



IN THE COURT OF APPEAL

AT NAIROBI
CIVIL APPLICATION NO. 63 OF 2010

BETWEEN

REPUBLICAPPLICANT

AND

THE PUBLIC PROCUREMENT

ADMINISTRATIVE REVIEW BOARDRESPONDENT

AND

ZHONGMAN PETROLEUM & NATURAL GAS

GROUP COMPANY LIMITED 1ST INTERESTED PARTY

SHENGLI OIL FIELDS HIGHLAND PETROLEUM

EQUIPMENT COMPANY LTD. 2ND INRERESTED PARTY

CHINA PETROLEUM TECHNOLOGY &

DEVELOPMENT LT 3RD INTERESTED PARTY

EX-PARTE

KENYA ELECTRICITY GENERATING COMPANY LTD. APPLICANT

(An application for stay pending the determination of the intended appeal from the judgment of the High Court of Kenya at Nairobi (Wendoh, J.) dated 18th March, 2010

in

H.C.C.C. NO. 53 OF 2010)

RULING OF THE COURT

This is an application by **Kenya Electricity Generating Company Limited (Kengen)** under **Rule 5 (2) (b)** of the *Court of Appeal Rules* (Rules) for orders:

“1.

2. The orders of certiorari and mandamus made by the High Court on 18th March, 2010 in *High Court Misc. Civil Application No. 53 of 2010* be stayed pending the determination of intended appeal.

3. For the avoidance of doubt, the Public Procurement Administrative Review Board be barred from hearing a *Request for Review Number 2 of 2010* pending the hearing and determination of the intended appeal. In effect there be a stay of further proceedings before the Public Procurement Administrative Review Board.

4.”.

The dispute giving rise to the application is essentially between Kengen as a procuring entity and **Zhongman Petroleum & Natural Gas Group Company Limited** (Zhongman), the unsuccessful tenderer (1st Interested Party). The dispute relates to the procurement by Kengen pursuant to Public Procurement and Disposal Act – Act No. 3 of 2005 (Act) of two new 1500 HP D.C. Electrical Land Rigs and associated equipment for drilling wells for geothermal power generation.

By an Invitation of Tender advertised on 28th August, 2009, Kengen invited tenders for the supply of the equipments. Thereafter twelve companies including Zhongman and Shengli Oilfields Highland Petroleum Equipment Company Ltd. (Shengli), the 2nd interest party herein submitted tenders. The tenders were subsequently subjected to several stages of evaluation by the Evaluation Committee based on the criteria specified on the tender documents. After the conclusion of the evaluation process, Shengli was recommended as the lowest evaluated bidder and on 10th December, 2009, the Kengen Tender Committee approved the award to Shengli at a cost of U.S. Dollars 45,819,001.79.

By a letter dated 24th December, 2009, Kengen notified Zhongman that its tender was unsuccessful in compliance with **Section 67 (2)** of the Act which letter was delivered to Zhongman in China on 28th December, 2009. Kengen simultaneously notified Shengli that its tender had been accepted. Zhongman was aggrieved by the decision and on 11th January, 2010 it presented a *Request for Review* to the Public Procurement Administrative Review Board (Review Board) pursuant to **Section 93 (1)** of the Act which was given *Serial Number 2 of 2010*. By Regulation 73 (2) (c) (ii) of the *Public Procurement and Disposal Regulations, 2006* (Regulations) the Request for Review should be made within 14 days of the notification to the unsuccessful tenderer. The Request for Review was based on numerous grounds alleging breaches of various provisions of the Act and the Regulations. The procuring entity (Kengen) filed a detailed response to the Request for Review. In addition, Kengen filed a Notice of Preliminary objection to the hearing of the Request for Review under Regulation 77 (1) on the ground that the Review Board had no jurisdiction to entertain the Request for Review since the Request was allegedly made on 12th January, 2010, more than the stipulated period of 14 days of the notification. Three replying affidavits were filed by Zhongman deposing, *inter alia*, that the notification was received in Zhongman’s office in China on 28th December, 2009, when both the President and the Chief Mechanical Officer were out of office and that it was on 30th December, 2009 that they personally received the notification.

