



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 101 OF 2020

IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE

JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI AND PROHIBITION

BETWEEN

SKAGA LIMITED.....APPLICANT

VERSUS

THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD.....RESPONDENT

AND

THE ACCOUNTING OFFICER KENYA REVENUE AUTHORITY....1ST INTERESTED PARTY

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

RULING

The Application

1. Skaga Limited, the *ex parte* Applicant herein, is aggrieved by the decision of the Public Procurement Administrative Board (the Respondent herein) dated 5th May 2020 to cancel and also set aside the Tender No. KRA/HQS/NCB-046/2019-2020 which was awarded to the *ex parte* Applicant on the 27th March 2020 by the Kenya Revenue Authority (1st Interested Party herein). The Respondent also set aside the notification of the unsuccessful bid of even date made to On Mark Security Limited, the 2nd Interested party herein. The Respondent in its decision further directed the 1st Interested party to re-admit the 2nd Interested Party's Bid and that of the *ex parte* Applicant to the technical evaluation stage and have them re-evaluated afresh, and that the said process be concluded within 14 days from the 5th May 2020.

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 this Application be certified as urgent and the same be heard ex-parte.

b. THAT this Honourable Court be pleased to grant the Applicant an Order of Certiorari to bring into this Honourable Court for purposes of being quashed the entire decision of the PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD, the 1st Respondent herein, in Application Number 51 of 2020, On the Mark Security Ltd vs The Accounting Officer, Kenya Revenue Authority & Skaga Ltd, dated 5th May 2020, in relation to Tender No. KRA/HQS/NCB-046/2019-2020.

c. THAT this Honourable Court be pleased to grant the Applicant an Order of Prohibition to Prohibit the enforcement of the Final Orders made by the Respondent dated 5th May 2020 directed at the 1st Interested party to have the re-admission of the 2nd Interested party's bid and that of the Applicant to the Technical and Evaluation stage and the re-evaluation of the 2nd Interested party's bid and Applicants bid at the Technical Evaluation Stage, within the period of Fourteen (14) days from the 5th May 2020 as ordered by the till further orders of this Honourable Court.

d. THAT the Orders granted pursuant to prayers 3 and 4 hereinabove do operate as an Order of Stay to suspend all the Orders made by the Respondent on the 5th May 2020, until the determination of the Application and/or until further Orders of this Honourable Court.

e. THAT the Costs be to the Applicant in any event.

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 the same date by Simon Njeru Kabuga, the *ex parte* Applicant's Managing Director. In summary, the Applicant alleges that the Respondent heard and determined the Request for Review filed by the 2nd Interested Party against the award made to the Applicant in violation of the rules and laws governing the administrative Review process. Further, that its decision made on the 5th May 2020 is tainted with illegality as the rules of natural justice were not observed as far as the same relate to the *ex parte* Applicant, who was substantially condemned unheard.

4. The *ex parte* Applicant annexed copies of the subject Tender documents, the letter dated 27th March 2020 informing it had won the tender, the pleadings filed in relation to the Request for Review by the 1st Interested Party in Application Number 51 of 2020 before the Respondent, and the Respondent's decision dated 5th May 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 the Respondent in its decision dated 5th May 2020 directed the *ex parte* Applicant and Interested Parties to undertake further actions within a set timeline of fourteen (14) days.

6. 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 reason for the leave was 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** as follows:

“The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived... Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full *inter partes* hearing of the substantive application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised judicially”.

7. It is 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 letter awarding it the tender and of the Respondent's decision nullifying the tender. The *ex parte* Applicant has also averred to the grounds and reasons why it considers the Respondent's decision to be illegal, and 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. The main factor is whether or not the decision or action sought to be stayed has been fully implemented. It was thus held in **Jared Benson Kangwana vs. Attorney General, Nairobi HCCC No. 446 of 1995** that stay of proceedings should be granted where the situation may result in a decision which ought not to have been made being concluded. Similarly, Maraga J. (as he then was) in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006** expressed himself on this factor as follows:

“... The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken. It is however not appropriate to compel a public body to act....”

12. This factor was also discussed in R (H). vs Ashworth Special Hospital Authority (supra) where Dyson L.J. held as follows:

“As I have said, the essential effect of a stay of proceedings is to suspend them. What this means in practice will depend on the context and the stage that has been reached in the proceedings. If the inferior court or administrative body has not yet made a final decision, then the effect of the stay will be to prevent the taking of the steps that are required for the decision to be made. If a final decision has been made, but it has not been implemented, then the effect of the stay will be to prevent its implementation. In each of these situations, so long as the stay remains in force, no further steps can be taken in the proceedings, and any decision taken will cease to have effect: it is suspended for the time being.”

13. A similar position has been taken by Odunga J. in Republic vs Cabinet Secretary for Transport & Infrastructure & 4 Others ex parte Kenya Country Bus Owners Association and 8 Others (2014) e KLR and in James Opiyo Wandayi vs Kenya National Assembly & 2 Others, (2016) eKLR, where the learned judge held that it is only where the decision in question is complete that the Court cannot stay the same. However, where what ought to be stayed is a continuing process, the same may be stayed at any stage of the proceedings.

14. I am in agreement with the above-cited decisions. It therefore follows 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.

15. In the present application the Respondent’s decision has elements which still require further implementation in terms of re-consideration of the ex parte Applicant’s and 1st Interested Parties bids by the 2nd Interested Party. 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 Applicant is therefore merited to this extent.

The Orders

16. 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 Applicants’ 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 bring into this Court for purposes of being quashed the decision dated 5th May 2020 by the Public Procurement Administrative Review Board, the Respondent herein, in Application Number 51 of 2020 - On the Mark Security Ltd vs The Accounting Officer, Kenya Revenue Authority & Skaga Ltd, in relation to Tender No. KRA/HQS/NCB-046/2019-2020.

III. The ex parte Applicant is granted leave to apply for an order of Prohibition to Prohibit the enforcement of the final Orders made by the Respondent dated 5th May 2020 directed at the 1st Interested Party to have the re-admission of the 2nd Interested Party’s bid and that of the ex parte Applicant to the Technical and Evaluation stage, and the re-evaluation of the 2nd Interested party’s bid and ex parte Applicants bid at the Technical Evaluation Stage, within the period of fourteen (14) days from the 5th May 2020.

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 Friday, 15th May 2020.

XIV. 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.

XV. Parties shall be at liberty to apply.

17. Orders accordingly.

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

P. NYAMWEYA

JUDGEa