judicial Review within the stipulated timelines.
14. The Respondent further contested the Court's jurisdiction to hear and determine the matter as the impugned debarment decision arose in Nairobi and not Kisii.

Submissions

15. In its submissions dated 21st June 2023, the Applicant cited principles guiding Judicial Review and submitted that they had given a justifiable explanation for the delay to warrant this Court's discretion to allow the application. On this issue, the Applicant relied on the case of Republic v Kenya Revenue Authority Ex-parte Stanley Mombo Amuti [2018] eKLR where the Court allowed an application for extension of time to file Judicial Review proceedings.
16. Further, citing Rule 25 (5) (e) of the [Public Procurement and Asset Disposal Act](#), the Applicant submitted that it is not material that the Respondent would have arrived at the same decision if it had heard the parties in light of the fact that the Applicant was denied an opportunity to be heard. In conclusion, it submitted that leave ought to be granted where the Court is of the view that there is an arguable case.
17. The Respondent filed its submissions dated 22nd February 2023 and also reiterated the contents of the Replying Affidavit. They further submitted that Judicial Review is only concerned with the decision-making process and not the merits and demerits of the decision, which is a purview of the Appellate Court. They referred to the case of Republic v Public Procurement Administrative Review Board & Another Ex-parte Express DDB Kenya Limited [2018] eKLR.



18. Further, the Respondent submitted that having received a Request for Debarment from the Interested Party, it invited all the parties to make representations on their respective cases. They submitted that the debarment proceedings were regular and all parties were given a fair hearing and all issues considered.
19. Upon the Respondent's Debarment Committee finding that the case for debarment had been disclosed, the Respondent debarred the Applicant for 3 years as per Section 41 of the PPAD Act from 15th September 2021. The Respondent further submitted that even if the Applicant were to be granted leave to file for the Judicial Review proceedings, the grounds in the Application did not merit a case for Judicial Review exercise.
20. Lastly, the Respondent cited the case of Kenya Pipeline Company Limited v Hyosung Ebara Company Limited & 2 Others [2012] eKLR and Speaker of the National Assembly v James Njenga Karume [1992] eKLR and urged the Court not to interfere with specialized bodies in the exercise of their statutory mandate, unless in cases where the said bodies exercise their mandate illegally, irrationally or that the process was tainted with procedural impropriety.

Determination

21. Having considered material before this Court, the issues that arise for determination are: -
 1. Whether this Court has jurisdiction to handle the instant matter.
 2. Whether this Court can and should enlarge time for the Applicant to commence Judicial Review Proceedings.
 3. Whether the Applicant has established a case for this Court to grant leave to apply for orders of Certiorari and Mandamus with respect to the Respondent's decision delivered on 15th September 2021.
 4. Whether the leave so sought should operate as a stay of the Respondent's decision delivered on 15th September 2021.
22. On whether this Court has jurisdiction to handle the instant matter, the issue raised by the Respondent is that the cause of action arose in Nairobi and not Kisii where this matter was filed. That argument is not sound for reasons that under Article 165 (3) of *the Constitution*, this Court has unlimited jurisdiction on criminal and civil matters. This Court is not limited by local geographical boundaries either.
23. On the whether this Court can and should enlarge time for the Applicant to commence Judicial Review Proceedings, Section 42 of the *Public Procurement and Asset Disposal Act* 2025 provides that where a party is aggrieved by the decision of the Respondent, the Applicant should lodge application for judicial review within 14 days. The impugned decision was made on 15th September 2021. This Application was filed on 21st November, 2022 which was a delay of about one year two months.
24. The circumstances in Republic v Kenya Revenue Authority Ex-Parte Stanley Mombo Amuti [2018] eKLR cited by the Applicant were different from those in this case in that, the Application before that Court was filed out of time and the application under consideration was for extension of time. What however is the rationale in the said decision? The Court held:-

“The ex parte Applicant was candid. He explained the financial difficulties he faced and in ability to raise the court fees. The delay is not inordinate. I am persuaded that he has established sufficient cause. It is difficult to attempt to define the meaning of the words



‘sufficient cause.’ It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the Appellant. No negligence, inaction or want of bona fides has been alleged in this case.

In conclusion, the ex parte Applicant has sufficiently explained the delay and has established sufficient cause for this court to grant the extension of time sought. Accordingly, I allow the Application dated 26th June 2018 and order that the Application dated 20th June 2018 and filed on the same date be and is hereby admitted out of time and that the same is hereby deemed to have been duly and properly filed.”

