



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA  
AT NAIROBI  
MILIMANI LAW COURTS

Misc Appli 999 of 2007

LITHOTECH EXPORTS (PTY) LIMITED.....APPLICANT

VERSUS

ELECTORAL COMMISSION OF KENYA.....RESPONDENT

RULING

The background information to these proceedings as gathered from the documentation filed by the applicant is that the Electoral Commission of Kenya, advertised Tender No. ECK/31/2006-2007 for prequalification and tender for printing and supply of Ballot papers “As and when required” for the period up to 30<sup>th</sup> June 2008. Item 1 on the said Tender reads “local and Foreign firms are hereby invited for pre-qualification and tender for printing and supply of ballot papers” as and when required for the period up to 30<sup>th</sup> June 2008”. On page 2 of the said document there is a provision that Bidders are required to confirm in writing on the space provided below, that they possess the requisite capacity in terms of finances, manpower, plant, machinery and equipment and past relevant experiences to perform the contract with the acceptable delivery period if awarded.

Below these words there was a space provided for the confirmation. The confirmation is done in free hand by Lithotech Exports. The confirmation is to the effect that Lithotech possess the necessary capacity and capability in terms of finances, manpower, plant machinery and equipment and past experience to perform the contract within the acceptable delivery if awarded. The document is dated 14.3.2007.

The tender document provided space for the executive summary of the organization profile duly signed by the Managing Director/Chief Executive of the company in the space provided. In this space it is indicated clearly that Lethotech exports is a division of Lithotech Exports (PTY) Ltd where as Lithotech (PTY) Limited is a wholly owned subsidiary of the Bid Rest Group which is an international investment holding company. Also in the accompanying confidential business questionnaire Lithotech Exports is described as a division of Lithotech (PTY) Ltd. In the form of tender at page 17 of the bundle of documents submitted by the applicant, it is indicated clearly that the tender forms was from Lithotech Exports of the address given and which tender form was being addressed to the Chairman Electoral Commission of Kenya.

On 18<sup>th</sup> May 2007 there is a letter from the Electoral Commission addressed to the Managing Director Lithotech Exports (PTY) Limited. In summary the addressee was being informed that :-

- (i) their tender document had been received:-

(ii) It had been evaluated along with 14 others

(iii) The addressee had complied with the prequalification analysis, technical evaluation of sample and site visit, but their pricing was not very competitive and was ranked 3<sup>rd</sup>, 5<sup>th</sup> and 7<sup>th</sup> lowest hence not successful.

Though ECKS letter of 18<sup>th</sup> May 2007 was addressed to Lithotech PTY Limited the reply to the same is dated Monday 11 June 2007 on the headed paper and logo of Lithotech Exports. The central theme in the said communication is that they were seeking a review of the matter. A formal request of review was submitted dated 12<sup>th</sup> June 2007. The request for review was signed by one Ben Sachs, Applicants group market Development Manager, Lithotech Exports a division of Lithotech (PTY) Ltd special projects division.

The ECK responded to that appeal. The findings of the Appeals Board is dated 9<sup>th</sup> day of July 2007. The relevant portion states *“in the circumstances pursuant to section 98 (a) the board hereby annuls the awards made by the procuring entity on the 24<sup>th</sup> April and 4<sup>th</sup> May 2007. Pursuant to section 98 (b) the procuring entity may re-tender and may use restricted tendering procedure under Section 73 involving the fourteen tenderers that participated in this tender. The re-tender should be done within the shortest possible time.*

*Finally the Board is alive to the concerns of the procuring entity that there is an impending general election. As already stated the law has taken care of such an eventuality. The procuring entity in such a case may use the expedited procurement procedure, provided for in the Act. It is recommended that the public procurement oversight Authority provide all due assistance to the procuring entity both in preparing appropriate tender documents and granting authorization for hastened tendering. Dated at Nairobi this 9<sup>th</sup> day of July 2007”.*

These documentations are marked ET 1-7. The Courts excursion into them was solely for purposes of laying out in this ruling supportive facts in view of the objection raised as to who is supposed to be the right complainant in these proceedings. As to whether these documentations go to support facts or law will be dealt with at a later stage of this ruling.

The applicant being armed with the afore said information moved to this High Court and filed Misc. Civil Application No.999 of 2007. The reading of the application for purposes of this record reads *“in the matter of an application by Lithotech Exports (PTY) Limited for leave to apply for orders of certiorari, mandamus and prohibition.*

*And in the matter of tender No. ECK/31/2006-2007 for printing and supply of Ballot papers issued by the ELECTORIAL COMMISSION OF KENYA AND*

*IN THE MATTER OF THE CONSTITUTION OF KENYA”.* The notice is dated 5<sup>th</sup> September 2007 and it is explicit that it is Lithotech Exports (PTY) Limited which was giving notice. The notice is filed the same date of 05.09.2007. It is accompanied by a statutory statement and the verifying affidavit also filed the same date. These documentations were being presented in fulfillment of the requirements in order 53 rule 1(3) which states *“The applicant shall give notice of the application for leave not later than the proceeding day to the registrar and shall at the same time lodge with the Registrar copies of the statement and affidavits provided the court may extend this period or excuse the failure to file the notice of the application for good cause shown”.*

The chamber summons which bears the same heading as the one already set out here in was filed on 6<sup>th</sup> September 2007. It was brought under certificate of urgency. Having been presented within the court vacation it was accompanied by another chamber summons in compliance with the vacation rules. The prayers sought are:-

(1) That this application be certified as urgent and be heard *ex parte* in the first instance.

(2) That leave be granted the applicant to apply for Judicial Review for an order of certiorari to issue to bring into this Honourable Court and quash the decision of the Electoral Commission of Kenya to award the tender No. ECK/31/2006-2007 to Universal Print Group (PTY) Limited and Smith and Ouzman Limited.

(3) That leave be granted the applicant to apply for judicial Review for an order of mandamus to compel and direct the Electoral Commission of Kenya to award the tender ECK/31/2006-2007 to the applicant.

(4) That leave be granted to apply for Judicial Review for an order of prohibition directed against the Electoral Commission of Kenya forbidding the said Electoral Commission of Kenya from implementing the awards, executing any contract with the alleged successful and placing orders or local purchase orders with the alleged successful Tenderers.

(5) That the grant by this Honourable Court to the applicant to institute judicial Review proceedings do operate as a stay of the decision of the Electoral Commission of Kenya; in awarding tender No. ECK/91/2006-2007 to Universal Print Group (PTY) Limited and Smith and Ouzman Limited namely the implementations of the awards, execution of any contract by the Electoral Commission of Kenya with the alleged successful tenderers and carrying out or implementing the terms of any contract between the Electoral Commission of Kenya and the alleged successful Tenderers.

(6) That costs of the application be awarded to the applicant.

Below the prayers, it is noted that the applicant indicates that the application is made on the grounds:-

(a) the evaluation process of the tender was flawed.

(b) If the tender were evaluated transparently the applicant ought to have been the successful tenderer. Below this there is indicated that. And which application is further based on the matters stated in the statement and the affidavit here with and on further grounds to be adduced at the hearing hereof. No other documentations were filed along side the said chamber summons. This Chamber summons is supposed to have been filed in pursuance to the provision of order 53 rules 1 (1) and 2 which provide “1(1) No application for an order of mandamus, prohibitions or certiorari shall be made unless leave thereof has been granted in accordance with this rule.

*1(2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers and shall be accompanied by a statement setting out the name and description of the applicant the relief sought and the grounds on which it is sought and by affidavits verifying the facts relied on. The judge may in granting leave impose such terms as to costs and as to giving security as he thinks fit.”*

The operative words in sub rule 1(1) are “shall be made unless leave therefore has been granted in accordance with this rule” “ and those in sub rule 2 are

“ shall be accompanied by”.

The applicant ex parte chamber summons has not been accompanied by the documentation mentioned in sub rule 2, which documentation accompanied the notice to the Registrar filed on 5<sup>th</sup> September, 2007.

As to whether the documentation lodged with the notice to the Registrar operate for the ex parte chamber summons will depend on the construction of those provisions at a later stage of this ruling.

A perusal of the proceedings in the court record reveal that counsel for the applicant appeared before this court on 06/09/2007 under certificate of urgency. This court made the following orders.

(1) Leave to be heard during the vacation granted.

- (2) leave to apply for discretionary orders as per the chamber summons dated 6/09/07 granted .
- (3) Issues on whether leave granted is to operate as stay to be canvassed at the inter parties on a date to be fixed.
- (4). The substantive application to be filled and served within 21 days from today.
- (5). Hearing of substantive application so to 11/09/07.
- (6). Temporary stay pending hearing as in no 3 and 5 above granted till 11.09.07.

The substantive application which is by way of notice of motion is dated 10<sup>th</sup> September, 2007 and filed the same date. It is to be noted that the heading differs from the heading of the chamber summons. It reads:-

*“Republic .....Applicant*

*Versus*

*Electoral Commission of Kenya*

*Ex parte*

*Lithotech Experts PTY Limited.”*

The provisions under which it is brought are indicated to be under section 9 of the Law Reform Act and Order LIII Rule 3(1) of the Civil Procedure Rules.

