REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NO. 356 OF 2015

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW

AND

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO COMMENCE JUDICIALREVIEW

PROCEEDINGS FOR ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION.

AND

IN THE MATTER OF: THE PUBLIC PROCUREMENT AND DISPOSAL ACT (CAP. 412A) LAWS OF KENYA.

AND

IN THE MATTER OF: THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD.

AND

IN THE MATTER OF: A DECISION BY THE PUBLIC PROCUREMENT ADMINISTRATIVE

REVIEW BOARD TO ANNUL TENDER AWARDED TO THE EX-PARTE APPLICANT TO

SUPPLY AND DELIVER MOTORIZED NUMBER PLATE HOT STAMPING FOILS.

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE PUBLIC PROCUREMENT

ADMINISTRATIVE REVIEW BOARD.....1st RESPONDENT

MINISTRY OF INTERIOR AND COORDINATION

OF NATIONAL GOVERNMENT.....2ND RESPONDENT

AND

TROPICAL TECHNOLOGY LIMITED.....INTERESTED PARTY

EX PARTE:

MIG INTERNATIONAL LIMITED.....1st EX PARTE APPLICANT

HOFFMAN INTERNATIONAL GmbH.....2nd EX PARTE APPLICANT

RULING

1. On 17th August, 2016, I issued the following orders in this matter:

> 1. **The Respondent Board's decision awarding Tender No. KPS/ICB/T/11/2015-2017 for supply and delivery of motorized vehicle hot stamping foils size 220mm X 305m to the interested party is hereby removed to this Court and is quashed and the decision of the Procuring Entity recommending re-advertisement thereof is hereby upheld.**
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> 2. **The decisions of the Board in respect of the other two Tenders which were awarded to the interested party is hereby quashed and the Board is directed to hear all the parties on the issue of the alteration of the forms and whether the interested party's quoted prices were within the funds appropriated by the Procuring Entity towards the said tender and make a determination thereon. Based on the outcome of the said decision, the Board is at liberty to make appropriate orders under section 98 of the Act.**
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> 3. **The recommendation by the Board to the Director of the Public Procurement Oversight Authority and other investigative Agencies of the Government to carry out an investigation to establish whether there was any impropriety in the Procuring Entity's decision to alter the prices submitted by the parties in their tenders and or in adopting prices and awarding the subject tenders to bidders at prices not set out in the form of tenders, is hereby quashed.**
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> 4. **As none of the parties can be said to have wholly succeeded, there will be no order as to costs.**

2. By an application dated 23rd November, 2016, the first applicant herein **MIG International Limited** (hereinafter refeed to as "MIG") now seeks an order that this Court be pleased to vary and review the said orders made on 17th August, 2016 on the grounds that the applicant was a successful bidder on tender no. KPS/T/11/2015-2016 for the supply and delivery of the motorized vehicle number plate hot sampling foils of sizes 305m x 120mm and 305m x 220mm which tender was one tender and was not subject to being split into two as per the tender documents availed to the parties and that the orders made or issued were due to misrepresentation of facts and material non-disclosure.

3. According to the said applicant, both during the hearing before the Board and before this Court the 2nd Respondent confirmed that the said tender was one and in line with the tender documents, the applicant bided for the tender as a unit as there were no separate price schedules provided to allow the splitting of the tender.

4. Accordingly the applicant prayed that the orders directing the re-advertisement of the tender KPS/ICB/T/11/2015-2017 for supply and delivery of motorized vehicle hot stamping foils of 305m x 220mm be reviewed and the said applicant be allowed to supply tender No. KPS/ICB/T/11/2015-2017 for supply and delivery of motorized vehicle hot stamping foils of sizes 305m x 120mm and 305m x 220mm as a whole and not as a split tender.

