



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, GATEMBU & MURGOR, J.J.A)

CIVIL APPEAL (APPLICATION) NO. 276 OF 2017

BETWEEN

QUESTA CARE LIMITED..... APPLICANT

AND

THE PUBLIC PROCUREMENT

ADMINISTRATIVE REVIEW BOARD.....1ST RESPONDENT

KENYA MEDICAL SUPPLIES AUTHORITY.....2ND RESPONDENT

SIMBA PHARMACEUTICALS LIMITED.....3ND RESPONDENT

(Being an application for injunction pending the hearing and determination of an Appeal from

a judgment of the High Court at Nairobi (Aburili, J.) delivered on 23rd November 2014

in

Judicial Review No. 186 of 2017

(as consolidated with Judicial Review No. 186 of 2017))

RULING OF THE COURT

This Notice of Motion dated 30th November 2017 is made under **section 3A and 3A of the Appellate Jurisdiction Act** and **rule 5 (2) (b) of the Court of Appeal Rules, 2010** following a decision of the High Court delivered on 1st July 2016 where **the applicant, Questa Care Limited** seeks for orders of injunction to be issued restraining, **Kenya Medical Supplies Authority** and **Simba Pharmaceuticals Limited**, the 2nd and 3rd respondent respectively, their servants agents and employees from signing or performing the contract in respect of tender No. KEMAS/GOK – CPF/HIV- 16/17 – 001 - Supply and delivery of ARV Medicine- Adults (**the tender contract**) pending the hearing and determination of the application and the intended appeal.

The application was premised on the grounds that the judgment of the High Court upheld the 2nd and 3rd respondents’ judicial review applications and quashed the decision of the 1st respondent in **PPRAB Application No. 28 of 2017**, and prohibited it from applying a 15% margin of preference against the price tendered by the applicant; that since leave granted by the High Court to the 2nd and 3rd respondents to file the judicial review application operated as a stay of execution of the decision of the 1st respondent, it was reasonable and just for the orders sought herein to be granted to maintain the status quo pending the hearing and determination of the intended appeal; and that if the injunction is not granted, the 2nd and 3rd respondents would sign the tender contract and subject the applicant to irreparable harm and by so doing, render the appeal nugatory. The motion was supported by the affidavit of **Hiren Metha** a director of the applicant sworn on 30th November 2017, and a supplementary affidavit sworn on 16th January 2018.

By a replying affidavit sworn on 21st December 2017 by **Fred Wanyonyi**, the Acting Chief Executive Officer of the 2nd respondent, it was

deponed that the 2nd respondent's legal mandate was to procure antiretroviral drugs and to supply them to the 47 counties to offset the deficit currently being experienced in public medical facilities; that the applicant merely seeks a definition of manufacturer which is not a matter that is liable to affect the performance of the tender contract.

In a replying affidavit sworn by **Kalithodi Ravinder Menon**, the Chief Executive officer of the 3rd respondent and sworn on 20th February 2018, it was deponed that during the hearing of *PPRAB Application No. 28 of 2017* before the 1st respondent, it transpired that the applicant was only engaged in packaging, storage and labeling of HIV/AIDS, TB and malaria finished products on behalf of its principal, Mylan Laboratories situated in India; that despite this disclosure, in its decision of 3rd April 2017 the 1st respondent went ahead to determine that the applicant is a Kenyan manufacturer and award it a 15% preference margin instead of a 10% preference margin; that following the filing of the *Judicial Review No. 185 of 2017* and *Judicial Review No. 186 of 2017*, the High Court quashed the decision of the 1st respondent; prohibited the 2nd respondent from conducting a reevaluation of the financial bids of the tenderers and applying the 15% preference margin.

It was further deponed that following the orders of the court, since there were no orders of stay of execution issued by the trial court, the tender contract was executed on 29th November 2017, where the provisions compelled the 3rd respondent to import and deliver the antiretroviral drugs within a period of 12 weeks from 4th December 2017; that pursuant to the contract, by 11th January 2018, the 3rd respondent had delivered 55,000 units to the 2nd respondent, by the time of swearing the replying affidavit, a further 337,936 units had been delivered; that a third consignment of 336,407 units had already been shipped and was expected at the Port of Mombasa on 26th February 2018, while the 4th consignment was already manufactured, tested and certified and the export process underway.

It was averred that the appeal was not arguable, as the applicant seeks to be declared a manufacturer within the narrow definition of Pharmacy and Poisons Act which legislation was enacted in 1956, unlike the definition of manufacturer specified under the more current Public Procurement and Assets Disposal Act, 2015, and furthermore, based on its admissions before the 1st respondent regarding the processes it undertakes, the applicant was not a manufacturer.

It was further deponed that, the subject tender was for the supply of antiretroviral drugs to government hospitals in 47 counties, and was required for patients in dire need of this medication, as there had been an acute deficit of the drugs countrywide arising from delay in completion of the tender process and the resultant litigation.

As a brief background, on 1st March 2017, the 3rd respondent as successful bidder was awarded the tender contract for the procurement of HIV/AIDS, TB and Malaria Commodities under the Government of Kenya Global Funding of Antiretroviral Medicines under the HIV Program (*the supplies*). The applicant was dissatisfied with the tender process and lodged a review application *PPRAB Application No. 28 of 2017* before the 1st respondent, seeking a nullification of the tender. On 3rd April 2017, the 1st respondent allowed the review having found that the applicant fell within the definition of manufacturer under the Pharmacy and Poisons Act, Cap 244. In so finding, it directed the 2nd respondent to apply a 15% preferential margin against the price tendered by the 3rd respondent, thereby rendering the applicant the lowest bidder. It also ordered that a financial re- evaluation be carried out having regard to the 15% preferential margin. The 3rd respondent was aggrieved by the 1st respondent's decision and filed the aforementioned judicial review applications in the High Court which in turn quashed the 1st respondent's decision.

The applicant was aggrieved by the decision of the High Court and filed this motion which is before us.

Mr. Gachuhi, learned counsel for the applicant begun by informing us that despite this Court having certified the motion as urgent, the hearing of the application was delayed there by occasioning the applicant severe harm. It was also stated that the substantive appeal is yet to be filed. Counsel went on to submit that the appeal was arguable as the point of departure between the applicant and the High Court's decision was the definition of manufacturer; that the trial court did not agree that the applicant was a manufacturer, yet **section 2 of the Pharmacy and Poisons Act** provided the definition which the court ought to have relied upon. Further, **section 155 of the Public Procurement and Assets Disposal Act**, as well as **Article 277 of the Constitution**, provided that local manufacturers were to be accorded preference in the tender process, which is the essence of Private Public Partnerships with Government.

With respect to whether the appeal would be rendered nugatory in the event it was to succeed, counsel submitted that the tender was for the supply of antiretroviral drugs, and that at any part of execution of the tender contract could render the appeal nugatory.

In so far as the tender contract was concerned, counsel admitted that it was signed on 29th November 2017, and that according to the 3rd respondent's averments in the replying affidavit, the tender contract had all been performed. Counsel argued that for as long as the requirements of the procurement provisions were not adhered to, even though it was appreciated that the antiretroviral drugs were urgently required, the tender award and the tender contract were unlawful and for this reason an injunction should be issued. Counsel cited the case of ***Independent Electoral and Boundaries Commission vs National Super Alliance (NASA) Kenya & 6 others [2017] eKLR*** where the issue of public interest was addressed. Counsel further posited that the orders sought should be granted retrospectively from the date that the application was filed.

Mr. Munune Wanjohi, learned counsel for the 1st respondent did not take a position in the application, but left the determination of the application to the Court.

On his part **Mr. Ong'anda**, learned counsel for the 2nd respondent stated that he would rely entirely on the replying affidavit of **Fred Wanyonyi**. Counsel strenuously opposed the proposition that the application herein should act as an automatic stay of execution and submitted that the learned judge ordered that the procurement of the medical drugs proceed immediately to its conclusion; and that having failed to seek an order of stay of execution in the High Court, this application was an exercise in futility.

With regard to the two limbs, counsel argued that both limbs required to be satisfied; that the applicant has not demonstrated that the appeal was arguable, as the applicant was not a manufacturer since it only packaged finished products, and did not as a matter of fact manufacture the products under tender. Furthermore it was submitted that the applicant has not shown that an award of damages was insufficient.

Counsel went on to argue that the appeal would not be rendered nugatory as the contract was signed on 29th November 2017, meaning that by the time the applicant had filed the application, the status quo had already changed. Counsel further argued that the application for an injunction should be juxtaposed against the interests of Kenyans who urgently required the antiretroviral drugs in view of the likelihood of great suffering that would be imposed on them.

Counsel finally sought to argue that by virtue of **section 3 (3)** of the Fair Administration Actions Act, and subject to **section 8** of the **Law Reform Act**, both this Court and the High Court had no jurisdiction to grant injunctions in Judicial Review proceedings.

Mr. Wanga, learned counsel for the 3rd respondent opposed the application. Counsel relied on the replying affidavit of **Kalithodi Ravinder Menon** and reiterated to a large extent the contents of the affidavit, save to add that the 3rd respondent's largely performed the contract, and supplied a substantial part of the antiretroviral drugs. Counsel argued that the appeal is not arguable as the question of whether the applicant is a manufacturer was determined by the court below.

