



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

**Misc Civ Appli 1541 of 2005**

**IN THE MATTER OF TENDER NO. KEBS/TO38//2005/2006 FOR PRESHIPMENT  
VERIFICATION OF CONFORMITY (PVoC) TO STANDARDS SERVICES ISSUED BY THE  
KENYA BUREAU OF STANDARDS**

**AND**

**IN THE MATTER OF A DECISION BY THE KENYA BUREAU OF STANDARDS DATED 23<sup>RD</sup>  
AUGUST 2005 TO REJECT BIVAC INTERNATIONAL SA 9BUREAU VERITAS)' BID FOR  
THE SAID TENDER**

**AND**

**IN THE MATTER OF A CONTRACT BETWEEN KENYA BUREAU OF STANDARDS AND  
SOCIETE GENERALE DE SURVEILLANCE SA FOR PROVISION OF SERVICES FOR PRE-  
SHIPMENT VERIFICATION OF CONFORMITY TO STANDARDS ALLEGEDLY SIGNED ON  
14<sup>TH</sup> SEPTMEBER, 2005**

**AND**

**IN THE MATTER OF A CONTRACT BETWEEN KENYA BUREAU OF STANDARDS AND  
INTERTEK INTERNATIONAL LTD FOR PROVISION OF SERVICES FOR PRE-SHIPMENT  
VERIFICATION OF CONFORMITY TO STANDARDS ALLEGEDLY SIGNED ON 14<sup>TH</sup>  
SEPTEMBER, 2005**

**AND**

**IN THE MATTER OF AN APPLICATION BY BIVAC INTERNATIONAL SA (BUREAU  
VERITAS) FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI, PROHIBITION AND  
MANDAMUS**

**RULING**

The application dated 21<sup>st</sup> December 2005 by way of Notice of Motion was filed by Intertek International Limited on the same day, it seeks an Order for stay of proceedings namely, the prosecution of a Notice of Motion by Bivac International (SA) Bureau Veritas filed on 9<sup>th</sup> December 2005 in pursuance of leave granted by this court to Bivac on 29<sup>th</sup> November 2005 to institute judicial review proceedings against the Kenya Bureau of Standards for inter-alia orders of mandamus, certiorari and prohibition as more particularly set out in Bivac Chamber Summons dated 25<sup>th</sup> October, 2005, pending the hearing and determination of Interteks intended Appeal against the grant of leave aforesaid. A notice of appeal against the grant of the order of leave has been filed.

The applicant contends that it has an arguable appeal in that leave to file the application for judicial review orders ought not to have been granted and that the appeal is likely to be rendered nugatory if stay is not granted. The applicant has argued that it is in the interest of justice to grant a stay of proceeding and that the stay would promote optimum utilization of judicial time and finally that the application was timeously brought and that it was brought expeditiously. These grounds are elaborated further in the applicant's skeleton arguments dated 27<sup>th</sup> February 2006 and filed in court on the same day. The applicant was also accorded the opportunity to orally highlight the skeleton arguments. The applicant further relies on an indexed bundle of authorities attached to the skeleton arguments. SGS which is the other interested party has largely adopted the position taken by Intertek.

The respondent who is the original ex-parte applicant (Bivac) has responded to the application by way of grounds of opposition dated 24<sup>th</sup> February 2006, and filed on the same date. The grounds have been outlined as under:

1. The application is bad in law
2. The application does not have any arguable grounds of appeal
3. The appeal if filed will not be rendered nugatory
4. The applicant has not been diligent in pursuing its appeal
5. The application is an abuse of process.

In addition the respondent has filed skeleton arguments dated 27<sup>th</sup> February 2006 and filed on the same date together with a list of authorities and a bundle of authorities annexed to the arguments. The skeleton arguments have raised the following:

1. The applicant has no arguable appeal
2. The appeal will not be rendered nugatory

The heart of the applicants application is that at the leave stage the court found arguable issues at pages 9 and 10 of the ruling and that the court declined to make a final determination on the identified arguable issues and held that instead they should be determined at the hearing of the Motion seeking the judicial review orders. According to the applicants a prima facie examination of the Bivac's leave application as well as the Motion filed on 9<sup>th</sup> December 2005, have failed to establish or plead that the remedies sought can be granted under judicial review. During the leave hearing, Bivac application disclosed no public or statutory duty that had been breached by the procuring entity and that without that complaint or allegation no judicial review lies and the applicants complaint is that the Tender conditions were not complied with. In the oral submissions before the court, the applicants contended that the fundamental issue is that the court has no jurisdiction to grant leave and that this point ought to have been determined by the court at leave stage. Several authorities have been cited including the case of *R v BBC ex-parte Lavelle [1983] 1 All En 241* (e to f) where the court held:

**“There is nothing in r 1 to S 31 which expressly extends the circumstances in which the prerogative remedies of mandamus, prohibition or certiorari are available. Those remedies were not previously available to enforce private rights but were what could be described as public law remedies for enforcing breaches of ordinary obligation owed by a master to a servant. An application for judicial review has not and should not be extended to a pure employment situation.”**

The long and short of it is that the court is being faulted in the intended appeal for having failed to determine finally the merits of the arguable points as identified by the court or by the parties in their arguments. The complexity of the issues identified is clearly apparent. It is not clear whether the applicable law is the Exchequer & Audit Act and the Procurement Regulations or the Standards Act and

its subsidiary legislation. Thus whether or not there is a statutory under pinning is a very serious issue not suitable for the threshold stage.

The heart of the respondents case against the grant of stay is that after the grant of leave, Bivac has filed the application for judicial review which has been served on all the parties and is awaiting the allocation of a hearing date. Thus, the applicants are saying that the application for leave was misconceived and not justiciable. Moreover the application for stay is based on Order 41 rule 4 which the applicant concedes is not applicable to judicial review at all although the court has inherent powers to grant a stay as per the case cited by the applicants ***R v MINISTER FOR FINANCE & 2 OTHERS (Misc Civil Application No.723 of 2003)***.

The respondents has responded that there is no arguable appeal and further states that an arguable appeal cannot be established or constituted by repeating the matters which were presented to court at leave stage and which the court found fit for resolution at the hearing on merit at the hearing stage (hearing of the Notice of Motion for judicial review orders). Indeed it is apparent that there are many issues for determination, including issues of law. In other words the court is being faulted for not having conducted a full hearing on merit at leave stage contrary to the test established by the Court of Appeal. The court is being asked to go beyond the test set out by the Court of Appeal in ***NJUGUNA v MINISTRY OF AGRICULTUE (2000) I EA 184*** – at page 186, in these terms:

**“Leave should be granted if on the material available to court it considers without going into the matter in depth, that there is arguable case for granting leave.”**

This point is further illustrated by the written submission of the applicant at page 16 where it contends:

**“It will be argued on appeal that the Judicial Review by Bivac would have had no chances of success and leave should have been denied instead of the learned judge correctly identifying the issues but failing to make a determination on it at that initial stage. These challenges are so fundamental that leave stage was the proper stage at where to evaluate the application for judicial review.”**

To me the above quotation is a serious misdirection and it goes contrary to the NJUGUNA test above.

On this point the respondent concluded by submitting that neither the Law Reform Act nor the Order 53 of the Civil Procedure Rules confer jurisdiction on the court to decide on the merits at leave stage and for this reason there is no sustainable arguable appeal. The court must however state at the outset that whether or not there is a sustainable appeal is a matter for another court – Nema Judex Rule - I cannot be a Judge in my own cause.

The court has considered the grounds raised for and against the grant of stay and has further taken into account the cited authorities and the court would like to make the following observations and findings.

### **NOVEL**

This application is a novel one and this court has so far not come across an application which is intended to stay the hearing of an application for judicial review on merit.

### **Starting point – Purpose of leave**

The court considers that the starting point is to consider the purpose of prior leave in judicial review. The court is of the view that the purpose of leave is to prevent the time of court being wasted by busy bodies with misguided or trivial complaints of administrative errors and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it, were actually pending even though misconceived. The other reason is to prevent floodgates. The reason of floodgate has for many years now been discredited, in that no floodgates have happened or opened in this area of law. In practice very

few cases are filtered out at this stage, except the simple, plain, hopeless and unmeritorious one's.

The applicants for leave has a responsibility at the threshold stage to make out or establish a prima facie case for leave. Thus if the court were to require applicants to do more than establish a prima facie case at the threshold stage, surely it would defy commonsense and logic to require a judge to go into the matter in any depth at this threshold stage.

It is important to appreciate the principle or the philosophy behind the two stages in the judicial review jurisdiction and that principle is that the whole purpose the rules require that leave should first be obtained to make the applications for judicial review would be defeated if the court were to go into the matter in any depth or on merit at that stage. If on a quick perusal of the material availed under a certificate of urgency as is usually the case, the court is of the view a matter, discloses what might on further considerations turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of its judicial discretion, give the applicant leave to apply for that relief. It must be appreciated that even at the first stage ie. the threshold stage the court is exercising some judicial discretion but that discretion is being exercised on the material available then without any detailed arguments. The court has the evidence of the applicant only. At the second stage the court is again called upon to exercise yet another discretion but it is a different discretion in that at the second stage all the evidence and arguments are availed by all the parties and the matter is fully heard on merit. For a judge to be required to embark on a serious inquiry at the threshold stage it would give rise to serious prejudice and a miscarriage of justice to the parties and to the case.

### **Appeal**

On what basis can a party who has an opportunity of challenging the merits of the application at the second stage, challenge the courts exercise of a discretion which he does without going into any depth or considering the merits. No such right has been conferred by Law Reform Act or Order 53. By challenging the order of leave given at this stage you are asking the court to hear the matter on merit and pronounce a final determination. This flies in the face of O 53 and S 8 and of the Law Reform Act. In my view Order 42 which confers an automatic right of appeal in respect of Order 53 orders on "prerogative orders" is not applicable to judicial review at all because prerogative orders mentioned therein ceased to exist on 18<sup>th</sup> December 1956 when the Law Reform Act abolished prerogative orders and instead introduced the making of judicial orders. "Prerogative orders" ceased to exist in 1956! Similarly there is no provision for staying judicial review proceedings. This is the reason why all the cited authorities by the applicant on stay relate to civil proceedings and not judicial review. The Law Reform Act gives the right of appeal as against the judicial orders of certiorari, mandamus and prohibition. While the right of appeal is cherished, it is trite law that it is either specially conferred by the Constitution or by statute and the right cannot therefore be implied or inferred.

I therefore find that the applicants have no right of appeal or ought not to have the right of appeal in the circumstances described and for the same reasons, I decline to give a stay in a vacuum.

### **No sustainable Appeal**

In the event I am wrong that there cannot be any valid application for stay or the right appeal I agree with the counsel for the respondent that in view of the test of an arguable case as per the NJUGUNA case cited above there is no sustainable arguable appeal because it defies logic and common sense for an applicant to be allowed to fault the arguable test by delving into the depths and merits after leave is granted while at the same time the judge himself is not allowed to go beyond the prima facie test or give detailed reasons for the exercise of his discretion. How would an appeal logically stem from such a situation.

### **Whether Appeal will be rendered Nugatory**

The applicant claims that its Appeal will be rendered nugatory merely because if its appeal succeeds time and resources would have been wasted in pursuing a judicial review application which would

otherwise have been determined on preliminary issues on Appeal.

Because the application for leave was determined by the court on a prima facie basis the intended appeal is literally asking the Court of Appeal to assume original jurisdiction and finally determine the matter without the matter proceeding to the second stage for hearing by the High Court on merit. In other words, the Court of Appeal is being asked to assume original jurisdiction in a matter the High Court has not determined on merit and it is not under the law, or the appropriate test allowed to determine on merit. In my view the invitation to the Court of Appeal to exercise original jurisdiction to determine the matter as if the second stage were not necessary would be misconceived in that the Court of Appeal's jurisdiction is appellate only which right the applicant would have undisputed right in law to invoke upon the hearing at the second stage. The intended appeal cannot therefore be rendered nugatory. In addition for the same reasons the applicant cannot demonstrate that it will suffer substantial loss if the court declines to stay the judicial review proceedings in the High Court because it still can appeal if it does not succeed at the second stage and argue the same fundamental issue it is now raising prematurely. It can be compensated by way of costs in respect of the hearing in the High Court. I am in full agreement with the finding of Platt J.A. page 1022 in the case of *KENYA SHELL LTD v BENJAMIN KARUGA KIBURU AND RUTH WAIRIMU KARUGA* (1982-1988) I KAR 1018 where he found:-

**“If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting a stay.”**

The applicant has not demonstrated that it is likely to suffer substantial loss instead it is lamenting that the respondent wants to be heard on merit in the High Court!

In the case of *BUTT v RENT RESTRICTION TRIBUNAL (1982) KAR 417* THE Court of Appeal held at page 74:

**“The court will grant a stay where special circumstances of the case so require. The special circumstances in this case are that there is a large amount of rent in dispute between the parties.”**

The applicant here has failed to demonstrate either substantial loss or special circumstances.

It is important for the court to observe that, it is being asked to give much more than a stay of execution. The applicant seeks an order for stay of proceedings and in such applications which are clearly aimed at stopping a party from being heard there is a higher test of scrutiny if the proceedings were to be halted. On this I am indebted to the counsel for the respondent who cited from HALSBURYS LAW OF ENGLAND 4th Edition page 137 para 442 as follows:

**“The stay of proceedings is a serious grave and fundamental interruption in the right that a party has to conduct his litigation or the trial on the basis of substantive merits of his case and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue.”**

It cannot be said that in the circumstances proceedings in respect of the judicial review ought to be stayed beyond all reasonable doubt because they cause no prejudice to the applicant except perhaps on the issue of costs which can clearly be compensated.

In the Court of Appeal case of *KENYA COMMERCIAL BANK LTD v BENJOH AMALGAMATED & ANOTHER UNREPORTED* Civil Appeal Nai 50 of 2001 at page 2 the Court of Appeal observed:-

**“The onus of satisfying us on the second condition that unless stay is granted the intended appeal would be rendered nugatory is also upon the applicant.”**

**“In our view it has unfortunately failed to discharge this onus. We remind ourselves that each case**

**depends on its own facts and we find it difficult to be persuaded that the appeal on the facts of the present case would be rendered nugatory if stay is not granted. The appeal may be heard and if successful, the proceedings in the superior court could be determined in accordance herewith. The hearing in the superior court might have been unnecessary for what appropriate costs can be ordered but the appeal will not have been worthless.”**

The same reasoning was adopted in the case of *SILVERSTEIN v CHESONI* (2002) KLR 867 – page 873 paras 20-40 and in *UAP PROVINCIAL INSURANCE CO LTD v MICHAEL JOHN BECKET*.

Finally, in a case which appears to be on all fours with this one, the case of *R v MINISTER FOR FINANCE & OTHER CA Nai 93 of 2004*, the Court of Appeal held:

**“If a stay is not granted and the Appeal eventually succeeds, the appeal will only appear possible to have been rendered nugatory if the hearing of the main case has been concluded adversely to Cotecna both before the hearing of the appeal and before the completion of the contract. If this happened, Cotecna would have its right of appeal against the judgment and the right to apply for stay of that judgment at that time.”**

Even under the principle established in the seminal case of *WILSON v CHURCH* (1879) 12 CH D 454 the intended appeal is not likely to be rendered nugatory on the facts of this case because if stay is not granted, Bivac will have an opportunity to proceed with its application for Judicial Review. All the parties will then place all the facts before the court. If the applicant is right, then the application for judicial review if heard before the Appeal will be dismissed and it will incur no further costs or anxiety. On the other hand if Bivac succeeds the applicant will have the liberty to apply for a stay against the final order and pursue the appeal. On the other hand if the appeal is heard before the Judicial Review application and the applicant succeeds, then that will stop all further proceedings. Either way, the applicant suffers no loss which cannot be compensated by an order for costs. Justice Ringera’s ruling in *GLOBAL TOURS & TRAVEL LTD Misc C App 43 of 2000* is distinguishable in view of the special facts and circumstances of this case and the fact that judicial review is a special jurisdiction.

To conclude it is also important to stress that because judicial review is a special jurisdiction regard must be had to ensuring that the needs of good public administration alluded to in my earlier ruling in Bivac 1, when granting leave cannot justifiably be disregarded by the courts when invoking the jurisdiction. On this ground as well I would – not grant stay – the challenged contract is for 3 years, and one year is about to expire. The targeted body is entitled to plan its affairs and to make any lawful decision concerning the same matter as early as possible and even the applicant need to know its fate as early as possible. The court process has a responsibility to ensure that its decision is given within a reasonable time. The applicant has also argued that since there is no prima facie breach of statutory duty or any public element in the matter before the Court this should have been determined summarily at the leave stage. However judicial review is developing first and extending itself beyond the traditional targeted areas and grounds. For example in the case of *R v PANEL ON TAKE OVER AND MERGERS ex parte DATAFIN 1987 QB 815* it was extended to a non statutory body ie. a self regulating body in the area of stock exchange and the House of Lords held that the court should not only look at the source of power (ie statute only) but also look at the nature of the power and whether the targeted body is performing a public function. Determination on whether or not there is a public law element, in depth analysis on the validity of the grounds for courts intervention, and justiciability are not always matters suitable for the threshold stage. Statutory under pinning is a matter of serious contest in some cases and this is one of them.

For the above reasons the application for stay is dismissed with costs.

DATED and delivered at Nairobi this 26<sup>th</sup> day of May 2006.

J.G. NYAMU

JUDGE