Editorial Note

Judicial Review

- **Exparte order for leave – the only conditions**

  to be attached must be on costs and provision of security and nothing more

- **In procurement contracts it is enough to**

  attach a certified "decision" of under attack and a verifying affidavit

- **Principle of "Proportionality" in the EU**

  jurisprudence considered – whether the means justify the ends.

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
MISC CIVIL APPLICATION NO 617 OF 2004
IN THE MATTER OF AN APPLICATION BY PEGRUME LIMITED FOR AN ORDER OF CERTIORARI
AND
IN THE MATTER OF THE PUBLIC PROCUREMENT COMPLAINTS REVIEW AND APPEALS BOARD, APPLICATION NO 13 OF 26TH MARCH 2004
AND
IN THE MATTER OF THE EXCHEQUER AND AUDIT (PUBLIC PROCUREMENT) REGULATIONS, 2001

REPUBLIC ..... APPLICANT

VERSUS

THE PUBLIC PROCUREMENT COMPLAINTS

REVIEW AND APPEALS BOARD ..... RESPONDENT

RULING

When the application dated 24th May 2004 seeking the judicial order of certiorari to remove to the court and quash the decision of the Public Procurement Complaints, Review and Appeals Board in application No 15 of 26th March 2004 delivered on 22nd April 2004 came up for hearing before me on 13th July 2004 the learned counsel for the 3rd respondent Mr Rach did raise four preliminary objections a

per his written objections dated 18th June 2004 and filed on the same day.

> 1. The first objection is that the applicant according to the heading of the application was Pegrume Ltd and not the Republic but he abandoned this following the observations of the court which drew his attention to the cases of MOHAMED AHAMED v R (1957) EA 523 and FARMERS BUS v TRANSPORT LICENSING APPEAL BOARD – (1959) EA 779 to the effect that the format used was substantially in compliance with the formats recommended in the two cases.
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> 2. That the order for leave gave the applicants 21 days to make the application and have it heard within the same period and that the application had not been heard and time had not been extended or the order varied.

It is important to observe that the application was filed within 21 days and not heard within 21 days. After filing the application, it allocated a hearing date for 7th June 2004 which was well within 21 days and all parties had been served before being and that the application was ready for hearing on 7th June 2004. On this day despite the service it is only the 1st respondents counsel Mr Sitima who appeared only to make a spirited application for adjournment before my brother Acting Judge Lenaola. The application for a adjournment was opposed by the applicant but the Judge allowed the adjournment to 14th June 2004. On this day although the applicant was prepared to go on both the advocates for the first respondent and the objector's counsel applied for adjournment before my learned sister Judge Mugo who adjourned the matter to 15th June 2004 before the Duty Judge. On this day the counsel for the objector indicated to the court that he would not be available until 10th July 2004. The Duty Judge imposed a date of 21st July 2004 because of the urgency of the matter.

On this day the objector's Counsel sent another advocate to hold his brief before the Duty Judge when an order was made that the matter be heard on 7th July 2004. On this day the matter came before me when the objectors advocate submitted that there was an interested party who was not present and that he had some preliminary points to raise. As a result he indicated that he would be applying for an adjournment should the court be inclined to proceed notwithstanding the absence of one of the interested parties.

On this day I asked the applicants counsel to look into certain procedural steps which in the view of the court had not been done and I stood over the matter to 13th June 2004. I reject the objections for the following reasons:-

> **1. In retrospect (we learn all the time) I gave the exparte order for leave and because I did decline the second prayer for leave to operate as stay I did intend that the hearing of the matter would be given priority this being a commercial matter involving Government procurement procedures. The equipment involved had something to do with security arrangements as well hence the urgency and the refusal to grant a stay.**

It is now clear to me that O 53 Rule 1(2) does not give court powers to impose conditions on leave except as regards costs and the giving of security.

The rule is silent on the time for hearing except that under O 53 rule 3(1) it is mandatory for the main application to be made within 21 days and served within 8 days before the hearing.

The courts discretion to shorten the 8 days has been granted.

It follows therefore that my order in so far as it purports to direct for a hearing other than as provided above is ultra vires the rule and therefore void to that extent and for the additional reason that the Rules reproduced in Order 53 is almost a replica of the statutory provisions of section 9 of the Law Reform Act.

