REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO. 468 OF 2017

BETWEEN

REPUBLIC…….....……..…….....APPLICANT

VERSUS

THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD…..... RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....1ST INTERESTED PARTY

SCANAD KENYA LIMITED …….....…….....…..2ND INTERESTED PARTY

EX-PARTE APPLICANT: TRANSCEND MEDIA GROUP LIMITED

RULING

1. In these proceedings the ex parte applicant herein, Transcend Media Group Limited, intends to seek an order of certiorari to quash the decision of the Respondent dated 24th July, 2017 by which the Respondent Board found that the 1st Interested Party herein, the **IEBC**, was entitled to conduct negotiations with **Scanad Kenya Limited** (hereinafter referred to as "Scanad").

2. On 1st August, 2017, this Court granted leave to the applicant to commence judicial review proceedings as sought. With respect to the direction whether the grant of such leave would operate as a stay of the said decision, the Court directed that the issue be canvassed at an inter partes hearing. It is that limb that falls for determination in this ruling.

3. It was submitted on behalf of the applicant that the Courts have interpreted section 175(1) of the ***Public Procurement and Asset Disposal Act, 2015*** (hereinafter referred to as "the 2015 Act") which as formerly section 100 of the repealed ***Public Procurement and Disposal Act, 2005*** to mean that once the applicant files judicial review proceedings there is an automatic stay of the proceedings in question.

4. In this respect the applicant relied on inter alia **Republic vs. Public Procurement Administrative Review Board & 2 Others ex parte Noble Gases International Limited [2013] KLR.**

5. Apart from that I was not addressed on any other basis for the stay save that the applicant's right to justice would be contravened.

Determinations

6. I have considered the foregoing submissions. Section 175(1) of the 2015 Act provides as follows:

> ***A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen 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.***

7. It is therefore clear that the section does not expressly state that the commencement of judicial review proceedings is an automatic stay. However once the said proceedings are commenced the binding effect and finality of the decision is thereby suspended so that any contract entered into between the procuring entity and the party in whose favour a tender has been awarded cannot defeat the proceedings merely because such a contract has been entered into.

8. In other words a procuring entity which enters into a contract during the pendency of judicial review proceedings properly commenced does so at the risk that the Court may quash the decision and thereby nullify the contract with the attendant consequences.

9. It is in this respect that the holding that the commencement of judicial review proceedings amounts to automatic stay ought to be understood. That was this Court's position when dealing with the provisions in the repealed Act in **Republic vs. Public Procurement Administrative Review Board & Others ex parte Avante International Technology Inc. Nairobi High Court Misc. Application No. 451 of 2012** and **Republic vs. Director General of the Public Procurement Oversight Authority & Others ex parte Africa Infrastructure Development Company Nairobi High Court Misc. Application No. 24 of 2013** in which it was held as follows:

> **"Section 100(1) of the Act provides that a decision made by the Review Board shall, be final and binding on the parties unless judicial review thereof commences within fourteen days from the date of the Review Board's decision. The respondents contend that since there was no stay granted by the Court and the said contract was entered into the orders sought herein are incapable of being granted. This action is justified on the ground that the Commission's action is dictated by the timelines for the conduct of the elections and therefore it had to proceed with the contract. That may be so, however, if the Commission decides to enter into a contract during the pendency of judicial review proceedings filed within the stipulated period, it does so at the risk that the Court may nullify the process leading to the tender and it would be no excuse that the tender had been entered into since it is clear that where the judicial review proceedings are commenced within 14 days, the decision of the Procuring Entity is not final in which event the Court could be properly entitled to nullify the procurement. The decision of the Board having been made on 11th December 2012 and these proceedings having been instituted on 20th December 2012, the same were instituted within time hence the mere fact that the contract had been awarded and part payment made is in my view inconsequential."**

10. In this case the procurement in question was with respect to consultancy services for the provision of strategic communication and integrated media campaign towards the 2017 general elections. The aim of the consultancy was *inter alia* to educate, motivate and encourage citizens, voters and all electoral stakeholders to effectively participate in and support the 2017 general elections.

11. In this case the IEBC contended that it had in fact entered into a contract with the 2nd interested party and exhibited a copy thereof. In other words the decision which is sought to be stayed has already been implemented.

12. The principles that guide the grant of an order that the leave do operate as stay of the proceedings in question have been crystallised over a period of time in this jurisdiction. Where, the decision sought to be quashed has been implemented leave ought not to operate as a stay since where a decision has been implemented stay is nolonger efficacious as there may be nothing remaining to be stayed. See **George**

Philip M Wekulo vs. The Law Society of Kenya & Another Kakamega HCMISCA No. 29 of 2005.

13. It is trite that in giving effect to the rights the courts must balance fundamental rights of individual against the public interest in the attainment of justice in the context of the prevailing system of legal administration and the prevailing economic, social and cultural conditions. See **Bell vs. DPP [1988] 2 WLR 73.**

14. In this case the general elections are due for 8th August, 2017 which is just a few days from now. The effect of the grant of the stay would be to prohibit the IEBC from continuing with the on-going voter education. Since the general elections cannot be postponed, it in effect would mean that the voters would proceed with the exercise without the full benefit of education and that would be catastrophic. If eventually the application was to fail the damage would be irreversible since the rights of the citizens pursuant to Article 38 would have been infringed beyond repair.

15. Even if I were to find that section 175 aforesaid grants the applicant automatic stay, that section cannot override the express provisions of the Constitution. Article 1(1) of the Constitution provides that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the Constitution while under Article 1(3)(c) sovereign power under the Constitution is delegated *inter* alia to the Judiciary and independent tribunals. Dealing with a similar provision in **Rwanyarare & Others vs. Attorney General [2003] 2 EA 664**, it was held with respect to Uganda that Judicial power is derived from the sovereign people of Uganda and is to be administered in their names. Similarly, it is my view and I so hold that in Kenya under the current Constitutional dispensation judicial power whether exercised by the Court or Independent Tribunals is derived from the sovereign people of Kenya and is to be administered in their name and on their behalf. It follows that to purport to administer judicial power in a manner that is contrary to the expectation of the people of Kenya would be contrary to the said Constitutional provisions. I therefore associate myself with the decision in **Konway vs. Limmer [1968] 1 All ER 874** that there is the public interest that harm shall not be to the nation or public and that there are many cases where the nature of the injury which would or might be done to the Nation or the public service is of so grave a character that no other interest public or private, can be allowed to prevail over it.

16. It is therefore my view and I so hold that in appropriate circumstances, Courts of law and Independent Tribunals are properly entitled pursuant to Article 1 of the Constitution to take into account public or national interest in determining disputes before them where there is a conflict between public interest and private interest by balancing the two and deciding where the scales of justice tilt. Therefore the Court or Tribunals ought to appreciate that in our jurisdiction, the principle of proportionality is now part of our jurisprudence and therefore it is not unreasonable or irrational to take the said principle into account in arriving at a judicial determination.

17. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.**

18. In **East African Cables Limited vs. The Public Procurement Complaints, Review & Appeals Board And Another [2007] eKLR** the Court of Appeal held that:

> **"We think that in the particular circumstances of this case, if we allowed the application the consequences of our orders would harm the greatest number of people. In this instance we would recall that advocates of Utilitarianism, like the famous philosopher John Stuart Mill, contend that in evaluating the rightness or wrongness of an action, we should be primarily concerned with the consequences of our action and if we are comparing the ethical quality of two ways of acting, then we should choose the alternative which tends to produce the greatest happiness for the greatest number of people and produces the most goods. Though we are not dealing with ethical issues, this doctrine in our view is aptly applicable"**

19. In this case despite the ex parte applicant's vehement denial its loss can be quantified in monetary terms since matters of procurement are substantially commercial in nature.

20. Having considered the issues raised before me it is my view that I should choose the alternative which tends to produce the greatest happiness for the greatest number of people and produces the most goods. In this case it is that the voter education ought to proceed so that the citizenry can make informed decisions on 8th August 2017, an occasion which ordinarily presents itself only once in five years .

21. In the premises I decline to direct that the leave granted herein shall operate as a stay of the decision being challenged by the ex parte applicant.

22. The costs will be in the cause.

23. It is so ordered.

Dated at Nairobi this 4th day of August, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Gachuba for the applicant

Mr Lubullelah for the 1st interested party

Mr Kipkorir fothe 2nd interested party

CA Mwangi