



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
CIVIL APPLICATION 145 OF 2009 (UR 95/2009)**

THE KENYA REVENUE AUTHORITY APPLICANT

AND

DE LA RUE CURRENCY AND

SECURITY PRINT LTD 1ST RESPONDENT

THE PUBLIC PROCUREMENT

ADMINISTRATIVE REVIEW BOARD 2ND RESPONDENT

MADRAS SECURITY PRINTERS 3RD RESPONDENT

(An application for stay of execution pending the hearing and determination of an appeal from the Ruling and Order of the High Court of Kenya at Nairobi, (Nyamu, J) dated 18th December, 2008

in

H. C. Misc. Civil Appl. No. 540 of 2008)

RULING OF THE COURT

This is an application under *Rule 5 (2) (b)* of the Court of Appeal Rules (“the Rules”) for stay of execution pending the hearing and determination of the appeal filed herein.

The application, which is supported by the affidavit of Grace Murichu, a Deputy Commissioner in the Procurement and Supplies Division of the Applicant, is based on the following grounds:

- “1. *THAT the applicant is aggrieved by the said decision of Hon. Justice Nyamu delivered on the 18th December, 2008 in the superior court and has appealed against the said decision to the Court of Appeal.*
2. *THAT the appeal raises arguable points of law and has high prospects of success.*

3. *THAT unless this Honourable Court grants a stay of execution of the orders issued in High Court Miscellaneous Civil Application No. 540 of 2008, the pending appeal will be rendered nugatory.*
4. *THAT the 1st respondent has threatened to institute contempt proceedings against the applicant unless it complies with the said orders.*
5. *THAT unless the stay of execution is granted, the applicant is likely to be cited for contempt of the said court orders issued on 18th December, 2008.*
6. *THAT it is in the interests of fairness and justice that this application be allowed as prayed.”*

The primary facts giving rise to this application are briefly as follows: In February, 2008 the applicant issued an invitation to tender for the printing, supply and delivery of self-adhesive stamps. The 1st respondent was one of the two companies that responded and submitted a bid. The other was the third respondent, a foreign company based in India. By a letter dated 15th July, 2008, the 1st respondent was informed that its bid was unsuccessful. Aggrieved by that decision, the 1st respondent filed the Request for Review before the Public Procurement Administrative Review Board (“the Board”). The Board handed down its decision on 22nd August, 2008 dismissing the 1st respondent’s appeal. Thereafter, the 1st respondent moved to the superior court seeking the following six judicial review orders:

- “1. An ORDER OF CERTIORARI do issue to remove into this Honourable Court and quash the decision of the Public Procurement Administrative Review Board dated 22nd August, 2008 dismissing the Request for Review No. 24 of 2008 of 29th July, 2008 by the Applicant and directing the Kenya Revenue Authority to proceed with the tender process in respect of the Tender No. KRA/HQS/INT-002/2007-2008 (Re-Advertisement).*
- 2. An ORDER OF CERTIORARI do issue to remove into this Honourable Court and quash the decision of the Kenya Revenue Authority as set out in the letter dated 15th July, 2008 to award Tender No. KRA/HQS/INT-002/2007-2008 (Re-Advertisement) to Madras Security Printers Limited.*
- 3. An ORDER OF CERTIORARI do issue to remove into this Honourable Court and quash the contract, if any, signed pursuant to the decision of the Public Procurement Administrative Review Board dated 25th July, 2008 and the decision of the Kenya Revenue Authority as communicated to the Applicant by a letter dated 15th July, 2008.*
- 4. An ORDER OF PROHIBITION do issue to prohibit the Kenya Revenue Authority from signing any contract in relation to the Tender No. KRA/HQS/INT-002/2007-2008 (Re-Advertisement) pursuant to the evaluation process without compliance with the provisions of Public Procurement and Disposal Act, the Public Procurement and Disposal Regulations and the tender documents issued by the Kenya Revenue Authority.*
- 5. An ORDER OF MANDAMUS do issue directed to the Kenya Revenue Authority to evaluate the Tender No. KRA/HQS/INT-002/2007-2008 (Re-Advertisement) and award the said tender in compliance with the provisions of the Public Procurement and Disposal Act, the Public Procurement and Disposal Regulations and the tender documents issued by the Kenya Revenue Authority.*
- 6. In the alternative to the Order 5 above, an ORDER OF MANDAMUS do issue directed to the Public Procurement Administrative Review Board to re-evaluate and consider Request for Review No. 24/2008 of 29th July, 2008 and to render an Award in compliance with the provisions of the Public Procurement and Disposal Act, the Public Procurement and Disposal Regulations and the tender documents issued by the Kenya Revenue Authority.”*

