



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW APPLICATION NO. 136 OF 2019**

**REPUBLIC.....APPLICANT**

**VERSUS**

**KENYA VETERINARY VACCINATION PRODUCTION INSTITUTE.....1<sup>ST</sup> RESPONDENT**

**DR JANE WACHIRA.....2<sup>ND</sup> RESPONDENT**

**AND**

**LEEDS EQUIPMENTS & SYSTEMS LTD.....EX PARTE APPLICANT**

**JUDGEMENT**

**The orders sought**

1. Pursuant to the provisions of article 165 (6) and (7) of the 2010 Constitution of Kenya, part III of the Fair Administrative Action Act 2015 and Order 53 rule 3 and 4 of the Civil Procedure Rules 2010 and sections 1A, 1B, and 3A of the Civil Procedure Act (Cap 21) Laws of Kenya, the *ex parte* applicant has applied for the following orders.

1. An order of mandamus to compel the respondents to award tender no. KVVPI/T/I/2017-2018 (Restricted Tender) for the supply, installation and commissioning of laboratory equipment Lot 4 to the *ex parte* applicant.
2. An order of mandamus to compel the respondents to complete the tendering process in respect to tender KVVPI/T/I/2017 (Restricted Tender) for the supply, installation and commissioning of laboratory equipment.
3. Costs of the suit.

**The case for the *ex parte* applicant**

**Grounds in support of the application.**

2. The application is grounded upon the statement, the verifying affidavit of the *ex parte* applicant and other grounds to be adduced at the hearing hereof. The major grounds upon which the relief is sought are as follows. The respondent's accounting officer has acted and is continuing to act in excess of her powers in refusing to carry out her statutory obligations and to complete the tendering process. The respondent's accounting officer has not implemented the order of the respondent's review board. That despite demand having been made the accounting officer has refused and continues to refuse to carry out her public duty namely to complete the procuring process. Finally, there is no other available remedy to compel the accounting officer to carry out her public duty. Additionally, there is no other available remedy to compel the compliance of the order of the review board of the respondent.

**Its affidavit evidence.**

3. The *ex parte* applicant through its director (Geoffrey Koech) has deposed to a 11 paragraphs verifying affidavit. The major averments in that affidavit are as follows. That on 12<sup>th</sup> February 2018, he received an e-mail dated 8<sup>th</sup> February 2018 from the 1<sup>st</sup> respondent notifying him that the Lot he had participated in had been terminated due to inadequate budgetary provisions. He was aggrieved by that decision. As a result, he lodged a request for review on 23<sup>rd</sup> February 2018 before the Public Procurement Administrative Review Board, which subsequently rendered its decision in their favour on 16<sup>th</sup> March 2018.

4. The respondents being aggrieved by the decision of the board on 29<sup>th</sup> March 2018 applied and were granted *ex parte* leave to apply for judicial review of the board's decision vide Judicial Review No 142 of 2018. On 20<sup>th</sup> November 2018 the High Court affirmed the decision of the board and proceeded to dismiss the respondents' application for the judicial review order of certiorari. Furthermore, despite several reminders and demands, the respondents have refused and/or neglected to award them the tender. The refusal to award them the tender despite the order of the review board is contrary to the constitutional dictates of the procurement principles. Based on advice of his counsel, the deponent believes that the High Court can only interfere with the decision of the board if it is found to be illegal, unreasonable or irrational.

#### **The submissions of the *ex parte* applicant.**

5. Counsel for the *ex parte* applicant has submitted that the 1<sup>st</sup> respondent as the procuring entity was directed to issue a letter of award in respect to No. KVVPI/T/I/2017-18 in respect to specification for laboratory equipment No. 4 of the Tender document to the *ex parte* applicant within 14 days from the date of the order; which order has not been complied with. Counsel has further submitted that the procuring entity filed a *Judicial Review Application No 142 of 2018, R v Public Procurement Review Board, ex parte, Kenya Vaccines Production Institute* in which the High Court found that the review board had taken into account the applicable law and the relevant factors. The review board had found that the respondents' termination of the tender proceedings on the grounds of inadequate budgetary provisions was illegal and unjustified.

6. Based on the case of ***Republic v Public Procurement Administrative Review Board & 2 Others, ex parte BABS Security Services Ltd [2018] EKLK***, which in turn cited the Canadian case of ***Apotex Inc. v Canada (Attorney General)***, counsel has submitted that the *ex parte* applicant has met the threshold for the grant of the order of mandamus. In that case the court held that an applicant for the grant of an order of mandamus had to meet the following conditions.

1. There must be a public legal duty to act.
2. The duty must be owed to the applicants.
3. There must be a clear right to the performance of that duty which includes among other conditions, a prior demand for performance, a reasonable time to comply and an ex-press refusal to comply.
4. No other remedy is available to the applicant
5. The order sought must be of some practical value or effect.
6. there is no equitable bar to the relief sought.
7. on a balance of convenience, mandamus must lie.

7. Furthermore, counsel cited the Court of Appeal decision in ***Republic v Kenya National Examination Council, ex parte Gathenji & Others, Civil Appeal No. 266 of 1996***, in which that court set out the parameters of judicial review. It explained that the order of mandamus is of a most remedial nature and is a command issued by the High Court directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and it will issue where there is a specific legal right or no specific legal remedy for that right. That court in terms said that: "...an order of mandamus compels the performance of a public duty which is imposed by a statute on a person or body of persons and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed...."

8. Counsel has further submitted that there resides in the *ex parte* applicant a legal right which has not been enforced despite demands for its performance by the respondents. He also has submitted that there is no equitable bar to the relief being sought. The respondent filed a notice of appeal on 3<sup>rd</sup> December 2018 against the decision of the High Court, when the board's decision had become final. The notice was filed outside the statutory time lines and there is no stay of execution of the orders of the board. Counsel has also submitted that the appeal remains unprosecuted. In terms of section 175 (3) and (4) of the PPADA the High Court is required to determine the judicial review application within 45 days. A person aggrieved by the decision of the High Court may appeal to the Court of Appeal within seven days of such decision and the Court of Appeal shall make a decision within 45 days; which decision shall be final. If either High Court or Court of Appeal fails to make a decision within the prescribed time, the decision of the review board shall be final and binding on all parties.

9. Furthermore, counsel has submitted, based on ***Republic v Central Bank of Kenya & Another, ex parte Horsebridge Network Systems (EA) Ltd [2014] eKLR*** in which the court stated that it would defeat the purpose of judicial review to deny an applicant judicial review remedies, where it has been established that the orders ought to issue, where there is no viable alternative remedy. Counsel has therefore urged the court to grant the applicant's application, with costs.

#### **The case for the respondent.**

10. The 1<sup>st</sup> respondent through Dr. Jane Wachira, who is the accounting officer has filed a 20 paragraph replying affidavit in opposition to the application. In response to paragraphs 6 and 7 of the verifying affidavit, she has deposed that an order of mandamus is not an efficacious relief as she is not under any legal duty to award the tender to the *ex parte* applicant as the tender validity period has lapsed and that the budgetary cycle also lapsed on 30<sup>th</sup> June 2018. Furthermore, the bid tender of the *ex parte* applicant is non-responsive in that it did not comply with the requirements of the equipment that were required.

11. Additionally, she has averred that she is not under a duty to award the tender to the *ex parte* applicant, whose bid price was above the approved budget.

12. Furthermore, she has deposed that mandamus will not be an effective remedy as the evaluation of the tender was contrary to section 80 (1) (2) of the PPADA, 2015. She also has deposed that she is not bound to award the tender to the *ex parte* applicant; since the professional opinion of the 1<sup>st</sup> respondent's head of procurement was arbitrary. She has further deposed that mandamus is not an efficacious remedy; since she is not under a duty to award the tender to the *ex parte* applicant as this will be contrary to the provisions of articles 201 and 227 (1) of the 2010 Constitution, the Public Finance Management Act, 2011, and the PPADA, 2015.

13. In response to paragraph 8 of the verifying affidavit, she has deposed that the review board exceeded its powers by directing her to award the tender to the *ex parte* applicant without due regard to the technical and financial non-responsiveness. Additionally, she has averred in response to paragraphs 6 and 7 of the verifying affidavit that the order of mandamus is not an efficacious relief as the review board was under immense pressure and duress from the *ex parte* applicant to award the tender to it, annexed and marked "JN 4" are two copies of letters.

14. In addition to the foregoing, she has averred that if the court were to grant an order of mandamus, it would be approving an error, which was committed by the review board, contrary to its mandate. She also has averred in response to paragraph 9 of the verifying affidavit that the review board had a legal duty to uphold, respect and promote the constitutional and legal values and principles that are applicable to the public procurement in Kenya. She also has averred that this application is barred by the doctrine of *sub judice* by virtue of the appeal pending in the Court of Appeal, annexed and marked 'JN 5' is a notice of appeal. She also has averred that in the circumstances of the tender, an order of mandamus will not be an efficacious relief for there is no legal duty to negate the public interest by awarding the tender to the *ex parte* applicant to procure a plant that is not fit for the purpose. She has further averred that in the circumstances of the tender, an order of mandamus is not an efficacious relief as she has no legal duty to breach the constitutional and binding principles of responsibility, good governance, prudence, cost effectiveness and value for money. She finally has averred that the application lacks merit and has failed to demonstrate that she owed a duty to award it the tender as its tender bid was technically and financially non-responsive, and was tainted with illegality, unreasonableness and irrationality and the same ought to be dismissed with costs to the respondents.

### **The submissions of the respondents**

15. Counsel for the respondent has submitted that mandamus is a remedy of last resort, which should be granted in exceptional circumstances. He has cited ***Republic v Nairobi Coffee Exchange & 2 Others, ex parte Kenya Planters Co-operative Union Ltd [2019] EKLK***, in which the court held that mandamus is a command requiring the performance of a specified duty, which has not been performed and that it is a discretionary remedy, which the court may refuse to grant, even when the requisite grounds for it exist. In that case again the court observed that examples of where discretion will be exercised against an applicant may include where the applicant's conduct has been unmeritorious or unreasonable. The other cases cited by the respondent have also been cited by the *ex parte* applicant and therefore I do not need to cite them again.

16. The respondent has therefore urged the court to dismiss the *ex parte* applicant's notice of motion dated 19<sup>th</sup> July 2019.

### **ISSUES FOR DETERMINATION.**

17. I have considered the affidavit evidence of the parties, their submissions including the authorities which they cited. As a result, I find that the following are the issues for determination.

1. Whether or not the *ex parte* applicant has made out a case for the grant of the order of mandamus.
2. whether or not the matter is *sub-judice*.
3. Whether or not lack of budgetary provisions is a bar to the grant of an order of mandamus
4. Who bears the costs of this application?

### **Issue 1**

18.18. I find that the issues raised in the submissions of the respondents were first considered in the Public Procurement Administrative Review Board in Review No. 34 of 2018, between Leeds Equipment & Systems Ltd and Kenya Veterinary Vaccines Production Institute and that board by its decision dated 16th March 2018, found that the termination of the tender in favour of the *ex parte* applicant by the respondents as the procuring authority was unlawful. The procuring entity challenged the decision of the board in this court (Nyamweya, J) vide Judicial Review Miscellaneous Application No 142 of 2018, raising the same issues that had been raised before the review board. By its decision the court (Nyamweya, J) on 20<sup>th</sup> November 2018 dismissed the respondents' application for an order of certiorari; with the result that the procuring entity was directed to award the tender to the instant *ex parte* applicant. The termination of the tender was done on the basis that there were inadequate budgetary provisions.

19. The instant *ex parte* applicant has an order of this court in his favour, which it is seeking to enforce by way of an order of mandamus. The respondents position is that an order of mandamus is not an efficacious relief as she is not under any legal duty to award the tender to the *ex parte* applicant as the tender validity period has lapsed. The submission of the *ex parte* applicant is that it is the only remedy that is available and efficacious. The position in law is that the order of the High Court (Nyamweya, J) that confirmed the order of the review board did not lapse because the tender period lapsed. It remains valid and effective until is executed or set aside by the Court of Appeal. This is precisely

the reason why the respondents filed a notice of appeal with a view to have it set aside. Similarly, that order did not lapse because the budgetary cycle also lapsed on 30<sup>th</sup> June 2018. The order remains binding upon the respondents until it is executed or set aside by the Court of Appeal. The order of mandamus will be efficacious, since it is the only way of enforcing the court order. Once the order of the court was issued it acquired a life of its own, independent of the budgetary cycle and the period of the tender validity.

20. Furthermore, the fact that the bid price of the *ex parte* was above the approved budget and the fact that it was not responsive did not affect the validity of the court order, which required compliance from the respondents. Since the respondents did not comply with the court order, it became necessary to enforce it with the order of mandamus. The respondents are under a duty to award the tender to the *ex parte* applicant as directed by the court.

21. Apart from the foregoing, I find as persuasive ***Republic v Central Bank of Kenya & Another, ex parte Horsebridge Network Systems (EA) Ltd, supra***, in which the court stated that it would defeat the purpose of judicial review to deny an applicant judicial review remedies, where it has been established that the orders ought to issue where there is no viable alternative remedy. In the instant application, the *ex parte* applicant has no available alternative; since the respondent is a Governmental body, that is immune from the normal processes of execution used in satisfaction of court decrees and orders in civil proceedings. The 2<sup>nd</sup> respondent is its accounting officer. That leaves the *ex parte* applicant with no option other than to proceed by way of an application for an order of mandamus. The conduct of the *ex parte* applicant has been reasonable. I do not find any barrier to the grant of the order of mandamus in favour of the *ex parte* applicant. I therefore find that the *ex parte* applicant has met the following conditions, which are necessary before an applicant is granted an order of mandamus.

1. There must be a public legal duty to act.
2. The duty must be owed to the applicants.
3. There must be a clear right to the performance of that duty which includes among other conditions, a prior demand for performance, a reasonable time to comply and an ex-press refusal to comply.
4. No other remedy is available to the applicant
5. The order sought must be of some practical value or effect.
6. There is no equitable bar to the relief sought.
7. On a balance of convenience, mandamus must lie, which conditions were set out in ***Republic v Public Procurement Administrative Review Board & 2 Others, ex parte BABS Security Services Ltd, supra***, which was cited by counsel for the *ex parte* applicant and the respondents. Mandamus will therefore issue.

## ISSUE 2

22. The respondents have taken the position that since they have filed a notice of appeal in the Court of Appeal, the matter is *sub-judice* and should not be heard and determined in this court. The law in this regard is that proceedings in this court may only be stayed by this court or the Court of Appeal. It should always be borne in mind that the mere filing of an appeal does not by itself stay proceedings. There is no order of this court or Court of Appeal staying the instant proceedings. The rule of *sub-judice* is a rule of judicial practice that forbids public debate or discussions in respect of the merits or demerits of cases pending in court in the interests of fair determination by the court. The rule does not apply to proceedings in court.

## ISSUE 3.

23. The respondents' submission is that the *ex parte* applicant's bid price was above the approved budgetary provision and was therefore not responsive. I find that according to section 53 (8) of the PPADA, the accounting officer is required to ensure that there are sufficient funds to meet the obligations of the resulting contract are reflected in its approved budget estimates. In terms section 53 (8) reads:

“section 53 (8) Accounting officer shall not commence any procurement proceeding until satisfied that sufficient funds to meet the obligations of the resulting contract are reflected in its approved estimates. “

24. Furthermore, section 53 (9) of the Act makes it an offence for an accounting officer of a procuring entity to start a procurement process without first ascertaining that the goods, works, or the services have been budgeted for. In terms, the provisions of that section reads: “section 53 (9) An accounting officer who knowingly commences any procurement process without ascertaining whether the goods, work, or service is budgeted for, commits an offence under this Act. “

25. The respondents failed to comply with these statutory requirements. The moment they knew they did not have enough funds for this tender, they should have terminated the procuring process. Instead they allowed the process to continue by evaluating the tenders and then terminated it upon the conclusion of the evaluation exercise. The respondents made the bidders including the *ex parte* applicant, believe that there were adequate budgetary allocations for that bidding process. The respondents cannot therefore rely on their failure to defeat the order in favour of the *ex parte* applicant. Furthermore, the provisions of the law that govern execution against the Government do not condition payment and / or settlement of orders of the court to budgetary allocation and parliamentary approval of the Government expenditure in any financial year. In that regard, Githua, J, in ***Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security, ex parte Fredrick Manoah Egunza [2012] ECLR***, put the matter in the following terms: “..... This provision does not condition payment to budgetary allocation and parliamentary approval of Government expenditure in the financial year subsequent to which Government liability accrues. The Respondent's claim that the applicant should have waited until the start of the next financial year to

enforce payment of the decree issued in his favour cannot be sustained firstly because it has no legal basis and secondly because it is the responsibility of the Government to make contingency provisions for its liabilities in tort in each financial year so that successful litigants who obtain decrees against Government are not left without remedy at any time of the year.”

26. Furthermore, with good planning and proper budgetary estimates Government will not lack money to satisfy court decrees and other liabilities. This explains why Government has a contingent fund to cater for emergencies, which may not be subjected to this elaborate procedures of procurement of goods, services and works. It should also be borne in mind that satisfying court judgements and decrees is part of the public duties of the accounting officer. This was stated to be the position in ***Republic v Kenya National Examination Council, ex parte Gathenji & Others, Civil Appeal No. 266 of 1996***, in which the court explained that the order of mandamus is of a most remedial nature and is a command issued by the High Court directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing specified which appertains to his or their office and is in the nature of a public duty. It therefore follows that lack of adequate budgetary provisions does not bar the court from granting an order of mandamus to a deserving litigant. It is up to the accounting officer to comply and implement the court order through good planning and proper budgetary estimates.

27. In the light of the foregoing considerations, I find that the *ex parte* applicant has succeeded in its application. An order of mandamus will therefore issue directing the 2<sup>nd</sup> respondent to award the tender to the *ex parte* applicant.

#### **ISSUE 4**

28. The *ex parte* applicant has succeeded in its application. It therefore follows that the *ex parte* applicant will have the costs of this application.

Judgement dated and signed at Narok this 28<sup>th</sup> day of November 2019.

**J. M. Bwonwong’a**

**Judge**

**And**

**Judgement signed, dated and delivered in open court at Nairobi this 9<sup>th</sup> day of December, 2019.**

**J. M. Mativo**

**Judge**

**9/12/2019**