



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW APPLICATION NO. 84 OF 2020**

**IN THE MATTER OF AN APPLICATION FOR LEAVE FOR**

**JUDICIAL REVIEW ORDERS OF PROHIBITION AND CERTIORARI**

**AND**

**IN THE MATTER OF THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT, 2015**

**AND**

**IN THE MATTER OF PUBLIC PROCUREMENT ADMINISTRATIVE**

**REVIEW BOARD APPLICATION NO. 41 OF 2020**

**BETWEEN**

**THE ACCOUNTING OFFICER,**

**KENYA NATIONAL HIGHWAYS AUTHORITY.....1<sup>ST</sup> APPLICANT**

**KENYA NATIONAL HIGHWAYS AUTHORITY.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD.....RESPONDENT**

**AND**

**ROADS AND CIVIL ENGINEERING**

**CONTRACTORS ASSOCIATION (RACECA).....INTERESTED PARTY**

**RULING**

**The Application**

1. The Applicants herein are the Accounting Officer of the Kenya National Highways Authority and the Kenya National Highways Authority. (hereinafter referred the “1<sup>st</sup> Applicant” and “2<sup>nd</sup> Applicant” respectively). The said Kenya National Highways Authority is a state corporation established under the Kenya Roads Act, with the responsibility for the management, development, rehabilitation and maintenance of national roads. It has been appointed as the implementing authority for the development of Isiolo Manderu Corridor Road as part of the North Eastern Transport Improvement Project (NETIP). The said road and project is being constructed using the proceeds of a loan to be granted to the Government of Kenya by the World Bank.

2. The Applicants state that it was agreed between the World Bank and the Government of Kenya that the 2<sup>nd</sup> Applicant would proceed with

advance procurement in respect of a portion of the road, being 204 kilometres of the NETIP Project. The 2<sup>nd</sup> Applicant in February 2020 accordingly issued a Request for Bids in respect the Upgrading of Isiolo - Kulamawe Mogadashe (A10/ B84) Road ICB No KeNHA 2236/2019 in 2 lots. Lot 1 was Tender No KeNHA 2267/2020 Isiolo - Kulamawe Road, while Lot 2 was Tender No KeNHA 2268/2020 Kulamawe- Mogadashe Road and Gar-batula Spur Road.

3. The Roads and Civil Engineering Contractors Association, which is the Interested Party herein, thereupon challenged the said Request for Bids by filing an application for a Request for Review before the Public Procurement Administrative Review Board on 20<sup>th</sup> March 2020, being **Public Procurement Administrative Review Board Application No. 41 of 2020**. The Public Procurement Administrative Review Board (hereinafter “the Respondent”) subsequently delivered a decision on the said Request for Review dated 14<sup>th</sup> April 2020 and rendered on 16<sup>th</sup> April 2020, wherein it made an order directing the Applicants to issue an Addendum to the Tender Document for the North Eastern Transport Improvement Project (NETIP) Project for both Lot 1 and Lot 2 within seven (7) days from the date of the decision, to ensure the Tender Document complies with the provisions of the Act and the Constitution, and taking into consideration the Respondent’s findings. Further, that the Respondent directed the Applicants to extend the deadline for submission of tenders for a further thirty (30) days from the date of issuance of the Addendum to the Tender.

4. The 1<sup>st</sup> and 2<sup>nd</sup> Applicants are aggrieved by the said decision, and have filed the present application by way of a Chamber Summons dated 20<sup>th</sup> April 2020, brought under a Certificate of Urgency of the same date. The Applicants are seeking the following orders therein:

**a) The application be certified urgent and heard *ex-parte* in the first instance.**

**b) Leave to apply for an order of Certiorari directed to the Respondent to remove into this Court and be quashed, its decision dated 14<sup>th</sup> April 2020 and rendered on 16<sup>th</sup> April 2020 directing the Applicants to issue an Addendum to the Tender Document for North Eastern Transport Improvement Project (NETIP) Project ID: PKG1: Upgrading of Isiolo Kulamawe-Mogadashe (A10/B84) Road ICB No. KeNHA/2236/2019 Lot 1; Tender No KeNHA/2267/2020 Isiolo Kulamawe Road and Lot 2: Tender No. KeNHA 2268/2020- Kulamawe- Modogashe Road and Garbatula Spur Road within seven (7) days from the date of the said decision to ensure the Tender Document complies with the provisions of the Act and the Constitution, taking into consideration the Respondent’s findings in PPARB Application No 41 of 2020 Roads and Civil Engineering Association (RACECA) and the Accounting Officer Kenya National Highways Authority and Kenya National Highways Authority.**

**c) Leave be granted to apply for an order of Certiorari directed to the Respondent to remove into this Court and be quashed, its decision dated 14<sup>th</sup> April 2020 and rendered on 16<sup>th</sup> April 2020 directing the Applicants to extend the deadline for submission of tenders specified as 28<sup>th</sup> April 2020 for a further thirty (30) days from the date of issuance of an Addendum to the Tender Document pursuant to Order No 1 therein.**

**d) Leave be granted to apply for an Order of Certiorari directed to the Respondent to remove into this Court and be quashed its decision dated 14<sup>th</sup> April 2020 and rendered on 16<sup>th</sup> April 2020 directing each party to bear its own costs.**

**e) The grant of leave to apply for the above orders do operate as a stay of the directions/orders of the Respondent in the Judgment dated 14<sup>th</sup> April and rendered on 16<sup>th</sup> April 2020 directing the Applicants to issue an Addendum to the Tender Document for North Eastern Transport Improvement Project (NETIP) Project ID: PKG1: Upgrading of Isiolo Kulamawe-Mogadashe (A10/B84) Road ICB No. KeNHA/2236/2019 Lot 1; Tender No KeNHA/2267/2020 Isiolo Kulamawe Road and Lot 2: Tender No. KeNHA 2268/2020- Kulamawe- Modogashe Road and Garbatula Spur Road within seven (7) days from the date of this decision to ensure the Tender Document complies with the provisions of the Act and the Constitution, taking into consideration the Board’s findings in the case.**

**f) The grant of leave to apply for the above orders do operate as a stay of the directions/orders of the Respondent in the Judgment dated 14<sup>th</sup> April and rendered on 16<sup>th</sup> April 2020 directing the Applicants to directing the Applicants to extend the deadline for submission of tenders specified as 28<sup>th</sup> April 2020 for a further thirty (30) days from the date of issuance of an Addendum to the Tender Document pursuant to Order No 1 therein.**

**g) Any other orders as the Court may deem fit to grant.**

**h) The costs of the Application be provided for.**

5. The main grounds for the application are stated in the Applicants’ Statutory Statement dated 20<sup>th</sup> April 2020, and a verifying affidavit sworn on the same date by Engineer Paul Omondi, the 2<sup>nd</sup> Applicant’s Deputy Director of Special Programs. In summary, the Applicants allege that the Respondent’s decision is illegal, *ultravires* and in excess of its jurisdiction, as it is was made contrary to the mandatory provisions of sections 171 and 4(2)(f) of the Public Procurement and Asset Disposal Act.

### **The Determination**

6. Upon carefully considering the application dated 20<sup>th</sup> April 2020 and the reasons offered in support of the urgency, I am satisfied that the Applicant has demonstrated that the matter is urgent, and that the same ought to be heard on a priority basis. This is for the reasons that there are strict timelines that are set by the impugned decision within which the Applicants were to undertake certain actions, namely the issue an Addendum to the Tender Document within 7 days and thereupon an extension of the submission for tender documents for 30 more days. This necessitates an urgent decision by this Court on the application, as time is running against the Applicants.

7. On the orders sought 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”.**

8. 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. The merits test commonly applied is whether the ground of challenge is arguable. In **Sharma vs Brown Antoine (2007) I WLR 780**, Lord Bingham explained 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, however, that the test is flexible depending on the nature and gravity of the issues.

9. In the present application, the Applicant’s grievance emanates from the decision made by the Respondent on 14<sup>th</sup> April 2020 and issued on 16<sup>th</sup> April 2020, and have in this regard provided evidence of the said decision, of the pleadings filed in **Public Procurement Administrative Review Board Application No. 41 of 2020**, and of the advertisement for the Request for Bids that led to the said proceedings and decision. The said evidence is annexed to the Applicants’ verifying affidavit. The Applicant have also averred to the grounds and reasons why they consider the Respondent’s decision to be illegal and *ultra vires*. To this extent I find that the Applicants have demonstrated an arguable case, and are 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 decision, 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. 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.

12. 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...”**

13. 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.”**

14. 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.

15. I am in agreement with the above-cited decisions. 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.

16. In the present application the decision made by the Respondent on 14<sup>th</sup> April 2020 and issued on 16<sup>th</sup> April 2020 required the Applicants to undertake certain actions within specified timelines, as indicated in the foregoing. The decision was therefore not to have effect immediately, and its implementation is of a continuing nature. The said decision is thus amenable to stay. In addition, there is need to preserve the current *status quo* until the reasons and legality of the Respondent's decision is established. The stay orders sought by the Applicants are therefore merited.

### **The Orders**

17. In light of the foregoing observations and findings, the Applicants' Chamber Summons dated 20<sup>th</sup> April 2020 is found to be merited. I accordingly grant the following orders:

**I. The Chamber Summons application dated 20<sup>th</sup> 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 1<sup>st</sup> and 2<sup>nd</sup> Applicants are granted leave to apply for an order of Certiorari directed to the Respondent to remove into this Court and be quashed, its decision dated 14<sup>th</sup> April 2020 and rendered on 16<sup>th</sup> April 2020 directing the Applicants to issue an Addendum to the Tender Document for North Eastern Transport Improvement Project (NETIP) Project ID: PKG1: Upgrading of Isiolo Kulamawe- Mogadashe (A10/B84) Road ICB No. KeNHA/2236/2019 Lot 1; Tender No KeNHA/2267/2020 Isiolo Kulamawe Road and Lot 2: Tender No. KeNHA 2268/2020- Kulamawe- Modogashe Road and Garbatula Spur Road within seven (7) days from the date of the said decision to ensure the Tender Document complies with the provisions of the Act and the Constitution, taking into consideration the Respondent's findings in PPARB Application No 41 of 2020 Roads and Civil Engineering Association (RACECA) and the Accounting Officer Kenya National Highways Authority and Kenya National Highways Authority.**

**III. The 1<sup>st</sup> and 2<sup>nd</sup> Applicants are granted leave to apply for an order of Certiorari directed to the Respondent to remove into this Court and be quashed, its decision dated 14<sup>th</sup> April 2020 and rendered on 16<sup>th</sup> April 2020 directing the Applicants to extend the deadline for submission of tenders specified as 28<sup>th</sup> April 2020 for a further thirty (30) days from the date of issuance of an Addendum to the Tender Document pursuant to Order No 1 therein.**

**IV. The 1<sup>st</sup> and 2<sup>nd</sup> Applicants are granted leave to apply for an Order of Certiorari directed to the Respondent to remove into this Court and be quashed its decision dated 14<sup>th</sup> April 2020 and rendered on 16<sup>th</sup> April 2020 directing each party to bear its own costs.**

**V. The grant of leave by the orders hereinabove shall operate as a stay of the directions/orders of the Respondent in its Judgment dated 14<sup>th</sup> April and rendered on 16<sup>th</sup> April 2020 directing the Applicants to issue an Addendum to the Tender Document for North Eastern Transport Improvement Project (NETIP) Project ID: PKG1: Upgrading of Isiolo Kulamawe-Mogadashe (A10/B84) Road ICB No. KeNHA/2236/2019 Lot 1; Tender No KeNHA/2267/2020 Isiolo Kulamawe Road and Lot 2: Tender No. KeNHA 2268/2020- Kulamawe- Modogashe Road and Garbatula Spur Road within seven (7) days from the date of the said decision to ensure the Tender Document complies with the provisions of the Act and the Constitution and taking into consideration the Respondent's findings, pending the hearing and determination of the substantive Notice of Motion.**

**VI. The grant of leave by the orders hereinabove shall operate as a stay of the directions/orders of the Respondent in its Judgment dated 14<sup>th</sup> April and rendered on 16<sup>th</sup> April 2020 directing the Applicants to extend the deadline for submission of tenders specified as 28<sup>th</sup> April 2020 for a further thirty (30) days from the date of issuance of an Addendum to the Tender Document pursuant to Order No 1 therein, pending the hearing and determination of the substantive Notice of Motion.**

**VII. The costs of the Chamber Summons dated 20<sup>th</sup> April 2020 shall be in the cause.**

**VIII. The Applicants shall file and serve the Respondent and Interested Party with the substantive Notice of Motion, and shall also serve the Respondents and Interested Party with the Chamber Summons dated 20<sup>th</sup> April 2020 and its supporting documents together with a copy of this ruling, within seven (7) days from today's date.**

**IX. 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 seven (7) days from the date of service.**

**X. Upon service of the Respondent's and Interested Party's responses or upon default thereof, the Applicants are granted leave to file and serve any further affidavits if need be, together with skeletal submissions on its substantive Notice of Motion application, within fourteen (14) days.**

**XI. The Respondent and Interested Party are also granted leave to file and serve any further affidavits in response to the Applicants further affidavits if need be, together with their submissions on the substantive Notice of Motion within fourteen (14) days of service of the Applicants' further pleadings and submissions.**

XII. 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 Applicants' substantive Notice of Motion on the basis of the electronic copies of the pleadings and the written submissions filed by the parties.

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](mailto:judicialreview48@gmail.com) with copies to [asunachristine51@gmail.com](mailto:asunachristine51@gmail.com).

XIV. 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](mailto:judicialreview48@gmail.com) with copies to [asunachristine51@gmail.com](mailto:asunachristine51@gmail.com).

XV. The Deputy Registrar of the Judicial Review Division shall send a copy of this ruling and the extracted orders to the Applicants by electronic mail by close of business today.

XVI. The Deputy Registrar of the Judicial Review Division shall bring this matter to the attention of the duty Judge for further directions on 10<sup>th</sup> June 2020.

XVII. Parties shall be at liberty to apply.

18. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 24<sup>TH</sup> DAY OF APRIL 2020

P. NYAMWEYA

JUDGE