



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 104 OF 2020

IN THE MATTER OF AN APPLICATION FOR LEAVE FOR

JUDICIAL REVIEW ORDERS OF PROHIBITION AND CERTIORARI

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

CLERK OF THE NATIONAL ASSEMBLY.....1ST RESPONDENT

THE NATIONAL ASSEMBLY.....2ND RESPONDENT

OKIYA OMTATAH OKOITIL.....3RD RESPONDENT

EX PARTE APPLICANT.....EAA COMPANY LIMITED

RULING

The Application

1. EAA Company Limited, the *ex parte* Applicant herein is aggrieved by a report and recommendations made by the 2nd Respondent's Parliamentary Investment Committee on the Auditor General's Special Audit Report dated 10th July 2019, which it states has implications on Tender No. KEBS/T010/2019-2021, and the contract entered into by the *ex parte* Applicant upon participating in the said tender.
2. The *ex parte* Applicant has consequently moved this Court in an application by way of Chamber Summons dated 15th May 2020, seeking the following orders:

“1. THAT the 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 for purpose of quashing, and to quash, the 1st and 2nd respondent's Parliamentary Investment Committee's Report and Recommendations on the consideration of the Auditor General's Special Audit Report dated 10th July 2019 only insofar as it touches on, refers to, relates to and make recommendations respecting and regarding tender no. KEBS/T010/2019-2021 and the contract entered into by the applicant upon participating in the said tender.**

b) **An order of Prohibition stopping the 1st and 2nd Respondents from adopting and implementing the report and recommendations of the Parliamentary Investments Committee's Report and Recommendations on the consideration of the Auditor General's Special Audit Report dated 10th July 2019 only insofar as it touches on, refers to, relates to and make recommendations respecting and regarding tender no. KEBS/T010/2019-2021 and the contract entered into by the applicant upon participating in the said tender.**

2. **THAT the leave so granted to institute these judicial review proceedings shall operate as a stay to suspend the adoption and implementation of the Parliamentary Investments Committee's Report and Recommendations on the consideration of the Auditor General's Special Audit Report dated 10th July 2019 only insofar as it touches on, refers to, relates to and make recommendations respecting and regarding tender no. KEBS/T010/2019-2021 and the contract entered into by the applicant upon participating in the said tender.**

3. **THAT Costs be to the applicant.**

4. **Any other order that is just and equitable."**

5. The application is supported by the *ex parte* Applicants' Statutory Statement dated 15th May 2020, and a verifying affidavit sworn on the same date by Wycliffe Muga, the *ex parte* Applicant's manager. In summary, the *ex parte* Applicant avers that 1st and 2nd Respondents failed to comply with Article 229(8) Constitution of Kenya 2010 to debate, adopt and implement a report on the Auditor General's Special Audit Report dated 10th July 2019 within the required three (3) months of being tabled before them. However, that the 2nd Respondent's Parliamentary Investment Committee has now come up with a report and recommendations on the same audit report, that has been publicised and published through the 3rd Respondent in a suit filed by him in Judicial Review Application No. 90 of 2020, prematurely and before the 1st and 2nd Respondents have considered and adopted them as parliamentary documents.

6. Further, that the 1st and 2nd Respondents' Parliamentary Investment Committee Report and Recommendations went beyond its scope by touching upon Tender no. KEBS/T010/2019-2021 whereas it had been mandated to consider the Auditor General's Special Audit Report dated 10th July 2019 respecting a previous tender no. KEBS/T019/2017-2020, and also made recommendations on the said tender which it never gave the *ex parte* Applicant an opportunity to respond to or present its defence upon.

3. The *ex parte* Applicant annexed copies of the reports of the Hansard proceedings of the Public Investment Committee hearing for 13th November 2019, the impugned Report, Recommendations and Decisions by the Public Investment Committee, the decision delivered by the Public Procurement Administrative Review Board in Request For Review No. 18 of 2020, and pleadings filed in Nairobi H.C Judicial Review Application No. 66 of 2020 and Nairobi H.C. Judicial Review Application No. 66 of 2020 on the subject tender, as well as various other reports on the previous tenders No. KEBS/TO57/2014-2015 and No. KEBS/TO10/2019-2021.

