



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 658 OF 2016

**IN THE MATTER OF AN APPLICATION BY JEBESS FOR LEAVE TO APPLY FOR
JUDICIAL REVIEW ORDERS OF CERTIORARI & PROHIBITION**

AND

**IN THE MATTER OF AN APPLICATION UNDER ARTICLES 1, 47, 227 AND 232 OF THE
CONSTITUTION OF KENYA 2010**

AND

IN THE MATTER OF THE PUBLIC PROCUREMENT & ASSET DISPOSAL ACT, 2015

AND

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD.....RESPONDENT

AND

NATIONAL GOVERNMENT CDF EMGWEN CONSTITUENCY....1ST INTERESTED PARTY

FEMJI ENTERPRISES LIMITED2ND INTERESTED PARTY

JEBESS CONTRACTORSEX-PARTE APPLICANTS

RULING ON LEAVE

1. By a chamber summons dated 28th December 2016, the exparte applicant Jebbes Contractors seek from this court orders:

1. That the applicant be granted leave to apply for an order of certiorari to remove into this court and quash the decision of the respondent Public Procurement Administrative Review Board issued on 16th November 2016 in Review Number 105/2016 of 28th November 2016

to award the tender No. EMG.NGCD.KIP/001/2016-2017 for proposed construction 8 No. classrooms and Administrative Block at Kipkeibon Secondary School to Femji Enterprises Limited, the 2nd interested party herein.

2. That the applicant be granted leave to apply for an order of Mandamus to compel the 1st interested party National Government CDF EMGWEN Constituency to implement the recommendation of the Evaluation Committee of the procuring entity to award the tender No. EMG.NGCD.KIP/001/2016-2017 for proposed construction 8 No. classrooms and Administrative Block at Kipkeibon Secondary School to the applicant or in the alternative to restart the tender process in respect of tender No. EMG.NGCD.KIP/001/2016-2017 and the same be done in compliance with the provisions of the Public Procurement & Asset Disposal Act.

3. That the applicant be granted leave to apply for an order of prohibition directed to the 1st interested party from executing a contract or any transaction in respect of tender Number EMG-NGCD.KIP/001/2016-2017 for proposed construction 8 No. classrooms and Administrative Block at Kipkeibon Secondary School with FEMJI Enterprises Ltd, the 2nd interested party herein or any other company or body.

4. That the applicant be granted leave to apply for an order of certiorari to move into this court to review and quash the decision of the respondent contained in the decision or judgment delivered and issued by the respondent in Review Number 105/2016 of 28th November 2016 FEMJI Enterprise Ltd Vs National Government CDF EMGWEN CONSTITUENCY on 16th November 2016.

5. That the grant to leave do operate as a stay against the decision/judgment of the respondent issued on the 16th November 2016 in Review Number 105/2016 of 28th November 2016 awarding tender No. EMG.NGCD.KIP/001/2016-2017 for the proposed construction 8 No. classrooms and Administrative Block at Kipkeibon Secondary School to FEMJI Enterprises Limited, the 2nd interested party herein.

6. That the grant of leave do operate as a stay of the award or any subsequent contract or any transaction in respect of tender No. EMG.NGCD.KP/001/2016-2017 for the proposed construction 8 No. classrooms and Administrative Block at Kipkeibon Secondary School to FEMJI Enterprises Limited the 2nd interested party herein, as directed in the decision/judgment of the respondent issued on the 16th November 2016 in Review Number 105/2016 of the 28th November 2016.

7. That service upon the interested parties be effected through the advertisement to the published in a national newspaper with a country wide circulation.

8. That the Honourable court be pleased to grant such other or further relief as it may deem fit and necessary in the circumstances.

9. That costs of the application be provided for.

2. The application which was brought under the provisions of Order 53 of the Civil Procedure Rules, Section 8 of the Law Reform Act and the Sections 18 and 19 of the High Court Organization and Administration Rules, 2016 was supported by grounds on the face of the chamber summons, the statutory statement and verifying affidavit and annexures thereto.

3. Principally the grounds as per the statutory statement dated 28th December 2016 are that the respondent Review Board acted illegally, unconstitutionally in directing the procuring entity to award the tender to the 2nd interested party, a power that the respondent does not possess; that the

decision of 16th November 2016 is not in conformity with Article 227(1) of the Constitution of Kenya and the provisions of the Public Procurement and Asset Disposal Act, 2015; that the respondent usurped the powers of the Evaluation Committee of the procuring entity in its decision of 16th November 2016, that the respondent violated its powers under Section 173 of the Act in that it did not allow the right of appeal provided for under Section 175 of the Act, within 14 days of the date of the decision by the Review Board and in default the decision would be final; that by its decision, the Review Board purported to procure the services of the 2nd interested party contrary to Article 227(1) of the Constitution and the provisions of the Public Procurement & Asset Disposal Act, 2015; the decision by the respondent was irrational, unreasonable, was laced with bad faith and improper motive in that its conduct for its insisting that the award under a legal regime which is section 98 of the repealed Act and a nullity by dint of the Public Procurement & Asset Disposal Act, 2015 which does not give it the power to award; that the award to the 2nd interested party which was a non-responsive bidder who did not comply with the mandatory requirements of proof of current registration with the National Construction Authority was contrary to the provisions of the Public Procurement & Asset Disposal Act, 2015;

4. That it was irrational and unreasonable for the applicant to be deprived of a tender after emerging top in the evaluation and re-evaluation, and award a tender to a bidder who did not comply with the mandatory requirements of the tender;

5. That the decision was made with procedural impropriety, unfairness and arbitrariness in that the respondent disregarded the provisions of Sections 173 of the Public Procurement & Asset Disposal Act, 2015 which empowers it to order termination of the procurement process and commencement of a new procurement process but not to award a tender.

6. That the respondent usurped powers of the tender evaluation committee by purporting to make recommendation and awarding tender Number EMG.NGCD.KIP/001/2016-2017 for proposed construction in favour of the 2nd respondent; that the respondent's conduct is capricious, arbitrary, oppressive and unfair and cannot be justified with the Rule of Law.

7. That the decision of the respondent violates the legitimate expectation of the applicant and members of the public, that the tender will be in accordance with a system that is fair, equitable, transparent, competitive and cost effective and in accordance with the law; that having complied with the law, the applicant had a legitimate expectation to be awarded the tender and or that the procurement process would generate public confidence which was violated.

8. The grounds are further supported by a verifying affidavit sworn by Sammy Kipchirchir Biwott on 4th January 2017 and the annexures thereto as filed under the orders of the court on 4th January 2017.

9. The verifying affidavit reiterates, in a summary form, the grounds as set out in the statutory statement and as reproduced herein above, while verifying the facts as disclosed in the Review proceedings, and annexing thereto the decision under challenge as SKB2; The notification of the award of the tender to the applicant by letter dated 24th November 2016 by the procuring entity; email forwarding the award erroneously dating the award as dated 16th November 2016 but which was made on 16th December 2016; and a response by the procuring entity to the challenge procuring entity's award to the applicant.

10. The application was seriously opposed by the 2nd interested party. There was no response by the respondent and the 1st interested party.

11. Initially, the 2nd interested party raised a preliminary objection which was disposed of on 4th January 2017 paving way for them to file replying affidavit on 10th January 2017 sworn by Felix Arusei, director of the 2nd respondent wherein it is deposed that the chamber summons is bad in law for

non joinder of the Attorney General to the proceedings ; that the principles for grant of leave and stay have not been fulfilled by the applicant; That the first respondent has wider powers to hear the application for request for Review and make orders and directions with regard to the same including directing a procuring entity to award a tender to any preferred candidate or bidder in the consideration and justice and fairness; That therefore the application is frivolous; hopelessly and vexatiously made; that the respondent in its decision considered the entire case of the parties in respect of the tender in question, which decision was made on 16th December 2016 hence the application should be dismissed.

12. The parties' advocates urged the application this morning by way of oral submissions; with Mr Appollo Mboya counsel for the applicant reiterating the grounds upon which the application is predicated and referring the court to various provisions of the Public Procurement & Asset Disposal Act, 2015 and relying on his client's verifying affidavit and annexures including the decision made by the review board on 16th December 2016 but erroneously dated 16th November 2016.

13. Mr Apollo Mboya reiterated that the orders sought are merited as the decision of 16th December 2016 does not comply with the law in that Section 175 of the Public Procurement & Asset Disposal Act provides for an automatic stay yet the Review Board fixed the timelines for the issuance of the letter of notification of award of the tender by the procuring entity to the 2nd respondent.

14. Further, that the board erred in getting involved in the award of the tender contrary to Section 173 of the Public Procurement & Asset Disposal Act, 2015 and that by doing so, the respondent exceeded its mandate by taking over the role of the evaluation committee of the procuring entity.

15. Further that the decision was laced with unreasonableness and irrationality and recklessness and that even the misdating of the decision was a deliberate attempt to deny the applicant a right of appeal.

16. In opposition, Mr Masika counsel for the 2nd interested party submitted relying on the client's replying affidavit, annexures and list and bundle of authorities filed in court. It was submitted that the applicant does not deserve the orders sought and that the decision of JR 543/2016 by this court was relevant on the principles for the grant of leave and stay.

17. According to Mr Masika, Section 173(b) of the Public Procurement & Asset Disposal Act empowers the Review Board to make the orders that it made, including awarding of the tender and that pursuant to Section 98 of the repealed Act and decisions made in the previous legal regime, the Review Board could award tenders.

18. Further, that the directive to give notification letter of award was not a denial of the right of appeal as the applicant is already before the court and that the court must always adopt a purposive interpretation of the law under Section 173(b) of the Act to find that the directives therein include awarding of a tender.

19. Further, that in any event, Section 175 of the Act is not mandatory as it says 'may' appeal which is discretionary as far as steps by an aggrieved party to challenge the decision of the Review Board is concerned.

20. It was also submitted that Honourable Attorney General ought to have been enjoined to the proceedings to represent the 1st respondent hence the application was bad in law and should not go to the substantive stage.

21. In a brief rejoinder, Mr Apollo Mboya maintained that the application was meritorious and not frivolous or vexatious. He reiterated his earlier submissions that the Board's Powers under Section 173 of the Act were clear and that the Section was not ambiguous to require a purposive interpretation.

22. Further, that powers of the Board under the previous regime are not applicable to the current legal regime. He also corrected his earlier submissions on Section 174 instead of Section 175 of the Public Procurement & Asset Disposal Act, 2015 and maintained that where any action is done before expiry of 14 days of the decision of the Board, it takes away the automatic statutory stay as conferred by Section 175 of the Act.

23. On non joinder, counsel submitted that it was not fatal to the proceedings as the court can order any party to be enjoined to the proceedings if it deems it fit and just to do so. Mr Mboya urged the court to grant the orders sought.

Determination.

24. I have carefully considered the application for leave and that the leave to apply if granted do operate as stay of enforcement or implementation of the decision of the Review Board made on 16th December 2016.

25. I have also considered the parties' advocates respective submissions and case law, and constitutional provisions cited.

26. Albeit both counsels delved into the merits and demerits of the intended motion at this stage, this court does not at this stage delve into such merits of the matter.

27. The issues for determination are whether the application for leave is merited and if so, whether such leave should operate as stay of enforcement of the impugned decision of 16th December 2016.

28. All parties' counsels are in agreement that the decision though dated 16th November 2016, was made on 16th December 2016 hence the court shall adopt the latter date.

29. On whether leave sought is merited, the principles that guide the grant of leave are now settled. The rationale for the requirement for leave under Order 53 of the Civil Procedure Rules is to exclude frivolous and vexatious applications which prima facie appear to be abuse of the court process or those applications which are statute barred. However, it is generally agreed that leave should be granted if, on the material available, the court considers, without delving into the matter in-depth, that there is an arguable case. Leave stage is therefore a filter whose purpose is to weed out hopeless cases at the earliest possible time, thus saving the pressure on the courts and needless expense for the applicant by allowing malicious and futile claims to be weeded out or eliminated so as to prevent public bodies being paralyzed for months because of pending court action which might turn out to be unmeritorious.

30. The above principles were espoused in the cases of **Matiba vs Attorney General Nairobi HCC Miscellaneous 790/93; Republic Vs Land Disputes Tribunal Court Central Division & Another Exparte Nzioka (2006) I EA 321; Republic Vs Permanent Secretary Ministry of Planning and National Development Exparte Kaimenyi(2006)1 EA 353; and Republic Vs County Council of Kwale & Another Exparte Kondo &57 Others Mombasa HC Miscellaneous Application 384 of 1996.**

31. The yardstick for the grant of leave was however set by the Court of Appeal in **Mirugi Kariuki V Attorney General CA70/91 [1990-1994] EA 156 [1992] KLR** and in the following terms; inter alia:

“.....in this appeal, the issue is whether the appellant in his application for leave to apply for orders of certiorari and mandamus demonstrated to the High Court a prima facie case for the grant of those orders. Clearly, one breach of the rules of natural justice was alleged, the exercise of discretion by the Attorney General under Section 11(1) of the Act was brought into question. Without a rebuttal to these allegations the appellant certainly disclosed a prima facie case. For that, he should have been granted leave to apply for orders sought.”

32. And in **Republic vs Communication Commission of Kenya & 2 Others Exparte East Africa Television Network Ltd** CA 175/2000 [2001] KLR 82; [2001] 1 EA 199, the Court of Appeal was of the view that leave should be granted, if, on the material available, the court considers, without going into the matter in-depth, that there is an arguable case for granting leave.

33. In **Re Birac International SA (Bureau Veritas)**(2005) 2 EA 43 HCK, the court stated, inter alia:

*“ An application for leave to apply for orders of Judicial Review are normally ex parte and such an application does restrict the court to threshold issues namely, whether the applicant has an arguable case, and whether if leave is granted, the same should operate as stay.....there should be an arguable case which without delving into the details could succeed and an arguable case is not ascertained by the court by tossing a coin or waving a magic wand or raising a green flag, the ascertainment of an arguable case is an intellectual exercise in this fast growing area of the law and one has to consider without making any findings, the scope of the Judicial Review remedy sought, the grounds and the possible principles of administrative law involved and not forgotten the ever expanding frontiers of Judicial Review and perhaps give an applicant his day in court instead of denying him.....like the Biblical mustard seed which a man took and sowed in his field and which the smallest of all seeds but when it grew up it became the biggest shrub of all and became a tree so that birds of the air came sheltered in its branches, JR stemmed from the doctrine of ultra vires and the rules of natural justice and had grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure – the 3¹” and had become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. One can safely state that the growth of JR can only be compared to the never ending categories of negligence after the celebrated case of *Donohue Vs Stephenson* in the last Century. Although leave should not be granted as a matter of routine, where one is in doubt one has to consider the wise words of *Megany J* in the case of *John Vs Rees* [1970] ch 345 at 402 that in the exercise of the discretion on whether or not to grant stay, the court takes into account the needs of good administration.”*

34. Therefore, leave to apply for Judicial Review Orders is not a formality nor a magical practice. The applicant must demonstrate that it has an prima facie arguable case for deserving of leave and therefore that it has not brought a frivolous or malicious or vexatious matter which is futile before the court.

35. In the instant case, the applicant alleges that the respondent Review Board acted illegally and irrationally and with impropriety in, among others, directing the award of the tender to the 2nd interested party who did not meet the mandatory requirements for current registration with National Construction Authority (NCA0; that the review Board took over the powers of the evaluation committee in directing award of the tender to the 2nd interested party whose bid was unsuccessful; and that it also acted contrary to law by directing that the award notification letter be issued before the lapse of 14 days from date of the decision.

36. Judicial Review is not just a common law remedy. It is now a constitutionally recognized remedy for enforcement of fundamental rights and freedoms under the Bill of Rights.

37. In addition, fair administrative action which is enforceable through Judicial Review remedy is a constitutionally guaranteed right under Article 47 and under the Bill of Rights of the Constitution. Therefore, even without delving into the depths of the matter at hand, where there is a serious allegation of breach of the rules of natural justice, bias, violation of the statutory provisions, ultra vires, acting without or in excess of jurisdiction or abuse of power, this court would not shut from the seat of justice any aggrieved party, to enable them ventilate their grievances, as that is their solemn right under Article 48 of the Constitution.

38. I am unable to find on the face of the application before me, that it is malicious frivolous and or

vexatious or an abuse of court process.

39. The Review Board's decision admittedly, was made on 16th December 2016 and the application herein made on 28th December 2016 which was within 14 days as stipulated by Section 175 of the Public Procurement and Asset Disposal Act, 2015 hence the application is not statute barred.

40. The submission on the powers of the Review Board under Section 173(b) of the Act is a merit matter which this court will have an opportunity, at the substantive stage, to consider, and so are all other grounds which both parties' counsels have ably put forward for and against.

41. That being the case, I find that on the material placed before this court, and even without delving into the depths thereof, the applicant has established a prima facie arguable case, capable of ventilation at the substantive stage and accordingly, I find all the prayers for leave as sought being merited and I proceed to grant leave to apply as sought in prayers Nos 3,4,5,6, of the chamber summons dated 28th December 2016.

42. The substantive motion to be filed and served within seven(7) days from the date hereof.

43. On the prayer for stay, the decision to stay the implementation of the decision of the Review Board is a discretionary one which must be exercised judiciously.

44. The circumstances under which the court may grant stay of proceedings/decisions in question pending determination of the substantive application or until the judge orders otherwise are now well settled. However, where the decision sought to be quashed or prohibited has already been implemented, the leave granted ought not to operate as stay; as was held in **Geoge Phillip Wekulo Vs Law Society of Kenya & Another KAK HC Miscellaneous Application 29/2005** .

45. Maraga J (as he then was) in **Taib A. Taib V The Minister for Local Government & Others Mombasa HC Miscellaneous Application No. 158/06** stated as follows:

“ As injunctions are not available against the government and public officers, stay is a very important aspect of the Judicial Review jurisdiction. In Judicial Review Application the court should always ensure that the exparte applicant's application is not rendered nugatory by the acts of the respondent during the pendency of the applicant and therefore where the order is efficacious the court should not hesitate to grant it though it must never be forgotten that the stay orders are discretionary and their scope and purpose is limited. The purpose of a stay order in Judicial Review proceedings is to prevent the decision maker from continuing with the decision making process if the decision had not been made or to suspend the validity and implantation of the decision that has been made and it is not limited to judicial or quasi judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken. It is however not appropriate to compel a public body to act. A stay order framed in such a way as to compel the respondents to reinstate the applicant before hearing the respondent cannot be granted.”

46. In this case, there is the decision of 16th December 2016 which directs the implementation thereof by 23rd December 2016 which has lapsed. The Judicial Review proceedings herein are pending. The implementation of that decision means that the procuring entity goes ahead to execute a contract for construction of a school. There are public funds involved.

47. The applicant complains that the 2nd interested party was not a successful bidder and that it never met the mandatory requirements and that the Review Board in directing award of the tender in its favour violated the provisions of Section 173 of the Public Procurement & Asset Disposal Act, 2015. That is a matter that is yet to be fully demonstrated. The applicant claims that it was the successful

bidder. In the midst of the dispute, is the procuring entity. In my humble view, the applicant in these Judicial Review proceedings will be rendered a pious explorer in the judicial process if stay of enforcement or implementation of the decision of the Review Board is not granted.

48. In addition, the Judicial Review proceedings will be rendered nugatory, as the 2nd interested party will have already implemented the contract and constructed buildings as per the tender. The right to appeal or review is statutorily provided and the applicant having exercised that right under Section 175 of the Act, it should be given an opportunity to exhaust the remedies available to it in law, so as to ensure that justice is accessed by all.

49. In the premises, I am satisfied that the prayer that the leave sought and granted do operate as stay of enforcement/implementation of the decision of 16th December 2016 erroneously dated 16th November 2016 is merited and I so grant stay as sought in prayers Nos 7 and 8 of the chamber summons dated 28th December 2016, until the substantive motion once filed and served, is heard and determined interpartes.

50. On the issue of joinder, I hold that it is not fatal to these proceedings as the respondent is a corporate body with the power to sue and being sued and can either appear in its own name or through the legal representation of the Honourable Attorney General.

51. Costs shall be in the cause.

Dated, signed and delivered in open court at Nairobi this 10th day of January 2017.

R.E. ABURILI

JUDGE

In the presence of Mr Apollo Mboya for the applicant

Mr Masika for the 2nd interested party

N/A for the Respondent

N/A for the 1st Interested Party

CA: George