



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

JUDICIAL REVIEW NO. 50 OF 2017

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDER OF CERTIORARI

AND

IN THE MATTER OF: THE DECISION MADE BY THE KENYA PORTS AUTHORITY DATED 9TH AUGUST, 2017 TO MAKE AWARDS IN RESPECT TO TENDER NO. KPA/114/2016-17/ADM

AND

IN THE MATTER OF: THE SAID DECISION BY THE KENYA PORTS AUTHORITY FAILING TO ADHERE TO THE PRINCIPLE OF TRANSPARENCY, ACCOUNTABILITY AND CREDIBILITY AS REQUIRED BY ARTICLES 10, 47, 201 AND 227 OF THE CONSTITUTION OF KENYA, 2010 AND ALSO THE PUBLIC PROCUREMENT AND ASSETS DISPOSAL ACT, 2015

AND

IN THE MATTER OF: CONTRAVENTION OF SECTION 88 OF THE PUBLIC PROCUREMENT AND ASSETS DISPOSAL ACT, 2015

BETWEEN

HIGAWA ENTERPRISES LIMITED.....APPLICANT

VERSUS

1. KENYA PORTS AUTHORITY

2. YOBESH OYARO.....RESPONDENTS

AND

1. AUTOMIC ENTERPRISES

2. JASY SOLUTIONS

3. BOKOLA TRADING

4. SINBAD PROJECTS LIMITED

5. ROYALNIC CLEANERS LTD.....INTERESTED PARTIES

RULING

The Application

1. By a Notice of Motion application dated 9th August, 2018 and filed herein on 13th August, 2018 the Applicant prays for an order of injunction pending appeal restraining the Respondents from executing any contracts in respect of Tender Numbers KPA/114/2016-17/MD – Provision of Housekeeping Services (preference group).

2. The said prayer of stay of execution became necessary pursuant to the Ruling delivered herein on 5th July, 2018 which dismissed the Ex parte Applicant's application for Judicial Review orders in the Ex parte Applicant's application dated 26th September, 2017.

3. The application is premised on the grounds:

(a) That the Ex parte Applicant was dissatisfied with the said Ruling and has since filed a notice of appeal against the aforesaid decision and have applied for certified copies of proceedings so that they may pursue an appeal in the court of appeal against the said decision.

(b) That the intended appeal raises fundamental questions of law as per the annexed memorandum of appeal at paragraph 5 of the supporting affidavit.

(c) That as the result of the Ruling delivered on 5/7/2018, the Respondents have requested the successful tenderers to submit their performance bond so that they can execute the contracts.

(d) That there has not been any delay in filing this application.

(e) That in the event the Respondents execute in favour of the successful tenderers the contracts for awards in respect of Tender Numbers KPA/114/2016-17/MO-Provision of Housekeeping services (preference group) before the intended appeal is heard and determined, the same will be rendered nugatory and a total academic exercise.

(f) That this court is under a duty in law to preserve the subject matter of the intended appeal irrespective of whether in the court's view the appeal is devoid of merits. The Ex parte Applicant stand on that right and pleads with the court to uphold the law.

The Response

4. The application is opposed by the Respondents on the ground that the Notice of Motion application dated 26th September, 2017 which was dismissed by this court was a Judicial Review application and that consequently upon the dismissal of the same by this court, this court had no further jurisdiction to grant any more orders in the matter. Pursuant to above argument the Respondents filed Grounds of Opposition on 28th August, 2018 and a Replying Affidavit sworn by Ahmed A. Abdalla on the same date.

The Determination

5. The issue for determination in this application is whether injunction can be granted by this court after the dismissal of prerogative orders of Judicial Review. Under Section 8(3) of the Law Reform Act:

(3) No reform shall be made to any such order, and no pleadings in prohibition shall be allowed, but the order shall be final, subject to the right of appeal therefrom conferred by Section 5 of this section.

The argument, now firmly embedded in judicial practice, is that after a Judicial Review court has dismissed an application for the prerogative orders prayed for therein the court is divested of jurisdiction. By entertaining this application, this court would be reviving the Judicial Review proceedings which it had dismissed. By dismissing the Judicial Review application this court did not thereby grant any positive order in favour of the Respondents which is capable of extension.

6. In the case of **Stanbic Bank Kenya Limited vs. Kenya Revenue Authority Civil Appeal No. 294 of 2007 (200/2007 UR)** the court, had this to say:

“All that the superior court did after hearing the notice of motion was to dismiss the motion with cost to the respondent. Other than an order of costs, the superior court order was negative and could not be executed by either party. That being the case, there is no order the execution of which this court can stay as the superior court did not order any party to do anything or to refrain from doing anything that this court can stay. This view has been taken by this court in many decisions pronounced in the past and recent past. We need not belabor it anymore, but if there be any further need to draw the attention of the legal fraternity to some of those cases, then the recent decision of this court in the case of Western College of Arts and Applied Sciences (Weco) vs. Oranga (1976) KLR 63, where after the predecessor to this court considered a similar application, Law V. P. stated as follows –

“But what is there to be executed under the Judgment the subject of the intended appeal” The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs. In the instant case, the High Court has not ordered any of the parties to do anything or refrain from doing anything or to pay any sum. There is nothing arising out of the High court Judgment for this court, in an application for stay, to ensure or to restrain by injunction.”

And on his part, Mustafa J.A. who was a member of that bench stated:

“The temporary injunction asked for by the applicant is extraneous to a stay of execution as it does not relate to what the High Court ordered to be done or not to be done and this court has no jurisdiction to entertain it.”

“The superior court has not therefore ordered any of the parties to do anything or refrain from doing anything. There is therefore no positive and enforceable order made by the superior court which can be the subject matter of the application for injunction or stay. Prima facie, the superior court has not ordered any party to sign the lease. The application for injunction or stay is apparently extraneous to the orders made by the superior court.”

Likewise, in this case, the superior court did not order the respondent to collect the disputed amounts, nor did it order the applicant to pay that money. All it did was to dismiss the Judicial Review application for certiorari and prohibition. There is therefore no positive order it made that can be stayed even if we were minded to read the third prayer of the application before us to include prayer for stay of execution or for an order of status quo ante which we cannot do.”

7. Musinga J. as he then was, stated in **Republic vs. District Land Registrar Nandi & Another, ex parte Kiprono Tegerei & Another [2005] eKLR** that:

“...it is common knowledge that under Order LIII (53) the only remedy that can be granted are orders of certiorari, mandamus, and prohibition. Injunction cannot be sought in a matter commenced as a Judicial Review.”

8. From the foregoing it is the finding of the court that it has no jurisdiction to grant an injunction in form of a stay in this matter and that the application under consideration lacks merit and is dismissed with costs to the Respondents.

Dated, Signed and Delivered at Mombasa this 24th day of October, 2018.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Gikandi for Applicant

Mr. Cheruiyot for 1st and 2nd Respondents

Mr. Mutisya holding brief Magolo for Interested Parties

Mr. Kaunda Court Assistant