



Skaga Limited v Public Procurement Administrative Review Board & 3 others (Civil Appeal (Application) E232 of 2021) [2021] KECA 272 (KLR) (3 December 2021) (Ruling)

Neutral citation: [2021] KECA 272 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E232 OF 2021
DK MUSINGA, AK MURGOR & J MOHAMMED, JJA
DECEMBER 3, 2021**

BETWEEN

SKAGA LIMITED APPELLANT

AND

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD 1ST
RESPONDENT**

**ACCOUNTING OFFICER KENYA REVENUE AUTHORITY 2ND
RESPONDENT**

KENYA REVENUE AUTHORITY 3RD RESPONDENT

ON THE MARK SECURITY LIMITED 4TH RESPONDENT

*(An appeal from the Orders of the High Court of Kenya at Nairobi (Nyamweya, J.)
dated 20th April 2021 in Nairobi High Court Judicial Review No. E038 of 2021)*

RULING

1. The applicant's notice of motion dated 20th May 2021 seeks the striking out of the notice of appeal dated 26th April 2021 and the entire record of appeal dated 27th April 2021.
2. The application was supported by an affidavit sworn by Solomon Kimeu, a director of the 4th respondent/applicant, who depones, inter alia, that the appellant and the 4th respondent had noticed a tender advertised through the 2nd respondent's website/portal for the supply of K9 dogs and training of Dog Handlers and the 4th respondent submitted their respective bids for evaluation by the 2nd respondent; that the 4th respondent and the appellant were the only bidders for the tender and the 2nd and 3rd respondents have made a questionable decision on the tender which became the subject of litigation before the Public Procurement Administrative Review Board (the Review Board), the 1st respondent, and the High Court.



3. Mr. Kimeu further states that the tender proceedings have been the subject of four requests for review before the 1st respondent and two judicial review applications before the High Court; that on 16th March 2021, the appellant took out summons for leave to institute judicial review proceedings and on 17th March 2021 was granted leave as sought on the terms that: “the motion together with written submissions shall be filed and served within 3 days of the date of this ruling, the respondents and the Interested Parties to file and serve their response together within 3 days of service of the applicant’s application and the application shall be mentioned on 24th March 2021 to reserve it for judgment.”
4. The *ex parte* applicant and the appellant filed the substantive notice of motion within the stipulated period of time but failed and or neglected to serve the motion within the 3 days’ period as ordered by the court, Mr. Kimeu stated.
5. The scheduled mention on 24th March 2021 did not take place because the learned judge who was seized of the matter was not sitting, but as at that date the appellant had not fully complied with the orders issued on 17th March 2021; the matter was then mentioned on 20th April 2021 before Nyamweya, J. (as she then was), when the Court gave the following directions:
 - “(i) THAT the applicant shall serve the 1st respondent with the pleadings by close of business today, and shall also file and serve all the respondents and Interested Party with their submissions within 3 days.
 - (ii). THAT the respondents and the Interested Party be and are hereby granted leave to file and serve their reply if need be and submissions within 3 days of service by the applicant.
 - (iii). THAT a virtual mention shall be held on 10th May 2021 at 3:00 p.m. to confirm the status of this matter and for further directions after receipt of the reasons of the judgment in Civil Appeal 39 of 2021; and in light of the non-compliance by parties with the directions given herein by Hon. Justice J. Ngaah on 17th March 2021 as this court may not have the time to deliver judgment in this matter.”
6. The 4th respondent further states that the *ex parte* applicant instead of complying with the said court order preferred an appeal against the order; that the appellant served the respondent/applicant with the notice of appeal dated 26th April 2021 along with the record of appeal dated 27th April 2021; that the notice of appeal indicated that the appellant was appealing against the directions given on 20th April 2021, but the appellant did not seek leave of the court that issued the said orders which the 4th respondent argues are not appealable as a matter of right by dint of section 75(g) of the *Civil Procedure Act* and order 43 of the *Civil Procedure Rules, 2010*.
7. The 4th respondent further states that the appellant served the respondent/applicant with both the notice of appeal and the record of appeal electronically on 30th April 2021 and as per the provisions or rule 84 as read together with rules 39(b), 42 and 43 of this Court’s Rules, an application for striking out a notice of appeal must be filed within 30 days of service of the notice and record of appeal, which the 4th respondent had done.
8. For the aforesaid reasons we were urged to grant the orders sought so that the tendering proceedings can be completed in time in accordance with the provisions of Article 227 of the *Constitution* and the *Public Procurement and Disposal of Assets Act*.