5. It is important to restate the decision that provoked the proceedings before the Review Board. In its

decision the procuring entity's Ministerial tender committee adjudicated on the subject tenders and awarded the contracts to those it considered the lowest evaluated bidders as follows:

i. MS EHA Hoffimann GmbH International was awarded tender No. KPS/ICB/T/10/2015-2017 for supply and delivery of motorized vehicle number plate blanks for a period of three years at a grand total of USD 6,953,700.00

ii. MIG International awarded tender No. KPS/ICB/T/11/2015-2017 for supply and delivery of motorized vehicle hot stamping foils size 120mm X 305m for three years at a grand total of USD 1,418,842.00

iii. Tender No. KPS/ICB/T/11/2015-2017 for supply and delivery of motorized vehicle hot stamping foils size 220mm X 305m was found to be overpriced and recommended for re-advertisement.

6. It is therefore clear that the procuring entity itself seems to have separated the two tenders in its decision whether rightly or wrongly. The applicant herein however did not contest the said decision since the proceedings before the Board were initiated by the interested party herein, **Tropical Technology Limited.**

7. After hearing the objection the Review Board on its part gave the following orders:-

a. The interested party's request for review was allowed;

b. The award of the tender for the supply of motorized number plate blanks to Hoffman was annulled;

c. The award of the tender for the supply and delivery of motorized number plate hot stamping foils to MIG, the instant applicant, for hot stamping foils size 120mm x 305m was annulled;

d. The decision of the Ministry failing to award the tender for foil 220mm x 305m and the recommendation that the tender for the supply of the said foil be re-advertised was annulled;

c. The Board thereby substituted the decision of the Ministry declaring the interested party's tenders in tender No. 10 and No. 11 as unsuccessful and thereby substituted the said decision by awarding the interested party:-

i. Tender Number KPS/ICB/T/10/2014/2015-2016/2017 for the supply and delivery of motorized vehicle number plate blanks at the price in the form of tender dated 2nd March, 2015 and the schedule annexed thereto;

ii. Tender number KPS/ICB/T/11/2014/2015-2016/2017 for the supply and delivery of motorized number plate hot stamping foils size 120mm x 305m including foil size 220mm x 305m at unit prices set out in the interested party's form of tender dated 2nd March, 2015 and the schedule annexed thereto.

f. The Ministry was directed to issue letters of award to the interested party in respect of the two tenders and complete the entire procurement process in accordance with the law within a period of fifteen days from the date of the decision.

8. The effect of this Court's decision which is sought to be reviewed was that the procuring entity's decision that Tender No. KPS/ICB/T/11/2015-2017 for supply and delivery of motorized vehicle hot stamping foils size 220mm X 305m to the interested party be re-advertised was reinstated so that the process of awarding that tender was to start afresh. With respect to the other two tenders which had been awarded by the procuring entity, the Court directed that the request for review be heard afresh before the Board.

9. It is therefore clear that both in the procuring entity's view and the proceedings before the Board Tender number KPS/ICB/T/11/2014/2015-2016/2017 for the supply and delivery of motorized number plate hot stamping foils size 120mm x 305m and Tender No. KPS/ICB/T/11/2014/2015-2016/2017 for the supply and delivery of motorized number plate hot stamping foils size 305m x 220mm were treated as to separate tenders. If the applicant was aggrieved by that course it ought to have challenged the same before the Board.

10. In **Ndungu Njau vs. National Bank of Kenya Limited Civil Appeal No. 257 of 2002,** the Court of Appeal expressed itself as follows:

> **"Neither in the application, its grounds or supporting affidavit nor in the instant appeal was or has been raised any important matter or evidence which was not within the knowledge of the appellant at the time the decree was passed in spite of exercise of due diligence which requires strict proof...Nor was there any submission before the Court about any mistake or error apparent on the face of the record to warrant an order of review which was sought. The error or omission on record must be self-evident on the part of the court and should not require elaborate argument in order to be established...There was no reference to such mistake or error before the trial Court and the grounds of appeal in the instant appeal do not point to any such omission or error."**

11. Similarly in **National Bank of Kenya vs. Ndungu Njau Civil Appeal No. 211 of 1996 [1995-98] 2 EA 249,** the same Court expressed itself as follows:

> **"In an application for review, it is particularly necessary that the application should disclose in the body of the notice of motion the ground or grounds on which the review is being sought. Although this was, in the court's view, a fatal omission, yet the court in the broad interest of justice, asked counsel for the appellant on which ground under Order 44 he had argued the said notice of motion in the Superior Court and he replied that he had sought the review on the ground that there was a mistake or error apparent on the face of the record of the Superior Court...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 and the error or omission must be self-evident and should not require an elaborate argument to be established. It will not be sufficient ground of review that another judge could have taken a different view of the matter. Nor can it be a ground of review that the Court proceeded on an incorrect exposition of the law and reached erroneous conclusion of the law...Misconstruing a statute or other provision of the law is not a ground for review...In the instant case the matters in dispute had been fully canvassed before the Learned Judge who made a conscious decision on the matters in controversy and exercised his discretion in favour of the Respondent. If he had reached a wrong conclusion of law, it would be a good ground for appeal but not for review. Otherwise the learned Judge would be sitting in appeal on his own judgement which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it."**

12. The effect of the said decisions is that the Court cannot in its decision on review grant orders which we not in the contemplation of the parties at the time the decision sought to be reviewed was handed down. In this case to grant the orders sought herein would have the effect of completely altering not only the case presented against the Board but the view taken by the procuring entity itself which was not the subject of challenge before the Board.

13. I am cognisant of the fact that some of the parties herein did not oppose the application. It is however my view and I hold that in judicial review proceedings, consents between the parties do not necessarily bound the Court especially if third parties are likely to be affected thereby. In in **Destro and Others vs. Attorney General [1980] KLR 77; [1976-80] 1 KLR 1590, Simpson, J** (as he then was) expressed himself as follows:

> **"In public law the most obvious limitation on the doctrine of estoppel is that it cannot be**

invoked so as to give an authority powers which it does not in law possess. In other words no estoppel can legitimate an action, which is *ultra vires*…Waiver and consent are in their effects closely akin to estoppel, and not always clearly distinguishable from it. But no rigid distinction need be made since the law is similar. The primary rule is that no waiver of rights and no consent or private bargain can give a public authority more power than it legitimately possesses. Once again the principle of *ultra vires* must prevail when it comes into conflict with the ordinary rule of law."

14. Circumstances such as in the instant case arose in **Republic vs. Registrar of Societies ex-Parte Justus Nyangaya & 3 others [2005] eKLR** where a consent was recorded in judicial review in which there was an applicant, respondent and interested party. In setting aside the consent recorded by the Deputy Registrar therein, **Nyamu, J** (as he then was) expressed himself as follows:

"The applicants claim that the original applicants are aware of the fact that the applicants had become parties firstly because they were served with the orders enjoining them and secondly through Boro Gathuo they had filed a replying affidavit on 5th November, 2002. In para 3 and the whole of the affidavit there is a clear acknowledgement that the IPs were interested parties and were part of the proceedings. Similarly the Registrar General by an affidavit sworn by Ms Catherine Nyiha, a Senior Assistant Registrar of Societies on 17th December, 2003 did respond to the IPs application and she too had knowledge of the IPs and the fact that they were part of the proceedings. Both affidavits it is contended show that at all times the original applicants and the respondent were aware that the IPs were contesting the proceedings. On 29th October 2003 a consent letter was filed in court. The consent letter was dated 25th October, 2003. Although the consent letter was signed by the original applicants and the respondent it was not signed by the IPs. It was also not shown to the IPs. I have considered the positions taken by all the parties as outlined above including the submissions of counsel together with the written skeleton arguments. The court after a careful scrutiny of the reasons given by the applicants counsel in his lengthy arguments number 1 to 22 as outlined above has been sufficiently persuaded that the reasons given in support of the arguments are convincing. On the other hand the brief arguments advanced by the counsel for the original applicants and the respondent in support of the consent order are off the mark in terms of the applicable law and are also factually incorrect. Firstly the changes effected pursuant to the consent order were the ones the applicants were opposed to and were entitled to a hearing and determination. Secondly once proceedings in the nature of Judicial review are filed it is not the parties who give relief but the court."

15. The learned Judge then proceeded to deal with the parties to judicial review proceedings and their respective roles and expressed the opinion that:

"It is significant to consider who are the parties to a Judicial review application. One of the situations is where there is an applicant or applicants and a respondent or respondents. The second situation is where there is an applicant or applicants, a respondent or respondents and an interested party or parties. The facts of this particular case fit the second category. It is common ground that there were interested parties in this case. It was therefore necessary for both the court and all the other parties at all times to recognize their presence until the determination of the matter in question. The position as outlined has the authoritative support of *THE WHITE BOOK VOL 2002 at page 152* as cited by the learned counsel for the applicants Mr Pherozee Nowrojee. The relevant portion 54.1.13 reads:

> **'The parties to a Judicial review claim will be the claimant, the defendant and interested parties. The defendant will usually be the public body whose decision, action or failure to act is under challenge. An 'interested party' is defined in rule 54 1(1) (f) as any person 'who is directly affected by the claim.' Under the former RSC Order 53 r 5(3) application for Judicial review had to be served on persons "directly affected.'**

In the Kenyan context it is Order 53 rules 3 and 4 which requires service on persons directly

affected. I therefore find that the Kenyan situation on parties to be similar to the current situation in the United Kingdom notwithstanding the repeal of their O 53 by the new O 54."

16. The learned Judge then proceeded to deal with the matter in the following manner:

"Since it is common ground that the IPs were not parties to the consent letter and order and yet they were affected parties how does this affect the consent letter and order…On this I find that in the circumstances of the case before me since the IPs were parties to the proceedings in law and they were deliberately excluded from the consent letter/order or judgment the very act of excluding them is a fraudulent act taking into account that the exclusion was clearly aimed at conferring benefits to the excluding parties and denying the IPs of the same benefits. Similarly the exclusion of the IPs if not done fraudulently does in the circumstances constitute negligent misrepresentation to say the least and an unforgivable mistake as well… The oversight on the part of the Deputy Registrar was either deliberate, negligent or by mistake and all these lapses entitle the aggrieved party to avoid the consent order. Lord Herschell in the celebrated case on misrepresentation *DERRY v PEEK 1889 14 AC 389 said "if a representor deliberately shuts his eyes to the facts or purposely abstains from their investigation, his belief is not honest and he is just as liable as if he had knowingly stated a falsehood"*

17. In the Court's view:

"Neither the Registrar of societies nor the Deputy Registrar can oust the Court's jurisdiction to determine matters referred to it. When the application for leave was filed on 27th September, 2002 and leave granted it was granted on the strength of the statement filed on the same day and the relief sought… However the consent recorded and in particular orders (a) (b) and (c) are completely outside the ambit of the relief sought. Thus the orders are not in the nature of mandamus directed at the registrar of Societies. The orders are not in the nature of mandamus at all and are therefore outside the scope of Judicial review remedies at all or as claimed in the proceedings the consent order was purporting to settle. The orders disregarded the IPs who were part of the proceedings and literally took away offices from them without any determination by a Judicial review court. It is not possible in law for a consent order or letter to confer Jurisdiction on the Deputy Registrar where it is not specifically conferred on him. In other words jurisdiction cannot be conferred by consent. It is trite law that jurisdiction to grant Judicial review remedies is vested in the court (Judges), and they cannot delegate the power to grant those remedies to a Deputy Registrar or any other person this being a supervisory jurisdiction specifically conferred on them by statute – *see HALSBURY'S LAWS OF ENGLAND 3rd Edition vol II page 119 and para 222:*

'Parties cannot by agreement or otherwise confer jurisdiction upon or oust the jurisdiction of a court'."

Surely the effect of the consent judgment or order was to oust the jurisdiction of the court by virtue of an agreement by some of the parties to make the matter worse. Even if all the parties had agreed to oust the court's jurisdiction I find and hold that they could not do so. The said consent judgment/order is null and void for this reason as well."

18. According to the Court:

"a party or parties cannot seek relief that is outside the statement unless leave to amend the statement is sought and granted pursuant to O 53 rule 4(2) and no such amendment or leave was sought in this case. It follows that the consent judgment or order flies in the face of O 53 rule 4(1) of the Civil Procedure Rules which is worded in mandatory terms. The consent is not valid for this reason as well."

19. It was further held that:

> **"It is clear from the facts outlined above that the original applicants counsel kept away from the court material facts concerning the settlement which had been worked on behind the IPs back on 29th September, 2003… Since the IPs were parties to the proceedings and were deliberately kept out of the consent judgment or order by the other parties, the effect of this must be the same as that of a party to a contract which he is entitled to rescind and once he challenges such a consent judgment/order in court for keeping him away the effect must be to restore the parties position to that prevailing before the consent was entered into – parties in status quo ante. Lord Atkinson in the case of *ABRAM STEAMSHIP COMPANY v WESTVILLE SHIPPING COMPALY LTD [1923] AC 773 at 781* described the effect in the following terms:**
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> **"Where one party to a contract expresses by word or act in an unequivocal manner that by reason of fraud or essential error of a material kind inducing him to enter into the contract he has resolved to rescind it, and refuses to be bound by it the expression of his election, if justified by the facts, terminates the contract, puts the parties in status quo ante and restores things as between them, to the position in which they stood before the contract was entered into."**
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> **I therefore hold that this court views the position of IPs in electing to apply to set aside the consent judgment in the same light. They have elected not to be bound by it although the consent judgment purports to bind them and consequently this court is obligated to set the consent judgment/order aside in order to restore all the parties to the position they stood before the consent judgment/order was entered into. It does not matter to the court whether the acts leading to the entering of the consent constitute mistake, fraud or misrepresentation, justice demands that the previous position be restored…I also accept as good law that where some of the parties such as in this case fail to make a full disclosure to the court and obtain what for all practical purposes is an ex parte order behind the back of bona fide parties to the proceedings such as the IPs the court has jurisdiction to refuse such an application if asked for ex-parte or obtained ex parte, in violation of the duty *uberrimae fidei* to make full disclosure to court."**

20. This Court in **Republic vs. Procurement Administrative Review Board ex parte Coast Water Services Board & Others Miscellaneous Application No. 116 of 2016**, expressed itself as hereunder:

> ***"In my view, in judicial review and any public law litigation, at that, parties cannot, without the endorsement of the Court, compromise the proceedings. Further, once parties have been joined thereto, it is not open for some of them to compromise the proceedings in a way that prejudices the interests of the other parties, however nominal they may seem to be to the parties compromising the suit. In other words, once the Court or the parties themselves recognise that there are persons interested in the proceedings, any compromise thereof as opposed to the withdrawal of the proceedings by the applicant ought not to be permitted unless it is clear that the issues in the judicial review proceedings can be said to be divisible and the compromise only affects the part of the suit which does not affect the interests of the persons not consenting. In this case, I have found that the 2nd interested party stands to benefit if these proceedings are determined in favour of the applicant. In other words the 2nd interested party's interests are intertwined with and not divisible from those of the Procuring Entity hence the latter cannot by a stroke of the pen and in collusion with the other persons take steps whose effect would be to obliterate the 2nd interested party's interests more so where it is contended, as in this case that the effect of the compromise would be to render the Constitutional and statutory provisions guiding public procurement irrelevant. It is therefore my view that the attempt by the ex parte applicants, the respondent and the 1st interested party must be rendered stillborn. That purported consent cannot be permitted to see the light of the day and must be nipped in the bud for violating both the procedural and the substantive law relating to judicial review proceedings.***

In the premises, the draft consent filed herein on 21st June, 2016 is inconsequential and remain a mere piece of paper without any legal validity. The Court will therefore proceed to deliver the judgement on a date to be given by the Court."

21. Therefore though no serious objection was raised to the instant application, taking into consideration the nature of judicial review proceedings, I decline to grant the Notice of Motion dated 23rd November, 2016 which I hereby dismiss but with no order as to costs.

22. It is so ordered.

Dated at Nairobi this 15th day of May, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kinyanjui for the applicant and holding brief for Mr Thangei for the interested party and Mr Munene for the Respondent

CA Mwangi