REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO. 232 OF 2016

IN THE MATTER OF: ARTICLES 47 AND 227 OF THE CONSTITUTION

AND

IN THE MATTER OF: THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT, NO. 33 2015

AND

IN THE MATTER OF: THE PUBLIC PROCUREMENT AND ASSET DISPOSAL REGULATIONS, 2006

AND

IN THE MATTER OF: TENDER NO. KAA/ES/WARGADUD/983/C.

CONSTRUCTION OF MANDERA WARDADUD AIRPORT (PHASE 1)

AND

IN THE MATTER OF: A DECISION AND RULING BY THE PUBLIC PROCUREMENT ADMINISTRATIVE

REVIEW BOARD IN REVIEW APPLICATION NUMBER 26 OF 2016 DATED 11TH MAY 2016.

AND

IN THE MATTER OF: AN APPLICATION SEEKING LEAVE TO COMMENCE

JUDICIAL REVIEW PROCEEDINGS BY ALWAHAB ENTERPRISES LIMITED

AND

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW

ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS.

REPUBLIC

-VERSUS-

PUBLIC PROCUREMENT AND ADMINISTRATIVE REVIEW BOARD...1ST RESPONDENT

KENYA AIRPORTS AUTHORITY.....2ND RESPONDENT

AND

SEO & SONS LIMITED.....INTERESTED PARTY

EX PARTE: ALWAHAB ENTERPRISES LTD

RULING

Introduction

1. The applicant herein, **Alwahab Enterprises Ltd,** by a Chamber Summons dated sought the following orders.

2. Upon hearing the application ex parte on 23rd May, 2016, I granted the applicant leave to commence judicial review proceedings as sought. I however directed that the application be served for determination of the issue whether the leave so granted would operate as a stay of the decision in question.

3. The hearing of the said limb of the application took place before me on 10th June, 2016 and it is the subject of this ruling.

The Application

4. **Miss Mutua**, learned counsel for the ex parte applicant relied on James **Mburu Gitau t/a Jambo Merchant vs. Sub-county Public Health Officer Kiambu County [2013] eKLR**, the principles for the grant of stay are that the same ought to be granted where the orders sought to be granted , if not granted, would render the proceedings in question nugatory. According to learned counsel, the applicant seeks to stop the entry into a contract for the construction of the Airport and at the time of coming to Court although the tender had been awarded and the interested party had moved onto the site, the contract had not yet been signed. To the learned counsel unless the actions of the interested party are stopped the contract for the project in question would be signed and the construction would take off hence these proceedings would be of no value. It was on this basis that the applicant sought an order that the interested party and the respondent be restrained from entering into the contract.

5. It was submitted by **Miss Mutua** that what was necessary was the establishment of a prima facie case which had been established. Based on **Lady Justice Joyce N. Khaminwa vs. Judicial Service Commision & Another [2014] eKLR**, it was submitted that it was necessary that the stay be granted so that the application is not rendered nugatory which would be the position if the decision maker was permitted to continue with the decision.

6. The ex parte applicant therefore sought an order that the stay be granted pending the hearing of the Motion.

Response

7. On behalf of the interested party herein, **SEO & Sons Limited**, **Mr Ochieng Oduol** together with **Mr. Wandabwa** submitted that based on the same decision of **Lady Justice Joyce N. Khaminwa vs. Judicial Service Commision & Another** (supra), the power to grant stay is discretionary and must be exercised on established principles one of which is that the conduct of the applicant ought not to be such as too disentitle the applicant to the orders sought.

8. According to the said learned counsel the application was based on the allegation that the applicant had a qualified engineer before the Board, an allegation which was clearly incorrect as the person who was alleged to be the engineer was not qualified as such.

9. It was further submitted that though the applicant applied for the award of the tender as a joint venture with **Messrs. Concordia Building and Civil Engineering Company Limited** which had since stated that it was nolonger desirous of continuing with the said joint venture hence some of the orders sought such as a declaration that the joint venture was the successful bidder were nolonger tenable. In the absence of the other partner in the joint venture, it was submitted that the applicant could not establish a *prima facie* case since the applicant could not be considered as a complete applicant.

10. It was further submitted that the stay sought was in respect of two decisions one of which had already been effected by an award of the tender. As a result it was submitted that the prayer had been overtaken by events. To the interested party, challenge to an award ought to have been taken within 7 days which was not done in this case. With respect to the decision of the procurement entity, it was submitted that the same can only be challenged before the Board.

11. It was further contended that since the Board ordered the procurement entity to evaluate the tender, the said decision cannot be the subject of judicial review and if a party is dissatisfied with the decision of the Board, the option is to appeal against the said decision.

12. Suffice it to say that the interested party's submissions were supported by the 1st Respondent while the 2nd Respondent left the matter to the Court.

Determinations

13. I have considered the submissions made on behalf of the parties herein.

14. 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. It is only in cases where either the decision has not been implemented or where the same is in the course of implementation that stay may be granted. See **George Philip M Wekulo vs. The Law Society of Kenya & Another Kakamega HCMISCA No. 29 of 2005.**

15. However even where the leave is granted, it was held in **Jared Benson Kangwana vs. Attorney General Nairobi HCCC No. 446 of 1995** that in considering whether the said leave ought to operate as a stay of proceedings the Court has to be careful in what it states lest it touches 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.

16. In my view, it is only where the imminent outcome of the decision challenged is likely to render the success of the judicial review nugatory or an academic exercise that the Court would stay the said proceedings the strength or otherwise of the applicant's case notwithstanding.

17. **Maraga, J** (as he then was) in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006** was of the view that:

> **"…as injunctions are not available against the Government and public officers, stay is a very important aspect of the judicial review jurisdiction…I also want to state that in judicial review applications like this one 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. Therefore where the order is efficacious the Court should not hesitate to grant it. Even with that in mind, however, it should never be forgotten that the stay orders are discretionary and their scope and purpose is limited. What then is the scope and purpose**

of stay orders in the judicial review jurisdiction? 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. It is not limited to judicial or quasi-judicial proceedings as some people think. It encompasses the administrative decision making process *(if it has not yet been completed)* 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*. A stay is only appropriate to restrain a public body from acting. It is, however, not appropriate to compel a public body to act. With this legal position in mind I now wish to turn to the facts of this case and decide whether or not the Ex parte Applicant's case is deserving of a stay order. The Ex-parte Applicant seeks:

"THAT the grant of leave do operate as a stay stopping each and all the Respondents from restraining the Applicant from the exercise of his office, functions, duties and powers as the Mayor of Mombasa and as a nominated councilor in the Municipal Council of Mombasa."

Can I grant this prayer in view of the scope and purpose of the stay order as stated above? I think not. Not as it is framed. To grant it as prayed would be compelling the Respondents to reinstate the Ex-parte Applicant to his position as Mayor before hearing them. Even in the cases cited by Mr. Orengo stay orders were not granted in the circumstances and terms as sought in this case. As I have already said, however, when dealing with applications like this the court should always ensure that the applicant's application is not rendered nugatory. Having considered all the circumstances of this case I am satisfied that the Ex-parte Applicant is deserving of a stay order but not as prayed in the application. What I think is an appropriate order to make in the circumstances of this case is to direct, which I hereby do, that the leave granted shall operate as a stay to restrain the Respondents jointly and severally from nominating or causing to be nominated another councilor or to hold the elections or elect the Mayor of Mombasa until this matter is heard and determined." [Emphasis added].

18. As this Court held in Miscellaneous Application No. 363 of 2013 **In Re: Meridian Medical Centre**;

"....it is only where the imminent outcome of the decision challenged is likely to render the success of the judicial review nugatory or an academic exercise that the Court would stay the said proceedings the strength or otherwise of the applicant's case notwithstanding...It must be shown that the probability of a determination being made in the challenged proceedings, are high and such probability cannot be said to have been achieved on mere conjecture and speculation. It follows that the stage at which the said proceedings have reached may be crucial in determining whether or not to grant the stay sought though that is not the determinant factor."

19. As was held in **Taib A. Taib vs. The Minister for Local Government & 3 Others** (supra) 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. In other words, stay is meant to prohibit the continuation of the decision making process where the process is still ongoing. Where however the decision has been made, the implementation thereof can still be stayed where the same is yet to be implemented.

20. However where the decision has been implemented to grant the stay would be meaningless where the effect is to maintain the *status quo* if the *status quo* would be that the decision remains in force. On the other hand where a stay is granted after the decision has taken effect, its upshot may well be to reverse the decision made by the Respondent. Ordinarily as stated above orders of stay in judicial review as opposed to conservatory orders in Constitutional Petitions are not to be granted if the result would be in the nature of mandatory injunctions. Whereas this Court appreciates that in certain cases a stay may be granted even where its effect may be to temporarily reverse the decision, that remedy may only be resorted to in exceptional cases and the onus is upon the applicant to prove that such exceptional circumstances exist. It

is in this light that this Court understands the decision of **Gladwell LJ** in **Republic vs. Secretary of State for Education and Science, ex parte Avon County Council (No. 2) CA (1991) 1 All ER 282** where he said that:

> **"An order that a decision of a person or body whose decisions are open to challenge by judicial review shall not take effect until the challenge has been finally determined is, in my view, correctly described as a stay."**

21. Where there are competing interests, the Court ought to balance the said competing interests with a view to arriving at a decision based on the lower risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.**

22. In addition, 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.**

23. That this Court has jurisdiction to set aside leave and/or stay granted in judicial review proceedings is not in doubt. The Court of Appeal made this clear 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** where it held:

> **"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. The appropriate procedure for challenging such leave subsequently is by an application by the Respondent under the inherent jurisdiction of the Court, to the Judge who granted leave to set it aside."**

See also **Njuguna vs. Minister for Agriculture Civil Appeal No. 144 of 2000 [2000] 1 EA 184.**

24. However as was expressed in **Nakumatt Holdings Limited vs. Commissioner of Value Added Tax [2011] eKLR**:

> **"Although leave granted *ex parte* can be set aside on an application, that is a very limited jurisdiction and will obviously be exercised very sparingly and on very clear cut cases unless it be contended that judges of the Superior Court grant leave as a matter of course which is not correct. Unless the case is an obvious one, such as where an order of *certiorari* is being sought and it is clear to the court that the decision sought to be quashed was made more than six months prior to the application coming to court and there is, therefore, no prospects at all of success, the court would discourage practitioners from routinely following the grant of leave with application to set aside. Fortunately such applications are rare and like the Judges in the United Kingdom, the court would also point out that the mere fact that an applicant may in the end have great difficulties in proving his case is no basis for setting aside leave already granted."**

25. Similar sentiments were expressed by the same Court in **Aga Khan Education Service Kenya vs. Republic & Others Civil Appeal Number 257 of 2003** where the court pointed out that:

> **"We would, however, caution practitioners that even though leave granted ex parte can be set aside on an application, that is a very limited jurisdiction and will obviously be exercised very sparingly and on very clear-cut cases, unless it be contended that judges of the superior court grant leave as a matter of course. We do not think that is correct. Unless the case is an obvious one, such as where an order of certiorari is being sought and it is clear to the court that the decision sought to be quashed was made more than six months prior to the applicant coming to court, and there is, therefore, no prospects at all of success, we would ourselves discourage practitioners from routinely following the grant of leave with applications to set leave aside. Fortunately such applications are rare and like the judges in the United**

Kingdom, we would also point out that the mere fact that an applicant may in the end have great difficulties in proving his case is no basis for setting aside leave already granted."

