REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

[JUDICIAL REVIEW DIVISION]

JUDICIAL REVIEW APPLICATION NO. 77 OF 2016

IN THE MATTER OF THE PUBLIC PROCUREMENT AND DISPOSALS ACT, 2005

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT, CAP 26

BETWEEN

REPUBLIC……..……..APPLICANT

AND

COUNTY GOVERNMENT OF MIGORI…….....RESPONDENT

EX PARTE: INB MANAGEMENT & IT CONSULTING LIMITED

RULING

Introduction

1. On 24th November, 2016 I delivered a judgement in this matter in which I issued an order of an order of *mandamus* compelling the Respondent to forthwith proceed and conclude the procuring process in tender number MC/49/2013-2014 for the Supply, Customisation, Installation and Implementation of a Revenue Collection Cash Flow Management and Funds Requisition System, in Migori County by signing its part of the Contract and proceed with the implementation of the tender as ordered by the Public Procurement Administrative Review Board.

2. Aggrieved by the said decision, the Respondent intends to appeal to the Court of Appeal against the said decision. In the meantime the Respondent has moved this Court seeking the following orders:

a) This application be certified urgent and it be heard *ex - parte* at this first instance.

b) There be an interim stay of execution of the judgment and decree of this Court in this cause, pending the hearing and determination of this application, *inter partes*.

c) There be a stay of execution of the judgment and decree of this Court in this suit, pending the hearing and determination of the Respondent's intended appeal from the judgment and decree of this Court in this cause to the Court of Appeal.

d) The costs of this application do abide the outcome of the intended appeal.

Respondent's Case

3. According to the Respondent, on 24th November, 2016, judgment was entered in these proceedings for the Ex Parte Applicant against the Respondent, requiring the Respondent to execute a contract for collection of public revenue with the Ex Parte Applicant and which contract would place public funds amounting to at least Kshs. 84, 332, 000/-, into the Ex Parte Applicant's hands, if that contract were indeed executed and performed yet the Respondent is a stranger to the Ex Parte Applicant's material possessions which entity is a corporation mostly owned by a non-Kenyans.

4. It was averred that the Respondent, being dissatisfied with the judgment of this court, has started the process of appealing to the Court of Appeal by lodging a notice of appeal, serving it, applying for certified copies of proceedings and judgment and filing this application. However, processes calculated at enforcing that judgment and decree, inclusive of execution and contempt proceedings against officials of the Respondent, are now imminent.

5. It was the Respondent's case that its intended appeal to the Court of Appeal would certainly be rendered nugatory, if an order staying the execution of the judgment and decree of this Court in this cause were not made, as the Ex Parte Applicant shall certainly move to execute the judgment and decree herein against the Respondent and her officials. To the Respondent, unless a stay of execution of the judgment and decree of this Court in this suit is granted, pending the hearing and determination of the Respondent's intended appeal to the Court of Appeal, the Respondent shall suffer substantial loss in the nature and to the extent of at least Kshs. 84, 332, 000/-, as the Ex Parte Applicant shall cause this Court to execute its judgment against the Respondent and her official, but the Ex Parte Applicant, into whose hands public funds amounting to at least at least Kshs. 84, 332, 000/- would have been placed, shall not be capable of refunding that colossal amount of money, if the Respondent's intended appeal were to succeed.

6. The Respondent reiterated that if its intended appeal to the Court of Appeal were rendered nugatory, because of execution proceedings, then the Respondent's right of appeal, which is a constitutional entitlement, would be undermined gravely, alongside the Respondent's constitutional rights of access to justice and the protection and benefit of the law. It was its case that this application had been made without any unreasonable delay and that it was ready and willing to furnish such security, as the Court may order, for the due performance or satisfaction of the decree of this Court in this cause. Accordingly, it contended that it would be just, affordable and proportionate for this Court to order a stay of execution of its judgment and decree in this suit, pending the hearing and determination of the Respondent's intended appeal to the Court of Appeal, so as to preserve the substratum of the Respondent's intended appeal to the Court of Appeal.

7. To the Respondent, if granted, an order staying execution of the judgment and decree of this Court would not prejudice the Ex Parte Applicant, as the Respondent is ready and willing to furnish such security, as the Court may order, for the due satisfaction of that decree. The Respondent's opinion was that altogether, there exists a demonstrably sufficient cause for an order staying execution of the judgment and decree of this Court in this cause, pending the hearing and determination of the Respondent's intended appeal to the Court of Appeal.

Ex Parte Applicant's Case

8. The application was opposed by the ex parte applicant.

9. According to the applicant, to the extent that the application is made to delay a statutory obligation that arose on 22nd February 2015, the same is inequitable and an abuse of the court process. In the applicant's view, the Respondent's application amounts to invoking the court's power to continue to disobey a statutory obligation and that it is now beyond peradventure that the refusal to sign the contract is founded on the personal opinion and prejudice of one **Mr. Christopher Rusana** who has categorically stated that he will not bow to order of the Board/Court and the instant application perpetrates that disobedience.

10. The ex parte applicant while admitting that it had moved this court for contempt of court against the deponent of the affidavit in support of the motion the said **Christopher Rusana**, averred that this was after the Judgement, a Notice of Address of Service, Decree and Penal Notice were personally served on him.

11. To the ex parte applicant, the instant application is a reaction to service of the said documents.

12. It was the ex parte applicant's contention that this Court in its judgement observed that the ideals of Procurement include efficiency and expediency which ideals would be totally defeated if a stay was granted yet the Respondent had not shown what loss it would incur by signing the contract whose draft included in the form of tender lists obligations attendant to both parties. It was averred that it was pre-emptive, speculative and unfair to state that the *ex parte* Applicant will breach a contract that has been signed.

13. It was therefore the ex parte applicant's case that the application is misconceived and an abuse of the court process as there was no execution imminent for the sum of Kshs. 84, 332, 000 but the simple act of signing a contract.

14. The ex parte applicant disclosed that as part of the pre- contract obligations, it took out a performance bond for the performance of the contract. According to it by its nature, the contract would require payment of the amount in phases subject to performance of certain obligations by ex parte Applicants as milestones for the performance of the contract. Therefore the impression created by the that the *ex parte* Applicant would be paid the sum of Kshs.84,332,000.00 on signing the contract was untrue and meant to mislead the court.

15. It was averred that the Respondent as part of due diligence at the *ex parte* Applicant's expense, held a demonstration at its offices in Commodore Suite, 6 –C, Kilimani Nairobi as part of the demonstration, it was able to demonstrate to the Respondents and the consultants it had hired, that it had already purchased a software for the sum of Us $ 250,000.00 (approximately Kshs. 25,000,000.00) which will be the platform on which the envisaged Revenue Collection Software will be anchored.

16. The applicant averred that it is a Kenyan Company, duly registered with all the relevant statutory and regulatory bodies. It is also has an office in Commodore Suite, 6 –C, Kilimani Nairobi which the Respondent's officials have visited to verify and witness a demonstration. This, together with the performance bond dispels the Respondent allegation that it is unaware of the company's material possession and location.

17. It was reiterated that there was no execution being commenced but that the Respondent was simply being asked to sign a contract that would spell out obligations of parties herein.

18. The ex parte applicant noted that the Respondent has not faulted the judge or demonstrated that it has an arguable appeal. However, the Court only ordered the signing of a contract which obligation is spelt out in statute and was also affirmed by the Public Procurement Administrative Review Board. From the record, the ex parte applicant averred that the Respondent's County Secretary **Christopher Odhiambo Rusana** had trivialized the award, order of the Board and now this Honourable Court's *Writs of Mandamus*. He is on record as describing the orders of the Board as **"**nothing**"** and has vowed never to sign the contract. He is a clog in a legitimate process affirmed by statute, the Public Procurement Administrative Review Board and now the High Court through *Wrists of Mandamus*. Accordingly, the Respondent is undeserving of the court's discretion as the refusal to sign the contract by the Respondent is a personal crusade by the said **Christopher Odhiambo Rusana** to the detriment of the County Government of Migori. In the ex parte applicant's view, it is sad that the County Government of Migori has not automated its Revenue collection process as a result of the personal crusade of one officer.

19. It was therefore the ex parte applicant's case that the Respondent had not demonstrated sufficient cause to warrant a grant of stay of judgement and decree herein.

Determination

20. I have considered the foregoing.

21. The ex parte applicant took issue with the fact that the Respondent had not disclosed the nature of its intended appeal. However whereas I appreciate that in an application for stay pending appeal, it is permitted for the applicant to disclose the nature of his intended appeal so that the Court satisfies itself that in determining whether or not to exercise its discretion in favour of the applicant, it is not doing so on frivolous grounds, under Order 42 rule 6 of the ***Civil Procedure Rules***, it is not a condition for grant of stay that the applicant satisfies the Court that his appeal or intended appeal has overwhelming chances of success. In my view the omission to include such a condition is for good cause. It is in my view meant to insulate the Court from which an appeal is preferred from the embarrassment of holding a mini-appeal as it were. Accordingly whereas the Court of Appeal is in a better position to gauge the chances of success of an appeal or intended appeal, this Court in an application seeking stay of execution of its decision pending an appeal to the Court of Appeal is not enjoined to consider such condition. In fact it would be highly undesirable to do so, though it may superficially make reference to the grounds of the intended appeal. This was the position adopted in **Universal Petroleum Services Limited vs. B P Tanzania Limited [2006] 1 EA 486** where the Court held that:

> **"The granting or otherwise of an order of stay of execution under rule 9(2)(b) is at the discretion of the court and in the exercise of that judicial discretion the court as and where is relevant considers a number of factors, notably, whether the refusal to grant stay is likely to cause substantial and irreparable injury or loss to an applicant, whether the injury or loss cannot be atoned by damages, balance of convenience, and whether prima facie the intended appeal has likelihood of success. Above all, further to considering the above factors the court takes into account the individual circumstances and merits of the case in question…At this stage one has to be careful not to pre-empt the pending appeal and for that reason, the court has to discourage a detailed discussion of the weaknesses or otherwise of the decision intended to be impugned on appeal… There is also a danger in saying or making a finding that an appeal has an overwhelming chances of success."**

22. **In Mangungu vs. National Bank of Commerce Ltd [2007] 2 EA 285**, the Court expressed itself on the issue as follows:

> **"Generally the merits of a party's case in a stay application is not a particularly relevant matter for consideration at this stage. Although it is true that the Court under rule 9(2)(b) has discretion to stay execution, but only on grounds which are relevant to a stay order. Whether or not the appeal has good chances of success is a matter, which should be raised in the appeal itself. The correctness of the judgement should not be impugned in an application for stay of execution save in very obvious cases such as lack of jurisdiction."**

23. Accordingly, I will avoid the temptation to embark on such a potentially perilous and embarrassing voyage.

24. I have considered the issues raised by the parties herein. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the ***Civil Procedure Rules*** under which the court is to be satisfied that substantial loss may result to the applicant unless the order is made; that the application has been made without unreasonable delay; and that such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant. In **Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365,** the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in

sections 1A and 1B of the ***Civil Procedure Act***, the Court is nolonger limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the Act or in the interpretation of any of its provisions. According to section 1A(2) "the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective" while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.

25. It therefore follows that all the pre-Overriding Objective decisions must now be looked at in the light of the said provisions. This does not necessarily imply that all precedents are ignored but that the same must be interpreted in a manner that gives effect to the said objective. What is expected of the Court is to ensure that the aims and intendment of the overriding objective as stipulated in section 1A as read with section 1B of the ***Civil Procedure Act*** are attained. It is therefore important that the Court takes into consideration the likely effect of granting the stay on the proceedings in question. In other words the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.**

26. Therefore this Court must guard against any action or inaction whose effect may remove pith of this litigation and leave only a shell as was appreciated by the Court of Appeal position in **Dr Alfred Mutua vs. Ethics & Anti-corruption Commission & Others Civil Application No. Nai. 31 of 2016** in which it cited the Nigerian Court of Appeal decision of **Olusi & Another vs. Abanobi & Others [suit No. CA/B/309/2008]** that:

> **"It is an affront to the rule of law to… render nugatory an order of Court whether real or anticipatory. Furthermore…parties who have submitted themselves to the equitable jurisdiction of courts must act within the dictates of equity."**

27. It is trite that in giving effect to the rights the courts must balance fundamental rights of individual against the public interest in the attainment of justice in the context of the prevailing system of legal administration and the prevailing economic, social and cultural conditions. See **Bell vs. DPP [1988] 2 WLR 73.**

28. Apart from that as the Supreme Court appreciated in **Gitirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others [2014] eKLR**, the Court must consider whether or not it is in the public interest that the order of stay be granted and that this condition is dictated by the expanded scope of the Bill of Rights, and the public spiritedness that run through the Constitution.

29. In this case, the Respondent is a County Government. The tender in question is meant to benefit the said Government. The amount in question is Kshs. 84, 332, 000/- which is by no means a tidy sum of money. If the said project proceeds and the Revenue Collection Cash Flow Management and Funds Requisition System is Supplied, Customised and Installed, none of the parties has addressed me on how easy it would be to decommission it. In **Job Kilach vs. Nation Media Group & 2 Others Civil Application No. Nai. 168 of 2005** the Court of Appeal citing **Oraro & Rachier Advocates vs. Co-operative Bank of Kenya Limited Civil Application No. Nai. 358 of 1999** took into account the fact that the decree against the applicant was for a colossal amount.

30. In such matters the law is that when a party is appealing, exercising his undoubted right of appeal, the court ought to see that the appeal if successful is not rendered nugatory. See **Erinford Properties Ltd vs. Cheshire County International Limited [1974] 2 ALL ER 448; Madhupaper International Limited**

vs. Ken [1985] KLR 840; Butt vs. Rent Restriction Tribunal [1982] KLR 417.

31. It is therefore my view considering all the factors in this application that the *status quo* should be preserved until the appeal is heard. Since the Respondent is a county government, I do grant an order staying the execution of the judgment and decree of this Court delivered on 24th November, 2016 pending the hearing and determination of the Respondent's intended appeal therefrom to the Court of Appeal.

32. The costs are awarded to the ex parte applicant in any event.

33. It is so ordered.

Dated at Nairobi this 20th day of February, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Gitonga for the ex parte applicant

Mr Otieno for Mr Odero for the Respondent

CA Mwangi