



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW APPLICATION NO. E012 OF 2021**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE**

**JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI AND DECLARATION**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**PUBLIC PROCUREMENT ADMINISTRATIVE**

**REVIEW BOARD.....1<sup>ST</sup> RESPONDENT**

**ACCOUNTING OFFICER KENYA NATIONAL**

**HIGHWAYS AUTHORITY.....2<sup>ND</sup> RESPONDENT**

**EX PARTE:**

**KIU CONSTRUCTION LIMITED**

**RULING**

**The Application**

1. Kiu Construction Limited, the *ex parte* Applicant herein, is aggrieved by the decision made on 18<sup>th</sup> January 2021 by the Public Procurement Administrative Review Board (the 1<sup>st</sup> Respondent herein) in PPARB Application No. 160 of 2020.
2. The *ex parte* Applicant has consequently filed an application by way of a Chamber Summons dated 18<sup>th</sup> January 2021, seeking the following orders:

1. **The application be certified as urgent and service be dispensed with in the first instance;**
2. **Leave be granted to commence judicial review proceedings for an Order of Certiorari to quash only those parts of the findings of the 1st Respondent's decision dated 18th January, 2021, in PPARB Application No. 160 of 2020 Kiu Construction Limited versus The Accounting Officer Kenya National Highways Authority (KeNHA) to the effect that "the Bid security dated 14th October, 2020 issued by Credit Bank PLC fails to satisfy the conditions stipulated under Clause 1.3 Eligibility Requirements of Section 4. Qualification Criteria read together with Schedule 3 of Section 10 Standard Forms of Tender Document".**
3. **Leave be granted to commence judicial review proceedings for an Order that consequent upon and to facilitate the implementation of Order No. 3 of the 1st Respondents decision dated 18th January, 2021, there be a declaration that the 2nd Respondent is entitled to recall, accept, and/or readmit the tender security for the lowest evaluated bidder in respect to Tender No. KENHA/R4/244/2020 for performance based contract for the maintenance of Subukia-Nyahururu (B21) Road if the same has been released.**
4. **Leave granted do operate as a stay of the enforcement and implementation of Order Number 3, and Order Number 4 of**

**the 1st Respondent's decision dated 18th January, 2021 in respect to PPARB Application No. 160 of 2020 Kiu Construction Limited versus The Accounting Officer Kenya National Highways Authority (KeNHA).**

**5. The costs of this Application be provided for.**

3. The grounds for the application are stated in the *ex parte* Applicant's statutory statement dated 27<sup>th</sup> January 2021, and a verifying affidavit sworn on the same date by Kariuki Theuri, the *ex parte* Applicant's Director. In summary, the *ex parte* Applicant averred that its application before the 1<sup>st</sup> Respondent succeeded in overturning the reasons that had been cited by the 2<sup>nd</sup> Respondent for disqualifying its bid in its regret letter. However, that the 1st Respondent proceeded to make a determination on the bid security of the Applicant, which reason was not in the said regret letter, but was raised as an afterthought by the 2<sup>nd</sup> Respondent in its response to the request for review.

4. Further, that in the decision dated 18th January 2021, the 1st Respondent held that the *ex parte* Applicant's Bid Security in the Tender Document did not satisfy the requirements stipulated under the Tender Document, and that the said decision was unlawful for various reasons it enumerated.

5. The *ex parte* Applicant annexed a copy of the impugned decision made by the 1<sup>st</sup> Respondent on 18th January 2021 in PPARB Application No. 160 of 2020.

**The Determination**

6. I have considered the application dated 18<sup>th</sup> January 2021 and the reasons offered in support of the urgency, and I am satisfied that the *ex parte* Applicant has demonstrated that this matter is urgent. This for reasons that there are certain actions required to be undertaken with respect to the subject tender arising from the 1<sup>st</sup> Respondent's impugned decision.

7. On the orders sought by the *ex parte* Applicant for leave to commence judicial review proceedings, the applicable law is *Order 53 Rule 1* of the Civil Procedure Rules, which provides that no application for judicial review orders should be made unless leave of the court was sought and granted. The main reason for the leave as explained by Waki J. (as he then was), in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996**, is to ensure that an applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration.

8. It is also trite that in an application for leave such as the present one, the Court ought not to delve deeply into the arguments of the parties, but should make cursory perusal of the evidence before it and make the decision as to whether an applicant's case is sufficiently meritorious to justify leave. It was explained by Lord Bingham in this respect in **Sharma vs Brown Antoine (2007) 1 WLR 780**, that a ground of challenge is arguable if its capable of being the subject of sensible argument in court, in the sense of having a realistic prospect of success.

9. In the present application, the *ex parte* Applicant has provided evidence of the ruling by the 1<sup>st</sup> Respondent on in PPARB Application No. 160 of 2020, and has averred as to the grounds and reasons why it considers the Respondent's decision to be illegal. To this extent I find that the *ex parte* Applicant has met the threshold of an arguable case, and is therefore entitled to the leave sought to commence judicial review proceedings against the Respondent.

10. On the question of whether the said leave can operate as a stay of the impugned report, the applicable principle is that the grant of such leave is discretionary, but the Court should exercise such discretion judiciously. Order 53 Rule 1(4) of the Civil Procedure Rules provides as follows in this respect:

**“The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise.”**

11. In **R (H). vs Ashworth Special Hospital Authority (2003) 1 WLR 127**, it was held that such a stay halts or suspends proceedings that are challenged by a claim for judicial review, and the purpose of a stay is to preserve the *status quo* pending the final determination of the claim for judicial review. The circumstances under which a Court may grant a direction that the grant of leave do operate as a stay of proceedings or of a decision, and the factors to be taken into account by the Courts in this regard were laid down in the said decision, and in various decisions by Kenyan Courts.

12. The main factor is whether or not the decision or action sought to be stayed has been fully implemented. It was thus held in **Jared Benson Kangwana vs. Attorney General, Nairobi HCCC No. 446 of 1995** that stay of proceedings should be granted where the situation may result in a decision which ought not to have been made being concluded. A similar decision was made by Maraga J. (as he then was) in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006** .

13. This factor was also discussed in **R (H). vs Ashworth Special Hospital Authority (supra)** where Dyson L.J. held as follows:

**“As I have said, the essential effect of a stay of proceedings is to suspend them. What this means in practice will depend on the context and the stage that has been reached in the proceedings. If the inferior court or administrative body has not yet made a final decision, then the effect of the stay will be to prevent the taking of the steps that are required for the decision to be made. If a final decision has been made, but it has not been implemented, then the effect of the stay will be to prevent its implementation. In each of these situations, so long as the stay remains in force, no further steps can be taken in the proceedings, and any decision taken will cease to have effect: it is suspended for the time being.”**

14. It therefore follows that were the action or decision is yet to be implemented, a stay order can normally be granted in such circumstances. Where the action or decision is implemented, then the Court needs to consider the completeness or continuing nature of such implementation. If it is a continuing nature, then it is still possible to suspend the implementation.

15. In this regard, the orders given by the 1<sup>st</sup> Respondent in the impugned decision require certain actions to be taken by the 2<sup>nd</sup> Respondent as a result, and the said orders are therefore not only amenable to stay, but the *ex parte* Applicant's application would also be rendered nugatory if they are not stayed. In the premises the stay orders are merited to this extent.

