



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. E1102 OF 2020

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE
JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI AND PROHIBITION**

BETWEEN

BERNARD NJIINU NJIRAINI.....APPLICANT

VERSUS

CLERK OF THE NATIONAL ASSEMBLY.....1ST RESPONDENT

THE NATIONAL ASSEMBLY.....2ND RESPONDENT

AND

THE CABINET SECRETARY, MINISTRY OF INDUSTRIALISATION,

TRADE & ENTERPRISE DEVELOPMENT.....1ST INTERESTED PARTY

OFFICE OF DIRECTOR OF

PUBLIC PROSECUTIONS.....2ND INTERESTED PARTY

ETHICS & ANTI-CORRUPTION

COMMISSION.....3RD INTERESTED PARTY

DIRECTORATE OF CRIMINAL

PROSECUTION.....4TH INTERESTED PARTY

PUBLIC PROCUREMENT

REGULATORY AUTHORITY.....5TH INTERESTED PARTY

RULING

The Application

1. Bernard Njiinu Njiraini, the *ex parte* Applicant herein, is the Managing Director of the Kenya Bureau of Standards. He is aggrieved by the decision and recommendations made by the National Assembly's Public Investments Committee Report dated 29th May 2020 on the Pre-Export Verification of Conformity (PVoC) to Standard Services for Used Motor Vehicles, Mobile Equipment and Used Spare Parts. The said report recommended *inter alia* were that the *ex parte* Applicant be held personally liable and faces civil and criminal liability over the procurement of international tender no. KEBS/T010/2019-2021 on the Pre-Export Verification of Conformity (PVoC) to Standard Services for Used Motor Vehicles, Mobile Equipment and Used Spare Parts.

2. The *ex parte* Applicant has consequently filed an application by way of a Chamber Summons dated 14th September 2020, seeking the following orders:

1. THAT this application be certified urgent and be heard *ex parte*.

2. THAT leave be and is hereby granted to the Applicant, to hear and determine this Chamber Summons dated 14th September 2020 during this Court's current vacation, and to institute judicial review proceedings seeking:

(a) An Order of *Certiorari* to remove into this Court for purpose of quashing, and to quash, portions of the National Assembly's Public Investment Committee's (PIC) Report dated 29th May 2020 on the Pre-Export Verification of Conformity (PVoC) to Standard Services for Used Motor Vehicles, Mobile Equipment and Used Spare Parts specifically found at its Chapter 5, pages 61, 62 and 63, paragraphs (iii), (iv {a-j}), (v) & (viii) that recommended that the Applicant be held personally liable for delaying to seek the Attorney General's opinion under S. 134 Public Procurement & Asset Disposal Act 2015 and for withholding or giving mis-leading information to the Attorney General when the alleged opinion was sought, for ignoring PIC's opinion that he seeks and follows the Attorney General's legal opinion before awarding tender no. KEBS/T010/2019-2021, for loss or costs arising from litigation relating to the same tender, and further recommending that the Directorate of Criminal Investigations (DCI), the Director of Public Prosecutions (DPP) and the Ethics & Anti-Corruption Commission (EACC) investigates the circumstances under which the Kenya Bureau of Standards (KEBS), through the Applicant, entered into contract with firms that had been recommended for debarment, in total contempt of the advice of the Attorney General and the advice of PIC, and contrary to the Public Procurement & Asset Disposal Act 2015 on procurement process, the Penal Code Cap 63 on forgery, Public Finance Management Act of 2012 on initiation of a procurement without approved budget and procurement plan among others with a view to preferring charges to those found culpable.

(b) An order of Prohibition to stop the implementation of the Report of the National Assembly's Public Investment Committee (PIC) dated 29th May 2020 on the Pre-Export Verification of Conformity (PVoC) to Standard Services for Used Motor Vehicles, Mobile Equipment and Used Spare Parts specifically found at its Chapter 5, pages 61, 62 and 63, paragraphs (iii), (iv {a-j}) and (v) that recommended that the Applicant be held personally liable for delaying to seek the Attorney General's opinion under S. 134 Public Procurement & Asset Disposal Act 2015 and for withholding or giving misleading information to the Attorney General when the alleged opinion was sought, for ignoring PIC's opinion that he seeks and follows the Attorney General's legal opinion before awarding tender no. KEBS/T010/2019-2021, for loss or costs arising from litigation relating to the same tender, and further recommending that the Directorate of Criminal Investigations (DCI), the Director of Public Prosecutions (DPP) and the Ethics & Anti-Corruption Commission (EACC) investigates the circumstances under which the Kenya Bureau of Standards (KEBS), through the Applicant, entered into contract with firms that had been recommended for debarment, in total contempt of the advice of the Attorney General and the advice of PIC, and contrary to the Public Procurement & Asset Disposal Act 2015 on procurement process, the Penal Code Cap 63 on forgery, Public Finance Management Act of 2012 on initiation of a procurement without approved budget and procurement plan among others with a view to preferring charges to those found culpable.

