



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 18 OF 2016

KENYA PORTS AUTHORITY.....APPELLANT /APPLICANT

VERSUS

AUTO EXPRESS LIMITED.....RESPONDENT

AND

HAJJ MOTORS LIMITED.....1ST INTERESTED PARTY

KINGSWAY TYRES LIMITED.....2ND INTERESTED PARTY

RULING

a. The applicant; **Kenya Ports Authority** took out the motion dated 21st January 2016 in which it sought for the following orders:

- 1. THAT the application be certified as urgent and service be dispensed with in the first instance.*
- 2. Pending the inter- partes hearing and determination of this application, there be a stay of execution of the award and orders of the Public Procurement Administrative Review Board Application number 61 of 2015; Auto express Limited versus Kenya Ports Authority .*
- 3. Owing to the nature of the case, the honorable court be pleased to issue a nearby inter- parties hearing date for the application and or appeal or alternatively to order the fixing of a hearing date at the registry on a priority basis*
- 4. Pending the hearing and determination of the appeal, there be a stay of execution of the award and orders of the Public Procurement Review Board made on 22nd December 2015 in Public Procurement Administrative Review Board. Application number 61 of 2015; Auto express Limited versus Kenya Ports Authority*
- 5. THAT the costs of this application be provided for.*

2. The motion is supported by the affidavit of **Turasha J. Kinyanjui**. When served **Dipesh Dodhia**, the respondent's head of supply chain and operations, and **Mark Okumu**, the Managing Director of the 1st interested party filed their respective replying affidavits, they swore to oppose the motion. When the motion came up for interpartes hearing, learned counsels appearing in the matter recorded a consent order

to have the motion disposed of by written submissions. The respondent also raised a preliminary objection to the appeal and the application on the grounds that:

a. "The appeal herein is time barred having been filed out of the 14 days period provided for under section 112 of the Public Procurement and Disposal Act no. 3 of 2005;

b. Further and without prejudice to the ground above, appeals from the decisions of the Public Procurement Review Board can only be by way of Judicial Review as set out in Order 53 of the Civil Procedure Rules, 2010. The appellants appeal is therefore hopelessly incompetent as it has been brought by way of Judicial Review and should be struck out.

c. The orders sought in the Notice of Motion application dated 21st January 2016 cannot be granted by virtue of section 97(2) of the Public Procurement and Disposal Act No. 3 of 2005 which prohibits an appeal from staying or delaying the procurement process."

3. I have considered the grounds stated on preliminary objection, those on the face of the motion together with the facts deponed in the supporting affidavit filed for the motion and the replying affidavits. I have also taken into account the rival written submissions.

I will first deal with the P.O. As it appears on the P.O, the respondent is basically asking that this appeal and application be struck out since according to it, the appeal is time barred. It is also argued that the appeal should be by way of judicial review not an appeal and that the orders sought in the application cannot issue, since the Public Procurement and Disposal Act prohibits an appeal from staying and delaying the procurement process.

4. The Respondent submitted that, the appellant called for bids for the supply of tyres, tubes and associated products under tender KPA/030/2015/16/PSM. The respondent was one of the bidders who lost the bid, instituted a complaint with the appellant upon being dissatisfied with the decision of the applicant. It argued that the matter was heard by the Public Procurement Administrative Review Board which pronounced a decision in its favour prompting this appeal by the applicant. It averred that the applicable law in this appeal is the Public Procurement and Disposal Act, 2015 to which section 112 provides for an appeal to be filed within 14 days contrary to the current appeal that was filed 30 days after the decision of the board. It argued further that contrary to averments by the applicant that section 112, applies only to part V11, the same applies to the whole Act and therefore the appeal is time barred. On the issue touching on Judicial review, the respondent submitted that the applicable Act is the Public Procurement and Disposal Act, 2015 that commenced on 7th January 2016 before the appeal was filed and not the repealed Act, which new Act, he said, provides for Judicial Review and not an Appeal, where a party is aggrieved by the decision of the Public Procurement Administrative Review Board(PPARB). It averred further that an appeal would take a minimum of 3 years to conclude due to the backlog unlike a Judicial Review that will take a shorter period to conclude the matters. It asserted on the matter of stay of execution, that the applicant has not established that the appeal is arguable since the PPARB established that there were flaws in the tendering process that included shifting goal posts midstream in the tendering process and contradicting section 30 of the PPDA. It further argued that the appellant will not suffer irreparable harm since it is in the public interest that procurement of goods is done in a transparent manner and that it is not enough that the appellant's managing Director will be disqualified from holding public office or that he stands to be fined kshs 10,000,000/=. It averred that should the stay of execution be granted, then the appellant will continue to procure tyres from the previous tenders floated 2 years ago that are more expensive and will eventually cost the tax payers which is contrary to the public interest. On the matter of bringing the application without unreasonable delay, the respondent submitted that the appellant delay in bringing the application the last day and the excuse that it was during Christmas holidays are not good enough reasons.

6. The 1st interested party submitted that Judicial Review remedies are available to persons questioning the procedure and not substance. It argued therefore that the most appropriate forum would be an appeal since it would address the substance of the decision. It referred the court to section 100 (2) of the PPD Act which provides an appeal to the High Court. On the merit of the application, the 1st interested party

submitted that, the appeal is not time barred since section 100(1) of the Act provides for the time limit within which an application for Judicial Review should be filed as 14 days while the an appeal is generally governed by the Civil Procedure Act that provides for the filing of an appeal within 30 days under Order 50 Rule 4. It asserted further that the provision of time limit under section 112 of the Act only relates to Part V111 of the Act that provides for review by the board on an order of the Director General made pursuant to section 105 of the Act which is not the case in the current matter, therefore, the appeal was filed within time. He contended that section 97 (2) of the PPD Act does not take away the court's jurisdiction to issue stay orders but only requires that an appeal should not stay or delay procurement beyond a certain period of time. It added that the period of time prescribed in section 97(1) is not the period referred in section 92(2). It further argued that the appellant has an arguable appeal that the orders of stay should issue.

7. The 2nd interested party submitted that judicial review focuses on the decision making process only unlike an appeal that considers the merits of the determination by questioning the facts and the law applied. It argued further that the appeal was not time barred since section 112 of the PPD Act did not apply in this particular case and that the section applicable is section 100(2) that allows an appeal which under the Civil Procedure Act is within 30 days. It contended further that the PPRB decision was made on 22nd December 2015 while the time for lodging an appeal began running from 14th January 2016, consequently, the appeal was filed within time. It concluded that orders of stay should be granted since the appellant has an arguable appeal and that the appellant will suffer substantial loss since there are penalties to be suffered by the appellant for failing to abide by the Public Procurement Board's decision.

8. The main contention in this case as raised in the P.O is whether this court has the jurisdiction to hear this appeal or whether the same should be referred for Judicial Review. I have taken the arguments of the parties into consideration. The respondent argues that the appeal has been filed after the new PPD Act 2015 commenced and it should therefore have filed a Judicial Review as provided for by section 174. The appellant on the other hand argues that the applicable Act in this appeal is the PPD Act 2005 which under section 100(2), allows the High Court to hear appeals arising from the decision of the Public Procurement Administrative Review Board. The question arising therefore, is which of the two Acts is applicable to this case. It is trite law that the law does not apply retrospectively. The Public Procurement Administrative Review Board decision was delivered on 22nd December 2015 when the old Act was still operational since the new Act commenced on 7th January 2016. The appeal in this case was filed on 21st January 2016 after the commencement of the new Act. However, the decision was made under the old Act and so to speak in accordance with the old Act. It would therefore be inappropriate to apply the new Act at the appeal level yet the matter was heard and concluded when the old Act was in operation. In my view therefore, the most appropriate Law to apply in this case is the PPD Act 2005.

9. Having said that, the next step is to address the issue of whether an appeal or Judicial Review application should have been filed. Section 100(1) and 100(2), provides for the right of an aggrieved party to either seek Judicial review redress or file an appeal to the High Court. This particular section gives the aggrieved party the choice to either seek Judicial Review or Appeal. In this case the appellant has chosen to appeal against the decision rightly so under section 100(2). The appeal is therefore properly before this court.

10. On the other ground in the P.O as to whether the appeal is time barred, under section 112 of the PPD Act, 2005, Section 112 provides for an appeal to the High court where a party is aggrieved by the decision of the Review Board within 14 days. Indeed looking at the context of section 112, it is apparent that the same applies to a party that is aggrieved by an order of the Director- General made pursuant to section 105 of the Act. It specifically applies where compliance with the Authority is effected. Under Part VIII where section 112 falls, the Director General has the prerogative to institute an investigation on procurement proceedings, where a report is then compiled on findings after which he makes an order. It is the appeal against this order that should be lodged within 14 days. This current appeal does not emanate from a decision of the board made under Part V111 of the Act. In any case, all the appeals in the High Court under the Civil Procedure Act are required to be filed within 30 days and as correctly submitted by the 1st interested party, the period between the 21st and 13th day of January the following year is

exempted from computation of time under Order 50 Rule 4 of the Civil Procedure Rules, 2010. Therefore, since the appeal was filed on 21st Jan 2016, which is 8 days after 13th January 2016, then the same was filed within time. Even without taking Order 50 Rule 4 into consideration, the appellant filed the appeal within 30 days hence the same is not time barred.

11. On the third issue that the order of stay cannot issue by virtue of section 97(2) of the PPD Act which prohibits an appeal from staying or delaying the procurement process, I am of the view that once an appeal is filed in the High Court, the Civil Procedure Act applies as the parties become amenable to the provisions of this Act and are bound by them. In that case, orders for stay can very well issue and it is in the interest of justice that the application of stay be considered. I therefore find that the P.O lacks merit and the same is hereby dismissed.

12. Having addressed the P.O, I now consider merits or otherwise of the application. The applicant is basically praying for orders of stay of execution pending the hearing and determination of this application and appeal. The principles to be considered in an application for stay are well settled under Order 42 Rule 6. Firstly, there must be threat of substantial loss on the part of the applicant if the orders of stay fail to issue. Secondly, the application must have been brought without delay and thirdly, the security has to be given by the applicant.

13. The appellant claims that should the orders for stay fail to issue, it will suffer substantial loss since its managing director risks being disqualified from holding public office and the appellant stands to be fined kshs 10,000,000/=. In addition, there will be no appeal since the appellant will have re-advertised the tender. The appellant further argues that in the event of re-advertisement of tender and a successful appeal, there will have been misuse of public funds to re advertise and restart a tender process. In the premises, I am convinced that the appellant will suffer substantial loss should the orders of stay fail to issue.

14. On the second principle bring the application without undue delay, as stated herein above and by virtue of Order 50 rule 4 of the Civil Procedure Rules, the application has been brought without undue delay since it was filed within time.

15. *Thirdly, the court should take into consideration the provision of security for the due performance of the decree.* The parties have not addressed the issue of security. I think, in the circumstances of this dispute, there is o need to order for the provision of security.

15. Consequently, I grant the order for stay of execution pending appeal. Costs of the motion to await the outcome of the Appeal.

Dated, Signed and Delivered in open court this 18th day of March, 2016.

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

..... for the Respondent.

.....for the 1st interested party

.....for the 2nd interested party