



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW MISCELLANEOUS APPLICATION NO. 80 OF 2019**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND MANDAMUS**

**AND**

**IN THE MATTER OF THE PUBLIC PRIVATE PARTNERSHIP ACT NO 15 OF 2013, LAWS OF KENYA**

**BETWEEN**

**MOTA-ENGIL ENGENHARIA E CONSTRUCAO AFRICA SA**

**ORASCOM CONSTRUCTION**

**EGIS PROJECTS S.A**

**AFRICAN INFRASTRUCTURE INVESTMENT FUND**

**3 PARTNERSHIP(Acting as a Consortium).....APPLICANTS**

**VERSUS**

**PUBLIC PRIVATE PARTNERSHIP PETITION COMMITTEE.....1<sup>ST</sup> RESPONDENT**

**KENYA NATIONAL HIGHWAYS AUTHORITY.....2<sup>ND</sup> RESPONDENT**

**VINCI HIGHWAYS SAS,**

**MERIDIAM INFRASTRUCTURE AFRICA FUND (MIAF)**

**VINCI CONCESSIONS SAS (Acting as a Consortium).....INTERESTED PARTY**

**RULING**

**Introduction**

1. The Applicants herein are a Consortium who bid for Tender No. KeNHA/PPP/1689/2017 for the Design, Build, Finance, Operate, Maintain and Transfer of the Nairobi- Nakuru-Mau Summit Highway, pursuant to a Request for Proposals by the Kenya National Highways Authority, which is the 2<sup>nd</sup> Respondent herein. The 2<sup>nd</sup> Respondent is a state corporation established under the Kenya Roads Act of 2007, with the responsibility for the management, development, rehabilitation and maintenance of roads, and it invited bids for the said Tender on the basis of a Public Private Partnership under the Public Private Partnership Act, 2013. After the close and evaluation of the bids, the 2<sup>nd</sup> Respondent informed the Applicants by a letter dated 27<sup>th</sup> February 2019 that they had been declared the Reserve Bidder, and were to send their unconditional acceptance within 21 days. The Interested Party is a consortium which was also bidding for the same tender, and was declared the Preferred Bidder by the 2<sup>nd</sup> Respondent.

2. The Applicants thereupon sought clarification from the 2<sup>nd</sup> Respondent on *inter alia*, the details of the evaluation and the reasons for its selection as the Reserve Bidder and that of the Interested Party as the Preferred Bidder. According to the Applicants, this information was not forthcoming from the 2<sup>nd</sup> Respondent, whereupon the Applicants filed a Petition PPP Petition Number 1 of 2019 before the Public Private

Partnership Petition Committee, which is 1<sup>st</sup> Respondent herein, challenging the said decision of the 2<sup>nd</sup> Respondent of 27<sup>th</sup> February 2019. The 1<sup>st</sup> Respondent is a Tribunal established under the Public Private Partnerships Act, 2013.

3. At a hearing of the said Petition on 15<sup>th</sup> March 2019, the Applicants sought disclosure and production of the Evaluation Report and other reports and documents supporting the decision of 27<sup>th</sup> February 2019, and claims that the 1<sup>st</sup> Respondent declined its request in a ruling dated 18<sup>th</sup> March 2019, and further directed the Applicants to raise the issue of non-disclosure of these documents in the main hearing of the Petition.

4. The said ruling by the 1<sup>st</sup> Respondent provoked the instant application, which was filed by the Applicants by way of a Chamber Summons dated 22<sup>nd</sup> March 2019, seeking leave to institute judicial review proceedings for orders of certiorari and mandamus, and that the said leave operates as a stay of the proceedings in **PPP Petition Number 1 of 2019**, and of the progression of the Tender. The main grounds for the application are that the decision by the 1<sup>st</sup> Respondent to decline disclosure was irrational and unreasonable; was in breach of natural justice and constitutional principles of fair hearing; and denied the Applicants the opportunity to make an informed case before the 1<sup>st</sup> Respondent.

5. The 1<sup>st</sup> Respondent filed Grounds of Opposition dated 22<sup>nd</sup> March 2019 as its response to the Chamber Summons. The 2<sup>nd</sup> Respondent on its part filed a Replying Affidavit sworn on 26<sup>th</sup> March 2019 by Eng. George Kiiru, its Deputy Director, Public-Private Partnerships Department. The 2<sup>nd</sup> Respondent in addition simultaneously filed a Notice of Preliminary Objection to the application dated 26<sup>th</sup> March 2019, on the following grounds:

- a) The Court lacks jurisdiction to take cognizance of, hear and determine the Application.
- b) The issues in dispute are *sub judice* before the PPP Petition Committee.
- c) The purported application has been filed contrary to the express provisions of Order 9 Rule 1(a) and 2(a) of the Civil Procedure Rules 2010.
- d) The purported Applicant lacks capacity to sue in its own name as a consortium.
- e) The purported suit is instituted by a stranger to the tender process.
- f) The deponent of the Verifying Affidavit lacks lawful authority to act for and on behalf of the Applicant.
- g) The purported Power of Attorney to John Kaigua Kimothi is invalid and incapable of conferring the power to institute the suit herein.
- h) The purported Power of Attorney offends the express provisions of sections 9, 31 and 34 of the Advocates Act Cap 16 of the Laws of Kenya.
- i) The application is an abuse of the process of this Court.

6. When the application matter came up for *inter partes* hearing, the Applicants sought the orders of stay pending the hearing of the prayers for leave. This Court (Mativo J.), after hearing the parties, declined to grant the orders of stay in a ruling delivered 27<sup>th</sup> March 2019, and directed that the Chamber Summons proceeds to hearing. The Court thereupon directed that the 2<sup>nd</sup> Respondent's Notice of Preliminary Objection be heard and determined first by way of oral submissions, which hearing was held on 3<sup>rd</sup> April 2019. This ruling was consequently reserved on the said Preliminary Objection.

### **The Legal Arguments**

7. Prof. Albert Mumma, the counsel for the 2<sup>nd</sup> Respondent, collapsed the preliminary objection to two main grounds, namely that the Applicants lack legal capacity to bring the instant application; and that the issues raised in the application are *sub-judice*, as the same are pending determination before the 1<sup>st</sup> Respondent. On the issue of lack of legal capacity, the counsel urged that the Applicants are suing as a consortium which is not a legal person, and that it was therefore essential that it designates an authorized person to speak on its behalf. Further, that the Applicants did so by way of a Power of Attorney appointing and authorizing one Mr. Joao Vasco Alvos dos Reis who is from the lead member of the said consortium as their authorized representative, and that they have annexed the duly signed, certified and authenticated Power of Attorney. Prof Mumma cited the decision in **Kipsiwo Community Self Help Group vs Attorney General and 6 Others (2013) e KLR** for the proposition that unincorporated agencies must sue in the name of authorized persons.

8. It was the 2<sup>nd</sup> Respondent's case that the person who has sworn the verifying affidavit in the instant application, one John Kaigua Kimotho, is not an authorized person, and that the Power of Attorney annexed by the Applicants appointing him to act on the Applicants' behalf is defective and invalid, for reasons that it is not from the lead member of the consortium; it was to terminate 6 months from the date of signature; was not dated when signed; and is not certified and notarized as required when signed by witnesses resident outside the country. Furthermore, that no application was made to the Court for its approval as required by Order 9 Rule 2(a) of the Civil Procedure Rules. Reliance was placed in this regard on the decisions in **Jack J. Kanjira & Another vs Safaricom Limited (2012) e KLR** and **Tsuma Kenga Mwadzemba vs Karemba Anthony Masha (2016) e KLR** on why the prior approval of the Court is necessary.

9. On the second ground of the instant application being *sub-judice*, Prof. Mumma submitted that the matters in issue in the application are

also in issue before the 1<sup>st</sup> Respondent in **PPP Petition Number 1 of 2019** that was lodged by the Applicants therein. Reliance was in this regard placed on section 6 of the Civil Procedure Act and section 9(2) of the Fair Administrative Action Act, for the position that the alternative dispute resolution mechanisms have not been exhausted, and that this Court has no jurisdiction to hear the application. The 2<sup>nd</sup> Respondent also cited the decision in **Republic vs Nanyuki Express Cabs Savings & Credit Co-operative Society & Another ex parte Elijah Mutheki Mbugua (2016) e KLR** for the holding that two fora cannot litigate on the same matter.

