



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. E063 OF 2021

IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE

JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI BETWEEN

REPUBLIC.....APPLICANT

VERSUS

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

N. K. BROTHERS LIMITED.....2ND RESPONDENT

AND

ACCOUNTING OFFICER, SPORTS, ARTS AND SOCIAL DEVELOPMENT FUND...1ST INTERESTED PARTY

MILICON'S LIMITED2ND INTERESTED PARTY

EX PARTE: SPORTS, ARTS AND SOCIAL DEVELOPMENT FUND

RULING

The Application

1. Sports, Arts and Social Development Fund, the *ex parte* Applicant herein, is aggrieved by the decision made on 26th April 2021 by the Public Procurement Administrative Review Board (the Respondent herein) in PPARB Application No. 46 of 2021, with respect to Tender No SASDEF/T/PROC/002/2020-2021 for the Proposed Completion of Office Block (SASDEF Plaza) on L. R. No 209/12386 for Sports, Arts and Social Development Fund.

2. The *ex parte* Applicant has consequently filed an application by way of a Chamber Summons dated 11th May 2021, seeking the following orders:

- 1. The matter be certified as urgent and service thereof be dispensed with in the first instance.
- 2. Leave be granted for the Applicant to apply for the ORDER OF CERTIORARI to remove to this Honorable Court for purposes of quashing the decision of the 1st Respondent of 26th April 2021 cancelling and setting aside the 1st Respondent's Letter of Notification of Award for Tender No SASDEF/T/PROC/002/2020-2021 for the Proposed Completion of Office Block (SASDEF Plaza) on L. R. No 209/12386 for Sports, Arts and Social Development Fund at Upper-Hill Nairobi dated 19th March 2021 (the decision).
- 3. Leave be granted for the Applicant to apply for the ORDER OF CERTIORARI to remove to this Honorable Court for purposes of quashing the decision of the 1st Respondent of 26th April 2021 cancelling and setting aside the 1st Respondent's Letters of Notification of Results for Tender No SASDEF/T/PROC/002/2020-2021 for the Proposed Completion of Office Block (SASDEF Plaza) on L. R. No 209/12386 for Sports, Arts and Social Development Fund at Upper-Hill Nairobi dated 22nd March 2021 notifying unsuccessful bidders of award to Milicon's Limited (the decision)

4. Leave granted act as stay of the effecting and/or implementation of the decision directing the Applicant's Evaluation Committee to reinstate the 2nd Respondent's and all other bidders' bids at the Mandatory Requirements/Preliminary Examination stage and conduct re-evaluation of all bidders' bids at the Mandatory Requirements/Preliminary Examination stage.

5. Cost of this application be provided for.

3. The grounds for the application are stated in the *ex parte* Applicant's statutory statement dated 11th May 2021, and a verifying affidavit sworn on the same date by Mark Wambugu, the *ex parte* Applicant's Chief Executive Officer and 1st Interested Party. In summary, the *ex parte* Applicant averred that vide an advertisement published in the Daily Nation of 8th December 2020, it invited sealed tenders for Tender No. SASDEF/T/PROC/002/2020-2021 for the Proposed Completion of Office Block (SASDEF Plaza) on L. R. No 209/12386 for Sports, Arts and Social Development Fund at Upper- Hill Nairobi, and the initial bid submission deadline was provided as 22nd December 2020 and was extended to 5th January 2021 through an addendum of 16th December 2020.

4. Further, that the Tender document provided for the evaluation criteria and provided that evaluation would be carried out in three main stages: Mandatory Requirements/Preliminary Examination; Technical Evaluation and Financial Evaluation. The *ex parte* Applicant claims that the 2nd Interested Party was awarded the Tender vide a Letter of Award dated 19th March 2021, as its bid was the sole responsive bid and having met the minimum technical evaluation score and financial evaluation. In addition, that the *ex parte* Applicant also informed the unsuccessful bidders that their bids had failed through the Letters of Notification of Results dated 22nd March 2021.

5. However, that the 2nd Respondent thereupon filed a Request for Review on the 6th April 2021 with the 1st Respondent, challenging the decision of the *ex parte* Applicant contained in the Letters of Notification of Results dated 22nd March 2021, and that the 1st Respondent purportedly delivered a decision dated 26th April 2021, but which was transmitted to the parties on or about 27th April 2021 at around 9.47 PM through email, and which email was not received by the *ex parte* Applicant. In addition, that the *ex parte* Applicant upon being served with the 2nd Respondent's supplementary affidavit and submissions on or about the 23rd March 2021 proceeded to the 1st Respondent's registry on the 28th March 2021 to file its Notice of Preliminary Objection and submissions but was informed that a decision had already been rendered. The *ex parte* Applicant claims that the decision of the 1st Respondent was subsequently forwarded to it vide an email of 28th April 2021 at around 12.45PM.

6. The *ex parte* Applicant seeks to challenge the decision of the 1st Respondent on the grounds that the decision is *ultra vires* and in excess of jurisdiction; is tainted with illegality; based on grave misapprehension of the law and thorough misunderstanding of facts; amounts to abuse of power; that the 1st Respondent made considerations of irrelevant facts and failed to consider relevant facts and the decision is Wednesbury unreasonable and irrational. The *ex parte* Applicant detailed these grounds in its applications.

