



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. 74 OF 2010

BETWEEN

KENYA POWER AND LIGHTING

COMPANY LTD.....APPLICANT

AND

NGM COMPANY LTD.....RESPONDENT

PUBLIC PROCUREMENT ADMINISTRATIVE

REVIEW BOARD 1ST INTERESTED PARTY

BETTERLINE CO. LIMITED and

POWERGEN TECHNOLOGIES LTD.....2ND INTERESTED PARTIES

(being an application for stay of proceedings and the orders of the High Court of Kenya at Nairobi (Gacheche J.) dated 16th March 2010

in

H.C. MISC.C.A NO. 1 OF 2010)

RULING OF BOSIRE J.A

The applicant, Kenya Power And Lighting Company Limited, has come to this Court under **rule 5(2) (b)** of this Court’s Rules, seeking orders, inter alia, that:

- (1) the proceedings in High Court Misc. Civil Application No. 1 of 2010 be stayed pending the hearing and determination of an intended appeal against the decision of the High Court (Gacheche J.) given on 16th March 2010 in the aforesaid suit.
- (2) the aforesaid order, which among other things, stays the implementation of a contract between the applicant and Betterline Co. Limited and Powergen Technologies Limited, be stayed pending the hearing and determination of the aforesaid intended appeal.

Several decisions of this Court, among them, Reliance Bank Ltd v. Norlake Investments Ltd. [2002] 1EA 277 and Oraro and Rachier Advocates v. Co-operative Bank of Kenya[1999] EA 236, summarize the principles which govern applications of this nature. An applicant must first show that his appeal or intended appeal, is arguable, or differently put, that it is not a frivolous one. Second, and in addition, that unless the applicant is granted a stay of either proceedings or execution, or an injunction as the case may be, his appeal or intended appeal if it were eventually to succeed, the success will be rendered nugatory. In dealing with such matters the court is obliged to weigh the claims of both sides.

The applicant advertised in the local press and invited tenders for the design, supply and construction of the Lanet-Naivasha 2nd 33 KV bays and lines on concrete poles, which tender was numbered, Kenya Power & Lighting Co. Ltd 1/6F/LR PRO JECTS/4 – 2009. Among the companies which submitted tenders in response thereto were Betterline Co. Ltd and Powergen Technologies Ltd, together described as interested parties and NGM Company Limited, the respondent in this motion. The former was awarded the tender, by the applicant. The respondent was notified in writing that its bid had not been successful and some reason was given for its failure in its bid. The respondent thereupon lodged a request for review challenging the tender process at the Public Procurement Administrative Review Board (which hereunder shall be referred to as simply, the Board). In response to the request for review the applicant, among other things, stated that the respondent was unsuccessful because its bid breached the requirements of section 57 of the Public Procurement and Disposal Act, and Regulations made thereunder, and more specifically, that the respondent did not provide the tender security in the prescribed form as set out in the tender documents.

The Board heard the respondent's review application, and on 18th December, 2009, dismissed it. It directed that the procurement process proceed. The respondent was dissatisfied with that decision and accordingly moved the superior court by way of an application for judicial review for orders of certiorari to, inter alia, quash the decision of the applicant to award the aforesaid tender to Betterline Co. Ltd and Powergen Technologies; a further order of certiorari, to quash the decision of the Board dismissing the respondent's request for review. The respondent also prayed for an order of prohibition to stop the applicant herein from signing any contract relating to tender No. KPLC 1/6F/LR PROJECTS/4 – 2009, and a further order of mandamus directing the applicant herein to evaluate the aforesaid tender and award tenders in compliance with the Public Procurement and Disposal Act and Regulations made thereunder, and in the alternative an order of mandamus directed to the Board to re-evaluate and re-consider the respondent's request for review, and to render an award in terms of the aforesaid Act.

As required by the provisions of O.LIII of the Civil Procedure Rules, the application was preceded by an application for leave, with a request that the leave to institute judicial review proceedings, do operate as a stay of the signing, implementation and performance of any contract in terms of the tender awarded, pending the hearing and determination of the judicial review proceedings.

The application for leave was handled by Gacheche J. Such applications are normally made ex parte, but for some reason, which is not apparent, on record, the application was heard inter partes. The learned Judge heard submissions from the respondent, the applicant, and the successful bidders. The successful bidders opposed grant of leave on the main grounds, that the applicant and themselves had executed performance contracts, the applicant had issued to them irrevocable letters of credit soon after performance bonds had been issued to it by the successful bidders, and that work had already commenced.

In her ruling, relying on two authorities by this Court of Mohamed Yakub & Mohamed Yusuf T/A Yasser Butchery v. Mrs. Badur Nasa & 2 Others, Civil Appeal No. NAI. 285 of 1999, and Samuel Muchiri W. Njuguna & Others V. Minister for Agriculture Civil Appeal No. 144 of 2000, the learned Judge ruled that the respondent's was a fit case for the grant of leave. She accordingly granted the leave and ordered that the leave do operate as a stay of the implementation and performance of any contract to design, supply and construct the Lanet – Naivasha 2nd 33 KV bays and lines in concrete poles, pending the hearing and determination of the judicial review proceedings.

It is against that decision, that the leave granted operate to stay further action on the performance of

the contracts allegedly already entered into between the applicant herein and the successful bidders, that an appeal is intended. The applicant has come before this Court for an order of stay of that decision to await the outcome of the appeal.

The Board gave its decision on 18th December, 2009. The application for leave to apply for an order of judicial review was made on 5th January 2010, about 18 days after the decision. Relying on section 100 (1) of the Public Procurement and Disposal Act, Act No. 3 of 2005, Mr. Kiragu Kimani, for the applicant submitted before us that the application having been mainly for an order of certiorari, should have but was not filed within 14 days from the date the Board gave its decision. For that reason, he said, the application for judicial review was filed out of time and is therefore incompetent. In his view the primary order in the application for judicial review is certiorari and that being so, leave should not have been given in the first place. He therefore, urged us to find that the applicant's intended appeal is for that reason, arguable. Messrs. Wetangula and Mutinda who appeared for the respondent and the Board respectively concurred.

Mr. Gichuru for the respondent was of a different view. In his view, by virtue of the provisions of the Interpretation and General Provisions Act, Cap 2 Laws of Kenya, the period after 20th December were excluded days from computation of time as they fell within the court vacation provided for under rules made pursuant to section 10 of the Judicature Act. In view of that argument, a question arises whether or not the application for leave to apply for an order of judicial review was within time. Mr. Gichuru conceded that there was indeed an arguable point in the intended appeal relating to jurisdiction. That being the case on the authority of Judicial Commission of Inquiry into the Goldenberg Affair & 3 Others v. Kilach [2003] KLR 249, I would rule that the establishment of that one issue is sufficient for purposes of an application under **rule 5 (2) (b)** of the Court Rules, and there would be no necessity of a multiplicity of arguable points.

On the nugatory aspect, Mr. Kiragu Kimani submitted that the contract in dispute is for the supply of goods and services. Performance of the contract has already started, subcontracts have been entered into, and that interfering with those contracts will greatly delay the provision of essential services and thus affect consumers of electricity in the area concerned. The disruption likely to result will be unremediable by an award of damages. The same sentiments were expressed by Mr. Wetangula for Betterline Co. Ltd.

In answer Mr. Gichuru for the respondent submitted that granting a stay as prayed herein will render the respondent's cause worthless. It was his view that the policy behind the provisions of the Public Procurement Act, is to promote competition. In his view the applicant fomented the situation it finds itself in by breaching the law and it should not therefore benefit from its own default.

Whether or not to grant leave to apply for an order of judicial review is a matter for the discretion of the Judge seised of the application for leave. The issue before us is not whether or not leave was properly given, but whether or not Gacheche J. acted properly in ordering that the leave does operate as a stay. The 1st respondent and the successful bidders are in business, their respective losses, if any, are financial. Stay of further performance of the contract entered into between the applicant and the successful bidders was ordered in March 2010, a period of about 3 months since the stay was ordered. The respondent argues that if we order a stay it will be tantamount to allowing the successful bidders to proceed with the works and thus render their cause, still pending in the superior court, worthless. The applicant on the other hand contends that the 1st respondent was late in coming to court, and because of that delay it allowed a contract to be entered into by the applicant with the successful bidders which in turn have contracted with third parties to perform the contracted works.

I have weighed one thing against another in this matter. Other than the delay in providing services to the people, the other losses, by whichever party, are financial and in my view, damages will be an adequate remedy for those losses. As this Court is not able at this stage to rule on the issues between the parties, that being the duty of the bench which shall hear the intended appeal, I eschew any attempt of expressing any definite views about the merits or otherwise of the intended appeal. Suffice it to reiterate

that the intended appeal is not a frivolous one. There are issues for determination and the parties should have the opportunity of ventilating them. It is my view, however, that granting a stay as prayed will certainly render Otiose the respondent's suit pending in the superior court. So weighing the competing interests of the parties, the balance tilts in favour of dismissing the motion dated 9th April 2010. Accordingly I would order that the motion be dismissed. I would order that the costs of the motion abide the outcome of the intended appeal.

As Githinji and Nyamu, JJ.A are of a different view, the order shall be as proposed by Githinji, J.A.

Dated and delivered at Nairobi this 11th day of June 2010

S.E.O. BOSIRE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

RULING OF GITHINJI, J.A.

This is an application under **Rule 5 (2) (b)** of the *Court of Appeal Rules* for three main orders, namely, that:

- "1.**
- 2. the proceedings in High Court Miscellaneous Civil Application No. 1 of 2010 be stayed pending the hearing and determination of the intended appeal.**
- 3. The orders of the superior court made on 16th March, 2010 granting leave to the respondent to commence judicial review proceedings be stayed pending the hearing and determination of the intended appeal.**
- 4. The order of the superior court made on 16th March, 2010 staying the implementation of the contract already entered into between the applicant and the second interested parties be stayed pending the hearing and determination of the intended appeal".**

This application arises from the ruling of the superior court (Gacheche, J.) dated 16th March, 2010 granting leave to NGM Company Ltd., the respondent herein to file a judicial review application seeking orders of certiorari, prohibition and mandamus and a consequential order that the grant of leave do operate as a stay of implementation and performance of any contract pending the hearing and determination of judicial review proceedings.

On 1st April, 2010, the respondent pursuant to the grant of leave filed *High Court Miscellaneous Application No. 1 of 2010* seeking three orders of certiorari, firstly to quash the decision of *Public*

procurement Administrative Review Board (Review Board) dated 18th December, 2009 dismissing Request for Review and directing **Kenya Power and Lighting Company** (KPLC) to proceed with tender process; secondly, to quash the decision of KPLC as set out in the letter of 12th November, 2009 to award the impugned tender to **Better Line Co. Ltd.** and **Powergen Technologies** (2nd Interested Party herein) and, thirdly to quash the contract, if any, signed pursuant to the decision of Review Board and decision of KPLC. The judicial review application further seeks an order of prohibition prohibiting KPLC from signing any contract without compliance with the relevant procurement law and an order of mandamus ordering KPLC to evaluate the tender in compliance with the relevant law and tender documents.

On 3rd August, 2009, KPLC advertised a tender for the Design Supply and Installation of Lanet – Naivasha 2nd 33 KV Bays and Lines Concrete Poles. Four firms responded to the tender including the respondent and the 2nd interested party. At the opening, the 1st respondents tender price was Shs.174,884,033 while the 2nd interested parties tender price was Shs.169,030,790.45. After the Preliminary Evaluation by the Evaluation Committee, the bid of the 1st respondent and another firm were not recommended for further technical evaluation. The 1st respondents tender was rejected because it did not provide a bid security from a local bank but instead provided a Bond from Madison Insurance Company. The second complainant firm failed the technical evaluation. The second interested party passed the technical evaluation and was recommended for financial evaluation. It passed the financial evaluation and the Evaluation Committee, thereafter, recommended to the Tender Committee that the tender be awarded to the 2nd interested party. On 3rd November, 2009 the Tender Committee deliberated the recommendation and awarded the tender as recommended. The bidders were notified of the decision of the Tender Committee vide letters dated 12th November, 2009.

The respondent being aggrieved by decision of the Tender Committee filed a Request for *Review No. 52/2009* before the Review Board contending as the main ground, that, it had met all tender requirements and fulfilled the relevant clauses of the Instructions to Bidders which required that the security be in form of bank guarantee. The Review Board considered the rival contentions in the light of the law and concluded that the law gave KPLC discretion to choose the form and amount of tender security; that bidders could use other formats with prior approval of KPLC; that the respondent did not seek such prior approval and that the respondent bid was disqualified properly.

The respondent further contended that KPLC had breached the law by failing to prepare unambiguous standard documents and manuals to be used in procurement process but the Review Board dismissed this complaint saying that the instructions on tender security were clearly set out in the tender document and there was no ambiguity as alleged.

On 5th January, 2010 the respondent filed an application for leave to file judicial review application and sought an order that the grant of leave do operate as a stay of the proceedings in question, namely, *“the signing and/or implementation and performance of any contract for the design supply and construction of Lanet – Naivasha 2nd 33 KV bays and lines in concrete poles and of any operations thereunder”* pending the determination and judicial review the application.

The application for leave was heard inter partes. It was strenuously opposed by KPLC, mainly on the ground that the application was time-barred by virtue of **Section 100 (1)** of the *Public Procurement and Disposal Act* (Act) which provides:

“A decision made by the Review Board shall, be final and binding on the parties, unless judicial review thereof commences within fourteen days from the date of the Review Boards decision”.

It was contended in the superior court that the limitation period of six months for making application for the order of certiorari stipulated in **Section 9 (3)** of the *Law Reform Act* in the specified circumstances, applied where there is no shorter period prescribed under written law governing the matter. **Section 9 (3)** of the law Reform Act provides:

“In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for purposes of being quashed, leave shall not be given unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceedings or such shorter period as may be prescribed under any written law”

The superior court, however, considered **Section 100 (1)** aforesaid; **Section 9 (3)** of *Law Reform Act* in conjunction with **Section 57** of the *Interpretation and General Provisions Act* (Cap 2) and held that the application was filed within time.

The successful bidder (2nd Interested Party) opposed the application for leave and filed a replying affidavit deposing, among other things, that the contract was signed on 21st December, 2009; that implementation of the contract had commenced; that it had already issued performance Bond to KPLC that KPLC had already issued irrevocable letters of Credit in foreign currency for procurement of foreign equipment for the contract, that the 2nd interested party had already issued some orders both locally and internationally for provision of relevant material for undertaking works; that it had already taken over the site and that it had already entered into contract with Repcon and Geolop Surveys Ltd. to undertake works related to the signed contract. On that issue the superior court said:

“It is alleged that the contract has already been signed. I have taken into account the fact that despite there being a requirement that there be a window for thirty days it was allegedly signed within three days of the contention decision. This raises yet another prima facie issue”.

The applicant (KPLC) being aggrieved by the decision of the superior court has filed a notice of appeal indicating that it intends to appeal against the whole decision of the superior court.

In the ordinary applications under **Rule 5 (2) (b)**, the applicant in order to get the exercise of the court’s discretion in its favour is required to satisfy the court that the appeal or the intended appeal is not frivolous and that unless the application is granted, the appeal, if it ultimately succeeds would be rendered nugatory.

The applicant is supported by the affidavit of Awour Owiti, legal officer of KPLC. He has enumerated eleven proposed grounds of appeal the main one being:

“The superior court erred in law in granting leave to the respondent to commence judicial review proceedings while the application for leave was filed after expiry of the statutory period prescribed by Section 100 of the public procurement and Disposal Act”.

It is submitted in support of that ground that the 14 days specified by **Section 100 (1)** of the Act lapsed on 1st January, 2010 but because that happened to be a public holiday, and the 2nd and 3rd January, 2010 were non working days the 14 days lapsed on 4th January, 2010.

I have considered the provisions of **Section 57** of the *Interpretation and General Provisions Act* particularly **Section 57 (d)** which provides:

“where an act or proceedings is directed or allowed to be done or taken within any time not exceeding six days excluded days shall not be reckoned in the computation of the time”.

I am satisfied that the proposed main ground of appeal that the application for leave was time barred is not frivolous.

The applicant in addition intends to show in the appeal that the superior court erred in law in granting leave when the respondent has not shown a prima facie case for grant of judicial review orders.

Lastly, the applicant intends to show in the appeal that the order for stay of implementation of the contract was wrongly granted.

From the foregoing, I am satisfied that the intended appeal is indeed arguable.

In my view, the second test whether or not the appeal would be rendered nugatory unless the application is granted is not the appropriate test in the circumstances of this case. The respondent has filed a judicial review application seeking public law remedies. In my view, the appropriate test is whether it is in the public, interest and also in accordance with the policy of the Public Procurement and Disposal Act to grant the orders of stay sought in the application. This so because in **East African Cables Ltd and The Public Procurement Complaints Review and Appeals Board** (1st Respondent) **Kenya Power and Lighting Co. Ltd.** (2nd Respondent) – *Civil Application No. Nai. 109 of 2007* (unreported) this Court said in part:

“We think that in a case like this, we must consider the likely effect the orders sought by the applicant. We should take into account the special nature of the set up of the 2nd respondent. It is common ground that it is the sole supplier of electricity in the country and that has the duty to satisfy its ever surging number of consumers of vital commodity. While we agree that the applicant has an undoubted right of challenging the decision of the superior court and that the court has a duty to see that procurement laws are not breached nevertheless court has a reciprocal duty to ensure that it does not hamstring such bodies like the 2nd respondent from performing their lawful duty or duties as bestowed upon them by the relevant law”.

It has been submitted on behalf of the applicant that the public interest in the contract outweighs the commercial interest of the respondent and that the order of stay granted by the superior court has the effect of paralyzing supply of electricity to a large public and industries i.e. horticultural and flower farms, tourist hotels and agricultural industries which serve as the backbone of Kenya economy.

Further, Mr. Awuor Owiti deposes in the supporting affidavit that the performance of the contract is substantially under way and has annexed a copy of the Monthly Progress Report for month of March as at 19th March, 2010 which shows the percentages of the works already done by the 2nd interested party. This Report was prepared three days after the superior court granted leave.

It is clear from the affidavit of the 2nd interested party filed in the superior court and the documents annexed to support the affidavit and also from the Monthly Progress Report for March, 2010 exhibited herein that the contract was signed; has been substantially implemented and that the 2nd interested parties has entered into subcontracts with third parties for performance of some works relating to the contract.

In those circumstances, the order of stay of implementation of the contract is a very drastic order.

Furthermore, it is clear from the application for judicial review that it is the decision of the Review Board dated 18th December dismissing the Request for Review which is the proper subject matter of the judicial review. It is doubtful that the decision of KPLC awarding the contract to the 2nd interested party can be the proper subject of judicial review.

It is further doubtful that the contract signed between KPLC, a body corporate and 2nd interested party can be a proper subject of judicial review and whether such contract and consequential sub-contracts can be rescinded or implementation thereof suspended through judicial review jurisdiction.

Lastly, it is trite law that a “stay” does not reverse, annul, undo or suspend what has already been done – see **Kileleshwa Service Station Ltd. vs. Kenya Shell Ltd.** – *Civil Application No. Nai. 84 of 2008* (unreported).

In the circumstances, I am satisfied that this is a proper case for grant of order of stay of proceedings and the order for stay of the order stopping the implementation of the contract. It is not appropriate to stay the order granting leave.

As Nyamu, J.A. agrees, the application is allowed to the extent that orders in terms of prayer 2 and 4 of the application are granted. The costs of this application shall be costs in the appeal.

Dated and delivered at Nairobi this 11th day of June, 2010.

E. M. GITHINJI

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JUDGE OF APPEAL

RULING OF NYAMU, J.A.

The application brought before us is dated 9th April 2010 and is based on Rule 5(2)(b) of this Court's Rules. The substantive orders sought are:-

- 1. *The proceedings in High Court Miscellaneous Civil Application Number 1 of 2010 be stayed pending the hearing and determination of the intended appeal.***
- 2. *The orders of the superior court made on 16th March, 2010 granting leave for the respondent to commence judicial review proceedings be stayed pending the hearing and determination of the intended appeal .***
- 3. *The order of the superior court made on 16th March 2010 staying the implementation of the contract already entered into between the applicant and the second interested parties be stayed pending the hearing and determination of the intended appeal.***

As expected the applicant has in the body of the application cited the two essential requirements an applicant must demonstrate to be successful under the rule namely:-

