REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 112 OF 2018

IN THE MATTER OF AN APPLICATION BY PARITY PERFORMANCE & COMPLIANCE LIMITED FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS

AND

IN THE MATTER OF ARTICLE 10, 22, 23 (3) (F),47(1), 50(1) AND 165 (6) & (7) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT,2015

AND

IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM ACT, CHAPTER 26

AND

IN THE MATTER OF ORDER 53(1) OF THE CIVIL PROCEDURE RULES, 2010

AND

IN THE MATTER OF SECTION 175(1) OF THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT, 2015

AND

IN THE MATTER OF THE REQUEST FOR PROPOSALS FOR DEVELOPMENT OF MANAGEMENT INFORMATION SYSTEMS (MIS) FOR KENYA DEVOLUTION SUPPORT PROGRAMME (KDSP) (TENDER NO. MODP/2DD/KDSP/RFP/3/2017-2018)

REPUBLIC.....APPLICANT

VERSUS

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD.....RESPONDENT

MINISTRY OF DEVOLUTION & PLANNING (STATE DEPARTMENT OF

DEVOLUTION).....1ST INTERESTED PARTY

PRESTIGE MANAGEMENT SOLUTIONS LIMITED.....2ND INTERESTED PARTY

RULING

1. The background information relevant this ruling this is that on **9th** March 2018, the *ex parte* applied for leave to apply for orders of *Certiorari* and *Mandamus* to quash the Respondent's decision dated **23rd** February 2018 dismissing its application with costs and to compel the first Interested Party to re-admit the its proposal and evaluate it.

2. On **12th** March 2018, the Court granted the leave sought and ordered that the leave so granted shall operate as stay of the proceedings in question pending the hearing and determination of the substantive motion or further orders. The substantive application was filed on **28th** March 2018. However, on **27th** March 2018, one day before the substantive application was filed, the second Interested Party, applied for orders that the orders granting leave and stay be reviewed, vacated and or set aside and that the entire suit be dismissed.

3. The application is founded on the grounds listed on the face of the application and the annexed supporting Affidavit of **William Ndungu**. The grounds are that:- **(a)** that the Court gave the orders in absence of factual information concerning the implementation of the procurement process of the said tender which had already been implemented vide a contract dated **26th** March 2018; **(b)** that had the said information been brought to the Court's attention, the Court could have arrived at a different outcome; **(c)** that, had the Court been informed that the

procurement process had taken place; and that the second Interested Party had already signed the contract with the first Interested Party, the Court would have exercised judicial restraint in exercising its discretion in granting stay or adverse orders against the applicant herein; **(d)** Further, discretion should be exercised judiciously so as not to occasion injustice; **(e)** if the orders sought are not granted, there is a danger of the applicant suffering loss and prejudice and that the court ought not to have been misled on the issue.

4. The *ex parte* applicant filed grounds of opposition stating that the application is vitiated by Section **175 (1)** of the Public Procurement and Asset Disposal Act[1]

5. Parties adopted their written submissions.

6. The applicants counsel argued that:- *(i) this court has power to review its own orders;**[2]** (ii) the Court has residual power to correct its own mistake;**[3]** (iii) the applicant learnt about this courts orders on 13th March 2018 by which time the applicant already had been awarded the contract; (iv) had the signing of the contact been brought to the attention of the Court, the Court could have arrived at a different conclusion; (iv)Judicial Review or injunctions are never retrospective; (v) the contract having been awarded, the substratum of the suit was fully extinguished; and, that, section **175 (1)** of the Public Procurement and Asset Disposal Act**[4]** does not grant an automatic stay and the ex parte applicant is not entitled to the Judicial Review orders sought or by extension, the interim orders sought.*

7. Counsel for the *ex parte* applicant argued that the applicant has not demonstrated any of the grounds for Review, and that the grounds cited cannot form the basis for review. He also distinguished the authorities cited by the applicants counsel. He argued that review can be granted upon discovery of new and important matter or evidence which was not within the applicants knowledge or could not be produced at the time the order was issued or upon discovery of a mistake or error apparent on the face of the record or any other sufficient reason to merit review and the application must be filed without unreasonable delay.

Issues for determination

8. Two issues fall for determination, namely; *(a)* Whether the applicant has established grounds for review; and (b)whether there grounds for the court to dismiss the Judicial Review Application.

9. It is well settled that the review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order **45** Rule **1** of the Civil Procedure Rules, 2010 and Section **80** of the Civil Procedure Act.[5] Put differently, the High Court has a power of review, but such power must be exercised within the framework of Section **80** of the Civil Procedure Act[6] and Order **45** Rule **1**.[7]

10. Section **80** of the Civil Procedure Act[8] provides as follows:-

> ***80.*** *Any person who considers himself aggrieved-*
>
> ***(a)*** by a decree or order from *which an appeal is allowed by this Act, but from which no appeal has been preferred; or*
>
> (b) by a decree or order from which no appeal is allowed by this Act, May apply for a review of judgement to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

11. Order **45** Rule **1** of the Civil Procedure Rules, 2010 provides as follows:-

> ***45*** *Rule* ***1 (1)****Any person considering himself aggrieved-*
>
> a. By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
>
> b. By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay."

12. Section **80** gives the power of review and Order **45** sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; ***(a)*** *discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;* ***(b)*** *on account of some mistake or error apparent on the face of the record, or* ***(c)*** *for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.*

13. It is also important to distinguish grounds of appeal and grounds for review. Guidance can be obtained from the case of *National Bank of Kenya Ltd vs Ndungu Njau*[9] where the court held:-

> "In my discernment, an order cannot be reviewed because it is shown that the judge decided the matter on a foundation of incorrect procedure and or that his decision revealed a misapprehension of the law, or that he exercised his discretion wrongly in the case. Much less could it be reviewed on the ground that the other judges of coordinate jurisdiction and even the judge whose order is sought to be reviewed have subsequently arrived at different decisions on the same issue? In my opinion the proper way to correct a judge's alleged misapprehension of the procedure or the substantive law or his alleged wrongful exercise of discretion is to appeal the decision unless the error be apparent on the face of the record and therefore requires no elaborate argument to

expose."(Emphasis added).

14. In *Abasi Belinda vs Fredrick Kangwamu and another***[10]** the Court held that:-

> "*a point which may be a good ground of appeal may not be a good ground for review and an erroneous view of evidence or law is not a ground for review though it may be a good ground for appeal"*

15. Also of useful guidance is the following excerpt from the judgement in the above cited case of *National Bank of Kenya Ltd vs Ndungu Njau***[11]**where the court stated:-

> "A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review."

16. The power to review a judgment or an order can be exercised on the application of a person on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression "any other sufficient reason" means a reason sufficiently analogous to those specified in the rule.[12] Where the application is based on sufficient reason it is for the Court to exercise its discretion.[13]

17. The applicant argues that at the time leave was granted and the Court ordered the leave so granted to operate as stay, the contract had been awarded. To me, that is not a ground for review at all. In fact, whether or not the contract was validly awarded is an issue for determination at the hearing of the main motion. It is not a ground for review within the ambit of Order **45** Rule **1** of Section **80** cited above. A decision, including the awarding of the cointract can be challenged for ***illegality, irrationality*** *and* ***procedural impropriety.*** These are the core issues the Court will be called upon to determine at the main hearing. The applicant cannot use the contract as a shield to evade court scrutiny. In the event the Court finds that the contract was illegally awarded, then it can grant appropriate reliefs.

18. Judicial Review plays an important role in our society which is to check excesses, omnipotence, arbitrariness, abuse of power and also accountability and maintenance of constitutionalism and the Rule of Law. A party cannot stand up and say that now that I have a contract, the manner in which I acquired it cannot be examined. That is exactly what the applicant herein is saying.

19. I must add that an ex parte order can only be set aside if the party who applied it concealed material facts from the Court, which material, if the same had been brought to the Courts attention, the Court could not have granted the orders. That is not the case here. It has not been alleged that the ex parte applicant failed to disclose relevant or material facts to the Court.

20. Review can also be allowed for any other sufficient reason. The expression *'any other sufficient reason'* means a reason sufficiently analogous to those specified in the rule.[14] Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out would amount to an abuse of the liberty given to the court under the Act to review its judgement.[15] The grounds cited here do not fall under "any other sufficient reason.'

21. A review can be allowed upon discovery of new and important matter or evidence. An applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. This has not been shown to be the case here. The applicant is coming up with what in my view should be his argument in opposition to the main motion, and is attempting to convert it to a ground for review.

22. Also, to succeed in a review application, an applicant has have to show that there was a mistake or error apparent on the face of the record. The power of review is available when there is an error apparent on the face of the record. The order the subject of this application does not suffer any such error apparent on the face of the record. The review must be confined to error apparent on the face of the record and re-appraisal of the entire evidence or how the judge applied or interpreted the law or exercised his discretion would amount to exercise of Appellate Jurisdiction, which is not permissible.[16]

23. I am not persuaded that the applicant has offered *grounds* within the meaning of the provisions of Section **80** of the Civil Procedure Act[17] or the Order **45** Rule **1** of the Civil Procedure Rules, 2010. My finding is also fortified by the holding in the case of *Evan Bwire vs Andrew Nginda***[18]**where the court held that *'an application for review will only be allowed on very strong grounds....".* It is my that the grounds relied upon do not fall within the scope for review.

b) Whether there are grounds to strike off of dismiss the substantive application.

24. Citing the above grounds relied upon for review, the applicant has asked this Court strike off the substantive application.

25. Dismissing a suit without affording a litigant the opportunity to be heard is a drastic step. In *Dickson Karaba Vs. John Ngata Kariuki & Another****[19]*** the court stated as follows:-

> "**…**striking out is a very serious matter, it is draconian and it should be resorted to as an avenue when the cause filed is hopeless or it is meant or intended to abuse the process of the court…"

26. I also usefully recall the dicta of Fletcher Moulton L. J. in *Dyson Vs. Attorney General**[20]*** thus:-

> "*.....and t*he courts have properly considered that this power of arresting an action and deciding it without trial is one to be very sparingly used and rarely, if ever, excepting in causes were the action is an abuse of legal procedure… To my mind, it is evident that our judicial system would never permit a plaintiff to be "driven from the judgment seat" in this way without any court having considered his right to be heard, excepting in cases where the cause of action was obviously and almost incontestably bad". (Emphasis added)

27. In the words of Madan JA *our judicial system would never permit a plaintiff to be "driven from the judgment seat without any court having considered his right to be heard, excepting in cases where the cause of action was obviously and almost incontestably bad.* No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so week as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it."

28. The right to be heard was also appreciated in *Richard Nchapai Leiyangu vs IEBC & 2 others***[21]** where it was held as follows:-

> "The right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality."

29. Striking out pleadings is a draconian step and as was held in *Agip Kenya Ltd vs Highlands Tyres Ltd**[22]***the process of the judicial system requires that all parties before the court should be given an opportunity to present their cases before a decision is given. As **Lord Cairns** bluntly put it:-[23]

> "One of the first and highest duties of all, Courts is to take care that the act of the court does no injury to any of the suitors and when the expression 'Act of the court' is used it does not mean merely the act of the primary court, or of any intermediate court of appeal, but the act of the court as a whole from the lowest court which entertains jurisdiction over the matters up to the highest court which finally disposes of the case."

30. The fundamental duty of the court is to do justice between the parties. It is, in turn, fundamental to that duty that parties should each be allowed a proper opportunity to put their cases upon the merits of the matter. It is fundamental principle of natural justice, applicable to all courts whether superior or inferior, that a person against whom a claim or charge is made must be given a reasonable opportunity of appearing and presenting his case. If this principle be not observed, the person affected is entitled, *ex debito justiciae*, to have any determination which affects him set aside.

31. Discretion vested in the court is dependent upon various circumstances, which the court has to consider among them the need to do real and substantial justice to the parties to the suit.[24] Discretion must be exercised in accordance with sound and reasonable judicial principles. The King's Bench in Rookey's Case[25] stated as follows:-

> "Discretion is a science, not to act arbitrarily according to men's will and private affection: so the discretion which is exercised here, is to be governed by rules of law and equity, which are to oppose, but each, in its turn, to be subservient to the other. This discretion, in some cases follows the law implicitly, in others or allays the rigour of it, but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this Court. That is a discretionary power, which neither this nor any other Court, not even the highest, acting in a judicial capacity is by the constitution entrusted with."

32. Writing on judicial power, Chief Justice John Marshall wrote:-

> "Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge, always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law.**[26]**

33. Applying the principles laid down in the above precedents, I decline the invitation to dismiss the *ex parte* applicant's case without affording it a hearing.

34. In view of my analysis and conclusions on the above two issues, I find that the application dated **27th** March 2018 it totally unmerited and misconceived. Accordingly, I dismiss it with costs to the ex parte applicant.

Orders accordingly

Signed, Delivered and Dated at Nairobi this 5th day of June 2018

John M. Mativo

Judge

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[1] Act No. 33 of 2015.

[2] Counsel cited *R vs Anti-Counterfeit Agency & 2 Others ex parte Surgipham Ltd* & *R vs Cabinet Secretary for Transport & Infrastructure & 6 Others* (Citations not provided!).

[3] Counsel cited *Nakumatt Holdings Ltd vs Commissioner of Value Added Tax* {2011}e KLR and *R vs Public Procurement Administrative Review Board & Another Adan Osman Godana t/a Eldorect Standard Butchery & Another* {2017}eKLR

[4] Act No. 33 of 2015.

[5] Cap 21, Laws of Kenya

[6] Ibid

[7] See *Sinha J in Union of India vs B. Valluvan*, AIR 2007 SC 210; (2006) 8 SCC 686

[8] Supra

[9]{1996} KLR 469 (CAK) at Page 381

[10] {1963}E.A 557, Bennet J also see *Chittaley &Rao in the Code of Civil Procedure*, 4th Edition, Vol 3, Page 3227.

[11] Supra.

[12] *Ajit Kumar Rath vs State of Orisa & Others*, 9 Supreme Court Cases 596 at Page 608.

[13]*Tokesi Mambili and others vs Simion Litsanga* {2004} eKLR.

[14]Sir Dinshah Fardunji Mulla, *The Code of Civil Procedure*, 18th Edition, Reprint 2012, at Page 1147.

[15] Ibid

[16] See *Meera Bhanja v. Nirmala Kumari Choudhury*, (1995) 1 SCC 170.

[17] Cap21, Laws of Kenya.

[18] Civil Appeal No. 103 of 2000, Kisumu ; {2000} LLR 8340.

[19] {2010} e KLR

[20] {1911} KB 418

[21] Ibid

[22]{2001} KLR 630

[23] In *Roger Vs Comptoir D' Escompts De Paris*, {1871} LR 3 PC 465.

[24] See Sir Dinshah F. Mulla, Supra, at page 1381.

[25] 77 ER 209; (1597) 5 Co.Rep.99]

[26] *Osborn vs. Bank of the United States*, 22 U. S. 738 {1824}.