



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW NO. 371 OF 2015**

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

AND

IN THE MATTER OF ARTICLES 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 ACTIONS ACT, 2015

AND

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

AND

IN THE MATTER OF ORDER53 (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 SUPPLY OF NON PHARMACEUTICALS (SURGICAL TUBES AND CANNULAES) TENDER NO. KEMSA /01T7/2015-2017 BY KENYA MEDICAL SUPPLIES AUTHORITY

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

PUBLIC PROCUREMENT

ADMINISTRATIVE REVIEW BOARD.....	RESPONDENT
KENYA MEDICAL SUPPLIES AUTHORITY.....	1 <sup>ST</sup> INTERESTED PARTY
REVITAL HEALTHCARE (EPZ) LIMITED.....	2 <sup>ND</sup> INTERESTED PARTY
ANOCMA ENTERPRISES.....	3 <sup>RD</sup> INTERESTED PARTY
SYNER- CHEMIE LIMITED .....	EX-PARTE APPLICANT

## RULING

1. By an application dated 5<sup>th</sup> October 2016 the applicant who is the 1<sup>st</sup> interested party herein Kenya Medical Supplies Authority seeks from this court orders:

- i. That the application be certified urgent and the same be heard exparte on a priority basis and service therefore be dispensed with the first instance.
- ii. That the court be pleased to issue an order of stay of the order made on 23<sup>rd</sup> September 2016 staying the procurement process of tender No. KEMSA /01777/2015- 2017 pending interpartes hearing hereof and final disposal of the application.
- iii. That there is stay of the order of 23<sup>rd</sup> September 2016 pending hearing and determination of the appeal as lodged.
- iv. That costs be provided for.

2. The application is predicated on the grounds on the face of the notice of motion, the supporting affidavit of Dr John Munyu and the annexures thereto.

3. Mr Senteyo counsel for the 1<sup>st</sup> interested party/applicant argued the application orally before me this morning after I certified it urgent and directed that it be heard expeditiously in the first instance.

4. Mr Senteyo submitted that his client was dissatisfied with the orders of this court made on 23<sup>rd</sup> September 2016 staying procurement process of tender No. KEMSA /01T7/2015-2017 pending hearing and determination of these judicial review proceedings and have since filed a notice of appeal to the Court of Appeal challenging that order.

5. That the contract between the 1<sup>st</sup> and 2<sup>nd</sup> interested parties was signed on 15<sup>th</sup> August 2016 which was way before the exparte applicant filed the application for leave to commence judicial review proceedings on 19<sup>th</sup> August 2016.

6. Further, that the Review Board after striking out the request for review, ordered that the procurement process proceeds hence the signing of the contract on 15<sup>th</sup> August 2016 as shown by annexure JMM2.

7. It was submitted that at the time when the contract was being signed there was no stay and that the application for leave was only served upon his clients on 28<sup>th</sup> August 2016 without an accompanying order of stay hence there was nothing to prevent the procurement process from going on.

8. Further, it was submitted that when the parties came to court on 31<sup>st</sup> August 2016 the exparte applicant withdrew the notice of motion hence the stay orders that were granted on 19<sup>th</sup> August

2016 lapsed.

9. It was submitted that the procurement process is at an advanced stage, and that therefore the 1<sup>st</sup> interested party being a state corporation mandated by statute to supply pharmaceutical and non pharmaceutical products to hospitals, and since the supplies have run out, the decision of this court made on 23<sup>rd</sup> September 2016 extending stay orders which lapsed and that order of stay being appealed from, it in the interest of justice that the said order be stayed to allow the procurement process to proceed since the stoppage thereof has serious ramifications as public facilities will not get the supply of the tubes.

10. Further, that damages might ensue which will prejudice the interests of the interested parties who have already signed a contract for procurement.

11. I have carefully considered the application by the applicant 1<sup>st</sup> interested party brought under Order 42 rule 6 and Order 51 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act and all other enabling laws.

12. The significance of an order of stay was exemplified in the case of **In Butt Vs Rent Restriction Tribunal [1982] KLR 417** where the court held that:

*“ The general principle in granting or refusing a stay is that if there is no other overwhelming hindrance a stay must be granted to that an appeal may not be rendered nugatory should the decision be reversed.”*

13. And in **Mukoma Vs Abuoga, [1988] KLR 545** the Court of Appeal stated inter alia, that:

*“.....the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”*

14. In **Standard Ltd & Others Wilson Kalya Civil Application CA Nairobi 369/2001** the Court of Appeal held inter alia that:

*“.....a) the appellant must show that his appeal is an arguable one. In other words, he must show that the appeal is not a frivolous one;*

*(b) The appellant must also show, in addition, that if the order of stay of proceedings is not granted, his appeal, if it were to succeed, would be rendered nugatory.*

15. In **Tabro Transporter Ltd Vs Absolom Dora Lumbani [2012]**, Gikonyo J stated that:

*“Of course a frivolous appeal cannot be rendered nugatory. The only caution however, is that the High Court should not base the exercise of its discretion under Order 43 Rule 6 of the Civil Procedures Rules on the chances of the success of the appeal. It must consider factors that constitute substantial loss. Much more is therefore needed in order to pass the test I have set above.”*

16. In the instant case, on 23<sup>rd</sup> September 2016 this court granted the ex parte applicant orders enlarging the period within which the substantive notice of motion was to be filed after the initial period granted by the court lapsed after the withdrawal of an erroneous application.