26. Therefore the power to set aside the leave ought only to be exercised sparingly and in exceptional cases for example where there was non-disclosure of material facts or where the circumstances are such that the leave ought not to have been granted in the first place. However, that jurisdiction is always open to the Court and may be exercised either on the Court's own motion after affording an opportunity to the parties to be heard or on an application by a party to the proceedings.

27. Where, therefore it is shown that the applicant did not disclose relevant material at the ex parte stage as a result of which the Court granted undeserved orders, the Court in the exercise of its inherent powers may well be entitled to set aside the leave granted as the conduct of the applicant may well amount to an abuse of the Court process. The position where there is an abuse of the court process was restated in **Mitchell and Others vs- Director of Public Prosecutions and Another (1987) LRC (const) 128** where it was held that:

" ….in civilized society legal process is the machinery used in the courts of law to vindicate a man's rights or to enforce his duties .It can be used properly ,it can be used improperly, and so abused. An instance of this is where it is diverted from its proper purpose, and is used with some ulterior motive, for some collateral one or to gain some collateral advantage, which the law does not recognize as legitimate use of that process. But the circumstance in which abuse of process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes BY extrinsic evidence only. But if and when it is shown it happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instance. Others attract the res judicata rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop proceedings, or put an end to it. This inherent power has been used time and again to put a summary end to a process which seeks to raise and have determined an issue which has been decided against the party issuing it in earlier proceedings between the parties"

28. It is trite that the grant of leave to commence judicial review proceeding is not a mere formality and leave is not granted as a matter of course. The applicant for leave is under an obligation to show to the court that he has a *prima facie* arguable case for grant of leave. Whereas he is not required at that stage to go into the depth of the application, he has to show that he has not come to court after an inordinate delay and that the application is not frivolous, malicious and futile. Whereas in determining the limb for stay the Court ordinarily does not revisit the leave already granted, where it comes out clearly that leave ought not to have been granted, it would be irresponsible for the Court to allow proceedings which are clearly frivolous to continue. The rationale for this was appreciated in **Republic vs. Land Disputes Tribunal Court Central Division and Another Ex Parte Nzioka [2006] 1 EA 321,** where **Nyamu, J** (as he then was) held that leave stage is a filter whose purpose is to weed out hopeless cases at the earliest possible time, thus saving the pressure on the courts and needless expense for the applicant by allowing malicious and futile claims to be weeded out or eliminated so as to prevent public bodies being paralysed for months because of pending court action which might turn out to be unmeritorious. **See also Republic vs. The P/S Ministry of Planning and National Development Ex Parte Kaimenyi [2006] 1 EA 353.**

29. **Waki, J** (as he then was), on the other hand, in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others Mombasa HCMCA No. 384 of 1996** put it thus:

"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".

30. In **Muchanga Investments Limited vs. Safaris Unlimited (Africa) Ltd & 2 Others Civil Appeal No. 25 of 2002 [2009] KLR 229**, the Court of Appeal had this about time as a judicial resource:

"A court of law would not be entitled in our view to abdicate its cardinal role of making a determination. Section 57(8) contemplates a speedy process to have the rights of both the caveator and caveatee determined and not a protracted trial. In our view, the often quoted principle that a party should have his day in court should not be taken literally. He should have his day only when there is something to hear. No party should have a right to squander judicial time. Hearing time should be allocated by the court on a need basis and not as a matter of routine. Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice. We have no doubt that what is before us is a matter that could have been determined summarily and the matter finalized... We approve and adopt the principles so ably expressed by both *Lord Roskil* and *Lord Templeman* in the case of *ASHMORE v CORP OF LLOYDS [1992] 2 ALL E.R 486* at page 488 where *Lord Roskil* states:

"It is the trial judge who has control of the proceedings. It is part of his duty to identify crucial issues and to see they are tried as expeditiously and as inexpensively as possible. It is the duty of the advisers of the parties to assist the trial judge in carrying out his duty. Litigants are not entitled to the uncontrolled use of a trial judge's time. Other litigants await their turn. Litigants are only entitled to so much of the trial judges' time as is necessary for the proper determination of the relevant issues."

At page 493 of the same case *Lord Templeman* delivered himself thus:

"an expectation that the trial would proceed to a conclusion upon the evidence to be produced is not a legitimate expectation. The only legitimate expectation of any plaintiff is to receive justice. Justice can only be achieved by assisting the judge."

...In the case of *FREMAR CONSTRUCTION CO LTD v MWAKISITI NAVI SHAH 2005 e KLR* at page 6 where the Court said:-

"Trials are not merely held to glorify the hallowed principle that disputes ought to be heard and determined on oral evidence in open court. Unless a trial is on discernable issues it would be farcical to waste judicial time on it."

.....In our view he, knowingly and dishonestly, used the legal process to accomplish an ulterior purpose to that of the court process, which is to protect the interests of justice. We are of course aware that we cannot comprehensively list all possible forms of abuse of court process and that we cannot formulate any hard and fast rule to determine whether in any given facts, abuse is to be found or not...To re-inforce the point, abuse of process has been defined in *WIKIPEDIA*, the free encyclopedia:

"The person who abuses process is interested only in accomplishing some improper purpose that is collateral to the proper object of the process, and that offends justice."

In *BEINOSI v WIYLEY 1973 SA 721 [SCA]* at page 734F-G a South African case heard by the Appeal Court of South Africa, *Mohomad CJ*, set out the applicable legal principle as follows:-

"What does constitute an abuse of process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of "abuse of process." It can be said in general terms, however, that an abuse

of process takes place where the proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for purposes extraneous, to that objective."

Again the Court of Appeal in Abuja, Nigeria in the case of *ATTAHIRO v BAGUDO 1998 3 NWLL pt 545 page 656*, stated that the term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it.

In the Nigerian Case of *KARIBU-WHYTIE J Sc* in *SARAK v KOTOYE (1992) 9 NWLR 9pt 264) 156 at 188-189 (e)* the concept of abuse of judicial process was defined:-

"The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice…"

31. In this case, it is clear that the ex parte applicant herein applied for the award of the tender in question as a joint venture between the Applicant herein, **Alwahab Enterprises Ltd** and **Messrs. Concordia Building and Civil Engineering Company Limited.** A joint venture, according to ***Black's Law Dictionary***, 9th Edition at page 915 is "a business undertaking by two or more persons engaged in a single defined project." Accordingly a joint venture is a single business and in my view inseparable for the purposes of the particular undertaking. The applicant herein is however only **Alwahab Enterprises Ltd.**

32. In this case, the ex parte applicant is aware that its other half is nolonger desirous of continuing with the award of the tender. In other words the applicant, in the absence of the partner has been crippled in its quest to secure the subject tender. Even if the applicant was to succeed, it would not be in a position, on its own, to secure the tender in the same manner as it had tendered for the same unless the circumstances relating to its application for the tender were to be materially altered. This Court ought not to exercise judicial discretion based on conjectures and speculation.

33. I am therefore satisfied that had this Court's attention been drawn to the fact that the party with whom the applicant herein partnered in the joint venture is nolonger desirous of pursuing the tender, this Court would no doubt have had a dim view of the applicant's prospects of success.

Order

34. In the premises, the order which commends itself to me and which I hereby grant is that the order granting leave to the applicant herein is hereby set aside. In the premises it is nolonger necessary to deal with the other issues raised on behalf of the parties herein.

35. Consequently, these proceedings are struck out but since the Respondents and the interested party did not make a formal application to that effect, there will be no order as to costs.

36. Orders accordingly.

Dated at Nairobi this 21st day of June, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Mutua for the applicant

Mr Wanga for Mr Ochieng Oduol for the 2nd Respondent

Mr Munene for the 1st Respondent

Cc Mutisya