25. In this case, the explanation for delay is that the sole Director of the Applicant was diagnosed with cancer during the proceedings before the Debarment Committee of the Respondent. That was an illness that would make anyone empathise with the patient. To follow up a patient in those circumstances so as to give instructions and sign documents in support of an intended Application to be filed before court in order to comply with timelines, would appear to any right-thinking person inconsiderate. In this case the circumstances may appear inordinate but it is satisfactorily explained and can be excused for the reasons advanced and which are not disputed.
26. On whether the Applicant should be granted leave to institute Judicial Review proceedings, the Supreme Court of Kenya in *Dande & 3 others v Inspector General, National Police Service & 5 others* (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR) (16 June 2023) (Judgment) held as follows: -

“The entrenchment of Judicial Review under *the Constitution* of Kenya, 2010 elevated it to a substantive and justiciable right under *the Constitution*. Accordingly, Judicial Review was no longer a strict administrative law remedy but also a constitutional fundamental right enshrined in *the Constitution*. Thus, Article 47 of *the Constitution* provided that every person had a right to an administrative action that was expeditious, efficient, lawful, reasonable and procedurally fair.

The entrenchment of Judicial Review in *the Constitution* had led to the emergence of divergent views on the scope of Judicial Review. The first group postulated that judicial review was concerned with the process a statutory body employed to reach its decision and not the merits of the decision itself while the second group opined that under the current constitutional dispensation, courts could delve into both procedural and merit review in resolving disputes.”
27. In disallowing Appeal No 6 (E007) of 2022 dated March 24, 2022 being one of the Appeals consolidated with *Dande & 3 others* (supra), the Supreme Court made “a declaration that Judicial Review proceedings brought under the provisions of *the Constitution* must involve a review of merits.”
28. In this case, the argument by the Respondent is that even if the Applicant was allowed leave sought, the Application would not be merited as the grounds raised do not hold water.
29. One of the grounds the Applicant relies on is that the that failure to hold an oral hearing violated its rights to fair hearing as he was not given an opportunity to be heard. The Applicant further argues that an oral hearing is what is anticipated under the Public Procurement and Assets Disposal Act and its regulations.
30. Of course, the right to a fair trial under Article 50 of *the Constitution* need not be overemphasized here. There is no dispute that a request for Debarment was made in accordance with the Rule 22 (1)



of Public Procurement and Assets Disposal Regulations, 2020. Rule 22 of the Regulations deals with request for Debarment and Debarment proceedings. It provides as follows: -

5. For purposes of section 41(5) of the Act and this regulation, debarment procedures shall be as follows-
 - a. upon receipt of a request for debarment, the Board shall analyze the case within thirty days to determine whether there is a prima facie case for debarment;
 - b. if the analysis establishes a prima facie case for debarment, the Board shall issue a notice of intended debarment to the party, who shall be the subject of the debarment proceedings requiring him or her to file a written response with the Board;
 - c. the notice of intended debarment issued under paragraph (b) shall contain the grounds of debarment, a brief statement of the facts in support of debarment and the consequences that may arise from the debarment;
 - d. the respondent shall within fourteen days of receipt of a notice of intended debarment, file a written response with the Board;
 - e. where the facts of the intended debarment are contested, the debarment committee shall within twenty-one days of receipt of the response in paragraph (d) hold a debarment hearing to determine the disputed facts;
 - f. a seven (7) days' notice shall be given to the parties to appear before the debarment committee;
 - g. the debarment committee shall prepare a report of its findings and recommendations, and make a determination on the request for debarment within thirty days from the date of hearing;
 - h. where the request for debarment is approved, such debarment shall be for a period of not less than three years;
 - i. the decision to debar a person shall promptly be communicated to the parties involved in the debarment proceedings;
 - j. after the expiry of twenty-one days from the date of the debarment decision, the Authority shall publish the details of the person debarred and the corresponding period of debarment;
 - k. the Authority shall forward the details of the debarred person to the Cabinet Secretary for gazettelement.

31. This Court has perused the proceedings before the before the Debarment Committee and there is no dispute that the Respondent followed the procedure provided for strictly and the Respondent did file a written response pursuant to Rule 22 (5) (d) of the Regulations. What appears to be the issue here is



that the Applicant herein was not called to give oral evidence. In “determination of prima facie case”, the committee stated: -

“During its 13th Sitting of 9th August ,2021 the Public Procurement Regulatory Board’s Debarment Committee considered the subject Request for Debarment in accordance with regulation 22 (5) (a) of the Public Procurement and Asset Disposal Regulations and found that it appears that there was a prima facie case for debarment. This decision was communicated to the parties via a Notice of Intended Debarment dated 10th August ,2021 requiring the Respondent to file its response within 14 days, the Applicant to respond to the same within 7 days together with its written submissions and the Respondent to file submissions within 7 days thereafter.”