The orders sought in the substantive motion are:-

- (1) An order of certiorari do issue to bringing into this Honourable Court and quash the decision of the Electoral Commission of Kenya to award the tender No. ECK/31/2006-2007 to Universal Print Group (PTY) Limited and Smith and Ouzman Limited.
- (2) An order of mandamus do issue directing and compelling the Electoral Commission of Kenya to award the tender No. ECK/31/2006 – 2007 to the applicant.
- (3) An order of prohibition do issue directed against the Electoral Commission of Kenya forbidding the said Electoral Commission of Kenya from implementing the awards, executing any contract with the alleged successful Tenderers and placing orders or local purchase orders with the alleged successful tenderers.
- (4) The cost of this application be provided for.

It is also noted that the format of the substantive application after the prayers is the same. It is indicated that the application is made upon the following grounds:-

- (1) The Electoral Commission of Kenya acted in breach of the rules of natural justice by carrying out a flawed evaluation process.
- (2) The Electoral Commission of Kenya breached its representation as contained in the tender documents and as such its actions were an abuse of power.
- (3) Out of the four firms that reached the 4<sup>th</sup> and final stage being the commercial and or financial stage the applications. Tender was the only responsive tender. Below this it is added further words that and which applicants is further based upon the matter set out in the statutory statement and the verifying

Affidavit of ENOCK TUMUSIIME already filed in these proceedings and upon such further and other grounds that may be adduced at the hearing hereof. There is no other documentation filed with the substantive application.

This substantive application is filed in pursuance of Order 53 rule 3(1) Civil Procedure Rules which provides “*When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within 21 days by notice of motion to the High Court, and there shall unless the judge granting the leave has otherwise directed be at least either clear days between the service of the notice of motion and the day named therein for the hearing*”. The notice of motion presented in pursuance to rule 3(1) is supposed also to comply with rule 4(1) and 2 of the said rules which provide 4(1) “*copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall subject here after in this rule provided be relied upon or relief sought at the hearing of the motion except the grounds and relief set out in the statement*

(2) *the High Court may on the hearing of the motion allow the statement to be amended and may allow further affidavits to be used if they deal with new matter arising out of the affidavits of any to party to the application, and where the applicant intends to ask to be allowed to amend his statement or use further affidavits, he shall give notice of his intention and of any proposed amendment of his statement, and shall supply on demand copies of any such further affidavits.*

(3) *Every party to the proceedings shall supply to any other party on demand copies of the affidavits he proposes to use out the hearing*”. The operative words in rule 4(1) are “*copies of the statement accompanying the application for leave shall be served with the notice of motion and copies of any affidavit accompanying the application for leave shall be supplied on demand*” whereas the operative words in sub rule 2 are “*may on the hearing of the motion allow the said statement to be amended and may allow further affidavits to be used if they deal with new matter arising out of the affidavits of any other party to the application*”.

Against the foregoing background information, advocates for the Respondent and one interested party filed notices appointment of Counsel. Counsel for the Respondent followed the notice of appointment with a notice of preliminary objection dated 12<sup>th</sup> September and filed the same date. It raises five grounds namely:-

- (1) The application is bad in law, there being no substantive application filed.
- (2) The court has no jurisdiction to grant the orders sought.
- (3) The application has been overtaken by events the impugned contracts having already been executed and partly performed.
- (4) There has been an undue delay on the part of the applicant in filing these proceedings.
- (5) The orders sought if granted would jeopardize the impending general election to be held any time between now and December.

The interested party put in grounds of opposition and for purposes of completeness of the record only, it is proper to have them set out as well. They are dated 11<sup>th</sup> September, 2007 and filed the same date.

- (1) This Honourable Court has no jurisdiction to entertain the application for the reasons that leave having been granted *exparte*, the court is *finctus officio* and the application for stay has been spent.
- (2) Any orders of stay would be contrary to mandatory provisions of the public procurement and disposals. Act 2005 concerning delay of procurement processes.
- (3) The orders of stay sought as against the implementation of the contract, the execution of any

contract or the carrying out is complementing (sic) the terms of any contract has been overtaken by events as the contracts have already been signed and part performed by the winning bidders and the respondent herein.

(4) The grant of any orders of stay for an un determinate period of time would be highly inimical to the public interest and would cause substantial prejudice and harm to the interested party and would serve solely to benefit the applicant whilst in acceptably delaying this vital procurement process for elections due this year.

(5) The interested party will at the earliest opportunity seek to set aside the leave granted by this Honourable Court to the applicant to commence judicial review proceedings for the reason, the complaints of the applicant are not justiciable under the judicial review jurisdiction of this Honourable Court.

(6) Any injury suffered by the applicant should a stay not be granted, can be compensated by damages should the applicant show that it suffered any loss at the end of the judicial review proceedings. Conversely the harm and damages otherwise caused by granting such an order of stay, including jeopardizing the ability of the ECK to conduct the general elections, would not be compensable in money or damages should the applicant not be successful in its judicial review application.

Parties were heard by this Court and grounds raised in their oral submissions as well. Those relied upon by the Respondent are:-

(1) The applicant herein Litho Tech Exports (PTY) Limited has no locus standi in these proceedings because the tenderer is Lithotech Exports a division of Lithotech Exports (PTY) Limited. They contend the two are different entities and the only party justified to complain is the party that applied for the Tender. The applicant being a stranger to the tender sought to be reviewed, it cannot avail itself of the judicial review process herein.

(2) That Lithotech Exports (PTY) has described itself as a company incorporated in South Africa whose details cannot be obtained through search. This being the case it is their stand that the application should not have been brought by a strange South African Entity.

(3) Both the Chamber Summons as well as the substantive application are incurably defective for the following reasons:-

(i) The procedural law invoked is the Constitution of Kenya whereas the proceedings should have been brought under the Law Reform Act Cap.26 Laws of Kenya and Order 53 Civil Procedure Rules.

(ii) The Chamber summons did not have the statement of facts and the verifying affidavit accompany it as required by the provisions. Instead the applicant relied on documents which he had lodged with the notice to the registrar.

(iii) The chamber summons does not indicate the substantive law under which it brought.

4 Leave to operate as stay should not have been granted and cannot be granted for the following reasons:-

(i) leave can only be granted to a party with locus standi.

(ii) Leave cannot be granted because the Court has not been moved in the proper form.

(iii) If granted it will affect parties who in the applicant has chosen not to bring on board (namely all the 14 tenderers inclusive of the two successful ones.

(iv) Stay should not be granted in favour of an entity a stranger from South Africa as opposed to the

interests of 30 million Kenya.

(v) Stay should also be denied because there has been undue delay in coming to court to seek redress as the tender was awarded way back in April 2007 and the contract has been partly performed and goods supplied.

(vi) Stay should not be granted because the Respondent acted within the law as it has reserved its right in the duly executed documents not to award a tender to any of the tenderers without giving any reasons. The applicants' subsidiary executed those documents and agreed to be bound by them and cannot go round that.

Counsel for the interested party stressed the following points:-

(1) It is their stand that this court having granted leave without an attendant order for that leave operating as stay cannot be revisited because this court cannot invoke the ordinary civil procedure proceedings into the special jurisdiction of judicial review and secondly it is not proper under the judicial review proceedings. It is their stand that the issue of leave granted to apply for judicial review and the issue of leave granted operating as stay have to be dealt with at the same time. On the basis of legal authorities relied upon by them this court is functus officio and cannot revisit that issue.

(2) This court is called upon to be guided by the Court of Appeal decisions, on the subject and not the High Court decisions and the English authorities which are only persuasive in nature.

In response to the foregoing submissions counsel for the applicant stressed the following points:-

(1) the papers filed by them herein are proper as they filed notice with the registrar accompanied by the statement of facts and verifying affidavits which are still on record. The Chamber Summons was subsequently filed on the basis of those papers. After leave was granted the notice of motion was duly filed and all these are properly on record.

(2) It is their stand that the issue of locus standi should be dealt with at the hearing of the main substantive application as this calls for adduction of evidence through scrutiny of documents an exercise not allowed when a court is dealing with issues of preliminary objection which is supposed to be based solely on points of law.

3. The preliminary objection raised by the respondent cannot stand as it is based on disputed facts. To them a Preliminary Objection thrives on the assumption that all the facts pleaded by the other side are correct. Once they dispute that the applicant is not a proper entity in law to apply for judicial review, it becomes a disputed fact.

4. They contend that the Respondent is estopped from denying the involvement of the applicant in the process subject of these proceedings when they addressed correspondence to them over the same issue.

5. No authority has been cited to show that a chamber summons shown to have been brought under the Constitution of Kenya cannot be acted upon under the judicial Review notwithstanding that the title reads constitution where as the application speaks for itself that it is for judicial review.

(ii) They contend that the mere fact that the word constitutional appears in the heading does not make it a constitutional review matter.

(iii) They contend their application is not defective in form and substance as the only reason why they cited the constitution is because the Electoral Commission of Kenya is a Constitutional body created under the provisions of the Kenya Constitution.

(iv) This Court is properly seized of this matter as section 128 of the Constitution gives this court power to deal with any matter touching on a constitution like the Electoral Commission of Kenya in these

proceedings.

6. They contend one cannot defeat the substance of an application on the basis of failure to comply with the relevant provisions. The court is asked to rely on order 50 rules 12 Civil Procedure Rules by analogy.

7. Issue of lack of service to all the 14 tenderers does not arise as the proceedings herein go to affect the Electoral Commission of Kenya and the interested parties who warn the tender one of whom has already brought himself on board. Secondly issue as to whether a party is affected by the proceedings or not is a question of fact which cannot be entertained in proceedings such as this. They should be reserved for the substantive hearing.

8. By submitting that the chamber summons is defective because it is not supported by an affidavit, Counsel is importing into the judicial review process, the civil procedure rules which have no application to these proceedings.

9. That the Electoral Commission of Kenya gave out an international tender opening avenue for international companies like the applicant tendering and when they alleged that the process was flawed and seek redress from this court they have to be treated like any other litigant. Issue of interest of 30 million Kenyans does not arise as the contract was not between applicant and the 30 million Kenyans but with the Electoral Commission of Kenya which is an independent legal entity accountable for its own actions.

10. They maintain that there is jurisdiction to grant leave to apply for judicial review and order the issue of leave granted operating as stay to be heard inter partes as ordered in this case.

Upon hearing all the three Counsels on points raised for and against the preliminary objection there are two tests that the objections have to pass. The first one is technical and the second one is the merit test. The technical one arises because it is necessary for the preliminary objection to satisfy the ingredients required of sustaining a preliminary objection. The yard stick is found in the famous case of **MUKISA BISCUIT MANUFACTURING CO. LTD VERSUS WEST END DISTRIBUTORS LTD (1969) E.A. 696**. At page 700 paragraph D-E, LAW J.A., as he then was had this to say “*a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation ...*” in the same decision Sir Charles Newbold P. as he then was at page 701, paragraph AB had this to say “*A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is exercise of judicial discretion.*”

These principles have been followed in numerous authorities in the recent past. In the case of **NJOYA AND 6 OTHERS VERSUS ATTORNEY GENERAL AND ANOTHER (2004) 1 KLR 232** it was held inter alia that a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. This holding has combined both the principles set out by both law J.A. and Newbold, P as they were then. The same view was held by Kimaru J. in the case of **WILLIE VERSUS MUCHUKI AND 2 OTHERS (2004) 2 KLR 357**. On an argument on a preliminary objection the learned judge reiterated the well known principle by holding inter alia that “*a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit.*”

*The foregoing principles are to be applied to the preliminary objection points raised namely:-*

(1) Whether the applicant has locus standi to file these proceedings or whether it is a wrong party to championing interests of a bystander.

(2) Whether the applicants chamber summons on the basis of which leave was obtained as well as the substantive applications are defective and incurably bad in law.

(3) Whether this court is functus officio in so far as the leave of leave granted being ordered to operate as stay is concerned.

(4) Whether the interests of 30 million Kenyans is to reign supreme over the interests of the applicant a company with a foreign registration. The sole test to be applied to the foregoing is that if upheld they will dispose of the proceedings. In determining whether these issues raised answer the requirement of a preliminary objection or not the courts mind has to be directed to the pleadings. The standard of construction is either express or by implication. In an application under Sections 8, and 9 of the law reforms Act Cap.26 Laws of Kenya as well as order 53 Civil Procedure Rules, the only pleadings allowed to be presented to court when seeking relief are:-

(i) notice to the Registrar

(ii) Statutory statement

(iii) Verifying affidavit

(iv) Other affidavits

(v) Chamber summons

(vi) Notice of Motion

(vii) Annexures to either the verifying affidavit or other affidavits relied upon by the parties.

This court has given due consideration to the foregoing principles and applied them to points raised and find that they have satisfied the ingredients set out in the authorities relied upon for the following reasons.

(1) If the current applicant Lithotech Export (PTY) Limited is found to be a wrong entity pursuing the rights of a bystander the proceedings will collapse as there is no provision for a representative action provided for in judicial review.

(2) If both the chamber summons and the substantive application are found not to have presented in accordance with the prescribed rules the entire proceedings will collapse as there will be no basis on which to proceed further. The substantive application owes its life to the chamber summons. Once the chamber summons is faulted the substantive application lacks anchor and collapses.

(3) If the court rules that it had no jurisdiction to grant leave to apply for judicial review and by deferring the issue of that leave to operate as stay to a hearing inter parties, then the issue of leave granted operating as stay will be fore closed.

(4) If the court were to hold that the foreign company cannot pursue rights in this courts in opposition to the interests of the 30 million Kenyans in the wake of the impending elections, then the matter will be fore closed for the applicant.

As for pleadings the Court is satisfied that the documentations presented to court are the pleadings to be looked at by the court.

Having passed the test of a preliminary objection, the next to be determined are the merits of the objections. The points for determination on merits are:-

(1) Whether this court is to hold the interests of 30 million Kenyans as being of paramount consideration as opposed to the rights of the foreign company.

- (2) Whether Lithotech Exports (PTY) Limited the applicant herein has locus standi to champion rights in these proceedings.
- (3) Whether the applicant has used the correct format when presenting the papers to court.
- (4) Whether other Civil Procedure Rules can be imported into the judicial review proceedings to cure any defects that may be apparent on the face of the pleadings herein.
- (5) Whether the chamber summons filed herein is incurably defective and bad in law.
- (6) Whether the substantive application is incurably defective and cannot be sustained.
- (7) Whether the issue of leave granted operating as stay cannot be revisited by this Court because this Court is functus officio having not dealt with it at the time leave to apply for judicial review was being granted.
- (8) What are the final orders of this court.

On the first question of whose rights are to be considered as paramount before the court, it is not disputed that item 1 of the tender document indicate that *“local and foreign firms are hereby invited for pre-qualification and tender for printing and supply of ballot papers” as and when required for the period up to 30<sup>th</sup> June 2008.*” The moment Electoral Commission of Kenya contracted outside National Territorial boarders, it exposed itself to International Standards and through it the Court to which the dispute has been submitted for a resolution. The court is duly constituted in accordance with the Kenya Constitution to administer and enforce National laws. But it cannot loose cannot course sight of the international obligations when the country through it’s lawfully constituted organs does something that exposes them to international obligations constitution organs. The first stop is the charter of the United Nations. The court takes judicial notice of the fact that Kenyan is a signatory to this document. Purpose no.3 of the said charter provides *“to achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex language or religion”*

The next stop is the A. Constitutive Act. Article 2 there spells out the objectives of the union. Among them are:-

- (i) Accelerate the political and socio economic integration of the continent
- (ii) Establish the necessary conditions which enable the continent to play its rightful role in the global economy and international negotiations.
- (iii) Promote sustainable development at the economic, social and central levels as well as the integration of African economics.
- (iv) Promote cooperation in all fields of human activity to raise the living standards of African peoples.
- (v) Coo-ordinate and harmonize policies between existing and future Regional economic communities for the gradual attainment of the objectives of the union.

The next top is the African (Banjui) Charter on human and peoples rights Article 3 there of makes provisions that every individual shall be equal before the law and is entitled to equal projection of the law.

The second last stop is the Kenya Constitution itself. Section 77 (9) provides *“A Court or other adjudication authority prescribed by law for the determination of the existence or extend of a civil right or obligation shall be established by law and shall be independent and impartial and where proceedings for*

such a determination are instituted by a person before such a court or other adjudicating authority the case shall be given a fair hearing within a reasonable time”.

The last is the oath office of the trial judge which enjoins him/her to render justice to all who come to the seat of justice in search of the same without distinction legal instruments both international, regional and national enjoin this court to render justice to all without distinction. Meaning that the rights of the litigants in these proceedings all rank equal and the same is do be decided in accordance with the law.

As for locus standi, in normal circumstances a court would not scrutinize documents to establish this when dealing with determination as to whether a preliminary objection is validly raised or not. However in these proceedings, where pleadings comprise all the documentations filed, there is no way the court can refrain from referring to all the documentation filed. When so done it is not disputed that the tender documents both ET1 and ET2 all show that the tendering company was Lithotech Exports a division of Lithotech Exports (PTY) limited. The request for review is made on the headed paper of Lithotech Exports. The confusion of reference being made to Lithotech Exports (PTY) Limited arose from the Electoral Commission of Kenya letter dated 18.5.2007 informing the company that it was unsuccessful in the tendering processes. That was addressed to Lithotech Experts (PTY) Limited.

It is the finding of this Court after due consideration that correspondences cannot oust the legal documents which are the tender documents. They spell out who the aggrieved party should be the party that tendered is the right aggrieved party. The prevent party can only complain on behalf of the tendering entity if it can be shown that there is authority from the subsidiary authorizing the present entity to take legal proceedings on its belief. In the absence of such authority Lithotech Exports (PTY) Limited is none suited.

Concerning the correct format to have been used, in the case of **FARMERS BUS SERVICE AND OTHERS VERSUS THE TRANSPORT LICENSING APPEAL TRIBUNAL (1959) E.A. 779** of the point's under consideration was how proceedings for application for prerogative orders are to be commenced. At page 781 the court set out the format to be followed. It was held that prerogative orders are issued in the name of the crown and applications for such orders must be correctly instituted. In the case of **WELAMONDI VERSUS THE CHAIRMAN ELECTORAL COMMISSION OF KENYA (2007)1 KLR 486** Ringera J. as he then was reiterated that the correct format to be followed when presenting the application is the one set out in the case of **FORMEN BUS SERVICES VERSUS TRANSPORT LICENSING APPEAL TRIBUNAL (SUPRA)**. The relevant holding states that all orders of certiorari, mandamus or prohibitory issue in the name of the Republic and application thereby are made in the name of the Republic at the essence of the person affected by the action or omissions in issue. The application in this case was completely muddled form and thus incompetent and misconceived in substance. Being brought in the name of the Republic, it is imperative for the applicant and or his application to identify himself with the provisions under which such orders are to be sought. Those are section 8 and 9 of Law Reform Act Cap.26 Laws of Kenya and the attendant procedural rules namely order 53 Civil Procedure Rules. The healing of the processes herein cited the Constitution and Section3A of the Civil Procedure Act. It does not follow the format in the farmer's case. It is therefore the finding of this court that the applicant has not used the correct format in presenting the application.

As to whether other procedure rules apply to judicial review procedure to cure any defect that may exist there in, it is now trite law that judicial review proceedings are special proceedings and other Civil Procedure Rules do not apply to it to cure any defect that may exist in the processes filed. This arises because both the chamber summons seeking leave and the substantial notice of motion have other grounds set out in the body of the application and the chamber summons also cites the provisions of section 3A of the Civil Procedure Act. In the case of **REPUBLIC VERSUS COMMUNICATION COMMISSION OF KENYA(2001) 1 E.A. 199**, the Court of appeal held that the provisions of order L rule 16 of the Civil Procedure Act do not apply to proceedings under Order LIII. This stand has been followed by the superior courts in the case of **REPUBLIC VERSUS MINISTER FOR LOCAL GOVERNMENT AND ANOTHER EX PARTE MWAHIMA (No.2) (2002) 2 KLR 574** Onyancha J. made the following holding

- (1). that it is trite law that where any proceedings are governed by a special Act of Parliament, the same shall be interpreted and construed strictly. The mere fact that the Law Reform Act and Order LIII of the Civil Procedure Rules are silent on certain aspects cannot of itself necessitate the application of and Section of the Civil Procedure Act and the Rules even such provisions as Section 3A.
- (2). Order LIII Civil Procedure Rules draws its authority not from the Civil Procedure Act but from the Law Reform Act.
- (3). Order LIII is self sufficient and where it is silent resort should be had to the law Reform Act and not to any provisions of the Civil Procedure Act and Rules.

Likewise in the case of **WELAMONDI VERSUS THE CHAIRMAN ELECTORAL COMMISSION OF KENYA(supra)** Ringer J. as he then was held inter alia that judicial review proceedings under Order 53 of the Civil Procedure Act are a special procedure which are invoked whenever orders of certiorari, mandamus or prohibition are sought in either in criminal or civil proceedings. In exercising powers under order 53, the court is exercising neither civil nor a criminal jurisdiction in the strict sense of the word. It is exercising jurisdiction Sui generis. It therefore follows that it is incompetent to invoke the provisions of Section 3A and order 1 rule 8 of the Civil Procedure Rules and Section 42, 79 and 80 of the Constitution of Kenya.

It is therefore the finding of the court that there is no cure of the applicant's invocation of the general Civil Procedure Act and Civil Procedure Rules provisions and rules.

As regards the ex parte chamber summons herein, this court has already set out earlier on in this ruling that order 53 rule 1(1) and (2) require that it be accompanied with the papers supporting the application for leave which were lodged with the Registrar on the day preceding the filing of the application. The papers lodged with the Registrar were the statement and the verifying affidavit. These are supposed to have been attached to the application and should also have borne the additional stamp of 6<sup>th</sup> September, 2007. In the absence of that the chamber summons presented is incompetent as it is not accompanied by the requisite documentation. There is no provisions which says that it is to be supported by the documents lodged with the Registrar.

Likewise the substantive application as set out herein is supposed to be supported by the copies of the statement accompanying the application for leave which means that such a copy of the statement should bear the stamp of the date when presented to the Registrar, the date when the chamber summons was filed and a 3<sup>rd</sup> stamp when the substantive motion is filed. No such statement accompanied the application for leave and has accompanied the substantive application. Rule 4 also envisages availability of affidavits to be supplied on demand which accompanied the application for leave. None exist here. It is therefore also the finding of this court that the substantive application does not comply with the rules and so it cannot stand.

As regards the issue of whether this court was right in granting leave to apply for judicial review and then defending the issue of leave granted operating as stay to be canvassed inter parties after the substantive motion has been filed and the Respondents brought on board, Reliance has been placed on the Court of Appeal decisions in the following cases:-

- (1) Republic Versus Commissioner of Co-operative ex parte Kirinyaga Tea Growers cooperative savings credit society Ltd (1999) 1 E.A.L.R.
- (2). Shah Versus Resident Magistrate Nairobi (2000) 1 E ALR
- (3). In the matter of an application by Tourism Promotion Services Limited High Court Misc. Civil Application No.772 of 2006.
- (4). Republic Versus Chief Magistrates Court Nairobi and Another Ex parte HINESHK CHUDAJEMA MISC. APPLICATION No. 473/2006.

This issue has been explained at length by this court in its own decision delivered on 24<sup>th</sup> September, 2007 in the case of MISC. APPL. NO. 993 OF 2007 REPUBLIC VERSUS ATTORNEY GENERAL AND 3 OTHERS. All these case 5 were reviewed by this court and the court arrived at the following conclusion as the same.

