



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Miscellaneous Application 367 of 2009**

**PEWIN SUPPLIES LIMITED..... APPLICANT**

**VERSUS**

**THE PERMANENT SECRETARY,**

**MINISTRY OF PUBLIC WORKS..... RESPONDENT**

**RULING**

By a Chamber Summons dated 17<sup>th</sup> June 2009 the ex parte Applicant Pewin Supplies Ltd. Seek the leave of this court to commence Judicial Review proceedings against the Respondent, Ministry of Public Works. It seeks leave to apply for an order of certiorari to remove into the High Court and quash the decision, order, or directive of the Ministerial Tender Committee Ref No. MPWA/A 164. 17 Vol X (133) and dated 6<sup>th</sup> June 2008 purporting to have extended in particular the contract for the supply of “Fire Fighting Equipment” and AFFF Foam Compound, safety and emergency Equipment from 30<sup>th</sup> June 2008 to 30<sup>th</sup> December 2009. Leave to apply for an order of prohibition of the Permanent Secretary Ministry of Public Works Prohibiting him from implementing the directives dated 6<sup>th</sup> June 2008 that purported to extend the contract in issue from 30<sup>th</sup> June 2008 to 30<sup>th</sup> December 2009, leave to apply for an order of mandamus directed at the Respondent to advertise for the supply of fire fighting equipment and AFFF Foam compound safety and emergency equipment for the Period 2009-2010. Lastly, and that the grant of leave do operate as stay of the decision of the Ministerial Tender Committee to extend the contract until the determination of his application. The application is supported by a statement of facts dated 16<sup>th</sup> June 2009 and the verifying affidavit of Peter Kirigua the Managing Director of the Applicant.

When Mr. Kamunde, Counsel for the Applicant approached the court for leave, this court directed that the chamber summons be served and be heard interparties. Mr. Waudo from the State Law Office appeared for the Respondent Law Office and opposed the application on points of law.

Briefly, the facts of this case are that the Respondent advertised a tender for fire fighting equipment and the Applicant was one of the bidders. On 28<sup>th</sup> September 2007, the officer in charge, supplies, informed the Applicant that the Ministerial Tender Committee had awarded the tender to the successful bidder (PMK 2). The Applicant sought to know why its bid was not successful under letter of 2<sup>nd</sup> October 2007. They were informed that their tender was disqualified at technical evaluation (PMK 4). The Applicant was dissatisfied with the decision of the Committee and appealed to the Public Procurement Administrative Review Board vide appeal No. 56/2007 (PMK 5). However, the Applicant withdrew the appeal upon advise of the Director of Procurement Ministry of Public Works who intimated that the tender would only last upto 30<sup>th</sup> June 2008 after which the Applicant could apply for tender and he therefore withdrew the appeal (TMK 6). On 20<sup>th</sup> June 2008 and 18<sup>th</sup> July 2005 the Applicant wrote to Respondent complaining that the subject tender was being unlawfully considered for extension to 30<sup>th</sup> December 2009 (PMK 7 & 8) and on 9<sup>th</sup> August 2005 the Ministerial Tender Committee confirmed that they had approved and extended the tender to 30<sup>th</sup> December 2009 and were seeking advice from Public Procurement Authority (PPOA) on how to proceed (PMK 9). That on 10<sup>th</sup> September 2008, the PPOA wrote to the Respondent advising them to abide by the law and allow for competitive bidding. However, on 17<sup>th</sup> June 2009 the Applicant received a letter dated 29<sup>th</sup> May 2009 from the Respondent confirming that the contract for supply of fire fighting equipment was extended to 30<sup>th</sup> December 2009 vide letter of 6<sup>th</sup> June 2008 (PMK 11 & 12). That is the impugned decision.

In reply Mr. Waudo submitted that order of certiorari cannot issue as the application has been made outside the 6 months period allowed under Order 53 Rule 2 Civil Procedure Rules. That the directive has already taken effect and an order of stay cannot issue. That since a contract is already in existence it cannot be set aside by way of Judicial Review. He urged this court to dismiss the application.

At this stage all that the applicant needs to demonstrate to this court is that they have an arguable case with good chances of success. The Applicant has explained how the said contract has been entered into, it did not comply with the provisions of the Public Procurement and Disposal Act, 2005 whose object is to achieve efficiency, promote competition and ensure that competitors are treated fairly, increase transparency etc (section 2 of the Act). The Respondent acted contrary to the intent and spirit of the Act and to the advice given by the Public Procurement Oversight Authority that they comply with the Act. The issue is whether the extension of the contract by the Respondents is ultra vires the Public Procurement and Disposal Act, whether there was fairness in the award of the tender in accordance with principles envisaged in the Act and whether the Respondent considered irrelevant matters in the extension of the contract. This court is satisfied that an arguable case is disclosed in light of the above stated issue and leave is granted in terms of prayer 1, 2 and 3 of the Chamber Summons.

Can stay be granted? It seems the contract was granted in 2008 (PMK 8). Its already one year since the award. The reasons given for extension is that the contractor had excess materials right over. Only 5 months are left of its performance and for that reason the court will decline to grant an order of stay at this stage as it may serve to cause confusion and the beneficiaries of the equipment may suffer unnecessarily. I direct that the Notice of Motion be filed and served within 14 days.

Once Notice of Motion is served the same be listed for mention for purposes of taking directions.

Costs will abide the Notice of Motion.

Dated and delivered this 17<sup>th</sup> day of July 2009.

R.P.V. WENDOH

JUDGE

**Present**

Mr. Waweru holding brief for

Mr. Kamunde - Applicant

Mr. Wendoh - Respondent

Muturi - Court clerk