



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 113 OF 2020

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

PERMANENT SECRETARY, STATE DEPARTMENT

FOR CORRECTIONAL SERVICES.....RESPONDENT

EX PARTE APPLICANT: DANIEL NG'ANGÁ WANYOIKE

RULING

Introduction

1. The application coming up for ruling is a Chamber Summons dated 22nd May 2020, which was first filed by the *ex parte* Applicant in Kiambu High Court on 22nd May 2020. The application was subsequently transferred to this Court on account of the Respondent being based in Nairobi, and the cause of action having arisen in Nairobi. The said application is seeking the following orders:

a. That an order of certiorari be granted to remove to this Court and quash the decision of the Respondent to advertise through the daily newspapers invitations for bids to tenders for the year 2019-2022 with an existing tender already in place for the year 2019-2020 pending the hearing and determination of the application.

b. That an order of mandamus be granted to compel the Respondent to cancel the first invitation to tender for the year 2019-2020 before any subsequent advertising for the same period.'

c. That the Court be pleased to make such further and other orders that it deems fit to meet the ends of justice.

2. The application is supported by a statutory statement dated 22nd May 2020, and a verifying affidavit sworn on 21st May 2020 by the *ex parte* Applicant. The *ex parte* Applicant has also annexed copies of the impugned advertisement, notification of the awards by the Respondent, and newspaper reports on the said awards. This Court in a preliminary ruling dated 28th May 2020, noted that since the *ex parte* Applicant seeks to quash the Respondent's advertisement for new tenders, and is also challenging its awards of past tenders. The Court therefore ordered that the question of leave to commence judicial review proceedings against the Respondent be heard *inter partes* in light of these facts, taking into account the provisions of the Public Procurement and Disposal Act on appeals against public tenders, and this Court's jurisdiction in that regard.

3. While the said application was pending *inter partes* hearing, the *ex parte* Applicant filed yet another application by way of Notice of Motion dated 29th June 2020, seeking orders that the Respondent withdraws a circular dated 19th June 2020 on tenders for the 2019 -2020 and be cited for contempt of Court. However, as the *ex parte* Applicant has not been granted leave to commence judicial review proceedings, this Court on 6th July 2020 directed that the hearing of and fate of the said Notice of Motion would await the outcome and ruling on the Chamber Summons application dated 22nd May 2020.

4. My attention has also been brought to another Notice of Motion dated 20th September 2020 by one John Kingóri Kioni T/A as Worder Price Mjengo Timber Yard, seeking to be enjoined as an Interested Party in this suit on account of having been one of the successful bidders in the impugned tender.

The ex parte Applicant's Case

5. The *ex parte* Applicant filed submissions dated 5th June 2020 in support of his application for leave to commence judicial review proceedings in which he reiterated the averments in his supporting affidavit. In summary, the *ex parte* Applicant's case is that sometime in June 2019 the Respondent through the daily newspapers advertised a tender notice for supply and delivery of Dry Foodstuffs, Milk Products, Fruits, Vegetables, Meat Products and Wood Fuel for the Year 2019-2022. Further, that despite the said tender notice having a clear date on when the bids were to be opened, the Respondent failed to honor this date and took advantage of the Covid-19 lockdown to publish undated list of successful bidders in April 2020 in the departments' website, and only indicating that those bidders not appearing on the published list to consider their bids unsuccessful.

6. In addition, that the Respondent sent notification award letters to some of the successful bidders which were backdated to 15th January 2020 thereby blocking and denying the unsuccessful bidders a chance to appeal to the relevant body considering that the time for appeals had lapsed as per the procurement law. The *ex parte* Applicant alleged that there is evident bias as the Respondent awarded specific favorite companies numerous awards in numerous counties, and that the tenders will lead to loss of public Funds as the prices were overpriced per unit. He gave examples to support his allegations.

The Respondent's Case

7. The Respondent's response is in a Replying affidavit sworn on 3rd July 2020 by Joel K. Ngolekong, the Deputy Director Supply Chain Management Services at the State Department for Correctional Services. The Respondent confirmed that on 18th June 2019, the State Department for Correctional Services advertised Framework tenders for all counties across the country except Nairobi City County, For Supply and Delivery of Dry Foodstuffs, Fruits and Vegetables, Meat and Wood fuel for Financial Year 2019-2022 for Ministry of Interior and Coordination of National Government, the State Department for Correctional Service through the Kenya Prison Service. Further, that the advertisement was in accordance to section 114 of Public Procurement and Asset Disposal Act of 2015, and that at the time of advertisement, there was no existing tender/contract in the State Department for Correctional Services for the Prison stations across the country.

8. The Respondent explained that the tenders were to close on 11th July 2019, but that following requests from the applicants, the tender closing/opening was extended to 30th July, 2019. The Respondent further explained the evaluation processes of the said tender, and averred that the recommended awards and prices were fair and competitive in comparison to the prevailing market prices. Further, that the letters for notification of award were sent to main Prisons in each County through the Commissioner General of Prisons, and that in order to minimize travelling by suppliers to Nairobi during this time of Covid-19 pandemic, and arising from the directive on cessation of movement in and out of some counties, an advertisement was placed in daily newspapers of the 28th January 2020, informing the applicants to visit the Respondent's website to ascertain their status. In addition, that the successful bidders were also directed to collect their letters in main prisons in each county.