(1). That being Court of Appeal decisions, this court as a superior Court stands to be guided by them.

(2) That in the case of the **REPUBLIC VERSUS COMMISSION OF CORPORATIVES EXPARTE KIRINYAGA TEA GROWERS COOPERATIVE SAVINGS AND CREDIT SOCIETY**, the Court of Appeal had taken the strict stand that since the rules specify that the application is to be heard exparte it has to be heard exparte.

(2) That in the Shah case the Court of appeal introduced the issue of the superior Court having a discretion to adjourn the issue of the leave granted on stay being adjourned and heard inter partes on conditions that the whole application is adjourned.

(3) In a 3<sup>rd</sup> case not cited by the parties herein of **ZAKHEM CONSTITUTION KENYA LIMITED VERSUS PERMANENT SECRETARY MINISTRY O FROADS AND PUBLIC WORKS NAIROBI C.A. 244 OF 2006**, the Court of Appeal approved the exercise of the discretion in the Shah case and approved that the whole application has to be adjourned for hearing inter parties and then added another consideration of lack of prejudice to the other party or more particularly the complaining party.

(4). In the case of **REPUBLIC VERSUS CHIEF MAGISTRATE** court ex parte a decision of a Court concurrent jurisdiction, this court agreed entirely with the reasoning therein but bear in mind that the decision is not binding on this Court. The agreement was on the basis that stay appears to be a drastic order with far reaching consequences. The court has a discretion to allow the opposite party to be heard before stay is granted either on the whole application or after leave to apply for judicial review has been granted. But preferably after the substantive application has been filed, served and the Respondent has been brought on board. This Court, still holds the same view. Authority for him is from the fact that both order 53 rules 1(2) and rules 1 (4) do not say explicitly that these two remedies must be considered at the same time. Therefore the discretion of the Court to invoke its inherent powers to hear and grant the two relief's at different stages of the proceedings with emphasis on the opposite party being heard before stay is granted is the best mode to be take. The Respondents herein are beneficiaries of this action and so they should not be heard to complain.

For proceedings herein this court would not have been functus officio on the issue of leave because the inter parties hearing on leave would have been based on the substantive application and not the ex parte proceedings became extinct as soon as the substantive application was filed.

In conclusion the final orders of this court ore.

(1). The preliminary objection satisfied the ingredients for raising a preliminary objection as set out in the body of the ruling and It has rightly been considered on merit.

(2) The tendering procedures having taken on an international outlook, they thus brought Kenya and for that matter its organ the Electoral Commission of Kenya and the adjudicating body which is this court into the operation of the provisions of the U.N. Charter, A U Charter and the African Charter on human and peoples rights, as well as the Constitution of Kenya and the Oath of office of the office of a judge, which enjoins this court to treat all litigants inclusive of international ones coming to seek justice before it equally. It therefore follows that both the 30 million Kenyans and the applicant company stand on equal footing before the judgment seat of this court. They win and loose on merit and on the basis of the law applied and not sympathy.

(3). From the pleadings, herein, the entity which tendered and which has the right to complain is Lithotech Exports and not the applicant and so the applicant Lithotech Exports (PTY) limited stands none suited

(4). As per the decision in the case of **FARMERS BUS SERVICE VERSUS TRANSPORT LICENSING APEALS TRIBUINAL (1959) E.A. 779** the format used by the applicant is wrong as it did not cite the correct provision governing judicial review namely Section 8 and 9 of the Law Reform Act Cap.26 Laws of Kenya and this is fatal to the application.

(5). It is now trite law that other civil procedures under the civil procedure rules do not apply to judicial review, in that case the inclusion of the grounds in the body of the chamber summons and substantive notice of motion application as well as the cutting of section 3A Civil Procedure Act went along way in contributing to the fatal consequences that have befallen lien the processes herein.

(6). The chamber summons filed herein has been found to be defective because it was not accompanied by the statement and verifying Affidavit lodged with the Registrar on the preceding date.

(7). The substantive application is also defective as it was not accompanied by the statement which it should have been accompanied with, which statement was required to have accompanied the chamber summons at the leave stage which was not done .

(8). It is correctly submitted that issue of leave granted operating as stay can only be gone into if the documentation in respect of which it is being sought are regular. Herein since the documentation has been faulted, the issue of leave does not arise now.

(9). However had the documentation been proper, for the reasons given this court would not have been functus official in revisiting it at the inter parties stage.

(10). For the reasons given the applicants papers are struck out with costs to the Respondent and interested party.

**DATED, READ AND DELIVERED AT NAIROBI THIS 5<sup>TH</sup> DAY OF OCTOBER, 2007.**

**R. N. NAMBUYE**

**JUDGE**