



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KARANJA & J. MOHAMMED, JJ.A)

CIVIL APPLICATION NO. NAI. 25 OF 2017 (UR 19/17)

BETWEEN

AL GHURAIR PRINTING AND PUBLISHING COMPANY LLC.....APPLICANT

AND

COALITION FOR REFORMS AND DEMOCRACY.....1ST RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....2ND RESPONDENT

THE PUBLIC PROCUREMENT

ADMINISTRATIVE REVIEW BOARD.....INTERESTED PARTY

(An application for stay of execution and injunction from the Judgment of the

High Court of Kenya at Nairobi (Odunga, J.) dated 13th February, 2017

in

Misc. Application No. 637 of 2016)

RULING OF THE COURT

1. In preparation for the upcoming General Elections, the 2nd respondent on 17th August, 2016 advertised a tender being Tender No. IEBC/01/2016-2017 for the supply and delivery of ballot papers for elections, election result declaration forms and poll registers. In response, several bids were tendered by different entities including the applicant herein. Upon the conclusion of the evaluation process, the applicant was notified by a letter dated 18th October, 2016 that its bid was successful and the tender had been awarded in its favour.

2. However, on 7th November, 2016 the applicant learnt that one of the bidders namely, Paarl Media (PTY) Limited had challenged the said award and requested for a review of the same by the Public Procurement Administrative Review Board (herein after referred to as the Board) vide Review No. 93 of

2016. The Board in its decision which it rendered on 30th November, 2016 found that the review lacked merit and dismissed the same. In addition, it directed the procurement process to proceed to its conclusion. It is on that basis that a formal contract between the applicant and the 2nd respondent was executed.

3. Be that as it may, the 1st respondent instituted, with the leave of the court, judicial review proceedings seeking *inter alia*, an order of *certiorari* to quash the 2nd respondent's decision to award the tender to the applicant and an order of *mandamus* compelling the 2nd respondent to restart the tendering process. Basically, the 1st respondent challenged the entire procurement process on the ground that the specifications in the tender were not in conformity with the Constitution and the electoral laws.

4. The trial Judge, in a judgment dated 13th February, 2017 agreed with the respondent. In doing so, the learned Judge found that the issues raised by the 1st respondent could not and had not been determined by the Board. The procurement process, and in particular the execution of the contract in question, was done at a time when the offices of the 2nd respondent's commissioners had been declared vacant by the President. As such, the former commissioners had no capacity to make such decisions. He also found that the tender in question had not taken into account the current electoral legislative framework whose purpose is to ensure that the constitutional threshold of a fair election is achieved. Ultimately, the learned Judge issued orders in the following terms: -

a. An order of certiorari removing into this court for the purposes of being quashed the decision of the 1st respondent to award Tender Number IEBC/01/2016-2017 for the supply and delivery of the ballot papers for elections, election result declaration forms and poll registers to Al Ghurair Print and Publishing Company Limited of Dubai which decision is hereby quashed.

b. The 1st respondent (IEBC) is at liberty to restart the tender process for the supply and delivery of ballot papers for elections, election result declaration forms and poll registers and the same be done in compliance with the Constitution, provisions of the Public Procurement and Asset Disposal Act and the relevant election laws.

c. I however decline to issue the order sought against the 2nd respondent (Board).

d. Being a public interest litigation, each party will bear its own costs of these proceedings.

5. Naturally, the applicant was aggrieved with the foregoing decision and filed a notice of appeal. It also filed an application pursuant to ***Rule 5 (2) (b)*** of the ***Court of Appeal Rules*** which is before us, praying for-

a. An injunction restraining the 2nd respondent from commencing a fresh procurement process with regard to the tender in question.

b. Stay of execution of the trial judge's decision dated 13th February, 2017.

6. The application is premised on the grounds that the intended appeal is arguable and the same would be rendered nugatory in the event the orders sought are not granted. The applicant also stands to suffer huge financial loss. Mr. Ganapathy Lakshmanan, the applicant's General Manager, deposed that it was also in the interest of the public at large for the orders sought to be granted as the matter was in respect of the general elections.

7. In opposing the application, Mr. Norman Magaya, the 1st respondent's Executive Director, deposed that the applicant had neither demonstrated that the intended appeal raises an arguable point nor that it would be rendered nugatory unless the orders sought are granted. In his view, the contract which was executed is in the nature of a framework and is yet to materialize. Hence, the applicant is not likely to suffer any loss. In the alternative, the applicant can seek remedy by way of damages if there is default or

breach of the said contract. Finally, that it was in the public interest that the Court declines to grant the orders sought.

8. Mr. Kamau, together with Mr. Kabathi, appeared for the applicant while Senior Counsel, Mr. Orengo, Mr. Lubelellah and Mr. Bitta appeared for the 1st and 2nd respondents and the interested party respectively.

9. Elaborating on the arguability of the intended appeal, Mr. Kabathi faulted the trial Judge for finding that the 2nd respondent's accounting officer had no power to award the tender in question contrary to the clear provisions of **Section 34 (1)** of the **Public Procurement and Asset Disposal Act**. According to him, the commissioners need not have been in office for the tender to be awarded. He also submitted that the learned Judge did not give reasons for quashing the 2nd respondent's award.

10. On the nugatory aspect, he reiterated that if the 2nd respondent commenced the tendering process the intended appeal would be rendered nugatory. Furthermore, the applicant had begun the process of complying with the terms of the contract and stands to suffer losses.

11. Mr. Orengo submitted that there was no justification for this Court to interfere with the discretion of the trial Judge. He argued that the applicant had not explained what losses it stands to incur and that damages would be an adequate remedy. Mr. Orengo argued that the orders issued by the trial court were negative and incapable of being stayed. To him, the balance of convenience tilted in favour of the Court declining to grant the orders sought. This is because the 2nd respondent is required to conduct the General Elections on 8th August, 2017 and the orders sought are likely to interfere with the said time frame. He urged us to dismiss the application.

12. On his part, Mr. Lubullellah while conceding that the intended appeal was arguable maintained that the same would not be rendered nugatory since there was an alternative remedy available to the applicant should it suffer any loss.

13. In supporting the application, Mr. Bitta submitted that there was a binding contract between the applicant and 2nd respondent which ought to be upheld.

14. We have considered the application, affidavits on record, submissions as well as authorities submitted by counsel and the law. In an application under **Rule 5 (2) (b)** of the **Court of Appeal Rules**, the applicant ought to establish two twin principles before this Court can exercise its discretion in its favour. The principles were set out in this Court's decision in **Patrick Mweu Musimba -vs- Richard N. Kalembe Ndile & 3 Others [2013] eKLR** as follows;

“The law applicable in respect of applications under Rule 5 (2) (b) of the Court of Appeal Rules is well settled. Whereas the court has unfettered discretion to grant the orders sought, there are some principles on which such discretion must be based. In order for an applicant to succeed in such applications, he must establish that he has an arguable appeal i.e. one that is not frivolous while also bearing in mind that an arguable appeal is not necessarily one that will succeed. He must in addition establish that if the orders of stay or injunction sought are not granted, then in the event his appeal or intended appeal succeeds, the same would be rendered nugatory or ineffective.” Emphasis added.

15. With respect to the arguability of the intended appeal, we remind ourselves that an arguable appeal is not necessarily one that will succeed, but one that raises an issue that should be argued before the Court. Counsel for the parties agree that the intended appeal is indeed arguable. We concur with counsel and find that whether or not the tender could be awarded in the absence of commissioners of the 2nd respondent; whether or not the trial Judge erred in quashing the award of the tender in light of the Board's decision that the same was above board; and whether the trial Judge failed to appreciate the nature of the contract between the applicant and the 2nd respondent are some of the issues which in our view ought to be considered in the intended appeal.

16. Finally, in determining the nugatory aspect, we remind ourselves that we must carefully weigh the competing claims of both parties and each case must be determined on its own peculiar facts. See **Reliance Bank Ltd -vs- Norlake Investments Limited (2000) 1 EA 227**. Taking into consideration the circumstances of this case we find that the intended appeal would not be rendered nugatory if we do not grant the orders sought. We say so because firstly, the applicant can still participate in the fresh tendering process. Secondly, the applicant has not demonstrated the losses, if any, it stands to suffer by way of affidavit. Furthermore, even if the applicant has suffered any loss, it has an alternative remedy in damages. This much was appreciated by this Court in **Stanley Kangethe Kinyanjui -vs- Tony Ketter & 5 Others [2013] eKLR** as follows:-

“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.”

17. Thirdly, the general elections are scheduled to take place on 8th August, 2017 which date is fast approaching. In our view, there is a likelihood that the orders sought would interfere with the 2nd respondent’s preparation for the said election. It is therefore in the public interest for the elections to take place during the scheduled date. Consequently, the balance of convenience tilts in favour of us declining to grant the orders sought.

18. The upshot of the foregoing is that the application lacks merit and is hereby dismissed with no orders as to costs. However, we direct the applicant to file and serve the intended appeal within **7 days** from the date of this decision. We also direct that the appeal be heard on priority basis.

Dated and delivered at Nairobi this 10th day of March, 2017.

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR