



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

NAIROBI

JUDICIAL REVIEW APPLICATION NO. 102 OF 2020

IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE

JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI AND PROHIBITION

BETWEEN

KENYA REVENUE AUTHORITY.....APPLICANT

VERSUS

THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD....RESPONDENT

AND

SKAGA LIMITED.....1ST INTERESTED PARTY

ON THE MARK SECURITY LIMITED.....2ND INTERESTED PARTY

RULING

The Application

1. Kenya Revenue Authority, the *ex parte* Applicant herein, is aggrieved by the decision of the Public Procurement Administrative Board (the Respondent herein) dated 5th May 2020 on the 2nd Interested Party's Request for Review Application Number 51 of 2020. The said decision overturned the *ex parte* Applicant's award to the 1st Interested Party of Tender Number KRA/HQS/NCB-046/2019-2020 for the supply and delivery of K9 dogs and training of dog handlers.

2. The *ex parte* Applicant has consequently moved this Court by way of a Chamber Summons dated 13th May 2020, is seeking the following orders:

a) **THAT** the Court be pleased to certify the application as extremely urgent and admit the same for hearing *ex parte* in the first instance.

b) **THAT** the Court be pleased to grant leave to the *ex parte* Applicant to apply for an order of Certiorari to remove in to this Court and quash the decision made by the Respondent, the Public Procurement and Administrative Review Board (Review Board) on the 5th May 2020 by which it allowed the 2nd Interested Party's Request for Review.

c) **THAT** the Court be pleased to grant leave to the *ex parte* Applicant herein to apply for a Declaration that the letter of Notification of Award dated 24th March 2020 with respect to tender number KRA/HQS/NCB-046/2019-2020 addressed to the 1st Interested party (SKAGA Limited) be and is hereby upheld and reinstated.

d) **THAT** leave granted do operate as stay of the Respondent's Ruling of 5th May 2020 pending the hearing and determination of this application.

e) **THAT** leave granted do operate as stay of the Respondent's Ruling of 5th May 2020 pending the hearing and

determination of the intended Notice of Motion application.

d) THAT costs of this Application be provided to the Applicant.

3. The grounds for the application are stated in the *ex parte* Applicant's statutory statement dated 13th May 2020, and a verifying affidavit sworn on 14th May 2020 by Grace Murichu-Kariuki, the *ex parte* Applicant's Head of Procurement. In summary, the Applicant alleges that the Respondent committed a jurisdictional error, when it allowed a Preliminary Objection raised by the *ex-parte* Applicant that it had no jurisdiction to entertain the request for review, but went ahead to hear the Request for Review. Further, that the Respondent's decision was unfair, unreasonable and *ultra vires*, as it evaluated the tender and introduced adjustments to the tender document thus ensuring the 2nd Interested Party proceeds to the Financial Evaluation stage.

4. The *ex parte* Applicant annexed copies of the Respondent's decision dated 5th May 2020, the Request for Review filed with the Respondent by the 2nd Interested Party on 14th April 2020, the pleadings filed in relation to the said Request for Review, and of the Procurement Administrative Circular No.02/2020 dated 24th March 2020.

The Determination

5. I have considered the application dated 13th 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 the reason that there is a deadline set by law of fourteen (14) days within which it needs to apply for a review of the Respondent's decision.

6. 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.

7. 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 brought evidence of the impugned decision made by the Respondent, has averred to the grounds and reasons why it considers the Respondent's decision to be illegal an *ultra vires*, and has cited the legal provisions relied upon.

8. 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.

9. 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.”

10. 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.

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

12. In the present application, there is need to prevent the implementation of the Respondent's decision until its legality is established. In this respect a perusal of the decision shows that it requires the *ex parte* Applicant to re-evaluate the subject tender, and the decision is therefore amendable to stay. The stay orders sought by the *ex parte* Applicant is therefore merited to this extent.

The Orders

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

i. The *ex parte* Applicant's Chamber Summons application dated 13th May 2020 be and is hereby certified as urgent, and

that the same is hereby admitted for hearing *ex parte* and on a priority basis.

ii. The *ex parte* Applicant is granted leave to apply for an order of Certiorari to remove in to this Court and quash the decision made by the Respondent, the Public Procurement and Administrative Review Board (Review Board) on the 5th May 2020 by which it allowed the 2nd Interested Party's Request for Review.

iii. The *ex parte* Applicant is granted leave to apply for a Declaration that the letter of Notification of Award dated 24th March 2020 with respect to tender number KRA/HQS/NCB-046/2019-2020 addressed to the 1st Interested party (SKAGA Limited) be and is hereby upheld and reinstated.

iv. The leave so granted herein to institute these judicial review proceedings shall operate as a stay of the decision made by the Respondent on 5th May 2020 and of the execution of the orders in the said decision, pending the hearing and determination of the *ex parte* Applicant's substantive Notice of Motion or until further orders of this Court.

v. The costs of the Chamber Summons dated 13th 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 Parties with the Chamber Summons dated 13th 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 Parties shall be required to file their responses to the substantive Notice of Motion within ten (10) days from the date of service.

viii. This matter shall be mentioned on 9th 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 Monday, 18th May 2020.

The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for mention on 9th June 2020, and bring it to the attention of a Judge in the Division on that date for directions.

xiv. Parties shall be at liberty to apply.

14. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 15TH DAY OF MAY 2020

P. NYAMWEYA

JUDGE