



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 371 OF 2016

**IN THE MATTER OF AN APPLICATION BY SYNER-CHEMIE LIMITED FOR LEAVE TO
APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND MANDAMUS AGAINST
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

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 PART III 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 TENDER FOR THE SUPPLY OF NON-PHARMACEUTICALS
(SURGICAL TUBES & CANNULAE) TENDER NO. KEMSA/OIT7/2015-2017 BY KENYA
MEDICAL SUPPLIES AUTHORITY**

REPUBLIC.....APPLICANT

VERSUS

PUBLIC PROCUREMENT

ADMINISTRATIVE REVIEW BOARD.....RESPONDENT

AND

KENYA MEDICAL SUPPLIES AUTHORITY.....1ST INTERESTED PARTY

REVITAL HEALTHCARE (EPZ) LIMITED.....2ND INTERESTED PARTY

ANOCMA ENTERPRISES.....3RD INTERESTED PARTY

AND

SYNER-CHEMIE LIMITED.....EX-PARTE APPLICANT

RULING

1. On 19th October, 2016, **Aburili, J** granted leave to the ex parte applicant herein and directed the applicant to file and serve its substantive motion within 10 days. The said leave was directed to operate as a stay of the implementation of the subject award.

2. It would seem that instead of filing the substantive motion, the applicant filed a similar application to the one that had been granted i.e. seeking orders for leave. When therefore the matter came up for directions on 31st August, 2016, the Court noted that there was no application before the Court for which directions could be given whereupon counsel for the applicant sought leave to withdraw the subsequent application dated 25th August, 2016. The Court proceeded to strike out the said application.

3. Subsequently, the ex parte applicant filed an application dated 31st August, 2016 seeking to enlargement of time within which to file the substantive motion which application was opposed by the 1st and 2nd interested parties. By her ruling delivered on 23rd September, 2016, the Learned Judge, did allow the application and enlarged the time within which the substantive motion was to be filed by a further period of 7 days from the date of the ruling. The Learned Judge further directed that there would be a stay of the enforcement of the impugned decision.

4. It is this decision that provoked the filing of the Notice of Motion dated 14th October, 2016 by the 2nd interested party herein by which the said party seeks the following orders:

1) That this Honourable Court do certify this matter as urgent and service be dispensed with in the first instance.

2) That this Honourable Court does grant a Stay of any further execution of this Court's Ruling dated 23rd September 2016 pending the hearing and determination of this Application.

3) That this Honourable Court does grant a Stay of this Court's Ruling dated 23rd September 2016 pending the hearing and determination of the Applicant's intended Appeal of this Court's Ruling dated 23rd September 2016 to the Court of Appeal.

4) That the costs of this Application be provided for.

5. According to the applicant, by withdrawing the Notice of Motion dated 25th of August, 2016, the ex parte applicant terminated the whole Judicial Review process. It was the applicant's case that being aggrieved by the Courts Ruling enlarging time for the filing of the substantive motion it intends to appeal against the same and has filed the Notice of Appeal and requested for proceedings for the sad purpose.

6. The applicant averred that the procurement process is clearly stipulated by the Public Procurement Asset and Disposal Act and that as a result of the said ruling it sands to suffer tremendous loss. To the applicant, there had been a great delay by the Ex-parte applicant to adhere to the orders which it had not even served upon the applicant. It was the applicant's case that as a result of the matter the 1st Interested

party entirely suspended the contract that had been entered to.

7. From the record, none of the other parties filed any response though the 1st interested party intimated to the Court that it was associating itself with the applicant's position.

Determination

8. I have considered the foregoing.

9. 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 no longer 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.

10. 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**.

11. 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."

12. 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.**

13. 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.

14. In this case, the applicant has not alluded to any facts on the basis of which this Court can be satisfied that substantial loss may result to the applicant unless the order is made. What the applicant has alluded to is the delay in implementing the contract in question. By granting the instant application, it would in effect open the way for the interested parties to proceed with the procurement. In **Erinford Properties vs. Cheshire (1974) 2 All ER 448, 449**, it was held that stay of execution pending appeal is meant to preserve the *status quo*. The *status quo* contemplated here is the one that was prevailing before the ruling intended to be challenged was delivered. In this case, the *status quo* was that there was an application for leave on the basis of which leave had been granted and based thereon, stay had been granted. As to whether the striking out of the subsequent application terminated the whole proceedings is a matter for determination by the Court of Appeal. In my view the effect of the grant of stay orders sought herein would simply lead to confusion as the issue would then arise as to what the *status quo* ought to be and any determination on that issue would necessarily lead to trespassing on the substance of the intended appeal.

15. If the effect of the stay would be to permit the implementation of the award, it would mean that the intended appeal if it were to fail would render the proceedings pending before the High Court an academic exercise. On the other hand if the stay is denied and the Motion proceeds and the Court of Appeal allows the appeal, it would simply mean that the proceedings before the High Court would have been rendered unnecessary and they would be determined in accordance with the decision of the Court of Appeal. A not too dissimilar position was adopted in **David Morton Silverstein vs. Atsango Chesoni Civil Application No. Nai. 189 of 2001[2002] 1 KLR 867; [2002] 1 EA 296** where the Court of Appeal cited **Kenya Commercial Bank Ltd vs Benjoh Amalgamated Ltd & Another Civil Application No Nai 50 of 2001** and expressed itself as hereunder:

“We remind ourselves that each case depends on its own facts and we find it difficult to be persuaded that the appeal on the facts of the present case would be rendered nugatory if stay is not granted. The appeal may be heard and, if successful, the proceedings in the superior court would be determined in accordance therewith. The hearing in the superior court might have been unnecessary for which appropriate costs can be ordered but the appeal will not have been worthless...These remarks aptly apply to the application before us. What will happen if we do not grant the stay sought is that the appeal in the High Court will be heard and may well be determined. But when the appeal already lodged is heard, determined and, if it succeeded, what would automatically follow is that the proceedings in the High Court would have been rendered unnecessary, but an appropriate order for costs can be made to remedy that. However, the appeal in this Court would not have been rendered nugatory”.

16. With respect to the delay, it is my view that it is the suspension of the High Court proceedings that is likely to lead to the delay in resolving the subject dispute. If the High Court proceedings proceed and the Court of Appeal reverses the enlargement of time, the proceedings in the High Court notwithstanding the result therefor would be determined according to the Court of Appeal decision. If the Court of Appeal upholds the enlargement of time and the proceedings in the High Court are stayed it would mean that the High Court would then have to continue therewith. By that time, useful time would have been lost.

17. It is therefore my view that best course to adopt is that the proceedings in the High Court do proceed uninterrupted as none of the parties stand to be prejudiced by the outcome of the decision of the Court of Appeal either way even if the proceedings herein continue.

18. Accordingly I am not satisfied that the orders sought vide the Notice of Motion dated 14th October,

2016 are merited.

Order

19. In the result the order which commends itself to me and which I hereby issue is that the said Notice of Motion dated 14th October, 2016 fails and is dismissed but with no order as to costs.

20. Orders accordingly.

Dated at Nairobi this 27th day of March, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Senteu for the interested party

Mr Ayieko for Mr Gachuba for the ex parte applicant

CA Mwangi