REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW NO. E044 OF 2021

REPUBLIC.....APPLICANT

VERSUS

PUBLIC PROCUREMENT

REGULATORY AUTHORITY.....RESPONDENT

ex parte:

EAA COMPANY LIMITED (FORMERLY EAST

AFRICA AUTOMOBILE SERVICES CO. LTD)

RULING

On 28 March 2021, I granted the *ex parte* applicant leave to institute substantive proceedings of judicial review for the orders of certiorari and prohibition against the respondent. The applicant instituted the substantive proceedings by way of a motion dated 1 April 2021.

By yet another motion dated 29 March 2021, the applicant sought for review of my orders granting leave; the application is filed under Section 3A and 80 of the Civil Procedure Act, cap. 21. The main prayer in this motion is framed as follows:

> ***"1. THAT the Order dated 28th March 2021 by Hon. Justice Jairus Ngaah be and is hereby reviewed partially to the extent of allowing prayer 3 of the Chamber Summons dated 25th March 2021 that leave so granted to institute these judicial review proceedings vides the Order dated 28th March 2021 shall operate as a stay to suspend the debarment of the Applicant over TENDERS NOS. KEBS/ T057/2014-2015, KEBS/ T019/ 2017-2020 AND KEBS/ T010/ 2019-2021 commenced through the Respondent's Notice of Intended Debarment dated 28th September 2020 and Debarment Applications Nos. 1 & 2 of 2021 (Consolidated), and or through any other means, entity or person."***

As this prayer suggests, the applicant had indeed sought for leave granted to operate as stay in the initial summons seeking for leave to file the substantive motion for judicial review orders. This particular prayer was expressed in the following terms:

> ***"3. THAT the leave so granted to institute these judicial review proceedings shall operate as a stay to suspend the debarment of the Applicant over TENDERS NOS. KEBS/ T057/2014-2015, KEBS/ T019/ 2017-2020 AND KEBS/ T010/ 2019-2021 commenced through the Respondent's Notice of Intended Debarment dated 28th September 2020 and Debarment Applications Nos. 1 & 2 of 2021 (Consolidated), and or through any other means, entity or person."***

I did not grant this particular prayer hence the applicant's present application. The application is supported by an affidavit sworn by Mr. Andrew Ombwayo, the learned counsel for the applicant. The affidavit is headed 'supporting and verifying affidavit'; it is relatively short and I would not be out of step if I reproduced it here verbatim, if not for anything else, for the better understanding of the applicant's case.

After identifying himself, the deponent proceeded as follows:

> ***"1. I am an Advocate of the High Court of Kenya duly seized of this case on behalf of the Applicant and being knowledgeable of the same hence competent to swear this affidavit on the Applicant's behalf who is aggrieved of part of the Order dated 28th March 2021 in which an order requesting for the suspension of the applicant's debarment was not granted. Annexed as AO 1 is a copy of the Order dated 28th March 2021.***

2. The Applicant's grief is that the debarment process is out rightly illegal and invalid, and is being undertaken outside the remit of the Procurement Laws and Regulations and ought to be suspended till these proceedings are determined otherwise they shall be rendered moot and nugatory.

3. An error did occur where the annextures marked JBN 1-6 in the supporting and verifying affidavit of Josiah Benedict Nguku sworn on the 25th March 2021, which formed part of the application for leave that was considered by the Court in giving the Order dated 28th March 2021, were never filed and which have now been filed together with the application for review, for consideration and appreciation of the facts of this case.

4. I also received an e mail dated 26th March 2021 after the lodging of these proceedings, from the Respondent, which shows that the Request For Debarment against the Applicants were made by only two persons excluding the alleged Auditor General as the 1st Applicant in the consolidated Debarment Applications Nos. 1 & 2 of2021:

a) ***M/S Momanyi & Associates Advocates, dated 14th August 2020;***

b) ***Dr Charles Nzai, dated 14th September 2020.***

Annexed as AO 2 are copies of the Respondent's e mail dated 26th March 2021, Attached Debarment Request by Dr Charles Nzai received by the Respondent on 14th September 2020 as evinced by the receiving stamp, Debarment Notice dated 28th September 2020 and Debarment Notice dated 24th March 2021, which demonstrate the Respondent's inequities.

5. However, the debarment founded upon these Requests were overtaken by events and have lapsed by operation of the law since the Respondent was supposed to consider them and make a determination as to whether any prima facie case had been made within 30 days of receipt, under Regulation 22(5) (a) Procurement Regulations 2020, but purported to do so on the 22nd March 2021 as stated in the Debarment Notice dated 24th March 2021, way out of time; they are thus unsustainable in the eyes of the law. Annexed as AO 3 is a copy of the material excerpts of the Procurement Regulation 2020, and specifically Regulation 22 thereat.

