



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. E006 OF 2020

IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE

JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI AND PROHIBITION

BETWEEN

WILLIS PROTOCOL AND CONCIERGE

SERVICES LIMITED.....APPLICANT

VERSUS

PUBLIC PROCUREMENT ADMINISTRATIVE

REVIEW BOARD.....1ST RESPONDENT

KENYA AIRPORTS AUTHORITY.....2ND RESPONDENT

AND

CAPITAL INTERNATIONAL

CONCIERGE SERVICES LIMITED.....1ST INTERESTED PARTY

UMBATO SAFARIS LIMITED.....2ND INTERESTED PARTY

RULING

The Application

1. Willis Protocol and Concierge Services Limited, the Applicant herein, is aggrieved by the 1st Respondent's decision made on 19th January 2021 dismissing its application for review, arising from the award by the 2nd Respondent of the Tender for Provision of Meet and Assist Service at Jomo Kenyatta International Airport, Tender No. KAA/OT/JKIA/MBD/0022,2020-2021 to the Interested Parties.

2. The Applicant has consequently filed an application by way of a Chamber Summons dated 21st January 2021, seeking the following orders:

(a) THAT the matter be certified urgent and service be dispensed with in the first instance.

(b) THAT leave be granted to the ex-parte applicant to institute judicial review proceedings seeking for an order of CERTIORARI directed to the 1st Respondent, by itself, its servants and/or agents or any other officer acting under its authority to bring to the court for the purpose of quashing the decision made by it on or about 19/1/2021 dismissing the Applicant's Application for Review of Tender No. KAA/OT/JKIA/MBD/0022,2020-2021 to offer the 'meet and assist service' at the Jomo Kenyatta International Airport' which tender the 2nd Respondent awarded the 1st and 2nd Interested Parties.

(c) THAT leave be granted to the Applicant to apply for an order of PROHIBITION directed to the 2nd Respondent whether by itself, servants or agents from implementing/ entering into a contract with the 1st and 2nd Interested parties pending

the hearing and determination of this application.

(d) THAT a temporary injunction restraining the 2nd Respondent whether by itself, servants or agents from entering into a contract with the 1st and 2nd Interested parties pending the hearing and determination of this application.

(e) THAT leave so granted to the Applicant to do operate as stay on implementation of the tender award and or to maintain the status quo of any proceedings in the matter pending the hearing and determination of the main Judicial Review motion;

(f) THAT costs of this application and the review application be provided for by the 2nd Respondent.

3. The grounds for the application are stated in the Applicant's statutory statement dated 21st January 2021, and a verifying affidavit sworn on the same date by Willis Otieno Ochola, the Applicant's Managing Director. The grounds for the application are that is that the 1st Respondent's decision contravenes Article 227(1) of the Constitution of Kenya which provides that a procurement process should be fair, equitable, transparent, competitive and cost effective for reasons that it:

a) Misinterpreted and misapplied the provision of section 167 (1) of the Procurement and Asset Disposal Act 2015 and failed to consider the Applicant's grounds allegedly on account that it had been presented out of time;

b) Disregarded the Applicant's evidence that it had indeed provided the mandatory documents and it ought to have been evaluated.

c) Disregarded the Applicant's averments which were unchallenged that the successful interested parties lacked the 5-year experience as required in the tender document to offer the meet and assist service.

4. The Applicant annexed copies of various documents in support of his application including its application before the 1st Respondent and the impugned decision thereon made by the 1st Respondent on 19th January 2021.

The Determination

5. I have considered the application dated 21st January 2021 and the reasons offered in support of the urgency, and I am satisfied that the Applicant has demonstrated that this matter is urgent. This is for reasons that the procurement of the tender that was the subject of the Applicant's application before the 1st Respondent is ongoing.

6. On the orders sought by the Applicant for leave to commence judicial review proceedings, the applicable law is *Order 53 Rule 1* of the Civil Procedure Rules, which provides that no application for judicial review orders should be made unless leave of the court was sought and granted. The main reason for the leave as explained by Waki J. (as he then was), in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996**, is to ensure that an applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration.

7. It is also trite that in an application for leave such as the present one, the Court ought not to delve deeply into the arguments of the parties, but should make cursory perusal of the evidence before court and make the decision as to whether an applicant's case is sufficiently meritorious to justify leave. It was explained by Lord Bingham in **Sharma vs Brown Antoine (2007) 1 WLR 780**, that a ground of challenge is arguable if its capable of being the subject of sensible argument in court, in the sense of having a realistic prospect of success.

8. In the present application, the Applicant has provided evidence of the ruling by the 1st Respondent on his application and has averred as to the grounds and reasons why it considers the 1st Respondent's decision and recommendations to be illegal. To this extent I find that the *ex parte* Applicant has met the threshold of an arguable case, and is therefore entitled to the leave sought to commence judicial review proceedings against the Respondents.

9. On the question of whether the said leave can operate as a stay of the impugned report, the applicable principle is that the grant of such leave is discretionary, but the Court should exercise such discretion judiciously. Order 53 Rule 1(4) of the Civil Procedure Rules provides as follows in this respect:

“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.”

10. In **R (H). vs Ashworth Special Hospital Authority (2003) 1 WLR 127**, it was held that such a stay halts or suspends proceedings that are challenged by a claim for judicial review, and the purpose of a stay is to preserve the *status quo* pending the final determination of the claim for judicial review. The circumstances under which a Court may grant a direction that the grant of leave do operate as a stay of proceedings or of a decision, and the factors to be taken into account by the Courts in this regard were laid down in the said decision, and in various decisions by Kenyan Courts.

