



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. MISC. E070 OF 2021

IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE

JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI, A DECLARATION AND MANDAMUS

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

PUBLIC PROCUREMENT ADMINISTRATIVE

REVIEW BOARD.....RESPONDENT

AND

KENYA URBAN ROADS AUTHORITY.....1ST INTERESTED PARTY

M/S DELFREE COMPANY LTD2ND INTERESTED PARTY

EX PARTE:.....FAHIMYASIN COMPANY LTD

RULING

The Application

1. Fahimyasin Company Ltd, 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. 48 of 2021, with respect to Tender No. KURA/RMLF/SR/149/2020-2021 for Labour Based Works for Construction of Walkways in Kiptembwo Area in Nakuru Town – Lot 20.
2. The *ex parte* Applicant has consequently filed an application by way of a Chamber Summons dated 10th May 2021, seeking the following orders:

1. **This Application be certified as urgent and the same be determined on priority basis.**
2. **Leave be granted to the Applicant to institute Judicial Review proceedings against the Respondent for orders;**
 - i. **An order of certiorari be hereby issued to remove in to this court and quash the decision of the Respondent herein, the Public Procurement and Administrative Review Board dated 26th April, 2021 and sent on 27th April 2021 dismissing the ex parte Applicant's application for review No. 48 of 2021**
 - ii. **A declaration that the decision of the Interested Party dated 15th March, 2021 awarding TENDER NO. KURA/RMLF/SR/149/2020-2021 FOR LABOUR BASED WORKS FOR CONSTRUCTION OF WALKWAYS IN KIPTEMBWO AREA IN NAKURU TOWN – LOT 20 to M/S Delfree Company Ltd is illegal and unconstitutional**
 - iii. **Further and in the alternative and without prejudice to any other prayers sought herein, an order of mandamus be issued directing the Interested party to undertake fresh evaluation of all bids received in strict adherence to the tender, the Act and the regulations and award TENDER NO.**

iv. An order that leave so granted operates as stay of the decision of the Respondent herein, the Public Procurement and Administrative Review Board dated 26th April, 2021 and sent on 27th April, 2021 on application for review no 48 of 2021 and any other act including signing and award of contract to 2nd Interested Party .

3. Costs of this application be awarded to the Applicant

3. The grounds for the application are stated in the *ex parte* Applicant's statutory statement dated 10th May 2021, and a verifying affidavit sworn on the same date by Yasin Jaldesa, the *ex parte* Applicant's Chief Executive Officer. In summary, the *ex parte* Applicant averred that the Respondent rendered its decision on 27th April 2021 in the absence of the parties, that the said decision was issued without considering its submissions and supplementary affidavit, and that it was never invited for a virtual or oral hearing.

4. Therefore, that the Respondent failed to comply with the mandatory procedure in the Public Procurement and Asset Disposal Regulations, 2020 which provide for a reasonable notice of the date of the hearing, and conducted the proceedings unfairly without a proper hearing and notice which violated Article 47 of the Constitution. In addition, that the Respondent decision was in error of law for various reasons, and failed to take into account various relevant and material factors, which the *ex parte* Applicant specified in its application.

5. The *ex parte* Applicant annexed copies of the impugned decision made by the Respondent on 26th April 2021 in PPARB Application No. 48 of 2021; of its bid documents for Tender Number KURA/RMLF/SR/149/2020-2021; and of the pleadings it filed in PPARB Application No. 48 of 2021.

The Determination

6. I have considered the application dated 10th 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 proceed with the procurement process of the subject tender to arising from the 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 Respondent on in PPARB Application No. 48 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. 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.

12. 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.

13. 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.**

14. In the present application, the orders given by the Respondent in the impugned decision will result in consequent actions being undertaken in the subject procurement by the 1st and 2nd Interested Parties, and the implementation of the 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

15. In light of the foregoing observations and findings, the *ex parte* Applicants' Chamber Summons dated 10th May 2021 is found to be merited to the extent of the following orders:

I. The *ex parte* Applicants' Chamber Summons application dated 10th 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 apply for an order of Certiorari to remove into the High Court and quash the decision of the Public Procurement Administrative Review Board dated 21st April 2021 handed down in Application No 43 of 2021.

III. The *ex parte* Applicant is granted leave to apply for an order of Certiorari to remove in to this court and quash the decision of the Respondent herein, the Public Procurement and Administrative Review Board dated 26th April, 2021 and sent on 27th April 2021 dismissing the *ex parte* Applicant's application for Review No. 48 of 2021

IV. The *ex parte* Applicant is granted leave to apply for a declaration that the decision of the Interested Party dated 15th March, 2021 awarding TENDER NO. KURA/RMLF/SR/149/2020-2021 FOR LABOUR BASED WORKS FOR CONSTRUCTION OF WALKWAYS IN KIPTEMBWO AREA IN NAKURU TOWN – LOT 20 to M/S Delfree Company Ltd is illegal and unconstitutional.

V. The *ex parte* Applicant is granted leave to apply for an order of Mandamus an order of mandamus be issued directing the Interested party to undertake fresh evaluation of all bids received in strict adherence to the tender, the Act and the regulations and award TENDER NO. KURA/RMLF/SR/149/2020-2021 FOR LABOUR BASED WORKS FOR CONSTRUCTION OF WALKWAYS IN KIPTEMBWO AREA IN NAKURU TOWN – LOT 20 to the bidder with the most responsive bid .

VI. The leave granted herein shall operate as a stay of implementation in any manner by the Respondent and Interested Parties of the Respondent's decision dated 26th April 2021 in PPARB Case Number 48 of 2021 with respect of TENDER NO. KURA/RMLF/SR/149/2020-2021 FOR LABOUR BASED WORKS FOR CONSTRUCTION OF WALKWAYS IN KIPTEMBWO AREA IN NAKURU TOWN – LOT 20, including a stay of the signing and/or further implementation of any contract arising therefrom, pending the hearing and determination of the *ex parte* Applicant's substantive Notice of Motion or until further orders of this Court.

VII. The costs of the *ex parte* Applicants' Chamber Summons application dated 10th May 2021 shall be in the cause.

VIII. 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 copy of this ruling, and (v) a hearing notice, within ten (10) days from today's date.

IX. 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.

X. 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.

XI. 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.

XII. A virtual hearing of the *ex parte* Applicant's substantive Notice of Motion shall be held on 7th June 2021 at 3.00pm, when a judgment date will also be reserved.

XIII. 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.

XIV. 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.

XV. 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.

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

XVII. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for a virtual hearing on 7th June 2021 at 3.00pm and shall send the parties an electronic link for the mention.

XVIII. 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, 13th May 2021.

XIX. Parties shall be at liberty to apply.

16. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 12TH DAY OF MAY 2021

P. NYAMWEYA

JUDGE