



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Misc Appli 59 of 2006

**IN THE MATTER OF: AN APPLICATION BY EAST AFRICAN
ELEVATORS FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION**

AND

**IN THE MATTER OF: THE EXCHEQUER AND AUDIT
(PUBLIC PROCUREMENT) REGULATION**

REPUBLIC APPLICANT

VERSUS

KENYATTA INTERNATIONAL CONFERENCE CENTRE..1ST RESPONDENT

THE PUBLIC PROCUREMENT COMPLAINTS

REVIEW & APPEALS BOARD 2ND RESPONDENT

SCHINDLER LIMITED INTERESTED PARTY

EX PARTE.....EAST AFRICA ELEVATORS COMPANY LTD

RULING

By a Chamber Summons dated 28th February 2006 the 1st Respondent, Kenyatta International Conference Centre (KICC) moved this court for orders that at the court be pleased to set aside, discharge and or vacate the ex parte orders for leave and stay granted to the Applicant on 14th February 2006 to apply for Judicial Review orders and all other consequential orders made as prayed for in the chamber Summons dated 14th February 2006 and dismiss the whole entire suit with costs. The application is based on grounds found in the body of the application and the supporting affidavit of Lydia Ng'ang'a, the principal legal officer of KICC. The 1st Respondent also filed skeleton arguments dated 13th February 2008.

The 1st Respondent/Applicant was represented by Ms Nungo Advocate, Mr. Onyancha appeared for the 2nd Respondent and generally adopted the arguments by the 1st Respondent. Although the Applicants were aware of the hearing date, no Advocate appeared on their behalf but one Aggrey Kai was in court

and had nothing to say. However, a replying affidavit had been filed by Mr. Charles Kariuki Kibe dated 14th March 2006 in opposition to the Chamber Summons.

The background of this matter is that by a Chamber summons dated 14th February 2006, the ex parte Applicant, East African Elevator Company Ltd. moved this court through Mohamed Muigai Advocates for leave to commence Judicial Review proceedings for orders of certiorari to quash the decision of the 1st Respondent dated 8th November 2005 purporting to declare that the bid by the Applicant for the supply and installation of lifts in KICC building was not successful and the 2nd Respondent's decision dated 19th December 2005 ordering the procurement process for the supply and installation of lifts to KICC building to proceed. On the said date, leave was granted as prayed and the said leave was ordered to operate as stay.

The reasons for this application are that the Applicant suppressed certain relevant facts to wit, that the contract had already been awarded to Schindler Ltd; that the construction of the lifts had already commenced; that the review proceedings are made out of time, that the Applicants have refused to repair the 1st Respondent's old lifts.

Secondly, the 1st Respondent contends that the Applicant has totally misconstrued the law relating to procurement; that the jurisdiction of this court to entertain proceeding is limited by S. 42 (7) of the Exchequer and Audit Act (Public Procurement) Regulations 2001; that this application was filed after the 30 days allowed under that Section; that the court was misled to proceed under S.40 (3) of the Act which excludes Judicial Review proceedings after the contract has been signed and that the Applicant also failed to disclose that the tendering was undertaken in total compliance with S. 34 of the Act and did not need to be advertised. That the 1st Respondent has already given a letter of credit to Schindler Ltd. and so the process is irreversible, that if the orders of stay are to be obeyed it would mean that the lifts at KICC which had been dismantled would remain so till this application was heard and the 1st Respondent would have to pay damages of over 160,000,000/=. The 1st Respondent also contends that the Applicant has no grounds upon which the Judicial Review application is based and orders of certiorari as framed cannot lie and that the court's jurisdiction was never invoked to grant the orders of stay in any case.

The 1st Respondent purports to bring this application pursuant to Sections 3, 3A, 6, 7, 63 of the Civil Procedure Act, Order IV Rule 13 (b) and (d) of the Civil Procedure Rules, Section 40 (3) and 42 (7) of the Exchequer and Audit Act (Public Procurement) Regulations, 2001 and Order 53 rule 1, 2, 3, 4, 6 and 7 Civil Procedure Rules. The 1st Respondent seeks to set aside the order of this court granted ex parte to the Applicant on 14th February 2006.

In Judicial Review, the substantive law is found in Sections 8 and 9 of the Law Reform Act while procedure for filing applications for Judicial Review is under Order 53 Civil Procedure Rules. There is no procedure provided for setting aside of court orders. The 1st Respondent has cited provisions of the Civil Procedure Act as being applicable but Section 8 (1) of the Law Reform Act is explicit, that the Judicial Review jurisdiction is neither civil nor criminal and it follows that the Civil Procedure Act and its Rules are not applicable. S. 8 provides:

“8 (1) The High Court shall not, whether in the exercise of the civil or criminal jurisdiction issue any of the prerogative writs of mandamus, prohibition or certiorari.”

The Court of Appeal confirmed this position in its decision in **HOTEL KUNSTE V COMMISSIONER OF LANDS CA 243/1995**. The court held that Judicial Review is a special jurisdiction which is neither civil nor criminal and the Civil Procedure Act and Rules do not apply. The same court reiterated that position in **R V COMMUNICATION COMMISSION OF KENYA CA 17/2000 OR (2001) KLR 82** where it was held that Order VI Civil Procedure Rules did not apply to Judicial Review.

The provisions cited by the Applicant are not applicable to such application. Since there is no provision

for grant of such an Order as sought, the Applicant should have moved this court under its inherent jurisdiction. Bringing this application under so many provision of law that are not applicable is evidence that the 1st Respondent were not sure what they wanted such that they quoted Sections that do not even exist i.e. Sections 40 (3) and 42(7) of the Exchequer or Audit Act. The Respondents did not properly invoke the jurisdiction of this court and the order to set aside the orders of the court cannot avail under those cited provisions. The application is therefore incompetent and is for striking out.

Having found that the 1st Respondent has not properly moved this court for the orders sought, this court will not bother considering the grounds upon which the application was brought or the merits of the application.

The best way to proceed is to have the substantive Notice of Motion set down for hearing for all the parties to be heard once and for all. Otherwise the application dated 28th February 2006 is struck out with the 1st Respondent's bearing the costs of the application.

Dated and delivered this 26th day of May 2009.

R.P.V. WENDOH

JUDGE

Present

Mr. Kang'ahi holding brief for Ms. Mungo for the Applicant

Muturi: Court Clerk