



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 BOARD.....1ST
RESPONDENT**

MINISTRY OF DEFENCE.....2ND RESPONDENT

**JOSEPH CHESIRE CHEMUNA T/A AVENUE BUTCHERY....INTERESTED
PARTY/APPLICANT**

RULING ON REVIEW

1. On 28th February 2017 this court delivered a ruling on the exparte applicant's application by way of chamber summons dated 3rd December 2016 allowing the prayer that the leave granted do apply for Judicial Review orders on 13th December 2016 be and do operate as stay of enforcement or

implementation of the award of a tender for supply of fresh meat on bone between the procuring Entity Ministry of Defence and the interested parties Joseph Chesire Chemuna T/A Avenue Butchery.

2. More specifically, the court, after noting that there was an allegation that a contract of supply had been signed between the Procurement Entity and the interested party herein on 7th December 2016, made a specific finding that such contract was illegal and in violation of Section 175 of the Public Procurement and Asset Disposal Act, 2015 for reasons that the Section provides for an automatic statutory stay of implementation of any decision for 14 days from date of the award to allow for any challenge of the decision of the Review Board.

3. The court also ordered that there would be a stay 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 the Judicial Review application be successful; and or not to foist in the court a situation of hopelessness or render its decision an academic exercise and therefore nugatory.

4. The order for stay was extracted and issued on 2nd March 2017 by the honourable Deputy Registrar.

5. On 1st March 2017, the interested party herein JOSEPH CHESIRE CHEMUNA T/A AVENUE BUTCHERY filed a notice of motion dated the same day, pursuant to the provisions of Article 159(2) (d) of the Constitution of Kenya 2010, Section 3A, 63(e), Order 45 Rule 1 of the Civil Procedure Rules and Section 1A,1B, 3 and 3A of the Civil Procedure Act Cap 21 Laws of Kenya seeking for orders:-

a. That this matter be certified as urgent and service thereof dispensed owing to the urgency, nature and circumstances of the case;

b. That pending the hearing and determination of substantive motion, the orders of status quo as at 7th December 2016 over tender No. MOD/423(01103) 2016/2017 concerning the supply of fresh meat (beef) on bone to Eldoret Based Units made by this court on 28th February 2017 be reviewed, vacated and or set aside;

c. That the applicant/interested party herein be allowed to continue supplying the recruits in accordance with the tender No.MOD/423(01103) 2016/2017 concerning the supply of fresh meat on bone to Eldoret Based Units and for avoidance of doubt until the expiry and full performance of the contract dated 7th December 2016.

d. That costs of the application be provided for.

6. The application which was supported by the affidavit of Phillip Kosgei & Joseph Chesire jointly sworn on 1st March 2017 was predicated on the grounds that:

a. The subject of urgency is that the applicant has learnt of a recent court ruling made on 28th February 2017 touching on a tender known as Tender No, MOD/423(011 03) 2016/2017 concerning the supply of fresh meat (beef) on bone to Eldoret Based Units.

b. The court gave orders, in the absence of factual information concerning the expiry of the contract of the exparte applicant which expired in November 2016.

c. If this factual information was brought to the knowledge of the court, then the court would have arrived at a different outcome other than the order of 28th February 2017.

d. If the court would have been informed of the new facts and or evidence that there was an

expired contract as at November, 2016 against the then supplier, then the court would have exercised judicial restraint in exercising its discretion in granting stay or any adverse order against the applicant/interested party.

e. The status quo as at 7th December 2016 was that the contract of the exparte applicant had expired and that the contract to the new supplier/interested party was signed, and the earlier decision of 30th September 2016 was upheld by the 1st respondent and complied with by the 2nd respondent.

f. The law has been settled instances where the court is invited to exercise its discretionary powers, and in such circumstances, it behooves a court to exercise its discretion judiciously and in an independent and fair manner so as not to occasion injustice.

g. The application has been brought without undue delay, one day after the ruling.

h. If the ruling of 28th February 2017 and order is not reviewed urgently, there is a present danger and a real risk the applicant is going to suffer a major loss, delay and big financial setback, not only on the applicant but untold prejudice will also be visited upon the 2nd respondent who why find it hard to accept an invoice and pay or settle bills of the exparte applicant whose contract has expired by operation of the law.

i. The applicant is likely to lose a lot of millions if the orders issued on 28th February, 2017 are not stayed and reviewed and or vacated, in the sense that the applicant has invested in buying and fattening animals to the tune of over 20 million in a bid to realize the contract signed on 7th February, 2017 with the 2nd respondent.

j. Justice and interests of justice would have been properly served if the court would have seen the adverse effects of the order and ruling made on 28th February, 2017 was that the applicant/interested party's right to act under the contract would be stopped yet it has a valid contract signed on 7th December, 2016. This is itself was enough for the court to exercise judicial restraint.(sic).

7. The application is further supported by the affidavit sworn by Joseph Chesire Chemuna and Phillip Kosgei T/A Avenue Butchery, reiterating in their depositions, the grounds in support of the motion and maintaining that the orders of 28th February 2017 unless vacated will cause hardship to them and the Procuring Entity since they have a valid contract entered into on 7th December 2016 and that the contract between the exparte applicant and the Procuring Entity expired on 31st December 2016, while urging the court to exercise judicial restraint.

8. To the affidavit is annexed a copy of letter of notification of the award for supply of fresh meat(beef) on bone to Eldoret Based Units through restricted tendering dated 10th November 2016; a contract dated 7th December 2016 between the procuring entity-MOD and the interested party herein Avenue Butchery. The contract, clause 2:1 thereof stipulates that the effective date of the contract is 8th December 2016.

9. The respondents and exparte applicant did not file any responses to the notice of motion. Parties canvassed the application orally with Mr Langat appearing and also holding brief for Mr Okara for the interested party and Mr Odhiambo held brief for Ms Maina for the 1st respondent. Mr Were held brief for Mr Masika for the exparte applicant.

10. The respondents did not submit as they wished not to take any position in the matter whereas Mr Were on behalf of the exparte applicant was allowed to address the court on points of law only as they had not filed a formal response in writing.

11. According to Mr Lagat who fully adopted the grounds and supporting affidavit of the interested party/applicant, there are new facts and evidence in the form of a letter of notification and a signed contract binding the interested party and the procuring entity and that had that evidence been availed to the court at the time of hearing of the application and prayer for stay, the court would not have ordered for a stay. It was submitted that the new information is cardinal and that unless review of the ruling of 28th February 2017 is made, the rights of the interested party applicant stand prejudiced.

12. According to Mr Lagat, the notification letter was made 41 days after the ruling of Review Board delivered on 30th September 2016. That a promise was made to his client that they would receive a contract on notice from the MOD(PE) and that as at 10th December 2016 there was no stop order against the MOD contracting with the interested party hence the contract of 7th December 2016. It was further submitted that the applicant applied for review of the decision of the Tender Committee 41 days later after the award had been made.

13. That the status quo as at 7th December 2016 is that there was no existing contract and if the order is adhered to as it is, there will be a crisis as the (Procuring Entity) will not have anybody to supply meat to its Eldoret Based Units.

14. Further, that the contract for supply of meat between the Procuring Entity and the exparte applicant had effectively expired on 30th November 2016 hence the applicant (Interested Party) has a valid contract which took effect on 8th December 2016 and that having been the lowest tenderer, the Interested Party should be allowed to supply the meat to the Procuring Entity to avoid a crisis to the recruits. That the exparte applicant having wasted their time at the Review Board, they should not be allowed to enjoy any stay orders.

15. In response, Mr Were for the exparte applicant submitted in opposition to the notice of motion that the application is defective, is predicated on wrong provisions of the law; and that on the material that was placed before the court, the court deemed it fit to grant stay by declining to sanitize the violation of the law.

16. It was also submitted that the impugned decision was made on 7th December 2016 and that the alleged valid contract was signed on the same day without granting the exparte applicant time to challenge the decision contrary to Section 175 of the Public Procurement and Asset Disposal Act, 2015.

17. It was submitted that the applicant herein was deceiving the court that as at 7th December 2016 there was no supplier of beef the (Procuring Entity) yet it was the exparte applicant who was supplying beef to the recruits.

18. Mr Were concluded that the interested party applicant cannot seek sympathy from the court to violate the law.

19. In a rejoinder, Mr Lagat counsel for the interested party/applicant submitted that there was no existing contract in law as at 7th December 2016 as the contract which the exparte applicant had with the Procuring Entity expired on 30th November 2016 by effluxion of time hence the exparte applicant's claim is not supported in law.

Determination

20. I have considered the applicant/interested party's notice of motion, the grounds, supporting affidavit and counsel's submissions for and against the application .

21. In Kenya, the substantive law relating to review of the court's own order or judgment is Section 80 of the Civil Procedure Act whereas the procedural law is Order 45 of the Civil Procedure Rules.

22. Although the *ex parte* applicant attempted to submit that the court exercising Judicial Review jurisdiction has no jurisdiction or power to review its own orders/decision and that the applicant herein should have appealed the ruling of 28th February 2017 instead of applying for review, as the Law Reform Act does not provide for review of the courts own decision unlike the Civil Procedure Act and Rules; and whereas I agree that the court's jurisdiction in Judicial Review matters is donated by Section 8 and 9 of the Law Reform Act, which jurisdiction is exercised through Order 53 of the Civil Procedure Rules; and whereas Section 8 and 9 of the Law Reform Act do not provide for review of the court's own orders in Judicial Review; there are two conflicting pronouncements/ decisions from the Court of Appeal on this issue.

23. In **Biren Amritlal Shah & Another Vs Republic and 3 Others CA No. 186/2004[2013] e KLR** the court held that in view of the provision of Section 8(3) and 8(5) of the Law Reform Act, the High Court did not have jurisdiction to review its previous Judicial Review orders. But in an earlier decision in **Nakumatt Holdings Limited V Commissioner of Value added Tax[2011] e KLR**, the same Court of Appeal had made a different decision and held that the High Court had residual power to correct its own mistake in the exercise of its inherent jurisdiction where such a mistake is remediable by the court. The court stated:

“ Mr Ontweka for the respondents in his submissions to us, seemed to suggest that where a law is silent on whether review is permissible, the courts must decline jurisdiction where a review is sought. While we agree with him that Judicial Review is a special jurisdiction, we do not agree that in clear cases, courts should nonetheless fold their hands and decline jurisdiction. The process of review is intended to obviate hardship and injustice to a party who is otherwise not to blame for the circumstances he finds himself in. This court in the earlier case we cited of Aga Khan Education Services Kenya V Republic (supra) expressed the view that review jurisdiction in cases as the present one, should be exercised sparingly and in very clear cut cases.”

24. Odunga J in **Republic Vs Anti Counterfeit Agency & 2 Others ex parte Surgipharm Ltd and in Republic vs Cabinet Secretary for Transport & Infrastructure & 6 Others** followed the above Court of Appeal's latter (2011) decision in the Nakumatt Holding Ltd case and held inter alia, that this court in the exercise of its inherent powers had jurisdiction to grant order reviewing or setting aside Judicial Review orders.

25. I am in a total agreement with the Nakumatt Holdings decision as cited by Odunga J and add that the inherent jurisdiction of the court is not dependent on statutory provisions, it is residual power which the court exercises to ensure that the ends of justice are met in every case or to prevent abuse its process. It is that inherent power which the court will invoke to administer substantive justice in the adjudication of disputes as stipulated in the new constitutional dispensation.

26. Turning to the orders being sought in this case for review of its orders of stay issued on 28th February 2017 and setting aside the same to allow the interested party to continue supplying meat to the procuring entity on the grounds that this court made the orders of 28th February 2017 without factual information concerning the expiry of the contract of the *ex parte* applicant which expired on 30th November 2016; and that had that information been availed to the court then it would have arrived at a different decision owing to the new facts- It is clear that what the interested party is saying is that this court should vacate its orders of 28th February 2017 because it was made *per incuriam*, and that unless the said order is set aside and or reviewed, the interested party shall suffer great injustice and prejudice as it has a valid contract with the Procuring Entity and that as at 7th December 2016 when the Review Board's decision was made, there was nobody supplying meat to the recruits until when the new contract dated 7/12/2016 with the Procuring Entity was signed.

27. Further, that the *ex parte* applicant's contract had expired on 30th November 2016 hence there was nothing for them to lose as opposed to the interested party who had invested heavily in

purchasing and fattening of animals for meat Supply to the Procuring Entity; and that the Procuring Entity will not pay for supplies from the exparte applicant without a valid contract.

28. Examining the Ruling of 28th February 2017 which is sought to be reviewed vis avis the so called new facts or information which is a letter of notification of the award dated 10th November 2016 and a contract signed on 7th December 2016 commencing 8th December 2016 between the interested party and the procuring entity, I note that at paragraph 14 of the said ruling, the court clearly captured the submissions of the interested party's counsel relying on the Interested Party's replying affidavit filed in court on 29th December 2016 contending that a stay would not be viable as the interested party and the Procuring Entity had already signed a binding contract for supply of meat.

29. Obviously, although the contract was initially not annexed to that reply, there was a deposition and from submissions of its existence and as it has not been explained why the contract was never annexed to the reply, this court finds it hard to accept the claim that there is any new evidence which could not have been availed to the court at the material time of the hearing of the application for leave and stay.

30. In addition, the court in granting stay was clear that despite the disclosure of the existence of that contract, the said contract was illegal and in violation of the automatic statutory stay provided for under Section 175(1) of the Public Procurement Administrative Disposal Act, 2015 which stipulates that unless the judicial review is lodged within 14 days from the date of the decision of the Review Board, the decision of the Review Board is final and binding on the parties.

31. In this case, the parties were all in agreement that the decision of the Review Board was made on 7th December 2016. That being the case, I maintain that a contract entered into the same day is illegal and this court having pronounced itself on that issue of illegality of the contract of 7th December 2016, cannot be called upon to state otherwise by sitting on its own appeal. In my view, only an appellate court can reverse my decision on that issue of illegality of the material contract.

32. Further, the issue was canvassed comprehensively by both parties to the application for leave and stay and my ruling of 28th February 2017 captured the issue very well hence it is not a new matter or information.

33. Further, a letter of notification of an award is not a contract.

34. The applicant's counsel did state in his submissions that there was no meat supply to the Procuring Entity between 30th November 2016 and 7th December 2016 because the contract with the exparte applicant had expired on 30th November, 2016. That may be so but there was no evidence as to where the Procuring Entity was getting its meat supplies during that period which I can call the transitional period.

35. The Procuring Entity chose to remain a silent listener to the conversation between the exparte applicant and the interested party in this case as if waiting for this court's decision whichever way it goes.

36. It cannot, therefore be said on its behalf by the interested party that there will be a crisis at the Eldoret based recruits base if the interested party is not allowed to supply the meat, in view of the fact that the procuring entity and the interested party never said that between 30th November 2016 and 7th December 2016 they had any valid contract of supply.

37. The position does not change by re annexing the letter of notification of the award as it is the same letter dated 10th November 2016 which was annexed to the interested party's replying affidavit sworn on 18th December 2016 at paragraph 7 as annexure exhibit PKK4 and the next document attached thereto is a letter of acknowledgment of notification letter of award of the tender. It is dated 30th

November 2016 written by the Interested Party addressed to the Permanent Secretary Ministry of Defence. It therefore follows that indeed, there is no new evidence or matter or error apparent on the face of the record or sufficient reason or cause to warrant a review of the ruling of this court made on 28th February 2017.

38. In addition, a letter of notification of the award does not constitute a contract. On the face of the said letter is clearly written: "Kindly note that this is only a notification of offer and an Order"

39. That being the case, the Interested Party has to wait until a contract is signed before making any supplies. But because of the legal challenge to the award, the Interested Party never acknowledged notification until 30th November 2016 the same day it is alleged the contract between the exparte applicant and the Procuring Entity lapsed. And the parties waited until after the decision of the Review Board was pronounced then they quickly signed a contract of supply on the same day of the decision which this court has pronounced to be an illegal contractual act and it remains so, whatever the circumstances, and until this court pronounces itself on the merits of the substantive notice of motion, the status quo prevailing before 7th December 2016 and as at that date shall prevail.

40. The exparte applicant maintained in the application for stay that it continued supplying meat up to 7th December 2016 the date of the decision of the Review Board. If the contract ended on 30th November 2016 the Procuring Entity has not told the court why it was still in association with the exparte applicant.

41. Where there is challenge to the legal process, a stay is necessary and status quo should be maintained, where appropriate, for good administration and in order not to render the success of the Judicial Review nugatory. This is not to presume that the Judicial Review application will be successful but that 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, like in the present case, and this court would not sit and sanitize an illegal act.

42. In my humble view, the stay in public procurement processes if granted by the court cannot be an illegal stay as Order 53 (1) of the Civil Procedure Rules contemplates a stay. In most circumstances, by the time the parties are wrangling in court, the previous contracts lapse. That being the case, parties especially the Procuring Entity cannot be left in a state of hopelessness as a stay contemplates status quo prior to the decision of the Review Board to continue until the Judicial Review proceedings are heard and determined expeditiously.

43. This is a matter which this court gave priority but what it has witnessed is delay by this application for review which I find totally unmerited and I proceed to dismiss it. Each party to bear its own costs.

44. In order to have this matter out of way owing to its urgency, and for the PE to conclude the process of procuring meat for the recruits, I direct that the notice of motion dated 10th January 2017 be heard expeditiously on 5th April 2017. Parties to file written submissions within 3 days of today.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 23rd day of March, 2017.

R.E. ABURILI

JUDGE

In the presence of

Mr Lagat for interested party applicant

Mr Munene for Respondents

N/A for ex parte applicant