### **The Disposition**

16. In light of the foregoing observations and findings, the *ex parte* Applicants' Chamber Summons dated 18<sup>th</sup> January 2021 is found to be merited to the extent of the following orders:

**I. The *ex parte* Applicants' Chamber Summons application dated 18<sup>th</sup> January 2021 is hereby certified as urgent, and is hereby admitted for hearing *ex parte*.**

**II. The *ex parte* Applicant is granted leave to apply for an order of Certiorari to quash only those parts of the findings of the 1st Respondent's decision dated 18th January, 2021, in PPARB Application No. 160 of 2020 Kiu Construction Limited versus The Accounting Officer Kenya National Highways Authority (KeNHA) to the effect that "the Bid security dated 14th October, 2020 issued by Credit Bank PLC fails to satisfy the conditions stipulated under Clause 1.3 Eligibility Requirements of Section 4. Qualification Criteria read together with Schedule 3 of Section 10 Standard Forms of Tender Document".**

**III. The *ex parte* Applicant is granted leave to apply for an order that consequent upon and to facilitate the implementation of Order No. 3 of the 1st Respondents decision dated 18th January, 2021, there be a declaration that the 2nd Respondent is entitled to recall, accept, and/or readmit the tender security for the lowest evaluated bidder in respect to Tender No. KENHA/R4/244/2020 for performance based contract for the maintenance of Subukia-Nyahururu (B21) Road if the same has been released.**

**IV. The grant of leave herein shall operate as a stay of the enforcement and implementation of Order Number 3, and Order Number 4 of the 1st Respondent's decision dated 18th January, 2021 in respect to PPARB Application No. 160 of 2020 Kiu Construction Limited versus The Accounting Officer Kenya National Highways Authority (KeNHA).**

**V. The costs of the *ex parte* Applicants' Chamber Summons application dated 18<sup>th</sup> January 2021 shall be in the cause.**

**VI. The *ex parte* Applicant shall file and serve the Respondents and Interested Party with (i) the substantive Notice of Motion and submissions thereon, (ii) the Chamber Summons dated 18<sup>th</sup> January 2021 and its supporting documents, (iii) a copy of this ruling, and (v) a hearing notice, within twenty-one (21) days from today's date.**

**VII. Upon being served with the said pleadings and documents, the Respondents shall be required to file their responses to the substantive Notice of Motion and reply submissions within twenty-one (21) days from the date of service.**

**VIII. The hearing of the substantive Notice of Motion shall be held on 20<sup>th</sup> April 2021.**

**IX. In view of the Ministry of Health directives on the safeguards to be observed to stem the spread of the current COVID-19 pandemic, this Court shall hear and determine the *ex parte* Applicant's substantive Notice of Motion on the basis of the electronic copies of the pleadings and the written submissions filed by the parties.**

**X. All the parties shall file their pleadings and submissions electronically, by filing them with the Judiciary e-filing system, and send copies by electronic mail to the Deputy Registrar of the Judicial Review Division at [judicialreview48@gmail.com](mailto:judicialreview48@gmail.com) and [asunachristine51@gmail.com](mailto:asunachristine51@gmail.com).**

**XI. The service of pleadings and documents directed by the Court shall be by way of personal service and electronic mail, and in the case of service by way of electronic mail, the parties shall also email a copy of the documents so served to the Deputy Registrar of the Judicial Review Division at [judicialreview48@gmail.com](mailto:judicialreview48@gmail.com) with copies to [asunachristine51@gmail.com](mailto:asunachristine51@gmail.com).**

**XII. The parties shall also be required to file and send to the Deputy Registrar of the Judicial Review Division their respective affidavits of service evidencing personal service, by way of electronic mail to [judicialreview48@gmail.com](mailto:judicialreview48@gmail.com) with copies to [asunachristine51@gmail.com](mailto:asunachristine51@gmail.com).**

**XIII. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for hearing on 20<sup>th</sup> April 2021.**

**XIV. The Deputy Registrar of the Judicial Review Division shall send a copy of this ruling to the *ex parte* Applicant by electronic mail by close of business on Thursday, 4<sup>th</sup> February 2021.**

**XV. Parties shall be at liberty to apply.**

17. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 1<sup>ST</sup> DAY OF FEBRUARY 2021**

**P. NYAMWEYA**

**JUDGE**