



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 589 OF 2017

IN THE MATTER OF AN APPLICATION BY LORDSHIP AFRICA LIMITED FOR LEAVE

TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND MANDAMUS

AND

IN THE MATTER OF TENDER NO.NCC/UR & H/T/514/2016-2017 REQUEST FOR

PROPOSAL (RFP) FOR THE URBAN RENEWAL AND REDEVELOPMENT OF

PHASE 2- NGONG' ROAD ESTATE THOUGH JOINT VENTURE PARTNERSHIP

AND

IN THE MATTER OF A DECISION BY THE PUBLIC PROCUREMENT

ADMINISTRATIVE REVIEW BOARD IN RESPECT OF AN APPLICATION

FOR REVIEW OF THE DECISION BY THE NAIROBI CITY COUNTY

TO AWARD EDERMAN PROPERTY LIMITED THE TENDER.

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

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015 .

IN THE MATTER OF ARTICLES 10, 47,227 OF CONSTITUTION OF KENYA.

LORDSHIP AFRICA LIMITED.....EX-PARTE APPLICANT

VERSUS

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD....RESPONDENT

NAIROBI CITY COUNTY.....1ST INTERESTED PARTY

EDERMA PROPERTY LIMITED.....2ND INTERESTED PARTY

RULING

1. By a chamber summons dated 25th September 2017 and filed in court the same day, the ex parte applicant Lordship Africa Limited seeks leave of this court to institute Judicial Review proceedings of:

a) **Certiorari** to remove into the High Court and quash the decision of the Public Procurement Administrative Review Board dated 11th September 2017 handed down in Application No 78 of 2017.

b) **Certiorari** to remove into the High Court and quash the decision of the Nairobi City County dated 2nd August 2017 to award Tender No. NCC/UR & H/T/514/2016-2017 for Request for Proposal (RFP) for the Urban Renewal and Redevelopment of Phase 2- Ngong Road Estate through joint venture partnership to Ederman Property Limited.

c) **Certiorari** to remove into the High Court and quash the entire procurement proceedings with respect to Tender No. NCC/UR & H/T/514/2016-2017 for Request for Proposal (RFP) for the Urban Renewal and Redevelopment of Phase 2- Ngong Road Estate through joint venture partnership.

d) **Mandamus** to compel the Nairobi City County to Commence a fresh procurement process with respect to Tender No. NCC/UR & H/T/514/2016-2017 for Request for Proposal (RFP) for the Urban Renewal and Redevelopment of Phase 2- Ngong Road Estate through joint Venture Partnership

e) That the leave granted do operate as a stay of the procurement process in respect of Tender No. NCC/UR & H/T/514/2016-2017 for Request for Proposal (RFP) for the Urban Renewal and Redevelopment of Phase 2 – Ngong Road Estate through joint Venture Partnership, including the formation and or implementation of any contract arising there from.

f) That costs of the application.

2. The chamber summons are predicated on the grounds set out in the statutory statement and verifying affidavit of Jonathan Jackson sworn on 25th September 2017.

3. The application for leave which was heard inter partes is opposed by the 2nd interested party **Erdeman Property Limited** who filed an affidavit in reply sworn by **Ze Yun Yang**, the 2nd interested party's Managing Director on 2nd October 2017.

4. The ex parte applicant's case is that sometime in February 2017 the 1st interested party Nairobi City County published invitations in the local dailies for the submission of bids in respect of tender Reference No. stay of the procurement process in respect of Tender No. NCC/UR & H/T/514/2016-2017 being a request for proposal (RFP) for the Urban Renewal and Redevelopment of Phase 2- Ngong Road Estate through joint venture partnership.

5. The applicant being an interested bidder submitted its bid on 10th March 2017 within the timelines stipulated. In accordance with the tender documents, requirements the applicant claims that it submitted a complete set of mandatory requirements, being the technical bid, the financial bid, and the bid security in the sum of shs 10,000,000.

6. It is alleged that tenders were opened on 21st April 2017 at 12.00 noon in the presence of the respective bidders and or their representatives.

7. It is asserted that the 1st interested party (Procuring Entity) was expected, in accordance with the Section 126(3) of the Public Procurement and Asset Disposal Act, 2015 to undertake the evaluation

exercise of the bids to determine their responsiveness within 21 days of the opening of the bids.

8. However, that upon submitting its bid and attending the tender opening, the applicant never heard from the Procuring Entity either within 21 days stipulated under the law or at all and that in July 2017, the applicant learnt that the tender had been awarded to the 2nd interested party Ederman Property Limited in unclear circumstances.

9. The above situation prompted the applicant through its advocates on record to write to the County Secretary of the Procuring Entity seeking clarification as to the circumstances under which the tender was awarded to the 2nd interested party.

10. It is claimed that to date the said letter has never received a substantive response from the Procuring Entity, but that by a letter dated 25th August 2017 the 1st interested party denied ever receiving the letter of 28th July 2017 from the applicant's counsel.

11. That on 15th August 2017, the applicant received notification from the Postal Corporation of Kenya (PCK) a notification dated 14th August 2017 to the effect that there was a postal mail at the applicant's Box No. 47655-00100 Nairobi GPO and that it should collect the mail.

12. That it was on collecting and opening the mail on 15th August 2017 that the ex parte applicant learnt that it was a notice of regret from the 1st interested party (Procuring Entity) dated 2nd August 2017 informing the ex parte applicant that its bid was unsuccessful, which notification contained no reasons or explanation as to what exactly in the bid was incomplete and or the non-responsiveness of the ex parte applicant's bid, contrary to the express provisions of Section 87(3) and 126(4) of the Act which stipulates that a losing bidder should be provided with reasons as to why its bid was not successful. Further, it is claimed that such notification must be simultaneous with the notification to the successful bidder.

13. In this case, it is contended by the applicant that the Procuring Entity used different means to communicate its decision to the successful and unsuccessful bidders such that the successful bidder was officially informed of the award on 2nd August 2017 while the applicant herein learnt of the award /decision of the procuring entity 2 weeks later by which time a contract was about to be executed. It is claimed that the chosen mode of communicating to the applicant the outcome of the tendering process was deliberately designed to block the applicant from seeking remedies stipulated in Section 167 of the Act and in total disregard of Section 176(1) by withholding notification to an unsuccessful bidder.

14. It is claimed that the breaches herein complained of undermine the guiding principles set out in Section 3 of the Act, Article 10 of the Constitution and Article 227 (1) of the Constitution on good governance, integrity, transparency and accountability.

15. It is further contended that the Procuring Entity's conduct is tainted with opaqueness, lack of transparency and breach of the Act and the Constitution and hence the filing of the Request for Review was filed on 28th August 2017 with the Review Board (respondent) seeking for annulment of the procurement process and seeking for commencement of fresh procurement process.

16. It was claimed that upon such filing of the Request for Review and the Review Board notifying all the parties that no contract should be entered into, the 2nd interested party filed replying affidavit claiming that a contract had already been entered into (executed) with the Procuring Entity for a sum of shs 19,698,417,830 on 17th August 2017.

17. That on 8th September 2017 the request for review was heard and judgment reserved for 11th September 2017 when the respondent found that it lacked jurisdiction to hear and determine the Request for Review because a contract had already been entered into between the 1st interested party

procuring entity and the 2nd interested party and further that the request for review had been filed out of time hence the request for review was struck out without considering the same on its merits.

18. According to the applicant, the purported contract is in contravention of the law Section 134(2) of the Public Procurement and Asset Disposal Act, 2015 which mandates that the accounting officer must seek clearance of the Attorney General prior to the signing of a contract whose sum is in excess of shs 5 billion and that such contravention is an offence under Section 176(1) of the Act.

19. In addition, it was contended that the respondent's findings on the question of time running for the purposes of filing of the request for review was contrary to Section 3(5) of the Interpretation and General Provisions Act (Cap 2) Laws of Kenya which stipulates the time that a person is deemed to have been served by post.

20. Finally, the applicant claims that the Review Board proceeded to grant the Procuring Entity a go ahead to conclude the procurement process with the 2nd interested party hence this challenge and the leave sought.

21. The respondent and 1st interested party have not filed any responses to the chamber summons for leave despite being served for interpartes hearing.

