REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 310 OF 2014

REPUBLIC.....REPUBLIC

VERSUS

PUBLIC PROCUREMENT

ADMINISTRATIVE REVIEW BOARD.....1ST RESPONDENT

KENYA NATIONAL HIGHWAYS AUTHORITY .....2ND RESPONDENT

AND

CENTUNION .....INTERESTED PARTY

EX-PARTE

URSSA CONSTRUCCTIONES METALICAS

RULING

This ruling is in respect of two applications. The first application was filed by the 2nd Respondent, Kenya National Highways Authority (KeNHA) and is dated 4th September, 2014. The 2nd application dated 8th September, 2014 was filed by the Interested Party, Centunion.

Both application seek the setting aside of the leave granted ex-parte to the Applicant, URSSA Construcctiones Metalicas on 7th August, 2014 to commence judicial review proceedings. The 1st Respondent, the Public Procurement Administrative Review Board supports the application.

The originators of the two applications hold the view that the leave granted to the ex-parte Applicant to commence judicial review proceedings was in breach of **Section 100(1) of the Public Procurement and Disposal Act, 2005 (PP&DA)** which provides that **"[a] decision made by the Review Board shall be final and binding on the parties unless judicial review thereof commences within fourteen days from the date of the Review Boards' decision."**

It is their case that the decision of the Review Board which is the subject of these proceedings was made on 22nd July, 2014 and by the time the ex-parte Applicant approached this Court for leave on 6th August, 2014 the fourteen days allowed for commencement of judicial review proceedings had

lapsed. They state that the last day for filing judicial review proceedings was 5th August, 2014.

The ex-parte Applicant opposed the applications through grounds of opposition dated 4th November, 2014 wit:

"1. THAT the Interested Party's application dated 18th September 2014 is fatally defective and amounts to an abuse of the court process for failure of the Interested Party to support the application with an affidavit.

2. **THAT the Ex-parte Applicant satisfied the court that it had a prima facie case hence the reason for the grant of the leave.**
3. **THAT the issue of leave is therefore *res judicata* as the court has already exercised its discretion and directed that the case proceed to substantive hearing.**
4. **THAT such application to set aside leave granted ought not to turn the proceeding into a hearing of the substantive motion which is what the Interested Party seeks to do in its application.**
5. **THAT the court has the power to invoke its inherent jurisdiction and powers necessary for the ends of justice which it exercised in granting leave to apply for the judicial review orders.**
6. **THAT this court has original jurisdiction to entertain this matter.**
7. **THAT the court ought not to give undue regard to procedural technicalities and ought to entertain a matter on its merit.**
8. **THAT statutory restriction on judicial remedies is to be given the narrowest possible construction.**
9. **THAT the substantive motion has to be heard and determined in the spirit of justice.**
10. **THAT though finality is a good thing justice is better and justice can only be attained by the court hearing the substantive motion."**

Briefly, the ex-parte Applicant moved this Court on 6th August, 2014 by way of the Chamber Summons dated 6th August, 2014 seeking leave to commence judicial review proceedings and apply for the orders set out in the application. The Court directed that the application for leave be served for *inter-partes* hearing on 7th August, 2014. When the matter came up for hearing on that day, the respondents and Interested Party were not in Court. The Court proceeded to grant leave *ex-parte.* It is this leave to commence judicial review proceedings which the applicants (the 2nd Respondent and the Interested Party) seek to set aside through their applications.

It is not disputed that the decision of the 1st Respondent which the Applicant intends to challenge through these proceedings was delivered on 22nd July, 2014. It is also not disputed that fourteen days from that date lapsed on 5th August, 2014. It is further not disputed that **Section 100(1) of the PP&DA** requires any party desirous of taking out judicial review proceedings against the decision of the 1st Respondent to do so within fourteen days from the date of the delivery of its ruling.

The ex-parte Applicant contends that before granting leave this Court had established that it had an arguable case and the application to set aside the leave granted is an attempt to turn that decision into the hearing of the substantive notice of motion.

The ex-parte Applicant submits that this Court has inherent jurisdiction necessary for the ends of justice and that is the jurisdiction exercised by the Court when it granted leave. Further, that the Court ought not to give undue regard to procedural technicalities but should instead proceed to deal with the merits of the decision.