7. The *ex parte* Applicant annexed copies of the advertisement for the subject tender, its Tender Evaluation report, Letter of Notification of Results and its Letter of Award of the subject Tender, and the 2nd Respondent's Request for Review and pleadings filed in of filed in PPARB Application No. 46 of 2021. However, I note that while the *ex parte* Applicant averred and states that it annexed copy of the impugned decision made by the Respondent on 26th April 2021 in PPARB Application No. 46 of 2021, the same was uploaded on the e-filing system.

The Determination

8. I have considered the application dated 11th May 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 procuring entity is required to undertake certain actions in relation to the subject tender arising from the 1st Respondent's impugned decision.

9. 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.

10. 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.

11. In the present application, the *ex parte* Applicant has provided evidence of the proceedings in PPARB Application No. 46 of 2021, and has averred as to the grounds and reasons why it considers the 1st Respondent's decision therein to be illegal. Given the strict timelines in hearing this application, the *ex parte* Applicant will also be granted the opportunity to upload and serve the impugned decision as the hearing process starts. 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.

12. 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.”

13. I am guided by the exposition on the purpose of a stay in **R (H). vs Ashworth Special Hospital Authority (2003) 1 WLR 127**, where 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, and to ensure that a party who is eventually successful in his or her challenge is not denied the full benefit of the success.

14. 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. It has in this regard been held 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. These positions were also explained in the decisions in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006**, **Jared Benson Kangwana vs. Attorney General, Nairobi HCCC No. 446 of 1995**, **Republic vs Cabinet Secretary for Transport & Infrastructure & 4 Others ex parte Kenya Country Bus Owners Association and 8 Others (2014) e KLR** and **James Opiyo Wandayi vs Kenya National Assembly & 2 Others, (2016) eKLR**.

16. In the present application, the orders given by the 1st Respondent in the impugned decision will result in consequent actions being undertaken in the subject procurement by the ex parte Applicant and 1st Interested Party, 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. The stay orders are therefore merited to this extent.

The Disposition

17. In light of the foregoing observations and findings, the *ex parte* Applicants' Chamber Summons dated 11th May 2021 is found to be merited to the extent of the following orders:

I. The *ex parte* Applicants' Chamber Summons application dated 11th May 2021 is hereby certified as urgent, and is hereby admitted for hearing *ex parte* in the first instance.

II. The *ex parte* Applicant is granted leave to file and serve a supplementary affidavit annexing the decision of the 1st Respondent delivered on 26th April 2021 in PPARB Application No. 46 of 2021 within five (5) days of today's date.

III. The *ex parte* Applicant is granted leave to apply for an order of Certiorari, to remove to this Court for purposes of quashing the decision of the 1st Respondent of 26th April 2021 in PPARB Application No. 46 of 2021, cancelling and setting aside the 1st Respondent's Letter of Notification of Award for Tender No SASDEF/T/PROC/002/2020-2021 for the Proposed Completion of Office Block (SASDEF Plaza) on L. R. No 209/12386 for Sports, Arts and Social Development Fund at Upper-Hill Nairobi dated 19th March 2021.

IV. The *ex parte* Applicant is granted leave to apply for an order of Certiorari, to remove to this Court for purposes of quashing, the decision of the 1st Respondent of 26th April 2021 in PPARB Application No. 46 of 2021, cancelling and setting aside the 1st Respondent's Letters of Notification of Results for Tender No SASDEF/T/PROC/002/2020-2021 for the Proposed Completion of Office Block (SASDEF Plaza) on L. R. No 209/12386 for Sports, Arts and Social Development Fund at Upper-Hill Nairobi dated 22nd March 2021 notifying unsuccessful bidders of award to Milicon's Limited.

V. The leave granted herein shall operate as a stay of implementation of the 1st Respondent's decision dated 26th April 2021 in PPARB Application No. 46 of 2021, directing the Applicant's Evaluation Committee to reinstate the 2nd Respondent's and all other bidders' bids at the Mandatory Requirements/Preliminary Examination stage, and to conduct re-evaluation of all bidders' bids at the Mandatory Requirements/Preliminary Examination stage, 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 11th May 2021 shall be in the cause.

VII. The *ex parte* Applicant shall file and serve the Respondents and Interested Parties with (i) the substantive Notice of Motion and submissions thereon, (ii) the Chamber Summons dated 10th May 2021 and its supporting documents, (iii) a supplementary affidavit annexing the decision of the 1st Respondent delivered on 26th April 2021 in PPARB Application No. 46 of 2021 (iv) 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 and Interested Parties shall be required to file their responses, which shall include their substantive responses and any preliminary objections to the substantive Notice of Motion, together with 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 affidavit and supplementary submissions if need be, which shall be strictly limited to any new facts and issues of law raised by the Respondents and Interested Party, within five (5) days of service by the Respondents and Interested Parties.

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 8th June 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 in word format.

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 8th June 2021 at 3.00pm and shall send the parties an electronic link for the hearing.

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 Monday, 17th May 2021.

XVIII. Parties shall be at liberty to apply.

18. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 13TH DAY OF MAY 2021

P. NYAMWEYA

JUDGE