



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW APPLICATION NO. MISC E013 OF 2020**

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

**JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI AND PROHIBITION**

**BETWEEN**

**MAGAL SECURITY SERVICES LIMITED.....APPLICANT**

**VERSUS**

**THE PUBLIC PROCUREMENT**

**ADMINISTRATIVE REVIEW BOARD.....RESPONDENT**

**AND**

**KENYA RAILWAYS CORPORATION.....1<sup>ST</sup> INTERESTED PARTY**

**HORSEBRIDGE NETWORK SYSTEMS (EAST AFRICA)**

**LIMITED IN JV WITH FLIR SYSTEMS (UK).....2<sup>ND</sup> INTERESTED PARTY**

**ACHELIS KENYA LIMITED, DAMS CONSTRUCTION**

**LIMITED, OTTO MRUTTU + PARTNERS ARCHITECTS,**

**ARMSTRONG & DUNCAN, BRILLITECH ENGINEERING**

**SERVICES LIMITED, COM TWENTY -ONE LIMITED**

**GLOSEC SOLUTIONS LIMITED (CONSORTIUM).....3<sup>RD</sup> INTERESTED PARTY**

**RULING**

**The Application**

1. Magal Security Services Limited, the Applicant herein, is aggrieved by the decision made on dated 16<sup>th</sup> July 2020 by the Public Procurement Administrative Board (the Respondent herein), to dismiss the Applicant’s Request for Review with respect to Tender No. KR/SCM/064/2019-2020 for Design, Supply, Installation, Testing and Commissioning and Maintenance of Unified Security Management System (USMS) for the Standard Gauge Railway (SGR). The Respondent further directed the Kenya Railways Corporation, the 1<sup>st</sup> Interested Party herein, to proceed with the procurement process to its logical conclusion.

2. The Applicant has consequently moved this Court by way of a Chamber Summons dated 23<sup>rd</sup> July 2020, in which it is seeking the following orders:

1. The application be certified urgent and service be dispensed with in the first instance.

2. The Applicant be granted leave to apply for a judicial review Order of Certiorari to remove to this Honorable Court for the purposes of quashing the decision by the Respondent made on 16<sup>th</sup> July, 2020 in Public Procurement Administrative Review Board Application No. 88 of 2020; Magal Security Systems Limited vs the Accounting Office, Kenya Railways Corporation concerning Tender No. KR/SCM/064/2019-2020 for Design, Supply, Installation, Testing and Commissioning and Maintenance of Unified Security Management System (USMS) for the Standard Gauge Railway (SGR).

3. The Applicant be granted leave to apply for an Order of Prohibition directed against the 1<sup>st</sup> Interested Party, prohibiting them through their servants and/ or agents either directly or indirectly from proceeding with the procurement process to its logical conclusion and from entering into any written contract with respect to Tender No. KR/SCM/064/2019-2020 for Design, Supply, Installation, Testing and Commissioning and Maintenance of Unified Security Management System (USMS) for the Standard Gauge Railway (SGR).

4. The leave granted to apply for the judicial review orders of Certiorari and prohibition to operate as a stay of the orders made by the Respondent in Public Procurement Administrative Review Board Application No. 88 of 2020; Magal Security Systems Limited vs The Accounting Officer, Kenya Railways Corporation pending the hearing and determination of the substantive application for judicial review orders.

5. In any event, the Applicant's costs of the application be borne by the Respondent.

3. The grounds for the application are stated in the Applicant's statutory statement dated 23<sup>rd</sup> May 2020, and a verifying affidavit sworn on the same date by Guy Amsellem, the Applicant's General Manager. In summary, the Applicant alleges that the Respondent, has by making the said decision and dismissing its Request for Review, aided the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties in contravening the provisions of Section 79 of the Public Procurement and Asset Disposal Act No. 33 of 2015 on the mandatory requirements with regards to marking sealing and binding of the tender documents, and acted unreasonably, irrationally, illegally and considered irrelevant factors.

4. The Applicant annexed copies of the subject tender documents, the letter of notification of its unsuccessful tender, copies of its Request for Review filed on 25th June, 2020 before the Respondent, and a copy of the impugned Respondent's decision dated 16<sup>th</sup> July, 2020.

#### **The Determination**

5. I have considered the application dated 23<sup>th</sup> July 2020 and the reasons offered in support of the urgency, and I am satisfied that the Applicant has demonstrated that this matter is urgent. This for the reason that the Respondent in its decision dated 16<sup>th</sup> July 2020 directed the 1<sup>st</sup> Interested Party to proceed with the procurement process.

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 letter notifying it that its tender was unsuccessful, and of the Respondent's decision's dated 16<sup>th</sup> July 2020 dismissing its Request for Review. The *ex parte* Applicant has also averred to the grounds and reasons why it considers the Respondent's decision to be illegal, 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. 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.

12. See in this regard 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.**

13. In the present application the Respondent’s decision has elements which still require further implementation in terms of the conclusion of the procurement process. Its decision is thus not yet fully implemented, and is of a continuing nature and thus amenable to stay. In addition, if the 1st Interested Party is allowed to conclude the procurement process, the Applicant’s application will be rendered nugatory. The stay orders sought by *the ex parte* Applicant are therefore merited to this extent.

### **The Orders**

14. In light of the foregoing observations and findings, the *ex parte* Applicants’ Chamber Summons dated 23<sup>rd</sup> July 2020 is found to be merited. I accordingly grant the following orders:

**I. The *ex parte* Applicants’ Chamber Summons application dated 23<sup>rd</sup> July 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 to this Court for the purposes of quashing the decision by the Respondent made on 16<sup>th</sup> July, 2020 in Public Procurement Administrative Review Board Application No. 88 of 2020; Magal Security Systems Limited vs the Accounting Office, Kenya Railways Corporation concerning Tender No. KR/SCM/064/2019-2020 for Design, Supply, Installation, Testing and Commissioning and Maintenance of Unified Security Management System (USMS) for the Standard Gauge Railway (SGR).**

**III. The *ex parte* Applicant is granted leave to apply for an order of Prohibition directed against the 1<sup>st</sup> Interested Party, prohibiting them through their servants and/ or agents either directly or indirectly from proceeding with the procurement process to its logical conclusion and from entering into any written contract with respect to Tender No. KR/SCM/064/2019-2020 for Design, Supply, Installation, Testing and Commissioning and Maintenance of Unified Security Management System (USMS) for the Standard Gauge Railway (SGR).**

**IV. The leave so granted herein to institute these judicial review proceedings shall operate as a stay of the decision made by the Respondent in Public Procurement Administrative Review Board Application No. 88 of 2020; Magal Security Systems Limited vs The Accounting Officer, Kenya Railways Corporation and of the execution of the orders in the said decision, 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 Chamber Summons dated 23<sup>rd</sup> July 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 Parties with the Chamber Summons dated 23<sup>rd</sup> July 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 Parties shall be required to file their responses to the substantive Notice of Motion within fourteen (14) days from the date of service.**

**VIII. The *ex parte* Applicant is granted leave to file and serve its submissions on the substantive Notice of Motion within fourteen (14) days of service of the Respondent’s and Interested Parties’ responses.**

**IX. The Respondent and Interested Parties are granted leave to file and serve reply submissions within fourteen (14) days from the date of service of the *ex parte* Applicant’s submissions.**

**X. This matter shall be mentioned on 7<sup>th</sup> October 2020 to confirm compliance and for hearing.**

**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](mailto:judicialreview48@gmail.com) and [asunachristine51@gmail.com](mailto:asunachristine51@gmail.com).

XIII. 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 description of the Party sending it (that is whether the *Ex Parte* Applicant, Respondent or Interested Party), and the nature of the pleading or document.

XIV. 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).

XV. The parties shall also be required to file and send to the Deputy Registrar of the Judicial Review Division their respective affidavits of service evidencing personal service, by way of electronic mail to [judicialreview48@gmail.com](mailto:judicialreview48@gmail.com) with copies to [asunachristine51@gmail.com](mailto:asunachristine51@gmail.com).

XVI. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for hearing on 7<sup>th</sup> October 2020.

XVII. 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 Monday, 27<sup>th</sup> July 2020.

XVIII. Parties shall be at liberty to apply.

15. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 24<sup>th</sup> DAY OF JULY 2020

P. NYAMWEYA

JUDGE