



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. E059 OF 2020

IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE

JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

BETWEEN

THE CONSORTIUM OF TOYOTA TSUSHO CORPORATION; KYUDEN INTERNATIONAL CORPORATION AND DL KOISAGAT TEA ESTATE.....APPLICANT

AND

KENYA ELECTRICITY GENERATING COMPANY PLC [KENGEN].....RESPONDENT

RULING

The Application

1. The Consortium of Toyota Tsusho Corporation; Kyuden International Corporation And Dl Koisagat Tea Estate is the Applicant herein, and is aggrieved by the decision made on 15th October, 2020 by the Kenya Electricity Generating Company PLC [KENGEN] (the Respondent herein) through its Supply Chain Director, which disqualified the Applicant's consortium from further participation in the tender for financing, design, supply, construction, commissioning, operation and maintenance of 140 MW Olkaria PPP geothermal power project located at Olkaria.
2. Further, that consequent to the decision to disqualify the Applicants, the Respondent has published in the Kenya gazette dated the 30th October 2020 the updated list of the pre-qualified bidders, and is now proceeding to Request for Proposals from the said bidders for the project under reference without the participation of the Applicant.
3. The Applicant has therefore filed an application by way of a Chamber Summons dated 6th November 2020, seeking the following orders:

- 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 exempt the Applicant from seeking reliefs from the defunct Public-Private Partnership Petitions Committee and admit this Application for hearing and determination in the interest of justice.
- 3. THAT** 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 decision of the Kenya Electricity Generating Company PLC [KENGEN] contained in the notification of disqualification dated the 15th October 2020 in respect of the tender for financing, design, supply, construction, commissioning, operation and maintenance of 140 MW Olkaria PPP geothermal power project located at Olkaria.
- b. An order of prohibition restraining the Respondent from inviting qualified bidders to submit proposals or to proceed with the tender process in any way as long as the Applicant remains excluded.

c. **An order of mandamus to compel the Respondent to re-admit the Applicant back to the tender process and evaluate its proposal to the logical conclusion of the procurement.**

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

4. THAT the leave so granted does operate as a stay of implementation, enforcement, and/or execution of the decision by the Respondent contained in the letter dated the 15th October 2020 in respect of the tender for financing, design, supply, construction, commissioning, operation and maintenance of 140 MW Olkaria PPP geothermal power project located at Olkaria

5. 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 6th November 2020, and a verifying affidavit sworn on the same date by Reo Kumon, the Applicant's Consortium authorized representative. In summary, the main ground is that the Respondent's decision to disqualify the Applicant's Consortium based on the departure of its previous lead member was therefore unlawful and unfair, as the Applicant had by a letter dated 18th September 2020 submitted documents to the Respondent demonstrating the eligibility of Kyuden International Corporation [KIC] as a Lead Member of the consortium following the withdrawal of its previous lead member, and that the Respondent ignored and/or refused to respond to the said letter.

5. Furthermore, that pursuant to Section 67 (4) of the Public-Private Partnership Act, 2013 proceedings by a party aggrieved by a decision of the Contracting Authority must be commenced within 15 days otherwise the decision of the Contracting Authority shall become final and binding on the parties, and that the Applicant prepared and lodged a Petition at the Public-Private Partnership Petitions Committee. However, that the said forum is non-existent as it is yet to be constituted.

6. The Applicant annexed copies of various documents in support of their application, including the its consortium's tender documents, copies of letter it sent to the Respondent, and the impugned decision made by the Respondent contained in a letter by the Respondent's Supply Chain Director dated 15th October 2020, and a copy of its petition filed with the Public-Private Partnership Petitions Committee on 30th October 2020.

The Orders

7. I have considered the application dated 6th November 2020 and the reasons offered in support of the urgency, and I am satisfied that the Applicant has demonstrated that this matter is urgent. This for reasons that there are certain actions that are likely to be undertaken with respect to the tender that is the subject of the Respondent's impugned decision.

8. However, in light of the prayer that the Applicant be exempt from seeking reliefs from the Public-Private Partnership Petitions Committee, the said prayer and the question of leave to commence judicial review proceedings against the Respondent require to be heard *inter partes* before any orders can be granted by this Court.

9. Section 67 of the Public Private Partnerships Act provides as follows in this regard:

(1) There is established a committee to be known as the Petition Committee which shall consider all petitions and complaints submitted by a private party during the process of tendering and entering into a project agreement under this Act.

(2) The Petition Committee shall consist of —

(a) the chairperson who shall be a person qualified for appointment as a judge of the High Court of Kenya;

(b) four other persons with such knowledge and experience as the Cabinet Secretary shall, in consultation with the unit, consider appropriate; and

(c) the unit director.

(3) The members of the Petition Committee shall hold office for a term of three years and shall be eligible for re-appointment for one further term.

(4) Where a petition is based on an administrative decision of the Committee, the unit or the contracting authority, such petition for a review of the decision shall be made within fifteen days from the date of the decision in the prescribed form.

(5) The decision of the Committee shall be final and binding on both parties.

(6) The Cabinet Secretary may by regulations, provide for the procedure for determining a petition under subsection (1).

10. In the circumstances, I hereby direct and order as follows:

I. The Chamber Summons dated 6th November 2020 is certified urgent and is admitted to hearing on a priority basis.

II. The Applicant shall serve the Respondent with (i) the Chamber Summons dated 6th November 2020, (ii) skeletal submissions on the said Chamber Summons (iii) a copy of this ruling, and (iv) a hearing notice with ten (10) days of today's date.

III. The Respondent is granted leave to file and serve their responses to the Chamber Summons dated 6th November 2020 and skeletal submissions thereon within ten (10) days of service by the Applicant.

IV. The Chamber Summons dated 6th November 2020 shall be heard on 1st December 2020.

V. In the meantime temporary orders are hereby granted staying the implementation, enforcement, and/or execution of the decision by the Respondent disqualifying the Applicant's consortium contained in the letter dated the 15th October 2020 in respect of the tender for financing, design, supply, construction, commissioning, operation and maintenance of 140 MW Olkaria PPP geothermal power project located at Olkaria, pending the hearing and determination of the Chamber Summons dated 6th November 2020 or until further orders of this Court.

VI. 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 Chamber Summons dated 6th November 2020 on the basis of the electronic copies of the pleadings and the written submissions filed by the parties.

VII. 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.

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 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.

X. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for hearing on 1st December 2020.

XI. 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, 12th November 2020.

XII. Parties shall be at liberty to apply.

11. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 10TH DAY OF NOVEMBER 2020

P. NYAMWEYA

JUDGE