



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

Misc Civ Appli 115 of 2008

IN THE MATTER OF: THE PUBLIC PROCUREMENT AND DISPOSAL ACT, 2005

AND

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

AND

**IN THE MATTER OF: TENDER NO. KCAA/16/2006/2007:
MODERNISATION AND UPGRADING OF AIR NAVIGATION
EQUIPMENT BY THE KENYA CIVIL AVIATION
AUTHORITY**

AND

**IN THE MATTER OF: TENDER NO. KCAA/64/2007/2008 SUPPLY,
DELIVERY, COMMISSIONING AND TRAINING
OF COMMUNICATION, NAVIGATION AND
SURVEILLANCE EQUIPMENT BY THE
KENYA CIVIL AVIATION AUTHORITY**

AND

**IN THE MATTER OF: AN APPLICATION BY SELEX SISTEMI
INTEGRATI FOR LEAVE TO APPLY FOR**

JUDICIAL REVIEW ORDERS OF CERTIORARI

AND PROHIBITION

BETWEEN

SELEX SISTEMI INTEGRATI APPLICANT

AND

THE KENYA CIVIL AVIATION AUTHORITY..... RESPONDENT

RULING

On 19th March, 2008, Justice Wendoh certified this matter urgent, and directed that the matter be heard inter-partes on 25th March, 2008. The application, is made under Order 53, for **leave** to apply for Judicial Review Orders as follows:

(a) An Order of Certiorari removing to the High Court for purposes of being quashed the decision of the Respondent to conduct and invite expressions of interest in relation to Tender No. KCAA/64/2007/2008 SUPPLY, DELIVERY, COMMISSIONING AND TRAINING OF COMMUNICATION, NAVIGATION AND SURVEILLANCE EQUIPMENT;

(b) An Order of Certiorari removing to the High Court for purposes of being quashed the advertisement by the Respondent styled “Expression of Interest”, which advertisement purports to invite expressions of interest in Tender No. KCAA/64/2007/2008 SUPPLY, DELIVERY, COMMISSIONING AND TRAINING OF COMMUNICATION, NAVIGATION AND SURVEILLANCE EQUIPMENT; and which advertisement was published in the Daily Nation of 6th March, 2008 and other print and electronic media; and

(c) An Order of Prohibition against the Respondent precluding it, its officers, servants and or agents from continuing with, completing and or taking any further steps or transactions expressed in and or envisioned by its advertisement styled “Expression of Interest”, which advertisement purports to invite expressions of interest in Tender No. KCAA/64/2007/2008 SUPPLY, DELIVERY, COMMISSIONING AND TRAINING OF COMMUNICATION, NAVIGATION AND SURVEILLANCE EQUIPMENT, and which advertisement was published in the Daily Nation of 6th March, 2008 and other print and electronic media.

The applicant also wants such leave to operate as “stay” of “further proceedings, steps and or transactions expressed in and or envisioned by the Respondent’s advertisement styled “Expression of Interest”, which advertisement purports to invite expressions of interest in Tender No. KCAA/64/2007/2008 SUPPLY, DELIVERY, COMMISSIONING AND TRAINING OF COMMUNICATION, NAVIGATION AND SURVEILLANCE EQUIPMENT and which advertisement was published in the Daily Nation of 6th March, 2008 and other print and electronic media.”

The application is based on the grounds stipulated on the body of the application, the statutory statement and the Verifying Affidavit of Muthomi Thiankolu.

In his submissions before this Court, Mr Muthomi, for the Applicant, argued that the issue and advertisement of the current tender is a covert attempt to re-start a tender which is in dispute and pending before the Court in HCMCA 1260 of 2007. It is not in dispute that the subject matter of this tender is the same as the subject matter in Case No. 1260 of 2007, which is slated for hearing before the High Court on 21st April, 2008. It is also not in dispute that no “stay” has been granted in the previous tender, the subject of dispute in case 1260 of 2002. However, Mr Muthomi has argued that to allow the Respondent to proceed with this tender would undermine the authority, dignity and sanctity of the process of the Court; that the issue of this tender is intended to deny the Applicant the same tender already awarded to it (though it is the subject of litigation in case 1260 of 2007); that the issue of this tender is unlawful and contrary to the intention of the Parliament in enacting Section 2 of the Public Procurement and Disposal Act, 2005 (“the Act”); and finally that the issue of this tender is sub-judice.

In reply, Mr Ogunde, Counsel for the Respondent, argued that there was nothing illegal about the issue of this tender as no stay orders were in effect; that the Applicant had indeed chosen to participate in the current tender; that the Applicant had not made out an arguable case to warrant the orders sought; and finally no reasons had been advanced to show why the Notice to the Registrar could not be issued.

There are essentially two issues before me at this time: “**leave**”, and “**stay**”. The failure to give Notice to the Registrar is not an issue. I am satisfied that because of the urgency demonstrated by the applicant, **the Notice to the Registrar can and should be waived.**

With regard to **leave**, there are serious allegations raised against the Respondent regarding its impropriety and motive in issuing the current tender, and possible breaches of the Act. The Applicant should have the opportunity to ventilate its case, **and accordingly I grant leave as prayed.**

With regard to “stay”, **I am not persuaded that the grant of leave should operate as “stay” for the following reasons:**

1. It is not in dispute that no stay was granted with regard to the previous tender which is the same here, and which is the subject of litigation in Case No. 1260 of 2007. To grant stay here would be tantamount to granting stay in the other case, against the wisdom of the Court in not making that decision in case 1260 of 2007.
2. The Applicant here stands to suffer no prejudice if stay is not granted because its rights pertaining to this tender are the subject of litigation elsewhere, and should it succeed, the Respondent will be obligated to award it the tender, notwithstanding the issue of the current tender.
3. On the other hand, the Respondent stands to suffer prejudice if stay is ordered, as the country’s national interest could be compromised (paragraph 10 (b) of the Replying Affidavit).

Accordingly, I disallow prayer 4 (for stay), but grant leave as prayed. The Applicant shall file and serve the substantive application within the next 21 days.

Dated and delivered at Nairobi this 26th day of March, 2008.

ALNASHIR VISRAM

JUDGE