



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
JUDICIAL REVIEW DIVISION
JUDICIAL REVIEW NO. 32 OF 2020

GUARDFORCE GROUP LIMITED.....EX PARTE APPLICANT

VERSUS

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD.....RESPONDENT

AND

1. PWANI UNIVERSITY

2. THE ACCOUNTIGN OFFICER, PWANI UNIVERSITY

3. CATCH SECURITY LINKS LIMITED.....INTERESTED PARTIES

RULING

1. This is a Ruling on the Notice of Motion herein dated 2/10/2020 which prays for the following orders:

1. **THAT** this application be certified as urgent and be heard as a matter of priority.
2. **THAT** pending the hearing and determination of this application, a notice to show cause be issued against the 2nd Interested Party, to show-cause why he or she should not be punished for contempt of the court orders issued on 11th September,2020.
3. **THAT** the 2nd Interested Party be held in contempt of court orders issued on 11th September,2020 for non-compliance with the orders of stay against the 1st and 2nd Interested Parties, their agents and or servants from signing any contract with the 3rd Interested Party with respect to Tender No PU/OT/2020/2021-Provision of security services at the 1st Interested Party.
4. **THAT** the Court be pleased to order that the 2nd Interested Party be committed to prison for a period of six (6) months for contempt of court orders issued on 11th September,2020 or be pleased to order any other appropriate sanction or penalty.
5. **THAT** the Court be pleased to order that the status quo with regard to the provision of security services at the 1st Interested Party as at 11th September,2020 when the order of stay was granted by this Honourable Court and as at 12th September,2020 when the said order was served upon the parties herein be maintained.
6. **THAT** the costs of this application be provided for.
7. **THAT** this Honourable Court be pleased to make such further or other orders as it may deem just and expedient in the circumstances of this case.

2. The Ex parte Applicant states that it commenced these judicial review proceedings on 10/9/2020 by seeking leave of the court to apply for an order of certiorari to quash the decision of the Respondent made 7/9/2020 in Public Procurement Administrative Review Board Review Application No.117 of 2020 between the Ex parte Applicant and the Interested Parties herein; that this Court sitting in Malindi heard the Application filed under a Certificate of Urgency on 11/9/2020 and granted the leave to apply for order of certiorari; that the said leave was to

operate as stay restraining the 1st and 2nd Interested Parties, their agents and or servants from signing any contract with the 3rd Interested Party regarding Tender No PU/OT/2020/2021-Provision of Security Services at the 1st Interested Party's premises.

3. The Ex parte Applicant states that the said orders were duly served upon the Respondent and the Interested Parties on 12th September, 2020 in the first instance electronically through email pursuant to Order 5 Rule 22B of the Civil Procedure Rules as amended by Civil Procedure (Amendment) Rules, 2020; that further, on 18/9/2020 the Ex parte Applicant filed the substantive Judicial Review Application well within the fourteen (14) days envisaged by the Order issued on 11/9/2020. The application was fixed for hearing on 5/10/2020.

4. However, and contrary to the said orders, the 2nd and the 3rd Interested Parties proceeded to execute and or give effect to the contract for the Provision of security services at the 1st Interested Party with respect Tender No PU/OT/2020/2021 effective 1/10/2020. Pursuant thereto, the 3rd Interested Party has taken over the provision of such services at the 1st Interested Party as at 1/10/2020 thereby unlawfully and unprocedurally displacing the Ex parte Applicant who has been offering the said security services at the 1st Interested Party for the last two (2) years.

5. The Ex parte Applicant states that the 2nd Interested Party's refusal to comply with valid court orders issued on 11/9/2020 was calculated to undermine the authority of this Court, the rule of law, and is aimed at defeating the ends of Justice; that the said court order dated 11/9/2020 contains a Penal Notice to wit; **any person served with this order and disobeys it will be in contempt of court proceedings and will be liable to fine and/or imprisonment;**

6. The Ex parte Applicant avers that the Interested Parties are in contempt of court orders being an interference with the administration of justice and is a mockery of the authority and dignity of this court; that judicial power in Kenya vests in the courts established under the Constitution of Kenya, 2010 and that it is a fundamental rule of law that court orders must be obeyed; that it is therefore not open for the Interested Parties to choose whether or not to comply with the order issued herein by this Court; that the aforesaid Interested Parties contemptuous acts will not only interfere with the cause of justice but is also likely to cause substantial and irreparable losses to the Applicant and that the Interested Parties conduct greatly defies the authority and dignity of this Court and the Court ought to discourage such defiance in upholding the Rule of law and promoting administration of justice.

