



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
JUDICIAL REVIEW DIVISION
MISC. APPLICATION NO. 340 OF 2016

REPUBLIC.....APPLICANT

VERSUS

THE PUBLIC PROCUREMENT

ADMINISTRATIVE REVIEW BOARD.....RESPONDENT

H. YOUNG & CO, (E.A) LIMITED/

GIBB AFRICA LIMITS.....1ST INTERESTED PARTY

CHINA WU YI CO. LIMITED.....2ND INTERESTED PARTY

EX PARTE: KENYA NATIONAL HIGHWAY AUTHORITY

RULING

1. On 2nd August, 2016, **Lenaola, J** granted leave to the applicant herein, Kenya National Highways Authority, to commence these judicial review proceedings but directed the parties to argue the issue whether or not the grant of leave ought to operate as a stay interpartes and it is that issue which falls for determination in this ruling.
2. The Applicant herein was the procuring entity in respect of the tender for the construction of the Garsen-Witu-Lamu (C112 Road) while the 1st and 2nd interested parties were bidders thereof. The applicant proceeded to award the said tender to the 2nd interested party. However this decision did not go down well with the 1st interested party who being aggrieved therewith filed a review before the Respondent challenging the said decision
3. The Respondent after hearing the said review delivered its decision on 6th July, 2016 in which it allowed the review, annulled and set said the applicant’s said award, held that the 1st interested party joint venture is entitled to a preference of 20% on its tender sum for the purposes of the evaluation and award of the subject tender and that the 2nd interested party is not entitled to benefit of the margin of preference prescribed under section 86(2) of the Act for the purposes of evaluation and award of the subject tender and ordered the applicant to re-evaluate the financial proposal submitted to it by the 1st interested party

joint venture to the extent of according and incorporating the said 20% preference to the tender price submitted by the 1st interested party joint venture for the purposes of the award of the tender. It further directed that the said financial re-evaluation be undertaken within 7 days of its decision and that the applicant files the re-evaluation report setting out the outcome thereof with the secretary of the Respondent on or before 3rd August, 2016.

4. It is this decision that provoked these proceedings which in which the applicant has raised various grounds including the impartiality of the chairperson of the Respondent. **Lenaola, J** considered the said grounds and found that they established a *prima facie* case hence the leave granted.

5. On the issue of stay, it was argued by **Mr. Ligunya**, learned counsel for the applicant that unless the leave granted operates as a stay of the Respondents decision, the applicant will be compelled to sign the contract with the 1st interested party and that action would render this matter purely an academic exercise. In his view the effect of the stay would be only to maintain the status quo hence none of the parties herein would suffer any prejudice.

6. **Mr. Mutisya**, learned counsel for the 2nd interested party, on the other hand supported the application. In his view the refusal to grant the stay would prejudice the 2nd interested party who is affected by these proceedings and has a stake in the outcome of these proceedings. According to him, if the stay is not granted and the tender is awarded to the 1st interested party the 2nd interested party's interests would be adversely affected before it is afforded an opportunity of being heard.

7. The application was however opposed by the 1st interested party through its learned counsel, **Miss Wangoko**. According to learned counsel, neither the applicant nor the 2nd interested party complied with section 175 of the **Public Procurement and Asset Disposal Act No. 33 of 2015** (hereinafter referred to as "the Act"). According to learned counsel, if the 2nd interested party was aggrieved by the Respondent's decision, it ought to have moved the Court for judicial review. She urged the Court to decline to grant the directions sought since the applicant is made by the procuring entity as opposed to a party who stands to benefit from the tender.

8. In his rejoinder, **Mr. Ligunya** submitted that there are no rules contemplated under section 175(2) of the Act which provide for the percentage to be deposited by a party seeking judicial review remedies as yet. He further contended that the said provision does not apply to applications for judicial review made by the procuring entity as opposed to the tenderers.

9. I have considered the foregoing submissions. Section 175 of the Act provides as follows:

(1) 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.

(2) The application for a judicial review shall be accepted only after the aggrieved party pays a percentage of the contract value as security fee as shall be prescribed in Regulations.

(3) The High Court shall determine the judicial review application within forty five days after such application.

(4) A person aggrieved by the decision of the High Court may appeal to the Court of Appeal within seven days of such decision and the Court of Appeal shall make a decision within forty-five days which decision shall be final.

(5) If either the High Court or the Court of Appeal fails to make a decision within the prescribed timeline under subsection (3) or (4), the decision of the Review Board shall be final and binding to all parties.

(6) A party to the review which disobeys the decision of the Review Board or the High Court or the Court of Appeal shall be in breach of this Act and any action by such party contrary to the decision of the Review Board or the High Court or the Court of Appeal shall be null and void.

(7) Where a decision of the Review Board has been quashed, the High Court shall not impose costs on either party.

10. It is therefore clear that under section 175(2) aforesaid, this Court can only “accept” an application for a judicial review after the aggrieved party pays a percentage of the contract value as security fee as shall be prescribed in Regulations. The Court must therefore deal with the meaning of the word “accept”. This necessarily calls for what constitute judicial review application. In this jurisdiction it is now trite that judicial review proceedings proper are commenced by the Notice of Motion and not the Chamber Summons. The Chamber Summons is simply an application for leave or permission to commence judicial review proceedings and whereas on the filing of the Notice of Motion the Chamber Summons is subsumed or submerged in the Motion, it is the Motion that originates the judicial review application proper. I can do no better than quote the Court of Appeal 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 expressed itself *inter alia* as follows:

“The proceedings under Order 53 can only start after leave has been obtained and the proceedings are then originated by the notice of motion filed pursuant to the leave granted. It would be somewhat ridiculous to bring the application for leave by way of an originating summons and once the leave is granted, the originating summons is then swallowed up or submerged in the notice of motion.”

11. Similarly, in **Mike J. C. Mills & Another vs. The Posts & Telecommunications Nairobi HCMA No. 1013 of 1996**, it was held *inter alia* that the application for leave does not commence judicial review until such permission is granted to institute appropriate Judicial Review application.

12. It is therefore my view that it is at the time of leave that the Court in granting the leave may also direct as a condition that the deposit in form of the prescribed percentage of the contract value be made. It is however clear that the said deposit is required to be made by the aggrieved party. Under section 175(1) of the Act, it is clear that it is only a person aggrieved by a decision made by the Review Board that is entitled to seek judicial review by this High Court. If the term “aggrieved person” or “party” was to be interpreted to exclude the procuring entity, it would mean that the procuring entity has no right to invoke the judicial review jurisdiction of this Court. That view, in my view would be patently unconstitutional. Therefore the only proper interpretation would be that for the purposes of the Act, an “aggrieved person” or “party” includes the procuring entity.

13. However since section 175(2) of the Act places an obligation on the aggrieved party to pay a prescribed percentage of the contract value as security fee, I am unable to agree with the applicant that the said provision does not apply to it. As to what percentage is required to be paid, is a matter for the regulations. It is however contended which contention is not disputed that the regulations prescribing percentages are yet to be formulated. It is my view that section 175(2) of the Act with respect to payment of the percentage can only be implemented after the Regulations are in place. It is therefore my view and I hold that this application cannot be disallowed on the basis of the failure to pay a percentage which is yet to be prescribed.

14. Whereas no serious issue may be taken, in terms of stay, with respect to the Respondent’s direction to the Applicant to re-evaluate the tender in this case, the decision seemed to have conferred some benefit on the 1st interested party in the process of the said re-evaluation. If the decision of the Respondent is implemented and the benefit conferred by the Respondent on the 1st interested party accrues to its benefit to the disadvantage of the 2nd interested party thereby leading to the award of the tender to the 1st interested party, the success of these proceedings would be simply academic as the contract shall have been performed. Being a tender for the construction of a road, I cannot see how that performance can be reversed in such eventuality. As held by the High Court in Kaduna in **Econet Wireless Limited vs.**

Econet Wireless Nigeria Ltd and Another [FHC/KD/CS/39/208] the decision to grant a stay involves:

“a consideration of some collateral circumstances and perhaps in some cases inherent matters which may, unless the order of stay is granted, destroy the subject matter or foist upon the Court...a situation of complete hopelessness or render nugatory any order of the... Court or paralyse in one way or the other, the exercise by the litigant of his constitutional right...or generally provide a situation in which whatever happens to the case, and in particular even if the applicant succeeds...there would be no return to the status quo.”

15. It is also not lost to me that the applicant herein is in fact the procuring entity for whose benefit the tender is being undertaken though on behalf of the public at large. In these unique circumstances, to subject it to enter into a contract whose future is not certain does not augur well for the principle of acceleration of finality of Public Projects.

16. Having considered the spirit of the Act, it is my view that the subject procurement process be kept in abeyance. Accordingly, I direct that the leave granted herein shall operate as a stay of the decision of the Respondent, the subject of these proceedings pending the hearing and determination of the substantive motion or further orders of this Court.

17. The costs of the application will be in the cause.

18. It is so ordered.

Dated at Nairobi this 31st day of August, 2016

G V ODUNGA

JUDGE

In the presence of:

Mr. Ligunya for the Applicant

Miss Wangokho for the 1st Interested Party

Cc Mwangi