



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**JUDICIAL REVIEW DIVISION**  
**MISCELLANEOUS CIVIL APPLICATION NO. JR 17 OF 2012**

**IN THE MATTER OF TENDER NO KEBS/TO55/2011/2012 IN RELATION TO THE REQUEST FOR PROPOSAL TO OFFER PRE EXPORT VERIFICATION OF CONFORMITY (PVOC) TO STANDARDS SERVICES ISSUED BY THE KENYA BUREAU OF STANDARDS**

**AND**

**IN THE MATTER OF AN AWARD DATED 11<sup>TH</sup> JANUARY, 2012 BY THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD IN APPLICATION NO 48/2011 OF 13<sup>TH</sup> DECEMBER, 2011 ALLOWING THE PROCEEDINGS IN THE TENDER NO KEBS/TO55/20122/2012 TO PROCEED**

**AND**

**IN THE MATTER OF THE PUBLIC PROCUREMENT DISPOSAL ACT, 2005**

**AND**

**IN THE MATTER OF PUBLIC PROCUREMENT AND DISPOSAL REGULATIONS 2006**

**AND**

**IN THE MATTER OF AN APPLICATION BY INTERTEK INTERNATIONAL FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI, PROHIBITION AND**

**MANDAMUS**

**RULING**

By way of a chamber summons application dated 17<sup>th</sup> January, 2012 brought under Section 9 of the Law Reform Act and Order 53 Rule 1(1), (2), (3) and (4) of the Civil Procedure Rules Intertek International Limited (the applicant) applies for leave to commence judicial review proceedings. In the said application the applicant also prays that if leave is granted, then it should:

**“...operate as a stay of the proceedings in question, namely the signing and/or implementation and performance of any contracts for the pre-shipment verification of conformity to standards services under the impugned tender, and of any operations thereunder, pending the hearing and determination of the judicial review proceedings.”**

The application is supported by grounds on its face, a statement of facts and a verifying affidavit sworn by Douglas Nyamori on 16<sup>th</sup> January, 2012 plus annexures thereto.

When counsel for the applicant appeared before me on 18<sup>th</sup> January, 2012 I directed that the application be served for inter-parties hearing. The application was argued on 25<sup>th</sup> January, 2012.

Kenya Bureau of Standards (KEBS) one of the respondents filed grounds of opposition dated 20<sup>th</sup> January, 2012. The Public Procurement Administrative Review Board (PPARB) which is the other respondent though served did not file any reply. Bureau Veritas, Kenya came on board as an interested party and opposed the application through a replying affidavit sworn on 24<sup>th</sup> January, 2012 by Charles Ochieng' who identified himself as the Deputy Chief Executive Officer of the company.

In seeking leave to commence judicial review proceedings, the applicant has given detailed information as to why it believes that this is a case for judicial review. The information placed before the court also explains why the grant of leave to commence judicial review proceedings should operate as stay of further proceedings in respect of the challenged decision.

KEBS and the interested party are opposed to the grant of the two prayers sought by the applicant. In summary they are saying that the application should not be allowed because:-

1. The application amounts to an appeal against the decision of the PPARB and not a review of the same;
2. An order of prohibition is no longer available to the applicant since the contracts have been signed and are being performed;
3. The applicant has concealed some material facts from the court;
4. If stay is granted the inspection of goods coming into the country will be grounded thus resulting in chaos;
5. The court cannot quash a contract; and
6. The court has no jurisdiction to issue the orders sought.

I will start by addressing the issue of jurisdiction. It has been argued that this court has no jurisdiction to issue the orders sought by the applicant. I did not seem to have clearly understood what the respondents were saying regarding this line of argument. What is clear is that the applicant seeks remedies that are available within the judicial review province. There was an argument that the contracts have been signed and an order of prohibition cannot issue. The applicant has, however, asked for other orders in the application. There is also room for amending the application if need be. In any case the applicant prays that KEBS be stopped from performing the contracts signed as a result of the challenged process. It is therefore clear that this court has the mandate to handle this matter.

Another line of argument advanced in opposition to the application is that allowing commencement of judicial review proceedings amounts to allowing the applicant to appeal against the decision of PPARB. A look at the applicant's papers filed in court, however, reveals that the applicant is challenging the process through which the decision was reached. The application is therefore within the four corners of judicial review.

Another argument put forward is that the application before the court is bad in law. I have looked at the application and it is clear that it conforms to the rules for commencement of judicial review proceedings.

It was also argued by the respondents that the applicant concealed some material facts from the court. The respondents did not however tell the court what the concealed facts were. From the face of it the applicant

appears to have placed all its cards on the table.

Considering the facts placed before the court I find that the applicant has established that it has an arguable case. Leave is therefore granted to the ex-parte applicant to commence judicial review proceedings.

The only remaining issue is whether the leave granted should operate as stay of further proceedings. There was an argument that since contracts have been signed then the remedies available in the judicial review province are no longer available to the applicant. This is an argument that the court cannot buy. I do not believe that the court will stand aside and refuse to cancel contracts that have been arrived at through a flawed process. If the court finds that a public body has breached the procurement laws in awarding a tender, then the court should step in and issue the necessary prerogative orders which will result in the cancellation of the contract that came out of the flawed process. The fact that the operations of KEBS may be halted were the court to issue stay orders should not make the court shy away from issuing orders which will serve the interests of justice. Public bodies should not be encouraged to use the fact that contracts have been signed with third parties to shield themselves from the probing light of judicial review.

Let me look at what other legal minds have said about stay orders in judicial review proceedings In **Taib A Taib Vs. Minister for Local Government & 3 others [2006] eKLR** D.K. Maraga J (as he then was) stated that:-

**“I also want to state that in judicial review applications like this one the court should always ensure that the Ex-parte applicant’s application is not rendered nugatory by the acts of the respondent during the pendency of the application. Therefore where the order of stay is efficacious the court should not hesitate to grant it. Even with that in mind, however, it should never be forgotten that stay orders are discretionary and their scope and purpose is limited. What then is the scope and purpose of stay orders in the judicial review jurisdiction?”**

**The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made.”**

Let me also quote the holding of the court in **REPUBLIC VS. SECRETARY OF STATE FOR EDUCATION AND SCIENCE, EX-PARTE AVON COUNTRY COUNCIL 282 (1991) All ER** to the effect that:-

**“.....the court had jurisdiction to grant a stay of the implementation of the Secretary of State’s decisions and the proposal for the school to become grant-maintained. However, since an early hearing of the substantive application was possible a stay was unnecessary and would not be granted.”**

Among the reasons that the Court of Appeal gave for setting aside the stay orders in the case of **Grain Bulk Handlers Limited Vs. J B Maina & Co Ltd & 2 others (2006) eKLR** were that:-

**“The learned judge does not seem to have considered the full implications of the order of stay to the business of GBHL, and the provision of port facilities and services by KPA .....**

**Lastly, we readily agree that the learned judge did not take into account the long and unexplained delay in seeking an order of stay.”**

Looking at the few decisions quoted above it is clear that the court will look at various factors before deciding whether or not to grant stay orders. The decisions also show that the court has discretion in granting stay orders. Where the interests of justice will be served by the grant of stay orders, the court should not hesitate in granting such orders.

In the case before me the applicant cannot be accused of delay in coming to court. The applicant was in court five days after the PPARB made its decision. It is however agreed that the contracts the applicant wants to be suspended involve provision of inspection services in respect of goods being imported into the country. A grant of stay would immediately result in a stoppage of goods flowing into the country. The impact on the economy would be tremendous. It is encouraging to note that this matter can be heard and determined without undue delay due to the fact that hearing dates are available. The contracts the applicant seeks to quash will run for a period of three years and the matter can be heard and determined within one year. In my view this is not a case in which stay orders should be granted. I therefore decline to grant an order of stay in these proceedings. Award of costs will await the outcome of the substantive notice of motion.

So as to get this matter going I direct that the applicant files and serve the substantive notice of motion on the respondents and all potential interested parties within the next ten days. The respondents and interested parties are given ten days from the date of service within which to file and serve their responses. Mention on 23th February, 2012 for taking of a date for highlighting submissions.

Dated, signed and delivered at Nairobi this 1<sup>st</sup> day of February, 2012

**W. K. KORIR**  
**JUDGE**