6. From the documents I received from the Respondent vides the e mail dated 26th March 2021 above, there was no Request For Debarment dated 8th March 2021 purpotedly by Dr Charles Nzai, rather, the one presented to the Respondent on the 14th September 2020 is what the Respondent forwarded to us; the debarment is thus based upon falsity at the outset in order to obfuscate the fact that it has lapsed.

7. An injustice shall thus be committed by the continuation of the debarment process against the Applicant since the debarment shall be concluded within 71 days from the 25th March 2021 when the Debarment Notice dated 24th March 2021 was served, according to Regulation 22(5d-g) Procurement Regulations, which shall be way before the mention of this case next on the 14th June 2021, 88 days later on.

8. It is the applicant's prayer therefore that the application for review filed herewith be considered urgently and allowed ex parte in the interest of justice for all.

9. I further swear this affidavit to verify the facts herein and in further support of the judicial review proceedings.

10. All facts deposed to herein are true to the best of my knowledge, information and belief."

One thing that I have to quickly point out about this affidavit is that as counsel for the applicant, Mr Omwayo cannot swear an affidavit purporting to verify facts of his client's case for the obvious reason that under Order 53 Rule 2, the affidavit verifying facts can only be sworn by the applicant. Again, the practice of counsel swearing an affidavit on behalf of his client particularly on facts that may very well be in dispute is generally deprecated because it exposes the counsel to the danger of cross-examination on matters that he has deposed to and thereby relegating him from the noble position of an advocate to that of a witness.

Be that as it may, it is apparent that the applicant is aggrieved by the debarment proceedings that have been initiated against it and which are before the respondent. As I understand its case, these proceedings have been sparked by the respondent's notices of intention to debar respectively dated 28 September 2020 and 24 March 2021. According to the applicant, allegations against it and which form the basis of these proceedings arise from previous tenders or procurement proceedings in which it has previously participated; these tenders have been described as KEBS/T057/2014-2015; KEBS/T019/2017-2020 and KEBS/T010/2019-2021.

The respondent has opposed the application and filed a document described as "notice of preliminary objection and grounds of opposition." In this notice of preliminary objection or grounds of opposition, the respondent has opposed both the applicant's motions mainly on the ground that this court lacks jurisdiction to entertain this matter. In this regard, the respondent has invoked section 9(2) of the Fair Administrative Action Act No. 4 of 2015 which provides that this Court cannot not review an administrative action or decision unless the mechanisms available for resolution of the dispute that may ensue as a result of the action or decision, including internal mechanisms for appeal or review, have been exhausted.

According to the respondent, the Applicant has failed to exhaust all remedies available under rule 22 (5) (d) of the Public Procurement and Asset Disposal Regulations, 2020 by its failure to file a response within the statutory period of 14 days. It has also failed to demonstrate any

exceptional circumstances or grounds upon which it can be exempted from pursuing mechanisms for redress and alternative remedies in accordance with section 9(4) of the Fair Administrative Actions Act.

The respondent has also pleaded that according to Article 227 (2) of the Constitution, it is the respondent which has been established as part of the framework within which policies relating to procurement and asset disposal can be implemented and also provide for sanctions against contractors that have not performed according to professionally regulated procedures, contractual agreements or legislation.

Further, section 41 of the Public Procurement and Asset Disposal Act, 2015 as read together with regulation 22 of the Public Procurement and Asset Disposal Regulations give the Public Procurement Regulatory Board the power to debar any person who commits the breaches stipulated in those provisions of the law.

The respondent has also urged that the applicant's applications are premature because they have been filed contrary to the provisions of section 42 of the Public Procurement and Asset Disposal Act which provides that a party to the debarment may seek judicial review from the decision of the Authority to the High Court within fourteen days after the decision is made. In this case the Board has not yet made a decision which can be challenged by way of judicial review.

Accordingly, the application has been filed contrary to the decision in the Speaker of the **National Assembly vs James Njenga Karume (1992) Eklr** where the Court of Appeal held that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure must be strictly followed and that Order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions. This has again been reiterated in **Constitutional Petition No. 359 of 2013, Diana Kethi Kilonzo & Another Vs. IEBC and 10 Others (2013) KLR.**

Upon considering the applicant's application, the submissions filed on its behalf and the respondent's response, I must state at the outset that it would not be wise to delve into the merits of the applicant's application at this stage. As earlier noted, it sought for interim relief at the leave stage; the application for that relief was denied and all that the present application is about is the review of that particular order.

I understand the applicant to be saying that the basis for its quest for review is that the debarment proceedings will proceed against it and that there is certain information that was omitted from the initial application for leave which if it had been brought to the attention of the court, the court would probably have granted the applicant's prayer that the leave granted operates as stay. Although Order 45 of the Civil Procedure Rules has not been invoked, the applicant seems to be invoking the grounds for review under that particular order that there is an error apparent on the face of record and that its counsel has discovered a new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced when the order rejecting leave to operate as stay was made.

Irrespective of the ground or grounds the applicant has invoked in the application for review, it must be understood that there is no provision for review of an order or decree made under Order 53 or under the Law Reform Act, cap. 26 which is the substantive law for the application for judicial review. If anything section 8 (5) of the Law Reform Act is clear that any person aggrieved by any order made by the court in exercise of its judicial review jurisdiction has the option of appealing against the order; that section reads as follows:

> ***(5) Any person aggrieved by an order made in the exercise of the civil jurisdiction of the High Court under this section may appeal therefrom to the Court of Appeal.***

I am minded that **in Nakumatt Holdings Ltd versus Commissioner of Value Added Tax (2011) eKLR**, the Court of Appeal has held that as much as a judicial review order is not subject to the review proceedings under Order 45 of the Civil Procedure Rules, the court has residual jurisdiction in exercise of its inherent power to correct its own mistakes particularly where such mistakes are so glaring that they cannot be ignored.

But I cannot find any mistakes, whether 'glaring' or not, in my ruling of 28 October 2021; neither has been suggested nor shown to me by the applicant. In any event, I understand the Court of Appeal to have been saying that there is only that small window for correction clear and obvious errors in a review of an order made in judicial review proceedings otherwise the general rule is that where one is a aggrieved by an order in judicial review proceedings, his only recourse is to appeal to that court if he is minded to.

But even assuming the applicant was entitled to invoke Order 45 of the Civil Procedure Rules, its application still falls short of the threshold of the grounds for review which it has purported to invoke. First, it has not been proved that there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by the applicant at the time when the order was made. What the applicant's counsel said about what ought to be discovery of new and important matter or evidence is contained in the third and fourth paragraphs of his affidavit in support of the present application; he deposed as follows:

> "***3. An error did occur where the annextures marked JBN 1-6 in the supporting and verifying affidavit of Josiah Benedict Nguku sworn on the 25th March 2021, which formed part of the application for leave that was considered by the Court in giving the Order dated 28th March 2021, were never filed and which have now been filed together with the application for review, for consideration and appreciation of the facts of this case.***
>
> ***4. I also received an e mail dated 26th March 2021 after the lodging of these proceedings, from the Respondent, which shows that the Request For Debarment against the Applicants were made by only two persons excluding the alleged Auditor General as the 1st Applicant in the consolidated Debarment Applications Nos. 1 & 2 of2021:***
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> ***Annexed as AO 2 are copies of the Respondent's e mail dated 26th March 2021, Attached Debarment Request by Dr Charles Nzai received by the Respondent on 14th September 2020 as evinced by the receiving stamp, Debarment Notice dated 28th September 2020 and Debarment Notice dated 24th March 2021, which demonstrate the Respondent's inequities."***

What is apparent from these two paragraphs is that the applicant always had the evidence that ought to have been produced before the order was made but it was omitted because of an "error". Such evidence that was omitted as a result of an 'error' either by the applicant or his counsel cannot, by any stretch of imagination be deemed to be new evidence that even after exercise of due diligence was not within the applicant's knowledge or could be produced by the applicant at the time material to its application. Needless to say, this cannot be an error apparent on the face of record.

Secondly, the applicant seems to suggest that owing to the steps taken by the respondent, it is inevitable that debarment proceedings will proceed, apparently, against him and therefore the court ought to have granted the order for leave to operate as stay.

What the applicant is saying in a nutshell, is that owing to the circumstances of its case, it was entitled to the prayer that was denied and to the extent that this particular prayer was declined, the court misapprehended the law.

It is true that that the court may not always get it right but when it does so on a question of interpretation of the law, it cannot be asked to review its decision; the only option open to an aggrieved party is to appeal against the decision. I need not say more on this issue except quote the Court of Appeal in National **Bank of Kenya Ltd versus Njau (1995-1998) 2EA 249 (CAK)** on when an appeal rather a review, would be the only option open to an aggrieved party**;** at page 253 of its judgment, the Court said as follows: -

> ***"A review may be granted whenever the Court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground of review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of the law cannot be a ground for review." (Emphasis added).***

So, while the applicant is entitled to question my ruling denying it interim relief, the appropriate forum where my order can properly be interrogated is the Court of Appeal and not this honourable court.

As I conclude, counsel for the respondent has raised the issue whether this court has jurisdiction to entertain the suit before it; no doubt is an important question of law and which should be disposed of *in limine* before the hearing of the substantive motion. I propose to deal with it as preliminary point at the hearing of the applicant's substantive motion. For now, all I can say is that the applicant's application is dismissed. Costs will abide the outcome of the substantive motion.

DATED, SIGNED AND DELIVERED ON 21ST APRIL 2021.

NGAAH JAIRUS

JUDGE