17. The court also granted stay of enforcement of the decision of the Review Board made on 5<sup>th</sup> August 2016, which decision the ex parte applicant was seeking to challenge by these Judicial Review proceedings.

18. The 1<sup>st</sup> interested party claims that it will suffer irreparably if the orders of 23<sup>rd</sup> September 2016 are not stayed since on 15<sup>th</sup> August 2016 it entered into a procurement contract with the 2<sup>nd</sup> interested party since it was given a go ahead by the Review Board by its decisions made on 5<sup>th</sup> August 2016.

19. Although the application is being considered *ex parte*, the burden of proving that the stay orders sought are merited in the first instance lies with the person who applies and in this case, the 1<sup>st</sup> interested party.

20. The court notes that under Section 175(1) of the Public Procurement and Asset Disposal Act No. 33 of 2015, ***(1) A person aggrieved by a decision made by the Review Board may seek Judicial Review by the High Court within 14 days from for date of the Review of Board's decision, failure to which the decision of the Review Board shall be final and binding on both parties.***

21. In the instant case, the decision of the Review Board was made on 5<sup>th</sup> August 2016 and on 19<sup>th</sup> August 2016, the *ex parte* applicant filed an application for leave to institute Judicial Review proceedings, which was within the 14 days stipulated under Section 175(1) of the Public Procurement and Asset Disposal Act.

22. Nonetheless, from the averments of the 1<sup>st</sup> interested party, even before the elapse of the 14 days within which one would file for Judicial Review of the decision of the Review Board, on 15<sup>th</sup> August, 2016, the applicant herein entered into a contract with the 2<sup>nd</sup> interested party and that it is in the advanced stages of enforcing that contract hence the orders of 23<sup>rd</sup> September 2016 have serious ramifications including damages for breach of contract on the part of the 1<sup>st</sup> interested party which is a statutory body.

23. In **Republic Vs Public Procurement Administrative Review Board and 2 Others Ex parte Noble Gases International Ltd [2013] e KLR** the court was categorical that:

***“In my view, where Judicial Review proceedings are commenced within 14 days from the date of the respondent's decision the said decision is neither final nor binding and hence ought not to be implemented. Thus, there is an automatic stay under Order 53 of the Civil Procedure Rules.....the fourteen days period is a window period availed to serve the purpose of limiting the time frame within which a review against the Board's decision can be lodged in the High Court for purpose of expediency and conclusiveness of the Board's decision as these activities are time bound and the procurement process ought not to be hold hostage to indefinite proceedings.....***

***The decision of the Board after the application for review has been filed remains subject to the court's directions and decision. This provision answers the core question in contention, that is, whether the filing of Judicial Review proceedings before the High Court within the prescribed period of 14 days acts as an automatic stay. I take the position that Section 100 of the Act implies that the Board's decision is to be kept in abeyance until the court makes its final decision. The use of the term “shall take effect” discloses the legislative purposes and intent. For all practical purposes, the Board's decision was ‘frozen’ so to speak until such a time as the High Court issued an order of Judicial Review contemplated under the Section over the decision or after the lapse of the 14 days period whichever comes first. I find and hold that provision is a statutory stay.”***

24. From the above decision interpretative of Section 100 of the repealed Act and which is in *pari materia* with Section 175(1) of the current Public Procurement and Asset Disposal Act 2015, it is clear that the 1<sup>st</sup> interested party herein could only have signed a valid contract with the 2<sup>nd</sup> interested party after expiry of 14 days from 5<sup>th</sup> August 2016 and only if there was no application for Judicial Review proceedings. It cannot escape from the statutory provisions which are meant to protect those

who are aggrieved by the decisions of the tribunal. By entering into a contract on 15<sup>th</sup> August 2016 elapse of 14 days, it was varying the scope of its statutory powers and duties, which cannot be allowed to stand.

25. Accordingly, I find that the application for stay is not merited at this stage as it would amount to sanctioning an illegality to be continued by the 1<sup>st</sup> interested party and therefore the allegations of serious ramifications are in the view of this court meaningless to the established law. A similar decision was reached in Kenya **Power & Lighting Company Ltd Vs NGM.Co. Ltd & 2 Others [2010] e KLR** by the Court of Appeal.

26. Thus, even if the application was served on 28<sup>th</sup> August 2016 without any orders of stay by this court, by 15<sup>th</sup> August 2016 there was a statutory stay. Accordingly, find the application by the 1<sup>st</sup> interested party not merited. I dismiss the application for stay as sought in prayer 2 of the Notice of Motion dated 5th October 2016 with no orders as to costs. This ruling applies to JR 372 of 2016 with necessary modifications as to the parties thereto.

**Dated, signed and delivered in open court this 7<sup>th</sup> day of October 2016.**

**R.E. ABURILI**

**JUDGE**