



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A
IN THE CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW CASE NO. 3 OF 2013

IN THE MATTER OF: THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: PUBLIC PROCUREMENT AND DISPOSAL ACT CHAPTER 412C

AND

IN THE MATTER OF: PUBLIC PROCUREMENT AND DISPOSAL REGULATIONS, 2006

AND

IN THE MATTER OF: TENDER NO. MCC/2102/2013-1 FOR THE PROVISION OF SECURITY SERVICES

AND

IN THE MATTER OF: THE DECISION OF THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

AND

IN THE MATTER OF: AN ORDER FOR CERTIORARI TO QUASH THE DECISION OF THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD ON THE 21ST JANUARY, 2013

BETWEEN

**INTERNAL SECURITY SERVICES.....
APPLICANT**

VERSUS

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

**COUNTY COUNCIL OF MURANG'A.....2ND
RESPONDENT**

RULING

On 1st February, 2013, the Applicant filed in this honourable court a chamber summons dated 31st January, 2013 under a certificate of urgency of even date seeking, *inter alia*, leave to institute judicial review application for orders of certiorari to quash the decision of the 1st Respondent dated 21st January, 2012 awarding a tender to the 3rd Respondent herein in place of the Applicant for provision of security services to the 2nd Respondent and also to quash the entire procurement or tender process out of which the tender aforesaid was awarded. If leave was to be granted, the Applicant sought to have it stay the decision of the 1st Respondent, annulling the award of the tender to the Applicant and awarding it to the 3rd Respondent instead.

Along with the Chamber Summons, the Applicant filed a statutory statement dated 31st January, 2013 verified by an affidavit sworn on the same date by Joseph Mwangi Kariuki who described himself as the managing director of the Applicant herein. When the Applicant's counsel appeared before me *ex parte* on 1st February, 2013, I directed him to serve the Respondents with his application for hearing *inter partes* before the court could make a determination on whether leave to institute judicial review proceedings should be granted; this course is open to the court, under **Order 53 Rule 1** of the **Civil Procedure Rules 2010**, in a case where it is unclear whether or not leave should be granted, to invite the Respondents to make representations on the point. Accordingly, the Respondents filed Replying affidavits in opposition to the Chamber Summons.

When the Chamber Summons came up for hearing *inter partes* the Applicant brought to the fore the grounds upon which the substantive motion for judicial review would be based if leave was granted. The Applicant's main contention is that the 1st Respondent erred when it annulled the 2nd Respondent's award of a tender to the Applicant and proceeded to award the same tender to the 3rd Respondent, without giving the Applicant an opportunity to be heard. The second ground postulated is that the entire procurement process was vitiated by illegalities from the very beginning and ought to be annulled; I find this second ground rather perplexing because despite the Applicant's reservations with the procurement process, it is out of that same process that the Applicant company was awarded the tender and were it not for the reversal of the 2nd Respondent's decision to award it the tender it is doubtful the Applicant would be questioning the procurement process.

Much as the Applicant's counsel strongly argued out grounds upon which the judicial review application would be made and perhaps thereby provoking the Respondents to respond in equal measure, I am cautious to interrogate those grounds with reasonable restraint; all I need, at this stage of the proceedings, is to satisfy myself whether the Applicant has an arguable case which deserves grant of leave based on the material before court. Ordinarily, it is not necessary to delve into depths of the merits of the Applicant's case to determine whether the Applicant has made out a prima facie or arguable case capable of succeeding upon hearing the substantive motion. For avoidance of doubt, an arguable case been defined as one that has a realistic prospect of success (**see R v Secretary of State for the Home Department, ex p Swati [1986] 1 All ER 717**). Where such a case exists then more often than not leave would certainly be granted. In **R versus Secretary of State ex Parte Harbage (1978) 1 All ER 324** it was stated "**...it cannot be denied 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**".

The Applicant contends that he was condemned unheard. The proceedings in which the Applicant complains that he was not accorded the opportunity to be heard arose from the decision of the 2nd Respondent's tender committee to award the Applicant a tender for provision of security services to the 2nd Respondent. The tender in question had been floated by the 2nd Respondent and the only bidders to this tender happened to have been the Applicant and the 3rd Respondent. According to the 2nd Respondent's tender evaluation committee, it is only the 3rd Respondent's bid that was responsive and on

that basis the committee recommended that the 3rd Respondent be awarded the tender. However, contrary to the evaluation committee's recommendation, the tender committee awarded the tender to the Applicant whose bid had been found to have fallen far short of the advertised tender requirements. Being dissatisfied with the tender committee's decision to award the Applicant the tender, the 3rd Respondent lodged a request for review of the tender committee's award at the 1st Respondent Board; this option of challenging the 2nd Respondent's decision is backed by **Section 93 of the Public Procurement and Disposal Act, Chapter 412C, Laws of Kenya** (herein after referred to as "**the Act**"). According to the Applicant the review proceedings by the 1st Respondent were conducted and concluded in breach of its right to be heard.

