



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. E1155 OF 2020

IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE

JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

PUBLIC PROCUREMENT ADMINISTRATIVE

REVIEW BOARD.....1ST RESPONDENT

KENYA PORTS AUTHORITY.....2ND RESPONDENT

AND

XRX TECHNOLOGIES LIMITED.....INTERESTED PARTY

EX PARTE:

EXPRESS AUTOMATION LIMITED

RULING

The Application

1. Express Automation Limited, the *ex parte* Applicant herein, is aggrieved by the decision made on 8th December 2020 by the Public Procurement Administrative Review Board (the 1st Respondent herein), dismissing its Request for Review No. 139 of 2020.

2. The *ex parte* Applicant has consequently filed an application by way of a Chamber Summons dated 15th December 2020, seeking the following orders:

1. THAT due to its urgency, the service of this application be dispensed with in the first instance and the same be placed before the Court for hearing of this application.

2. THAT the applicant herein be and is hereby granted leave to apply for: -

a) An order of CERTIORARI to remove into this Court and quash the decision and order of the 1st Respondent rendered in Public Procurement Administrative Review Board PPARB Application No. 139 of 2020, dismissing its application and to quash the decision dated and delivered on 8th December, 2020 directing second 2nd Respondent to proceed with the procurement process in respect of Tender Number KPA/172/2019/20-ICT.

b) An order of PROHIBITION to prohibit the 2nd Respondent and or its agents and servants from entering or signing any contract with the Interested Party or any other third party concerning said Tender Number KPA/172/2019/20-ICT.

c) An order of MANDAMUS compelling the 2nd Respondent herein to carry out a fresh evaluation of the tenders submitted to it in the said Tender Number KPA/172/2019/20-ICT.

3. **THAT** the leave granted in respect of prayer 2 hereinabove do operate as stay of the decision and order of the Public Procurement Review Board (1st Respondent) contained in the decision dated 8th December, 2020 in PPARB Application No. 139 of 2020, directing the second Respondent to proceed with the procurement process, pending the hearing and determination of the substantive Judicial Review Application.

4. Any other orders that the honourable court may deem fit.

5. The costs of this application be provided for.

3. The grounds for the application are stated in the *ex parte* Applicant's statutory statement dated 15th December 2020, and a verifying affidavit sworn on the same date by Archith Rao, the *ex parte* Applicant's Head of Business Development. In summary, the *ex parte* Applicant averred that it received a letter of regret dated 4th November, 2020 from the 2nd Respondent informing it of its unsuccessful bid for tender number KPA/172/2019-2020/ICT in response to an invitation for tenders advertised by the 2nd Respondent, and indicating the winner of the said tender as XRX Technologies Limited, the Interested Party herein.

4. Being aggrieved, the *ex parte* Applicant subsequently filed a Request for Review on 18th November, 2020 with the 1st Respondent, seeking to nullify the decision of the 2nd Respondent and that without being given an opportunity to be heard or even directions being given on the said Request for Review, the *ex parte* Applicant received the decision of the 1st Respondent herein dated 8th December 2020 dismissing its application, thereby allowing the 2nd Respondent to sign and or execute a contract with the Interested Party herein.

5. The *ex parte* Applicant annexed a copy of the impugned decision made by the 1st Respondent in PPARB Application No 139 of 2020 on 8th December 2020.

The Determination

6. I have considered the application dated 15th December 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 there are certain actions required to be undertaken with respect to the subject tender arising from the 1st Respondent's impugned decision.

7. On the orders sought by the *ex parte* Applicant 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 it and make the decision as to whether an applicant's case is sufficiently meritorious to justify leave. It was explained by Lord Bingham in this respect 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.

9. In the present application, the *ex parte* Applicant has provided evidence of the ruling by the 1st Respondent on PPARB Review No 139 of 2020, and has averred as to the grounds and reasons why it considers the Respondent's decision to be illegal. 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.

10. 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.”

11. 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.

12. 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. A similar decision was made by Maraga J. (as he then was) in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006** .

13. 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.”

14. 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.

15. In this regard, the orders given by the 1st Respondent in the impugned decision require certain actions to be taken by the 2nd Respondent as a result, and the said orders are therefore not only amenable to stay, but the *ex parte* Applicant's application would also be rendered nugatory if they are not stayed. In the premises the stay orders are merited to this extent.

The Disposition

16. In light of the foregoing observations and findings, the *ex parte* Applicants' Chamber Summons dated 15th December 2020 is found to be merited to the extent of the following orders:

I. The *ex parte* Applicants' Chamber Summons application dated 15th December 2020 be and is hereby certified as urgent, and is hereby admitted for hearing *ex parte*.

II. The *ex parte* Applicant is granted leave to apply for an order of Certiorari to remove into this Court and quash the decision and order of the 1st Respondent rendered in Public Procurement Administrative Review Board PPARB Application No. 139 of 2020, dismissing its application and to quash the decision dated and delivered on 8th December, 2020 directing second 2nd Respondent to proceed with the procurement process in respect of Tender Number KPA/172/2019/20-ICT.

III. The *ex parte* Applicant is granted leave to apply for an order of prohibition to prohibit the 2nd Respondent and or its agents and servants from entering or signing any contract with the Interested Party or any other third party concerning said Tender Number KPA/172/2019/20-ICT.

IV. The *ex parte* Applicant is granted leave to apply for an order of Mandamus compelling the 2nd Respondent herein to carry out a fresh evaluation of the tenders submitted to it in the said Tender Number KPA/172/2019/20-ICT.

V. The grant of leave herein shall operate as a stay of execution and implementation of the 1st Respondent's entire decision do operate as stay of the decision and order of the Public Procurement Review Board (1st Respondent) contained in the decision dated 8th December, 2020 in PPARB Application No. 139 of 2020, directing the second Respondent to proceed with the procurement process, pending the hearing and determination of the substantive judicial review application or until further orders by this Court.

VI. The costs of the *ex parte* Applicants' Chamber Summons application dated 15th December 2020 shall be in the cause.

VII. The *ex parte* Applicant shall file and serve the Respondents and Interested Party with (i) the substantive Notice of Motion, (ii) the Chamber Summons dated 15th December 2020 and its supporting documents, (iii) a copy of this ruling, and (v) a hearing notice, within fourteen (14) days from today's date.

VIII. Upon being served with the said pleadings and documents, the Respondents and Interested Party shall be required to file their responses to the substantive Notice of Motion within fourteen (14) days from the date of service.

IX. The hearing of the substantive Notice of Motion shall be held on 3rd February 2021.

X. 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.

XI. 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.

XII. 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.

XIII. 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.

XIV. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for hearing on 3rd February 2021.

XV. The Deputy Registrar of the Judicial Review Division shall send a copy of this ruling to the *ex parte* Applicant by electronic mail by close of business on Monday, 21st December 2020.

XVI. Parties shall be at liberty to apply.

17. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 18TH DAY OF DECEMBER 2020

P. NYAMWEYA

JUDGE