



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW DIVISION

(CORAM: A.K. NDUNG'U J.)

MISCELLANEOUS APPLICATION NO. E176 OF 2021

REPUBLIC..... APPLICANT

AND

PROCUREMENT ADMINISTRATIVE REVIEW BOARD.....1ST RESPONDENT

ACCOUNTING OFFICER, KENYA PORTS AUTHORITY.....2ND RESPONDENT

KENYA PORTS AUTHORITY.....3RD RESPONDENT

RULING

1. This ruling disposes the application dated 29th November 2021 by the 2nd and 3rd respondents. The only pending prayer is for an order that the Judicial Review Proceedings filed herein be transferred to Mombasa High Court for hearing and final determination by the Judicial Review Division in Mombasa. The applicants also seek that costs be provided for. Suffice it to state that in so far as practicable, I shall endeavour to give a truncated ruling on the matter noting that brevity is key in view of the timelines applicable in all the related matters and the need therefore to dispose of the application timeously to allow other processes to continue. The court undertakes, as expected of it, to consider all issues raised that notwithstanding.

2. The application is based on 7 grounds listed on the face thereof and supported by an affidavit of Paul Munyao, Advocate. The gist of the applicants' case is that the proceedings herein relate to the decision of the Public Procurement Administrative Review Board (PPARB) dated 2.11.21 in Request for **Review Application No. 123 of 2021 between Rhombus Construction Ltd vs. The Accounting officer, Kenya Ports Authority and Kenya Ports Authority**. The proceedings arose from the tendering process in respect of tender No. KPA/073/2019-20/TE for the supply, testing and commissioning of 12 No. New Reachstackers. It is urged that there is a related Judicial Review application pending determination before the High Court in Mombasa being Judicial Review Application no E044 of 2021 Republic vs. The Chairperson PPARB Ex parte Kenya Ports Authority and The Accounting Officer Kenya Ports Authority. And Rhombus Construction Company Ltd as an Interested party which was filed on 16.11.21 before the application herein was filed. The matter seeks review of the same decision of PPARB.

3. In addition, **Mombasa Judicial Review application number JR E002 of 2021** between the same parties and in which the ex parte applicants herein were seeking to be awarded the subject tender was pending ruling before Mativo J on 14.12.21. It is contended that the 3 matters relate to the same tender and involve the same parties. A decision in any of the matters will have a direct bearing on the determination of the other matters. It is therefore necessary that the three matters be heard and determined by the same judge.

4. The application is opposed and on record is a replying affidavit by E. Githinji Kinyanjui. He depones that the subject matters are asymmetrical and decisions therein will not have a bearing on each other. The applicants are accused of forum shopping and no basis in law for the transfer of the matter has been disclosed.

5. The 1st Respondent herein supported the position taken by the ex parte applicant in the matter.

6. The application was disposed of by way of written submissions which were orally highlighted in court virtually on 17.11.21. Learned counsel for the applicant urged that the applicants are invoking the inherent powers of court. The provisions of section 3A and IA and 1B were cited as the cornerstone of the application. It was reiterated that the issues in the subject application are the related, arising from the

same decision of PPARB. It is the applicant's case that the ex parte applicant shall suffer no prejudice.

7. Learned counsel for the ex parte applicant submitted that the High Court (Organisation and Administration) Act provides that the filing of appeals, bail applications and references from the subordinate courts, tribunals and other bodies or authorities within the regions designated by the Chief Justice under the rules, shall be made at the High Court station with the corresponding supervisory jurisdiction. Regulation 20(1) of the High Court (Organisation and Administration) Act provides that such filings shall be according to established judicial administrative regions set out in the schedule. It is urged therefore that the challenge to the decision of PPARB should be filed in Nairobi. The ex parte applicant is apprehensive of being sent to a court without jurisdiction. It is further submitted that the High Court's power to withdraw a case and transfer it to another court is only exercisable in respect to cases filed in this subordinate court.

8. It is urged further that the ex parte applicant's grievance against the subject decision is different from that of other parties.

9. In rejoinder Mr. Munyao argued that section 12(3) of the High Court (organisation and Administration) Act does not provide for the filing of judicial review applications. He contends that the issue of jurisdiction has been raised and the court is being asked to determine the question of jurisdiction of another judge. It is urged that the ex parte applicant's submissions deviate from the replying affidavit.

10. I have considered the application, the supporting grounds and affidavit, the response and learned submission by counsel. Of determination is whether this court has the requisite power to transfer this matter to the High Court sitting at Mombasa and what orders, then, should issue.

11. The basis of the application is that this matter is directly related to Mombasa Judicial Review Application No. E044 of 2021. The common denominator in the 2 matters is the decision of the PPARB in Request for review Application No. 123 of 2021 which decision aggrieve the applicants herein leading to the filing of JR of 2021 at Mombasa and also aggrieved the ex parte applicant in this matter leading to the filing of this suit.

12. From the uncontested facts, it is clear in my mind that the two matters are intertwined and issues overlap. There is no gainsaying that whatever decision the judge sitting in Nairobi or Mombasa makes would have a bearing on the other matter notwithstanding the fact that the prayers by the parties in the two applications may be different.

13. Heavy weather has been made by the applicant regarding a possible lack of jurisdiction by the Judge in Mombasa over the matter. Suffice it to state, there are live proceedings before the judge at Mombasa and there is no indication that the jurisdiction has been challenged in that matter. That, in my view is an issue to be canvassed before the judge in Mombasa, if at all. Save to state that while am aware of the territorial jurisdictions given to the various High Court stations in the schedule to the High Court (Organisation and Administration) (General) rules 2016, these are administrative structures that do not take away the unlimited jurisdiction of the High court under Article 165 (3) of the constitution.

14. The applicant in the instant application has invoked the inherent powers of the court under section 3A and sections IA and 1B of the Civil Procedure Act and sections IA and 1B. Section 3A saves the inherent powers of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process court. Section IA and 1B provide;

IA (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

2. The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

3. A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

1B. (1) For the purpose of furthering the overriding objective specified in section IA, the Court shall handle all matters presented before it for the purpose of attaining the following

a. the just determination of the proceedings;

b. the efficient disposal of the business of the Court;

c. the efficient use of the available judicial and administrative

d. the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

e. the use of suitable technology.

15. The court cannot shy away from exercising its inherent powers to meet the ends of justice and to prevent abuse of the court process. Neither can the court aid or abet any act or omission that goes contrary to the overriding objective of the Civil Procedure Act and the rules made thereunder.

16. The instant suit is a perfect one for the invocation of the court's inherent jurisdiction to meet the ends of justice and for the promotion of the overriding objective of the Civil Procedure Act. There are two related matters in different courts arising from a common set of facts. The likelihood of having two conflicting decisions over same facts is real if the suits are tried by two different judges of concurrent jurisdiction. In **Stumberg and Another v Potgeiter 1970 EA 323** it was held;

"Where there are common questions of law or facts in actions having sufficient importance in proportion to the rest of each action to render it desirable that the whole of the matters should be disposed of at the same time, consolidation should be ordered."

Whereas this decision was addressing consolidation of suits, in my view the principle is applicable in circumstances before the court in this case. Noting that the question to consolidate or not must be left to the wisdom of the judge who shall be seized of the matter, am persuaded that placing these suits in the hands of one judge will not only serve the interests of justice but will go a long way in avoiding abuse of the court process and embarrassment on the part of the court.

17. With the result that I allow the Notice of motion dated 29.11.21 in terms of prayer 3. Each party to bear its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2021

A.K. NDUNG'U

JUDGE