REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 453 OF 2018

REPUBLIC.....APPLICANT

-VERSUS-

NAIROBI CITY WATER & SEWERAGE COMPANY.....RESPONDENT

AND

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD.....INTERESTED PARTY

ex parte: WEBTRIBE LIMITED T/A JAMBOPAY LTD

RULING

Before court is the respondent's notice of motion dated 4 June 2020 seeking orders which have been prayed for in the following terms:

"

1. ***That this application be certified urgent, service thereof be dispensed with and the same be heard ex parte in the first instance.***

2. ***That this Honourable Court do suspend, vary and or set aside the ex parte orders granted in the judgment delivered on 14 May 2020 compelling the respondent to proceed and complete the procurement process in respect of Tender No. NCWSC/41/2017-Implementation of Agency payment integration Platform and Digital Banking Channelsare-(Mobile, Agency Banking) for NCWSC (Re-advertisement) as ordered in Request for Review No. 150 of 2018: Webtribe Limited t/a Jambopay Limited v Nairobi City Water & Sewerage Company Limited.***

3. ***That this honourable court be pleased to grant the leave to the respondent to file its response to the substantive motion filed in the suit herein within a period of 14 days.***

4. ***That the costs of this application be in the cause."***

The application is made under order 10 Rule 11 and Order 12 Rule 7 of the Civil Procedure Rules 2010, Section 3A and 100 of the Civil Procedure Act and all enabling provisions of the Law.

No doubt, the first prayer is spent and all that the court is concerned with at the moment is the rest of four prayers.

Benedict Kiema, the respondent's supply chain manager swore the affidavit in support of the motion and in it he deposed that the applicant's suit was filed after respondent's suit being JR No. 437 of 2018 had been filed; the directions in the respondent's suit were issued on 27 February 2018 to the effect that the hearing of the applicant's suit was to await the outcome of the respondent's suit.

After judgment in the respondent's suit was delivered on 8 August 2019, the present suit came up for directions on 10 March 2020; on that date the court directed the respondent to file its response within fourteen days after which the court was to deliver its judgment on 30 June 2020.

On 13 March 2020, the first COVID case was reported in the country and on 15 March 2020, the Hon. Chief Justice directed that the courts be closed. Following this closure, no clear guidelines were given on filing of documents in the Judicial Review Division until 23 April 2020 when operating procedures during the COVID pandemic were published.

Mr Kiama admitted that failure to file the respondent's response immediately the guidelines were published is a mistake that the respondent's advocates should take responsibility of and should not be visited on the respondent.

The respondent, according to Kiama, only learnt of the judgment when it was sent to its counsel by the applicant's advocates. That judgment was to be delivered on 30 June 2020 but was delivered a month and a half earlier without notice to or knowledge of the respondent.

Danson Muchemi, the managing director of the applicant swore an affidavit in response to the respondent's affidavit. He deposed that on 10 March 2020, the court gave the respondent the last chance to file its response and submissions and it is on the same date that the court reserved a judgment date of 30 June 2020. He admitted however, that the judgment was delivered on 14 May 2020, which date was obviously earlier than the scheduled date.

However, despite the outbreak of the COVID pandemic, Muchemi deposed that this court's email address was always available for parties to file documents electronically. Again, there is no plausible reason why the respondent wrote to the court seeking directions on filing of its response and submissions even after standard operating procedures were published.

Like the respondent, the applicant was also not aware that the judgment was delivered on 14 May 2020 until it was sent by the court to its advocates. It is after the advocates received the judgment that they dutifully transmitted it to the respondent's counsel.

All I gather from the circumstances giving rise to what effectively was an ex parte judgment is a combination of lethargy on the part of the respondent's advocates and the outbreak of the covid pandemic. Reading the judgment delivered by this honourable court on 14 May 2020, it would appear that even before the pandemic struck, the respondent had been previously prodded to file its response and submissions. The court's efforts to this end seem not to have borne much fruit and so in the absence of any sort of response and, of course, submissions from the respondent, the court proceeded to make its determination on the basis of the pleadings and evidence filed by the applicant.

But the disruptions of court operations as a result of by the covid pandemic cannot be ignored; they constitute what one may describe as unforeseen circumstances that undoubtedly tampered with the ability of parties to suits to comply with timelines to take specific actions. And while it is appreciated that the judiciary administration moved fast to put in place measures to mitigate the unwarranted consequences of the pandemic disruptions, it took time for parties to get used to such measures and they have, in any event, not proved to be foolproof. This, however, is not to say that they will not improve with time.

My understanding of the respondent's case is that it was caught up in these circumstances and its failure to comply with the directions of the court and file its pleadings or affidavit within the prescribed timelines was partly due to these circumstances.

Its case seems to have been complicated even further when the judgment was delivered much earlier than the scheduled date; not that it mattered much but it is probable that since the respondent had the liberty to file its response and submissions even after the case had been reserved for judgment, albeit within a specific timeline, it would have filed these documents any time before the date of the judgment date and perhaps found itself in a less worse position.

In these circumstances, I would be prepared to give the respondent the benefit of the doubt that had it not been for the outbreak of the pandemic and the consequent events, perhaps it would have performed much better.

So much for the facts.

As far as the law is concerned, I am minded that judicial review proceedings are special and are, by and large, subject to no other procedural rules than those prescribed in order 53 of the Civil Procedure Rules and, of course, any of the provisions in the Law Reform Act relating to procedure. It follows that, if, for one reason or the other, one is dissatisfied with an order or a decree of the Court in judicial review proceedings, he cannot proceed against such an order or decree in a manner contemplated under the Civil Procedure Rules. In the event of such dissatisfaction, the only recourse would appear to be to lodge an appeal against the order or decree; this is what I gather from section 8(5) of the Law Reform Act; it says as follows:

> ***8. (5) Any person aggrieved by an order made in the exercise of the civil jurisdiction of the High Court under this section may appeal therefrom to the Court of Appeal.***

I understand this section to say that the only option available to party aggrieved by an order in an application for a Judicial Review order is to appeal against the order, if he is inclined to.

But I am also aware that the Court of Appeal has held in **Nakumatt Holdings Ltd versus Commissioner of Value Added Tax (2011) eKLR,** that as much as a judicial review order is not subject to the review proceedings under Order 45 of the Civil Procedure Rules, the court has residual jurisdiction in exercise of its inherent power to correct its own mistakes particularly where such mistakes are so glaring that they cannot be ignored.

By necessary implication, where a suit is heard and determined without the participation of the respondent, or any of the parties for that matter, nothing should stop the court from exercising its inherent power and set aside its order or decree and give both parties opportunity to be heard, if sufficient cause is shown for the party's absence or inaction. I note that among the several provisions of the law that the respondent has cited in its motion, Section 3A of the Civil Procedure Act, cap. 21 which is the foundation of the inherent jurisdiction of this court has also been invoked. I am persuaded to exercise this power in favour of the applicant.

Accordingly, the respondent's motion dated 4 June 2020 is allowed; the judgment delivered by this Honourable Court on 14 May 2020 is set aside. The respondent is hereby granted leave to file and serve its response to the applicant's motion dated 20 November 2018 within

fourteen days of the date of this ruling. Costs will abide the outcome of the applicant's motion.

For purposes of expeditious disposal of this matter, I direct that the substantive motion shall be disposed of by way of written submissions and, to this end, I further direct as follows:

1. The applicant shall file and serve its submissions within fourteen days of the date of service of the respondent's response.

2. The respondent shall file and service its submissions within fourteen days of the date of service of the applicant's submissions.

3. The motion shall be mentioned on 16 March 2021 when this honourable court will reserve the judgment or, if need be, when other directions or orders as may necessary for disposal of this matter will be made.

Orders accordingly.

Signed, dated and delivered this 9th day of February 2021

Ngaah Jairus

JUDGE