The 1st respondent relied on the following grounds in support of the application:

“4.1 The Authority failed to apply the preference applicable to the Applicant’s bid, in contravention of Section 39 (8) (b) of the Act, Regulation 28 (2) (a) of the Regulations, and Paragraph 2.25 of the tender documents issued by the Authority itself.

4.2 The Board failed to consider the submissions of the Applicant that it was entitled to a margin of preference under the Act, the Regulations and the Authority’s own tender documents.

4.3 The Board erred in law by concluding that the Applicant was not entitled to a margin of preference by basing its conclusions purely on the provision of Section 39 (8) (a) of the Public Procurement and Disposal Act, and failing to consider the provisions of Section 39 (8) (b) of the Act which had been cited to it during the hearing of the request for review.

4.4 The Board erred in law by misinterpreting and misconstruing Section 39 (8) (a) to be a prerequisite to the application of the margin of preference under Section 39 (8) (b) of the Act, especially in light of the provisions of paragraph 2.25 and the Appendix to Instructions to Tenderers found in the Authority’s own tender documents.

4.5 The Board erred in law by holding that the breach by the Authority of the mandatory provisions of Section 66 (6) and Regulation 46 of the Regulations could be excused on the basis that the breach caused no prejudice to the bidders.

4.6 The evaluation of tenders in tender No. KRA/HQS/INT-002/2007-2008 (Re-advertisement) was undertaken without paying heed to the provisions of the tender documents, the Act and the Regulations and as such was in breach of Section 66 of the Act.

4.7 The Applicant had a legitimate expectation that the Authority would apply the criteria for evaluation as advised in the tender documents and as required under the law. This is a basic tenet of the rule of law and good governance. This expectation was breached by the Authority and by the Board in failing to consider the Applicant’s entitlement to a margin of preference under the law of Kenya.”

By a Judgment handed down 18th December, 2008, the superior court (Nyamu, J as he then was) agreed with the 1st respondent that the applicant, in awarding the tender to the 3rd respondent, was in breach of some of the mandatory provisions of the Public Procurement and Disposal Act, and granted it five of the six prayers sought in its judicial review application.

Aggrieved by that decision, the applicant has now filed an appeal before this Court, and for now seeks stay of execution.

In his argument before us, Mr. M. Nyaoga, learned counsel for the applicant, submitted that the appeal raised several arguable points such as whether the 1st respondent was entitled to a “margin of preference” under the law when there was no clarity as to the origin of its goods; whether the goods that the 1st respondent manufactured were only for export purposes; and whether the 1st respondent had indeed suffered “prejudice” in the evaluation of the tender. Mr Nyaoga further argued that if the orders for stay of execution were not granted the applicant would likely be cited for contempt of the orders of the superior court, and hence the appeal herein would be rendered nugatory.

Mr Njogu, learned counsel for the 1st respondent, conceded that the appeal was arguable, although in his view it was spurious. He submitted that the appeal would not be rendered nugatory if the orders sought were not granted. On the other hand, he argued, that if the orders were indeed granted, the applicant would continue “business as usual” and would not comply with the law.

The discretion of the court on an application of this kind has to be exercised upon the established principles which require an applicant to satisfy the Court both that the intended appeal or appeal is arguable and that unless the order sought is granted, the appeal, if successful, would be rendered nugatory.

Mr Njogu has rightly conceded, and we are also of the same view that the appeal is arguable. We do not put it higher than that; it is to be remembered that an arguable point is not necessarily one that must succeed when the appeal is eventually heard and determined.

On the second point of whether the appeal will be rendered nugatory unless stay is granted, we are satisfied that the same will not be rendered nugatory, because all that the applicant is required to do is to follow the law. We do not see how doing just that will render the appeal nugatory.

Accordingly, and for reasons cited, we dismiss the Notice of Motion dated 28th May, 2009, with costs to the 1st respondent.

Dated and delivered at Nairobi this 3rd day of July, 2009.

S. E. O. BOSIRE

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR