REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC APPLICATION NO. 159 OF 2020

ROBEN ABERDARE (K) LIMITED..............APPLICANT

VERSUS

ENG. LUKA K. KIMELI, THE ACCOUNTING OFFICER

KENYA RURAL ROADS AUTHORIY.........CONTEMNOR

RULING

The applicant herein has moved the court by way of Notice of Motion dated 10th May, 2020 seeking orders that this court finds the contemnor in contempt of the orders of Public Procurement Administrative Review Board (PPARB) made on 14th April, 2020 in applications Nos 42 and or 43 of 2020 which were before the said Board and have him jailed for six months.

The applicant has also requested that the contemnor be fined a sum of Kshs. 4 Million under the provisions of Section 175 (6) and 176(2) of the Public Procurement and Assets Disposal Act. The application is supported by an affidavit sworn by one Daniel Wamahiu on 8th May, 2020 alongside several annexures attached thereto. The application is opposed and there is a replying affidavit sworn by the contemnor Engineer Luka K.Kimeli to which a supplementary affidavit was filed on behalf of the applicant.

Subsequently, parties filed their respective submissions as ordered by the court, and I have noted that there is a further supplementary affidavit sworn by Daniel Wamahiu on 3rd June, 2020, to which he has annexed a ruling of the Public Procurement Administrative Review Board delivered on 27th May, 2020, following an application by the procuring entity to extend time by 28 days, to facilitate compliance with the decision of 14th April,2020.

To put the matter in context, the applicant had tendered to undertake some projects under the Kenya Rural Roads Authority where the contemnor is said to be the accounting officer. One of the tenders was however terminated on the basis of inadequate budgetary allocation. However, in a ruling made on 14th April, 2020 the Kenya Rural Roads Authority was instructed to proceed with the subject procurement process, including the making of an award within seven days from the date of that decision, ie 14th April, 2020. The Kenya Rural Roads Authority did not comply with the said order and that is why the applicant moved the court for the orders set out in the application.

I pause here to observe that in the latest ruling of the PPARB dated and delivered on 27th May, 2020 and which has been filed alongside the supplementary affidavit aforesaid, the Board clearly observes that the procuring entity was in disobedience of board orders dated 14th April, 2020. Specifically the ruling of the Board reads in part as follows,

> **"Moreover, the seven (7) days period for compliance by the procuring entity lapsed on 21st April, 2020. It therefore follows that by 22nd April, 2020 the procuring entity was in disobedience of the Board's orders dated 14th April, 2020**."

In effect therefore, the Board has found the procuring entity in contempt of its orders. I observe, with respect, that this is the same order being sought by the applicant in this application, but which the board has now decided upon.

Under section 175 (1) of The Public Procurement and Assets Disposal Act it is provided as follows,

> **"A person aggrieved by a decision made by The Review Board may seek Judicial Review by the High Court within 14 days from the date of the Review Board's decision failure to which the decision of the Review Board shall be final and binding to both parties."**

There is no application for review of the decision of the Board as contemplated by the above provisions and in any case, the time allowed has expired. The court is now subjected to a situation whereby, it either endorses the said decision or leaves the parties to pursue the legal channels that are provided for under the relevant provision of law, which the parties are aware of.

That notwithstanding, I have to consider the application before me based on the material presented. The first observation is that the procuring entity has not made any award in the subject tender. In the replying affidavit the procuring entity has submitted that the failure to revaluate the tenders within seven days given by the PPARB was not wilful and have given the reasons and pleaded the circumstances that prevented the procuring entity from complying with the said order.

The second observation is that no one is in a position to say who the successful bidder was going to be had the procuring entity complied with the order of the Board.

I am in total agreement with the Board in citing the case of **Wild- life Lodges Limited vs. County Council of Narok & Another (2005) 2EA 344** where the court stated,

> **"It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a Court of competent Jurisdiction to obey it until that order was discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in the application to the court by him not being entertained until he had purged his contempt. A party who knows of an order whether a null or valid, regular or irregular, cannot be permitted to disobey it…… It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular. As long as a court order exit it must not be disobeyed."**

See also **Gideon Omare vs. Machakos University (2019) e KLR**.

The decision of the Board that has not been overturned by way of review or appeal has the same strength as that of the court. Going by the foregoing requirements, it matters not that the cited person agrees with the decision. It is enough that he is aware of the order and that that order has not been overturned.

