



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 88 OF 2020

IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE

JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI AND PROHIBITION

BETWEEN

EAA COMPANY LIMITED.....APPLICANT

VERSUS

PUBLIC PROCUREMENT REGULATORY

AUTHORITY.....RESPONDENT

AND

KENYA BUREAU OF STANDARDS....INTERESTED PARTY

RULING

The Application

1. EAA company Limited, the *ex parte* Applicant herein, participated in, and was one of the successful bidders in a tender advertised by the Kenya Bureaus Standards, which is joined as an Interested Party herein. The subject tender was Tender No. KEBS/T010/2019-2021 for Pre-Export Verification of Conformity (PVOC) to Standard Services-Used Motor Vehicles, Mobile Equipment and Used Spare Parts. The *ex parte* Applicant is aggrieved by an investigation report dated 23rd April 2020 undertaken by the Public Procurement Regulatory Authority on the procurement of the said tender, and has brought these proceedings against the said Authority, which is sued as the Respondent herein.

2. The *ex parte* Applicant in its application, brought by way of a Chamber Summons dated 28th April 2020, is seeking the following orders:

1. The application be certified urgent and be heard *ex parte*.

2. Leave be granted to the applicant to institute judicial review proceedings seeking:

a) An Order of *Certiorari* to remove into this Court the Investigations Report by the respondent dated 23rd April 2020 on the Procurement of Pre-Export Verification of Conformity (PVOC) to Standards Services- Used Motor Vehicles, Mobile Equipment and Used Spare Parts by Kenya Bureau of Standards Tender No. KEBS/T010/2019-2021, and additional report or finding founded upon the said report, and any decision to interfere with or to terminate the contract between the applicant and the interested party that resulted from that procurement process, for purposes of quashing it, and to quash it.

b) An order of Prohibition stopping the Respondent from continuing with its investigations into the Procurement of Pre-Export Verification of Conformity (PVOC) to Standards Services- Used Motor Vehicles, Mobile Equipment and Used Spare Parts by Kenya Bureau of Standards Tender No. KEBS/T010/2019-2021 and the resultant contract entered into between the applicant and the interested party, and further from adopting, effecting, executing, enforcing or causing the adoption, effectuation, execution and enforcement of its investigations report dated 23rd April 2020 and or of any other report or recommendations founded upon the said investigations report dated 23rd April 2020, the said procurement process and resultant contract, by itself or through any department, agency or body of the Government of Kenya.

3. The leave so granted to institute these judicial review proceedings shall operate as an Order to suspend the Respondent's and any other department, agency or body of the Government of Kenya's investigations into the Procurement of Pre-Export Verification of Conformity (PVOC) to Standards Services- Used Motor Vehicles, Mobile Equipment and Used Spare Parts by Kenya Bureau of Standards Tender No. KEBS/T010/2019-2021, or of any act or decision terminating or interfering with the contract entered into between the applicant and the interested party from the said procurement.

4. Costs be to the applicant.

3. The grounds for the application are stated in the *ex parte* Applicant's statutory statement dated 28th April 2020, and a verifying affidavit sworn on the same date by Wycliffe Muga, the *ex parte* Applicant's manager. In summary, the Applicant alleges that the Respondent is investigating the same issues raised before the Public Procurement Administrative Review Board in Application No. 18 of 2020, which is also still the subject of High Court Judicial Review Application No. 66 of 2020. Further, that the Respondent is barred from undertaking such investigations under section 40(1) Public Procurement Asset Disposal Act 2015.

4. The *ex parte* Applicant annexed copies of the Respondent's report on corruption and irregularities in the procurement of the tender for Pre-Export Verification of Conformity (PVOC) to Standard Services-Used Motor Vehicles, Mobile Equipment and Used Spare Parts which is dated 21st April 2020, and of the pleadings filed and orders made in Request For Review No. 18 of 2020 before the Public Procurement Administrative Review Board and in Judicial Review Application No. 66 of 2020 which is before this Court.

The Determination

5. I have considered the application dated 28th April 2020 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 Respondent intends to finalise the impugned investigation report for purposes of further action.

6. On the orders sought by the *ex parte* Applicant for leave to commence judicial review proceedings, the applicable law on leave 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 reason for the leave was 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** as follows:

“The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived... Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full *inter partes* hearing of the substantive application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised judicially”.

7. It is 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. In the present application, the *ex parte* Applicant has provided evidence of the Respondent's investigation report dated 21st April 2020 which is annexed as Annexure “WM8” to its verifying affidavit. It is notable in this respect that this Court can only give leave with respect to the said report, as there is no evidence provided of a report dated 23rd April 2020 as pleaded by the *ex parte* Applicant. Lastly, the *ex parte* Applicant has also averred to the grounds and reasons why it considers the Respondent's investigation report to be illegal and *ultra vires*, and cited the legal provisions relied upon.

8. 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.

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. Similarly, Maraga J. (as he then was) in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006** expressed himself on this factor as follows:

“... The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken. It is however not appropriate to compel a public body to act....”

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. A similar position has been taken by Odunga J. in **Republic vs Cabinet Secretary for Transport & Infrastructure & 4 Others ex parte Kenya Country Bus Owners Association and 8 Others (2014) e KLR** and in **James Opiyo Wandayi vs Kenya National Assembly & 2 Others, (2016) eKLR**, where the learned judge held that it is only where the decision in question is complete that the Court cannot stay the same. However, where what ought to be stayed is a continuing process, the same may be stayed at any stage of the proceedings.

14. I am in agreement with the above-cited decisions. It therefore follows that where 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.

15. In the present application the Respondent has stated in the impugned report that it intends to finalise the report within seven (7) days from the date of the report, and forward it to relevant government agencies for further action. Its decision is thus not yet fully implemented, and is of a continuing nature and thus amenable to stay. In addition, there is need to prevent the implementation of the said report until the legality of the Respondent's decision is established. The stay orders sought by *the ex parte* Applicants are therefore merited to this extent.

The Orders

16. In light of the foregoing observations and findings, the *ex parte* Applicants' Chamber Summons dated 28th April 2020 is found to be merited. I accordingly grant the following orders:

I. The *ex parte* Applicants' Chamber Summons application dated 28th April 2020 be and is hereby certified as urgent, and that the same is hereby admitted for hearing *ex parte* and on a priority basis.

II. The *ex parte* Applicant is granted leave to apply for an order of Certiorari to remove into this Court the Investigations Report by the Respondent dated 21st April 2020 on the Procurement of Pre-Export Verification of Conformity (PVOC) to Standards Services- Used Motor Vehicles, Mobile Equipment and Used Spare Parts by Kenya Bureau of Standards Tender No. KEBS/T010/2019-2021, and any additional report or finding founded upon the said report, and any decision to interfere with or to terminate the contract between the applicant and the interested party that resulted from that procurement process, for purposes of quashing it, and to quash it.

III. The *ex parte* Applicant is granted leave to apply for an order of Prohibition stopping the Respondent from continuing with its investigations into the Procurement of Pre-Export Verification of Conformity (PVOC) to Standards Services- Used Motor Vehicles, Mobile Equipment and Used Spare Parts by Kenya Bureau of Standards Tender No. KEBS/T010/2019-2021 and the resultant contract entered into between the Applicant and the Interested Party, and further from adopting, effecting, executing, enforcing or causing the adoption, effectuation, execution and enforcement of its investigations report dated 21st April 2020 and or of any other report or recommendations founded upon the said investigations report, the said procurement process and resultant contract, by itself or through any department, agency or body of the Government of Kenya.

IV. The leave so granted herein to institute these judicial review proceedings shall operate as a stay suspending the Respondent's investigations into the Procurement of Pre-Export Verification of Conformity (PVOC) to Standards Services- Used Motor Vehicles, Mobile Equipment and Used Spare Parts by Kenya Bureau of Standards Tender No. KEBS/T010/2019-2021, and suspending the implementation of, or further action on the Respondent's investigation report dated 21st April 2020 on Corruption and Irregularities in Tender No. KEBS/T010/2019-2021 for Pre-Export for Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services- Used Motor Vehicles, Mobile Equipment and Used Spare Parts, pending the hearing and determination of the substantive Notice of Motion.

V. The costs of the Chamber Summons dated 28th April 2020 shall be in the cause.

VI. The *ex parte* Applicant shall file and serve the Respondent and Interested Party with the substantive Notice of Motion, and shall also serve the Respondent and Interested Party with the Chamber Summons dated 28th April 2020 and its

supporting documents, a copy of this ruling, and a mention notice, within fourteen (14) 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 to the substantive Notice of Motion within fourteen (14) days from the date of service.

VIII. This matter shall be mentioned on 8th June 2020 for further directions.

IX. 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. In this respect, all the parties shall file their pleadings, applications and written submissions electronically, by sending them to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com with copies to asunachristine51@gmail.com, and shall also avail the electronic copies in word format.

X. The electronic copies of pleadings and documents sent by the parties shall be clearly and correctly titled to indicate the J.R Case Number, the name of the Party sending it (that is whether the *Ex Parte* Applicant, Respondent or Interested Party), and the nature of the pleading or document.

XI. 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.

XII. The parties shall also be required to send the respective affidavits of service by way of electronic mail to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com with copies to asunachristine51@gmail.com.

XIII. The Deputy Registrar of the Judicial Review Division shall send a copy of this ruling and the extracted orders to the *ex parte* Applicant by electronic mail by close of business on Monday, 4th May 2020, as 1st May 2020 is a public holiday.

XIV. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for mention on 8th June 2020, and bring it to the attention of a Judge in the Division on that date for directions.

XV. Parties shall be at liberty to apply.

17. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF APRIL 2020

P. NYAMWEYA

JUDGE