22. The 2nd interested party who is alleged to be the successful bidder and who has already signed a contract for the impugned tender with the procuring entity filed a replying affidavit sworn by its Managing Director Mr Ze Yun Yang contending that the applicant has not satisfied the criteria for lodging of these proceedings because it has not demonstrated that it is a candidate or tenderer who claims to have suffered or risks to suffer loss or damage due to breach of a duty imposed on a Procuring Entity as stipulated in Section 167(1) of the Act.

23. It is also contended that the applicant did not provide a bid security valid for 90 days and instead provided a bid security valid for only 85 days contrary to clause 3:11 of the Request for Proposal hence it was never qualified to succeed in the tender.

24. In addition, it was contended that contrary to Clause 3.14.2 of the Request for Proposals, the applicant was disqualified for including a set of conditions accompanying its bid. It is contended that no challenge has been levelled to the above matters.

25. It was contended that the ex parte applicant instead of filing a request for review in July upon becoming aware of the award of the tender, chose to write a letter contrary to Section 167(1) of the Act which allows a request for review to be lodged at any time.

26. Further, that the Review Board had no jurisdiction to entertain the review as the contract had already been executed as stipulated in Section 167(1) of the Act. That in this case the contract validity period was 14 days from 2nd August 2017 hence the contract had to be signed on 17th August 2017 before 19th August 2017 in accordance with Section 135(3) of the Act.

27. That upon signing of the contract, performance security of shs 2,987,846 was paid as stipulated in Section 142 of Act and so far, shs 40 million has been expended for mobilization process to ensure breaking ground for the project.

28. It is further contended by the 2nd interested party that under Section 87(1) (2) (3) of the Act, there is no requirement for the Procuring Entity to notify the bidders in the same manner simultaneously and that under Section 126(4) of the Act, same time notification is not simultaneous but that in this case, the successful and unsuccessful bidders were notified on the same day.

29. It was further deposed that there is no evidence to support the allegation that the first notification sent to the applicant by Postal Corporation of Kenya was on 14th September 2017 and not earlier. It

was also deposed that in law, time begun to run from the day after the posting of the notification which was 5th August, 2017 as held by the Review Board.

30. The second interested party's Managing Director further deposed that the Procuring Entity has no control over Postal Corporation of Kenya hence it could not have manipulated the delivery of the notification to the *ex parte* applicant and that no offence under Section 176(1) (k) of the Act was committed.

31. It was further contended that if the *ex parte* applicant had noticed manifest breach of the law by the Procuring Entity, it did not have to wait until the notification of the award was made before seeking for review. That the contract in question does not involve government spending hence the provisions of Section 134 of the Act on the authorization by the Attorney General with regard to contracts in excess of 5 billion does not apply to this case as there is no money payable by the government to the successful bidder.

32. That in this case, the notification having been posted, properly addressed to the applicant in accordance with Section 3(5) of the Interpretation and General Provisions Act Cap 2 Laws of Kenya, it has not been proved that there was any breach.

33. That if stay of implementation of the contract is granted, the 2nd interested party shall suffer huge losses yet the *ex parte* applicant has no *locus standi* before this court having not qualified to be awarded the tender or to commence proceedings before the Review Board hence these proceedings should be terminated *ab initio*.

34. The chamber summons was argued orally on 3rd October 2017 with the *ex parte* applicant being represented by Mr Mbaluto advocate and Miss Njeri Mucheru appearing for the 2nd interested party.

35. Both counsels reiterated the contents of their respective clients pleadings and affidavits for and against the application for leave and stay which I have reproduced above, and which does not warrant repeating.

36. However, Mr Mbaluto highlighted that the contract already executed was invalid and that at this stage the threshold for leave and stay is well established. It was emphasized that there are serious issues warranting leave which issues touch on the law and with regard to the consent of the Attorney General in contracts in excess of shs 5 billion it was submitted that Section 134 of the Act does not distinguish on whose benefit the funds are meant and that the circular by the Attorney General on the Section is at odds with a plain reading of the Section 134(2) of the Act and that the Attorney General was merely providing information to the *ex parte* applicant in accordance with the law.

37. On *locus standi* it was submitted that being aggrieved with the decision of the Review Board, the *ex parte* applicant has *locus standi* in the matter. Further, counsel maintained that his client received notification on 14th August 2017 and filed request on 28th August 2017 within 14 days and that they could not have been served with notification on 2nd August 2017 as was held by the Board.

38. That the applicant only challenged the breach upon becoming aware of the breach and after learning of the decision so that they could gather sufficient material as their letters to the Procuring Entity were never responded to.

39. Mr Mbaluto urged the court to find that it has jurisdiction to hear and determine this matter as illegalities cannot be overlooked.

40. On the part of Miss Njeri Mucheru on behalf of the 2nd interested party, it was emphasized that the applicant herein never supplied the required security bond and that it gave conditions in its bid which contravened clause 3.14.2 of the Request for Proposal (RFP).

41. It was further contended in submission that the applicant had not demonstrated that it had filed the Request for Review in 14 days of the date of the decision or the alleged breach which latter is said to have occurred sometime in July 2017. That it was not in good faith for the applicant to file request for review after notification of the award had been send.

42. It was further submitted that the contract was signed within the tender validity period. It was further submitted that whether or not the contract was valid should have been raised before the Review Board then taken up on appeal.

43. Counsel maintained that Section 134 of the Act on Attorney General's authority in contracts exceeding five billion is only concerned with government spending but that in this case the only contribution by the Government was a piece of land on which the contract is to be undertaken and that the value of the said land is not anywhere near the shs 5 billion as the 19 billion is being paid by the 2nd interested party upon which the houses will be sold for the Procuring Entity and 2nd interested party to recover their investments.

44. Further, that the Attorney General's letter was written on a without prejudice basis hence it could not be relied upon in legal proceedings to enforce rights of any party.

45. It was further submitted that the issue of there being no clearance authority from the Attorney General to contract was never canvassed before the Review Board and was snot a ground for review hence it cannot be a ground for this court's determination. The 2nd interested party maintained that the applicant has no locus standi before this court and that the Review Board declined the request for review on grounds which have not been advanced here which completely disqualifies the applicant.

DETERMINATION

46. I have considered the foregoing. In my view, the main issue for consideration is whether the applicant is entitled to the prayers for leave and stay.

47. The rationale for the requirement that leave be sought and obtained is to exclude frivolous vexatious or applications which *prima facie* appear to be abuse of the process of the Court or those applications which are statute barred. However, leave should be granted, if on the material available the court considers, without going into the matter in depth, that there is an arguable case.

48. Leave stage is a filter whose purpose is to weed out frivolous cases at the earliest opportunity, thus redeeming the pressure on the courts and needless expense for the applicant by ensuring that malicious and futile claims are weeded out or eliminated so as to prevent public bodies being paralyzed for months because of pending court action which might turn out to be unmeritorious. This is the principle espoused in the cases of **Matiba vs. Attorney General Nairobi H.C. Misc. Application No. 790 of 1993; Republic vs. Land Disputes Tribunal Court Central Division and Another Ex Parte Nzioka [2006] 1 EA 321; and Republic vs. The P/S Ministry of Planning and National Development Ex Parte Kaimenyi [2006] 1 EA 353.**

49. **Waki, J** (as he then was), in **Republic vs. County Council of Kwale & another Ex Parte Kondo & 57 Others Mombasa HCMCA No. 384 of 1996** further held that:

“The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived... Leave may only be granted

therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full inter partes hearing of the substantive application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised judicially”.

50. A similar holding can be found in **Meixner & Another vs. Attorney General** [2005] 2 KLR 189.

51. The yardstick for the grant of leave was nonetheless set by the Court of Appeal in **Mirugi Kariuki Vs. Attorney General** Civil Appeal No. 70 of 1991 [1990-1994] EA 156; [1992] KLR 8 as follows:

“The law relating to judicial review has now reached the stage where it can be said with confidence that, if the subject matter in respect of which prerogative power is exercised is justiciable, that is to say if it is a matter on which the Court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power...the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter... It is not the absoluteness of the discretion nor the authority of exercising it that matter but whether in its exercise, some of the person's legal rights or interests have been affected. This makes the exercise of such discretion justiciable and therefore subject to judicial review. In the instant appeal, it is of no consequence that the Attorney General has absolute discretion under section 11(1) of the Act if in its exercise the appellant's legal rights or interests were affected. The applicant's complaint in the High Court was that this was so and for that reason he sought leave of the court to have it investigated. It is wrong in law for the Court to attempt an assessment of the sufficiency of an applicant's interests without regard to the matter of his complaint. If he fails to show, when he applies for leave, a prima facie case, on reasonable grounds for believing that there has been a failure of public duty, the Court would be in error if it granted leave. The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables the Court to prevent abuse by busybodies, cranks and other mischief-makers... In this appeal, the issue is whether the appellant in his application for leave to apply for orders of certiorari and mandamus demonstrated to the High Court a prima facie case for the grant of those orders. Clearly, once breach of the rules of natural justice was alleged, the exercise of discretion by the Attorney General under section 11(1) of the Act was brought into question. Without a rebuttal to these allegations, the appellant certainly disclosed a prima facie case. For that, he should have been granted leave to apply for the orders sought.”

52. In **R vs. Communications Commission of Kenya & 2 Others Ex Parte East Africa Televisions Network Ltd.** Civil Appeal No. 175 of 2000 [2001] KLR 82; [2001] 1 EA 199, the Court of Appeal observed that leave should be granted if, on the material available, the Court considers, without going into the matter in depth, that there is an arguable case for granting leave.

53. In **Re Bivac International SA (Bureau Veritas)** [2005] 2 EA 43 (HCK), the Court stated:

“Application for leave to apply for orders of judicial review are normally ex parte and such an application does restrict the Court to threshold issues namely whether the applicant has an arguable case, and whether if leave is granted, the same should operate as a stay. Whereas judicial review remedies are at the end of the day discretionary, that discretion is a judicial discretion and, for this reason a court has to explain how the discretion, if any, was exercised so that all the parties are aware of the factors which led to the exercise of the Court's discretion. There should be an arguable case which without delving into the details could succeed and an arguable case is not ascertained by the court by tossing a coin or waving a magic wand or raising a green flag, the ascertainment of an arguable case is an intellectual exercise in this fast growing area of the law and one has to consider without making any findings, the scope of the judicial review remedy sought, the grounds and the possible principles of administrative law involved and not forget the ever expanding frontiers of judicial review and perhaps give an

***applicant his day in court instead of denying him.... Like the Biblical mustard seed which a man took and sowed in his field and which the smallest of all seeds but when it grew up it became the biggest shrub of all and became a tree so that the birds of the air came and sheltered in its branches, judicial review stemmed from the doctrine of ultra vires and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three "I's") and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. One can safely state that the growth of judicial review can only be compared to the never-ending categories of negligence after the celebrated case of Donoghue vs. Stephenson in the last century. Although leave should not be granted as a matter of routine, where one is in doubt one has to consider the wise words of Megarry, J in the case of John vs. Rees [1970] Ch 345 at 402. In the exercise of the discretion on whether or not to grant stay, the court takes into account the needs of good administration.*"**

54. What clearly emerges from the surplus of case law cited hereinabove is that the grant of leave to commence judicial review proceeding is neither a mere formality nor a practice of magic. It is not to be granted as a matter of course. Delay is one of the factors which a Court often considers in deciding whether or not to grant leave.

55. In addition, the applicant for leave is under an obligation to show to the court that they have a prima facie arguable case for grant of leave. Therefore whereas an applicant is not required at the leave stage to go into the depth of the application, they have to show that they have not come to court after an inordinate delay and that the application is not frivolous, malicious and futile.

56. The ex parte applicant claims that after the tender documents were opened, it never heard from the Procuring Entity within 21 days and that despite writing to the procuring entity through its advocates herein on record, there was no response, which is contrary to the express provisions of section 126(3) of the Public Procurement and Asset Disposal Act, 2015. It is claimed that the applicant wrote to the procuring entity seeking information on the pending procurement process but no response was received. The procuring entity has denied receiving the said letter seeking clarification.

57. The ex parte applicant claims that when it finally received the notification letter from the Postal Corporation, the reasons for rejection of its bid at the preliminary stage were not indicated that is, as to what, exactly was incomplete and or how non-responsive it was, and that such notification must be simultaneous with the notification send to the successful bidder.

58. It is contended by the applicant that the separate modes of notification gave the successful bidder an opportunity to get its notification earlier while the applicant got its notification later, by which time a contract was about to be executed hence the delayed notification to the applicant was deliberately designed to deny it an opportunity to seek remedies stipulated in section 167 of the Act, which breach undermines the guiding principles set out in section 3 of the Act, Articles 10 and 227(1) of the Constitution on good governance, integrity, transparency and accountability. It is also claimed that the process was tainted with opaqueness, lack of transparency and breach of the law and the Constitution.

59. Upon filing of the Request for Review on 28th August 2017 it became apparent that a contract had already been entered into on 17th August 2017 and was in the process of being implemented and it was for that reason that the Review Board declined the jurisdiction in the matter on account that a contract had already been executed between the procuring entity and the successful bidder, and that the Request for Review was filed out of time.

60. The applicant claims that despite the contract being entered into, that contract is illegal because it involves over sh 5 billion and was executed without the authorization of the Attorney General, contrary to section 134(4) of the Act and which act on the part of the procuring entity is an offence under section 176(1) of the Act.

61. It is also contended that the Review Board's computation of time is contrary to section 3(5) of the

Interpretation and General Provisions Act, Cap 2 Laws of Kenya. The applicant maintains that the request for review was filed within the stipulated time, considering when it was notified of the award.

62. It is not denied that at the time of hearing of the request for the Review, the procuring entity had already executed a contract with the successful bidder herein, which contract the exparte applicant claims is illegal ab initio. It is also contended that the Review Board should not have declined jurisdiction to entertain the Request for Review over an illegal procurement process and that the Request for review was filed in time yet the Review Board found that it was filed out of time

63. Therefore, the question is, would this court be in a position to interfere with the contract having regard to the circumstances of this case.

64. In my humble view, those are issues which this court would be faced with and which demonstrate that these proceedings are not *per se* frivolous or vexatious. However, this court would not at this stage delve into the depths of the said issues as that would prejudice the parties' positions in the main motion.

65. Taking the foregoing into consideration, it is my view and I so find that the Applicant has established a prima facie case which warrants the grant of leave. Accordingly leave is hereby granted to the Applicant to apply for the judicial review orders in terms of the instant application. **The said Application is to be filed and served within 5 days from the date hereof.**

66. With respect to the prayer that the leave, if granted should operate as stay of implementation of the contract already entered into between the exparte applicant and the 2nd interested party, it is now trite that the decision whether or not to grant a stay pursuant to leave is no doubt an exercise of judicial discretion and that discretion like any other judicial discretion must be exercised judiciously. Where the decision sought to be quashed has been implemented leave ought not to operate as a stay. See **George Philip M Wekulo vs. The Law Society of Kenya & Another Kakamega HC MISC APP No. 29 of 2005.**

29. Maraga, J (as he then was) in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006** expressed himself as follows:

“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 encompasses 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 the applicant before hearing the Respondent cannot be granted.”

67. In the instant case, a contract has already been entered into between the procuring entity and the successful bidder and is in the process of being implemented but there was no evidence to the effect that any works had so far begun. Only mobilization is alleged to have taken place.

68. It is the same contract that is said to be illegal under section 134 of the Act. It therefore follows that unless stay is granted, then the outcome of the application if successful may well be rendered nugatory and an academic exercise.

69. If the court finds that the contract which was illegal has been fully performed, then it may pose serious legal challenges to undo the project after so much funds have been expended in the construction

works wherein it is admitted that the beneficiaries are both the procuring entity and the successful bidder herein through a joint development venture.

70. To avoid such an eventuality, it is my view that the lesser evil is to direct which I hereby do that the grant of leave herein shall operate as a stay of the implementation of the contract between the procuring entity and the successful bidder until the substantive notice motion if filed is heard and determined or until further orders of this court.

71. Accordingly, the main motion shall be fast tracked to the extent that the applicant shall file the motion together with its skeletal submissions within 5 days from to date and the respondents and interested parties shall file and serve their responses to the motion within five days of the date of service of the substantive motion together with their submissions.

72. The matter shall be mentioned on 6/11/2017 for directions on whether to highlight or give a date for judgment based on the submissions, noting that so much of the issues have been raised and canvassed by the parties' respective advocates in this application for leave.

73. Costs shall be in the cause.

Dated, signed and delivered at Nairobi this 23rd day of October, 2017.

R.E. ABURILI

JUDGE