The Review Board upheld the Preliminary Objection and dismissed the Request for Review on 8th February, 2010 holding, *inter alia*, that the date of notification was 24th December, 2009; that time started running on 25th December, 2009 and the last day for lodging the Request for Review was 7th January, 2010; that even if the date of notification is taken as 28th December, 2009, time started running on 29th December, 2009 and the last date for lodging Request was 11th January, 2010; that Zhongman made an attempt to lodge the Request on 11th December, 2009; that due to failure to comply with Regulation 73,

the applicant went back with the documents for rectification and that the documents were eventually lodged on 12th January, 2010. The Review Board said in part:

“The Board also notes that the Request for Review was filed and duly paid for at the Secretariat on the 12th January, 2010, one day after the appeal window had closed. The filing receipt number A3964128, in respect of the Request for Review shows that payment was effected on the 12th January, 2010 which is the date the documents were lodged and paid for at the secretariat”.

Again, Zhongman being aggrieved by the decision of the Review Board ultimately filed a Judicial Review Application – *High Court Miscellaneous Application No. 53 of 2010* with the leave of the Court seeking an order of certiorari to quash the decision of the Review Board and an order of mandamus to compel the Review Board to hear the Request for Review. The application for judicial review was based on numerous grounds, amongst them, that the decision of the Review Board was *ultra vires*, unreasonable and against rules of natural justice; that the Review Board erred in finding that the Request for Review was filed on 12th January, 2010 and not on 11th January, 2010; that, the Review Board failed to address the issues raised whether, or not the Board’s Secretary had authority or jurisdiction to refuse to accept or to accept and return a Request for Review, and, that, the Board failed to consider that the Preliminary Objection raised matters of fact.

Dennis Onwonga, the Legal Services Manager of Kengen deposed in a replying affidavit to the judicial review application, among other things, that the tenders submitted were required to be valid for 120 days; that the period ended on 10th February, 2010, that the contract had to be signed within the validity of tender period; that the contract was signed on 9th February, 2010 between Kengen and Shengli and that since the contract had already been signed, the Review Board would have no jurisdiction to hear the Request for Review. Further, Simon Maara Chege, the Country Manager and Representative of Shengli deposed in paragraph 17 of the replying affidavit sworn on 5th March, 2010:

“THAT the 2nd interested party (ie Shengli) signed the contract with the 1st interested party (ie Kengen) on 9th February, 2010 and it has since furnished performance bond and implementation of the contract is now ongoing”.

On 18th March, 2010, the superior court (Wendoh J) allowed the judicial review application, and, not only granted the orders of certiorari and mandamus but also held that the contract between Shengli and Kengen was illegal and a nullity *ab initio*.

Subsequently Kengen filed a notice of Appeal indicating that it intends to appeal against the whole of the decision of the superior court, and, has, in the meantime, filed the present application.

It is explicit from the application that Kengen, mainly seeks an order that the orders of certiorari and mandamus “*be stayed*”. However, prayer 3 of the application shows that the purpose of application is to obtain an order to stay further proceedings before the Review Board.

It seems to us that the application is defective for two reasons. Firstly, **Rule 5 (2) (b)** does not give this Court jurisdiction to grant a general stay order as sought in the application. Rather, **Rule 5 (2) (b)** gives the Court jurisdiction to grant three specific orders, namely, to “*order a stay of execution*” grant an injunction, or a stay of *any further proceeding*. The applicant in our view, should have sought “*a stay of execution*”.

Secondly, from its nature, an order of certiorari cannot be stayed pending appeal by interlocutory proceedings. Rather it can only be set aside in the appeal itself.

In **Karia Mbae vs. The Land Adjudication Officer, Chuka**, *High Court Miscellaneous Application No. 257 of 1987* (unreported), the High Court (Mbito & Mango, JJ.) held:

“In our view therefore, it would appear that this court has no jurisdiction to stay, recall, review or set aside or quash an order of certiorari once it has been made”.

In **Republic vs. Municipal Council of Mombasa & 2 Others**, *Exparte – Adopt – A – Light Ltd. Civil Application No. Nai. 15 of 2007* (unreported), this Court referring to an application for stay of an order of certiorari nullifying both the resolution of Mombasa Municipal Council to award a contract and the contract itself, said:

“The Court has no jurisdiction under Rule 5 (2) (b) to stay the nullification of the resolution and the contract. It can only stay the execution of the decree or orders of the superior court. The order of certiorari granted by the superior court is not capable of execution as the superior court did not order any party to do any thing or refrain from doing anything or to pay any sum (of money) other than costs.

Furthermore, the order of certiorari granted by the superior court quashing the resolutions of the Council and the Agreement is final and conclusive and took effect immediately. If the application is allowed the effect would to reverse the decision of the superior court and legalize the resolution and the contract already nullified until the determination of the appeal. This Court has no jurisdiction at this stage to undo what the superior court has done. It can only reverse the order of certiorari upon the hearing of the appeal”.

The same principle applies to the impugned order of certiorari made by Wendoh, J. The quashing of the decision of the superior court by an order of certiorari cannot be suspended pending appeal and the application is incompetent to that extent.

However, the order of mandamus is of a different species from the order of certiorari in that it is a positive order commanding an inferior body to perform its statutory duty. In this case, the order of mandamus compelled the Review Board to hear the Request for Review on the merits. In our view, the execution of the order of mandamus can be stayed pending appeal. Indeed, in **The Kenya National Examination Council and Republic** – *Exparte Kemunto Regina Ouru & 128 Others* – *Civil Application No. Nai. 150 of 2009* (unreported), this Court in exercise of its jurisdiction under **Rule 5 (2) (b)** in effect stayed the execution of an order of mandamus.

The defect in the application in seeking a stay of order of mandamus rather than a stay of execution of the order of mandamus is minor, and, in accordance with the overriding objective of the *Appellate Jurisdiction Act* and the Rules, we treat the application as an application for stay of execution of the order of Mandamus. Alternatively, the Court has jurisdiction under **Rule 5 (2) (b)** to grant a stay of “*any further proceedings*” resulting from the order of mandamus pending appeal against the order of mandamus, which is in essence, the intendment of the application.

In an application under **Rule 5 (2) (b)** an applicant is required to satisfy the court, among other things, firstly, that the intended appeal is arguable and secondly, that unless the order sought is granted, the appeal, if ultimately successful would be rendered nugatory.

On the first requirement, the grounds of the intended appeal are stipulated in paragraph 14 of the supporting affidavit. One of the proposed grounds of the intended appeal, which appears to be the main ground, questions the jurisdiction of the superior court to declare the contract already entered into by Kengen and Shengli null and void. It was contended at the hearing of this application that Zhongman had neither sought leave to apply for nullification of the contract nor sought nullification of the contract in the judicial review application and, further that, the superior court had only jurisdiction to grant orders of certiorari, prohibition and mandamus and not a nullification of contract. It was also submitted in the superior court on behalf of Kengen that once the contract is signed, the Review Board had no jurisdiction to entertain a Request for Review application. It is expedient to lay the statutory basis for this ground.

The contract was signed pursuant to **Section 68** of the Act which provides:

“68 (1) The person submitting a successful tender and the procuring entity shall enter into a written contract based on the tender documents, the successful tender, any clarification under Section 62 and any corrections under Section 63.

(2) The written contract shall be entered into within the period specified in the notification under Section 67 (1) but not until at least fourteen days have elapsed following the giving of that notification”.

Section 67 (1) of the Act referred to required Kengen to notify Shengli within the stipulated tender validity period of 120 days that its tender had been accepted.

Section 93 (1) gives a right to any tenderer who claims to have suffered or to risk suffering, loss or damage due to breach of duty imposed on a procuring entity under the Act or Regulations to seek administrative review. Section 93 (2) (c) stipulates that the matter shall not be subject to review where a contract is signed in accordance with Section 68.

Section 94 requires the secretary of the Review Board upon receiving a Request for Review to notify the procuring entity of the pending review and the suspension of the *procurement proceedings* in the manner as may be prescribed. Section 97 (1) requires the Review Board to complete its review within 30 days after receiving the Request for the Review and Section 97 (2) provides:

“In no case shall any appeal under this Act stay or delay procurement process beyond the time stipulated in the Act or the regulations”.

Section 100 (1) 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 Board’s decision”.

And lastly, Section 100 (4) provides:

“If judicial review is not declared by the High Court within thirty days from the date of filing, the decision of the Review Board shall take effect”.

It has been submitted that the contract was signed on 9th January, 2010 after the Review Board dismissed the Request for Review although the document exhibited bears a date earlier.

The superior court construed Section 100 (4) which prescribes a limitation period of 30 days as not a fetter to the unlimited jurisdiction of the High Court conferred by Section 60 of the Constitution and ruled that it was seized of the matter until it renders a decision. The superior court declared the contract illegal, null and void solely on the ground that, it was entered into before Zhongman had exhausted its right to challenge the decision of the Review Board. The court specifically said:

“The purported signing of the contract could not be done before the Applicant exhausted their right to challenge the decision of the Board What the interested parties purported to do on 8th or 9/7/2010 is illegal and smacks of bad faith because they seem to have been pre emptying the filing of this Judicial Review proceedings in the High Court”.

Another related ground of the intended appeal questions the legality of the order of mandamus on the grounds that the Review Board had no jurisdiction to hear the request afresh because, by Section 93 (2), the Board cannot entertain a Request for Review where a contract has been signed: by Section 93 (2) the Board must deliver its decision within 30 days of the Request for Review; the Request for Review having been filed on 12th January, 2010 the Board’s jurisdiction to entertain it lapsed on 12th February, 2010.

From the foregoing, several important broad issues arise, *inter alia*:

(i) *When does the procurement process or proceedings terminate? Is it when the procuring entity enters into a contract with the person submitting the successful tender or is it after the final determination by the court of any ensuing appeal or judicial review proceedings?*

(ii) *Does the court have jurisdiction to continue with judicial review proceedings or appeal which has not been determined within 30 days of the filing or is the decision of the Review Board final and conclusive after the expiry of the stipulated period?*

(iii) *Does the court have jurisdiction to command the Review Board to re-hear a Request for Review outside the time limitations stipulated by the Act?*

(iv) *Does the judicial review jurisdiction give the court power to annul a contract entered into pursuant to the Act solely on the ground that it was entered into during the pendency of judicial review proceedings when there is no stay order or on any other ground whatsoever?*

On our consideration of the proposed grounds of appeal, we are satisfied that the intended appeal raises arguable grounds fit for consideration by the Court.

However, Kithi Kilonzo, learned counsel for the Zhongman contended that by **Section 100 (2)** of the Act, the decision of the High Court is final and there is no right of appeal. On the other hand, Mr. Kiragu, learned counsel for Kengen countered that whereas the decision of the High Court on appeal is final, the decision of the High Court on judicial review is governed by **Section 9 (5)** of the *Law Reform Act* which gives a right of appeal to this Court. On the perusal of the relevant law, we are satisfied on *prima facie* basis that an appeal lies to this Court as of right from the impugned decision of the superior court. The issue can of course be raised at the hearing of the appeal for final determination.

We now turn to the question whether or not the intended appeal would be rendered nugatory, if we decline to grant appropriate orders. According to the applicant, if stay order is not granted, the Review Board will proceed to hear the Request for Review with the possibility that the tender would be cancelled with the result that the procurement of the drilling rigs would be greatly delayed thereby causing great financial loss to Kengen; exposing Kengen to possible suits; crippling the economy and adversely affecting the public.

However, according to Zhongman failure to grant the order would not render the appeal nugatory, instead, if the order is granted, the contract will be performed when its legality and validity is in question thereby causing prejudice to Zhongman.

As we have indicated above, the appeal is intended to question the legality of the judicial review proceedings which resulted in the nullification of the contract and in the granting of the order of mandamus. The applicant further intends to question the jurisdiction of the superior court to nullify the contract and to grant the order of mandamus. Further, the applicant intends to question the jurisdiction of the Review Board to re-hear the Request for Review. It is clear to us that unless the Review proceedings before the Review Board are stayed, the appeal would be rendered nugatory as the substratum of the appeal would not be subsisting. Indeed, the appeal itself would be rendered futile. In addition, the appeal raises important jurisdictional issues in the procurement process. The procurement jurisprudence is evolving and it is in the public interest that the issues raised in the appeal should be determined by the court of the last resort.

The 1st interested party, Zhongman, would not suffer undue prejudice, if the application is allowed because as we have already indicated, the effect of the order of stay is not to reverse the order of certiorari or mandamus. Indeed, it is not correct that the contract would be performed if the order of stay is granted. Rather, the order of stay would relate only to the proceedings before the Review Board.

It is Kengen which will suffer prejudice if the order of stay is granted because of the inherent delay in the determination of the appeal. Kengen cannot however complain because it has voluntarily opted to appeal and has sought the stay order.

For the foregoing reasons, we allow the application to the extent that, and, we order that, the execution of the order of mandamus granted by the superior court on 18th March, 2010 is stayed pending the determination of the intended appeal, with the result that, further proceedings in **Request for Review No. 2 of 2010** are stayed until the determination of the appeal.

The costs of this application shall be costs in the appeal.

Dated and delivered at Nairobi this 30th day of July, 2010.

E. M. GITHINJI

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR