REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. 382 OF 2013

IN THE MATTER OF AN APPLICATION BY KNOCKS KRANE GMBII FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

REPUBLIC…….....APPLICANT

VERSUS

PUBLIC PROCUREMENT

ADMINISTRATIVE REVIEW BOARD……...1ST RESPONDENT

KENYA PORTS AUTHORITY……..……2ND RESPONDENT

LIEBHERR CONTAINER CRANES LIMITED..INTERESTED PARTY

RULING

1. By a Notice of Motion dated 20th November 2013, the 2nd respondent, **Kenya Ports Authority**, seeks substantially an order that the leave granted on 28th October 2013 be set aside, the application for leave dated 25th October 2013 be struck out, that the notice of motion dated 2nd November 2013 and 12th November 2013 be struck out and that the costs of the application be provided for.
2. The application is supported by an affidavit sworn by **Stephen Kyandih**, the second respondent's senior legal officer sworn on 26th November 2013.
3. It is the 2nd respondent's case that although the Court stamp on the application for leave was dated 25th October 2013, the payment slip was dated 28th October 2013 and was stamped by Kenya Commercial Bank on 28th October 2013 which was the same date of the receipt issued by the registry. It was contended that the application for leave could not have been filed without payment having been made first and as payment was made on 28th October 2013, the application for leave could not have been filed on 25th October 2013 before payment was made. It was contended that a perusal of Miscellaneous Application No. 381 of 2013 whose serial number comes prior to the instant case was filed on 28th October 2013 hence this application could not have been filed on 25th October 2013. Since the decision of the 1st respondent was rendered on 11th October 2013, the last day for filing a judicial review application in respect of the 1st respondent's decision was 25th October 2013 hence the application was filed out of time. In the 2nd respondent's view, the statutory stay provided for under section 100 of the ***Public Procurement and Disposal Act***

(hereinafter referred to as the Act) only comes into force where a judicial review application is filed in time. The 2nd respondent avers that as a result of the stay, the 2nd respondent is unable to acquire the cranes that are urgently needed to ease the congestion delays caused by operational difficulties at the port.

4. In submissions in support of the application **Ms Malik**, learned counsel for the 2nd respondent reiterated the foregoing and further submitted that the Notice of Motion which was served on her firm pursuant to the orders of the Court made herein on 12th November 2013 were different from the ones filed in Court since the former were dated and stamped 12th November 2013 while the latter were dated and filed on 2nd November 2013. While relying on section 100(1) of the said Act, learned counsel submitted that a decision by the 1st respondent is binding unless judicial review proceedings are commenced within 14 days of the decision. As in this case the decision was made on 11th October 2013 it was incumbent on the ex parte applicant to file its judicial review application by latest 25th October 2013 and although the same was stamped 25th October 2013, payment in respect thereof was only made on 28th October 2013 as evidenced by annexture SK-1 stipulating the amount assessed as well as a copy of the payment slip with the Bank stamp indicating that payment was made on 28th October 2013. Further the Court receipt was issued on 28th October 2013.Learned Counsel therefore contended that in the premises the application could not have been filed on 25th October 2013 and that the stamp on the application seems to have been backdated. It was further contended that the copy of the replying affidavit served was not commissioned. In any case the averment that the Court Registry had run out of receipts contravened the provisions of Order 19 rule 3(1) of the ***Civil Procedure Rules*** for failing to disclose the person from whim this information emanated. In any event, it was submitted that the said averment was untrue in light of the practice at the registry that any payment in excess of Kshs 500/- must be made at the Bank on production of the assessment slip which payment is done by the advocates' clerks and it is only thereafter that pleadings are accepted and stamped based on the production of the slip stamped by the Bank. It was therefore submitted that the advocate on record could not have deposited the filing fees in the registry hence the reason why there is no affidavit by the registry clerks and there cannot be any in light of the fact that Miscellaneous Application No. 381 was filed on 28th October 2013 yet its serial number comes before the serial number for the present case. In the presence it was contended that the 1st respondent's decision is final and binding. On the issue of the authority by the deponent, it was submitted that the deponent has deposed that he was authorised. Learned Counsel was also of the view that as the matter had been referred to a Parliamentary Committee for investigations, the applicant is not without recourse hence the 2nd respondent's application ought to be granted.
5. **Ms Njoroge** learned counsel for the Interested Party supported the application and relied on an affidavit sworn by **Mercy Wambui Kimani**, one of the directors of Altair Company Limited the authorised agent of the interested Party herein. While supporting and reiterating the submissions made on behalf of the 2nd Respondent, learned counsel submitted that just as in the case of the 2nd respondent, the replying affidavit served on her was not commissioned. She similarly submitted on the same grounds relied upon by the 2nd respondent that these proceedings were commenced outside the 14 day period hence the stay which was granted herein was erroneous and the extensions thereafter were similarly improper. Since the application filed on the Interested Party was dated 12th November 2013 while the one in Court was dated 2nd November 2013, it was submitted that what was served was a different application.
6. On the *ex parte* applicant's part, a replying affidavit in opposition sworn by **Maur Abdalla Bwanamaka** was filed on 6th November 2013. According to the deponent, under Order 4 rule 4 (sic) of the Civil Procedure Rules the purported authority to **Stephen Kyandih** to swear an affidavit on behalf of the 2nd respondent ought to have been under seal of the 2nd respondent hence the affidavit is incompetent and ought to be struck out. Based on information from his advocate, he averred that the said advocate presented the Application for leave at the registry on 25th October 2013 at 3.00pm and the same was duly stamped as received and was advised to deposit the filing fees at the Registry and collect the receipt on 28th October, 2013 as the Registry had ran out of receipts. Therefore according to him the application for leave was filed within time