32. The issue then is whether “holding a debarment hearing” means viva voce evidence. There is no definition of “hearing” in the Regulations. The definition “hearing” may be discerned from Black’s Law Dictionary Tenth Edition at page 836 as “1. A judicial Session, usually open to the public, held for purpose of deciding issues of fact or of law, sometimes with witnesses testifying ...Also termed as adjudication hearing. 2. Administrative Law. Any setting in which an affected person presents arguments to a decision maker.”
33. In this case, there is no doubt that the Respondent herein, being a quasi -judicial body, was aware of the right of parties before it. The Applicant being the person affected by the request for Debarment had a right to appear in those proceedings and give oral evidence if he so wished.
34. However, there was nothing to bar the Respondent from giving necessary directions toward expeditious disposal of the matter. Towards that end, the Respondent, in their Notice of Intended Debarment directed: -

“In view of the Ministry of Health directives on the safeguards to be observed to curb the spread of COVID -19 pandemic, this Committee shall consider this matter on the basis of pleadings and written submissions filed by the parties and virtually where necessary.”

35. This Court takes judicial notice that the period within which the issues herein arose, this Country and the world at large was faced with challenges posed by Covid- 19 which necessitated periodical guidelines by the Ministry of Health to the public and institutions on how to minimize, if not curb, the spread of Covid -19. There is no evidence or indication however, that after receiving the said notice, either party to the debarment proceedings objected to filing of submissions or raise a concern that they wanted to attend, virtually or physically and give viva voce evidence.
36. There is no doubt that parties did file their Responses in regard to notice of intended Debarment. This Court therefore finds no violation of the rights of the Applicant by the Respondent in the process followed herein.
37. Further, from the documents availed before this Court including Annexure Exhibit marked IN1 to the Application herein, the Applicant herein has never disputed presenting the impugned Certificate to the Interested Party. The Applicant herein had produced a letter dated 25th June, 2021 from Protective Security Industry Association that the Applicant herein is a paid-up member of the Association.
38. While debarring the Applicant herein for three years, the Respondent held:

“...in light of the fact that this letter ... did not revoke the letter dated 21st April, 2021 on the status of the certificate submitted by the Respondent, then we find that the contents of that letter hold no waters as to the confirmation that the certificate was a forgery.



In the instant debarment proceedings, the attention of the Board would be drawn to the documents on record of the Applicant as at the date of Tender opening being 21st May 2021. As at that date, the impugned certificate from the Protective Security Industry Association was submitted by the Respondent whose validity was denied by the Protective Security Industry Association on 21st June 2021. It is more like not that the Respondent made good the situation and subscribed for membership with Protective Security Industry Association on or around 25th June 2021 and hence obtained the letter of that date.

From the above analysis, it is evident that the Respondent submitted a certificate which was found to be a forgery. In addition to the above in its response, the Respondent has not denied having submitted the impugned certificate which was found to be a forgery. On issue of the enquiries to the Protective Security Industry Association being made using private email of an officer of the Applicant, we find that the allegation is neither here nor there. Even though it is good practice to use official correspondence, there is no law that bars public officers from using personal emails in discharge of their official ditties.

Therefore, we find the Respondent guilty of the offence of submitting falsified document contrary to section 41 (d) of the Act which provides that the Board shall debar a person from participating in procurement or asset disposal proceedings, given false information about his or her qualification.”

39. Judicial Review is not an academic exercise to be carried out as a matter of course. Further, it is trite law that leave would not operate stay. On the merit basis therefore, the Applicant has clearly failed to demonstrate what would be achieved if Judicial Review proceedings were carried out. The fourth issue on whether the leave so sought should operate as a stay of the Respondent’s decision delivered on 15th September 2021 is therefore moot in the circumstances.
40. In conclusion, this Court finds no merit in the Application dated 9th November 2022. The same is dismissed. Considering the circumstances herein, each party is directed to bear its own costs.

DATED, DELIVERED AND SIGNED AT KISII THIS 31ST DAY OF OCTOBER, 2023.

PATRICIA GICHOHI

JUDGE

In the presence of:

Mr. Onyango for Applicant

N/A for Respondent

N/A for Interested Party

Court Assistant; Alphline