10. Mr. Odhiambo, a State Counsel in the Attorney General's chambers, made submissions on behalf of the 1<sup>st</sup> Respondent, and aligned himself with the submissions made by Prof. Mumma. Mr. Odhiambo reiterated that there are pending proceedings on this matter which is therefore *sub-judice*.

11. The counsel for the Applicants, Mr. Andrew Musangi, urged that the ruling made by the 1<sup>st</sup> Respondent was an interim determination on whether the reasons for the 2<sup>nd</sup> Respondent's decision should be disclosed to the Applicants, and that the said issue is not pending determination and is not *sub-judice*. The counsel cited the decision in **Republic vs Public Private Partnerships Petition Committee & 3 Others ex parte APM Terminals (2015) e KLR** in support of this proposition. Further, that since the 1<sup>st</sup> Respondent has made a decision, the only other avenue for redress for the Applicants under section 9(2) of the Fair Administrative Action Act is a review by this Court.

12. On the legal capacity of the Applicants to file the application, Mr. Musangi contended that each one of the Applicants is a corporate entity with legal status which has not been disputed. Further, that the Power of Attorney granted to Mr. Joao Vasco Alvos dos Reis was only with regards to the submission of the bid by the Applicants, and not for the appellate processes that commenced thereafter. Therefore, that for purposes of the legal proceedings herein, the Power of Attorney granted to John Kaigua Kimotho was for purposes of appointing him as a lawful agent of the Applicants as corporate entities under Order 9 Rule 2 (c) of the Civil Procedure Rules to represent them and sign legal documents in this application, and did not require any specific format. In addition, that Order 9 Rule 2(a) and (b) of the Rules only apply to Powers of Attorney meant to represent individuals and not corporations.

13. Mr. Musangi distinguished the authorities cited by Prof. Mumma on this ground, and in turn relied on the decisions in **Peeraj General Trading & Contracting Company Limited Kenya & Another vs Mumias Sugar Company Limited (2016) e KLR**, **Loise Wanjiru Meru & 3 Others vs John Migui Meru (2017) e KLR** and **Yamko Yadpaz Industries Limited vs Kalka Flowers Limited (2013) e KLR** for his submissions.

#### **The Determination**

14. The circumstances in which a preliminary objection may be raised was explained by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696**, as follows:

***“a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”***

The effect of a preliminary objection if upheld, renders any further proceedings before the court impossible or unnecessary.

15. A preliminary objection cannot therefore be raised if any fact requires to be ascertained. In the case of **Oraro -vs- Mbaja (2005)1KLR 141**, the court held that any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. The Court of Appeal also stated in **Mukisa Biscuit Company -vs- West End Distributors Ltd(supra)** that a preliminary objection cannot be raised if what is sought is the exercise of judicial discretion.

16. The issues for determination herein therefore are whether the grounds raised in the 2<sup>nd</sup> Respondent's preliminary objection raise pure points of law, and if so, whether the said preliminary objection has merit and should be upheld. On the ground raised by the 2<sup>nd</sup> Respondent of the lack of legal capacity to bring the application, the 2<sup>nd</sup> Respondent relied on Order 9 Rule 2(a) and (b) of the Civil Procedure Rules for the requirements as regards representation of the Applicants, while the Applicants' counsel disputed the application of the said rules and submitted that the applicable law was Order 9 Rule 2 (c) of the Rules.

17. A number of other aspects of the Powers of Attorney granted to Mr. Joao Vasco Alvos dos Reis and John Kaigua Kimotho were also disputed by the parties, particularly as regards the scope of their application, the legal requirements as regards their format, and their effect. In essence therefore, this is a ground that requires legal argument and evidence by the parties before it can be determined, and does not therefore raise a pure point of law. I agree with the Applicants position that it is not a ground which is dispositive of their application at this preliminary stage.