3. THAT the leave so granted to institute these judicial review proceedings shall operate as a stay of the implementation of portions of the National Assembly's Public Investment Committee's (PIC) Report dated 29th May 2020 on the Pre-Export Verification of Conformity (PVoC) to Standard Services for Used Motor Vehicles, Mobile Equipment and Used Spare Parts that seeks to hold the applicant liable in civil or criminal law of Kenya.

4. THAT Costs be to the applicant.

5. Any other order that is just and equitable.

3. The grounds for the application are stated in the *ex parte* Applicant's statutory statement dated 14th September 2020, and a verifying affidavit sworn on the same date by the *ex parte* Applicant. In summary, the *ex parte* Applicant states that he is threatened with personal civil and criminal liability for acts done in his capacity as a public officer, according to law and in execution of a valid decision of the Public Procurement Administrative Review Board (PPARB) in Review Application No. 18 of 2020, which is binding to date as it has never been set aside. Further, that the PPARB cleared the subject procurement (tender no. KEBS/T010/2019-2020) of any legal infringement under the Public Procurement & Asset Disposal Act.

4. In addition, that the *ex parte* Applicant lodged a Petition dated 3rd August 2020, challenging the recommendations in the PIC's Report dated 29th May 2020, which he served upon the Clerk to the National Assembly, the 1st Respondent herein. However, that the 1st Respondent has failed to act upon that petition, or to inform the *ex parte* Applicant of its outcome, which is its duty under the 2nd Respondent's Standing Order 227(1), (2) & (3).

5. The *ex parte* Applicant annexed copies of various documents in support of his application.

The Determination

6. I have considered the application dated 14th September 2020 and the reasons offered in support of the urgency, and I am satisfied that the *ex parte* Applicant has demonstrated that this matter is urgent. This for reasons that the impugned PIC Report is scheduled to be adopted, upon which it is required to be implemented not later than 60 days from the date of its adoption, under the 2nd Respondent's Standing Order 201.

7. On the orders sought by the Applicants for leave to commence judicial review proceedings, the applicable law 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 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.

8. It is also 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. 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. I

9. In the present application, the ex parte Applicant has provided evidence of the ruling by the PPARB in Review Application No. 18 of 2020; the contracts entered into with the winning bidders in tender no. KEBS/T010/2019-2021; the Auditor General's Special Audit Report on a previous tender floated by the Kenya Bureau of Standards; a copy of the impugned PIC Report dated 27th May 2020; and a copy of the ex parte Applicant's Petition dated 3rd August 2020 presented to the 1st Respondent. Lastly, the ex parte Applicant has also averred to the grounds and reasons why it considers the 2nd Respondent's decision and recommendations to be unreasonable, irrational and illegal.

10. 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.

11. 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.”

12. 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.

13. 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...”

2. 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.”

3. 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.

4. 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.

5. In the present application the Respondent has stated that the impugned report by the Parliamentary Investment Committee dated 29th May 2020 was to be tabled before the 1st Respondent, and is scheduled to be adopted on or about the 15th September 2020. It is therefore premature at this stage to make any orders of stay, as the final status of the said report is not known, given that no debate has been held, nor a final decision made by the 1st Respondent on the recommendations made in the report as regards the ex parte Applicant.

6. In addition, the *ex parte* Applicant still has the opportunity to challenge the said recommendations during the substantive hearing of its case, or in the event that the recommendations are adopted by the 1st Respondent, he is at liberty to seek further orders in this regard. In the premises I find that the stay orders are premature and not merited at this stage.

The Orders

7. In light of the foregoing observations and findings, the *ex parte* Applicants' Chamber Summons dated 14th September 2020 is found to be merited only to the extent of the following orders:

I. The *ex parte* Applicants' Chamber Summons application dated 14th September 2020 be and is hereby certified as urgent, and 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 into this Court for purpose of quashing, and to quash, portions of the National Assembly's Public Investment Committee's (PIC) Report dated 29th May 2020 on the Pre-Export Verification of Conformity (PVoC) to Standard Services for Used Motor Vehicles, Mobile Equipment and Used Spare Parts specifically found at its Chapter 5, pages 61, 62 and 63, paragraphs (iii), (iv {a-j}), (v) & (viii) that recommended that the Applicant be held personally liable for delaying to seek the Attorney General's opinion under S. 134 Public Procurement & Asset Disposal Act 2015 and for withholding or giving mis-leading information to the Attorney General when the alleged opinion was sought, for ignoring PIC's opinion that he seeks and follows the Attorney General's legal opinion before awarding tender no. KEBS/T010/2019-2021, for loss or costs arising from litigation relating to the same tender, and further recommending that the Directorate of Criminal Investigations (DCI), the Director of Public Prosecutions (DPP) and the Ethics & Anti-Corruption Commission (EACC) investigates the circumstances under which the Kenya Bureau of Standards (KEBS), through the Applicant, entered into contract with firms that had been recommended for debarment, in total contempt of the advice of the Attorney General and the advice of PIC, and contrary to the Public Procurement & Asset Disposal Act 2015 on procurement process, the Penal Code Cap 63 on forgery, Public Finance Management Act of 2012 on initiation of a procurement without approved budget and procurement plan among others with a view to preferring charges to those found culpable.

III. The *ex parte* Applicant is granted leave to apply for an order of Prohibition to stop the implementation of the Report of the National Assembly's Public Investment Committee (PIC) dated 29th May 2020 on the Pre-Export Verification of Conformity (PVoC) to Standard Services for Used Motor Vehicles, Mobile Equipment and Used Spare Parts specifically found at its Chapter 5, pages 61, 62 and 63, paragraphs (iii), (iv)(a-j) and (v) that recommended that the Applicant be held personally liable for delaying to seek the Attorney General's opinion under section 134 of the Public Procurement & Asset Disposal Act 2015 and for withholding or giving mis-leading information to the Attorney General when the alleged opinion was sought, for ignoring PIC's opinion that he seeks and follows the Attorney General's legal opinion before awarding tender no. KEBS/T010/2019-2021, for loss or costs arising from litigation relating to the same tender, and further recommending that the Directorate of Criminal Investigations (DCI), the Director of Public Prosecutions (DPP) and the Ethics & Anti-Corruption Commission (EACC) investigates the circumstances under which the Kenya Bureau of Standards (KEBS), through the Applicant, entered into contract with firms that had been recommended for debarment, in total contempt of the advice of the Attorney General and the advice of PIC, and contrary to the Public Procurement & Asset Disposal Act 2015 on procurement process, the Penal Code Cap 63 on forgery, Public Finance Management Act of 2012 on initiation of a procurement without approved budget and procurement plan among others with a view to preferring charges to those found culpable.

IV. The costs of the Chamber Summons dated 14th September 2020 shall be in the cause.

V. The *ex parte* Applicant shall file and serve the Respondents and Interested Parties with the substantive Notice of Motion, and shall also serve the Respondents and Interested Parties with the Chamber Summons dated 14th September 2020 and its supporting documents, a copy of this ruling, and a mention notice, within fourteen (14) days from today's date.

VI. Upon being served with the said pleadings and documents, the Respondents 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.

VII. This matter shall be mentioned on 9th November 2020 for further directions.

VIII. 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.

IX. 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 and asunachristine51@gmail.com.

X. 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.

XI. 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 with copies to asunachristine51@gmail.com.

XII. 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 with copies to asunachristine51@gmail.com.

XIII. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for mention on 9th November 2020.

XIV. The Deputy Registrar of the Judicial Review Division shall send a copy of these directions to the Applicant by electronic mail by close of business on Thursday, 17th September 2020.

XV. Parties shall be at liberty to apply.

8. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 17th DAY OF SEPTEMBER 2020

P. NYAMWEYA

JUDGE