The objection does challenge the validity of the exparte order and I hold that once an exparte order has been granted it cannot in my view be withdrawn because the signal the court gives to the applicant in

granting an order for leave is that the applicant has a chance of success in the main application see Wanjuguna v Ministry of Agriculture. In the case of CCSU v The Minister for Civil Service HL 1984 Lord Diplock had the vision of judicial review growing or developing on a case by case basis and in the ALCONBURY case Lord Slynn of Hadley has ruled that the new area where judicial review intervention would be available is the additional ground based on the principle of "proportionality" which is now recognised in the European Union jurisprudence as a ground for courts intervention by way of judicial review. Proportionality is concerned with balance and whether "the means justify the ends."

The Committee of Minister of the Council of Europe set up in 1980 described the principle of proportionality as follows:-

> **"An appropriate balance must be maintained between the adverse effects which an administrative authority's decision may have on the right, liberties or interest of the person concerned and the purpose which the authority is seeking to pursue."**

I can foresee considerable application of the principle to diverse situations in our country in future. While our facts are not on all four's with the principle as such, having granted leave, its object was to enable the applicant to be heard on merit in the main application for judicial review. The objectionable or challenged condition can clearly be severed from the grant of leave in order to attain the objective of leave. The balance of convenience in our local terms tilts in favour of the process continuing. It would be travesty of justice to purport to undo the granted leave. This cannot be done in the circumstances.

> **2. The second reason for rejection of this ground of objection is that the application was duly set down for hearing within the stipulated time and on each occasion an order varying the time for hearing was in my opinion granted and very often with the consent of the objector's counsel or on his request for adjournment. The objector's counsel has appeared severally after the expiry of time and never took any objection. He is therefore deemed to have waived the right to object which he should have done at the next appearance after the expiry. It is trite law that matters touching on jurisdiction should be raised at the earliest opportunity before any steps are taken in a matter.**

On the third ground that the verifying affidavit of Azhar Chaudry seeks reliefs different from the motion I cannot see the relevance of this since the only documents which are required to tally are the Statement in so far as relief is concerned and the Notice of Motion

. In the statement apart from reliefs B 1 and B2 relief 3 does in fact pray for a quashing order which in our terms in Kenya is an order for certiorari. Prayer 1 of the Notice of Motion does seek the order of certiorari. This tally complies with O 53 rule 4(1).

The grounds and relief sought in the application are substantially the same because reliefs B1 and B2 had already been dealt with at leave stage.

The inclusion of B1 and B2 cannot be fatal to the court entertaining the relief on certiorari which appears both in the Statement and the Motion. In addition the verifying affidavit sworn by Azhar Chaudry on 20th May 2004 verifying the Statement has factual value and therefore evidential value notwithstanding that the Statement does contain some factual matters which should be in the affidavit. The Statement does in the opinion of the court substantially comply with the requirements of O 53 rule 2 in that the name and description of the applicant is set out, the relief sought and the grounds have been disclosed. Inclusion of some facts does not in my opinion invalidate the Statement which is clearly supported by a factual affidavit. The case of STEPHENO OWAKI t/a Mirenga Filling Station CA 45/2000 KSM unreported is authority for the point that the facts set out in a Statement have no evidential value unless there is a factual affidavit verifying the statement.

I therefore decline to allow the objection for the above reasons.

Ground four has already been dealt with above and one part abandoned by the objector.

Ground 5 states that applicant has failed to lodge a copy of any order before the hearing of the Notice of Motion verified by an affidavit and failed to account for his failure to do so.

Under O 53 rule 7 I find no requirement requiring a decision of a quasi tribunal to be certified and verified with an affidavit. What is required to be verified is any order, warrant, commitment, conviction, inquisition or record. The term “order” is defined in S 2 of the Civil Procedure Act (which does not apply to judicial review) as the formal expression of any decision of a court which is not a decree and includes a rule nisi. Court is defined as the High Court or a subordinate court acting in exercise of its civil jurisdiction. In the Interpretation and General Provisions Act neither the term order nor record have been defined. The Procurement Complaints, Revenue and Appeal Boards proceedings though amenable to judicial review are not strictly courts proceedings. It is therefore sufficient to attach a certified decision and the applicant has done this vide the affidavit of 12th July 2004 sworn by A Chaudry. The substantive application for judicial review has not yet been heard. There is no time limit provided the affidavit attaching the decision or order challenged is filed before the hearing. I

therefore find that the applicant has substantially complied with O 53 rule 7.

The upshot is that as all the objections are dismissed. I order that the costs abide the outcome of the main application. It is so ordered.

DATED and delivered at Nairobi this 16th day of July 2004.

J G NYAMU

JUDGE