



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW NO. 622 OF 2016

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

IN THE MATTER OF THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT, 2015

AND

IN THE MATTER OF PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

AND

**IN THE MATTER OF APPLICATION NO. 98 OF 2016 AND 2ND DECEMBER, 2016
CONCERNING TENDER NO. MOD/422(01103) 2016/2017 CONCERNING SUPPLY OF FRESH
MEAT (BEEF) ON BONE TO ELDORET BASED UNITS**

BETWEEN

**ADAN OSMAN GODANA T/A ELDORET STANDARD BUTCHERY.....EXPARTE
APPLICANT**

AND

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD1ST
RESPONDENT**

**MINISTRY OF DEFENCE2ND
RESPONDENT**

**JOSEPH CHESIRE CHEMUNA T/A AVENUE BUTCHERYINTERESTED
PARTY/APPLICANT**

RULING ON STAY

1. On 13th December this court granted to the applicant Adan Osman Godana T/A Eldoret Standard Butchery, leave to institute Judicial Review proceedings as sought in prayers No. 2 and 3 of his chamber summons dated 3rd December 2016. The court also directed that the substantive motion be filed and served within 21 days from the date of leave.

2. The chamber summons also sought an order that the leave granted do operate as stay of enforcement of the decision of the Public Procurement Administrative Review Board (PPARB) which

directed the procuring entity (PE), Ministry of Defence, the 2nd respondent herein to proceed to procure for supply of fresh beef on bone to Eldoret based units, as per the tender No. MOD 423(01011)2016 -2017 by the interested party Joseph Chesire T/A Avenue Butchery.

3. The court did direct that the prayer for stay of enforcement of the decision by the Review Board be heard interpartes.

4. On 19th December 2016 all parties appeared before me after service of the chamber summons and I did grant 10 days to the respondents and the interested party to file replying affidavits. I also set the hearing date for 25th January 2017 while ordering that status quo obtaining as at 13th December 2016 do remain.

5. Mr Okara counsel for the interested party had informed the court that the status quo was that it is the interested party who was supplying beef to the recruits which position was confirmed by Mr Munene counsel for the respondents.

6. Regrettably, the court was not sitting on 25th January 2017 with notice to the parties that the court was involved in the training of judges in Electoral Dispute Resolution(EDR) hence the matter was rescheduled for mention on 30th January 2017 on which date I gave a hearing date of 20th February 2017.

7. The applicant's main prayers in the chamber summons sought for leave to apply for an order of **certiorari** removing to this court for purpose of being quashed the decision of the Public Procurement Administrative Review Board (PPARB) made on 7th December 2016 in application/Request for Review case No. 98/2016 of 2nd December 2016; That the leave be granted to the applicant to apply for an order of **prohibition** to prohibit and restrain the second respondent from acting upon the decision made by the first respondent made on 7th December 2016 and or signing any contract with any persons or entity other than the applicant in respect of the tender in question; That the grant of leave do operate as stay of the decision, directives and acts of the 1st respondent until determination of the application herein or until the court orders otherwise.

8. On the ground in support of the prayer for stay which is grounds No. (g) the applicant averred that if stay is not granted, there is a grave danger that the second respondent will proceed to act and or enforce the unlawful decision as made by the 1st respondent on 7th December 2016 with a grave danger that the applicant stands to suffer injustice and irreparable loss and damage and with a real danger that the proceedings herein might otherwise be rendered superfluous; and that the application is made bona fides without delay and in the best interest of justice and fairness.

9. The main challenge to the Review Board's decision is that the Board did not consider relevant factors in failing to consider the legality of the bid as tendered by the interested party especially in light of the documents forming part of the request for review as a result the applicant suffered prejudice.

10. In the replying affidavit filed by Joseph Chesire Chemuna and Phillip Kipketer Kosgei T/A Avenue Butchery and sworn jointly on 28th December 2016, it was deposed, among others that the challenge to the tender process was made vide review application No. 72/2016 dated 8th September 2016 which decision was in favour of the interested party on 30th September 2016, and that on 16th November 2016 the applicant herein filed a formal request for review dated 16th November 2016 and amended and filed on 2nd December 2016 and vide a ruling of 7th December 2016, the Review Board dismissed the application (request) for review and directed the 2nd respondent (PE) to award the tender to the interested party lowest bidder hence the notification of award on 10th November 2016 and an acknowledgment on 30th November 2016.

11. That the mandatory 14 days of stay started running from 30th September 2016 till 14th October

2016 hence the request for review was filed after lapse of 14 days instead of moving to the High Court for review.

12. Further, that illegality does not arise since the ex parte applicant was notified but opted to file a request for review.

13. In his submissions in support of the application for stay, counsel for the applicant, Mr Masika submitted that unto 7th December 2016 the applicant supplied fresh beef on bone to the 2nd respondent (PE) and that on 19th December 2016 the court directed status quo obtaining as at 13th December 2016 to remain for supply the (PE) with meat on bone without lawful basis. Reliance was placed on JR No. 658/2016 on the principles to be met in a case of this nature. In counsel's view, the grant of stay is discretionary but that there is grave danger that these proceedings might be rendered nugatory if there is no stay as the 2nd respondent (PE) will sign a contract with the interested party if there is no safeguard.

14. In opposition Mr Okara counsel for the interested party submitted relying on his client's replying affidavit filed on 29th December 2016 contending that there is already a contract between the interested party and the (PE); That the interested party has invested a lot in that business since he was lowest bidder hence the tender was lawfully awarded to him. Further, that if stay is granted, it will paralyze operations of the recruits; That the decision of the board was judicious and that the law was followed as required.

15. Counsel for the interested party urged the court not to grant stay since the decision which was being challenged had already been effected hence the stay orders were overtaken by events.

16. Mr Okara filed an authority later in the day being **Jason Ngumba Kagu & 2 Others V Intra Africa Assurance Company Ltd (2014) e KLR** on the possibility of substantial loss occurring if stay is granted and balancing the act between the right of the respondent to fruits of his judgment and the right of the applicant on the prospects of the appeal (as stipulated in Order 42 Rule 6 of the Civil Procedure Rules. He also relied on **James Wangalwa & Another vs Agnes Naliaka Cheseto[2012] e KLR** where Gikonyo J reiterated the holding that the applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal and what substantial loss would entail.

17. The respondents did not respond to the application.

18. In a rejoinder, Mr Masika counsel for the applicant submitted that the decision of the Review Board was made on 7th December 2016 and that therefore no contract was expected to have been signed and if there was one signed then the interested party was admitting an illegality and in violation of Section 175 of the Act which stipulates an automatic stay of that decision and which the interested party and the PE were circumventing. He added that there was no prejudice since the applicant had been supplying meat.

19. The 1st and 2nd respondent's counsel, Mr Kevin Odhiambo sought leave of court to be excused from the proceedings to attend to other official matters as his clients did not wish to take any position in the matter for stay and the leave was granted excusing Mr Odhiambo from active participation in the application for stay.

DETERMINATION

20. I have carefully considered the application for stay sought by the ex parte applicant as supported by the statutory statement, grounds therein and the verifying affidavit. I have also considered the interested party's replying affidavit and both parties counsel's oral submissions in support of their respective clients positions.

21. The only issue for determination is whether the stay sought is merited. The scope and purpose of stay in Judicial Review was ably stated by Maraga J (as he then was) in **Taib A. Taib V The Minister for Local Government & Others Mombasa HC Miscellaneous Application 158 of 2006** wherein the learned judge expressed himself thus *inter alia*:

“As injunctions are not available against the government and public officers, stay is a very important aspect of the judicial review jurisdiction. In Judicial Review applications, the court should always ensure that the ex parte applicant’s application is not rendered nugatory by the acts of the respondent during the pendency of the application and therefore where the order is efficacious the court should not hesitate to grant it though it must never be forgotten that the stay orders are discretionary and their scope and purpose is limited....”

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 encompassed 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. A stay order framed in such a way as to compel the respondents to reinstate order framed in such a way as to compel the respondents to reinstate the applicant before hearing the respondent cannot be granted.”

22. In **R (H) Ashworth Hospital Authority [2003] WLR 127** page 138, Lord Dyson held:

“The purpose of stay in a Judicial Review is clear. It is to suspend the “proceedings” that are under challenge pending the determination of the challenge pending the determination of the challenge. It preserves the status quo. This will aid the Judicial Review process and make it more effective. It will ensure, so far as possible, that, if a party is ultimately successful in his challenge. He will not be denied the full benefit of his success. In Aron, Glidewell LJ said that the phrase “stay of proceedings” must be given the wide interpretation so as to enhance the effectiveness of the Judicial Review jurisdiction. A narrow interpretation, such as that which appealed to the Privy Council in vehicle and supplies, would appear to deny jurisdiction even in case A. That would indeed be regrettable and, if correct, would expose a serious shortcoming in the armory of powers available to the court when granting permission to apply for judicial review....”

This it is common ground that “proceedings” includes not only the process leading up to the making of the decision but decision itself. The administrative court routinely grants a stay to prevent the implementation of a decision that has been made but not yet carried into effect, or fully carried into effect, or fully carried into effect.”

23. What emerges from the above jurisprudence is that stay in Judicial Review is in the discretion of the court and that where the stay sought is to compel performance of a duty then the court will not grant stay. Further, that stay is not a matter of course, and therefore it is upon the applicant to prove to the satisfaction of the court that there are exceptional circumstances warranting a stay of implementation of the decision of the administrative body.

24. Order 53 Rule 1 of the Civil Procedure Rules gives to the court granting leave to order that such leave shall operate as stay, but only where the substantive orders sought are certiorari and prohibition, not mandamus.

25. In **Econet Wireless Ltd V Econet wireless Nigeria Ltd & Another [FHC/KD/CS/208]** the Nigerian High Court at Kaduna held:

“The decision to grant stay involves a consideration of some collateral circumstances and

perhaps in some cases inherent matter which may, unless the order of stay is granted, destroy the subject matter or foist upon the court....a situation of complete hopelessness or render nugatory any order of the court to paralyze in one way or another, the exercise by the litigant of his constitutional right or generally provide a situation in which whatever happens to the case, and in particular even if the applicant succeeds, there would be no return to the status quo.”

26. Thus, parties who have invited the court to adjudicate on a matter which they are seriously disputing over ought to not to create a situation whereby the decision to be made by the court would be of no use, or “foist upon the court a situation of complete helplessness or render nugatory any judgment or order.

27. where the decision sought to be quashed has been implemented, however, the leave granted ought not to operate as stay since where the decision has been enforced, stay is no longer efficacious as there may be nothing remaining to be stayed. It is therefore only in cases where the decision has not been implemented or where the same is in the course of implementation that stay may be granted, as was held in **George Phillip Wekulo vs the Law Society of Kenya & Another KAKAMEGA HC Miscellaneous Application 29/2005**. It therefore follows that even where leave is granted, as was held in **Jared B. Kangwana vs Attorney General Nairobi HCC 446/95**, in considering whether that leave ought to operate as stay, the court has to be careful in what it states lest it touch on the merits of the main application for Judicial Review and that where the application raises important points deserving determination by way of Judicial Review it cannot be said to be frivolous.

28. It is for that reason that courts have over time held that it is only where the imminent outcome of the decision challenged is likely to render the success of the Judicial Review application nugatory or an academic exercise that the court would stay the said proceedings, the strength or otherwise of the applicant’s case notwithstanding, in order not to render the success of the Judicial Review nugatory (see **Re Meridian Medical Centre Nairobi HC Application No. 363/2013**).

29. In some instances, stay of the decision may amount to temporarily reversing the decision in exceptional circumstances, especially where the respondent’s actions are intended to frustrate the outcome of the proceedings or are illegal.

30. In the present case, the merits or success of the intended Judicial Review proceedings notwithstanding, it is not disputed that the decision of the Review Board was rendered on 7th December 2016, and that these proceedings for leave were commenced on 13th December 2016 within 6 days of the decision and leave to apply was granted on the same day of 13th December 2016 for the applicant to commence Judicial Review proceedings within 21 days which lapsed on 3rd January 2017.

31. The notice of motion was filed on 11th January 2017. However, in view of the provisions of Order 50 Rule 4 of the Civil Procedure Rules, the Notice of motion was filed in time. Order 50 Rule 4 of the Civil Procedure Rules provides that:

“50(4) except where otherwise directed by a judge for reasons to be recorded in writing, the period between the 21st December, in any year and the thirtieth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending delivering or filing of any pleading or the doing of any other act:

Provided that this rule shall not apply to any application in respect of a temporary injunction.”

32. Thus, the notice of motion was filed within 21 days excluding the days that Order 50 Rule 4 of the Civil Procedure Rules provide, that they should be excluded.

33. In the replying affidavit sworn and filed on 29th December 2016 by the interested party it is acknowledged that the decision which is subject of these proceedings was made on 7th December 2016 by the Review Board, dismissing the applicant's application for review, and directing the 2nd respondent Procuring Entity to award the tender to the interested party who was the lowest tenderer.

34. The interested party claims that 14 days started running from 30th September 2016 till 14th October 2016 but that the applicant filed a request for review after lapse of 14 days instead of moving the High Court for an appeal.

35. In paragraph (c) of the facts relied on by the applicant, it is stated that previous request for review No. 72/2016 of 9th September 2016 whose decision was rendered on 30th September 2016 the Review Board nullified the entire tendering process and directed the Procuring Entity to carry out fresh technical and Financial Evaluation of all the tenders and award the lowest evaluated bidder within 7 days of the date of the decision and that the Procuring Entity did not adhere to the above decision of 30th September 2016 hence these proceedings.

36. Although the applicant in his affidavit does not clearly state how these proceedings came about, the decision of the Review Board of 7th December 2016 is clear and the Review Board at page 15 of its decision only determined one issue, of whether its decision in **ARB No. 72/2016 Avenue Butchery vs MOD** was implemented by the procuring entity as ordered.

37. I have also carefully considered the facts relied on by the exparte applicant and it is alleged that the decision of the respondent was tainted with illegality. It is also claimed that the Review Board's conduct exhibited bias and partiality; among other accusations contained in the grounds.

38. In the submissions by the interested party, it is contended that the contract has already been performed between the interested party and the procuring entity hence there is nothing to be stayed. It is also submitted that from 7th December 2016 the interested party has been supplying beef to the Procuring Entity and if stay is granted, it will disrupt the supply to the recruits.

39. No copy of the signed contract was annexed to the replying affidavit. However, even if there was evidence of a signed contract, the question is whether that contract is valid in law. The answer lies in Section 175(1) of the Act which stipulates that *a person aggrieved by a decision made by the Review Board may seek Judicial Review by the High Court within 14 days from the date of the Review Board's decision, failure to which the decision of the Review Board shall be final and binding to both parties.*"

40. From the above provision, it is clear that the decision of the Review Board only becomes binding upon the parties as final if no Judicial Review is filed to the High Court within 14 days of the date of the decision.

41. It therefore follows that the law does not contemplate that any contract would be entered into between the Procuring Entity and the 'successful' tenderer before elapse of 14 days of the date of the decision by Review Board. To do so would not doubt be in violation of Section 175(1) of the Act, which it has been held, not once or twice, operates as an automatic stay of any action by the Procuring Entity until the elapse of the 14 days or until the court gives directions as to stay.

42. In this case, there is open admission of violation of that law which this court cannot sanitize. There was no reason or at all to rush to violate the law since the record is clear that the Procuring Entity was receiving supplies of meat from the applicant prior to 7th December 2016 hence it would not be disrupted or at all, for the 14 days stipulated in Section 175(1) of the Act.

43. In my humble view, that impunity on the part of the Procuring Entity must be halted by granting a stay and directing that status quo prevailing prior to the decision of 7th December 2016 when the Review Board made its decision shall be reverted to pending hearing and determination of these

Judicial Review proceedings as filed.

44. A party cannot be allowed to conduct themselves in a manner as to Circumvent the clear provisions of the law or to frustrate the judicial process which is in motion or foist upon the court a situation of hopelessness contrary to the stipulations under the law and get away with it.

45. In my humble view, the interested party and the 2nd respondent shall not suffer any prejudice if stay is granted as they were in an illegal relationship which this court has inherent power to nullify and which I have hereto declared a nullity hence they cannot be allowed to continue benefiting from an illegal act.

46. I am fortified by several decisions including **JR 371 of 2016 Republic vs Public Procurement Administrative Review Board Exparte Syner Chemie Limited, and in Republic vs Public Procurement Administrative Review Board Exparte Noble Gases International Ltd [2013] e KLR** where the court was emphatic, concerning Section 100 of the repealed 2005 Act which is in parimateria with Section 175(1) of the current 2015 Act and where it was observed that:

“ In my view, where Judicial Review proceedings are commenced within 14 days from the date of the respondent’s decision the said decision is neither final nor binding and hence ought not to be implemented. Thus, there is an automatic stay under Order 53 of the Civil Procedure Rules. The 14 days is a window period availed to serve the purpose of limiting the time frame within which a review against the Board’s decision can be lodged in the High Court for purpose of expediency and conclusiveness of the Board’s decision as these activities are time bound and the procurement process ought not to be held hostage to indefinite proceedings.....

The decision of the Board after the application for review has been filed remains subject to the court’s directions and decision. This provision answers the core question in contention, that is whether the filing of Judicial Review proceedings before the High Court within the prescribed period of 14 days acts as an automatic stay. I take the position that Section 100 of the Act implies that the Board’s decision is to be kept in abeyance until the court makes its final decision. The use of the term “shall take effect” discloses the legislative purposes and intent.

For all practical purposes, the Board’s decision was ‘frozen’ so to speak until such a time as the High Court issued an order of Judicial Review contemplated under the Section over the decision or after the lapse of the 14 days period, whichever comes first. I find and hold that provision a statutory stay.”

47. From the foregoing, it is clear that the Procuring Entity cannot enter into any binding contract with a tenderer within the 1st 14 days of the decision of the Review Board.

48. In the instant case, although the interested party relied on two authorities which espouse the principles of stay pending appeal under Order 42 Rule 6 of the Civil Procedure Rules. Regrettably, those principles though relevant are not applicable to Judicial Review proceedings. I have set out the applicable principles and in the circumstances of this case, without going into the merits of the Judicial Review proceedings commenced, I am satisfied that a stay is necessary in order to preserve the status quo prevailing as at 7th December 2016 and before the decision of the Review Board was made so as not to render the applicant a pious explorer in the judicial process, should his application succeed, and or not to foist in the court a situation of hopelessness or render its decision an academic exercise and therefore nugatory.

49. Accordingly, the order for stay as sought in prayer 4 of the chamber summons dated 9th December 2016 be and is hereby allowed as prayed until these judicial review proceedings are heard and determined.

50. Costs shall be in the cause.

Dated, signed and delivered at Nairobi this 28th day of February 2017.

R.E. ABURILI

JUDGE

In the presence of

Mr Wachira h/b for Mr Langat & Mr Okara for interested parties

Mr Were h/b for Masika for the applicant

CA: George