Once leave is granted the same should not be set aside save for exceptional reasons. This was the message passed by the Court of Appeal in **AGA KHAN EDUCATION SERVICE KENYA v REPUBLIC AND OTHER E.A. LR [2004] 1 E.A.1 (CAK)** when it stated that:

"We would, however, caution practitioners that even though leave granted ex-parte can be set aside on an application, that is a very limited jurisdiction and will obviously be exercised very sparingly and in very clear-cut cases, unless it is contented that judges of the superior court grant leave as a matter of course. We do not think that is correct. Unless the case is an obvious one, such as where an order of certiorari is being sought and it is clear to the court that the decision sought to be quashed was made more than six months prior to the applicant coming to court, and there are, therefore no prospects at all of success, we would ourselves discourage practitioners from routinely following the grant of leave with applications to set leave aside. Fortunately such applications are rare and like the judges in the United Kingdom, we would also point out that the mere fact that an applicant may in the end have great difficulties in proving his case is no basis for setting aside leave already granted."

As pointed out by the Court of Appeal, it is only in exceptional cases that leave already granted can be set aside. It must be remembered that before leave is granted, a judge will have gone through the application and satisfied himself/herself that the case is one fit for granting leave. However, some issues may at times escape the attention of the judge and leave may be granted erroneously. Where a party satisfies the court that leave was granted erroneously, the court should not hesitate to set aside such leave.

The question therefore is whether the leave granted herein should be set aside. The applicants support their application with the decision of my brother, G.V. Odunga, J in **REPUBLIC v PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD & 2 OTHERS [2013] eKLR** where he opined that:

"34. It is therefore clear that these proceedings were commenced on 28th October 2013 which was outside the 14 days period provided under section 100(1) of the Act. Mr Gachuba has however submitted that in light of the issues involved and the public policy considerations, these proceedings should not be terminated at this stage. However as stated above, the same public policy requires that judicial review proceedings ought to be instituted, heard and determined within the shortest time possible so as not to subject the decisions of public bodies which invariably involve substantial sums to indefinite anxiety and suspense and that people should not be left to fear that their investments or expenditure will be wasted by reason of belated challenge to the validity of such decisions taking into account the volatile financial markets. The public interest in the good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purporting the exercise of decision making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision. It has been held by the Court of Appeal that an issue of limitation can be taken for the first time on appeal because it goes to jurisdiction. See Pauline Wanjiru Thuo vs. David Mutegi Njuru Civil Appeal No. 278 of 1998.

35. **Order 53 rule 2 of the *Civil Procedure Rules* bars the Court from granting leave unless the application therefor is made not later than such shorter period as may be prescribed by any Act which in this case is 14 days from the date of the decision under challenge. Where therefore it turns out that leave ought not to have been granted in the first place, the Court has no option but to set aside such leave. In the circumstances, I find merit in the Notice of Motion dated 20th November 2013, set aside the leave granted on 28th October 2013 and strike out the entire proceedings with costs to the 2nd respondent and the interested party."**

The decision clearly captures the meaning of **Section 100(1) of the PP&DA.** Judicial review is about speed and promptitude. Procurement proceedings are meant to fit into structured time frames and anybody who fails to comply with the time lines set by the **PP&DA** must suffer the consequences. Inherent jurisdiction cannot come to the aid of an applicant who fails to comply with a clear provision of the law. Failure to comply with **Section 100(1) of the PP&DA** goes to the root of the matter and such failure cannot be reduced to procedural technicalities. **Article 159(2) (d) of the Constitution** will therefore not assist the ex-parte Applicant.

The only reasonable conclusion is that the leave granted to the ex-parte Applicant by this Court was granted in error. That leave needs to be withdrawn. As a consequence the two applications are allowed and the leave granted to the ex-parte Applicant on 7th August, 2014 to commence judicial review proceedings is set aside. These judicial review proceedings are therefore struck out. There will be no order as to costs.

Dated, signed and delivered at Nairobi this 10th day of December , 2014

W. KORIR,

JUDGE OF THE HIGH COURT