



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW APPLICATION NO. 117 OF 2020**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE**

**JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI AND DECLARATION**

**BETWEEN**

**PARLIAMENTARY SERVICE COMMISSION.....APPLICANT**

**VERSUS**

**THE PUBLIC PROCUREMENT**

**ADMINISTRATIVE REVIEW BOARD.....RESPONDENT**

**AND**

**ARPRIM CONSULTANTS.....INTERESTED PARTY**

**RULING**

**The Application**

1. The Parliamentary Service Commission, the *ex parte* Applicant herein, is aggrieved by the decision of the Public Procurement Administrative Board (the Respondent herein) delivered on 21<sup>st</sup> May 2020 in Request for Review Application No. 57/2020 that was lodged by the Interested Party. The said decision was in relation to Request for Proposal (RFP) No. PJS/RFP/001/2019-2020 for the Provision of Consultancy Services for Preparation of a Master Plan, Preliminary and Detailed Design, Tender Documents and Construction Supervision of the Proposed Centre for Parliamentary Studies and Training on L.R. No. 28172, in which the *ex parte* Applicant was the procuring entity and the Interested Party was a bidder.

2. The Respondent in the impugned decision of 21<sup>st</sup> May 2020 cancelled and set aside the *ex parte* Applicant's letter of notification of termination of the RFP dated 30<sup>th</sup> April 2020; nullified and cancelled and set aside the Procuring entity's professional opinion dated 27<sup>th</sup> April 2020, upheld the evaluation report dated 23<sup>rd</sup> April 2020 and ordered that the procuring entity completes the procurement process to its logical conclusion including issuance of letters of notification of the outcome of RFP No. PJS/RFP/001/2019-2020 within 14 days from the date of the decision.

3. The *ex parte* Applicant has consequently moved this Court by way of a Chamber Summons dated 29<sup>th</sup> May 2020, and is seeking the following orders therein:

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

**2. That the Court be pleased to grant leave to the *ex parte* Applicant herein apply for an order of certiorari to remove into this court and quash the decision made by the Respondent herein, the Public Procurement and Administrative Review Board (Review Board) on the 21<sup>st</sup> May, 2020 which allowed the Interested Party's Request for Review.**

**3. That the Court be pleased to grant leave to the *ex parte* Applicant herein to apply for a declaration that the Letters of Notification of Termination dated 30<sup>th</sup> April, 2020 with regards to Request For Proposal No. PJS/RFP/001/2019-2020 for the Provision of Consultancy Services for Preparation of a Master Plan, Preliminary and Detailed Design, Tender Documents**

and Construction Supervision of the Proposed Centre for Parliamentary Studies and Training on L.R. No. 28172 addressed to the Interested Party and other bidders involved in the Request for Proposal be and is hereby upheld and reinstated.

4. That leave granted herein do operate as stay of the Respondent's Ruling of 21<sup>st</sup> May, 2020 pending the hearing and determination of this Application.

5. That leave granted herein do operate as stay of the Respondent's Ruling of 21<sup>st</sup> May, 2020 pending the hearing and determination of the intended Notice of Motion Application.

6. That costs of this Application be provided to the Applicant.

4. The grounds for the application are stated in the *ex parte* Applicant's statutory statement dated 29<sup>th</sup> May 2020, and a verifying affidavit sworn on 29<sup>th</sup> May 2020 by Keith Kisinguh, the *ex parte* Applicant's Chief Procurement Officer. In summary, the *ex parte* Applicant alleges *inter alia* that the Respondent erred in law by dismissing a preliminary issue of jurisdiction raised by the *ex parte* Applicant that it had no jurisdiction to hear and determine the Request for Review since the procurement process had been terminated in accordance with section 63(1) of the Public Procurement and Asset Disposal Act, 2015 (the Act) as provided in section 167(4) of the Public Procurement and Asset Disposal Act.

5. Further, that the said termination was *inter alia* on account of the evaluation process not being completed within the statutory 21 days as provided for in section 126(3) of the Act, and after the accounting officer took into account to the professional opinion of the Procurement Officer in making a decision to award a tender in accordance with the provisions of section 84(1) of the Act. Therefore, that the Respondent's decision was *ultra vires*, illegal and irrational.

6. The *ex parte* Applicant annexed copies of the Respondent's impugned decision delivered on 21<sup>st</sup> May 2020, and of the pleadings filed in Request for Review Application No. 57/2020.

#### **The Determination**

7. I have considered the application dated 29<sup>th</sup> 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.

8. 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.

9. 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 on 21<sup>st</sup> 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.

10. 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.

11. 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.”**

12. 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.

13. 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.**

14. In the present application, a perusal of the Respondent's decision dated 21<sup>st</sup> May 2020 shows that it requires the *ex parte* Applicant to proceed with the procurement process of the subject Request for Proposals to its conclusion, including the issuance of notification letters of the outcome within fourteen days of the decision. The implementation of the decision is therefore of a continuing nature, and is amenable to stay. There is thus a need to maintain the *status quo* until the legality or otherwise of the Respondent's decision is established. The stay orders sought by the *ex parte* Applicant are therefore merited to this extent.

### **The Orders**

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

**I. The *ex parte* Applicant's Chamber Summons application dated 29<sup>th</sup> 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 into this court and quash the decision made by the Respondent herein, the Public Procurement and Administrative Review Board (Review Board) on the 21<sup>st</sup> May, 2020 which allowed the Interested Party's Request for Review Application No. 57/2020.**

**III. The *ex parte* Applicant is granted leave to apply for a declaration that the Letters of Notification of Termination dated 30<sup>th</sup> April, 2020 with regards to Request For Proposal No. PJS/RFP/001/2019-2020 for the Provision of Consultancy Services for Preparation of a Master Plan, Preliminary and Detailed Design, Tender Documents and Construction Supervision of the Proposed Centre for Parliamentary Studies and Training on L.R. No. 28172 addressed to the Interested Party and other bidders involved in the Request for Proposal be and is hereby upheld and reinstated.**

**IV. The leave granted herein to the *ex parte* Applicant to institute judicial review proceedings shall operate as a stay of the implementation of the Respondent's Ruling delivered on 21<sup>st</sup> May 2020 in Request for Review Application No. 57/2020, 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 29<sup>th</sup> May 2020 shall be in the cause.**

**VI. 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 Party with the Chamber Summons dated 29<sup>th</sup> May 2020 and its supporting documents, a copy of this ruling, and a mention notice, within fourteen (14) 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 15<sup>th</sup> July 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.**

**X. 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](mailto:judicialreview48@gmail.com) with copies to [asunachristine51@gmail.com](mailto:asunachristine51@gmail.com), and shall also avail the electronic copies in word format.**

**XI. 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.**

**XII. 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](mailto:judicialreview48@gmail.com) with copies to [asunachristine51@gmail.com](mailto:asunachristine51@gmail.com).**

**XIII. 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](mailto:judicialreview48@gmail.com) with copies to [asunachristine51@gmail.com](mailto:asunachristine51@gmail.com).**

**XIV. 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, 3<sup>rd</sup> June 2020.**

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

**XVI. Parties shall be at liberty to apply.**

16. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 2<sup>ND</sup> DAY OF JUNE 2020**

**P. NYAMWEYA**

**JUDGE**