



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**MILIMANI LAW COURTS**

**Misc Civil Appli 1541 of 2005**

**IN THE MATTER OF TENDER NO KEBS/TO38/2005/2006 FOR PRE-SHIPMENT  
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 (BUREAU VERITAS) BID FOR  
THE SAID TENDER**

**AND**

**IN THE MATTER OF A CONTRACT BETWEEN KENYA BUREAU OF STANDARDS AND  
SOCIETE GENERALE DE SURVEILANCE SA 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 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 MATTE ROF AN APPLICATION BY BIVAC INTERNATIONAL SA (BUREAU  
VERITAS) FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI, PROHIBITION AND  
MANDAMUS**

**RULING**

By an application dated 25<sup>th</sup> October, 2005 filed on 26<sup>th</sup> October, 2005 the applicant seeks leave in respect of the following prayers:

- a) That leave be granted to the applicant to apply for an order of certiorari to remove into the

Honourable court and quash the contract between the Kenya Bureau of Standards and SGS for the provision of services for pre-shipment verification of conformity to standards dated 14<sup>th</sup> September, 2005.

- b) That lower court to grant to the applicant to apply for an order of certiorari to remove into that Honourable court and quash the contract between the Kenya Bureau of Standards and Intertec International Ltd for the provision of services of the shipment verification of conformity of standards dated 14<sup>th</sup> September, 2005.
- c) The leave be granted to the applicant to apply for an order of mandamus directed to the Kenya Bureau of Standards requiring the said Kenya Bureau of Standards to invite the applicant to negotiate and sign a contract for provision of services for Pre-shipment verification of conformity for Standards.
- d) That leave be granted to the applicant to apply for an order of prohibition prohibiting the respondent from entering into any contract for the provision of services for pre-shipment verification of conformity to standards otherwise than in strict conformity with the terms of the Tender.
- e) That the grant of leave to operate as a stay of the proceedings in question ie the implementation of the aforesaid contracts and of any operations there-under pending the hearing and determination of the Judicial review proceedings
- f) Thus the costs of and occasioned by this application be costs in the cause.

The applicant contends that unless an order of stay is granted the Judicial Review proceedings with respect to which leave is sought herein will be rendered nugatory to the irreparable loss of the applicant. The application is based on a statement dated 25<sup>th</sup> October, 2005 and filed on the same date, which statement is verified by an affidavit of one Jean Spinosi sworn on 25<sup>th</sup> October, 2005 and filed on the same date which has annexures measuring 6 inches.

The brief facts are that the matter arises out an invitation made by the respondent the Kenya Bureau of Standards (KBS) on 20<sup>th</sup> July 2005 for tenders to be submitted for selection of agents to offer pre-shipment verification of conformity. The applicant was invited together with six others to submit their tenders. The tender document granted a right to those who submitted proposals to information relating to evaluation of proposals and recommendations concerning awards once the successful tenderers was notified. It is contended for the applicant that the respondent refused to provide the information on the basis for the award of the tender and the applicant did move this court in HC Misc 1335 of 2005 by way of a chamber summons dated 12<sup>th</sup> September, 2005 which sought the following orders.

- A) That the applicant be granted leave to apply for Judicial review in the form of an Order of Mandamus compelling the Kenya Bureau of Standards to provide forthwith to the applicant full and detailed information of the evaluation of the all the relevant proposals for the Tender No KEBS/TO38/2005/2006 – Pre-shipment verification of conformity (PVoc) to Standards Services and the recommendations made concerning the awards.
- B) That the applicant be granted leave to apply for Judicial review in the form of an order of Prohibition prohibiting the Kenya Bureau of Standards from signing the terms of Clause 1.3 (as amended) of the aforesaid Tender any contract unless and until the said information has been provided to the applicant and if the applicant has been given such adequate and reasonable terms as the Honourable court may determine to consider the same and act on it, if necessary.
- C) That the grant of leave do operate as stay the proceedings in question ie the tendering process and the signing of any contract pending the hearing and determination of the judicial review proceedings
- D) That the costs of and occasioned by this application be costs in the cause.

