



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
JUDICIAL REVIEW APPLICATION NO E071 OF 2021
IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE
JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI AND A DECLARATION
BETWEEN
REPUBLIC.....APPLICANT
VERSUS
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD...RESPONDENT
AND
ENERGY SECTOR CONTRACTORS' ASSOCIATION.....INTERESTED PARTY
EX PARTE: THE ACCOUNTING OFFICER, KENYA
ELECTRICITY TRANSMISSION COMPANY LIMITED

RULING

The Application

1. The Accounting Officer of Kenya Electricity Transmission Company Limited, the *ex parte* Applicant herein, is aggrieved by the decision made on 24th May 2021 by the Public Procurement Administrative Review Board (the Respondent herein), in Request for Review No. 64 of 2021.
2. The *ex parte* Applicant has consequently filed an application by way of a Chamber Summons dated 28th May 2021, seeking the following orders:
 - a. **THAT this application be certified as urgent and service hereof be dispensed with in the first instance.**
 - b. **THAT leave be granted to the Applicant to apply for Judicial Review Orders, to wit, an order of Certiorari to bring into the High Court for purposes of being quashed the decision of the Respondent delivered on 24th May, 2021 in Request for Review No. 64 of 2021 and in particular the following orders:-**

1. **The Accounting Officer of the Procurement Entity is hereby directed to issue an Addendum to the Bidding Document for ICB No. KETRACO/PT/009/2021 for Procurement of 132kV Underground Cable Nanyuki -Rumuruti Transmission Line, Volume 1 and 2 within seven days from the date of this decision to ensure the Bidding Document complies with the provisions of the Act and the Constitution in so far as preference and reservation schemes are concerned, taking into consideration the Board's findings in this Review.**
2. **The Accounting Officer of the Procurement Entity is hereby directed to extend the deadline for submission of tenders specified as 4th May 2021 for a further thirty (30) days from the date of issuance of an Addendum to the Bidding Document pursuant to Order 1 above.**

3. The Accounting Officer of the Procurement Entity is hereby directed to allow bidders to withdraw their bids that were submitted before the tender submission deadline of 4th May 2021 (if they wish to do so) and to submit new bids by the new submission deadline referred to in Order No. 2 above, or to choose to be bound by their already submitted bids.

c. THAT the grant of leave herein do operate as a stay of enforcement of any of the proceedings directed under Order 1, 2 and 3 of the Respondent's decision delivered on 24th May, 2021 or any further procurement proceedings for ICB No. KETRACO/PT/009/2021 for Procurement of 132kV Underground Cable Nanyuki-Rumuruti Transmission Line, Volume 1 and 2 until the determination of this Judicial Review application or until such further Orders are made in that regard by this Honourable Court.

d. THAT that this Court be pleased to issue a declaration that the tender in respect of ICB No. KETRACO/PT/009/2021 for Procurement of 132kV Underground Cable Nanyuki-Rumuruti Transmission Line, Volume 1 and 2 is exempt from application of the provisions of the Public Procurement and Asset Disposal Act, 2015 .

e. THAT this Court be pleased to issue such further or other relief as this Court may deem just and expedient to grant.

f. THAT the costs of and incidental to this application be provided for.

3. The grounds for the application are stated in the *ex parte* Applicant's statutory statement dated 24th May 2021, and a verifying affidavit sworn on the same date by Engineer Valentine Nyandika Moronge, who is employed as an Electrical Engineer, Transmission System Planning, with the Kenya Electricity Transmission Company Limited.

4. In summary, the grounds for the application are that the Respondent made a fundamental error of law by failing to find that the subject procurement is excluded from application of the provisions of the Public Procurement and Assets Disposal Act by virtue of section 4(2)(f) as read together with Section 6(1) of the said statute and lacked jurisdiction to hear and determine the Request for Review filed by the Interested Party. Further, that The Respondent acted in excess of its powers under section 173 of the said Act by directing the *ex parte* Applicant to issue an Addendum within 7 days of its decision and extend the tender submission period for 30 days.

5. The *ex parte* Applicant annexed copies of the impugned decision made by the Respondent on 24th May 2021 in Request for Review No. 64 of 2021; the pleadings filed in the said Request for Review, and the subject tender documents.

The Determination

6. I have considered the application dated 28th May 2021 and the reasons offered in support of the urgency, and I am satisfied that the *ex parte* Applicant has demonstrated that this matter is urgent. This for reasons that the procuring entity is required to undertake certain actions within seven days of the impugned decision, with regard to the procurement process of the subject tender.

7. On the orders sought by the *ex parte* 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.

8. 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 it and make the decision as to whether an applicant's case is sufficiently meritorious to justify leave. It was explained by Lord Bingham in this respect 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.

9. In the present application, the *ex parte* Applicant has provided evidence of the ruling by the Respondent in Request for Review No. 64 of 2021, and has averred as to the grounds and reasons why it considers the Respondent's decision to be unlawful. 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 Respondent.

10. 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.”

11. I am guided by the exposition on the purpose of a stay in **R (H.) vs Ashworth Special Hospital Authority (2003) 1 WLR 127**, where 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, and to ensure that a party who is eventually successful in his or her challenge is not denied the full benefit of the success.

12. 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. It has in this regard been held 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.

