



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW APPLICATION NO. 115 OF 2020
IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE
JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

BETWEEN

AFRICAN MERCHANT ASSURANCE

CO. LTD (AMACO).....APPLICANT

VERSUS

THE PUBLIC PROCUREMENT

ADMINISTRATIVE REVIEW BOARD.....RESPONDENT

AND

MADISON GENERAL INSURANCE

KENYA LTD.....1ST INTERESTED PARTY

THE ACCOUNTING OFFICER

NAIROBI CITY COUNTY.....2ND INTERESTED PARTY

M/S BRITAM GENERAL INSURANCE

COMPANY (K) LIMITED.....3RD INTERESTED PARTY

RULING

The Application

1. African Merchant Assurance Co. Ltd (AMACO), the *ex parte* Applicant herein, is aggrieved by the decision of the Public Procurement Administrative Board (the Respondent herein) delivered on 21st May 2020 in Review Applications No. 56/2020 and 61/2020 in regard to Tender No. NCC/F&EP/AM/T/318/2019-2020 for provision of insurance services to the Nairobi City County for the year 2020/2021. The said applications were lodged with the Respondent by the on the 1st and 3rd Interested Parties.
2. The Respondent in the impugned decision of 21st May 2020 cancelled and set aside a letter of notification of intention to enter into contract dated 14th April 2020; nullified and set aside the contract dated 30th April 2020 between the *ex parte* Applicant and Nairobi City County; ordered the Nairobi City County to undertake fresh evaluation of financial bids excluding the *ex parte* Applicant's; and ordered that the Nairobi City County must award and sign a fresh contract with another tenderer excluding the *ex parte* Applicant within 7 days.
3. The *ex parte* Applicant has consequently moved this Court by way of a Chamber Summons dated 29th May 2020, and is seeking the following orders therein:

1. THAT this Court be pleased to certify this matter urgent and direct that the same be heard *ex-parte* in the first instance.

2. THAT this Court be pleased to grant leave to the Applicant to file an application for Judicial Review seeking the following orders:-

(a) An order of certiorari to bring into the High Court for purposes of being quashed the consolidated decision of the Public Procurement Administrative Review Board dated the 21st May 2020 in Review Applications No. 56/2020 and 61/2020 in regard to Tender No. NCC/F&EP/AM/T/318/2019-2020 for provision of insurance services for the year 2020/2021 for Nairobi City County.

(b) An order of prohibition restraining the 2nd Interested Party from entering into any other contract other than the contract dated 30th April 2020 and executed between the 2nd Interested Party and the Applicant.

(c) An order of mandamus to compel the 2nd Interested Party to fully perform the contract dated 30th April 2020 and executed between the 2nd Interested Party and the Applicant.

(d) Such further and other reliefs as this Court may deem just and expedient to grant.

3. THAT the leave so granted does operate as stay of implementation, enforcement and/or execution of the consolidated decision of the Public Procurement Administrative Review Board dated the 21st May 2020 in Review Applications No. 56/2020 and 61/2020 in regard to Tender No. NCC/F&EP/AM/T/318/2019-2020 for provision of insurance services for the year 2020/2021 for Nairobi City County.

4. THAT costs of and incidental to this application be provided for.

4. The grounds for the application are stated in the *ex parte* Applicant's statutory statement dated 29th May 2020, and a verifying affidavit sworn on 29th May 2020 by Lawrence Tanui, the *ex parte* Applicant's General Manager. In summary, the *ex parte* Applicant alleges *inter alia* that the Respondent acted without jurisdiction, *ultra vires* and illegally in the consolidated decision dated the 21st May 2020 by entertaining the Requests for Review, and by purporting to recall procurement proceedings that had been concluded by the signing of the contract on 30th April 2020, contrary to section 167(4) of the Public Procurement and Asset Disposal Act.

5. The *ex parte* Applicant annexed copies of the letter of notification of award dated 14th April 2020 given to it by the 2nd Interested Party, its acceptance letter dated 29th April 2020, the contract signed with the 2nd Interested Party on 30th April 2020 and policies issued thereto, the pleadings filed with the Respondent in Review Applications No. 56/2020 and 61/2020, and the Respondent's impugned consolidated decision on the said applications delivered on 21st May 2020.

The Determination

6. I have considered the application dated 29th 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 of fourteen (14) days within which it needs to apply for a review of the Respondent's 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 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 contract it has entered into with the 2nd Interested Party and of the impugned decision made by the Respondent on 21st May 2020, and has also averred to the grounds and reasons why it considers the Respondent's decision to be illegal an *ultra vires*, including 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 Wandayi vs Kenya National Assembly & 2 Others, (2016) eKLR**.

13. In the present application, a perusal of the Respondent's decision dated 21st May 2020 shows that it requires the *ex parte* Applicant to proceed with the procurement process of the subject tender from the financial evaluation stage to conclusion, including the making of a fresh award, and the decision is therefore a continuing one and is amenable to stay. There is thus a need to maintain the *status quo* until the legality or otherwise of the Respondent's actions is established. The stay orders sought by the *ex parte* Applicant are therefore merited to this extent.

The Orders

14. In light of the foregoing observations and findings, the *ex parte* Applicants' Chamber Summons dated 29th May 2020 is found to be merited. I accordingly grant the following orders:

I. The *ex parte* Applicant's Chamber Summons application dated 29th 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 file an application for Judicial Review seeking an order of Certiorari to bring into the High Court for purposes of being quashed the consolidated decision of the Public Procurement Administrative Review Board dated the 21st May 2020 in Review Applications No. 56/2020 and 61/2020 in regard to Tender No. NCC/F&EP/AM/T/318/2019-2020 for provision of insurance services for the year 2020/2021 for Nairobi City County.

III. The *ex parte* Applicant is granted leave to file an application for Judicial Review seeking an order of Prohibition restraining the 2nd Interested Party from entering into any other contract other than the contract dated 30th April 2020 and executed between the 2nd Interested Party and the Applicant.

IV. The *ex parte* Applicant is granted leave to file an application for Judicial Review seeking an order of Mandamus to compel the 2nd Interested Party to fully perform the contract dated 30th April 2020 and executed between the 2nd Interested Party and the Applicant.

V. The leave granted herein to the *ex parte* Applicant to institute judicial review proceedings shall operate as a stay of the implementation, enforcement and/or execution of the consolidated decision of the Public Procurement Administrative Review Board dated the 21st May 2020 in Review Applications No. 56/2020 and 61/2020 in regard to Tender No. NCC/F&EP/AM/T/318/2019-2020 for provision of insurance services for the year 2020/2021 for Nairobi City County, pending the hearing and determination of the *ex parte* Applicant's substantive Notice of Motion or until further orders of this Court.

VI. The costs of the Chamber Summons dated 29th May 2020 shall be in the cause.

VII. The *ex parte* Applicant shall file and serve the Respondent and Interested Parties with the substantive Notice of Motion, and shall also serve the Respondent and Interested Parties with the Chamber Summons dated 29th May 2020 and its supporting documents, a copy of this ruling, and a mention notice, within fourteen (14) days from today's date.

VIII. 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 fourteen (14) days from the date of service.

IX. This matter shall be mentioned on 15th July 2020 for further directions.

X. 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.

XI. 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.

XII. 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 description of the Party sending it (that is whether the *Ex Parte* Applicant, Respondent or Interested Party), and the nature of the pleading or document.

XIII. 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.

XIV. 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.

XV. 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, 3rd June 2020.

XVI. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for mention on 15th July 2020, and bring it to the attention of a Judge in the Division on that date for directions.

XVII. Parties shall be at liberty to apply.

15. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 2ND DAY OF JUNE 2020

P. NYAMWEYA

JUDGE