18. On the second ground raised by the 2<sup>nd</sup> Respondent as to whether the instant application is *sub-judice* in light of Petition 1 of 2019 filed with the 1<sup>st</sup> Respondent, the **Black's Law Dictionary Tenth Edition** at page 1652 defines the term “*sub-judice*” to mean a matter or case that is “*before a judge or Court for determination*”. Section 6 of the Civil Procedure Act also makes provision for the principle of *sub-judice* in the following terms:

***“No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed.”***

19. The purpose of this principle is to avoid instances where multiple suits are filed by the same parties on the same issues before Courts of competent jurisdiction. In **Standard Chartered Bank Limited vs Jenipher Atieno Odok**, HCCC No. 120 of 2003, Warsame J. (as he then was), had the following to say about the doctrine of *sub judice*:

**“It is not within the rights of parties to engage in multiplicity of suits as the multiplicity of suits is meant to obstruct due process of law, and when a party shows design to abuse the powers of the Court, such actions must be stopped to avoid unnecessary costs and waste of judicial time.”**

Similar reasons were given by Kasango J. in **Republic vs Nanyuki Express Cabs Savings & Credit Co-operative Society & Another ex parte Elijah Mutheki Mbugua (supra) as follows:**

**“ Finally Elijah sought to stay his action before the tribunal. It is not clear to what end the stay was to serve. Was it to stay for Elijah to proceed with that action after the judicial review action is over. If that is so Elijah is inviting two forums to adjudicate on the same matters. To do is in my view an abuse of the court process. If it were allowed there is every possibility that this court would reach one determination and the Tribunal another. That would un-necessarily bring disrepute to the judicial process and is undesirable. This court has inherent power to stem any abuse of the court process.”**

20. If indeed a matter is found to be *sub judice*, the effect is to oust the jurisdiction of a Court to deal with the same issue. This is thus a pure point of law that has been raised by the 2<sup>nd</sup> Respondent. The test to be utilized to determine if a matter is *sub judice*, is whether the parties in the two suits are the same; whether the issues raised or subject matters of the suits are the same; and whether the matter is pending before a Court clothed with appropriate jurisdiction.

21. In the present application it is not in dispute that the Applicants herein have filed **PPP Petition Number 1 of 2019** before the 1<sup>st</sup> Respondent, in which they have sued the 2<sup>nd</sup> Respondent. It is also not in dispute that the parties in the said Petition are also parties in the present application. Lastly, the 1<sup>st</sup> Respondent has jurisdiction under section 67(1) of the Public Private Partnerships Act, 2013 to hear and determine the said Petition. The said section provides as follows:

**(1) “There is established a committee to be known as the Petition Committee which shall consider all petitions and complaints submitted by a private party during the process of tendering and entering into a project agreement under this Act.”**

22. The orders the Applicants seek in **PPP Petition Number 1 of 2019** arise from its request for review of the 2<sup>nd</sup> Respondent’s decision dated 27<sup>th</sup> February 2019, which they seek to be annulled on account of it being irregular, unfair, unprocedural and unlawful. They also seek a review of the 2<sup>nd</sup> Respondent’s Evaluation Report that informed the decision of 27<sup>th</sup> February 2019, or that in the alternative they be declared the Preferred Bidder. It is also not in dispute that in the course of hearing of the said Petition, the Applicants made an application for production of certain documents. The ruling on that application was delivered by the 1<sup>st</sup> Respondent on 18<sup>th</sup> March 2019, wherein it made the following determination:

**“The application by the Petitioner for the production of the requested documents is hereby disallowed at this stage, as it forms the main ground in the Petition, which will be disposed off by the Committee in any event in the next two weeks.”**

23. The issue of production of the documents was therefore not determined by the 1<sup>st</sup> Respondent with finality and on the merits as alleged by the Applicants, but was to be disposed of after the hearing of the Petition. It was therefore an issue that was still pending before the 1<sup>st</sup> Respondent at the time of filing the present application, and it would be premature and would not be efficacious for this Court to grant leave to the Applicants to commence judicial review proceedings on a matter that is still pending decision before a tribunal of competent jurisdiction.

24. The Applicants are in this respect seeking leave to apply for the following orders in the instant application:

**a) An Order of Certiorari do issue to bring into this Honourable Court for the purpose of being quashed the decision contained in the 1<sup>st</sup> Respondent’s Ruling dated 18<sup>th</sup> March 2019 in PPP Petition No. 1 of 2019 declining the application by the Ex parte Applicants’ Consortium for disclosure and production to the Applicants’ Consortium of the Undisclosed Documents relating to the Evaluation in respect of Tender No KeNHA/PPP/1689/2017 which Undisclosed Documents underpin the decision of the 2<sup>nd</sup> Respondent in the Tender;**

**b) 2. An Order of Mandamus do issue to direct the 2<sup>nd</sup> Respondent to disclose and produce to the Applicants’ Consortium under oath the Undisclosed Documents relating to the Evaluation in respect of Tender No KeNHA/PPP/1689/2017 with the reasons which underpin the decision of the 2<sup>nd</sup> Respondent in the Tender as sought by the Applicants’ Consortium in PPP Petition No. 1 of 2019 before any further proceedings are taken in the said Petition;**

**c) In the alternative to prayer (b) above, an Order of Mandamus do issue to direct the 1<sup>st</sup> Respondent to reconsider and review its decision on disclosure of the Undisclosed Documents in PPP Petition No. 1 of 2019 and compelling the 1<sup>st</sup> Respondent to give appropriate directions to the 2<sup>nd</sup> Respondent disclose and produce to the Applicants’ Consortium under oath the Undisclosed Documents relating to the Evaluation in respect of Tender No KeNHA/PPP/1689/2017 with reasons as sought by the Applicants’ Consortium before any further proceedings are taken in PPP Petition No. 1 of 2019.**

25. There is no final and conclusive decision by the 1<sup>st</sup> Respondent as regards the Applicants’ request for documents, against which the

orders sought in the application for leave can have effect. The decision relied upon by the Applicants in this respect in **Republic vs Public Private Partnerships Petition Committee & 3 Others ex parte APM Terminals (supra)** is distinguished on the ground that the refusal by the 1<sup>st</sup> Respondent to order disclosure in that case was a final decision, as it dismissed the Petitioners' request for documents at the interim stage, unlike in the present case where the request was not disposed of, but was pending.

26. Lastly, as the issues raised in the instant application were still pending before the 1<sup>st</sup> Respondent, sections 9(2) (3) and (4) of the Fair Administrative Action Act are therefore operative, as the Applicants are yet to exhaust the alternative review mechanisms, and have not shown any viable exceptional reason why they should be exempted from the proceedings before the 1<sup>st</sup> Respondent. Sections 9(2) (3) and (4) of the Fair Administrative Action Act provide as follows in this regard:

**“(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.**

**(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).**

**(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.”**

27. The 2<sup>nd</sup> Respondent's Preliminary Objection is to this extent therefore merited, and the only outstanding issue is whether this Court should in the circumstances strike out the Applicants' application or keep it alive pending the decision of the 1<sup>st</sup> Respondent in **PPP Petition 1 of 2019**. The requirements of Order 53 of the Civil Procedure Rules as regards applications for leave to commence judicial review require the application to be accompanied by a statement specifying the relief sought and grounds on which it is sought, and the facts relied upon to be verified by affidavits. Given that the nature of the Applicants' case may change depending on the decision made by the 1<sup>st</sup> Respondent, it may be prudent and more orderly for the Applicants to commence fresh proceedings, if they are still desirous of moving this Court for judicial review orders.

28. I accordingly order as follows:

I. The Applicants' Chamber Summons dated 22<sup>nd</sup> March 2019 is hereby struck out, with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

II. The Applicants shall be at liberty to commence fresh judicial review proceedings upon a final decision being made by the 1<sup>st</sup> Respondent in **PPP Petition 1 of 2019**.

29. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 16<sup>TH</sup> DAY OF APRIL 2019**

**P. NYAMWEYA**

**JUDGE**