In answer to this question, the 1st Respondent through its Acting Secretary filed a replying affidavit on which it annexed a copy of a letter dated 3rd January, 2012 notifying the Applicant's Managing Director that the 3rd Respondent had lodged a request for review of the award of the tender to the Applicant. In the same letter, the Applicant was asked to forward whatever information or arguments it had on the tender and was also notified of the date for the hearing of the review. This letter is marked as "**PO-3**" on the affidavit of Pauline Opiyo. On the same affidavit, Pauline Opiyo also annexed the attendance list marked as "**PO-4**" indicating that the General Manager and the Managing Director of the Applicant company attended the Review Board's proceedings that were held in the 1st Respondent's boardroom on 14th January, 2013. Again there is annexed a copy of the extract of proceedings marked as "**PO-5**" indicating that the Applicant was not only represented but its representatives and counsel also participated in the review proceedings. The Applicant did not disclose this information to court when it filed its application; it is not surprising that the Applicant could suppress such material information relating to its attendance and participation in the review proceedings and proceed to contend, at the *ex parte* stage of its application, that it had been denied the opportunity of being heard. It is quite apparent that this ground of attack against the 1st Respondent's decision cannot hold as, *prima facie*, the evidence available is contrary to the Applicant's allegations. In any event, it is quite evident that the Applicant is guilty of material non-disclosure and on this ground alone it would not succeed securing any of the orders of judicial review even if leave was granted. In **Nairobi High Court (Milimani Commercial Courts) Civil Case No. 2382 of 1999 John Murilu Kigwe versus Agip (Kenya) Ltd**, it has been held that an *ex parte* application is an application of utmost good faith, *uberrimae fidei*. There has to be full disclosure of all material facts within the knowledge of the applicant and where he deliberately chooses to suppress these facts to his advantage, he will be deprived of that advantage in the long run. This case follows the rationale in the decision in the English case of **The King versus General Commissioner for Income tax 1KB 486 at 515** where Lord Scrutton L J remarked that, "***a plaintiff applying ex parte comes (as it has been expressed) under a contract with the court that he will state the whole case fully and fairly to the court. If he fails to do that and the court finds when the other party applies to dissolve the injunction that any material fact has been suppressed or not properly brought forward the plaintiff is told that the court will not decide on the merits and he has broken faith with the court, the injunction must go.***" Although the court in this case was concerned with issue of injunctions *ex parte*, there is no doubt that the principle espoused applies with equal force to *ex parte* applications in judicial review proceedings. It follows that even if the Applicant had been granted leave at the *ex parte* stage, it would ultimately be set aside and the substantive motion would not be heard on merits.

As to whether the entire procurement process ought to be nullified because of illegalities, it is important to bear in mind that the decision the Applicant has sought leave to impeach by way of certiorari is that of the 1st Respondent; it is that decision which the Applicant has annexed to his affidavit verifying the statutory statement. The only other decision the Applicant may have challenged was the decision by the 2nd Respondent to award the Applicant the tender but having been the beneficiary of the award before it was nullified, the Applicant never, and perhaps could not, take such a step until the 1st Respondent nullified the award. The court's focus then is on the decision of the 1st Respondent which is annexed to the Applicant's affidavit in support of its application marked as "**JMK IV**".

The 1st Respondent is established under **Section 25 of the Act** with a statutory mandate to review decisions of procuring entities, such as the 2nd Respondent herein, whenever any candidate who

submitted a tender to the entity claims to have suffered or risks suffering loss or damage as a result of breach of duty imposed on the entity by the Act or the regulations made thereunder. The decision by the 2nd Respondent to award the tender to the Applicant is such decision subject to review by the 1st Respondent.

Upon receiving a request for review under **Section 93** of the Act, the Review Board is enjoined to complete its review within thirty days after receiving the request for the review as per **section 97(1)** of that Act. **Section 98** of the Act provides that upon completion of the review the Review Board may, amongst other things, substitute its decision for the decision of the procuring entity.

It is quite clear that in the instant case, the 3rd Respondent exercising its right under **Section 93 (1)** of the Act, requested for a review of the procuring entity's decision and in compliance with **Section 96 (c)** the Review Board not only notified the Applicant of the request for review but also asked it to attend the review proceedings and make representations. The Review Board completed its review within the stipulated time and in exercise of its powers under **Section 98(c)** it substituted its decision for that of the procuring entity. It is quite apparent that the 1st Respondent exercised its statutory mandate in strict compliance with the provisions of the law. In view of the material before, I am not persuaded that in executing its statutory mandate and arriving at the decision it did, the 1st Respondent was either irrational or was mired in illegalities or procedural improprieties. The grounds upon which its decision could have been impeached or reviewed by way of judicial review do not exist at all.

While the court in **R versus Secretary of State ex Parte Harbage (ibid)** held that it was inevitable that leave would be granted where on the basis of the material before court there is an arguable case, I reckon that the converse is true; where the court cannot discern an arguable case on the basis of the available material leave should be denied. The Applicant's case falls into the latter category- it has no arguable case and in the premises I am unable to exercise my discretion in favour of the Applicant. The Applicant's chamber summons dated 31st January, 2013 is dismissed with no orders as to costs.

Dated, signed and delivered in open court at Murang'a this 15th day of April, 2013

NGAAH JAIRUS

JUDGE

In the presence of:

Counsel for the Applicant.....

Counsel for the 1st and 2nd Respondents.....

Counsel for the 3rd Respondent.....