



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW MISCELLANEOUS APPLICATION NO. E030 OF 2020

IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE

JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI AND MANDAMUS

BETWEEN

ASHFORD KINOTI MURIUNGI APPLICANT

VERSUS

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

AND

KENYA BROADCASTING CORPORATION.....1ST INTERESTED PARTY

JOSEPH GITONGA2ND INTERESTED PARTY

RULING

The Application

1. Ashford Kinoti Muriungi, the *ex parte* Applicant herein, is aggrieved by the decision of the Public Procurement Administrative Board (the Respondent herein), which was delivered on 14th August 2020 in Review Application No 110 of 2020. The said decision concerns Tender No. No. 9/KBC/2019-20 for the lease out of a parcel of land (Marania TX Station), advertised by the Kenya Broadcasting Corporation (the 1st Interested Party), which tender was awarded to Joseph Gitonga, the 2nd Interested Party herein.

2. The *ex parte* Applicant has consequently moved this Court by way of a Chamber Summons application dated 27th August 2020, in which he is seeking the following orders:

1. The application be certified urgent and be heard and determined in the first instance.

2. The Applicant be granted leave to apply for:

a. An Order of Certiorari removing to this Court for purposes of being quashed, the decision of Public Procurement Administrative Review Board delivered on 14th of August 2020 being Application for Review No. 110 of 2020 (Ashford Kinoti Muriungi vs Kenya Broadcasting Corporation & Joseph Gitonga)

b. An Order of Certiorari removing to this Court for purposes of being quashed, the decision of Kenya Broadcasting Corporation in the matter of the award to Joseph Gitonga of the tender No. 9/KBC/2019-20 for lease out of parcel of land (Marania TX Station), contained in letters of notification dated on or about 10th July 2020 and addressed to Joseph Gitonga & Ashford Kinoti Muriungi, or any other bidder or party to the subject tender.

c. An Order of Mandamus compelling Kenya Broadcasting Corporation to award Ashford Kinoti Muriungi the tender No. 9/KBC/2019-20 for lease out of parcel of land (Marania TX Station) .

3. Leave herein do operate to stay the decision of the Public Procurement Administration Review Board dated the 14th of August 2020 and further stay Kenya Broadcasting Corporation award to Joseph Gitonga, the 2nd Interested Party herein, the contract for tender No. 9/KBC/2019-20 for lease out of parcel of land (Marania TX Station) by way of signing a contract, entering into contract negotiations or taking any other action to implement the said decision pending the hearing and determination of the substantive Judicial Review application.

4. The cost of this application in favour of the Applicant.

3. The grounds for the application are stated in the *ex parte* Applicant's statutory statement dated 27th August 2020, and a verifying affidavit he swore on the same date. The main ground for review is that the impugned decision and ruling of the Respondent in Application for Review No. 110 of 2020 dated 14th of August 2020 is vitiated by a fundamental error of law, to the extent that the Respondent failed to recognize the existence of the *ex parte* Applicant's pleadings and did not consider the issues raised therein.

4. The *ex parte* Applicant annexed copies of the subject tender documents, the pleadings filed in Application Number 110 of 2020 before the Respondent, and the Respondent's decision dated 14th August 2020.

The Determination

5. I have considered the application dated 27th August 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 subject tender is likely to be implemented by the Interested Parties.

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 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 eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless, and 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.

7. It is thus 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. 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 the implementation stage of the tender that is the subject of the impugned decision needs to be clarified to the Court. The question and prayer that the leave granted herein operates as a stay of the impugned decision 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 27th August 2020 is found to be merited to the extent of the following orders:

1. The *ex parte* Applicants' Chamber Summons application dated 27th August 2020 be and is hereby certified as urgent, and the same is hereby admitted for hearing *ex parte* at the first instance.

d. The *ex parte* Applicant is granted leave to apply for an order of Certiorari removing to this Court for purposes of being quashed, the decision of Public Procurement Administrative Review Board delivered on 14th of August 2020 being Application for Review No. 110 of 2020 (Ashford Kinoti Muriungi vs Kenya Broadcasting Corporation & Joseph Gitonga)

e. The *ex parte* Applicant is granted leave to apply for an order of Certiorari removing to this Court for purposes of being quashed, the decision of Kenya Broadcasting Corporation in the matter of the award to Joseph Gitonga of the tender No. 9/KBC/2019-20 for lease out of parcel of land (Marania TX Station), contained in letters of notification dated on or about 10th July 2020 and addressed to Joseph Gitonga & Ashford Kinoti Muriungi, or any other bidder or party to the subject tender.

f. The *ex parte* Applicant is granted leave to apply for an order of Mandamus compelling Kenya Broadcasting Corporation to award Ashford Kinoti Muriungi the tender No. 9/KBC/2019-20 for lease out of parcel of land (Marania TX Station).

II. Prayer 3 of the *ex parte* Applicant's Chamber Summons dated 27th August 2020 seeking orders that the leave so granted do operate as a stay of the Respondent's decision of 14th August 2020 and of the award to Joseph Gitonga, the 2nd Interested Party herein, of the contract for tender No. 9/KBC/2019-20, shall be heard *inter partes*, and a ruling thereon shall be reserved at a hearing to be held on 12th October 2020

III. The *ex parte* Applicant shall file and serve the Respondent and Interested Parties with (i) the substantive Notice of Motion (ii) the Chamber Summons dated 27th August 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 fourteen (14) days from today's date.

IV. 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 and skeletal submissions on prayer 3 of the *ex parte* Applicant's Chamber Summons dated 27th August 2020 within fourteen (14) days from the date of service.

V. 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 Applicant's substantive Notice of Motion on the basis of the electronic copies of the pleadings and the written submissions filed by the parties.

VI. All the parties shall file their pleadings and submissions electronically, by filing them with the Judiciary e-filing system, and send copies in word format by electronic mail to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com and asunachristine51@gmail.com.

VII. 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.

VIII. 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.

IX. 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.

X. The Deputy Registrar of the Judicial Review Division shall send a copy of these directions to the Applicant by electronic mail by close of business on Thursday, 3rd September 2020.

XI. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for hearing on 12th October 2020.

XII. Parties shall be at liberty to apply.

14. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 1ST SEPTEMBER 2020

P. NYAMWEYA

JUDGE