



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 GITONGA.....2ND INTERESTED PARTY

RULING NO 2

Introduction

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 consequently moved this Court by way of a Chamber Summons application dated 27th August 2020, in which he is sought 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. On 1st September 2020, this Court granted the *ex parte* Applicant leave to commence judicial review proceedings in terms of prayer 2 of the said Chamber Summons application, and directed that prayer 3 seeking orders that the leave so granted do operate as a stay be heard *inter partes*. This ruling is on the said prayer for stay.

4. Subsequent to this Court's ruling, the *ex parte* Applicant filed its substantive Notice of Motion dated 10th September 2020, while the Respondent filed two replying affidavits both sworn on 20th September 2020 by Robert Maumo Wekesa, its Procurement Manager, in response to the prayer for stay and the substantive Notice of Motion. The Respondent stated that had negotiated terms of the lease with the 2nd interested party, which culminated in the executing of a Lease Agreement on 5th June 2020, a copy of which was attached. Further, that the 2nd Interested Party was made a payment deposit of Kshs 2,000,000.00, and has taken possession of the leased land and has already cultivated the land by planting wheat and potatoes.

5. The 2nd Interested Party also filed two replying affidavits sworn on 2nd November 2020 and 9th November 2020 in response to the prayer for stay and substantive Notice of Motion respectively. The 2nd Interested Party confirmed the averments made by the Respondent that he had entered into a lease agreement and made payment thereto, and that he had taken possession of the subject land. The 2nd Interested Party stated that since proceeded to prepare the land in the subject tender and incurred considerable investment to plant wheat, onions, carrots and potatoes which are due for harvesting in November, 2020 and he annexed copies of photographs of the said crops on the land. Further, that the crops planted on the land in the subject tender are of a perishable nature and will waste away if the order for stay is granted.

The Submissions

6. The Applicant's advocates on record, Ishmael & Company Advocates, filed submissions dated 14th September 2020 on the prayer for stay, wherein reliance was placed on the decisions in the case of **African Merchant Assurance Co. Ltd (Amaco) v Public Procurement Administrative Review Board; Madison General Insurance Kenya Ltd & 2 others (Interested Parties), [2020] eKLR and R (H). vs Ashworth Special Hospital Authority (2003)** that the status quo be maintained until the legality or otherwise the Respondent's action is established.

7. The *ex parte* Applicant reiterated that the gist of its case is that the Respondent turned a blind eye to its own Tender requirements and deliberately lowered the bar for the 2nd Interested Party, thus clearly putting the *ex parte* Applicant and other tenderers at a disadvantage. Further, that the 1st Interested Party failed to recognize the pleadings of the *ex parte* Applicant.

8. Velma Kwanga, the Respondent's advocate on record, filed submissions dated 2nd November 2020 wherein she relied on the decisions in **Taib A. Taib vs. The Minister for Local Government & Others, Mombasa HCMISCA. No. 158 of 2006, Republic vs Cabinet Secretary for Transport & Infrastructure & 4 Others ex parte Kenya Bus Owners Association and 8 others (2014) e KLR**, and **James Opiyo Wandayi vs Kenya National Assembly & 2 Others, (2016) eKLR** to submit that the decision of the 1st Interested Party paved way for the Respondent to conclude the tendering process. Further, that this resulted to the tender award being given to the 2nd Interested Party, the agreement for lease is in place, a deposit has already been made and the 2nd Interested Party is in possession of the land and has already cultivated the leased land. Therefore, that this demonstrates the full implementation of the decision of the 1st Interested party's decision.

9. The 2nd Interested Party's Advocate on record, Sagana Biriq, & Company Advocates likewise filed submissions dated 2nd November 2020, wherein it was urged that a stay order in the present circumstances cannot issue since the action that the *ex parte* Applicant seeks to suspend has already been implemented and an order for stay cannot reverse past acts of both the Procuring Entity and successful tenderer. The decisions in **R (H) vs. Ashworth Hospital Authority (2003) WLR 127, Taib A. Taib vs. The Minister for Local Government & Others, Mombasa HCMISCA. No. 158 of 2006, Questa Care Limited vs Public Procurement Administrative Review Board & 2 others (2018) e KLR** and **George Philip M. Wekulo vs Law Society of Kenya & Another (2005) e KLR**, were cited for this proposition.

10. The 2nd Interested Party further submitted that he stands to suffer insurmountable loss of income and business, due to the amount of investment he has put in the leased agricultural land forming the subject of the tender in dispute, and urged the Court to balance the loss and prejudice to be occasioned to the 2nd Interested Party against any prejudice if any to be occasioned to the *ex parte* Applicant, by maintaining the status quo.

The Determination

11. I have considered the arguments made by the parties herein as regards the leave granted herein operating as a stay of the impugned decision and award, and am guided by the applicable principle that the grant of such leave is discretionary, but that 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 where 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 the Respondent and 2nd Interested Party have deponed that the impugned decision has already been implemented, and that the 2nd Interested is in possession of, and cultivating the subject land that is the subject of the impugned tender. These averments are not controverted by the *ex parte* Applicant. In addition, the 2nd Interested Party has demonstrated the prejudice he is likely to suffer if the stay orders are granted, is, whereas the prejudice that is to be suffered by the *ex parte* Applicant if a stay is not granted is not evident.

15. In the circumstances it is the finding of this Court that the 1st Interested Party’s decision dated 14th August 2020, and the award to the 2nd Interested Party of the contract for tender No. 9/KBC/2019-20 for lease of the subject parcel of land are not amenable to stay for the above reasons.

The Disposition

16. In light of the foregoing observations and findings, this Court orders as follows:

I. Prayer 3 of the *ex parte* Applicants’ Chamber Summons application dated 27th August 2020 is hereby declined.

II. The costs of the *ex parte* Applicants’ Chamber Summons application dated 27th August 2020 shall be in the cause

III. The *ex parte* Applicant shall file and serve the Respondent and Interested Parties with its submissions on the substantive Notice of Motion dated 10th September 2020 within twenty- one (21) days of today’s date.

IV. The Respondent and Interested Parties are granted leave to file and serve their reply submissions within twenty- one (21) days from the date of service by the *ex parte* Applicant.

V. The judgment on the substantive Notice of Motion dated 10th September 2020 shall be reserved at a hearing to be held on 3rd February 2021 .

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 substantive Notice of Motion dated 10th September 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 in word format 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 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 this ruling to the *ex parte* Applicant, Respondent and Interested Parties by electronic mail by close of business on Tuesday, 8th December 2020.

XI. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division’s causelist for hearing by email on 3rd February 2021 .

XII. Parties shall be at liberty to apply.

17. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 4TH DAY OF DECEMBER 2020

P. NYAMWEYA

JUDGE

FURTHER ORDERS ON THE MODE OF DELIVERY OF THIS RULING

In light of the declaration of measures restricting Court operations due to the COVID -19 Pandemic, and following the Practice Directions issued by the Honourable Chief Justice dated 17th March 2020 and published in the Kenya Gazette on 17th April 2020 as Kenya Gazette Notice No. 3137, this ruling will be delivered electronically by transmission to the email addresses of the *ex parte* Applicant's, Respondent's and Interested Parties' Advocates on record.

P. NYAMWEYA

JUDGE