The Determination

4. I have considered the application dated 15th 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 in light of the possible debate and adoption of the impugned Report and Recommendations of the 2nd Respondent's Parliamentary Investment Committee.

5. 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.

6. 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 impugned Report and Recommendations by the 2nd Respondent's Parliamentary Investment Committee, and has also averred to the grounds and reasons why it considers the Respondents' actions to be unconstitutional and illegal.

7. 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.

8. 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."

9. 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.

10. 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.

11. 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 Wandayi vs Kenya National Assembly & 2 Others, (2016) eKLR.

12. In the present application the implementation stage and processes of the of the impugned report and recommendations by the 2nd Respondent's Parliamentary Investment Committee need to be clarified to the Court. In addition, given that the amendment will affect members of the 2nd Respondent and public who are not parties in this suit, it is necessary to hear what prejudice is likely to be suffered if the stay orders sought are granted. The question and prayer that the leave granted herein operates as a stay of the impugned report and recommendations by the 2nd Respondent's Parliamentary Investment Committee will therefore need to be argued *inter-partes*.

The Orders

13. In light of the foregoing observations and findings, the *ex parte* Applicants' Chamber Summons dated 15th May 2020 is found to be merited to the extent of the following orders:

I. The *ex parte* Applicants' Chamber Summons application dated 15th 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 institute judicial review proceedings seeking an order of Certiorari to remove into this Court for purpose of quashing, and to quash, the 1st and 2nd Respondent's Parliamentary Investment Committee's Report and Recommendations on the consideration of the Auditor General's Special Audit Report dated 10th July 2019, only insofar as it touches on, refers to, relates to and make recommendations respecting and regarding tender no. KEBS/T010/2019-2021 and the contract entered into by the applicant upon participating in the said tender.

III. The *ex parte* Applicant is granted leave to institute judicial review proceedings seeking an order of Prohibition, stopping the 1st and 2nd Respondents from adopting and implementing the report and recommendations of the Parliamentary Investments Committee's Report and Recommendations on the consideration of the Auditor General's Special Audit Report dated 10th July 2019 only insofar as it touches on, refers to, relates to and make recommendations respecting and regarding tender no. KEBS/T010/2019-2021 and the contract entered into by the applicant upon participating in the said tender.

IV. Prayer 3 of the *ex parte* Applicant's Chamber Summons dated 15th May 2020 seeking orders that the leave so granted to institute these judicial review proceedings shall operate as a stay to suspend the adoption and implementation of the Parliamentary Investments Committee's Report and Recommendations on the consideration of the Auditor General's Special Audit Report dated 10th July 2019 only insofar as it touches on, refers to, relates to and make recommendations respecting and regarding tender no. KEBS/T010/2019-2021 and the contract entered into by the applicant upon participating in the said tender shall be heard *inter partes*, and a ruling thereon shall be reserved at a hearing to be held on 8th June 2020.

V. The *ex parte* Applicant shall file and serve the Respondents with (i) its substantive Notice of Motion (ii) the Chamber Summons dated 15th May 2020 and its supporting documents, (iii) skeletal submission on the prayer 3 of the said Chamber Summons, (iv) a copy of this ruling, and (v) a hearing notice, within seven (7) days from today's date.

VI. Upon being served with the said pleadings and documents, the Respondents shall be required to file their responses to, and skeletal submissions on prayer 4 of the *ex parte* Applicant's Chamber Summons dated 15th May 2020 within seven (7) days from the date of service.

VII. 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 prayer 4 of the *ex parte* Applicant's Chamber Summons dated 15th May 2020 and 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.

VIII. 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.

IX. 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.

X. 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.

XI. 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.

XII. 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 Thursday, 21st May 2020.

XIII. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for hearing on 8th June 2020, and bring it to the attention of a Judge in the Division on that date for reservation of a ruling on prayer 3 of the *ex parte* Applicant's Chamber Summons dated 15th May 2020 and for further directions.

XIV. Parties shall be at liberty to apply.

14. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 20TH DAY OF MAY 2020

P. NYAMWEYA

JUDGE