The applicant did on 12<sup>th</sup> September, 2005 obtain leave to institute judicial review proceedings for an

order of mandamus to compel the respondent to provide the requested information and for an order of prohibition to restrain the signing of the contract. The applicant was also granted an order that such leave do operate as stay of proceedings in question. The order was served on 14<sup>th</sup> September, 2005 at 10.20 am.

The applicant received a letter from the respondent on 19<sup>th</sup> September 2005 stating that any issue raised will be handled in accordance with the Exchequer and Audit (Public Procurement) Regulations 2001 and on 21<sup>st</sup> September, 2005 the applicant counsel responded to the letter pointing out that he said regulations did not apply to the tender.

On 15<sup>th</sup> September, 2005 an application for judicial review I HC 1335/2005 was filed and served on the respondent and the second interested party Intertech International "ITS" is on the same day but served on SGS on 16<sup>th</sup> September, 2005.

On 26<sup>th</sup> September, 2005 ITS in an affidavit filed in support of an application to set aside the ex-parte order for leave disclosed that the contract was signed on 14<sup>th</sup> September, 2005 "well after" the order had been served on the respondent.

On 27<sup>th</sup> September, 2005 the applicants counsel received a summary (summarized Tender Evaluation Information).

On 29<sup>th</sup> September, 2005 the applicant counsel wrote to the respondent to reiterate that the Procurement Regulations did not apply to the Tender.

On 26<sup>th</sup> September, 2005 he applied to have the ex-parte order for leave set aside.

On 4<sup>th</sup> October, 2005 SGS made an application set aside the ex-parte order and the applicant filed a replying affidavit on 13<sup>th</sup> October, 2005.

All the proceedings in respect of the above application are still pending.

According to the minutes of the Tender Evaluation committee the highest bidder on both the technical and financial score was the applicant and ITS in that order and that ITS had failed to satisfy the bid bond requirement. ITS is one of the two successful bidders the other one being SGS.

According to the applicant the tender document prescribed a schedule of activities as follows:-

- i. Release of Tender 25.7.2005**
- ii. Deadline answering questions 8.8.2005**
- iii. Deadline of submitting proposals 15.8.2005**
- iv. Contract awarding 22.8.2005**
- v. Signing contract 22.9.2005**
- vi. Start of operations 29.9.2005**

On the other hand according to Eva Adegga Oduor the General Manager, Standards Development Division and the Chairperson of the tenders Tribunal Evaluation Committee of Kenya Bureau of Standards the Tender Schedule 1.3 in the Tender provides as follows

- i. Release Tender 25.7.2005**

- ii. **Deadline of Answering questions 1.8.2005**
- iii. **Deadline of submitting proposals 8.8.2005**
- iv. **Contract Awarding 15.8.2005**
- v. **Signing of contract 15.9.2005**
- vi. **Start of operations 22.9.2005**

She further depones that the Procurement Regulations apply hence the variation between the two sets of activities.

The respondent has filed a replying affidavit sworn by Eva Oduor on 3<sup>rd</sup> November, 2005 and it also filed written submissions and a list of authorities. The Interested parties have also filed written submissions and a written reply.

It is important to mention that when the application came before me for hearing under a certificate of urgency on 26<sup>th</sup> October, 2005 I ordered that the application be served on the respondent for hearing inter-partes on 1<sup>st</sup> November, 2005 when the Interested parties (the IPS) also appeared through their representative advocates and sought audience .

Their presence was of course a surprise both to the court and to the applicants and the court did subsequently direct in a ruling that the Interested parties could not be shut out in view of the fact that there appeared to be the affected parties because of the very nature of the subject matter.

In this matter although written submissions have been filed and many authorities cited to the court by all the parties the court has opted not to refer to them in this ruling because notwithstanding the fact that the IPS were allowed to explain their respective interests the fact of the matter remains that the application is ordinarily ex-parte and such an application does restrict the court to threshold issues, namely whether the applicant has an arguable case and whether if leave is granted the same should operate as a stay. The other reason why the court should avoid making findings beyond the threshold issues as outlined above is that in the related matter HC Misc 1335 of 2005 between the applicant and the respondent there are several pending applications where the same issues as are raised herein feature very prominently and the applications have not been determined.

However in view of the complex nature of the case and the fact that the matter was heard inter-parties and the IPS allowed to explain their interests, even with the above warnings the court is aware that as judicial review remedies are at the end of the day discretionary see this court's judgment in ***R v Judicial Service Commission of Kenya*** Ex-parte Stephen Pareno HC Misc 1025 of 2003 (Authority No 6 in the respondent's bundle), that discretion is a judicial discretion and for this reason a court has to explain how the discretion if any was exercised so that all the parties are aware of the factors which led to the exercise of the court's discretion. For this reason I intend to outline the factors the court took into account without delving into the details. The other reason for outlining the factors is that in the event of an appeal the appellate court should be able to ascertain how and why the court's discretion was exercised in the way or manner it was exercised.

On the issue of leave the court finds arguable issues on a prima facie basis as follows:-

- 1) Whether judicial review remedies lie in respect of the application and if so what are the remedies
- 2) Whether the prayers sought in both applications lie in judicial review or whether they are strictly enforceable as private rights by way of discovery injunction, declarations and damages
- 3) Whether promptness or laches should affect the relief claimed

- 4) The bona fides of bringing this second judicial review application which prima facie appear not to attack any decision but the contracts already signed and the implementation and whether judicial review remedies can attack signed contracts and their implementation.
- 5) Whether the source of the power challenged is statute ie The Standards Act or the Exchequer and Audit Act and the regulations or whether the power springs from the contract (or tender)
- 6) Whether or not there is a contract at all between the applicant and the respondent
- 7) The impact of the IPS signed contracts
- 8) The impact of any court intervention to other parties including the impact of any such intervention on the country and the economy
- 9) The effect in law on the entire application dated 25<sup>th</sup> October, 2005 on the principles
  - a) Certiorari quashes an unlawful decision
  - b) Prohibition prevents a proposed unlawful act in the future
  - c) Mandamus compels the enforcement of a public duty by a public authority
- 10) Whether or not the court is entitled at this stage to consider the nature of the actual relief claimed and whether it falls outside judicial review re... eg whether is contractual, or discovery and mandatory and other injunctions
- 11) Whether the principles of good administration apply in this case in view of the nature of the contracts and the wide spectrum of involvement and effect on other parties including the country as a whole
- 12) Whether the court should take into account the alleged non obedience of the ex-parte order in HC 1335 of 2005 and whether the these second proceedings are an abuse of the court procedure.
- 13) Whether the applicant has a right to legitimate expectation to a contract in the circumstances
- 14) Whether the respondent bound itself to accepting the lowest or any bid at all
- 15) Whether there is a principle of public law on which to compel the respondent to offer the contract to the applicant or any other tenderer
- 16) Whether the remedies of specific performance, discovery, injunctions are available in judicial review in Kenya
- 17) Whether what is sought to be enforced are private rights against a public body.

In the estimation of the court the above are all arguable issues and although the court is aware of the test formulated by the Court of Appeal in *WANJUGUNA v MINISTRY OF AGRICULTURE* – that there should be an arguable case which without delving into details could, succeed, this particular case raises issues which could tilt the tables either way when fully ventilated but it might be in the interest of justice to have them heard on merit instead of so to speak tossing a coin.

As regards the prayers for leave the above outline of possible arguable issues tilts the balance in favour of granting leave. In my view an arguable case is not ascertained by the court by tossing a coin or waving a magic wand or raising a green flag, the ascertainment of an arguable case is an intellectual exercise in this fast growing area of law. One has to consider without making any findings the scope of the judicial review remedy sought the grounds and the possible principles of administrative law involved and not forget the ever expanding frontiers of judicial review and perhaps give an applicant his day in

court instead of denying him. Like the Biblical mustard seed which a man took and sowed in his field and which is the smallest of all seeds but when it grew it became the biggest shrub of all and became a tree so that birds of the air came and sheltered in its branches, judicial review stemmed from the doctrine of ultra vires ad rules of natural justice and it has grown to become a legal tree with branches in illegality, irrationality impropriety of procedure (the three “1s”) and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. One can safely state that the growth of judicial review can only be compared to the never ending categories of negligence after the celebrated cause of *DONOGHUE v STEPHENSON* in the last century. Of course I am not advocating the grating of leave as a matter of routine, without reflecting on the principles of judicial review and its unique jurisdiction – but where in doubt one should consider the wise words of MEGARRY J in the case of *John v Rees [1970] Ch 345 at page 402*.