7. The motion is supported by affidavit of **Polycap Okumu Ochola** sworn on 2/10/2020.

Response

8. The 1st and 2nd Interested Parties opposed the motion vide a Replying Affidavit sworn by **Prof. Mohamed S. Rajab** on 12/10/2020. The Interested Parties' case is that following an advertisement for Tender No. PU/OT/04/2020/2021, the 1st and 2nd Interested Parties received bid documents from fifteen (15) bidders including the Ex-parte Applicant and the 3rd Interested Party herein. The bids were evaluated and the Tender awarded to the 3rd Interested Party; that being aggrieved by the decision to award Tender No. PU/OT/04/2020/2021 to the 3rd Interested Party, the Applicant filed Application No. 117 of 2020 for review before the Respondent who on 7/9/2020 delivered its decision dismissing the Applicant's Request for Review for lack of merit; that the Respondent having rendered its decision on 7/9/2020, the 1st Interested Party lawfully and within its right proceeded to enter into a new contract for Provision of Security Services between itself and the 3rd Interested Party dated 9/9/2020, two days after the Respondent's decision. A copy of the said contract was annexed hereto and marked "MSR-3.

9. The 1st Interested Party states that security issue is very important for the institution and so they had to move with speed in completing the already delayed procurement process for security services.

10. The 1st and 2nd Interested Parties aver that on the morning of 14/9/2020 they were informed of an email from Applicant's Advocates being advance electronic service of the Order of the Court issued on 11/9/2020 and a letter dated 12/9/2020 sent electronically on Saturday the 12/9/2020 when their offices were closed; that by the time the Applicant filed the Chamber Summons Application for leave to file its judicial review application and the Certificate of Urgency thereto on 10/9/2020, the Contract dated 9/9/2020 complained of herein had already been duly executed; that by the time this Court issued the Orders of Stay dated 11/9/2020 barring the 1st and 2nd Interested Parties from signing any contract for the Provision of Security Services with respect to Tender No. PU/OT/04/2020/2021 with the 3rd Interested Party, the Contract dated 9/9/2020 complained of had already been duly executed; that by the time electronic service of the Orders of this Court issued on 11/9/2020 was done on Saturday 12/9/2020, the Contract dated 9/9/2020 complained of had already been duly executed; that further, by the time the 1st and 2nd Interested Parties became aware of the Orders of this Court on Monday 14/9/2020 the Contract dated 9/9/2020 complained of had already been duly executed.

11. The 1st and 2nd Interested Parties aver that they are law abiding persons whose actions were not in any way calculated to undermine the authority of this Court as alleged and they pray that this Court finds that the 1st and 2nd Interested Parties are not in contempt of court orders issued on 11/9/2020, and declines to order the 2nd Interested Party's committal to prison or such other sanction or penalty against the 1st and 2nd Interested Parties as prayed herein.

Submissions and Determination

12. The application was canvassed through written submissions. The Applicant filed submissions on 12/11/2020 while the 1st and 2nd Interested Parties filed submissions on 10/11/2020.

13. The only issue for determination by this Court is whether or not the 1st and 2nd Interested Parties are in contempt of this Court; that is, whether they entered into the contract dated 9/9/2020 with the 3rd Interested Party in violation of stay orders granted by this court on

11/9/2020.

14. The starting point is the said contract of 9/9/2020. The 1st and 2nd Interested Parties aver that they were served with court orders of stay on 14/9/2020 well after they had executed the contract with the 3rd Interested Party on 9/9/2020. That assertion is correct, that is, if the authenticity of that contract is not disputed. It is noteworthy that the said contract is not registered, and no stamp duty has been paid for it. It is not a document which can be accepted in this Court, and especially so since the Applicant has put reservations on it. However, granted that indeed the alleged contemnors had entered into contract on 9/9/2020, the issue then is whether or not that contract was valid during the time the Ex parte Applicant was entitled to challenge the decision of the Respondent herein.

15. Section 175 (1) of the Public Procurement and Asset Disposal Act, No. 33 of 2015 provides that: -

“(1) A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board’s decision, failure to which the decision of the Review Board shall be final and binding to both parties.”

16. This Section grants a party aggrieved by the Review Board’s decision a fourteen days window within which to challenge that decision by way of judicial review. The 1st and 2nd Interested Parties submitted that the Act is silent on whether this operates as a stay. In their view once a party decides to move the High Court for judicial review, the Rules provided in Order 53 of the Civil Procedure Rules now take effect, and that the application for or grant of leave to file judicial review does not operate as an automatic stay, and that an Applicant is required to expressly apply for the same and the Court will consider whether such an application is merited and pronounce itself expressly. The Interested Parties cited Justice Odunga in **Republic v Public Procurement Administrative Review Board Ex-Parte Transcend Media Group Limited [2017] eKLR** where the learned Judge held that:

“The principles that guide the grant of an order that the leave do operate as stay of the proceedings in question have been crystallised over a period of time in this jurisdiction. Where, the decision sought to be quashed has been implemented leave ought not to operate as a stay since where a decision has been implemented stay is no longer efficacious as there may be nothing remaining to be stayed. See George Philip M Wekulo vs. The Law Society of Kenya & Another Kakamega HCMISCA No. 29 of 2005.”

17. The learned Judge further expressed himself in **Republic v Public Procurement Administrative Review Board Ex-Parte Transcend Media Group Limited (supra)** as regards Section 175 (1) of the Public Procurement and Asset Disposal Act as follows:

“7. It is therefore clear that the section does not expressly state that the commencement of judicial review proceedings is an automatic stay. However once the said proceedings are commenced the binding effect and finality of the decision is thereby suspended so that any contract entered into between the procuring entity and the party in whose favour a tender has been awarded cannot defeat the proceedings merely because such a contract has been entered into.

8. In other words a procuring entity which enters into a contract during the pendency of judicial review proceedings properly commenced does so at the risk that the Court may quash the decision and thereby nullify the contract with the attendant consequences.

9. It is in this respect that the holding that the commencement of judicial review proceedings amounts to automatic stay ought to be understood.”

18. **Mr. Mungai**, learned counsel for the 1st and 2nd Interested Parties urged this court to find that “*the 14-days automatic stay rule*” as it were only comes to life once judicial review proceedings have commenced. With this argument it follows that any actions done by a party before judicial review proceedings have been commenced cannot be impugned on the basis of Section 175 (1) of the Public Procurement and Asset Disposal Act. Therefore, before such proceedings commence and the 1st and 2nd Interested Parties are notified, the 1st and 2nd Interested Parties had all rights or no reason at all not to proceed with the Contract in the best interest of the 1st Interested Party Institution.

19. I am not persuaded by the above argument. I am more persuaded by the Ex parte Applicant’s submission that in light of Section 175(1) of the PPAD Act, the Interested Party cannot purport to have signed the said contract one (1) day after the decision by the Respondent was communicated to the parties and before the lapse of the fourteen (14) days period. The Ex parte Applicant urged this Court to look at the intention of parliament pursuant to the said Section 175(1) to the extent that the Respondent’s decision ought to be kept in abeyance until the lapse of the said fourteen (14) days. In my view, the 14 days period after decision of the Respondent has meaning only if it acts as automatic stay to enable a dissatisfied party to seek judicial review remedies. See **Republic v Public Procurement Administrative Review Board & Others ex parte Avante International Technology Inc. Nairobi High Court Misc. Application No. 451 of 2012** and **Republic v Director General of the Public Procurement Oversight Authority & Others ex parte Africa Infrastructure Development Company Nairobi High Court Misc. Application No. 24 of 2013** in which it was held as follows:

