



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 18 OF 2016

KENYA PORTS AUTHORITY..... APPELLANT

- V E R S U S -

AUTOXPRESS LIMITED RESPONDENT

AND

HAJI MOTORS LIMITED

KINGS WAY TYRES LIMITED.....INTERESTED PARTIES

RULING

- 1) The subject matter of this ruling is the motion dated 8/3/2017 whereof the respondent sought for the order directing the respondent to pay costs of the appeal to be reviewed, set aside and be substituted with an order directing each party to meet its own costs of the appeal. The motion is supported by the affidavit Dipesh Dodhia. When served with the motion, the interested parties filed a notice of preliminary objection dated 4.4.2017 to oppose the application.
- 2) The appellant on the other hand filed grounds of opposition dated 19.4.2017 to oppose the motion. When the motion came up for interpartes hearing, learned counsels recorded a consent order to have the motion disposed of by written submissions.
- 3) I have considered the grounds stated on the face of the motion plus the facts deponed in the supporting affidavit. I have also considered the appellant's grounds of opposition and the interested parties' preliminary objection.
- 4) It is the submission of the respondent that this court should have treated the parties the way the public Procurement Review Board did by directing each party to bear its own costs since the dispute is a Public Interest litigation meant for the public to get value for their money in procurement.
- 5) The interested parties on the other hand have raised a preliminary objection claiming they were not awarded costs hence, the motion is not relevant to them. The appellant has on its part stated that the motion lacks merit in that the same does not fall within the parameters for an application for review. It is argued that the ground put forward is more of a ground of appeal rather than an application for review.
- 6) It is not in dispute that the motion dated 8.3.2017 is an application for review. The principles applicable in an application for review are expressly stated under Section 80 of the Civil Procedure Act

inter alia as follows:

a. Discovery of new and important matter or evidence which despite due diligence was not within the knowledge or could not be produced.

b. Mistake or error apparent on the face of the record.

c. Any sufficient reason.

7) The question is whether or not the motion before this court falls within the provisions of Section 80 of the Civil Procedure Act. It is the submission of the respondent that where a matter is litigated as a Public Interest litigation, each party should bear their own costs. It was pointed out that this court only faulted the Public Procurement Review Board's finding on the basis that the financial evaluation committee imported technical requirements. With respect, I agree that in disputes over public procurement, litigation appear to be made in public interest. However in the dispute before this court, the complaint over procurement was done by the respondent which had an interest in the outcome of the procurement process. It cannot in the circumstances be said that the respondent challenged the procurement process on behalf of the public. Even if the respondent had done so, as a public litigation, the issue touching on costs was not canvassed before this court. In the circumstances of this application, I do not think the motion comes within the purview of Section 80 of the Civil Procedure rules.

8) The ground put forward as a ground for review appears more as a ground for appeal.

9) In the end, I find no merit in the motion. It is dismissed with costs being awarded to the appellant.

Dated, Signed and Delivered in open court this 9th day of March, 2018.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent