



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. MISC. E049 OF 2021

IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE JUDICIAL REVIEW

PROCEEDINGS FOR ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD.....1ST RESPONDENT

THE ACCOUNTING OFFICER, KENYA MEDICAL SUPPLIES AUTHORITY.....2ND RESPONDENT

KENYA MEDICAL SUPPLIES AUTHORITY.....3RD RESPONDENT

NUFLOWER FOODS AND NUTRITION PVT.....4TH RESPONDENT

EX PARTE: TECHNO RELIEF SERVICES LIMITED

RULING

The Application

1. Techno Relief Services Limited, the *ex parte* Applicant herein, is aggrieved by the decision made on 29th March 2021 by the Public Procurement Administrative Review Board (the 1st Respondent herein) in PPARB Application No. 34 of 2021, in which it dismissed the *ex parte* Applicant’s Request for Review with respect to Tender Number GF ATM HIV NFM-20/21-O1T-011 for Supply of Nutritional Supplements by the Kenya Medical Supplies Authority, the 3rd Respondent herein.

2. The *ex parte* Applicant has consequently filed an application by way of a Chamber Summons dated 6th April 2021, seeking the following orders:

1. THAT leave be granted to the Applicant to apply for Judicial Review order of Certiorari to remove into this Honourable Court and quash the decision of the 1st Respondent dated 29th March, 2021 in Review Case number 34 of 2021; Techno Relief Services Limited vs The Accounting Officer of Kenya Medical Supplies Authority, Kenya Medical Supplies Authority & Nuflower Foods and Nutrition PVT Limited.

2. THAT leave be granted to the Applicant to apply for Judicial Review order of Mandamus to compel the 1st Respondent to re hear and determine PPARB Case Number 34 of 2021 by considering the Applicants filed and served Written Submissions, List of Authorities, Further Affidavit, Replying Affidavit to the 2nd and 3rd Respondent’s Grounds of Opposition and the Applicant’s written submissions to the 2nd and 3rd Respondents Grounds of Opposition.

3. THAT leave be granted to the Applicant to apply for Judicial Review order of Prohibition to remove into this honourable Court and prohibit the 3rd and 4th Respondent’s from entering into a binding contract in respect of tender No. GF ATM HIV NFM -20/21-01T-011 for supply of Nutritional Supplements to Kenya Medical Supplies Authority that form the subject

matter of this application.

4. THAT the leave so granted do operate as stay against the 1st Respondent decision dated 29th March 2021 in Review Case number 34 of 2021; Techno Relief Service Limited vs The Accounting Officer of Kenya Medical Supplies Authority, Kenya Medical Supplies Authority & Nuflower Foods and Nutrition PVT Limited.

5. THAT the Honourable Court be pleased to grant further orders, writs or alternative reliefs it may deem fit and expedient in the circumstances.

6. THAT the cost of this application be provided for.

3. The grounds for the application are stated in the *ex parte* Applicant's statutory statement dated 6th April 2021, and a verifying affidavit sworn on the same date by Ketan. K. Goswami, the *ex parte* Applicant's Tender and Product Development Manager. In summary, the *ex parte* Applicant averred that the 1st Respondent, acted unprocedurally, irrationally, illegally and unreasonably by failing and/ or refusing to consider the *ex parte* Applicant's filed written submissions, list of authorities, further affidavit, replying affidavit to the Grounds of Opposition and the *ex parte* applicant's written submissions to the 2nd and 3rd Respondents Ground of Opposition.

4. Further, that the 1st Respondent only considered the 2nd and 3rd Respondents' written submissions which were filed on the 29th March 2021 whereas the *ex parte* Applicant's written submissions were filed on 25th March 2021. In addition, that the Interested Party siled its written submissions on the 30th March 2021 whereas the 1st Respondent rendered its on the 29th March 2021. Lastly, that the 1st Respondent made an error of law, considered irrelevant considerations and was unreasonable in its findings that the *ex parte* Applicant's bid was non responsive.

5. The *ex parte* Applicant annexed copies of the subject tender documents, and of the pleadings filed in, and impugned decision made by the 1st Respondent on 29th March 2021 in PPARB Application No. 34 of 2021.

The Determination

6. I have considered the application dated 6th April 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 certain actions may be undertaken with respect to the subject tender arising from the 1st 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 1st Respondent on in PPARB Application No. 34 of 2021, 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 Respondents.

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 1st Respondent in the impugned decision will result in consequent actions being undertaken in the subject procurement by the 2nd and 3rd Respondents, and the implementation of the 1st Respondent’s decision is therefore not only amenable to stay, but the *ex parte* Applicant’s application will also be rendered nugatory if the stay order is not granted. 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 6th April 2021 is found to be merited to the extent of the following orders:

I. The *ex parte* Applicants’ Chamber Summons application dated 6th April 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 remove into this Honourable Court and quash the decision of the 1st Respondent dated 29th March, 2021 in PPARB Case Number 34 of 2021 - Techno Relief Services Limited vs The Accounting Officer of Kenya Medical Supplies Authority, Kenya Medical Supplies Authority & Nuflower Foods and Nutrition PVT Limited.

III. The *ex parte* Applicant is granted leave to apply for an order of Mandamus to compel the 1st Respondent to r- hear and determine PPARB Case Number 34 of 2021 by considering the *ex parte* Applicant’s filed and served Written Submissions, List of Authorities, Further Affidavit, Replying Affidavit to the 2nd and 3rd Respondent’s Grounds of Opposition and the *ex parte* Applicant’s written submissions to the 2nd and 3rd Respondents Grounds of Opposition.

IV. The *ex parte* Applicant is granted leave to apply for an order of Prohibition to remove into this Court and prohibit the 3rd and 4th Respondent’s from entering into a binding contract in respect of Tender No. GF ATM HIV NFM -20/21-01T-011 for supply of Nutritional Supplements to Kenya Medical Supplies Authority that form the subject matter of this application.

V. The leave granted herein shall operate as stay of implementation by the Respondents in any manner of the 1st Respondent’s decision dated 29th March 2021 in PPARB Case Number 34 of 2021 - Techno Relief Service Limited vs The Accounting Officer of Kenya Medical Supplies Authority, Kenya Medical Supplies Authority & Nuflower Foods and Nutrition PVT Limited, pending the hearing and determination of the *ex parte* Applicant’s substantive Notice of Motion or until further orders of this Court.

VI. The costs of the *ex parte* Applicants’ Chamber Summons application dated 6th April 2021 shall be in the cause.

VII. 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 6th April 2021 and its supporting documents, (iii) a copy of this ruling, and (v) a hearing notice, within ten (10) days from today’s date.

VIII. Upon being served with the said pleadings and documents, the Respondents shall be required to file their responses, which shall include their substantive responses and any preliminary objections to the substantive Notice of Motion and their reply submissions within ten (10) days from the date of service.

IX. The *ex parte* Applicant is granted leave to file and serve a further affidavits and supplementary submissions if need be, which shall be strictly limited to any new facts and issues of law raised by the Respondents, within five (5) days of service by the Respondents.

X. Timelines shall be strictly observed in light of the decision by the Court of Appeal in Civil Appeal No 39 of 2021- Aprim Ltd vs The Parliamentary Service Commission, and any default by any of the parties shall attract the appropriate sanctions and orders by the Court.

XI. A virtual hearing of the *ex parte* Applicant’s substantive Notice of Motion shall be held on 10th May 2021 at 3.00pm, when a judgment date will also be reserved.

XII. 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.

XIII. 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 and asunachristine51@gmail.com.

XIV. 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 with copies to asunachristine51@gmail.com.

XV. The parties shall also be required to file their respective affidavits evidencing service in the Judiciary's e-filing system

XVI. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for a virtual hearing on 10th May 2021 at 3.00pm and shall send the parties an electronic link for the mention.

XVII. The Deputy Registrar of the Judicial Review Division shall send a copy of these directions to the *ex parte* Applicant by electronic mail by close of business on Thursday, 15th April 2021.

XVIII. Parties shall be at liberty to apply.

17. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 14TH DAY OF APRIL 2021

P. NYAMWEYA

JUDGE