



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: KOOME, SICHALE & KANTAL, JJA]

CIVIL APPLICATION NO. 106 OF 2019 (UR 105/2019)

BETWEEN

ASTONFIELD SOLESA SOLA KENYA LTD/

CLEAR WATER INDUSTRIES LIMITED.....APPLICANT

AND

KENYA POWER AND LIGHTING

COMPANY LIMITED.....1ST RESPONDENT

PUBLIC PROCUREMENT

ADMINISTRATIVE REVIEW BOARD2ND RESPONDENT

SHENZHEN CLOU ELECTRONICS CO. LTDINTERESTED PARTY

(Being an application for stay of execution and injunction pending the hearing and determination of an intended appeal against the judgment of the High Court of Kenya at Nairobi (P. Nyamweya, J), dated 11th March, 2019

IN

JR MISC. APPLICATION NO. 181 OF 2018

RULING OF THE COURT

The applicant, **Astonfield Solesa Solar Kenya Ltd/Clearwater Industries Limited**, filed the motion dated 3rd April, 2019 and sought the following orders that:

“(i) (spent)

(ii) *there be a stay of execution of the judgment and orders made on 11th March, 2019 in the Judicial Review and Constitutional Division of the High Court at Nairobi by Honourable Lady Justice P. Nyamweya, J in JR Misc. Application No. 181 of 2018 pending the lodging, hearing and determination of the intended appeal;*

(iii) *there be a stay of further proceedings in the procurement process including the execution of the contracts and or performance of the contracts under tender No. KP1/6D.4/PT/1/17 pending the determination of the intended appeal.*

(iv) *ALTERNATIVELY, an injunction be and is hereby issued to restrain the 1st and the Interested Party from entering into a contract pursuant to tender No. KP1/6D.4/PT/1/17 and or from performing or implementing any such contract that may have been entered into.*

(v) *Costs be provided for*”.

In the motion, **Kenya Power and Lighting Company Limited** and the **Public Procurement and Administrative Review Board** were named as the 1st and 2nd respondents whilst **Shenzhen Clou Electronics Co. Limited** was named as an Interested Party, whom we shall refer to as the 3rd respondent.

A brief background leading to the institution of the motion is that the 1st respondent invited tenders for the procurement of plant supply, installation and commissioning of 550 KW Solar Plant- Kenya Electricity Expansion Project (KEEP).

The tender was eventually awarded to the 3rd respondent herein. In a request for review, (No. 42 of 2018) the applicant herein challenged the award before the 2nd respondent who in its decision of **19th April, 2018** nullified the award made to the 3rd respondent. It was the 1st respondent's turn to be aggrieved with the nullification of the tender. It filed the motion dated **13th August, 2018** that was heard and determined by **Nyamweya, J** who in a ruling dated **11th March, 2019** rendered herself as follows:

“ In the premises this court finds that the applicant’s Notice of Motion dated 13th August, 2018 is merited to the extent of the following orders:

(i) An order of certiorari be and is hereby issued to bring into this court for the purposes of being quashed the respondent’s entire decision in the ruling delivered on 19th April, 2018 in Request for Review No. 42 of 2018.

(ii) An order of prohibition be and is hereby issued prohibiting and /or restraining the respondent from (sic) entertaining any other and /or further administrative review touching on procurement of Plant, Supply, Installation and Commissioning of 550 KW Solar Plant-Kenya Electricity Expansion Project (KEEP) (ICB No. KPI/6D.4/PT/1/17).

(iii) The respondent and 1st Interested Party shall meet the applicant’s costs of the Notice of Motion dated 13th August, 2018”.

The applicant herein was aggrieved by the said outcome and hence filed the motion before us. In the supporting affidavit of **Abdi Dara**, a director of Clear Water Industries Limited (the applicant herein) sworn on **3rd April, 2019**, he deponed that the ruling of **Nyamweya, J** is **“... marred with irregularities arising from misinterpretation of the law and facts ...”**

The motion was opposed by the 1st respondent in an affidavit sworn by **Justus Ododa** on **4th February, 2020**. He deponed that what was before the High Court was a matter of interpretation of Section 4 (2) (f) and Section 6 (1) of the Public Procurement and Asset Disposal Act, 2015 (the Act); that the High Court correctly delivered itself in its interpretation to the effect that bilateral and multi-lateral agreements between Government of Kenya (GoK) and any foreign government entity or multilateral agency is not governed by the Act; that Section 4 (2) (8) of the Act provides :

“For avoidance of doubt, the following are not procurements or asset disposals with respect to which this Act applies: -

(f) procurement and disposal of assets under bilateral or multilateral agreements between the Government of Kenya and any other foreign governments, agency, entity or multi-lateral agency unless as otherwise prescribed in the Regulations”.

The local representative of the 3rd respondent namely **Zhao Yupeng** swore an affidavit dated **1st February, 2020** in opposition to the motion. He deponed that the main issue in respect of the intended appeal is whether the Act applied to procurement between GoK and a Foreign Government and/or a Multi-Lateral Agency; that the tender in question was to be funded under a bilateral grant agreement between the GoK and Nordic Development Fund.

On **4th February, 2020**, the motion came up for hearing before us. **Mr. Owino**, learned counsel for the applicant urged us to hold that section 4 (2) (f) which purports to oust certain clauses of the Procurement Act is unconstitutional.

On the nugatory aspect, counsel was of the view that unless stay is granted, the 3rd bidder will enter into a contract which will then be implemented.

Mr. Ogan for the 1st respondent refuted the contention that section 4 (2) (f) of the Act is unconstitutional. He also did not think the appeal will be rendered nugatory, absent stay. **Mr. Munene** for the 2nd respondent made no submissions, either for or against the motion.

On his part, **Mr. Muchoki** for the 3rd respondent submitted that the 2nd respondent did not have jurisdiction to entertain the review application filed by the applicant before it and hence there is no arguable point. As for the nugatory aspect, he submitted that the procurement process is on-going and it would be prejudicial if it was to be halted.

We have considered the record, the rival oral arguments made before us, the authorities cited and the law. The twin principles to be considered in an application for stay are that an applicant has to show that he/she has an arguable appeal which will be rendered nugatory, absent stay. As always, our jurisdiction under **Rule 5(2) (b)** of the rules of this Court is discretionary and fairly wide, guided only by the interests of justice. In the judicious exercise of this discretion, however, the Court must be satisfied on the twin principles, firstly, that the intended appeal is not frivolous but that it is arguable; and secondly, that if the orders sought are not granted, the success of the intended appeal will be rendered nugatory. These principles were aptly summarized in the case of **Stanley Kang’ethe Kinyanjui vs. Tony Keter & 5 Others [2013] eKLR** as follows:

In dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this court. See Ruben & 9 others v Nderitu & Another (1989) KLR 459.

ii) The discretion of this court under Rule 5(2) (b) to grant a stay or injunction is wide and unfettered provided it is just to do so.

iii) The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. Halai & Another v Thornton & Turpin (1963) Ltd. (1990) KLR 365

iv) In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances. David Morton Silverstein v Atsango Chesoni, Civil Application No. Nai 189 of 2001.

v) An applicant must satisfy the court on both of the twin principles.

vi) On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised. Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004.

vii) An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others, Civil Application No. 124 of 2008.

viii) In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.

ix) The term "nugatory" has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. Reliance Bank Ltd v Norlake Investments Ltd [2002] 1 EA 227 at page 232.

Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.

xi) Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecuniness, the onus shifts to the latter to rebut by evidence the claim".

International Laboratory for Research on Animal Diseases v. Kinyua, [1990] KLR 403.

The applicant's main contention is that section 4 (2) (f) of the Act is unconstitutional as it ousts the provisions of Article 227 of the Constitution which provides for accountability and transparency. Given the aforesaid specific provisions that excluded bilateral agreements, we think it is arguable whether the non-applicability of the Act to procurements between GoK and a foreign entity is unconstitutional.

However, on the nugatory aspect, the applicant's main contention is that unless stay is granted **"... loss of the tender herein as a result of the failure to follow the constitutional provisions will not only impede the growth of the applicant as a local company with capacity of carrying out the tender herein but the same will also affect its goodwill"**. From the above, it would appear that the main contention of the applicant is that unless a stay is granted, its anticipated growth and profit to be derived from the tender may be hampered. In our view, this is not a ground for consideration in deciding whether the appeal will be rendered nugatory or not absent stay.

In view of the fact that the applicant has failed to establish the second limb of consideration in a 5(2) (b) application, we find that the motion is for dismissal.

It is hereby dismissed with costs to the 1st and 3rd respondents, the 2nd respondent having opted not to take sides in the motion.

It is so ordered.

Dated and Delivered in Nairobi on this 8th Day of May, 2020.

M. KOOME

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

*I certify that this is a
true copy of the original*

Signed

DEPUTY REGISTRAR