- a) *The applicant has an arguable appeal.***
- b) *The intended appeal will be rendered nugatory unless a stay is ordered by this Court.***

The background essentials are that on 6th March, 2010 following an application for leave to file an application for judicial review the superior court, Gacheche, J. gave leave to the respondent to commence judicial review proceedings seeking judicial review orders of certiorari, mandamus and prohibition and that the leave so granted should operate as stay. For clarity, I consider it important to set out in extenso the orders granted at leave stage which are:-

- i. *Leave to the respondent to commence judicial review proceedings for orders of certiorari to quash the decision of the Public Procurement Administrative Review Board (the Board) made in the request for Review Application Number 52 of 2009, to quash the decision of the applicant to award the tender to the successful bidders, and to quash the contract entered into between the applicant and the successful bidders.***
- ii. *Leave to the respondent to commence judicial review proceedings for an order of mandamus to compel the Board to hear the Request for Review afresh.***
- iii. *Leave to the respondent to commence judicial review proceedings for an order of prohibition to prohibit the applicant from entering into contract with the second interested parties (the successful bidders).***

iv. Orders that the implementation of the contract entered into between the applicant and the successful bidders be stayed pending the hearing and determination of the judicial review application.

The background facts which gave rise to the application for leave were that the applicant, Kenya Power and Lighting Co. Ltd had advertised a tender for design, supply and construction of Lanet – Naivasha 2nd 33 KY bays and lines in concrete poles. The respondent was amongst the four bidders who submitted their bids in respect of the tender. After the evaluation of the tenders the 2nd interested parties, namely **Betterline Co. Ltd and Powergen Technologies Ltd** were awarded the tender jointly. The respondent was unsuccessful. Dissatisfied with the award of tender, the respondent, NGM Company Limited filed a request for review with the 1st interested party, **Public Procurement Administrative Review Board**, challenging the tender process. At the Board level, the request was opposed by the applicant and following an inter-partes hearing, the Board made a decision on 18th December, 2009 dismissing the request for review.

On 21st December, 2009 the applicant entered into a contract with the respondent allegedly because the tender validity period was scheduled to expire on 13th January 2010 and there was need for the successful 2nd interested parties to provide security on or before 6th March 2010 and all these events were preceded by the year 2009 Christmas holidays, which period was allegedly going to impair the 2nd interested parties' capacity to satisfy the requirements due to constraints of time by the two parties and their bankers.

Following the decision of the 1st interested party "**the Board**", on 18th December 2009 the respondent filed an application in the superior court on 4th January 2010 seeking leave to commence judicial review proceedings seeking judicial review orders and on 11th January 2010" the application was heard inter-partes and on 25th October, 2010 the superior court granted leave and further ordered that leave so granted should operate as stay.

Aggrieved by the above decision, the applicant has filed a Notice of appeal in which the applicant intends to rely on the following grounds.

- a. The superior court erred in law in granting leave to the respondent to commence judicial review proceedings while the application for leave was filed after the expiry of the statutory period prescribed by section 100 of the Public procurement and Disposal act, 2005.**
- b. The effect of the order of the superior court is to extend the time for applying for leave to commence judicial review proceedings which is not permitted by law.**
- c. The superior court erred in law in granting leave to the respondent to commence judicial review proceedings while the respondent had not satisfied the court that it had an arguable case which ought to be heard on substantive review.**
- d. The superior court erred in law in granting an order of stay of implementation of the contract while the applicant had not demonstrated that any losses suffered could not be compensated by way of damages.**
- e. The superior court erred in failing to take into account the evidence and submissions of the appellant that the contract had been signed and implementation was on course, and that damages would be an adequate remedy.**
- f. The superior court erred in making substantive findings on the merits of the procurement process and the Board's decision while those are matters which should be determined at the substantive stage.**
- g. The superior court misdirected itself on a point of law when it made a finding that the appellant and the 2nd interested parties were required by law to wait for 30 days before entering into the contract,**

when there is no such requirement.

