REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO. 446 OF 2015

IN THE MATTER OF AN APPLICATION BY REAL APPRAISAL LIMITED APPLY TO THE HIGH COURT FOR JUDICIAL REVIEW ORDERS OF PROHIBITION, CERTIORARI AND MANDAMUS

REPUBLIC.....APPLICANT

VERSUS

NATIONAL SOCIAL SECURITY FUND.....1ST RESPONDENT

SUMMIT COVELINES LIMITED.....2ND RESPONDENT

HASMO AGENCIES LIMITED.....3RD RESPONDENT

EX PARTE: REAL APPRAISAL LIMITED

RULING

Introduction

1. By a chamber summons dated 14th December, 2015 the applicant herein, **Real Appraisal Limited,** seeks he following orders:

> **1. That this application be certified urgent and be heard Ex parte in the first instance.**
>
> **2. That leave be granted to the Ex parte Applicant to apply for the order of prohibition to stop and/or restrain the 1st Respondent from awarding the tender for leasing its car park along Kenyatta Avenue vide Tender No. 02/2015-2016.**
>
> **3. That leave be granted to the Ex-parte Applicant to apply the order of certiorari to remove to this court and quash the decision of the 1st Respondent to award Tender No. 02/2015-2016 6o the 3rd Respondent.**
>
> **4. That leave be granted to the Ex-parte Applicant to apply for the order of mandamus to compel the 1st Respondent to award Tender No. 02/2015-2016 to the Ex parte Applicant.**

5. That the leave to apply for the order of prohibition, certiorari and mandamus do operate as stay pending hearing and determination of the substantive notice of motion application to be filed within twenty one (21) days from the date the order is made.

6. That the honourable court be pleased to give further orders and/or directions as the application in the light of the special circumstances of the case herein.

7. That cost of this application be in the cause.

2. According to the applicant although it tendered for the tender advertised by the 1st Respondent for the leasing of a car park along Kenyatta Avenue Nairobi and competitively won the same, the 1st Respondent instead awarded the tender to the 3rd Respondent. According to the applicant the award of the tender to the 3rd respondent was in breach and violation of the provisions of the ***Public Procurement and Disposals Act*** (hereinafter referred to as "the Act") and the Regulations made thereunder.

3. It was therefore the applicant's contention that it has established a *prima facie* case based on the breach of the said provisions of the law.

4. According to the applicant, following the impugned decision it did make a request for review which request was however dismissed by the **Public Procurement Administrative Review Board** (hereinafter referred to as "the Review Board).

Determinations

5. I have considered the application, the verifying affidavit and the statement of facts filed herein as well as the submissions of counsel.

6. The requirement for leave was explained by a three judge bench comprising **Bosire, Mbogholi-Msagha & Oguk, JJ** in **Matiba vs. Attorney General Nairobi H.C. Misc. Application No. 790 of 1993** in which the Court held that it is supposed to exclude frivolous vexatious or applications which *prima facie* appear to be abuse of the process of the Court or those applications which are statute barred. Similarly, in **Republic vs. Land Disputes Tribunal Court Central Division and Another Ex Parte Nzioka [2006] 1 EA 321, Nyamu, J** (as he then was) held that leave should be granted, if on the material available the court considers, without going into the matter in depth, that there is an arguable case for granting leave and that leave stage is a filter whose purpose is to weed out hopeless cases at the earliest possible time, thus saving the pressure on the courts and needless expense for the applicant by allowing malicious and futile claims to be weeded out or eliminated so as to prevent public bodies being paralysed for months because of pending court action which might turn out to be unmeritorious. See also **Republic vs. The P/S Ministry of Planning and National Development Ex Parte Kaimenyi [2006] 1 EA 353.**

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

> **"The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived… Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for**

further investigation at a full *inter partes* hearing of the substantive application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised judicially".

8. This position was confirmed by the Court of Appeal in **Meixner & Another vs. Attorney General [2005] 2 KLR 189** in which the Court held that the leave of the court is a prerequisite to making a substantive application for judicial review and that the purpose of the leave is to filter out frivolous applications hence the granting of leave or otherwise involves an exercise of judicial discretion.

9. The circumstances which guide the grant of leave to apply for judicial review remedies were enumerated in **Mirugi Kariuki vs. Attorney General Civil Appeal No. 70 of 1991 [1990-1994] EA 156; [1992] KLR 8** as follows:

"If he [the Applicant] fails to show, when he applies for leave, a *prima facie* case, on reasonable grounds for believing that there has been a failure of public duty, the Court would be in error if it granted leave. The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables the Court to prevent abuse by busybodies, cranks and other mischief-makers…"

10. In **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK)**, the Court stated:

"Application for leave to apply for orders of judicial review are normally *ex parte* and such an application does restrict the Court to threshold issues namely whether the applicant has an arguable case, and whether if leave is granted, the same should operate as a stay. Whereas judicial review remedies are at the end of the day discretionary, that discretion is a judicial discretion and, for this reason a court has to explain how the discretion, if any, was exercised so that all the parties are aware of the factors which led to the exercise of the Court's discretion. There should be an arguable case which without delving into the details could succeed and an arguable case is not ascertained by the court by tossing a coin or waving a magic wand or raising a green flag, the ascertainment of an arguable case is an intellectual exercise in this fast growing area of the law and one has to consider without making any findings, the scope of the judicial review remedy sought, the grounds and the possible principles of administrative law involved and not forget the ever expanding frontiers of judicial review and perhaps give an applicant his day in court instead of denying him…. Although leave should not be granted as a matter of routine, where one is in doubt one has to consider the wise words of Megarry, J in the case of *John vs. Rees [1970] Ch 345 at 402.* In the exercise of the discretion on whether or not to grant stay, the court takes into account the needs of good administration."

*11. This position was appreciated by **Majanja, J** in Judicial Review Misc. Civil Appl. No. 139 of 2014 between **Vania Investments Pool Limited and Capital Markets Authority & Others** in which the learned Judge expressed himself as follows:*

"I do not read the Court of Appeal to be saying that the Court should not have regard the facts of the case or have at best a cursory glance at the arguments. As I stated in Oceanfreight Transport Company Ltd vs. Purity Gathoni and Another Nairobi HC Misc. Appl JR No. 249 of 2011 [2014] eKLR, "In my view, the reference to an "arguable case" in W'Njuguna's Case is not that the issue is arguable merely because one party asserts one position and the other takes a contrary view." The duty of the court to consider the facts is not lessened by the mere conclusion that the case if frivolous, or that leave is underserved by examining the facts...Indeed, if leave was to be considered a matter of right then the purpose for which leave is required would be rendered otiose."

12. What comes out clearly from the foregoing is that the grant of leave to commence judicial review proceeding is not a mere formality and that leave is not granted as a matter of course. The applicant for

leave is under an obligation to show to the court that he has a *prima facie* arguable case for grant of leave. Whereas he is not required at that stage to go into the depth of the application, he has to show that he has not come to court after an inordinate delay and that the application is not frivolous, malicious and futile. The grant of leave being an exercise of discretion the conduct of the applicant must also be considered.

13.Section 93(1) of the Act provides:

> ***Subject to the provisions of this Part, any candidate who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the regulations, may seek administrative review as in such manner as may be prescribed.***

14. Section 9(2) of the ***Fair Administrative Action Act***, No. 4 of 2015 on the other hand provides:

> ***The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.***

15. Subsection (3) thereof provides:

> ***The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).***

16. Subsection (4) of the said section however provides:

> ***Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.***

17. It is however my view that the onus is upon the applicant to satisfy the Court that he ought to be exempted from resorting to the available remedies. One of the remedies available to a party aggrieved by the decision of the procuring entity is clearly a request for review to the Review Board unless the issues to be determined fall within the exceptions in section 93(2) of the Act. I considered the issues raised by the applicant and they clearly fall outside the said provisions. In fact the applicant must have appreciated this hence the reason for requesting for review.

18. Having requested for review before the Review Board and lost, can the applicant be permitted to go back and challenge the decision of the entity which it attempted to review before the Review Board without challenging the Board's decision? Whereas under section 99 of the Act, the right to request a review is in addition to any other legal remedy a person may have, a person who wishes the Court to entertain its application for judicial review against the decision of the procuring entity ought to justify such action since as held in was held by this Court in **Republic vs. Ministry of Interior and Coordination of National Government and Another ex parte ZTE** Judicial Review Case No. 441 of 2013:

> **"…one must not lose sight of the fact that the decision whether or not to grant judicial review orders is an exercise of judicial discretion and as was held by Ochieng, J in John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 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 though the applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. Therefore, unless due to the inherent nature of the remedy provided under the statute to resort thereto would be less convenient or otherwise less appropriate, parties ought to follow the procedure provided for under the statute. This position was re-affirmed by the Court of Appeal in Speaker of The National Assembly vs. Karume Civil Application**

> **No. Nai. 92 of 1992, where it was held that there is considerable merit in the submission that 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. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."**

19. It was similarly held in **Republic vs. National Environment Management Authority [2011] eKLR**, that where there is an alternative remedy and especially where Parliament has provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted.

20. It is now a cardinal principle, a principle underpinned by statute, vide the provisions of section 9 of the ***Fair Administrative Action Act,*** that save in the most exceptional circumstances, the judicial review jurisdiction would not be exercised and the court must not exercise it where there exist alternative remedy. See **Re Preston [1985] AC 835 at 825D** and **R (Regina) vs. Dudsheath**, *ex parte***, Meredith [1950] 2 ALL E.R. 741.**

21. I am also mindful of the d ecision of this Court in **Constitutional Petition Number 359 of 2013 Diana Kethi Kilonzo vs. IEBC and 2 Others** in which it was held that:

> "**We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities."**

22. In this case not only did the applicant have alternative remedy, but it did exercise the said alternative and lost. A similar scenario arose in **The Chairman Board of Governors Highway Secondary School vs. William Mmosi Moi Civil Application No. 277 of 2005** in which the Court of Appeal was dealing with a scenario where a party files a notice of appeal and at the same time proceeds to apply for review of the decision intended to be appealed against and following the dismissal of the application for review, sets out to revive its appellate process against the same decision and expressed itself as follows:

> **"An aggrieved party under Order 44 of the Civil Procedure Rules can apply for the review of a decree or order either where "no appeal has been preferred" or where "no appeal is allowed". An appeal is allowed on orders made under Order 9A rule 2 Civil Procedure Rules, as in this case, and indeed the Board filed a notice of appeal under rule 74 of the rules to challenge the orders. A notice of appeal however is only a formal notification of an intention to appeal and it cannot be said that the aggrieved party has "preferred" an appeal at that stage and was thus precluded from exercising the option of review. The issue as to whether a respondent having filed a notice of appeal, which had not been withdrawn, was answered in the affirmative by the Court of Appeal… *The Board was at liberty to pursue the option of review of the orders despite the filing of a notice of appeal to challenge the same orders. However upon the exercise of that option and pursuit therefrom until its conclusion, there would be no further jurisdiction exercisable by an appellate court over the same orders of the court. That was the end of the matter and the notice of appeal was rendered purposeless. Both options cannot be pursued concurrently or one after the other*."** [Emphasis added]

23. In this case having opted to challenge the decision of the procuring entity by way of a request for review under section 93(1) of the Act, the applicant cannot again seek to challenge the same decision in these proceedings after the Review Board disallowed its request for review. To do so would amount to an abuse of the Court process since by entertaining the intended proceedings the Court would in effect be invalidating the decision of the Review Board when the same is not the decision the subject of the judicial review proceedings. As was held by the Court of Appeal in **Muchanga Investments Limited vs. Safaris**

Unlimited (Africa) Ltd & 2 Others Civil Appeal No. 25 of 2002 [2009] KLR 229:

> **"The term abuse of court process has the same meaning as abuse of judicial process. *The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice*. It is a term generally applied to a proceeding, which is wanting in *bona fides* and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it...The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice. Examples of the abuse of the judicial process are: -**
>
> i. **Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.**
> ii. **Instituting different actions between the same parties simultaneously in different courts even though on different grounds.**
> iii. ***Where two similar processes are used in respect of the exercise of the same right*** **for example, a cross appeal and a respondent's notice.**
> iv. **Where there is no iota of law supporting a Court process or where it is premised on frivolity or recklessness.** [Emphasis added]

24. In my view the applicant having elected to challenge the decision of the procuring entity by way of the request must proceed upwards by challenging the decision of the Review Board either by way of an appeal or judicial review but not to engage the reverse gear and challenge the decision of the procuring entity. To do so may only irritate and annoy the intended respondents.

25. In my view a *prima facie* case cannot be said to have been established where the applicant in his application is abusing the judicial process from which discretion is sought to be exercised in his favour.

Order

26. In the premises, I decline to exercise my discretion in favour of the applicant as sought herein. It follows that without leave being granted these proceedings are misconceived and are hereby struck out but with no order as to costs.

Dated at Nairobi this 15th day of December, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Omuganda for Mr Ondabu for the Applicant

Cc Mutisya