



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

[Coram: A. C. Mrima, J.]

CIVIL APPEAL NO. 7 OF 2016

COUNTY GOVERNMENT OF MIGORI.....APPELLANT/RESPONDENT

-VERSUS-

INB MANAGEMENT & IT CONSULTING LIMITED.....RESPONDENT/APPLICANT

(Being an Appeal from the Public Procurement Administrative Review Board delivered on 15th January 2016)

RULING NO. 2

1. On Wednesday, 19th March 2014, the County Government of Migori, the Appellant herein, advertised a tender through the Standard Newspaper. It was 'Tender No. MC/49/2013-2014 for proposed Supply, Customization, Installation and Implementation of Revenue Collection Cash Flow Management and Funds Requisition System in Migori County'.
2. INB Management & IT Consulting Limited, the Respondent herein, was one of the entities which took part in bidding for the tender. At the end of the procurement process, the Respondent herein was the successful bidder being the lowest bidder. However, the procurement process did not proceed further. Instead, the Appellant cancelled the process altogether and re-advertised the tender.
3. The Respondent was grossly aggrieved with the decision to terminate the process. It applied for the review of the decision by the Appellant to terminate the procurement to the Public Procurement Administration Review Board (hereinafter referred to as '**the Board**').
4. The matter was heard before the Board. The Board rendered its decision on the request on 15/01/2016. The request was allowed and the termination of the subject tender by the Appellant as well as the re-advertisement were nullified and cancelled. The Appellant was instead ordered to proceed on with the implementation of the procurement process by issuing and executing the contract and to deposit a copy of the signed contract with the Board within 14 days. Costs for the request were assessed at Kshs. 200,000/=.
5. Being dissatisfied with the decision of the Board, the Appellant lodged an appeal to this Court. A Memorandum of Appeal was filed on 12/02/2016. The Appellant also filed a Notice of Motion dated 17/02/2016 on 18/02/2016. The application sought to stay the implementation of the decision of the Board pending the hearing and determination of the appeal.
6. In a quick rejoinder, the Respondent filed a Notice of Preliminary Objection dated 26/02/2016 on 29/02/2016. The gist of the objection was that this Court lacked jurisdiction to entertain the appeal.
7. The Respondent took a further step and filed a judicial review application in **Milimani High Court Judicial Review No. 77 of 2016** (hereinafter referred to as '**the judicial review**') against the Appellant. The judicial review sought for a writ of *mandamus* to enforce the decision of the Board.
8. Without any formal order on stay of proceedings, the parties herein seemed to have abandoned this appeal and pursued the determination of the judicial review. The judicial review was heard and determined in favour of the Respondent. The Appellant then lodged an appeal against the decision in the judicial review in **Nairobi Court of Appeal Civil Appeal No. 260 of 2017**. (hereinafter referred to as '**the judicial review appeal**'). The judicial review appeal is yet to be determined.
9. On the Court's direction the Preliminary Objection in this matter was heard. The objection was heard and disallowed *vide* a ruling delivered on 14/02/2019.
10. The disposal of the objection paved the way to the hearing of the Notice of Motion dated 17/02/2016.

11. Before the application was heard, the Respondent filed another application by way of a Notice of Motion. It was dated 12/03/2019. It sought the following orders: -

1. That pending the hearing and determination of Civil Appeal Number 260 of 2017 County Government of Migori vs INB IT Management & Consultancy Limited by Appellant, there be a stay of Proceedings in Civil Appeal 7 of 2016.

2. That Costs be provided in the cause.

12. I will hereinafter refer to the foregone application as 'the stay application'.

13. Directions were given on the way forward in the matter. Parties agreed, and the Court approved, the hearing of the stay application first. The Appellant filed grounds of opposition in respect to the stay application. The stay application was heard by way of written submissions. Both parties duly complied.

14. The Respondent submitted that further to the conditions provided for in **Order 42 Rule 6** of the **Civil Procedure Rules** a Court must be guided by other considerations including whether a *prima facie* case was established, whether the application was filed expeditiously and whether sufficient cause has been demonstrated in making its decision on whether to grant the stay application. The persuasive decisions in **Global Tours & Travels Limited, Nairobi High Court Winding Up Cause No. 43 of 2000** (unreported) and in **Rebecca Wanjiku Mathenge vs. Alpine Insurance Brokers Limited E&LRC 874 of 2016 (2019) eKLR**, the Court of Appeal in **Nairobi Civil Appeal No. 327 of 2003 Global Tours & Travels Limited vs. Five Continents Travels Limited (2015) eKLR** and the *Halsbury's Laws of England* were referred to in support of the stay application.

15. In opposing the stay application, the Appellant submitted that no sufficient cause has been demonstrated, that the Respondent does not stand to suffer any loss, it was not affordable, proportionate and in the interest of justice to stay the proceedings, that there was need for matters to be disposed of expeditiously and the issue of delay. The Appellant also relied on the same decisions relied upon by the Respondent. It however further relied in **Lucy Waithera Kimanga & 2 Others vs. John Waiganjo Gichuri (2015) eKLR** and **E. Torgbor Ladislaus Odongo (2015) eKLR**.

16. I have carefully perused the stay application, the response thereto, the parties' submissions, the decisions referred thereto and the record as a whole. I fully understand the purport of the stay application.

17. The stay application in this matter is not an ordinary one. I say so because the stay application sought to stay proceedings in this appeal on the basis of another suit which is the judicial review appeal. As stated, the judicial review appeal yielded from the judicial review which enforced the decision of the Board. On the other hand, the appeal in this matter is against the decision of the Board which decision the Respondent is enforcing.

18. As a starting point the caution in the *Halsbury's Laws of England*, 4th Edition, Vol. 32 at pages 330-332 comes in handy. It partly states thus: -

The stay of proceedings is a serious, grave and fundamental interference in the right that a party has to conduct his litigation towards trial on the basis of the substantive merits of his case and, therefore, the court's general practice is that a stay of proceedings should not be imposed, unless the proceedings beyond reasonable doubt should not be allowed to continue.

19. Several statutes provide for stay of suits. For instance, **Section 26(4)** of the **High Court (Organization and Administration) Act No. 27 of 2015** states as follows: -

Where an alternative dispute resolution mechanism is a condition precedent to any proceedings before the Court, the Court shall by order, stay the proceedings until the condition is fulfilled.

20. **Section 6** of the **Civil Procedure Act, Cap. 21** of the Laws of Kenya provides as follows: -

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceedings between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

Explanation – The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court.

21. Another area where the law provides for stay of proceedings is under **Order 42 Rule 6** of the **Civil Procedure Rules**. The provision is on stay in cases of appeals. The stay therein is twin-pronged. The provision deals with instances of stay of proceedings and also deals with cases of stay of execution pending determination of appeals. **Rule 6(1)** and **(2)** provides as follows: -

6(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the Court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set

aside.

(2) No order for stay of execution shall be made under subrule (1) unless -

a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

b) such security as the court orders for her due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

22. Courts have also dealt with the subject of stay of proceedings. In **Kenya Power & Lighting Company Limited vs. Esther Wanjiru Wokabi (2014) eKLR** the High Court referred to Ringera, J in **Global Tours & Travels Limited** (*supra*) where the Learned Judge had the following to say: -

Whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion; it should be exercised rationally and not capriciously or whimsically. The sole question is whether, it is in the interest of justice to order a stay of proceedings, and if it is, on what terms it should be granted. In deciding whether to order a stay the court should essentially weight the pros and cons of granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of the case, the prima facie merits of the intended appeal in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought timeously.

23. In **Machira t/a Machira & Co. Advocates v. East African Standard (No. 2) (2002) KLR 63** it was held that: -

The right of appeal must always be balanced with the equally important right to expeditious disposal of cases.

24. In **BM Logistics Ltd vs. Kenya National Bureau of Statistics & Another (2013) eKLR Ogola, J** cited with approval the position in **Global Tours & Travels Limited** (*supra*) and observed that: -

I am alive to the fact that stay of proceedings is at the discretion of the Court. However, the said discretion should be exercised judiciously and within the law. This Court is also enjoined under Section 1A of the Civil Procedure Act to facilitate the just and expeditious resolution of civil disputes.

25. From the foregone there are a set of considerations a Court must take into account in exercising its discretion in stay of proceedings applications. They include: -

i. *The need for expeditious disposal of cases;*

ii. *Whether the application was brought timeously;*

iii. *In a case where the basis of the stay order is the pendency of another suit; whether the issue(s) in the matter are also directly and substantially in issue in the other suit and whether the other suit involves the same parties or parties under whom they or any of them claim or litigate under the same title;*

iv. *The effect of granting or not granting the stay on the whole matter.*

26. I will now apply these considerations in this matter. The need for expeditious disposal of cases has now been ring-fenced in **Article 159(2)(b)** of the **Constitution**. Further, under **Section 39(2)(d)** of the **High Court (Organization and Administration) Act** the Chief Justice is required to make rules for disposal of matters within 12 months from the date the Court sets the matters down for hearing.

27. On when the stay application was brought, the appeal subject herein was filed on 12/02/2016. The stay application was filed on 16/04/2019. That was a period of over 3 years.

28. The stay order in this matter is sought on the basis of the judicial review appeal pending before the Court of Appeal. The judicial review appeal arose from the granting of a writ of *mandamus* in the judicial review. The writ of *mandamus* was to enforce the decision of the Board. On the other hand, the appeal herein is challenging the decision of the Board.

29. To me, the success of the judicial review appeal is not a bar to the success of the appeal herein. In other words, the appeal before this Court holds the key to the whole matter. In fact, the best scenario was to obtain an order of stay of proceedings of the judicial review or the now judicial review appeal pending the outcome of the appeal in this matter. The reason is simple. If for instance the judicial review appeal succeeds as well as the appeal in this matter, then the success of the judicial review appeal notwithstanding the decision of this Court will carry the day since there will be no decision of the Board to enforce.

30. I hence find and hold that even though the parties are the same in the twin suits, the issues for determination in those suits are indeed different.

31. In the event the orders sought in the stay application are granted then it means that the real issue in dispute in these proceedings, which is

whether the decision of the Board should stand or otherwise be set-aside, will remain pending.

32. By taking all the factors into consideration I find that interest of justice tilts in favour of expediting the disposal of the appeal before this Court.

33. The upshot is that the Notice of Motion dated 12/03/2019 is unsuccessful and is hereby dismissed with costs.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 28th day of May, 2020

A. C. MRIMA

JUDGE

Ruling delivered electronically: -

1. okongowandangomigori@gmail.com for Okongo Wandango & Company Advocates for the Applicant.
2. sgm@nairobi-legal.co.ke for Gitonga Murethi & Company Advocates for the Respondent
3. Parties are at liberty to obtain hard copies of the Ruling from the Registry upon payment of the requisite charges.

A. C. MRIMA

JUDGE