- h. The superior court erred by delving into the merits of the application while the matter before it was application for leave.***
- i. The superior court erred in failing to consider that reviewing the merits of the Board's decision could only have been by way of an appeal under section 100(2) of the Public Procurement and Disposal act, and not by way of judicial review which the applicant sought leave to commence.***
- j. The superior court erred in disregarding clear precedents set by this honourable Court on the subject, which it was obliged to follow.***
- k. In all, the superior court misguided itself generally and reached a wrong conclusion.***
- l. In view of the above and other grounds to be raised at the hearing of the appeal, the decision of the superior court cannot stand.***

The applicant further relies on the affidavit in support of the application sworn on 9th April 2010 by ***Awuor Owiti*** the legal officer of the applicant.

The application for stay is opposed and the grounds are contained in an affidavit sworn on 27th April 2010 by ***Joseph Muturi***, the General Manager of the respondent Company. The principal grounds are:-

- 1) Section 100(1) of the Public Procurement and Disposal Act 2005 provides for a wider period of 14 days before the decision of the board can be deemed to be binding and effective.***
- 2) The contract between the applicant and the 2nd interested party was made three days after the decision of the board – well within the window period of 14 days and the contract was therefore entered into in violation of the procurement law and therefore the contract and its implementation cannot be used as a basis for defeating or seeking to stay the decision of the superior court.***
- 3) That the judicial review proceedings were commenced on 5th January 2010 and according to the respondent, if the time was properly computed, the application was well within time.***
- 4) That if the order of stay sought by the applicant were granted, the net effect would be to allow the continued implementation of an illegal contract at the expense of the right of the respondent as guaranteed by the law.***
- 5) That in the event of the stay being granted, there was a big likelihood that the pending judicial review proceedings scheduled for 19th May 2010 would be rendered nugatory.***
- 6) Finally, that procurement legislation was aimed at ensuring fair treatment among competitors, to promote integrity, fairness, transparency, accountability and public confidence in procurement procedures and to promote local industry and economic development.***

At the hearing, the applicant was represented by ***Kiragu Kimani*** assisted by ***Michi Karimi*** while the respondent was represented by ***P.M. Gichuru***.

In brief, Mr Kiragu's submission repeated the grounds in support of the application as cited above. In addition, he cited a number of authorities and also reinforced his oral submissions by relying on written skeleton submissions:-

Mr Gichuru, learned counsel for the respondent similarly re-agitated the grounds as set in the grounds reproduced above .

This is not an easy application to the Court in that, it constitutes an interlocutory application arising from an application for leave to institute judicial review proceedings seeking judicial review orders of certiorari, mandamus and prohibition. The substantive judicial review application itself was scheduled for hearing on 19th May 2010, just a few days from the date of hearing of this application but this Court did stay the proceedings until 11th June 2010 so as to enable the Court adjudicate on this application first.

In principle, I am opposed to this Court interfering with the superior court's exercise of its discretion at the leave stage because it is a threshold stage when the court's discretion is ordinarily exercised on a prima facie basis see ***WANJUGUNA vs MINISTRY OF AGRICULTURE Civil Appeal No.144 of 2000***; I have also in the past described leave stage as a filter stage because once leave is granted, in my opinion, it is spent by the filing of review application itself. In the circumstances of this case, such an application has already been filed. What persists and is never spent until the determination of the substantive application is the order of stay since leave was ordered to have the effect of a stay. All the same, the applicant has come to this Court at this stage on the strength of the decision in the case of the ***JUDICIAL COMMISSION OF ENQUIRY INTO THE GOLDENBERG AFFAIRS & 3 OTHERS vs KILACH [2003] KLR 249***. I am personally compelled to observe that except in very exceptional cases involving jurisdictional and substantial public interest issues and where a stay has been granted, there cannot be any basis for allowing any such applications in view of the clear provisions of **section 8** of the Law Reform Act which contemplate only one appeal to this Court in terms of **section 8(5)** and only in respect of the actual judicial review orders. In this case however, there are both jurisdictional and public interest elements and therefore the case falls within the exception to the rule. For the same reasons, I consider that, the intended appeal might be rendered nugatory since it has often been rightly said that jurisdiction is everything.

For the foregoing reasons, I would therefore grant orders in terms of prayers 2, and 4 of the application dated 9th April 2010 and further order that the costs of the application abide the intended appeal.

It is so ordered.

DATED and delivered at Nairobi this 11th day of June, 2010.

J.G. NYAMU

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JUDGE OF APPEAL