9. This application came up for hearing on 21st June 2021. Our record shows that on 7th June 2021, all the parties were served with a hearing notice and directed to file and serve their respective submissions within 3 days from the date of service of the hearing notice.
10. Only the 4th respondent and the appellant filed submissions. The 4th respondent reiterated that the appeal having been filed without leave of the court is incompetent.
11. The appellant in its submissions argued that when the matter came up for mention before Nyamweya, J. on 20th April 2021, the learned judge informed the parties that she will not have time to deliver the judgment in the judicial review application within the statutory time lines and that in itself amounted to driving the appellant away from the seat of justice without granting the parties a hearing and making an appropriate determination within the statutory period of 45 days as provided for under section 175(4)(d) of the *Public Procurement and Assets Disposal Act*. In the appellant's view, the direction given by the learned judge was a "decision" of the court and no leave was necessary before an appeal could be lodged.
12. The appellant further submitted that section 175(4)(d) of the Public Procurement and Assets Disposal Act requires that a person aggrieved by the decision of the High Court may appeal to the Court of Appeal within seven (7) days of such decision but does not define the term "decision." The appellant further submitted that the Black's Law Dictionary defines "decision" as follows: "a judicial or agency determination after consideration of the facts and the law; especially a ruling, order or judgment pronounced by a court when considering or disposing of a case." The same dictionary also defines "appealable decision" as follows: "a decree or order that is sufficiently final to receive appellate review (such as an order granting summary judgment) or an interlocutory decree or order that is immediately appealable." It was therefore submitted that the orders made on 20th April 2021 constitute an appealable decision and no leave was necessary.
13. We have considered the submission by the applicant/4th respondent as well as the appellant. Section 75 (1) of the *Civil Procedure Act* states as follows:
 - "(1) An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted-
 - a. an order superseding an arbitration where the award has not been completed within the period allowed by the court;
 - b. an order on an award stated in the form of a special case;
 - c. an order modifying or correcting an award;
 - d. an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;
 - e. an order filing or refusing to file an award in an arbitration without the intervention of the court;
 - f. an order under section 64;
 - g. an order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;



h. any order made under rules from which an appeal is expressly allowed by rules.”

14. Order 43 of the Civil Procedure Rules sets out a list of orders from which appeals would lie as a matter of right. The kind of order that was made by the High Court on 20th April 2021 is not one of the orders that are stipulated under section 75 and order 43. In our view therefore, the appellant ought to have sought leave of the court to appeal against the said order.

15. We also do not agree that the order was a final decision of the court that was dispositive of the matter as to warrant lodging of an appeal without leave.

16. Whereas we agree with the appellant that it was important that the judicial review application be heard and determined within 45 days from the date of filing, which was ending on 1st May 2021, that per se did not permit the appellant to jump the gun and file an appeal unprocedurally.

17. Section 3 (1) of the [Appellate Jurisdiction Act](#) states as follows:

“(1) The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court and any other Court or Tribunal prescribed by an Act of Parliament in cases in which an appeal lies to the Court of Appeal under law.”

(Emphasis added)

18. For an appeal to lie to this Court, it has to be demonstrated that the provisions of section 75 of the [Civil Procedure Act](#) as read with order 43 of the Civil Procedure Rules have been complied with.

19. We are satisfied that this appeal was instituted without leave and does not therefore lie. Consequently, we strike out the notice of appeal and the entire record of appeal with costs to the 4th respondent.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF DECEMBER, 2021.

D. K. MUSINGA, (P)

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