**“It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. “When something is obvious, ‘they say, ‘ why force everybody to go through the tiresome waste of time involving in framing charges and giving an opportunity to be heard? The result is obvious from the start.’ Those who take this view do not, I think do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with open and shut cases which, somehow, were not, of unanswerable charges which, in the event were completely answered; of inexplicable conduct which was fully explained: of fixed and unalterable determinations that, by discussion suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events.”**

This is why the litany of arguable issues as listed above should be given a day in court without any final pronouncements at this stage. With the above in view I do grant leave in terms of prayers (a)(b)(c) and (d) in the application dated 25<sup>th</sup> October, 2005.

However as regards prayer (e) on stay the same is refused after taking into account the following factors.

- a) Prima facie no decision has been attacked and the contracts has already been signed and the implementation or roll out of services has already commenced
- b) Although it is arguable whether the Regulations under the Exchequer Act apply – the applicant appears to have had an opportunity to attack the decision to award the contract under the Regulations and did not avail itself of the opportunity and instead through its advocates insisted that the Regulations did not apply. There is a machinery of challenge under the Regulations and it is possible interim relief by way of stay would have been obtained in good ...
- c) The orders sought in respect of the first application and which took up quite a bit of time even assuming that the procurement regulation did not apply were not directed at the decision to award the contract at all. They sought information and prohibition whereas judicial review in generally aimed at decisions and the decision making process. The prima facie view of the court is that challenges could have been merited under both regimes – even on the assumption that the Procurement Regulations do not apply. Prima facie there was an opportunity to obtain stay based on an application seeking leave to apply for orders of certiorari and prohibition. This was not doe in respect of the first application.
- d) Although the challenged contracts were signed on 14<sup>th</sup> September, 2005 this application was not filed until 26<sup>th</sup> October, 2005 and the delay has not been satisfactorily explained. The reason that information concerning the award was not immediately availed should have put the applicant on its guards and a challenge should have been launched on immediately after the notification of award or immediately after signing of the contracts.
- e) The principles of good administration are in the view of this court a factor in the exercise of this court’s discretionary. There is absolute need for finality for example to enable the roll out. Other parties

are involved including the wider interest of the nation to have continuous services in this critical area without interruption. Promptness is therefore a key factor in the exercise of the courts discretion. The offer of an undertaking as to damages is not a major factor in favour of grant of stay because of the nature of the contracts and their impact on interested parties including the country.

In the exercise of my discretion on whether or not to grant stay this is the second case where I have taken into account the needs of good administration as outlined by Sir JOHN DONALDSON MR in the case of *R v MONOPOLIES AND MERGERS COMMISSION*, ex parte ARGYLL GROUP PLC 1986 I WLR 763 Court of Appeal, as follows:

**“We are sitting as a public law court concerned to review an administrative decision, albeit one which has to be reached by the application of judicial or quasi judicial principles. We have to approach our duties with a proper awareness of needs of public administration. I cannot catalogue them all, in the present context, would draw attention to a few which are relevant.”**

1. Good administration is concerned with speed of decision particularly in the financial field. ...

If the court were to intervene it will take a while before a fresh decision and contract is finalized on a matter touching the lifeline of this country's economy and security as well

2. Good public administration requires a proper consideration of the public interest ...

In case this factor does merge with 1 above

3. Good public administration requires a proper consideration of legitimate interests.

In this case the legitimate interest of the applicant to the contract must be weighed with the legitimate interests of the country and those of the IPS

4. Lastly good public administration requires decisiveness and finality unless there are compelling reasons to the contrary ...

In the case at hand the user of the services which are the subject-matter of the suit have already been informed following the signing of the contracts, after the expiry of the roll out period and they are therefore entitled to organize with certainty their commercial transactions and their relationships with their customers and affected countries for the period in question 2005-2006.

It is in the light of all the above considerations and the issue of promptness in seeking relief that I decline to order that the leave granted should operate as stay.

Taking the above factors on a strictly prima facie basis this courts discretion is exercised against the grant of leave to operate a stay and prayer (e) is refused. I order that costs abide the outcome of the application for Judicial review.

DATED and delivered at Nairobi this 29<sup>th</sup> day of November, 2005.

J G NYAMU

**JUDGE**