



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. E1111 OF 2020

IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE

JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI,

PROHIBITION AND MANDAMUS

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD.....RESPONDENT

THE ACCOUNTING OFFICER KENYATTA NATIONAL HOSPITAL....1ST INTERESTED PARTY

KENYATTA NATIONAL HOSPITAL.....2ND INTERESTED PARTY

KAMTIX CLEANERS CO. LTD.....3RD INTERESTED PARTY

EX PARTE: THE GARDENS AND WEDDING CENTRE LIMITED

RULING

The Application

1. The Garden and Wedding Centre Limited, the *ex parte* Applicant herein, is aggrieved by the Respondent's decision made on 17th September, 2020 in respect of the *ex parte* Applicant's application to re-admit Review No 106 of 2020 dated 25th August 2020 in arising from tender no KNH/T/33/2020-2021. The *ex parte* Applicant has consequently filed an application by way of a Chamber Summons dated 21st September 2020, seeking the following orders:

1. This Application be certified urgent and heard ex parte in the first instance.

2. The Applicant be granted Leave to apply for the following Judicial Review orders:

(a) An order of Certiorari to remove into this Court for the purpose of being quashed the Respondents decision contained in the ruling dated 17th September, 2020.

(b) An Order of prohibition to prohibit the 1st and 2nd interested parties from awarding and implementing tender No. KNH/V33/20 for Provisions of cleaning services

(c) An Order for mandamus to compel the Respondent to Re-admit PPARB Review No. 106 of 2020 and have the same heard before the board on merits.

3. The grant of leave do operate as a stay of procurement process of TENDER NO KNH/V33/2020-2021 which is likely to

proceed as a result of the Respondents decision dated 17th September, 2020, pending the hearing and determination of the substantive Notice of Motion.

4. The costs of this Application to abide the final outcome of the substantive motion.

2. The grounds for the application are stated in the *ex parte* Applicant's statutory statement dated 21st September 2020, and a verifying affidavit sworn on the same date by Daniel Gathogo Mugo, the *ex parte* Applicant's Director. In summary, the main ground is that the Respondent made material errors of law in dismissing its application to reinstate the review proceedings in Review No 106 of 2020. The *ex parte* Applicant annexed copies of various documents in support of his application including its application before the Respondent and the impugned decision made by the Respondent on 17th September 2020.

The Determination

3. I have considered the application dated 21st September 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 reasons that the procurement of the tender that was the subject of the *ex parte* Applicant's application before the Respondent is ongoing.

4. 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.

5. 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. It was explained by Lord Bingham in **Sharma vs Brown Antoine (2007) 1 WLR 780**, that a ground of challenge is arguable if its capable of being the subject of sensible argument in court, in the sense of having a realistic prospect of success.

6. In the present application, the *ex parte* Applicant has provided evidence of the ruling by the Respondent on his application in PPARB Review No 106 of 2020 and has averred as to the grounds and reasons why it considers the Respondent's decision and recommendations to be in error unreasonable, irrational and unfair. 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.

7. 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.”

8. 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.

9. 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. A similar decision was made by Maraga J. (as he then was) in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006** .

10. 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.”

11. 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.

12. In the present application the Respondent has stated that the procurement process of TENDER NO KNH/V33/2020-2021 that is sought to be stayed is ongoing. However, there is no information provided by the *ex parte* Applicant of the stage of procurement of the said tender. In the premises I find that the prayer for stay orders need to be canvassed *inter partes*, so that the parties likely to be affected by the prayer for stay can confirm the state of implementation .

The Orders

13. In light of the foregoing observations and findings, the *ex parte* Applicants' Chamber Summons dated 21st September 2020 is found to be merited only to the extent of the following orders:

I. The *ex parte* Applicants' Chamber Summons application dated 21st September 2020 be and is hereby certified as urgent, and 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 for purpose of being quashed the Respondents decision contained in the ruling dated 17th September, 2020.

III. The *ex parte* Applicant is granted leave to apply for an order of prohibition to prohibit the 1st and 2nd Interested Parties from awarding and implementing tender No. KNH/V33/20 for Provisions of cleaning services

IV. The *ex parte* Applicant is granted leave to apply for an order of mandamus to compel the Respondent to Re-admit PPARB Review No. 106 of 2020 and have the same heard before the board on merits.

V. Prayer 3 of the *ex parte* Applicant's Chamber Summons dated 21st September 2020 that the grant of leave do operate as a stay of procurement process of TENDER NO KNH/V33/2020-2021 shall be canvassed *inter partes* at a hearing to be held on 10th November 2020.

VI. 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 21st September 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.

VII. Upon being served with the said pleadings and documents, the Respondents 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 21st September 2020 within fourteen (14) days from the date of service.

VIII. 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 prayer 3 of the *ex parte* Applicant's Chamber Summons dated 21st September 2020, and 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.

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

X. 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.

XI. The parties shall also be required to file and send to the Deputy Registrar of the Judicial Review Division their respective affidavits of service evidencing personal service, by way of electronic mail to judicialreview48@gmail.com with copies to asunachristine51@gmail.com.

XII. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for hearing on 10th November 2020.

XIII. The Deputy Registrar of the Judicial Review Division shall send a copy of these directions to the *ex parte* Applicant by electronic mail by close of business on Friday, 2nd October 2020.

XIV. Parties shall be at liberty to apply.

14. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 1ST DAY OF OCTOBER 2020

P. NYAMWEYA

JUDGE