“Section 100(1) of the Act provides that a decision made by the Review Board shall, be final and binding on the parties unless judicial review thereof commences within fourteen days from the date of the Review Board’s decision. The respondents contend that since there was no stay granted by the Court and the said contract was entered into the orders sought herein are incapable of being granted. ...That may be so, however, if the Commission decides to enter into a contract during the pendency of judicial review proceedings filed within the stipulated period, it does so at the risk that the Court may nullify the process leading to the tender and it would be no excuse that the tender had been entered into since it is clear that where the judicial review proceedings are commenced within 14 days, the decision of the Procuring Entity is not final in which event the Court could be properly entitled to nullify the procurement. The decision of the Board having been made on 11th December 2012 and these proceedings having been instituted on 20th December 2012, the same were instituted within

time hence the mere fact that the contract had been awarded and part payment made is in my view inconsequential.”

20. In **Republic v Public Procurement Administrative Review Board & 2 others Ex parte Noble Gases International Limited [2013] eKLR** Majanja, J held that:

“...This provision answers the core question in contention, that is, whether the filing of judicial review proceeding before the High court within the prescribed 14 day-period acts as an automatic stay. I take the position that section 100 of the Act implies that the Board’s decision is to be kept in abeyance until the court makes its final decision. The use of the term, “shall take effect” discloses the legislative purpose and intent. For all practical purposes, the Board’s decision was ‘frozen’ so to speak until such a time as the High court issued an order of judicial review contemplated under the section over the decision or after the lapse of the 14 day period whichever comes first. I find and hold that the provision is a statutory stay.”

The learned Judge continued:

“In conclusion I find and hold that a reading of section 100 of the Public Procurement and Disposal Act leaves no doubt that the legislative intention was that the Board’s decision would not be final and binding and would remain in abeyance until the expiry of the 14-day period provided for appeal under subsection (1) or remain subject to the proceedings of the High Court.”

21. I am persuaded that the 14 days period is automatic stay to enable dissatisfied party to move to High Court for judicial review remedies. The signing of the contract merely one day after the Respondent’s ruling is a clear manifestation that the 1st and 2nd Interested Parties acted in bad faith and with the sole intention to defeat the Applicant’s rights which survived the Respondent’s ruling on 7/9/2020.

22. In light of the foregoing, it is clear that the Contract allegedly entered into by the Interested Parties on 9/9/2020, if at all, is null and void, illegal and unenforceable. That is to say, the order of stay issued by this Court on 11/9/2020 remains in force until such time that this Court finally determines the judicial review proceedings herein.

23. It is the finding hereof that the 2nd Interested Party’s refusal to comply with the orders issued on 11/9/2020 is calculated to undermine the rule of law and is aimed at defeating the ends of Justice. The aforesaid Interested Parties contemptuous acts will not only interfere with the cause of justice but will also likely cause substantial and irreparable losses to the Ex parte Applicant.

24. The upshot is that the application for contempt before the Court is merited and the same is allowed as follows:

(i) **THAT** the 2nd Interested Party be and is hereby held in contempt of Court orders issued on 11th September,2020 for non-compliance with the orders of stay against the 1st and 2nd Interested Parties, their agents and or servants from signing any contract with the 3rd Interested Party with respect to Tender No PU/OT/2020/2021-Provision of security services at the 1st Interested Party.

(ii) **THAT** this Court finds and holds that the 1st and 2nd Interested Parties herein are in contempt of this Court’s Orders of stay issued on 11/9/2020.

(iii) **THAT** it is hereby Ordered that the status quo with regard to the provision of security services at the 1st Interested Party as at 7/9/2020 shall remain until the judicial review proceedings herein are heard and determined on priority basis.

(iv) The 1st Interested Party is hereby ordered and directed to attend this Court on 2/6/2021 for purposes of mitigation and sentence.

(v) Costs herein shall be for the Ex parte Applicant to be paid by the 1st and 2nd Interested Parties.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 12TH DAY OF MAY, 2021

E. K. OGOLA

JUDGE

Ruing delivered via MS Teams in the presence of:

Ms. Mwangi for Ex parte Applicant

Ms. Mureithi for 1st and 2nd Interested Parties

Mr. Ondieki for 3rd Interested Party

Mr. Makuto holding brief Ms. Njau for Respondent

Ms. Peris Court Assistant