



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**(JUDICIAL REVIEW DIVISION)**

**J.R. MISC APPL. NO. 477 OF 2014**

**IN THE MATTER OF TENDER NO. KAA/197/2013-2014 FOR THE DEVELOPMENT AND MANAGEMENT OF AN INTERNATIONAL BRANDED FAST FOOD OUTLET AT JOMO KENYATTA INTERNATIONAL AIRPORT, NAIROBI**

**AND**

**IN THE MATTER OF THE DECISION OF THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD MADE ON 18<sup>TH</sup> DECEMBER, 2014**

**AND**

**IN THE MATTER OF THE SECTIONS 66, 98 AND 100 OF THE PUBLIC PROCUREMENT & DISPOSAL ACT, 2005 AND REGULATION 73 OF THE PUBLIC PROCUREMENT AND DISPOSAL (AMENDMENT) REGULATIONS, 2013**

**AND**

**IN THE MATTER OF THE LAW REFORM ACT CAP. 26, LAWS OF KENYA**

**BETWEEN**

**HOGGERS LIMITED.....APPLICANT**

**AND**

**1. PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD.....RESPONDENT**

**2. SUZAN GENERAL TRADING.....1<sup>ST</sup> INTERESTED PARTY**

**3. KENYA AIRPORTS AUTHORITY.....2<sup>ND</sup> INTERESTED PARTY**

**RULING**

1. On 29<sup>th</sup> December, 2014, I granted leave to the applicant herein, **Hoggers Ltd**, to apply for judicial review orders sought in this application. I however 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. According to **Mr Nganga**, learned counsel for the applicant, the purpose of stay is to preserve the status quo and in this case it was confirmed by the 2<sup>nd</sup> interested party that the contract had not been executed hence the impugned decision is yet to be implemented in any way.
3. It was submitted that the impugned decision was positive in nature as IN it, the procurement process was directed to be completed within 15 days which period was due to lapse on 2<sup>nd</sup> December, 2015. It was submitted that the conclusion of the process would entail the signing of the contract and this Court having granted leave to file the substantive Motion which indeed had been filed, the question is why would the decision be effected pending the hearing of the Motion.
4. It was submitted that under section 100(1) of the **Public Procurement and Disposals Act** (hereinafter referred to as the Act), the decision of the Respondent is not final once judicial review proceedings are commenced within 14 days of the decision in question. Based on **Republic vs. Public Procurement Administrative Review Board & 2 Others ex parte Noble Gases International Limited [2013] eKLR** (hereinafter referred to as the **Noble Gases Case**) and **Suzan General Trading JLT vs. Public Procurement Administrative Review Board, Hoggers & KAA JR No. 289 of 2014 (UR)**, this Court was urged to express itself on the issue that the decision of the Respondent remain stayed and should not be implemented hence the leave ought to operate as a stay.
5. On his part **Mr. Ngacha** for the 1<sup>st</sup> Interested Party, **Suzan General Trading**, in whose favour the impugned decision was made was of the view that the purpose of stay is not to preserve the *status quo* as a matter of right but is meant to avoid a situation where both the Court proceedings and the ultimate decision are not rendered nugatory or where irreparable harm is occasioned.
6. According to learned counsel section 100(1) and (4) of the Act must be considered in their proper context in relation to the decision so that it does not become final and binding. In his view this was what was held in the **Noble Gases Case** (supra). While agreeing that there is a statutory stay, he contended that the same only applies to the extent that the decision does not become final and binding. However in the instant case the signing or implementation does not affect the Court's jurisdiction.
7. He therefore submitted that the signing of the contract would not render these proceedings nugatory. In his view allowing limited implementation taking into account public interest and the unique circumstances of this case ought to warrant the said limited stay. It was submitted that since the signing and implementation is a process and a series of events the proceedings would not be rendered nugatory as long as the operations do not begin since all that would have happened is that the 1<sup>st</sup> interested party would have incurred costs and the applicant or the 2<sup>nd</sup> interested party, the procuring entity, would not have suffered any prejudice.
8. The Court was urged to consider the element of the delay. According to learned counsel if the application were succeed, it would not prejudice any of the parties save the 1<sup>st</sup> interested party. On the other hand if the application was to fail and part of the process had been undertaken it would cut down on the period for the implementation to the benefit of the public. **Mr Ngacha** therefore conceded that the stay ought to operate only up to the fitting in of equipment and commencement of operations and the Court was urged not to grant a blanket stay.
9. On her part **Miss Nyambati** who appeared for the 2<sup>nd</sup> interested party, the procuring entity did not oppose the application for stay and informed the Court that the 2<sup>nd</sup> interested party would abide by the Court's decision.
10. In his rejoinder, **Mr Nganga** submitted that the Court in the **Noble Gases Case** was explicit that the decision is kept abeyance till the Court's decision and that the same remains frozen hence nothing ought to be done towards the implementation thereof whether partly or fully. In his view the principles of the proceedings being rendered nugatory and irreversibility of harm which are more appropriate to applications for stay pending appeal do not apply to stay in judicial review proceedings under Order 53 of the **Civil Procedure Rules** under which what is sought is the preservation of the *status quo*.

11. I have considered the foregoing submissions. Section 100(1) of the Act provides as follows:

*A decision made by the Review Board shall, be final and binding on the parties unless judicial review thereof commences within fourteen days from the date of the Review Board's decision.*

12. This Court has had occasion to deal with the said provision in Republic vs. Public Procurement Administrative Review Board & Others ex parte Avante International Technology Inc. Nairobi High Court Misc. Application No. 451 of 2012 and Republic vs. Director General of the Public Procurement Oversight Authority & Others ex parte Africa Infrastructure Development Company Nairobi High Court Misc. Application No. 24 of 2013 in which it was held as follows:

“Section 100(1) of the Act provides that a decision made by the Review Board shall, be final and binding on the parties unless judicial review thereof commences within fourteen days from the date of the Review Board's decision. The respondents contend that since there was no stay granted by the Court and the said contract was entered into the orders sought herein are incapable of being granted. This action is justified on the ground that the Commission's action is dictated by the timelines for the conduct of the elections and therefore it had to proceed with the contract. That may be so, however, if the Commission decides to enter into a contract during the pendency of judicial review proceedings filed within the stipulated period, it does so at the risk that the Court may nullify the process leading to the tender and it would be no excuse that the tender had been entered into since it is clear that where the judicial review proceedings are commenced within 14 days, the decision of the Procuring Entity is not final in which event the Court could be properly entitled to nullify the procurement. The decision of the Board having been made on 11<sup>th</sup> December 2012 and these proceedings having been instituted on 20<sup>th</sup> December 2012, the same were instituted within time hence the mere fact that the contract had been awarded and part payment made is in my view inconsequential.”

13. As this Court held in Republic vs. Public Procurement Administrative Review Board & 2 Others Judicial Review Application No. 382 of 2013:

“It is therefore my view that where the decision of the Review Board is challenged by way of judicial review within 14 days of the date of the decision, the binding effect and finality of the decision is suspended until the determination of the said proceedings. Parliament attempted to provide a safeguard against abuse of this automatic suspension of the decision by providing that the said proceedings must be determined within 30 days. That provision however ran into problems in Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728.”

14. Majanja, J in the *Noble Gases Case* held that:

“...the fourteen days period is a window availed to serve the purpose of limiting the time frame within which a review against the Board's decision can be lodged in the High Court for purposes of expediency and conclusiveness of the Board's decision as these activities are time bound and the procurement process ought not be held hostage to indefinite proceedings. More importantly, subsection (4) of section 100 indirectly requires the High Court to pronounce itself within thirty days from the date of filing of the judicial review. For emphasis, the subsection states, “(4) If judicial review is not declared by the High Court within thirty days from the date of filing, the decision of the Review Board shall take effect.” Although this section has been declared unconstitutional, in the case of *Republic v Public Procurement Administrative Review Board and Another ex-parte Selex Sistemi Integrati Nairobi Misc. Appl. 1260 of 2007 [2008] eKLR*, in so far as it limits the time in which the High Court is to render a decision, the decision of the Board after the application for review has been filed remains subject to the Court directions and decision. This provision answers the core question in contention, that is, whether the filing of judicial review proceeding before the High court within the prescribed 14 day-period acts as an automatic stay. I take the position

that section 100 of the Act implies that the Board's decision is to be kept in abeyance until the court makes its final decision. The use of the term, "shall take effect" discloses the legislative purpose and intent. For all practical purposes, the Board's decision was 'frozen' so to speak until such a time as the High court issued an order of judicial review contemplated under the section over the decision or after the lapse of the 14 day period whichever comes first. I find and hold that the provision is a statutory stay."

15. The principles guiding procurement processes were established by **Nyamu, J** (as he then was) in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728** where he expressed himself as follows:

**"The Court must look at the intention of Parliament in section 2 of the said Act which is *inter alia*, to promote the integrity and fairness as well as to increase transparency and accountability in Public Procurement Procedures... It suffices, to find that the ouster sections in the Public Procurement and Disposal Act, 2005 are designed in the context of ensuring fairness, transparency and accountability in the procurement procedure... Section 2 of the Public Procurement and Disposal Act, 2005 is elaborate on the purpose of the Act and top on the list, is to maximize economy and efficiency as well as to increase public confidence in those procedures. The Act was legislated to hasten or expedite the Procurement Procedures for the benefit of the public. Indeed, sections 36(6) and 100(4) of the Act which are ouster clauses, were tailored to accelerate finality of Public Projects. The intention of efficiency is noble and must be appreciated if the development agenda is to be achieved. The Court cannot ignore that objective because it is meant for a wider public good as opposed to an individual who may be dissatisfied with the procuring entity."**

16. In my view the reason why the Act provides for statutory stay is to ensure that procurement process are speedily determined and with finality. This is meant, as was appreciated by **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:**

**"...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."**

17. In this case the 2<sup>nd</sup> interested party, the procuring entity which is the party for whose benefit the procurement was being undertaken does not seem to be in a hurry to enter into the contract. In those 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.

18. 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 proceedings in question pending the hearing and determination of the already filed Notice of Motion or until further orders of this Court.

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

20. It is so ordered.

**Dated at Nairobi this 2<sup>nd</sup> January, 2015**

**G V ODUNGA**

**JUDGE**

**In the presence of:**

**Mr. Nganga for the Applicant.**

**Mr. Ngacha for the 1<sup>st</sup> interested party.**

**Miss Nyambati for the 2<sup>nd</sup> interested party.**

**Cc Richard.**