



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(JUDICIAL REVIEW DIVISION)

MISCELLANEOUS CIVIL APPLICATION NO. 24 OF 2013

REPUBLIC.....APPLICANT

VERSUS

THE DIRECTOR GENERAL OF THE PUBLIC

PROCUREMENT OVERSIGHT AUTHORITY.....1ST RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....2ND RESPONDENT

PUBLIC PROCUREMENT ADMINISTRATIVE

REVIEW BOARD.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

EX PARTE APPLICANT

AFRICA INFRASTRUCTURE DEVELOPMENT COMPANY

RULING

1. This ruling is in respect of the ex parte applicant’s Motion dated 19th February 2013 by which the applicant seeks the following Orders:

1. That this matter be certified as urgent and service of the same be dispensed with in the first instance.

2. That the 2nd Respondent herein be ordered and/or compelled to avail to the Applicant herein the following:

(a) full disclosure and furnish it with a Register of Samples, Tender Opening Register, the Evaluation Report comprising the Summary of the evaluation and comparison of tenders and criteria used for evaluation and tender Opening Minutes in respect of tender No. IEBC/01/2012-2013 for the supply and delivery of General Election materials.

(b) details of the annual procurement plan and budget allocation per item as well as the previous purchase price of each item, pertaining to all the items procured under the said tender.

(c) details of the Orders placed and Delivery Notes and Acceptance Certificates issued for the supply of items under dispute (solar lanterns, indelible marker pens and polling station banners) together with a certified copy of the Manufacturer's Authorization Form submitted by it as listed in its Technical Compliance Schedule.

3. That the 3rd Respondent herein be ordered and/or compelled to avail to the Applicant herein the proceedings of the hearing of the Ex-Parte Applicant's Review Application No. 70/2012.

4. That costs be in the cause

2. The application is based on the following grounds:

a). That the Ex-parte Applicant herein has repeatedly and without any success asked for disclosure from the 2nd respondent herein related to various crucial documentation and samples as specified herein above.

b). That it is the right to have full access to information as provided by the Constitution of Kenya and the Ex-parte Applicant Constitutional rights are hence being infringed.

c). That the IEBC shall not be prejudiced nor any the other Respondents by full disclosure as sought herein and letting the Ex-parte applicant have the documents and samples asked for.

d) That it would only be fair and just that the said disclosure be made and all documents and samples provided to the Ex-parte Applicant.

3. The application is supported by an affidavit sworn by **Shaileshkumar N. Patel**, the sole proprietor of the ex parte applicant on 19th February 2013. According to the deponent, following the unsuccessful bid by the ex parte applicant and Lithotech in respect of the subject bid, they made concerted efforts to secure various documents from the and respondent Commission through the 3rd respondent the same were never supplied. The failure to supply the said documents according to the deponent amounts to a breach of the ex parte applicant's fundamental right to having access to information as provided under the Constitution of Kenya and Sections 44(3), 45(3) and 60(6)1 of the Public Procurement and Disposal Act, 2005 which disclosure are necessary for the purpose of enhancing public confidence in the conduct of the procurement entity in respect of procurement of the goods in question and to ascertain whether the procurement process was done fairly, transparently, accountably and with integrity. Since no prejudice is likely to be occasioned by the order sought, it is deposed that the grant of the orders sought is fair and just.

4. In opposition to the application the respondent on 26th February 2012 filed an affidavit sworn by **Mahamud Mohamed Jabane**, the Manager Legal Affairs of the 2nd Respondent Commission on 26th February 2013.

5. I have considered the foregoing. It is important to point out that before the subject application was filed the ex parte applicant had filed a Notice of Motion dated 1st February 2013 seeking the following orders:

1. An Order of Certiorari removing to this Honourable Court for

purposes of being quashed the proceedings and decision of the 3rd Respondent, the Public Procurement Administrative Review Board, made on the 15th day of January

2013 (but delivered on 23rd January 2013) in respect of review Application No. 70 of 17th December 2012.

2. **An Order of Mandamus to compel the 2nd Respondent the Independent Electoral and Boundaries Commission to procure the supply and delivery of General Election materials and/or in particular the Solar lanterns, Indelible Marker Pens, Tallying Centre Printer and Polling Station Banner in compliance and adherence to the provisions of the Public Procurement and Disposal Act, 2005 and the Public Procurement and Disposal Regulations, 2006.**
3. **An Order of Mandamus COMPELLING HE 2ND Respondent, the Independent Electoral and Boundaries Commission, to avail the Tender opening Register the summary of the evaluation report and comparison of tenders and Tender opening minutes as well as provide details of the annual procurement plan and budget allocation per item and the previous purchase price for each item.**
4. **An order of Mandamus compelling the 3rd Respondent, the Public Procurement Administrative Review Board, to release all proceedings relating to the said Review.**
5. **An Order of Mandamus to compel the 2nd Respondent, the Independent Electoral and Boundaries Commission, to clarify whether the Tender Committee effectively fulfilled its mandate by ensuring that funds were available for the procurement and hence ensuring that it does not pay in excess of the prevailing market prices.**
6. **An order of Prohibition to restrain the 2nd Respondent the Independent Electoral and Boundaries Commission from procuring and/or in any way acting upon the decision made by the 3rd Respondent, the Public procurement Administrative Review Board on the 15th of January 2013 and or signing or entering into any contract with any persons or entity for the supply and delivery of general election materials and/or in particular the Solar Lanterns, indelible Marker Pens, Tallying Centre Printer and Polling Station Banner until and unless the said items are re-tendered by way of emergency quotations, single sourcing through Lithotech exports or from the Ex-Parte Applicants Principal manufacturers who can source and supply the same at competitive costs or through restricted tendering or any suitable alternative avenue.**
7. **The grant of leave do operate as a stay of the decision, directives and acts of the 3rd Respondent, The Public Procurement Administrative Review Board and of any further Procurement proceedings in respect of the supply and delivery of General Election materials and/or in particular the Solar Lanterns, Indelible marker Pens, Tallying Centre Printer and polling Station Banner until this application is heard and determined.**
8. **The costs of this application be borne by the Respondents.**

6. In paragraph 54 of the verifying affidavit the same deponent deposed as follows:

“That considering the time frame involved I do not wish that the entire tender be annulled but only that section of it as relates to the supply and delivery of solar lanterns, indelible marker pens, tallying centre printer and polling station banner (Tender item Nos 9, 2, 20 and 12 respectively) that I informed the 3rd Respondent that I did not wish to challenge the entire procurement but only part of it as relates to the items just mentioned (Attached hereto and marked as SKNP 13) is a copy of an E mail to that effect.”

7. It is therefore clear that the applicant at the time of the filing of the present applicant was aware that due to time constraints, the orders sought would most probably not be capable of being

- granted due to the short period between the time for the hearing of the application and the time when the General elections were due to be held. It therefore resorted to the present application which according to it was made pursuant to the provisions of the Constitution and the Public Procurement and Disposal Act in order according to it 'to enhance public confidence in the conduct of procurement entity in respect of procurement of its goods in question and to ascertain whether the procurement process was done with fairness, transparency, integrity and in accountable manner.'
8. I must stress the fact that every High Court is a Constitutional Court and where a Constitutional issue arises in the course of its proceeding, the Court is entitled and obligated to determine the issue without refereeing the said issue to any other Court or Division of the High Court. However, the issue must arise in the course of the proceedings for the Court to be entitled to determine the same in the course of the existing proceedings.
 9. Where however, a party on realising that the course it had undertaken to advance is no longer tenable decides to change its case with a view to metamorphosing it into a Constitutional issue the Court will be reluctant to allow such a party to do so. To allow the party to take such a course of action would amount to abetting abuse of the Court process by such a party. This is particularly so taking into account the fact that there is a specific procedure provided for ventilating matters revolving around the interpretation of and prayers for remedies under the constitution with respect to upholding of fundamental rights and freedoms. The law is 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. See **Speaker of The National Assembly vs. Njenga Karume Civil Appeal No. 92 of 1992 [1990-1994] EA 549; William Kipruto Chelashaw vs. Republic; Livingstone Maina Ngare vs. Attorney General, The Chief Magistrate, Anti Corruption Court Nairobi Misc. CR App No. 173 of 2003.**
 10. I am well aware of the provisions of Article 159(2)(d) of the Constitution which enjoins the Court to ensure justice is administered without undue regard to procedural technicalities. In my view the administration of justice is with respect to particular proceedings before the Court so that where a party is properly before the Court, the Court ought not to send the litigant away simply due to procedural technicalities. However, where a party seeks to abuse the process of the Court, the Court is duty bound to ensure that its dignity is maintained by declining to entertain such proceedings.
 11. Under Article 10(1) of the Constitution:

The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

(a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions.
 12. Clause (2) of the said Article, on the other hand provides *inter alia*, that the said national values include the rule of law. In my view, it is a principle of the rule of the law that the authority and dignity of the Court be maintained and that parties and their counsel should not take actions that may be deemed to amount to an abuse of the process of Court. Apart from the Constitutional provisions it is trite that every court has a right in its discretion to decline to hear proceedings on the ground that they are oppressive and an abuse of the process of the Court. See **Kamlesh Mansuklal Damji Pattni & Another vs. R. Nairobi HCMA No. 322 of 1999; Connelly vs. D. P. P. (1964) 2 All ER 401 D. P. P. vs. Humphrys (1976) 2 All ER 497 & Williams vs. Spaitz (1992) Vol. 66 C. L. R. 383.**
 13. In dealing with the issue of abuse of the process of the Court **Kimaru, J** in **Stephen Somek Takwenyi & Another vs. David Mbutia Githare & 2 Others Nairobi (Milimani) HCCC No. 363 of 2009** expressed himself as follows:

“This is a power inherent in the court, but one which should only be used in cases which

bring conviction to the mind of the court that it has been deceived. The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilised legal process it is the machinery used in the courts of law to vindicate a man's rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract *res judicata* rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it".

14. I associate myself with the holding in Karuri & Others vs. Dawa Pharmaceuticals Company Limited and Others [2007] 2 EA 235 that nothing can take away the courts inherent power to prevent the abuse of its process by striking out pleadings or striking out a frivolous and vexatious application and that baptising such matters constitutional cannot make them so if they are in fact plainly an abuse of the court process.
15. Since Counsel appreciated the fact that the main Motion had been overtaken by events, the present application is therefore misconceived and an abuse of the process of the Court. In my view an application made within the Notice of Motion under Order 53 ought only to be made in furtherance of the judicial review proceedings or to set aside the orders made in the judicial review proceedings. In other words such an application can only be made with a view to keeping alive the said proceedings or to bring to an end the same and ought not to be transformed into an avenue for seeking parallel orders. Where therefore it is recognised that the judicial review proceedings are for all intents and purposes untenable, to make an application with a view to obtaining orders totally unrelated to the judicial review orders sought in my view amounts to a gross abuse of the process of the Court and ought not to be entertained.
16. Accordingly I dismiss the Motion dated 19th February 2013 with costs to the respondents. Since it was conceded by **Mr Oriaro**, learned counsel for the ex parte applicant that the orders sought in the motion dated 1st February 2013 were overtaken by events, the said Motion is similarly struck out with costs to the respondents.

Dated at Nairobi this day 11th day of March 2013

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Ngeresa for Mr Mutubwa for the 2nd Respondent

Ms Chilaka for 1st, 3rd and 4th Respondents

Mr Shailesh Patel the ex parte applicant's director