



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. E058 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.....1ST RESPONDENT

KENYA NATIONAL HIGHWAYS AUTHORITY.....2ND RESPONDENT

THE ACCOUNTING OFFICER,

KENYA NATIONAL HIGHWAYS AUTHORITY.....3RD RESPONDENT

AND

CHINA COMMUNICATIONS

SERVICES INTERNATIONAL LIMITED1ST INTERESTED PARTY

WHITESPACE TECHNOLOGIES LIMITED.....2ND INTERESTED PARTY

GEONET TECHNOLOGIES LIMITED3RD INTERESTED PARTY

EX PARTE:.....SOLITON TELMEC LIMITED

RULING

The Application

1. Soliton Telmec Limited, the *ex parte* Applicant herein, is aggrieved by the decision made on 29th October, 2020 by the Public Procurement Administrative Review Board (the 1st Respondent herein), on Request for Review No. 134 of 2020 filed by the China Communications Services International Limited, the 1st Interested Party herein. The said Request for Review concerned the decision of the Kenya National Highways Authority (the 2nd Respondent herein) to re-award Tender No. KeNHA/2297/2020 - Civil Works for the Main Build of Optic Fiber Cable for Eldoret-Lokichar-Nakodok Corridor, Lot 5: Eldoret- Lokichar Section (28514M) to the *ex parte* Applicant.
2. The 1st Respondent, in its decision dated 29th October 2020, cancelled and set aside the 2nd Respondent's Letter of Notification of Award of the subject Tender to the *ex parte* Applicant, and the Letter of Notification of Unsuccessful bid to the 1st Interested Party all dated 29th September 2020 The 1st Respondent further directed the 2nd Respondent to comply with the orders it issued on 15th September 2020 in PPARB Application No. 121 of 2020 within fourteen (14) days from the date of the impugned decision.

3. The *ex parte* Applicant has consequently filed an application by way of a Chamber Summons dated 4th November 2020, seeking the following orders:

1. **THAT this matter be certified urgent and heard expeditiously on a priority basis and service of the same be dispensed with.**

2. **THAT the Ex parte Applicant be and is hereby granted leave to apply for:**

a) **An Order of Certiorari to bring into this Court for purposes of being quashed the entire decision of the Public Procurement Administrative Review Board, the 1st Respondent herein, dated 29th October 2020 in respect of the Request for Review Application No. 134/2020 of 8th October 2020 for Tender No. KeNHA/2297/2020 - Civil Works for the Main Build of optic Fiber Cable for Eldoret-Lokichar-Nakodok Corridor, Lot 5: Eldoret-Lokichar Section (28514M)**

b) **An Order of Prohibition to bring into this Honorable Court for purposes of prohibiting the 2nd Respondent from implementing the entire decision of the Public Procurement Administrative Review Board, the 1st Respondent herein, dated 29th October 2020 in respect of the Request for Review Application No. 134/2020 of 8th October 2020 for Tender No. KeNHA/2297/2020 - Civil Works for the Main Build of Optic Fiber Cable for Eldoret-Lokichar-Nakodok Corridor, Lot 5: Eldoret-Lokichar Section (28514M).**

c) **An Order of Mandamus to bring into this Honorable Court directed at the Kenya National Highways Authority, the 2nd Respondent herein, compelling it to award Tender No. KeNHA/2297/2020 Civil Works for the Main Build of Optic Fiber Cable for Eldoret-Lokichar-Nakodok Corridor, Lot 5: Eldoret-Lokichar Section (28514M) to Soliton Telmec Limited, the Ex-Parte Applicant herein.**

3. **THAT the grant of leave herein do operate as a stay of execution and implementation of the 1st Respondent's entire decision dated 29th October 2020 in respect of the Request for Review Application No. 134/2020 of 8th October 2020 for Tender No. KeNHA/2297/2020 - Civil Works for the Main Build of Optic Fiber Cable for Eldoret-Lokichar-Nakodok Corridor, Lot 5: Eldoret-Lokichar Section (28514M), pending the hearing and determination of the substantive judicial review application.**

4. **THAT the costs of this application be provided for.**

4. The grounds for the application are stated in the *ex parte* Applicant's statutory statement dated 4th November 2020, and a verifying affidavit sworn on the same date by Hassan Omar, the *ex parte* Applicant's Chief Finance Officer. In summary, the main ground is that the 1st Respondent's jurisdiction to hear and determine the 1st Interested Party's Request for Review was ousted by virtue of section 4 (2) (f) of the Public Procurement and Asset Disposal Act, 2015, as the procurement of the subject tender was under a bilateral and multilateral agreement between the government of Kenya and a foreign agency, entity or multilateral agency with respect to which the Act did not apply.

5. The *ex parte* Applicant annexed copies of various documents in support of his application, including the tender documents floated in its Tender No. KeNHA/2297/2020, the letter of notification of award dated 29th September 2020 sent to it by the 2nd Respondent, and the impugned decision made by the 1st Respondent in PPARB Application No 134 of 2020 on 29th October 2020.

The Determination

6. I have considered the application dated 4th November 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 there are certain actions required to be undertaken with respect to the subject tender within fourteen days arising from the 1st Respondent's impugned 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. 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.

9. In the present application, the *ex parte* Applicant has provided evidence of the award of the subject tender to it, and the ruling by the Respondent on PPARB Review No 134 of 2020 cancelling the same, and has averred as to the grounds and reasons why it considers the Respondent's decision to be illegal. 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. 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** .

13. 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.”

14. 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.

15. In this regard, the orders given by the 1st Respondent in the impugned decision require certain actions to be taken by the 2nd Respondent within fourteen (14) days from the date of the impugned decision, including re-evaluation of all the tenders and award of a new tender. The said orders are therefore not only amenable to stay, but the *ex parte* Applicant’s application would also be rendered nugatory if they are not stayed. In the premises the stay orders are merited to this extent.

The Orders

16. In light of the foregoing observations and findings, the *ex parte* Applicants’ Chamber Summons dated 4th November 2020 is found to be merited to the extent of the following orders:

I. The *ex parte* Applicants’ Chamber Summons application dated 4th November 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 bring into this Court for purposes of being quashed the entire decision of the Public Procurement Administrative Review Board, the 1st Respondent herein, dated 29th October 2020 in respect of the Request for Review Application No. 134/2020 of 8th October 2020 for Tender No. KeNHA/2297/2020 - Civil Works for the Main Build of optic Fiber Cable for Eldoret-Lokichar-Nakodok Corridor, Lot 5: Eldoret-Lokichar Section (28514M)

III. The *ex parte* Applicant is granted leave to apply for an order of prohibition for purposes of prohibiting the 2nd Respondent from implementing the entire decision of the Public Procurement Administrative Review Board, the 1st Respondent herein, dated 29th October 2020 in respect of the Request for Review Application No. 134/2020 of 8th October 2020 for Tender No. KeNHA/2297/2020 - Civil Works for the Main Build of Optic Fiber Cable for Eldoret-Lokichar-Nakodok Corridor, Lot 5: Eldoret-Lokichar Section (28514M).

IV. The *ex parte* Applicant is granted leave to apply for an order of mandamus directed at the Kenya National Highways Authority, the 2nd Respondent herein, compelling it to award Tender No. KeNHA/2297/2020 Civil Works for the Main Build of Optic Fiber Cable for Eldoret-Lokichar-Nakodok Corridor, Lot 5: Eldoret-Lokichar Section (28514M) to Soliton Telmec Limited, the Ex-Parte Applicant herein.

V. The grant of leave herein do operate as a stay of execution and implementation of the 1st Respondent's entire decision dated 29th October 2020 in respect of the Request for Review Application No. 134/2020 of 8th October 2020 for Tender No. KeNHA/2297/2020 - Civil Works for the Main Build of Optic Fiber Cable for Eldoret-Lokichar-Nakodok Corridor, Lot 5: Eldoret-Lokichar Section (28514M), pending the hearing and determination of the substantive judicial review application or until further orders by this Court.

VI. The costs of the *ex parte* Applicants’ Chamber Summons application dated 4th November 2020 shall be in the cause.

VII. The *ex parte* Applicant shall file and serve the Respondents and Interested Parties with (i) the substantive Notice of Motion, (ii) the Chamber Summons dated 4th November 2020 and its supporting documents, (iii) a copy of this ruling, and (v) a hearing notice, within fourteen (14) days from today's date.

VIII. Upon being served with the said pleadings and documents, the Respondents 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. The hearing of the substantive Notice of Motion shall be held on 16th December 2020.

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 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.

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 with copies to asunachristine51@gmail.com.

XIII. 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.

XIV. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for hearing on 16th December 2020.

XV. The Deputy Registrar of the Judicial Review Division shall send a copy of this ruling to the *ex parte* Applicant by electronic mail by close of business on Monday, 9th November 2020.

XVI. Parties shall be at liberty to apply.

17. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 6TH DAY OF NOVEMBER 2020

P. NYAMWEYA

JUDGE