11. The main factor is whether or not the decision or action sought to be stayed has been fully implemented. It was thus held in **Jared Benson Kangwana vs. Attorney General, Nairobi HCCC No. 446 of 1995** that stay of proceedings should be granted where the situation may result in a decision which ought not to have been made being concluded. A similar decision was made by Maraga J. (as he then was) in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006** .

12. This factor was also discussed in R (H). vs Ashworth Special Hospital Authority (supra) where Dyson L.J. held as follows:

“As I have said, the essential effect of a stay of proceedings is to suspend them. What this means in practice will depend on the context and the stage that has been reached in the proceedings. If the inferior court or administrative body has not yet made a final decision, then the effect of the stay will be to prevent the taking of the steps that are required for the decision to be made. If a final decision has been made, but it has not been implemented, then the effect of the stay will be to prevent its implementation. In each of these situations, so long as the stay remains in force, no further steps can be taken in the proceedings, and any decision taken will cease to have effect: it is suspended for the time being.”

13. It therefore follows that were the action or decision is yet to be implemented, a stay order can normally be granted in such circumstances. Where the action or decision is implemented, then the Court needs to consider the completeness or continuing nature of such implementation. If it is a continuing nature, then it is still possible to suspend the implementation.

14. In the present application the prayers of injunction and stay sought by the Applicant seem to suggest that the procurement process of the Tender for Provision of Meet and Assist Service at Jomo Kenyatta International Airport, Tender No. KAA/OT/JKIA/MBD/0022,2020-2021 that is sought to be stayed is ongoing. However, there is no information provided by the Applicant of the stage of procurement of the said tender. In the premises I find that the prayers for injunction and stay orders need to be canvassed *inter partes*, so that the parties likely to be affected by the prayer for stay can confirm the state of implementation .

The Orders

15. In light of the foregoing observations and findings, the Applicant’s Chamber Summons dated 21st January 2021 is found to be merited to the extent of the following orders:

I. The *ex parte* Applicants’ Chamber Summons application dated 21st January 2021 be and is hereby certified as urgent, and is hereby admitted for hearing *ex parte* at the first instance.

II. The Applicant is granted leave to apply for an order of Certiorari directed to the 1st Respondent, by itself, its servants and/or agents or any other officer acting under its authority to bring to the court for the purpose of quashing the decision made by it on or about 19/1/2021 dismissing the Applicant's Application for Review of Tender No. KAA/OT/JKIA/MBD/0022,2020-2021 to offer the 'meet and assist service' at the Jomo Kenyatta International Airport' which tender the 2nd Respondent awarded the 1st and 2nd Interested Parties.

III. The Applicant is granted leave to apply for an order of Prohibition directed to the 2nd Respondent whether by itself, servants or agents from implementing/ entering into a contract with the 1st and 2nd Interested parties.

IV. Prayers 4 and 5 of the Applicant’s Chamber Summons dated 21st January 2021 seeking an a temporary injunction restraining the 2nd Respondent whether by itself, servants or agents from entering into a contract with the 1st and 2nd Interested parties and that the grant of leave do operate as a stay of implementation of the tender award and/ or to maintain the status quo of any proceedings, shall be canvassed *inter partes* at a hearing to be held on 8th February 2021 before Hon. Mr. Justice Ngaah as this Court is proceedings on leave.

V. The Applicant shall file and serve the Respondent and Interested Parties with (i) the substantive Notice of Motion (ii) the Chamber Summons dated 21st January 2021 and its supporting documents, (iii) skeletal submission on the prayers 3&4 of the said Chamber Summons, (iv) a copy of this ruling, and (v) a hearing notice, within fourteen (7) days from today’s date.

VI. Upon being served with the said pleadings and documents, the Respondents and Interested Parties shall file and serve their responses and skeletal submissions on prayer 3 of the *ex parte* Applicant’s Chamber Summons dated 21st January 2021 within fourteen (7) days from the date of service.

VII. In view of the Ministry of Health directives on the safeguards to be observed to stem the spread of the current COVID-19 pandemic, this Court shall hear and determine prayer 3 of the *ex parte* Applicant’s Chamber Summons dated 21st January 2021 and the Applicant’s substantive Notice of Motion on the basis of the electronic copies of the pleadings and the written submissions filed by the parties.

VIII. All the parties shall file their pleadings and submissions electronically, by filing them with the Judiciary e-filing system, and send copies by electronic mail to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com and asunachristine51@gmail.com.

IX. The service of pleadings and documents directed by the Court shall be by way of personal service and electronic mail, and in the case of service by way of electronic mail, the parties shall also email a copy of the documents so served to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com with copies to asunachristine51@gmail.com.

X. The parties shall also be required to file and send to the Deputy Registrar of the Judicial Review Division their respective affidavits of service evidencing personal service, by way of electronic mail to judicialreview48@gmail.com with copies to asunachristine51@gmail.com.

XI. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for hearing on 8th February 2021 before Hon. Mr. Justice Ngaah.

XII. The Deputy Registrar of the Judicial Review Division shall send a copy of these directions to the Applicant by electronic mail by close of business on Friday, 22nd January 2021.

XIII. Parties shall be at liberty to apply.

16. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 22ND DAY OF JANUARY 2021

P. NYAMWEYA

JUDGE