



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL APPEAL NO. 45 OF 2015

M/S MASTER POWER SYSTEMS LIMITED.....APPELLANT

VERSUS

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

M/S CENTRAL ELECTRICALS INTERNATIONAL

LIMITED.....2ND RESPONDENT

GLAMA ELECTRICAL &MECHANICAL COMPANY

LIMITED.....3RD RESPONDENT

RULING

This ruling determines two applications on record. The first application is dated 10th March 2015 filed by the 2nd respondent Tourism Fund, seeking to strike out the appeal herein as filed by M/S Power Systems Limited for want of jurisdiction of this court. The other application is dated 20th March 2015 filed by the appellant seeking stay of enforcement of the decision of the Public Procurement Administrative Review Board (PPARB). The two applications were heard together by way of oral arguments following this court's directions given on 4th May 2015 with the agreement of all parties' advocates on record.

In support of the application dated 10th March 2015, the applicant's counsel Mr Omwebu relied on the grounds on the face of the application and the supporting affidavit of Allan Chenane and three decided authorities.

Mr Omwebu submitted that the Memorandum of Appeal and the entire record of appeal should be struck out as the appeal offends Section 100 (1) (2) and (4) of the Public Procurement and Disposal Act, 2005. Mr Omwebu contended that the appellant should have challenged the decision of the Public Procurement Administrative Review Board by way of Judicial Review not by way of an appeal hence the appeal is incompetent as it seeks to challenge the process and not the merits of the 1st respondent's decision as borne out of the Memorandum of Appeal.

Mr Omwebu relied on the case of **Riley Services Ltd vs The Judiciary** whose facts were similar to this matter and submitted that the appellant should have approached the court under Order 53 of the

Civil Procedure Rules.

Mr Omwebu was emphatic that this court has no jurisdiction to hear and determine this appeal or other application predicated on the appeal arising from the decision of Public Procurement Administrative Review Board since the appeal is incompetent and that a court can only exercise jurisdiction conferred by law as was held in **Samuel Kamau Macharia & another vs KCB and 2 Others** and the case of **Owners of the Motor Vessel “Lillians” vs Caltex Oil (K) Ltd.** He therefore urged the court to allow the application and strike out the appeal.

In urging the application dated 20th March 2015, Mr Gichamba advocate for the appellant also responded to the 2nd respondent’s application urging the latter application to be dismissed with costs. He submitted that Section 100 of the Public Procurement and Disposal Act, 2005 provides for the two clear ways of approaching this court. Under Section 100(1), it was submitted that Judicial Review can be applied for challenging the process adopted by the Public Procurement Administrative Review Board whereas under Section 100(2) of the Act, an appeal to the High court lies, and that the decision of the High Court is final where a party chooses to file an appeal. Mr Gichamba relied on the grounds of objection and supplementary affidavit urging this court to disregard the preliminary objection grounded on jurisdiction. He relied on the cases of **R vs Public Procurement Administrative Review Board and Another Exparte Selex Sistemi Integrati (2008) e KLR** wherein the issue of jurisdiction of the High court to hear an appeal challenging the decision of Public Procurement Administrative Review Board was considered.

Mr Gichamba maintained that the ordinary jurisdiction of the High court to hear appeals from tribunals and other judicial and quasi –judicial bodies is preserved by Section 100(2) of the Public Procurement and Disposal Act, 2005, conferring on an aggrieved party the right of appeal.

Mr Gichamba submitted that the decision in **Riley v Judiciary** was made *per incuriam*. He relied on **Regina v Montilla & Others (2003) UKHC** to propose that heading and side notes to Section 100 of the Public Procurement and Disposal Act, 2005 can be considered in construing a provision of an Act of Parliament. In that case, it was observed.

“The question then is whether headings and side notes, although unamendable, can be considered in construing a provision on an Act of parliament. Account must of course; be taken of the fact that these components were included in the Bill not for debate but for ease of reference. This indicates that less weight can be attached to them than to the parts of the Act that are open for consideration and debate in parliament”

In Mr Gichamba view, the **Riley Services Ltd** case referred to marginal notes which only serve as guidelines but not meant to change the meaning of the statute.

Miss Chilaka appearing for the 1st respondent Public Procurement Administrative Review Board submitted that the Public Procurement and Disposal Act gives the High Court jurisdiction to hear an appeal arising from the decision of the 1st respondent Review Board but that the aggrieved party can elect to either file an appeal or come to this court by way of Judicial Review. She submitted that the 1st respondent will not be affected by any orders that this court may issue staying or not staying orders of the 1st respondent.

Mr Okatch representing the 3rd respondent relied on the replying affidavit sworn by Karim Meghji the Managing Director of the 3rd respondent and submitted that the issue of process can only be brought before the court by way of Judicial Review. Mr Okatch associated himself with the submissions by Mr Omwebu for the 2nd respondent /applicant on the issue of jurisdiction of this court to hear and determine an appeal emanating from the decision of the Public Procurement Administrative Review Board and contended that what the appellants are challenging is process not merits of the decision of the 1st respondent and that as matters stand now, the impugned contract has already been executed and works have been expended as shown by Annexure **KM1** hence there is nothing to be challenged .

He maintained that the **Riley Services Ltd vs Judiciary** case was relevant to this case as the court rendered itself on the issue of the role of marginal notes and that in the **R vs Public Procurement Administrative Review Board** case cited by Mr Gichamba, the court was faced with a provision that could be interpreted in two ways. Further, it was submitted that in interpreting statutes, the provisions must be read as a whole and put in the context. According to Mr Okatch, isolating provisions of the statute leads to misconstruction.

Mr Okatch further submitted that Public Procurement processes have elements of time hinged on any deliberations after a decision by the 1st respondent and that Section 100(4) talks of Judicial Review and the time within which it must be determined, same as Section 100(1).

Mr Kagucho counsel for the 4th respondent also joined in the fray to support the competency of this appeal and associated himself with the submissions by the appellant's counsel and relied on the replying affidavit of Daniel Mbiyu Nganga. He submitted that the Public Procurement Administrative Review Board -1st respondent did not deal with issues of merit which were addressed by parties and that this court is the right forum to address those issues of merit. He also submitted that there are two schools of thought concerning Section 100 of the Public Procurement and Disposal Act- the proponents for Judicial Review and proponents for appeal and that since the **Riley Services Ltd** case is not binding on this court, the court should determine that issue independently of what the law is, applying the authorities supplied. That since the appeal challenges both process and merits, this is the right court to deal with any challenge to the decision of the 1st defendant, since Judicial Review only deals with process. Counsel further submitted that under Section 99 of the Public Procurement and Disposal Act,2005, parties have a choice to go to other institutions and the High Court is the best alternative since its jurisdiction is unlimited as provided for in the Constitution. He urged the court to dismiss the preliminary objection of jurisdiction and allow the case to go to full trial.

In response to the various submissions on the issue of jurisdiction of this court, Mr Omwebu submitted that the **Riley Services Ltd** case applied other decisions with approval hence it cannot be a per incuriam decision. Further, that the **Kenya Pipeline** case is distinguishable since there was no question of interpretation of Section 100 of Public Procurement and Disposal Act,2005 as it was an appeal from a Judicial Review matter in the High court, relating to procurement and that the Court of Appeal did not answer the question posed in this appeal. Mr Omwebu further submitted that the Court of Appeal decision in the **Kenya Pipeline** case does not support the two roots of challenging the Review Board's decision.

In a rejoinder, Mr Gichamba maintained that Judicial Review does not deal with merits and that only an appeal can dispose of the issues of merits of the decision of the Review Board.

The application dated 20th March 2015 seeks for stay of enforcement of the decision of the 1st respondent herein Public Procurement Administrative Review Board pending hearing and determination of this appeal. The applicant/appellant M/S Master Power Systems Ltd relies on the 6 grounds on the face of the said application contending that it participated in the tender No. TF/05/2014 -2015 for the supply, delivery, installation, testing and commissioning of electrical and associated works installations as the proposed Ronald Ngala, Utalii College–Kilifi County. That a review was lodged against the 1st respondent with the applicant being enjoined as the 2nd interested party and its decision delivered on 29th January 2015; That the applicant was aggrieved by the said decision of the Public Procurement Administrative Review Board and lodged this appeal pursuant to Section 100(2) of the Public Procurement and Disposal Act,2005; That the 2nd/main contractor on site may proceed with execution and implementation of the contract with the 3rd respondent which contract with the 3rd respondent is subject matter of this appeal; That the 3rd respondent has already moved on site and has commenced electrical works with an intention to render the appeal nugatory.

Finally, that if the orders sought herein are denied then the rather meritorious appeal will be rendered nugatory, an illegality will occur and the course of justice will be defeated.

The applicant/appellant's application was also supported by the affidavit of Mukesh Hurani sworn on 20th March 2015 reiterating the grounds above.

The appellant maintains that it bid for the tender for the supply, delivery, installation, testing and commissioning of Electrical and Associated Works Installation at the proposed site and was notified by 2nd respondent that it had been prequalified as a supplier and it did submit quotations as expected.

Further, that it passed and emerged as the most responsive bidder as per Evaluation Committees Report dated 31st October 2014 annexed whereas the 3rd respondent Central Electrical Internationals Limited who won the tender had been found to be technically non responsive and therefore disqualified from further evaluation.

It is deposed that for unclear reasons the 2nd respondent Tourism Fund conducted an illegal and unwarranted second evaluation and produced an attached report dated 27th November 2014 revising the scores upwards in favour of the third respondent without giving any explanations. Further, it is contended by the appellant that the scores for the rest of the bidders remained constant while the 2nd respondent marked certain requirements which had earlier been found missing to be present thereby recommending for approval the 3rd respondent.

The appellant further contends that the 4th respondent was dissatisfied with that decision to award the 3rd respondent the tender and filed for review to the 1st respondent wherein the appellant was enjoined as an interested party and in its decision dated 29th January 2015, the 1st respondent dismissed the application for review and directed the 2nd respondent to proceed with the procurement process to its logical conclusion, hence this appeal challenging that decision of the 1st respondent.

The appellant was apprehensive that this appeal will be rendered nugatory unless the stay is granted since the 2nd respondent had started implementing the directives of the 1st respondent and was about to conclude the contract with the 3rd respondent who was already onsite, thereby prejudicing the orders being sought in this appeal. The appellant also filed supplementary affidavit sworn on 30th April, 2014 by Mukesh Hurani reiterating its depositions in the earlier affidavit in support of the application for stay and maintaining that the application was made timeously and that the appeal stands to be nugatory unless stay is granted. The appellant urged the court to grant the orders sought as the application had been made without inordinate delay.

The application dated 20th March 2015 was opposed by the 1st, 2nd and 3rd respondents whereas the 4th respondents concurred with the appellant that indeed there should be stay as there was no equity in awarding the tender to the 3rd respondent. It filed a replying affidavit through David Mbiyu Ngang'a (**undated**) reiterating the background information provided by the appellant and stating that the 4th respondent also bid for the material tender and emerged the second best although it was the lowest bidder and urging this court to stay execution as there are real issues to be determined in this appeal and that the appeal shall be rendered nugatory unless stay is granted. The 4th respondent's interest in the matter is that in any event, should this court find the appeal meritorious, it should award the tender to the 4th respondent.

The 1st respondent did not file any grounds of opposition or replying affidavit. The 3rd respondents filed replying affidavit sworn by Karim Meghji its Managing Director, on 17th April 2015 contending that the appellant's application lacks merit. Mr Meghji deposed that the application for stay was overtaken by events as the 2nd defendant had already executed a contract with the 3rd respondent, which contract was already in the process of being implemented. In addition, it was deposed that the appellant was guilty of laches as it had filed an appeal after 14 days from 29th January 2015 when the 1st respondent rendered its decision and another 8 weeks before filing the application for stay of that ruling knowing very well that the signed contract was being implemented hence the orders being sought are

malicious.

The 3rd respondents also contended that the appellant was not even a substantive party to the proceedings before the Review Board and that its intentions is to delay the process and or scuttle the whole process to enable it have another shot at the tender.

The 3rd respondent further contended that the applicant has not shown any loss or damage that it was likely to suffer as a result of refusal to grant stay since even the appeal has no chances of success.

The 3rd respondent maintained that it was the successful bidder for the subject tender process which is only a part of the bigger project which was underway hence the interruption of the contract will have a ripple crippling negative effect to the many others which are part of the 2030 flagship projects hence the balance of convenience does not tilt in favour of the appellant since the 3rd respondent had already applied massive resources on the project and finally, that the appellant could only have challenged the decision of the Public Procurement Administrative Review Board by way of Judicial Review and not by way of an appeal.

I have carefully considered all the arguments on record for and against the two applications.

As earlier indicated, there are two main issues for determination in this application. The first issue is a preliminary objection to the entire appeal on the ground that it does not lie from the decision of the 1st Respondent. The second issue is whether this court should stay execution of the contracts already signed between the procuring entity 2nd respondent and the 3rd Respondent.

On the first issue, the 2nd respondent and other parties that support it contend that the appeal is incompetent and that the court has no jurisdiction to hear an appeal arising from the decision of the PPARB. In addition, the opponents of this appeal contend that the appellant should, instead, have filed judicial review proceedings as contemplated in section 100 of the Public Procurement and Disposal Act, 2005. The appellant and its supporters contend that the appeal is properly before this court since it challenges the decision of the Public Procurement Administrative Review Board on the merits and not necessarily of the process which would have been in the premise of the judicial review proceedings. That Judicial Review only concerned with decision making process and procedure not merits of decision.

I have carefully considered the preliminary objection and the counsels' comprehensive submissions in line with the documentation on record and in my view the only question for determination on issue number one is ***whether in the circumstances of this matter the preliminary objection should be allowed.***

The essence of a preliminary objection was given by Law, JA and Sir Charles Newbold P. in ***MUKISA BISCUITS MANUFACTURING CO LTD VS WEST END DISTRIBUTORS (1969) EA 696***. At page 700, Law, JA stated that:

“...a ‘preliminary objection’ consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Sir Charles Newbold P. added as follows at page 701:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

This court is also alive to the established law that the power to strike out a pleading or suit is one that a

court should exercise sparingly and cautiously, as the same is exercised without the court being fully informed on the merits of the case, unless the case is so hopeless that no amount of amendment can inject life in it. In the case of **DT Dobie & Company (K) Ltd Vs Muchina (1982) KLR 1 page 9 Madam J A** held:

“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable action for being otherwise as abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that function is solely reserved for the trial judge as the court itself is not usually fully informed so as to deal with the merits. No suits ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption... A court of justice ought not to act in darkness without the full facts of the case before it.”

Madan JA (as he then was) further adopting the finding of Sellers L in **Wenlock vs Moloney (1965) 1 WLR 1238** where it was stated :-

“ This summary jurisdiction of the court was never intended to be exercised by a minute and a protracted examination of documents and the facts of the case in order to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial judge and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power.”

Further, Danckwerts L.J in the same case stated:

“ The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading.”

In **Crescent Construction Co. Ltd vs Delphis Bank Ltd CA 146/2001(2007) e KLR** the Court of Appeal in dealing with an appeal where a plaint was struck out on the grounds that it disclosed no cause of action and that it was frivolous , vexatious and an abuse of the court process observed:

“However, one thing remains clear and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realization that the rules of natural justice require that the court must not drive any litigant however weak his cause may be from the seat of justice. This is a time honoured legal principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non starter.”

The issue of whether or not a court has jurisdiction to hear and determine this appeal is critical as its determination might as well determine the entire appeal at a preliminary stage hence the need to determine it first.

As held in **Owners of the Motor Vessel “Lillian S vs Caltex Oil (Kenya) Ltd (1989) KLR 1.**

“ By jurisdiction , is meant the authority which a court has to decide matters that are before it or take cognizance of matters presented in a formal way for its decision. The limits for this authority are imposed by the statute, Charter, or Commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance or as to the area over which the jurisdiction of an inferior court of tribunal (including an arbitrator) depends on the existence of a particular state of facts. The court or

tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction, but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given...

This court must therefore inquire as to whether it has jurisdiction to hear and determine this appeal on its merits or the jurisdiction lies elsewhere in the Judicial Review Division of the High Court by way of Judicial Review proceedings.

The above principles of law, in my view, are applicable to appeals and any other form of pleading or proceeding initiated before a court of law or a dispute that can be resolved by application of the law. The said principle has since found support in Article 50(1) of the Constitution which Article guarantees all persons the right to a fair hearing and Article 48 of the Constitution on the right to access to justice. Where pleadings or proceedings are struck out before both parties are accorded an opportunity to be heard, unless such pleading or proceeding is incompetent and therefore an abuse of the court process, the court will hesitate to accede to the prayer to strike it out at the interlocutory stage. In **Richard Ncharpi Leiyagu case CA 18/2013** the Court of Appeal stated:

“ The right to a hearing has always been a well protected right in our constitution and is also the cornerstone of the Rule of law. This is why even if the court have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality.”

To answer the critical question posed hereto, we must embark on an appreciation of what judicial review and appeal are and what each of the two modes of challenging decisions of tribunals are intended to achieve. So much has been written on this aspect and the courts have churned out a plethora of decisions on the matter that I need not reinvent the wheel in setting out the distinction between the two remedies which are recognized not only in our statute books but in the Constitution of Kenya, 2010.

It is a well established fact and principle of law that Judicial Review remedies are discretionary and are not guaranteed. According to **Judicial Review Handbook**, 6th Edition by **Michael Fordham** at page 5, judicial review is a central control mechanism of administrative law (public law), by which the judiciary discharges the constitutional responsibility of protecting against abuses of power by public authorities. It constitutes a safeguard which is essential to the rule of law; promoting the public interest; policing parameters and duties imposed by Parliament; guiding public authorities and securing that they act lawfully; ensuring that they are accountable to law and not above it; and protecting the rights and interests of those affected by the exercise of public authority power.

The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. It is meant to uplift the quality of public decision making, and thereby ensure for the citizen civilized governance, by holding the public authority to the accountable limits defined by the law. Judicial review is therefore an important control, ventilating a host of varied types of problems.

However, it is important to remember that Judicial Review is a special supervisory jurisdiction which is different from both (1) ordinary (adversarial) litigation between private parties and (2) **an appeal (rehearing)** on the merits. The question is not whether the judge disagrees with what the public body has done, but whether there is some recognizable public law wrong that has been committed. Whereas private law proceedings involve the claimant asserting rights, judicial review represents the claimant invoking supervisory jurisdiction of the Court through proceedings brought nominally by the Republic. See **R vs. Traffic Commissioner for North Western Traffic Area ex parte Brake [1996] COD 248.**

Judicial review is a constitutional supervision of public authorities involving a challenge to the legal and procedural validity of the decision. ***It does not allow the court of review to examine the evidence with a***

view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through taking into account an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, ***as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence.*** See Reid vs. Secretary of State for Scotland [1999] 2 AC 512.

Judicial review, it has been held time and again, is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See **R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285.**

The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment reaches on a matter which it is authorized by law to decide for itself a conclusion which is correct in the eyes of the court. See **Chief Constable of the North Wales Police vs. Evans (1982) 1 WLR 1155.**

But the availability of alternative remedies has never been a bar to Judicial Review remedy as was held in the case of **David Mato T/A Manyatta Auctioneers v R CA 265/97.** In **Republic vs Public Procurement Administrative Review Board & another Exparte Selex Selex Sistemi Integrati Nyamu J** stated:

“ The second issue is whether the public interest of finality in procurement procedures outweigh the judicial adjudication. 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, Section 36(6) and 100(4) of the Act which are ouster clauses were tailored to accelerate finality in 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.

However, the court must put all public interest considerations in the scales and not only the finality consideration. The said Act also has objectives namely to provide the integrity and fairness of the procurement procedures and to increase transparency and accountability. Fairness, transparency and accountability are core values of modern society like Kenya. They are equally important and may not be sacrificed at the altar a of finality. The court must look into reach and every case and its circumstances and balance the public interest with that of a dissatisfied applicant. Adjudication of disputes is a constitutional mandate of the courts and the court cannot abdicate from it. Speed is the hallmark of Judicial Review and even an application for leave is filed under certificate of urgency. The law also sets out the period within which to file the application for substantive orders, failure of which the orders granted at leave stage automatically lapse. It is therefore arguable that finality is the very nature of Judicial Review. It is also arguable that whenever a party comes to court for redress un public procurement cases, finality cannot outweigh judicial adjudication as there may be other issues such as integrity, transparency and accountability which are also the in public interest and it adjudicated upon by the court, may maximize economy and increase public confidence in the procurement procedures.

Perhaps, if finality is over emphasized at the expense of other equally important core values in the said Act, the very intention of parliament captured by Section 2 will substantially fall. The court appreciates that one of the objects of the said Act in Section 2(a) is to maximize economy and efficiency. However, while time is of essence in carrying out projects, speed cannot override justice and an illegality cannot be countenanced by the court merely because the offending party is over zealous to complete a project.

It is also one of the objects of the Act, to promote integrity and fairness of procurement and disposal procedures. The law acknowledges the need for speed certainly as to the legitimacy of target activities and requires applicants for Judicial Review to act promptly and avoid frustrating a public body whose decision is challenged particularly because of public interest.”

Section 100 of the Public Procurement and Disposal Act is clear on the specific timelines for challenging decisions of the Review Board. Fourteen days is given for filing of judicial review proceedings and under subsection 4, the High Court must determine the Judicial Review matter within 30 days otherwise the decision of the Review Board takes effect.

Nonetheless, the same Act, and the reason why this court must belabor herein, is that section 100 (2) makes provision for appeal. From the many decisions that I have examined as cited by parties advocates and on my own, only Hon Justice Mabeya interpreted that section to the effect that the word “appeal” as used in the section as read with the marginal notes meant the Judicial Review proceedings. The learned judge referred to the case of **Anisminic Ltd v Foreign Compensation Commission 19 (69) 2 WLR 163 Lord Reed** on ouster clauses that:

“it is well established that a provision ousting the ordinary jurisdiction must be construed strictly. Meaning in turn, that if such a provision is capable of having two meanings that meaning shall be taken which preserves the ordinary jurisdiction of the court.”

The Hon Judge’s finding that the “appeal” process referred to in Section 100(2) of the Public Procurement and Disposal Act is a technical term for the appropriate mode of challenging decisions of the Board and that in the context of that Section “appeal” technically is Judicial Review.” In the learned judge’s view, the ordinary jurisdiction of the High Court with regard to Public Procurement law is the Jurisdiction for Judicial Review.

While I am in agreement that the procurement law was meant to expedite procurement procedures and that in appeals, there may be delays due to the many lengthy procedures attendant thereto, I nonetheless do not agree with my brother judge’s interpretation of section 100 of the Public Procurement and Disposal Act, 2005 and will proceed to give my reasons.

First, is that the Section 100(2) of the Act, in my view, gives an aggrieved party a choice between Judicial Review and appeal depending on what is being challenged. The Act in that section provides for two alternatives for challenging the decision of the Review Board and therefore once a party chooses the Judicial Review path, then they are precluded from filing an appeal at the same time and if they choose the appeal way, then they cannot be allowed to pursue Judicial Review.

The appellant maintains that they are challenging the merits of the decision of the Review Board and therefore the Judicial Review remedy would not be available to them and that since the Judicial Review remedy is discretionary, it is not available to a party who is challenging the merits of the decision of the Review Board.

The respondents who oppose the appeal on the other hand contend that the appeal is challenging the process of the Procuring entity and not merits of the decision of the Review Board.

For this court to determine whether the appeal herein is challenging the process or the merits of the decision of the Review Board, it will have to hear all arguments for and against the specific grounds set

out in the memorandum of appeal as filed. If that happens at this stage, no doubt, then the appeal will be heard prematurely.

In this case, a record of appeal has been filed but the appeal has not been considered by a judge in chambers for admission under section 79 B of the Civil Procedure Act and no directions have been given. Those are the legal and procedural steps necessary for the preparation of disposal of appeals, which procedure is quite different from Judicial Review Proceedings.

This court has also heard serious objections to the competency of the appeal, for reasons that the law does not permit the filing of an appeal under section 100 of the Act, but a judicial review. The court has not heard any substantive submissions as to the substance of the appeal upon which it can make a finding that the appellant ought to have filed a Judicial Review application and not an appeal. Having found that there are two paths to challenging the Review Board's decision depending on whether the challenge is against process or merits of the decision, I also note that in the decision by Justice Mabeya and all other decisions of the High Court and this court relating to the issue, the courts have made decisions on whether or not the judicial review remedy was available to the applicants, only after hearing all the parties on the merits of the applications for Judicial Review. In each of those decisions, the courts were considering whether Judicial Review remedies were available to the applicants and not appeals. The courts were also clear that the applicants had options of filing an appeal and not judicial Review and where the courts found that indeed the remedy of Judicial Review was not available and that the applicants should have filed appeal, the courts did not hesitate to dismiss the Judicial Review proceedings.

The court's jurisdiction can be expressly conferred by the Constitution or Statute and in some instances like in the present case, it depends on the circumstances of a particular set of facts, since the issue at hand is whether the appellant had a right to elect whether to file an appeal or to file Judicial Review proceedings to challenge the decision of the Public Procurement Administrative Review Board and not whether the High Court has the jurisdiction to hear and determine the dispute between the parties.

What the application by the respondents opposed to the appeal herein seeks is to ask this court to determine whether the matter herein is fit for an appeal as filed or for Judicial Review orders. To determine that question, this court must endeavor though briefly, to examine what judicial review entails and hence, whether this appeal is properly before this court as I have done herein.

When the High Court entertains Judicial Review proceedings it exercises its jurisdiction as conferred by Articles 47, 165 (3) (e) and (7) of the Constitution and Order 53 of the Civil Procedure Rules. In addition, the court exercises jurisdiction as conferred by Section 8 and 9 of the Law Reform Act Cap 26 of Kenya.

I reiterate that the purpose of Judicial Review is to check that public bodies or tribunals do not exceed their jurisdiction and that they carry out their statutory duties in a manner that is not detrimental to the public at large (See **Republic vs Permanent Secretary to the Cabinet and Head of Public Service, Office of the President and 2 Others – Exparte Stanley Kamanga Nganga (2006) e KLR.**

Zeroing down to this case which involves procurement of services, what Judicial Review would be seeking to do is to check whether the Review Board derogated from the procedures, in reviewing the decision of the procuring entity, since the Rules and Procedures and Regulations regarding procurement of public goods and services are meant to inspire public confidence in the procurement sector, to ensure a fair, transparent, and efficacious procurement atmosphere that would not allow one party to steal a match on the others.

Judicial Review Orders are also discretionary and the Public Procurement and Disposal Act and Regulations provide for strict timelines which parties should adhere to in seeking Judicial Review orders. In **Vania Investments Pool Ltd v Capital Markets Authority & 8 Others 2014) e KLR** the Court of Appeal, in upholding the decision of (Majanja J) **in the HC MISC CIVIL APPL 139/204** where the learned judge held that one of the reasons that a court may reject an application for Judicial Review is the availability of an alternative remedy for the aggrieved party, relying on **Speaker of the National**

Assembly vs Njenga Karume (1990-1994) EA 546, and R vs National Environment Management Authority Ex parte Sound Equipment Ltd CA 84/2010 (2011) e KLR in which the Court of Appeal observed that :

“ Where there was an alternative remedy and especially where parliament has provided a statutory procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and Judicial Review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it.”

The Court of Appeal in the above matter further observed that although ideally Judicial Review should be sought as a remedy of last resort, there can be exceptions. The same Court of Appeal pronounced itself thus in **R vs National Environmental Management Authority (2011) e KLR (Supra)** that:

“.....in determining whether an exception should be made, and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it.”

In **HC MISC 424/2013 (2015) e KLR R vs THE HIV & AIDS TRIBUNAL Ex parte DynCorp International & JKM** where it was contended by the respondent that the applicant had no right of appeal against the decision of the respondent and that it should have filed for Judicial Review, Odunga J found that:

*“the applicant had an opportunity of appealing against the decision of the respondent.” The law is that Judicial Review proceedings are special proceedings and ought not to be resorted to as an alternative to ordinary civil litigation or an appellate process. As was held by Ochieng J, in **John Fitzgerald Kennedy Omanga vs The Post Master General Postal Corporation of Kenya & 2 Others Nairobi HC MA 997/2003**, for the court to require the alternative procedure to be exhausted prior to resorting to Judicial Review is in accord with Judicial Review being very properly regarded as a remedy of last resort; the applicant however will not be required to resort to some procedure if that other procedure is less convenient or otherwise less appropriate, the adversely affected party ought to appeal against the said order rather than to challenge a decision in respect of which an application has been made and dismissed by the tribunal by way of Judicial Review proceedings.*

Having considered the application herein, it is my view that the application ought to have pursued the appellate process rather than challenging the respondent’s decision in these Judicial Review proceedings.”

The scope of Judicial Review was also considered in **R v Vice Chancellor JKUAT Ex parte Cecilia Mwathi & Another** in which the following excerpt from Supreme Court practice 1997 VOL 53/1-416 was quoted:

“ The remedy of Judicial Review is concerned with reviewing not the merits of the decision in respect of which the application for Judicial Review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of authority constituted by law to decide the matters in question”

What I gather from the above distinguished decisions is that Judicial Review has never been the

only remedy available to a party who wishes to challenge a decision of a tribunal or body subordinate to the High Court (including other Superior Courts of same status as the High Court).

The above position is fortified by the provisions of Section 99 of the Public Procurement and Disposal Act which allows an aggrieved party to pursue any other remedy it can lodge such as lodging a complaint with any other constitutional body if there is a basis, a petition, appeal etc. The Section does not specify those other remedies available but courts have over time held that other available fora for complaining against decisions of public administrative bodies are the Ombudsman's Office (Commission of Administrative Justice (CAJ)), filing of civil suit or even an appeal. The Section provides:-

“The right to request a review under this part is in addition to any other legal remedy a person may have.”

In **R vs Epping and Harlow General Commissioner Exparte Gold Straw (1983) 3 ALL ER 257** it was stated:

“The application for Judicial Review was within the residual jurisdiction of the court, but save in exceptional circumstances, that jurisdiction would not be exercised where other remedies were available and had not been used.”

In **Republic vs Kenya Revenue Authority Exparte Yaya Towers Ltd (2008) e KLR**, the court was clear that the remedy of Judicial Review is concerned with reviewing not the merits of the decision but the decision making process.”

The above position was also accepted in **Municipal Council of Mombasa v Republic & Umoja Consultants Ltd (2002) e KLR** where it was stated that:

“ In Judicial Review, the court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? did those who made the decision have the power, i.e the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of Judicial Review is concerned with, and such court is not entitled to act as a Court of Appeal over the decider; acting as an Appeal Court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision and that, as we have said, is not the province of Judicial Review.”

Judicial Review remedy is not guaranteed to a party, being a discretionary remedy (see **R vs Kenya National Commission on Human Rights Exparte Uhuru Muigai Kenyatta HC MCA 86/2009** and in granting the remedy, even if the particular case falls into one of the categories where Judicial Review will be, the court is not bound to grant it. In addition, as to what orders the court will make in an application for judicial review will depend on the circumstances of each case. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining and the discretion of the court being a judicial one must be exercised on the evidence of sound legal principles.

From my expositions of the two positions of whether one has an option of filing for Judicial Review or not, I have come to the conclusion that under Section 99 of the Act, in addition to any other legal remedy, a person may have Judicial Review sought, and that, the availability of an alternative remedy is not a bar to Judicial Review of Administrative action under the Public Procurement and Disposal Act.

I have also come to the conclusion that under Section 100 of the Act, an aggrieved party has the option of appealing or applying for Judicial Review, and that by dint of Section 100(4) of the Act, if Judicial Review is taken by the party, it must be declared/determined within 30 days from date of filing failure

to which the decision of the Board takes effect.

I am also persuaded that whereas an appeal is concerned with the merits of the decision of the administrative body or tribunal, Judicial Review is concerned with the decision making process. Judicial Review is thus concerned with whether or not the authority has exceeded its powers, committed an error of law, omitted Rules of Natural Justice, a duty to act fairly, reached a decision which no reasonable tribunal could have reached or abused its power. In this case, the appellant maintains that it is challenging the merits of the decision, having regard to circumstances of the case. It is their appeal. They are under a legal burden to prove what they allege, and this court cannot oust them from the judgment seat especially where there is abundant jurisdiction to receive and determine the appeal on its merits.

Thus, whether a party aggrieved by the decision of the 1st respondent has the option of either filing an appeal or filing an application for Judicial Review, the option a party takes determines the scope of the jurisdiction of the court in entertaining the challenge to the decision of the 1st respondent Review Board.

Where one chooses to go by way of Judicial Review, then the role of the court is circumscribed by the provisions of the Law Reform Act and Order 53 of the Civil Procedure Rules (See **Shaban Mohamed Hassan & 2 Others vs Attorney General & 3 Others** , CA 281/2012 where Koome, Mwera, Musinga, Ouko and Mohammed JJA (5 bench) dealt with the issue of whether under Article 89 of the Constitution Judicial Review is a proper mode of review of the decision of IEBC published as National Assembly Constituencies and County Assembly wards Order, 2012 LN 14/2012.

I must also mention here that it would be a travesty of justice in the circumstances of this case if the court were to bar the appellants from seeking justice by way of an appeal as that would leave them remediless, noting that Judicial review process is now a foregone matter owing to the limitations of time placed by the Act. Thus, where a remedy provided under the Act is made illusory with the result that it is practically a mirage, the Court will not shirk from its Constitutional mandate to ensure that the provisions of Article 50(1) are attained with respect to ensuring that a person's right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body is achieved. As was rightly stated in **Republic vs. Returning Officer of Kamukunji Constituency & The Electoral Commission of Kenya HCMCA No. 13 of 2008**, it is the responsibility of the Court to ensure that executive action is exercised; that Parliament intended and that the High Court has the responsibility for the maintenance of the rule of law; that there cannot be a gap in the application of the rule of law; that the Court must at all times embrace a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law. Therefore where there is a lacuna with respect to enforcement of remedies provided under the Constitution or an Act of Parliament, or if, through the procedure provided under an Act of Parliament, an aggrieved party is left with no alternative but to invoke the jurisdiction of the Court and the Court is perfectly within its rights to investigate the allegations, to fail to do so would be to engender and abet an injustice and as has been held before, a court of justice has no jurisdiction to do injustice. See **M Mwenesi vs. Shirley Luckhurst & Another Civil Application No. Nai. 170 of 2000** and **Kenya Industrial Estates Ltd vs. Transland Shoe Manufacturers Ltd. & 2 Others Civil Application No. Nai. 364 of 1999.**

The law being a living thing, a court would be shirking its responsibility were it to say, assuming that there be no existing recognized remedy covering the facts of a particular case, "Why then, this must be an end to it." The law may be thought to have failed if it can offer no remedy for the deliberate acts of one person which injures another. See **Bollinger vs. Costa Brava Wine Co. Ltd [1960] 1 Ch. 262 at 238.**

Before I make my final decision on this matter, I must also consider the role of Marginal notes. In interpreting statutes, it is a fundamental rule of interpretation of all enactments to which all other rules are subordinate that laws be construed according to the intent of the parliament which passed the law. The Privy Council in **Shannon Realities v. Ville de St. Micheal [1924] AC 185 at pg 192 (per Lord Shaw)** when he expressed the view that:

“Where the words of a statute are clear, they must, of course be followed, but in their lordships opinion, where alternative constructions are equally open, that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating and that alternative to be rejected which will introduce uncertainty, friction or confusion into the working of the system.”

The term used in Section 100(2) is “**decision**” and not “**procedure.**” In my view, what that implies is that whoever wishes to challenge the decision or determination of the Review Board, and not procedure has the option of appealing or filing for review. I entertain doubt that Parliament of Kenya ever intended to limit the options for the aggrieved party and if it had so intended, then Section 99 would not have been enacted providing for alternative remedies.

In my view, indeed, the use of the phrase “**Judicial Review**” in Section 100 is a term of art used to describe the process by which the High Court uses the 3 remedies of certiorari, prohibition and mandamus to supervise Public procurement Administrative Review Board to ensure it does not make decisions or undertake activities which are *ultra vires* its statutory mandate or which are irrational or otherwise illegal in order to prevent the authority subjecting parties before it to unfair treatment. However, there is a line of authorities that where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it was only unexceptionally that Judicial Review would be granted. In determining whether an exception should be made and Judicial Review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what is the context of the statutory power and what was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it. (see **R vs Birmingham City Council Exparte Ferrero Ltd (1993) 1 ALL ER 530.**)

In **Speaker of National Assembly V Karume (2009) KLR 425** the Court of Appeal held:

“ Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament that procedure should be strictly followed. Order 52 (now 53) cannot oust clear Constitutional and statutory provisions.”

In this case, the clear statutory provisions of the law are sections 99 and 100.

Examining some of the grounds of appeal in the appellant’s memorandum of appeal and without delving into its merits, In my view, as to whether Judicial Review is the appropriate remedy for determination of question of:1...Failure to or disregarding major issues raised by appellant in the replying affidavit such as:

- a. Utility criteria other than that specified in the tender documents; – this would require re-examination and re-evaluation of affidavit evidence and annexures which can only be done by an appellate court under Section 78 of the Civil Procedure Act;
- b. failure to consider 1st report in the ruling and replying on the 2nd revised report and thereby ignoring inconsistencies between the 2 reports;
- c. and failure to award the tender to the appellant who claimed to have been the successful bidder, the court will have to re-examine, re-evaluate the law and evidence afresh hence seeking a merit review of the evidence on record to reach its own independent findings and conclusions.

As I have stated before, the grounds on which the application for striking out this appeal for reasons that the appellant should have approached the court by way of Judicial Review were seriously contested facts which this court can only exhaustively determine at the substantive hearing of the appeal, and not at this interlocutory stage.

It is for those many reasons that I find no merit in the application seeking to strike out this appeal and I decline to grant it.

Back to the issue of stay of execution of the contract already concluded, Section 100(1) and (4) of the Act, effectively provides for an automatic statutory suspension of any steps towards concluding the procurement or the giving effect of its decision for a minimum of 44 days – 14 days for appeal and 30 days for determination of Judicial Review (See **R v Public Procurement Administrative Review Board & 2 Others Exparte Noble Gases International Ltd (2013) e KLR**

According to the respondents, the contract having been entered into before any stay was granted, the application for stay has been overtaken by events (see **Kileleshwa Service Station Ltd & Kenya shell Ltd CA 84/2008**).

In R vs Public Procurement Administrative Review Board & 2 Others Exparte Noble Gases International Ltd (2013) e KLR the court held:

“ In my view, where Judicial Review proceedings are commenced within 14 days from the date of the respondent decision the said decision is neither final nor binding and hence ought not to be implemented. Thus there is an automatic stay under Order 53 of Civil Procedure Rules.

In addition, Section 100(1) is clear that the decision of the Review Board is final and binding on the parties unless Judicial Review commences within 14 days of the date of Review of the Board’s decision.

The courts have over time held that even where there is no stay, notwithstanding the timelines given, should the court find the decision of Review Board a nullity then the contract may be a non –starter. However, in the case before me, the applicant having come to court by way of an appeal, the provisions relating to Judicial Review are not available to them. The Appellant cannot hang on provisions that favour Judicial Review which is an expeditious process. In other words, there are no safe guards for the applicant unless stay is specifically sought and granted in time where they come to court by way of an appeal. That application for stay would then be governed by the provisions of Order 42 rule 6 of the Civil Procedure Rules and the conditions thereto which are that:

- a. Substantial loss may result to the applicant unless the order is made;
- b. The applicant has been made without unreasonable delay; and
- c. Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.

The Court also exercises its inherent power under Sections 1A, 1B and 3A of the Civil Procedure Act, treating each case according to its own peculiar circumstances, in deciding whether or not to grant stay of execution pending appeal.

Commencing with the second condition, In this case, the application for stay was sought but not without inordinate delay which has not been explained or at all. From the facts of this case as set out herein and the pleadings, the applicant knew that the contract subject matter was being concluded and yet they chose not to seek for an interim stay. They filed the appeal on 11th February, 2015 and only filed the application for stay on 20th March 2015. As at the time they filed the application for stay, a contract had already been sealed and performance or implementation was in the process. The decision of the Review Board had been rendered on 29th January, 2015. In my view, the applicant having elected to file an appeal must play by the rules of appeal and so is the party who chooses to go the Judicial Review way. He cannot be allowed to argue Judicial Review in an appeal and vice versa.

The granting of stay of execution of decree pending appeal by the High Court is a discretionary power, granted when sufficient cause has been established by the applicant, on whom the incidence of the legal burden of proof lies (see section 107 and 108 of the Evidence Act Cap 80 Laws of Kenya and Halsbury’s Laws of England , VOL 17, paragraph 14 that :

“The incidence of burden...In respect of a particular allegation, the burden lies upon the party for whom the substantiation of the particular allegation is an essential of his cases.”

An order for stay pending appeal serves the purpose of preserving the status quo and ensuring that the appeal is not defeated. This principle was enunciated in the case of **BUTT V RENT RESTRICTION TRIBUNAL (1982) KLR 417** that:

“the general principle in granting or refusing a stay is that if there is no other overwhelming hindrance a stay must be granted so that an appeal may not be rendered nugatory should the decision be reversed.”

From the record herein, there was no subject matter capable of being preserved, the applicant having watched the contract being concluded between the 1st and third respondent before seeking a stay. To reverse that situation required judicial review filed within 30 days of the decision which would have automatically stayed the decision, or an expeditious application and order for stay in this appeal, none of which were exercised by the appellant.

On the first condition of substantial loss occurring, in **Mukuma vs Abuoga (supra)** the Court of Appeal held:

“..... the issue of substantial loss is the cornerstone of both jurisdiction. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

In **Timmeh Ibrahim v Tipapa Ole Kirrokor & Another Civil Appeal no. 445 of 2014 [2014] eKLR**, this court, citing with approval Ringera J (as he then was) in the case of **Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000** and the Court of Appeal decision in the **Standard Limited & Others – Vs – Wilson Kalya CA App Nai No 369/2001** held that :

“The Court of Appeal in Standard Limited & Others – Vs – Wilson Kalya CA App NRB 369/2001 developed some principles applicable in application for stay of proceedings to guide the exercise of that power of stay so that the same is not left to caprice and those guidelines are simple and direct as follows:

- a) The appellant must show that his appeal is an arguable one. In other words, he must show that the appeal is not a frivolous one***
- b) The appellant must also show, in addition, that if the order of stay of proceeding is not granted, his appeal, if it were to succeed, would be rendered nugatory.***

In **Tabro Transporter Ltd vs Absolom Dora Lumbani (2012) e KLR** Gikonyo J was categorical that:

“Of course a frivolous appeal cannot be rendered nugatory. The only caution however, is that the High Court should not base the exercise of its discretion under Order 42 Rule 6 of the Civil Procedure Rule on the chances of the success of the appeal. It must consider factors that constitute substantial loss. Much more is therefore needed in order to pass the test I have set out above.”

Although the above principles were made regarding appeals to the Court of Appeal, I find them relevant to this matter and I apply them. From the foregoing submissions by both the appellant and the respondents, I find the appeal is arguable. The appeal in my view raises issues that cannot properly be determined conclusively at this interlocutory stage. In considering this application, I am mindful that an arguable appeal is not one that must necessarily succeed, but one in which the court should consider, that whether or not an appeal will be rendered nugatory is a question of fact which will depend on the peculiar circumstances of each case; whether or not what is sought to be stayed, if allowed to happen, is reversible or not and whether an award of damages will be sufficient compensation for the purpose of the application.

In **Elegance Investment Limited & Another v Anthony Chinedu Ifedigbo Civil Application No. Nai**

321 of 2014 (UR 243/2014)[2015] eKLR the court stated that:

“However, it is not for this court to delve into the arguableness of that appeal as filed at this stage. The main issue for determination in prayer 1 of the application is indeed, whether the appellant/applicant has established a case to enable this court to grant it the stay orders sought.”

In **Timmeh Ibrahim v Tipapa Ole Kirrokor & Another (supra)** this court, citing with approval Ringera J (as he then was) in the case of **Global Tours & Travels Limited Nairobi HC Winding Up Cause No. 43 of 2000** and the Court of Appeal decision in the **Standard Limited & Others – Vs – Wilson Kalya CA App NRB 369/2001** held that:

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- a) The appellant must show that his appeal is an arguable one. In other words, he must show that the appeal is not a frivolous one***
- b) The appellant must also show, in addition, that if the order of stay of proceeding is not granted, his appeal, if it were to succeed, would be rendered nugatory.***

Albeit the appeal herein cannot be said to be frivolous and is therefore arguable, nonetheless, it was not demonstrated to this court that the appellant shall suffer substantial loss that cannot be compensated in damages unless the stay sought is granted and that the said appeal if successful shall be rendered nugatory.

The application was made with inordinate delay and that no substantial loss has been demonstrated by the applicant, which loss would render the appeal nugatory. That being the case, I find no need elaborating on the third condition requiring security for the due performance of decree. Accordingly, I decline to grant the prayers for stay of execution of the contract pending hearing and determination of this appeal.

The upshot of all the above is that I find no merit in the application seeking to prematurely end this appeal and decline to grant the orders sought by the 3rd respondent.

I further decline to grant orders for stay of enforcement of the contract already entered into between the 3rd respondent and the 2nd respondent pending hearing and determination of this appeal.

I order that each party bears its own costs of the respective applications.

Dated, signed and delivered in open court this 31st day of July, 2015.

R.E.ABURILI

JUDGE