9. According to the Respondent, the complaint that the awards were made to preferred suppliers is without basis, and that the actions of the Respondent's Accounting Officer regarding the tender has been procedural and as per the provisions of the Public Procurement and Asset Disposal Act. Lastly, that the claims by the *ex-parte* Applicant are unfounded, tenuous and malicious, and that the orders sought will be cause an injustice against the successful bidders who have since been notified of their success and accepted the awards.

10. The Respondent annexed copies of the advertisement for the tenders; the advert for extension of closing & opening of tender dates; the appointment letters for the Tender Opening Committee and the Tender Evaluation Committee, the letters of notification of awards to the tenderers in each county; and of the advertisement in in the local newspapers notifying successful applicants to collect their awards in prisons in each county .

The Determination

11. I have considered the application dated dated 22nd May 2020, and the substantive issue that require to be determined is whether leave should to be granted to the *ex parte* Applicant to commence judicial review proceedings. I am in this respect mindful of the provisions of *Order 53 Rule 1* of the Civil Procedure Rules, which provide that no application for judicial review orders should be made unless leave of the court was sought and granted. The main reason for the leave as 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**, is to ensure that an applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration.

12. The question to be answered therefore is whether the *ex parte* Applicant's case is sufficiently meritorious to justify leave. It is trite that the Court in this regard ought not to delve deeply into the arguments of the parties, but should make cursory perusal of the evidence before it in arriving at a decision whether there is an arguable case. It was explained by Lord Bingham in **Sharma vs Brown Antoine (2007) 1 WLR 780**, 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.

13. In the present application, the dispute between the *ex parte* Applicant and Respondent emanates from the advertisement by the Respondent for a tender for Supply and Delivery of Dry Foodstuffs, Fruits and Vegetables, Meat and Wood fuel for Financial Year 2019-2022. I note that the *ex parte* Applicant has brought the application herein in his capacity as a concerned citizen in the public interest. His right to seek judicial review is saved by section 174 of the Public Procurement and Asset Disposal Act of 2015, which allows for other legal remedies with respect to the procurement of public tenders, in addition to the review provided for under the Act.

14. In this respect, section 167 and 168 of the Public Procurement and Asset Disposal Act of 2015, provides for review by the Public Procurement Review Administrative Board as a statutory dispute resolution mechanism of public tender procurement disputes, but only where the applicant is a candidate or tenderer in a tender. The right to judicial review of procurement actions by this Court with respect to the such applicants is also limited in this respect to decisions made by the Public Procurement Review Administrative Board by section 175 (1)

of the Act.

15. This finding notwithstanding, I note from the evidence presented by both the *ex parte* Applicant and Respondent that the advertisement for the tender for Supply and Delivery of Dry Foodstuffs, Fruits and Vegetables, Meat and Wood fuel for Financial Year 2019-2022, that the *ex parte* Applicant seeks to leave to quash by way of certiorari, was advertised on 18th June 2018. There has been inordinate delay on the part of the *ex parte* Applicant in seeking leave to quash the said advertisement, which was published over two years ago, and his application for leave has become time barred. In this respect, the provisions of Order 53 Rule 2 of the Civil Procedure Act provides as follows:

“Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.”

16. Secondly, as regards the order of mandamus sought, the *ex parte* Applicant has not brought any evidence of the first invitation to tender for the year 2019-2020 which he wants leave to compel the Respondent to cancel. The existence of such a tender has also been expressly denied by the Respondent. In the circumstances, I find that the *ex parte* Applicant has not shown an arguable case with respect to the prayer for mandamus. It is notable again in this respect that Order 53 Rule 1(2) provides as follows:

“An application for such leave as aforesaid shall be made *ex parte* to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.”

17. The prayers for leave in the Chamber Summons application dated 22nd May 2020 are accordingly denied for the foregoing reasons. The said application is thus dismissed with no order as to costs. Consequently, the *ex parte* Applicant’s Notice of Motion dated 29th June 2020 and Intended Interested Party’s Notice of Motion dated 20th September 2020 also fall by the wayside, as there is no substantive suit herein which they can stand on. The two Notices of Motion are accordingly struck out with no order as to costs.

18. The Deputy Registrar of this Court shall send a copy of this ruling by email to the *ex parte* Applicant and Intended Interested Party, by close of business on Thursday, 1st October 2020.

19. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF SEPTEMBER 2020

P. NYAMWEYA

JUDGE

FURTHER ORDERS ON THE MODE OF DELIVERY OF THIS RULING

In light of the declaration of measures restricting Court operations due to the COVID -19 Pandemic, and following the Practice Directions issued by the Honourable Chief Justice dated 17th March 2020 and published in the Kenya Gazette on 17th April 2020 as Kenya Gazette Notice No. 3137, this ruling will be delivered electronically by transmission to the *ex parte* Applicant’s and Respondent’s advocates respective email addresses.

P. NYAMWEYA

JUDGE