13. These positions were also explained in the decisions in Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006, Jared Benson Kangwana vs. Attorney General, Nairobi HCCC No. 446 of 1995, Republic vs Cabinet Secretary for Transport & Infrastructure & 4 Others ex parte Kenya Country Bus Owners Association and 8 Others. (2014) e KLR and James Opiyo Wandayi vs Kenya National Assembly & 2 Others, (2016) eKLR.

14. In the present application, the orders given by the Respondent in the impugned decision will result in consequent actions being undertaken in the subject procurement by the *ex parte* Applicant, and the implementation of the Respondent's decision is therefore not only amenable to stay, but the *ex parte* Applicant's application will also be rendered nugatory if the stay order is not granted. The stay orders are therefore merited to this extent.

The Disposition

15. In light of the foregoing observations and findings, the *ex parte* Applicants' Chamber Summons dated 24th May 2021 is found to be merited to the extent of the following orders:

I. The *ex parte* Applicants' Chamber Summons application dated 24th May 2021 is hereby certified as urgent, and is hereby admitted for hearing *ex parte* in the first instance.

II. The *ex parte* Applicant is granted leave to apply for an order of Certiorari to bring into the High Court for purposes of being quashed the decision of the Respondent delivered on 24th May, 2021 in Request for Review No. 64 of 2021 and in particular the following orders:-

a. The Accounting Officer of the Procurement Entity is hereby directed to issue an Addendum to the Bidding Document for ICB No. KETRACO/PT/009/2021 for Procurement of 132kV Underground Cable Nanyuki -Rumuruti Transmission Line, Volume 1 and 2 within seven days from the date of this decision to ensure the Bidding Document complies with the provisions of the Act and the Constitution in so far as preference and reservation schemes are concerned, taking into consideration the Boards findings in this Review.

b. The Accounting Officer of the Procurement Entity is hereby directed to extend the deadline for submission of tenders specified as 4th May 2021 for a further thirty (30) days from the date of issuance of an Addendum to the Bidding Document pursuant to Order 1 above.

c. The Accounting Officer of the Procurement Entity is hereby directed to allow bidders to withdraw their bids that were submitted before the tender submission deadline of 4th May 2021 (if they wish to do so) and to submit new bids by the new submission deadline referred to in Order No. 2 above, or to choose to be bound by their already submitted bids.

III. The *ex parte* Applicant is granted leave to apply for a declaration that declaration that the tender in respect of ICB No. KETRACO/PT/009/2021 for Procurement of 132kV Underground Cable Nanyuki-Rumuruti Transmission Line, Volume 1 and 2 is exempt from application of the provisions of the Public Procurement and Asset Disposal Act, 2015 .

IV. The leave granted herein shall operate as a stay of implementation in any manner by the *ex parte* Applicant, Respondent and Interested Party of the proceedings directed under Order 1, 2 and 3 of the Respondent's decision delivered on 24th May 2021 in Request for Review No. 64 of 2021, or of any further procurement proceedings for ICB No. KETRACO/PT/009/2021 for Procurement of 132kV Underground Cable Nanyuki-Rumuruti Transmission Line, Volume 1 and 2, pending the hearing and determination of the *ex parte* Applicant's substantive Notice of Motion or until further orders of this Court.

V. The costs of the *ex parte* Applicants' Chamber Summons application dated 24th May 2021 shall be in the cause.

VI. The *ex parte* Applicant shall file and serve the Respondent and Interested Party with (i) the substantive Notice of Motion and submissions thereon, (ii) the Chamber Summons dated 24th May 2021 and its supporting documents, (iii) a copy of this ruling, and (v) a hearing notice, within ten (10) days from today's date.

VII. Upon being served with the said pleadings and documents, the Respondent and Interested Party shall be required to file their responses, which shall include their substantive responses and any preliminary objections to the substantive Notice of Motion, together with their reply submissions, within ten (10) days from the date of service.

VIII. The *ex parte* Applicant is granted leave to file and serve a further affidavit and supplementary submissions if need be, which shall be strictly limited to any new facts and issues of law raised by the Respondents and Interested Party, within five (5) days of service by the Respondent and Interested Party.

IX. Timelines shall be strictly observed in light of the decision by the Court of Appeal in Civil Appeal No 39 of 2021- Aprim Ltd vs The Parliamentary Service Commission, and any default by any of the parties shall attract the appropriate sanctions and orders by the Court.

X. A virtual hearing of the *ex parte* Applicant's substantive Notice of Motion shall be held on 28th June 2021 at 3.00 pm, when a judgment date will also be reserved.

XI. 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 the *ex parte* Applicant's substantive Notice of Motion on the basis of the electronic copies of the pleadings and the written submissions filed by the parties.

XII. 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. in word format.

XIII. 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.

XIV. The parties shall also be required to file their respective affidavits evidencing service in the Judiciary's e-filing system

XV. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for a virtual hearing on 28th June 2021 at 3.00 pm and shall send the parties an electronic link for the mention.

XVI. The Deputy Registrar of the Judicial Review Division shall send a copy of these directions to the *ex parte* Applicant by electronic mail by close of business on Tuesday, 2nd June 2021.

XVII. Parties shall be at liberty to apply.

16. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 31ST DAY OF MAY 2021

P. NYAMWEYA

JUDGE