



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 96 OF 2020

IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE

JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI AND PROHIBITION

BETWEEN

PREMIER VERIFICATION QUALITY SERVICES (PVQS) LTD.....APPLICANT

VERSUS

PUBLIC PROCUREMENT REGULATORY AUTHORITY.....RESPONDENT

AND

KENYA BUREAU OF STANDARDS.....INTERESTED PARTY

RULING

The Application

1. Premier Verification Quality Services (PVQS) Limited, the *ex parte* Applicant herein, participated in, and was one of the successful bidders in a tender advertised by the Kenya Bureaus Standards, which is joined as an Interested Party herein. The subject tender was Tender No. KEBS/T009/2019-2021- International Tender for Enlargement of Provision of Pre-Export Verification of Conformity (PVOC) to Standard Services. The *ex parte* Applicant is aggrieved by an investigation report dated 29th April 2020 undertaken by the Public Procurement Regulatory Authority on the procurement of the said tender, and has brought these proceedings against the said Authority, which is sued as the Respondent herein.

2. The *ex parte* Applicant in its application, brought by way of a Chamber Summons dated 8th May 2020, is seeking the following orders:

“1.THAT this application be certified urgent and be heard *ex parte*.

2. THAT leave be and is hereby granted to the applicant to institute judicial review proceedings seeking:

(a) An Order of *Certiorari* to remove into this Court the Investigations Report by the respondent dated 29th April 2020 on the Procurement of Pre-Export Verification of Conformity (PVOC) to Standards Services Tender No. KEBS/T009/2019-2021, and any additional report or finding founded upon the said report, and any decision to interfere with or to terminate the contract between the applicant and the interested party that shall result from that procurement process, for purposes of quashing it, and to quash it.

(b) An order of Prohibition stopping the Respondent from continuing with its investigations into the Procurement of Pre-Export Verification of Conformity (PVOC) to Standards Services Tender No. KEBS/T009/2019-2021 and further from barring or interfering with the entry into a contract between the applicant and the interested party arising from the aforesaid procurement, and further from adopting, effecting, executing, enforcing or causing the adoption, effectuation, execution and enforcement of its investigations report dated 29th April 2020 and or of any other report or recommendations founded upon the said investigations report dated 29th April 2020, targeting the said

procurement process and resultant contract, by itself or through any department, agency or body of the Government of Kenya.

3. THAT the leave so granted to institute these judicial review proceedings shall operate as an Order of stay suspending the respondent's and any other department, agency or body of the Government of Kenya's investigations into the Procurement of Pre-Export Verification of Conformity (PVOC) to Standards Services- Tender No. KEBS/T009/2019-2021, in addition to suspending the implementation of, or further action on the respondent's Investigations Report dated 29th April 2020 on corruption and irregularities in Tender No. KEBS/T009/2019-2021 pending the hearing and determination of the substantive Notice of Motion.

4. THAT costs be to the Applicant.

5. Any other order that is just and equitable".

3. The grounds for the application are stated in the *ex parte* Applicant's statutory statement dated 8th April 2020, and a verifying affidavit sworn on the same date by Abdiwali Ali Mohammed, the *ex parte* Applicant's manager. In summary, the Applicant alleges that the impugned investigations report dated 29th April 2020 by the Respondent shall come into effect on 11th May 2020, having been served upon the Interested Party on the 4th May 2020.

4. Further, that the said report indicates that it is conclusive and that the Respondent shall terminate the subject procurement process, despite the said tender having been the subject of a determination by the Public Procurement Administrative Review Board in Application No. 14 of 2020, and of High Court Judicial Review Application No. 60 of 2020. Lastly, that the Respondent is barred from undertaking such investigations under section 40(1) Public Procurement Asset Disposal Act 2015.

5. The *ex parte* Applicant annexed copies of the Respondent's report on corruption and irregularities in the procurement of the tender for Pre-Export Verification of Conformity (PVOC) to Standard Services which is dated 29th April 2020, and of the pleadings filed and orders made in Request For Review No. 14 of 2020 before the Public Procurement Administrative Review Board and in Judicial Review Application No. 60 of 2020 which is before this Court.

The Determination

6. I have considered the application dated 8th May 2020 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 the Respondent intends to implement and take further action on the impugned investigation report.

7. On the orders sought by the *ex parte* Applicant for leave to commence judicial review proceedings, the applicable law on leave 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 court and make the decision as to whether an applicant's case is sufficiently meritorious to justify leave. In the present application, the *ex parte* Applicant has provided evidence of the Respondent's investigation report dated 29th April 2020 which is annexed as Annexure "AAM4" to its verifying affidavit. The Applicant has also averred to the grounds and reasons why it considers the Respondent's investigation report to be illegal and *ultra vires*, and cited the legal provisions relied upon.

9. 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 Respondent.

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. 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. See in this regard 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 Wandaayi vs Kenya National Assembly & 2 Others, (2016) eKLR.

13. In the present application the Respondent has stated in the impugned report that it intends to finalise the report within seven (7) days from the date of the report, and forward it to relevant government agencies for further action. Its decision is thus not yet fully implemented, and is of a continuing nature and thus amenable to stay. In addition, there is need to prevent the implementation of the said report until the legality of the Respondent's decision is established. The stay orders sought by *the ex parte* Applicants are therefore merited to this extent.

The Orders

14. In light of the foregoing observations and findings, the *ex parte* Applicants' Chamber Summons dated 8th May 2020 is found to be merited. I accordingly grant the following orders:

I. The *ex parte* Applicants' Chamber Summons application dated 8th May 2020 be and is hereby certified as urgent, and that the same is hereby admitted for hearing *ex parte* at the first instance.

II. The *ex parte* Applicant is granted leave to apply for an order of Certiorari to remove into this Court the Investigations Report by the Respondent dated 29th April 2020 on the Procurement of Pre-Export Verification of Conformity (PVOC) to Standards Services Tender No. KEBS/T009/2019-2021, and any additional report or finding founded upon the said report, and any decision to interfere with or to terminate the contract between the Applicant and the interested party that shall result from that procurement process, for purposes of quashing it, and to quash it.

III. The *ex parte* Applicant is granted leave to apply for an order of Prohibition stopping the Respondent from continuing with its investigations into the Procurement of Pre-Export Verification of Conformity (PVOC) to Standards Services Tender No. KEBS/T009/2019-2021 and further from barring or interfering with the entry into a contract between the applicant and the interested party arising from the aforesaid procurement, and further from adopting, effecting, executing, enforcing or causing the adoption, effectuation, execution and enforcement of its investigations report dated 29th April 2020 and or of any other report or recommendations founded upon the said investigations report dated 29th April 2020, targeting the said procurement process and resultant contract, by itself or through any department, agency or body of the Government of Kenya.

IV. The leave so granted herein to institute these judicial review proceedings shall operate as a stay suspending the Respondent's investigations into the Procurement of Pre-Export Verification of Conformity (PVOC) to Standards Services-Tender No. KEBS/T009/2019-2021, and suspending the implementation of, or further action on the Respondent's investigation report dated 29th April 2020 on Corruption and Irregularities in Tender No. KEBS/T009/2019-2021 for Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services, pending the hearing and determination of the substantive Notice of Motion or further orders by this Court.

V. The costs of the Chamber Summons dated 8th May 2020 shall be in the cause.

VI. The *ex parte* Applicant shall file and serve the Respondent and Interested Party with the substantive Notice of Motion, and shall also serve the Respondent and Interested Party with the Chamber Summons dated 8th May 2020 and its supporting documents, a copy of this ruling, and a mention notice, within ten (10) days from today's date.

VII. Upon being served with the said pleadings and documents, the Respondent and Interested Party shall be required to file their responses to the substantive Notice of Motion within fourteen (14) days from the date of service.

VIII. This matter shall be mentioned on 8th June 2020 for further directions.

IX. 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. In this respect, all the parties shall file their pleadings, applications and written submissions electronically, by sending them to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com with copies to asunachristine51@gmail.com, and shall also avail the electronic copies in word format.

X. The electronic copies of pleadings and documents sent by the parties shall be clearly and correctly titled to indicate the J.R Case Number, the name of the Party sending it (that is whether the *Ex Parte* Applicant, Respondent or Interested Party), and the nature of the pleading or document.

XI. 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.

XII. The parties shall also be required to send the respective affidavits of service by way of electronic mail to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com with copies to asunachristine51@gmail.com.

XIII. The Deputy Registrar of the Judicial Review Division shall send a copy of this ruling and the extracted orders to the *ex parte* Applicant by electronic mail by close of business on Wednesday, 13th May 2020.

XIV. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for mention on 8th June 2020, and bring it to the attention of a Judge in the Division on that date for directions.

XV. Parties shall be at liberty to apply.

15. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 12TH DAY OF MAY 2020

P. NYAMWEYA

JUDGE