An allegation of contempt of an order by the court or any lawful authority has a criminal element associated therewith. It is also clear that no award has been made in favour of the applicant with respect to the tenders. In the cited authorities, it is clear that the applicant must establish the failure of the procuring entity to comply with the orders made on 14th April, 2020 was wilful and deliberate.

For one to be punished for contempt of an order capable of execution, it must be established that indeed he was aware of the order, that he had the power to execute the order, and that failure to do so resulted to some damage, either pecuniary or to the reputation of the complaining party. It must also be established that, failure to execute the order has brought into disrepute, the institution or person who gave such an order. Proof of the conduct of the contemnor's action must be beyond a balance of probability. That is to say, the standard of proof is not the same as that required under civil process. I say so because the consequences of contempt result, as pleaded by the applicant, in depriving the contemnor of his or her liberty by committal into jail, payment of fine and in some cases attachment of personal property.

In the case of **Gatharia K. Mutikika vs. Baharini Farm Limited 1985 KLR** the court stated as follows,

> **"A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved. To use the time– honoured phrase, it must be proved beyond reasonable doubt".**
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> **With the greatest possible respect to that eminent English judge, that proof is much too high for an offence "of a criminal character" and, *ipso facto*, not a criminal offence properly so defined.**
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> **We agree with Mr. Khaminwa's submissions in this respect. In our view the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt. We envisage no difficulty in courts determining the suggested standard of proof. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to offence which can be said to be quasi – criminal in nature Winn LJ on page 1064 was in our view right in saying that the guilt has to be proved**
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>> **"with such strictness of proof ... as is consistent with the gravity of the charge ..."**
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> **The principle propounded in *Re Maria Annie Davies* [1889] 21 QBD 236, and 239, that**
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>> **"Recourse ought not to be had to process of contempt in aid of a civil remedy where there is any other method of doing justice. The observations of the later Master of the Rolls in the case of *Re Clement* seem much in point: 'It seems to me that this jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched, and exercised, if I may say so, with the greatest reluctance and the greatest anxiety on the part of judges to see whether there is no other mode which is not open to the objection of arbitrariness, and which can be brought to bear upon the subject.**

The High court in the case of **Silverse Lisamula Anami vs. Justus Kizito Mugali & Another (2017) e KLR** cited the Supreme Court of India in the case of **Mahinder Jitsingh Bitta vs. Union of India & Others 1A NO.10 OF 020** as follows,

> “**In exercise of its contempt jurisdiction the courts are primarily concerned with enquiring whether the contemnor is guilty of intentional and wilful violation of the order of the court, even to constitute a civil contempt. Every party is *lis* before the court and even otherwise, is expected to obey the orders of the court in spirit and substance. Every person is required to respect and obey the orders of the court with due dignity for the institution.”**

Black’s Law Dictionary has defined **“wilful”** as **“voluntary and intentional but not necessarily malicious. A voluntary act becomes wilful in law, when it involves conscious wrong or evil purpose on the part of the actor or at least inexcusable carelessness whether the act is right or wrong.”**

Caution must therefore be exercised when dealing with some matters where a party seeks to enforce an order through an application of this nature. The procuring entity has cited the Covid 19 pandemic for its failure to assemble its members with a view to complying with the orders of PPARB. In the ruling I have referred to by the said Board which has been introduced by way of supplementary affidavit, the Board has addressed that issue and given its assessment as to why that cannot be an excuse.

The procuring entity ought to have met online to be able to address the issues raised by the applicant. It is true that the failure of the procuring entity may have serious financial implications. However we cannot ignore the fact, that the set in of the pandemic has had adverse consequences which may not be wished away.

I have asked myself whether or not, in the circumstances, anyone should be punished for what I may call error of judgment in addressing issues during this particular time. I have also asked myself whether a party may be cited and punished for contravening Article 10 of the Constitution which relates to, *inter alia*, good governance, integrity, transparency and accountability in the context of the material presented in this application.

With respect, I am unable to relate those national values to the default on the part of the contemnor herein in that, the standard of proof I have cited above has not been achieved. I am persuaded that the contemnor could not have deliberately ignored the orders of PPARB and other than the delay occasioned thereby, no serious prejudice can be alleged to have befallen the applicant therein. The applicant has not provided evidence that meets the threshold of contempt proceedings and therefore I am unable to cite and punish the contemnor as requested by the applicant. The application is therefore dismissed with costs to the contemnor.

Dated, signed and delivered at Nairobi this 23rd Day of July, 2020.

A. MBOGHOLI MSAGHA

JUDGE