REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

JUDICIAL REVIEW APPLICATION NO E001 OF 2020

REPUBLIC.....APPLICANT

VERSUS

PRINCIPAL SECRETARY,

MINISTRY OF INTERIOR & COORDINATION OF GOVERNMENT.....RESPONDENT

EX PARTE

SAMMY KIPLAGAT T/A FLAX SAWMILLS & SAKUKI ENTERPRISES & 17 OTHERS

RULING:

What is pending before this Court is an application dated 29th September 2020 wherein the applicants seek for the following orders;

a) Leave to apply for the orders of certiorari to quash the letter dated 19/6/2020 under reference SDC/SEC/PRO/5/13/XI/85.

b) Leave to apply for orders of mandamus to compel the respondent to honour tenders awarded to the applicants for the supply of various items or products for the financial year 2019-2022

c) Leave to apply for orders of prohibition to prohibit the respondent from illegally and unprocedurally terminating the tenders awarded to the applicants.

d) The leave so granted to operate as stay for the enforcement of the respondent's decision contained in the letter dated 19/6/2020 under reference SDC/SEC/PRO/5/13/XI/85

APPLICANT'S CASE

The application is based on the grounds that;

a) The applicants won tenders to supply various items to the respondents' Eldoret and Kapsabet G K facilities.

b) The tenders are to run between the years 2019-2022 financial years.

c) The respondent has through its letter dated 19/6/2020 reference SDC/SEC/PRO/5/13/XI (85) irregularly and illegally removed the applicants form the list of suppliers.

d) The respondent's decision is unprocedural and illegal

e) The respondents' decision is arbitrary and unjust

f) The applicants in account of the tenders have invested in their businesses to enable them service their tenders.

g) The applicants are entitled to fair administrative action and hearing before their tenders are terminated.

h) The respondent intends to proceed with the implementation of its illegal decision.

i) The respondent is acting arbitrarily, unfairly and unjustly.

j) The applicants stand to suffer loss as a consequence of the respondent's unjust conduct.

The applicants filed submissions on 19th December 2020. They submit that at the centre of the dispute is the manner in which the tenders to the applicants to supply various items to the G K prisons were terminated. They were terminated unprocedurally and without the applicants being accorded a hearing despite the fact that the decision was to affect them adversely.

The applicants have demonstrated that they were successful tenderers through the tender letters which were acknowledged and duly accepted. They won the tenders to supply the items to the government and have demonstrated the fact that they have been servicing the tenders through the local purchase orders. Their tenders have been terminated irregularly and unprocedurally through the action of the respondent contained in its letter dated 19/6/2020 (Annexure SAM2).

Regarding the leave operating as stay of the decision in the letter dated 19th June 2020, they submit that the tenders awarded to the applicants are for specific periods. If the applicants are not allowed to continue supplying the items they were contracted to supply, the tenders will expire or lapse. The applicants have already committed resources into their business to enable them meet the tenders through local purchase orders. The reliefs the applicants seek will only have meaning if they are allowed to operate during their tender periods as they have demonstrated prima facie, genuine grievances with a high probability of success.

They submit that the applicants have opted not to file a replying affidavit. The averments in the application remain uncontroverted.

RESPONDENT'S CASE

The respondents filed submissions on 14th December 2020. They also filed grounds of opposition dated 29th October 2020.

The respondents submit that the application is fatally defective as it does not meet the mandatory requirements of order 53 rule 3(2) in that the principal secretary in the state department for correctional services whose alleged decision is being challenged was never personally served with the application. There is no evidence that he was personally served thus the orders sought cannot be issued. The provisions of order 53 are mandatory requirements.

The orders sought are against the principal secretary Ministry of Interior and National Coordination whereas the letter in question is written by the principal secretary in the state department for Correctional Services. These are distinct offices hence the application is at variance with the orders being sought and cannot be granted. The alleged tenders were issued by a totally different entity being the County Commissioners' office and so the impugned letter dated 19th June 2020 is not addressed to the County Commissioner and neither does it mention the alleged tenders at all.

The letter dated 19th June 2020 is merely a communication from the Principal Secretary who is the accounting officer in the State Department for Correctional Services to various officers in charge of G.K Prisons facilities in the country and not a decision capable of being quashed by the Court. According to Order 53 Rule 2 of the Civil Procedure Rules, 2010, a decision capable of being quashed would either be a judgment, order, decree, conviction or any decision emanating from proceedings. The letter dated 19th June 2020 does not in any way fall within the above categories. The respondents cite the case of ***R v Ministry of Transport and Communication*** in support of this submission.

In these proceedings, what is being challenged is not the decision per se but the implementation thereof by the respondent through the impugned letter. Whether or not the decision was lawful, without the decision itself being challenged, the court would be acting in vain if it were to purport to quash the implementation thereof while leaving the decision itself intact.

If the applicants have the valid tenders with the respondent, then they have nothing to fear and worry about. They have misapprehended the meaning and import of the letter dated 19th June 2020. The alleged tenders being exhibited by the applicants came long after the principal secretary who is the accounting officer in the state department for correctional services had advertised on 18th June 2018 and thereafter awarded the tenders to the respective bidders. The letter does not fall within the ambit of order 53 rule 2 and hence not a decision capable of being quashed at all.

The application is res judicata in view of the ruling in Nairobi Judicial Review Application Number 113 of 2020 between ***Daniel Nganga Wanyoike Ex Parte Applicant Vs The Principal Secretary Ministry of Interior Coordination of National Security***, the respondent herein. A scrutiny of the said ruling demonstrates that the applicant was aggrieved by the decision of the respondent to advertise for invitation for tenders for the year 2019-2022 while there were existing tenders for the same period as claimed by the applicants herein. A summary of the ruling would inform that after the respondent advertised on 18th June 2018, people applied and subsequently were awarded tenders which is the substantive decision. The applicants have not demonstrated that they participated in that process as advertised by the respondent.

The applicants are guilty of non-disclosure of relevant information, in that in the above stated ruling which is based on the same facts as what the applicants are relying on, leave was denied. They cite the case of ***R v Kenyan National Federation of Cooperatives Ltd Ex Parte Communication Commission of Kenya (2005) 1 KLR.*** The applicants having failed to disclose such information do not deserve the orders sought.

There is no evidence laid before the court to suggest that indeed the respondent's letter dated 19th June 2020 violates the rights of the

applicant in any way that is unlawful and in breach of their rights to warrant challenge of the same.

The applicants have not met the threshold to warrant grant of leave to challenge the letter dated 19th June 2020 as was stated in the case of ***Republic vs. County Council of Kwale and another Ex Parte Kondo & 57 others, Mombasa HCMCA No. 384 of 1996*.** They have not laid any basis at all or demonstrated that they have an arguable case. The Courts have stated that an applicant seeking for leave to institute proceedings must show that:- i) sufficient interest in the matter/locus standi (ii) that he/she is affected in some way by the decision being challenged (iii) that he/she has an arguable case and that the case has a reasonable chance of success (iv) the application must be concerned with a public law matter, (v) the decision complained of must have been taken by a public body, that is a body established by statute or otherwise exercising a public function.

The applicants have not even attempted to demonstrate the above five elements to be entitled to the orders being sought. The courts have held that at the leave stage, the burden of demonstrating that the impugned decision is illegal, unfair and irrational is squarely on the applicants, of which burden has not been discharged by the applicants in this case.

On the issue of leave to operate as stay, the respondents submit that the alleged tenders were issued by the county commissioners office and not the respondent hence there is nothing to stay based on the communication issued via letter dated 19th June 2019.

They urged the Court to dismiss the application with costs.

ISSUES FOR DETERMINATION

1. Whether the applicant should be granted leave to apply for Judicial Review

2. Whether the application is fatally defective/meets the requirements of order 53 Rule 2 of the Civil Procedure Rules

3. Whether leave if granted should operate as stay

WHETHER THE APPLICANT SHOULD BE GRANTED LEAVE TO APPLY FOR JUDICIAL REVIEW

In **Vivo Energy Limited v National Land Commission [2020] eKLR** the Court held;

> **In an application for leave such as the present one, the Court ought not to delve into the arguments of the parties, but should make cursory perusal deeply of the evidence before it and make the decision as to whether an applicant's case is sufficiently meritorious to justify leave.**

The reason for application for leave was explained in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996 as follows:**

> **"The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, 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 if it were actually pending even though misconceived… Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant. The test being whether there is a case fit for further investigation at a full *inter partes* hearing of the substantive application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised judiciously".**

In **Aga Khan Education Service v Republic ex parte Seif [2004] eKLR the Court of Appeal observed that:**

> **"We think both Mr. Inamdar and Mr. Kigano are generally agreed on the principles of law applicable in these matters. They are agreed that in order to enable a judge to grant leave under Order 53, there must be prima facie evidence of an arguable case and for that proposition both counsel rely on this Court's decision in THE MATTER OF AN APPLICATION BY SAMUEL MUCHIRI WANJUGUNA & 6 OTHERS and in THE MATTER OF THE MINISTER FOR AGRICULTURE AND THE TEA ACT, Civil Appeal No. 144 of 2000 in which the Court approved and applied the principles to be found in the English case of R v SECRETARY OF STATE, ex p. HERBAGE [1978] 1 ALL ER 324 where it was stated thus:**
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> **"It cannot be denied that leave should be granted, if on the material available, the court considers without going into the matter in depth, that there is an arguable case for granting leave. The appropriate procedure for challenging such leave subsequently is by an application by the Respondent under the inherent jurisdiction of the court, to the judge who granted leave to set aside such leave – see Halsbury's Laws of England, 4th Edition Vol 1 (1) paragraph 167 at page 1276."**
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> **So once there is an arguable case, leave is to be granted and the Court at that stage, is not called upon to go into the matter in depth."**

Order 53 Rule 2 is vital in consideration of whether there's an arguable case for the purposes of Judicial Review. It states:-

> **Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.**

It therefore follows that leave is to be granted for quashing a judgment, order, decree, conviction or any other proceeding. For one to have an arguable case there must exist a judgment, order, decree, conviction or any other proceeding. Does the letter dated 19th June 2020, amount to any of the above? The letter, in my view, is not a decision that has the effect of terminating the tenders awarded to the applicants.

It instructs the officers and A.I.E holders to adhere strictly to the circular guidelines. I find that there is nothing in the letter that amounts to a decision cancelling tenders.

WHETHER THE APPLICATION IS FATALLY DEFECTIVE/ MEETS THE REQUIREMENTS OF ORDER 53 RULE 3(2) OF THE CIVIL PROCEDURE RULES.

Order 53 rule 3(2) provides that there must be a **judgment, order, decree, conviction or other proceeding** deserving quashing by way of certiorari. The applicant has not proven that there exists any of the above. The applicant avers that the letter is a decision. There is no explanation as to how the same is an actual decision and how it affects the applicants. A reading of the said letter shows that it was instructing the officers to adhere to guidelines. I have read on it nothing on termination of any tenders. There is no decision in the letter worthy challenging in relation to the alleged won tenders.

The letter does not therefore fall into the category of decisions that can be quashed as per order 53 rule 3(2).

WHETHER THE ORDER OF LEAVE IF GRANTED, SHOULD OPERATE AS STAY

Given that there is no decision to be quashed, there is no arguable case deserving granting leave to the applicant. The application fails to meet the threshold for orders of leave to file a judicial review. In the premises there is no need to determine whether the leave should operate as stay as there is no leave granted.

The application therefore fails and is dismissed with costs to the Respondent.

S. M GITHINJI

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 11TH DAY OF MARCH, 2021.

In the absence of:-

Mr. Momanyi for the applicant.

Mr. Wabwire for the respondent.

Gladys - Court Assistant

Parties be notified of delivery of the ruling virtually.