and the ex parte applicant should not be denied justice or be punished for administrative procedures over which it had no control whatsoever. According to him, the impugned award to the interested party is subject of investigations by the Parliamentary Select Committee and the Public Procurement Oversight Authority hence the present application would entrench impunity in public procurement system. According to legal advice from his legal counsel the application is fatally defective and incompetent for misdescription of the 2nd respondent as well as failure to cite the provisions under which the application is brought and ought to be struck out. In his submissions, **Mr Gachuba**, learned counsel for the ex parte applicant reiterated the foregoing and added that the 2nd respondent despite failing to respond to the application has brought the instant application. In his view an interlocutory application cannot precede a substantive response to the suit. According to him the averment in the replying affidavit have not been controverted and there is no allegation that the stamp is a forgery hence prima facie the application was received on 25th October 2013. While admitting that they do not contend that they paid for the application on 25th October 2013, learned counsel submitted that the sum therefor was deposited on 25th October 2013. To him the issues raised herein are more of an administrative in nature and that the procedures in question did not prejudice any party as the application was received within time. To him to allow the application would be contrary to public policy.

7. I have considered the application, the affidavits sworn both in support of and in opposition to the application as well as the submissions made and this is the view I form of the mater.
8. Before I deal with the issues raised herein, it is important to deal with the import of section 100(1) of the ***Public Procurement and Disposal Act***. The said section provides as follows:

   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 Board's decision.

9. This Court has had occasion to deal with the said provision in **Republic vs. Public Procurement Administrative Review Board & Others ex parte Avante International Technology Inc. Nairobi High Court Misc. Application No. 451 of 2012** and **Republic vs. Director General of the Public Procurement Oversight Authority & Others ex parte Africa Infrastructure Development Company Nairobi High Court Misc. Application No. 24 of 2013** in which it was held as follows:

   "Section 100(1) of the Act 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 Board's decision. The respondents contend that since there was no stay granted by the Court and the said contract was entered into the orders sought herein are incapable of being granted. This action is justified on the ground that the Commission's action is dictated by the timelines for the conduct of the elections and therefore it had to proceed with the contract. That may be so, however, if the Commission decides to enter into a contract during the pendency of judicial review proceedings filed within the stipulated period, it does so at the risk that the Court may nullify the process leading to the tender and it would be no excuse that the tender had been entered into since it is clear that where the judicial review proceedings are commenced within 14 days, the decision of the Procuring Entity is not final in which event the Court could be properly entitled to nullify the procurement. The decision of the Board having been made on 11th December 2012 and these proceedings having been instituted on 20th December 2012, the same were instituted within time hence the mere fact that the contract had been awarded and part payment made is in my view inconsequential."

10. It is therefore my view that where the decision of the Review Board is challenged by way of judicial review within 14 days of the date of the decision, the binding effect and finality of the decision is suspended until the determination of the said proceedings. Parliament attempted to provide a safeguard against abuse of this automatic suspension of the decision by providing that the said proceedings must be determined within 30 days. That provision however ran into problems in **Republic vs. Public Procurement Administrative Review Board & Another Ex**

Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728.

11. I now wish to deal with matters which I consider preliminary in nature in the sense that they are procedural issues.

12. It was contended by the 2nd respondent and the interested party that the affidavit which was served on them was not commissioned. I have perused the affidavit which was filed in Court and I am satisfied that the same was duly commissioned. Whereas I agree that the copies of the affidavits served on parties to the suit ought to be the counterparts of the ones filed, I am not in the circumstances of this case prepared to strike out the affidavit filed in this case which clearly is not affected by the said defect. It is also contended that the supporting affidavit to the application under consideration is defective since there is no authority under seal as required under Order 4 rule 1(4) of the ***Civil Procedure Rules***. First and foremost, it must be made clear that the provisions of the ***Civil Procedure Act*** as well as the Rules made thereunder do not ordinarily apply to judicial review proceedings since the ***Civil Procedure Act*** is expressed to be "An Act of Parliament to make provision for procedure in civil courts" yet judicial review proceedings are neither civil nor criminal proceedings. See **Commissioner of Lands vs. Hotel Kunste Civil Appeal No. 234 of 1995; Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486; Paul Kipkemoi Melly vs. The Capital Markets Authority Nairobi HCMA No. 1523 of 2003.**

13. In any case I had an occasion to deal with a similar objection in **Nairobi HCCC (Commercial & Admiralty Division) No. 122 of 2011** between **Mavuno Industries & Others vs. Keroche Industries Limited** in which I expressed myself as follows:

> **"As properly submitted by the defendant, under Order 4 rule 1(4) of the Civil Procedure Rules, where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so. Nowhere is it stated that such authority or resolution must be filed. The failure to file the same may be a ground for seeking particulars assuming that the said authority does not form part of the plaintiff's bundle of documents which common sense dictates it should. Of course, if a suit is filed without a resolution of a corporation, it may attract some consequences. The mere failure to file the same with the plaint or with the Registrar of companies, as the requirement is extended by the defendant, does not invalidate the suit. I associate myself with the decision of Kimaru, J in *Republic vs. Registrar General and 13 Others Misc. Application No. 67 of 2005 [2005] eKLR* and hold that the position in law is that such a resolution by the Board of Directors of a company may be filed anytime before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as the suit. Its absence, is therefore, not fatal to the suit, at least not at this stage."**

14. Accordingly I do not accede to the submission that the supporting affidavit is incurably defective and incompetent on that score.

15. It was submitted that the application is further incompetent on the ground that the title to the application is the one for the Notice of Motion rather than the ex parte application. In support of this submission, **Mr Gachuba** relied on **Ulungalu Na Utanu Yatta Trading Industry and Transport Co. Ltd vs. Francis Mboya & Nzisi Advocates & 2 Others Machakos High Court Civil Case No. 72 of 2003** and **Kinyanjui Ng'ang'a & Two Others vs. Wallace Gathua Kangethe & 2 Others Nairobi HCCC No. 377 of 2003**. Although copies of these authorities were not availed at the hearing hence the advocates for the 2nd respondent and the interested party had no opportunity of looking at them, I have perused the same and it is my view that nothing turns on them. With respect to **Ulungalu Case**, it was held and correctly in my view that orders cannot be sought against an intended defendant for the simple reason that the intended party may never become a party to the proceedings and to make orders against a non-party would fly in the face of the rules of natural justice. With respect to **Kinyanjui Ng'ang'a Case** with due respect I do not agree that in light of the provisions of Article 159(2)(d) of the Constitution the mere omission to indicate in the application that the party is both plaintiff and applicant and instead indicating that the party is the applicant renders the application incompetent when from the record it can be clearly discerned that the party applying is also a plaintiff in the suit. To do so would in my view be stretching the procedural requirements if there is any such requirement too far.

16. Suffice to state that in **Republic Ex Parte the Minister For Finance & The Commissioner of Insurance as Licensing and Regulating Officers vs. Charles Lutta Kasamani T/A Kasamani & Co. Advocate & Another Civil Appeal (Application) No. Nai. 281 of 2005** the Court of Appeal stated:

"Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment...Is the form of title to the appeal as adopted by the Attorney General in this matter defective or irregular? We think not, as we find that it substantially complies with the guidelines set out by this Court".

17. Therefore even if I were to hold that there was a defect in the title to the application which I am not prepared to do, the same would not have been fatal to the application.
18. Related to this issue is the contention that the applicant ought not to have filed the instant application before responding to the Motion. No authority was cited and no legal provision was referred to for such a robust submission and the Court is aware of none. However, in **Geosurvey International LLC and Another vs. The Town Clerk. Malindi Municipal Council Malindi HCCC No. 106 of 2007 [2008] 2 EA 144** the Court expressed itself as follows:

"It is the law that any party aggrieved by the grant of leave in a judicial review application may apply to the judge who granted it or any other judge if the former is not available to set it aside. The issue is at what stage can the aggrieved party make the application for setting aside the leave. In the instant matter it will be noted that apart from the granting leave it was ordered that the said leave to operate as a stay of the respondent's decision which was being challenged. That in effect, meant that the respondent would be served with the order. If the order aggrieved the respondent there is absolutely nothing wrong with the application to set aside the order in question being brought at the time it was brought. If leave has been granted on *ex parte* basis the respondent can make an application to set aside the leave. If such application is to be made, it must be made timeously if it is to have any point at all. What is discouraged is the delay in instituting an application to challenge leave."

19. Similarly, in **Republic vs. Commissioner of Co-Operative Development & Another Ex Parte Gusii Farmers Rural Sacco Ltd. Kisii HCMA No. 32 of 2004 [2004] 1 KLR 483,** the Court held:

"Judicial review proceedings under Order 53 CPR starts when the substantive motion has been filed.... In this case the substantive motion had not been filed. However though the parties would not be heard on the issue of judicial review *per se* they still can be heard on the issue of stay if it is granted simultaneously with the leave to institute judicial review. Granting leave to institute judicial review is one thing and granting stay is another thing altogether. Whereas issues relating to the former should be dealt with after the substantive motion has been filed parties interested in the matter can canvass the issue of stay even before the substantive motion has been filed. This is only logical since if a party feels that he will be affected by the order of stay he may not have to wait for 21 days if he feels that by doing so his rights will be infringed. Therefore there was nothing wrong for the Judge to rule that the 3 interested parties could be heard."

20. It is therefore my view and I so hold that an application seeking to set aside leave and stay may be made at any time. In fact it ought to be made as soon as it is discovered that grounds justifying such an application exist.
21. It was further contended that the instant application is incurably defective and incompetent for failure to cite the provisions under which the application is brought. The Court of Appeal in **R vs. Communications Commission of Kenya & 2 Others Ex Parte East Africa Televisions Network Ltd. Civil Appeal No. 175 of 2000 [2001] KLR 82; [2001] 1 EA 199** 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. The appropriate procedure for

challenging such leave subsequently is by an application by the Respondent under the inherent jurisdiction of the Court, to the Judge who granted leave to set it aside. It follows that the Court in setting aside leave does so in the exercise of its inherent powers. The Court's inherent jurisdiction is not conferred upon the Court by a particular legislation but inheres in every court hence the court has inherent jurisdiction not created by legal provisions, but which only manifests the existence of such powers. See **Ryan Investments Ltd & Another vs. The United States of America [1970] EA 675.**

22. Similarly, it was held in **Republic vs. The Public Procurement Complaints, Review and Appeals Board & Another Ex Parte Jacorossi Impresse Spa Mombasa HCMA No. 365 of 2006** that the Court has power under its inherent jurisdiction to make orders that may be necessary for the ends of justice and to enable the Court maintain its character as a court of justice and that this repository power is necessary to be there in appreciation of the fact that the law cannot make express provisions against all inconveniences and that the Court retains a residual power in nolonger in dispute. In **The Matter of The Estate of George M'mboroki Meru HCSC No. 357 of 2004, Ouko, J** (as he then was) expressed himself inter alia as follows:

".....the court retains certain intrinsic authority in the absence of specific or alternative remedy, a residual source of power, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent abuse of its process, to do justice between the parties and to secure a fair trial between them."

23. In the same vein **Kimaru, J** in **Rev. Madara Evans Okanga Dondo vs. Housing Finance Company of Kenya Nakuru Hccc No. 262 Of 2005** held:

"The court will always invoke its inherent jurisdiction to prevent the abuse of the due process of the court. The jurisdiction of the court, which is comprised within the term "inherent", is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of the substantive law; it is exercisable by summary process, without plenary trial, it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of the court. The inherent jurisdiction of the court enables the court to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process. In sum, it may be said that the inherent jurisdiction of the court is virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."

24. In **Meshallum Wanguhu vs. Kamau Kania Civil Appeal No. 101 of 1984 1 KAR 780 [1987] KLR 51; [1986-1989] EA 593, Hancox, JA** (as he then was) emphasised that it is a residual jurisdiction, which should only be used, in special circumstances in order to put right that which would otherwise be a clear injustice.

25. The upshot of the foregoing authorities is that the failure to cite a particular provision of the law does not preclude the Court from invoking its inherent powers to ensure that the ends of justice are met in appropriate circumstances.

26. It was further contended that the application which was served on the 2nd respondent and interested party was not the one that was filed hence, there was non-compliance with the order made on 12th November 2013. It is admitted that the Motion which was served on the 2nd respondent and the interested party was dated and date stamped 12th November 2013 while the Motion in the Court file was filed and dated 2nd November 2013. I have however perused the two documents and apart from the date appearing thereon and the date stamp, the substance of both

documents are the same. I have not seen any receipts showing that court fees was paid in respect of the document date stamped 12th November 2013, in order to deem it as having been filed in which case, there would have been two applications filed in this case seeking same orders, an event which would have pursuant to the decision of the Court of Appeal in **Billy Ngongah vs. Khan & Associates Civil Appeal No. 104 of 2001** amounted to an abuse of the Court process. Accordingly I am not prepared to find that the inadvertence on the part of the applicant to serve the counterpart of the document which was filed in court ought to warrant the holding that the said court order was not complied with since in my view I am not satisfied in light of the explanation offered by the applicant that the said action was meant to mislead.

27. That now brings me to the effect of the failure to challenge the decision of the Review Board within the 14 days under section 100(1) of the Act. Sections 9(2) and (3) of the ***Law Reform Act*** provides as follows:

(2) Subject to the provisions of subsection (3), rules made under subsection (1) may prescribe that applications for an order of mandamus, prohibition or certiorari shall, in specified proceedings, be made within six months, or such shorter period as may be prescribed, after the act or omission to which the application for leave relates.

(3) In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

28. It is therefore clear that it is lawful to provide in specific proceedings that applications for an order of *mandamus*, prohibition or certiorari shall be made within such shorter period than 6 months as may be prescribed, after the act or omission to which the application for leave relates. Therefore there is nothing wrong in my view with the prescription that a challenge to the decision of the Review Board be made by judicial review within 14 days of the decision.

27. This position was justified in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati** (supra) in which **Nyamu, J** (as he then was) expressed himself as follows:

"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, sections 36(6) and 100(4) of the Act which are ouster clauses, were tailored to accelerate finality of 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 other objectives namely to promote the integrity and fairness of the procurement procedures and to increase transparency and accountability. Fairness, transparency and accountability are core values of a modern society like Kenya. They are equally important and may not be sacrificed at the altar of finality. The Court must look into each 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 in public procurement cases, finality cannot outweigh judicial adjudication as there may be other issues such as integrity, transparency and accountability which are also in public interest and if adjudicated upon by the court, may maximize economy and increase public confidence in the procurement procedures. Perhaps, if finality is overemphasized at the expense of other equally important core values in the said Act, the very intention of the Parliament captured by section 2 will substantially fail…… 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 overzealous to complete a project. It is also one of the objects of the said Act, to promote integrity and fairness of procurement and disposal procedures. The law acknowledges the need for speedy certainty as to the legitimacy of target activities and requires applicants for judicial review to act promptly to avoid frustrating a public body whose decision is challenged, particularly because of public interest."

28. The above pronouncement recognises the fact that judicial review acknowledges the need for speedy certainty as to the legitimacy of the target activities. The court's responsibility is that of handling matters before it with speed, efficiency and economy so as to achieve the overall objective of judicial review. See **O'reilly vs. Mackman and Others [1982] 3 ALL ER 1124.**
29. Judicial review proceedings ought as a matter of public policy to be instituted, heard and determined within the shortest time possible hence the stringent limitation provided for instituting such proceedings. It is recognised that judicial review jurisdiction is a special jurisdiction. The decisions of parastatals and public bodies involve million and sometimes billions of shillings and public policy demands that the validity of those decisions should not be held in suspense indefinitely. It is important that citizens know where they stand and how they can order their affairs in the light of such administrative decisions. The financial public in particular requires decisiveness and finality in such decisions. 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. The economy with the current volatile financial markets cannot afford to have such uncertainty. As such judicial review remedies being exceptional in nature should not be made available to indolents who sleep on their rights. When such people wake up they should be advised to invoke other jurisdictions and not judicial review. Public law litigation cannot and should not be conducted at the leisurely pace too often accepted in private law disputes. See **Republic vs. The Minister for Lands & Settlement & Others Mombasa HCMCA No. 1091 of 2006.**
30. The next issue for determination is whether these proceedings were commenced within the 14 day period stipulated under the said Act. It is not in doubt that the filing fees was paid on 28th October 2013. According to the ex parte applicant when the advocate went to file the application he was informed by the registry that the receipt book had run out of receipts and he deposited the amount with the registry. It is however clear that there was no affidavit from the registry clerk from whom this information was obtained. In **Municipal Council of Kisumu vs. Lake Basin Dev. Authority Kisumu HCCC No. 440 of 2001**, it was held by **Mwera, J** (as he then was) that where allegations are made that non-attendance at the taxation was due to the fact that the applicant was misled by registry clerks, an affidavit from the clerks is prudent. Similarly, **Waki, JA** in **Gerphas Alphonse Odhiambo vs. Felix Adiego Civil Application No. Nai. 352 of 2005** held that where the basis for the delay is knowledge derived from the advocate's court clerk who was dealing with the file and there should be an affidavit from the Court clerk or an explanation why he could not state the information personally and that ordinarily an affidavit should not be sworn by an advocate on behalf of his client or clerk when those persons are available to swear and prove the facts of their knowledge and in appropriate cases such affidavits may be struck out or given little or no weight at all and the learned Judge went ahead to hold that no reason was given why the Court clerk who had personal knowledge of the disappearance of the Court file could not swear the supporting affidavit as required under the rules, the affidavit disregarded. Similarly, in **Ngirwa T/A Quality Signwriter General Limited vs. Tanzania Harbours Authority [2006] 1 EA 294,** it was held by the Tanzania Court of Appeal that if the registry assistant misplaced the earlier Notice of Appeal

inadvertently in the cause of her duties, she would have deposed an affidavit to explain how or why the Notice of Appeal got lost if she had diligently and honestly been performing her duties. That she refrained from filing an affidavit to prove that the alleged Notice of Appeal was received, misplaced or lost in the Registry for reasons her affidavit would reflect, renders the assertion incredible.

31. In this case the replying affidavit was sworn by the client based on information from his advocate who similarly based his information on lack of receipts on the information given by an undisclosed person in the registry. The client's affidavit in my view amounted to double hearsay and hence inadmissible.

32. The inadmissibility of the said affidavit leaves the Court with no explanation as to why the filing fees was never paid on 25th October 2013. Even if the registry had run out of receipts, it has been submitted which submission has not been controverted that the procedure is that where the filing fees exceeds Kshs 500/- the same is payable in the Bank where the payment slip is duly stamped and the stamp slip is then presented at the registry. It has not been alleged that the registry also ran out of the said slips hence there is no explanation why the slip could not have been presented on 25th October 2013. If the same had been presented to the Bank on the said date, in my view the stamping thereon by the Bank would have been evidence of payment of the filing fees the subsequent issuance of the court receipt notwithstanding since in those circumstances the Bank would be deemed to be an agent of the Court. In this case, however, the slip is dated 28th October 2013. The 2nd respondent has further exhibited a court receipt in respect of Miscellaneous Application No. 381 of 2013 filed in this Division whose receipt is dated 28th October 2013. The implication here is that if the case whose serial number 381 was filed on 28th October 2013, there is no way this case whose serial number is 382 of 2013 could have been filed on 25th October 2013.

That leads me to the issue of when a document is deemed to have been filed. In **Unta Exports Ltd vs. Customs Kampala HCCC No. 403 of 1968 [1970] EA 648** it was held:

"There is no doubt whatsoever that both as a matter of practice and also as a matter of law that documents cannot validly be filed in the civil registry until fees have either been paid or provided for by general deposit from the filing advocate from which authority has been given to deduct court fees. In this case it is admitted that there was no such general deposit.... mere entry in the column of a register or note by a clerk on the back of a letter certainly cannot override the omission to pay or provide for the necessary fees at the time of the alleged filing. Accordingly, the plaint was filed out of time, having not been properly filed until the date when fees was paid."

33. In this case there is no allegation that there was a general deposit from which filing fees could be deducted. The applicant's argument was that the filing fees for the particular case had been deposited in the registry. Without an affidavit from the registry staff and in light of the procedure for filing documents, it cannot be said that there was a general deposit so as to amount to filing of the document. This however does not mean that any document presented to court without the necessary court fees cannot be relied upon since the Court may by an order either exempt the payment of court fees or direct that the same be paid at a later stage but that is a decision which rests with the court and such a document must be presented to the court within the time provided.

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.

Dated at Nairobi this 9th day of December 2013

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Gachuba for ex parte applicant

Ms Malik for 2nd respondent

Mrs Njoroge for Interested Party