In submitting that this Court should have regard to the circumstances of the case, and exercise its discretion in favour of the interest of those Kenyans who were in urgent need of the antiretroviral drugs, and the likely hardship that they would be subjected if an injunction was ordered, counsel cited **Daniel Ptiony & others vs Cheporonger Ngoleswa CA.NAI 46 of 2010** and **East African Cables Limited vs Public Procurement Complaints, Review and Appeals Board & another [2007] eKLR**.

This application is brought under **rule 5 (2) (b)** of this Court's Rules, where the requirements to obtain the orders as sought are undoubtedly well settled. It is original and discretionary. For an applicant to succeed, twin guiding principles must be satisfied, first, that the intended appeal is arguable, and it is not frivolous and second, that unless a stay is granted, the appeal or as in this case, the intended appeal, if it eventually succeeds, will be rendered nugatory - see the cases of **Githunguri vs. Jimba Credit Corporation Ltd. (No. 2) (1988) KLR 838**, **J.K. Industries Ltd. vs. Kenya Commercial Bank Ltd. (1982- 88) 1 KAR 1688**, **Reliance Bank Limited (In Liquidation) vs. Norlake Investments Limited – Civil Application No. Nai. 98 of 2002 (unreported)** and **Al-Mahra Limited vs. Premier Foods Industries Limited – Civil Application No. Nai. 163 of 2006**.

We begin by considering whether the appeal is arguable. According to the applicant, the gravamen of the intended appeal is whether the applicable definition of manufacturer was that specified under the Pharmacy and Poisons Act Cap 244, or as specified under the Public Procurement and Disposals Act, and, if the applicant was considered to be a manufacturer under the applicable definition. The 2nd and 3rd respondents on the other hand contend that the applicant was not a manufacturer within the meaning of either definition, as it did not manufacture the antiretroviral drugs to be supplied. It is clear from the assertions that, the issue boils down to an interpretation of the applicable provisions of both the Pharmacy and Poisons Act and the Public Procurement and Disposals Act, which are matters of law that fall squarely within the mandate of this Court. Accordingly we find it to be arguable.

Turning to the nugatory aspect, it is conceded by the applicant that though the orders sought in the motion are to restrain the 2nd and 3rd respondent from signing or performing the tender contract pending the hearing and determination of the application and the intended appeal, the contract was signed on 29th November 2017, and the supply of the antiretroviral drugs is substantially complete. What remains is delivery of a consignment due at the Port of Mombasa on 26th February 2018, and a final consignment, which has been manufactured, tested and certified as fit for export.

Clearly, when the applicant's motion and the orders sought are considered alongside these averments, there is no question that the orders sought have been overtaken by events and there is nothing more that this Court can do.

Needless to say, the applicant has argued that since this Court certified the application as urgent, it should take into account that the award of the contract was unlawful, and grant the orders sought retrospectively, from the date that the application was filed. Much as we appreciate the predicament in which applicant finds itself, since the orders sought were specifically for an injunction to stay the signing of the tender contract, and execution of the contract, a party is bound by its pleadings, and we are in no position to make orders of which have not been prayed.

We also take into account the case of **East African Cables Limited vs Public Procurement Complaints, Review and Appeals Board & another [2007] eKLR** wherein this Court stated thus;

"We think that in the particular circumstances of this case, if we allow the application the consequences of our orders would harm the greatest number of people. In this instance we would recall that the advocates of Utilitarianism, like the famous philosopher John Stuart Mill, contend that in evaluating the rightness or wrongness of an action we should be primarily concerned with the consequences of our action, and if we are comparing the ethical quality of two ways of acting, then we should choose the alternative which tends to produce the greatest happiness for the greatest number of people and produces the most goods. Though we are not dealing with ethical issues, this doctrine in our view is aptly applicable."

We concur with the views outlined. See also **National Union of Water Sewerage Employees & 3 Others vs Nairobi City Water & Sewerage Co. Ltd & 3 Others Civil Application No. 85 of 2013**. In our view, it would be improper to stop the supply of antiretroviral drugs which are for the benefit of HIV/AIDS patients in Kenya who are in dire need of this medication. We further observe that any further interruption to its supply would only lead to greater harm and suffering of those in need.

Accordingly, we do not find any merit in the application which we hereby dismiss. We order that the costs of this application to be costs in

the appeal.

It is so ordered

Dated and delivered at Nairobi this 21st day of March, 2018.

R.N. NYAMBUYE

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JUDGE OF APPEAL

S. GATEMBU KAIRU FCIArb

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JUDGE OF APPEAL

A.K MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR