



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CONSTITUTIONAL PETITION NO. 75 OF 2012**

IN THE MATTER OF: CONSTITUTIONAL PETITION BROUGHT PURSUANT TO ARTICLES  
22, 23, 165(3)(B) & 258 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF: THE ENFORCEMENT OF THE SUPREMACY OF THE CONSTITUTION  
AS PER ARTICLE 2(1 AND 4) OF THE CONSTITUTION

AND

IN THE MATTER OF: THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS  
UNDER ARTICLES 35(1) (B) AND 46(1) (B) OF THE CONSTITUTION REGARDING RIGHT TO  
INFORMATION

AND

IN THE MATTER OF: THE CONTRAVENTION OF THE FUNDAMENTAL RIGHTS AND  
FREEDOMS UNDER ARTICLE 47 OF THE CONSTITUTION REGARDING THE RIGHT TO  
FAIR ADMINISTRATIVE ACTION

AND

IN THE MATTER OF: UNDERMINING THE PRINCIPLE OF FAIR AND NATURAL JUSTICE

AND

IN THE MATTER OF: THE PRINCIPLE OF LEGITIMATE EXPECTATION

AND

IN THE MATTER OF: THE UNCONSTITUTIONALITY OF CLAUSE 38.3 OF THE TENDER NO.  
KEMSA/KHSSP-OIT11/2012-2013 PROCUREMENT OF NON-PHARMACEUTICALS (LOTS) BY  
KENYA MEDICAL SUPPLIES AGENCY

AND

IN THE MATTER OF: THE UNCONSTITUTIONALITY OF SECTION 6(1) OF THE PUBLIC  
PROCUREMENT AND DISPOSAL ACT NO. 3 OF 2005

AND

IN THE MATTER OF: THE INTERNATIONAL BANK OF RECONSTRUCTION AND DEVELOPMENTS GUIDELINES: PROCUREMENT UNDER IBRD LOANS AND IDA CREDITS

AND

ALL OTHER ENABLING PROVISIONS OF THE CONSTITUTION

**BETWEEN**

REVITAL HEALTH (EPZ) LIMITED.....PETITIONER

VERSUS

1. PUBLIC PROCUREMENT OVERSIGHT AUTHORITY
2. KENYA MEDICAL SUPPLIES AUTHORITY
3. HON. ATTORNEY-GENERAL.....RESPONDENTS

AND

1. MINISTER OF PUBLIC HEALTH AND SANITATION
2. MINISTER OF MEDICAL SERVICES
3. INTERNATIONAL DEVELOPMENT ASSOCIATION
4. ANGELICA MEDICAL SUPPLIES LIMITED.....INTERESTED PARTIES

**RULING**

**INTRODUCTION**

1. The Kenya Medical Supplies Authority (the Applicant) is the Government of Kenya agency for the procurement of medical supplies to the public health hospitals and facilities throughout the Republic. In the year 2013, it sought to procure syringes under the Applicant's Tender No. KEMSA/KHSSP-OIT11/2011-2013 PROCUREMENT OF NON-PHARMACEUTICALS (LOTS). The Petitioner, REVITAL HEALTH (EPZ) LIMITED was one of the unsuccessful bidders. In the Petition herein, it sought a declaration that Clause 38.3 the Instruction to Bidders [ITB], incorporating the World Bank Guidelines offends the provisions of Article 47 of the Constitution and as such an award by the Applicant to the successful bidder of the said Tender be declared null and void.

2. In a Judgment dated and delivered on 29<sup>th</sup> October, 2015, the court found that Clause 38.3 of the Tender Document offends Article 47 of the Constitution and was therefore unconstitutional, that the Petitioner's right to fair administrative action was violated and that the Petitioner was entitled to damages for breach of its constitutional right to fair administrative action, and that the damages be determined upon presentation by parties of submissions therein together with any relevant affidavits as the parties may wish to present. The court also awarded costs to the Petitioner.

**THE APPLICATION**

3. In the Notice of Motion (the Application) dated 19<sup>th</sup> February, 2016 and filed on 22<sup>nd</sup> February, 2016, and filed under a Certificate of Urgency the Applicant sought orders: –

- (1) that there be a stay of execution of the Judgment of the Hon. Mr. Justice Edward M. Muriithi delivered at the High Court of Kenya at Mombasa and all consequential orders arising therefrom pending the hearing and determination of the lodged appeal, and
- (2) the costs of the application be in the cause.

### **THE APPLICANT'S CASE**

4. The Applicant's case is set out in the Supporting Affidavit of Fred Wanyonyi Simiyu, the Applicant's Corporation Secretary, the grounds on the face of the Application, and the Further Affidavit of the said Fred Wanyonyi Simiyu sworn on 11<sup>th</sup> April, 2016 and filed on 16<sup>th</sup> April, 2016. The Applicant's case was urged by Mr. Migos Ogamba on 6<sup>th</sup> May, 2016, while the Petitioner's case was argued by Dr. Khaminwa.

5. The Applicants main contention is that because court declared Clause 38.3 of the World Bank/IDA General Conditions applicable to Loans and Credits by those organization as offending Article 47 of the Constitution, and therefore unconstitutional, the Applicant would never be able to procure any health products including **pharmaceuticals**? whenever donor funds are used for the purchase of such products.

6. Secondly, counsel argued the Petitioner was awarded damages to be assessed and that if such damages were to be assessed, the Applicant's appeal may be rendered nugatory, and the Applicant would suffer irreparable harm and loss. Counsel submitted that, the Applicant would prosecute the appeal within such reasonable time as the court may impose; and that it would be in the interest of justice if the orders sought were granted, pending the hearing and determination of the appeal, that the Petitioner would suffer no prejudice if the orders were granted.

### **THE PETITIONER'S CASE**

7. The application was however opposed by the Petitioner/Respondent through the Replying Affidavit of Rajnikant C. Vora, the Petitioner's Managing Director, sworn on 10<sup>th</sup> March, 2016, and filed on 11<sup>th</sup> March, 2016 and the submissions of counsel dated and filed on the same date.

8. Dr. Khaminwa argued strongly against granting any stay orders. **Firstly**, counsel argued, this court being a court of cognate jurisdiction would be sitting on appeal on a cognate court's interpretation of the constitution, **secondly**, as the party who is unsuccessful in a procurement tender is not given an opportunity for review, this court cannot challenge interpretation of a constitutional provision by the cognate court. The interpretation can only be determined on appeal and **thirdly**, the Petitioner had taken no steps yet to determine the question of damages, as any threat of execution would only happen after the determination of damages, and the agreement on, or taxation of costs.

9. There was a Notice of Appeal, but no Memorandum of Appeal. The Petitioner/Respondent was therefore unaware of the Applicant's complaint or concern. There was therefore no threat of execution.

### **ANALYSIS OF SUBMISSIONS AND THE QUESTION OF STAY**

10. There is but one issue to be determined in this application, and that is whether this court, rather than the Court of Appeal has jurisdiction to stay the Judgment delivered on 29<sup>th</sup> October, 2015. The ancillary question is whether there are any consequential orders in the said Judgment which may be stayed without affecting the Judgment as a whole?

11. By definition, a stay of proceedings, or orders in a Judgment, is a temporary halt on proceedings, apart from taking any steps allowed by the Rules of the terms of the stay. Consequently the power to stay proceedings is derived from the Rules governing the proceedings.

12. The matter herein is a Constitutional Petition. It is therefore governed by the Rules regulating the

manner of conducting such Petitions. The Rules in issue here are the Constitution of Kenya (Fundamental Rights and Rights of the Individual) Practice and Procedure Rules 2013 (**the Mutunga Rules**). These rules were not in existence at the time the Petition herein was filed. The Petition was determined after coming into force of the **Mutunga Rules**. Rule 33(2) of the Mutunga Rules permits a party to orally make an application for stay of proceedings or order made in a Judgment on a Petition, and a formal application be made within 14 days.

13. Unfortunately the **Mutunga Rules** do not provide the procedure under which the court may be moved for a stay of proceedings or orders made in a Constitutional Petition. My view is that an application for stay of orders under a Constitutional Petition should be made under the inherent jurisdiction of the court under Articles 23(1) and 165(3) of the Constitution. An application under Order 50 of the Civil Procedure Rules is not fatal, as it introduces the principles upon which a **stay of proceedings and execution** may be granted. Those principles as set out in Order 42 rule (6) and are:-

- (1) the application for stay should be made before the same court which made the order or before which proceedings are pending determination in the first instance;
- (2) if an applicant is unsuccessful in the court of first instance an applicant has the same right to proceed to the appellate court, with which the court of first instance shares the same jurisdiction, to grant a stay;
- (3) No stay is however granted as a matter of right. An applicant for stay of proceedings or order thereunder must show –
  - (a) substantial loss if an order of stay of execution is not made;
  - (b) the application is made without unreasonable delay;
  - (c) security is ordered by the court is provided by the applicant.

14. In this case, the Judgment was indeed delivered in the absence of the Applicant's counsel, and after learning the contents of the Judgment, the Applicant changed its Advocates, and a decision had to be obtained from the new Board as the previous Board's term had expired, and other decisions had to be sought and obtained from the First to Fourth Interested Parties. The application was thereafter made at the earliest opportunity, after such approvals had been obtained. The delay of nearly three months was excusable.

15. There is no question that the Applicant would suffer substantial loss unless a stay of execution is granted. A substantial part of the country's health budget for acquisition of medical supplies including drugs, is funded by donors, and invariably with the Third Interested Party. In effect, it is not any of the Interested Parties, but rather the sick people of Kenya who would suffer most.

16. This position must however be balanced with the cardinal principle that court orders must be obeyed so that the rule of law is maintained and adhered to all the time. I consequently allow the application in terms of paragraph 3 thereof on terms that the appeal herein be filed and served in the next sixty (60) days, and steps taken by both the Applicant and the Petitioner to have the appeal ready for hearing in shortest time possible, subject of course to the directions of the Court of Appeal.

17. There shall be orders accordingly.

**Dated, Signed and Delivered in Mombasa this 8<sup>th</sup> day of June, 2016.**

**M. J. ANYARA EMUKULE, MBS**

**JUDGE**

In the presence of:

Mr. Gathuku holding brief Dr. Khaminwa for Petitioner

Mr. Ombaka holding brief Mr. Gumba for Respondent

Mr. S. Kaunda Court Assistant