**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL OF KENYA**

**AT NAIROBI**

**Civil Appli. Nai 109 of 2007 (UR 71/712007**

**EAST AFRICAN CABLES LIMITED ……………………..………….APPLICANT**

**AND**

**THE PUBLIC PROCUREMENT COMPLAINTS,**

**REVIEW AND APPEALS BOARD……………………………..1ST RESPONDENT**

**KENYA POWER & LIGHTING COMPANY LIMITED…......….2ND RESPONDENT**

***(Application for stay of execution pending the lodging, hearing and determination of an intended appeal from the decision of the High Court of Kenya at Nairobi (Emukule, J) dated 14th May, 2007***

**in**

**H.C.MISC. APPLN. NO. 372 OF 2007)**

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**RULING OF THE COURT**

The issue that is brought before us is to determine, as sought by the applicant, whether we should make the following orders:-

1) A stay of execution of the order on the judgment delivered by *Emukule J* on 14th May, 2007 in High Court Misc. Application No. 372 of 2007 pending the lodging, hearing and determination of the intended appeal.

2) An order staying further proceedings in the procurement process including the execution of the contracts and or performance of the contracts under the tender NO. KPL 1/IC/5/3/88/2006 pending the determination of the intended appeal.

The orders are sought under *rule 5(2) (b)* of the Rules of this Court and the principles that guide the Court in considering such applications are now well settled. The applicant, in order to succeed, must satisfy the Court that the appeal or intended appeal is an arguable one, that is, that it is not a frivolous

appeal. Secondly, that if an order of stay or injunction, as the case may be, is not granted, the appeal were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction – see <u>*RELIANCE BANK LTD (IN LIQUIDATION) V NORLAKE INVESTMENTS LTD*</u> *– Civil Appl. No. Nai. 93/02 (UR).*

The brief background to the application, as far as we can gather from the record is as follows. On 2nd November, 2006 the respondent, Kenya Power & Lighting Company Limited, advertised in the press the tender for supply of cables and conductors under reference No. KPL 1/1C/5/3/88/2006. Eighteen bidders, including the applicant, purchased and returned the tender documents but the 2nd respondent issued an addendum on 17th November, 2006 which reduced the numbers of items in the tender, revised the formula for price variations, indicated the Duty payable for the cables and conductors and extended the closing date for the tender to 19th December, 2006. It is common ground that the tender was opened on the same day at 2.00 p.m. and was thereafter subjected to evaluation, both technically and commercially.

The applicant bid for 30 out of the 32 items and requested from the 2nd respondent a summary of the evaluation report but the latter declined on the ground that from the nature of the tender it would not have been possible to produce a summary without disclosing the actual content of the bidder's tenders. It is the 2nd respondent's case that the applicant was found to be the lowest evaluated tenderer in only one item Code Numbered 108886 which was worth UD$ 82,893.60. Its bid was not successful in all the other items as it had quoted higher prices than other bidders.

Being aggrieved by the decision of the 2nd respondent's Tender Committee the applicant preferred an appeal before the Public Procurement Review Board. The applicant submitted before the Board, inter alia, first, that the 2nd respondent had breached Regulations 24(2) and 26 of the Exchequer and Audit (Public Procurement) Regulations 2001 in that it split the tender into more than one procurement without so specifying in the tender documents; secondly, that the 2nd respondent had breached Regulation 33(1) of the said Regulations in not notifying the applicant of the outcome of the remaining items of the tender; thirdly, that the 2nd respondent had failed to set out in the tender the criteria for tender evaluation; and fourthly, that the 2nd respondent did not conduct the tender process in a fair and transparent manner. The parties appeared by counsel before the Review Board and made lengthy submissions. However, the Board dismissed the appeal.

The dismissal of the applicant's appeal by the Board triggered the institution of the proceedings before the superior court by which the applicant sought the Prerogative Orders of Certiorari, Mandamus and Prohibition under Order LIII rule 3 of the Civil Procedure Rules. After hearing counsel for the parties, the learned Judge in a short ruling held:-

**"***By virtue of Section 8(1) of the Law Reform Act (Cap 26, Laws of Kenya) in its judicial review jurisdiction, the High Court can only issue any of the prerogative orders of mandamus, prohibition or certiorari. The Court will only issue declaratory orders in its civil jurisdiction. An order of declaration will not lie.*

*An order of prohibition will only issue to prohibit a person from acting illegally. There can be no plausible reason for prohibiting the second respondent from signing a contract which has been the subject of prolonged procurement proceedings with each stage of that process being substantially compliant with the requisite law and regulations.*

*An order of mandamus will issue to a person or body entrusted with a statutory duty to do that which it has failed to do. The second respondent herein has already carried out the procurement in accordance with the law and regulations. There is no basis for making an order of mandamus*-------

*For all these reasons the Notice of Motion is dismissed."*

*Mr. Ojiambo* counsel for the applicant contended before us that the intended appeal is arguable and is

not a frivolous one and in support of that contention, *Mr. Ojiambo* referred us to the applicant's draft memorandum of appeal, which contains a total of fifteen grounds of appeal. He will contend, *inter alia*, that the learned Judge erred in holding that the applicant was in breach of the rules of natural justice when the court had discretion pursuant *to Order LIII 3(4*) to adjourn the hearing of the motion if in his opinion, any person who ought to have been served therewith had not been served. He will submit further that failure to serve was not fatal nor could it be a ground for ruling against the applicant. *Mr. Ojiambo*, also, submitted that it was an error on the part of the learned Judge in failing to apply *section 44(3)* and *44(4)* of the Public Procurement and Disposal Act, 2005 and that he ought to have held that a summary of the evaluation report is required to be given on request to a candidate after completion of the procurement process and cannot be the foundation for breach of the rules of natural justice or illegality by the procuring entity.

Both *Mr. Ombwayo* and *Mr. Kiragu Kimani* for the 1st and 2nd respondents respectively have vehemently opposed the application. They contented themselves by submitting that there were no arguable issues in the intended appeal. They argued that before the Review Board there were four parties who were directly interested in the tender and yet they were kept in the dark about the appeal. They further submitted that there were no proceedings before the superior court capable of being stayed. They averred that the Motion before us is misconceived.

We would observe that the draft memorandum of appeal was made part of the record before us and is therefore perfectly open to the Court to look at the grounds enumerated thereon. It is also plain that in an application such as this the grounds are not to be argued; all an applicant is required to do is to point out to the Court the ground or grounds which he believes are arguable and leave it to the Court to decide whether the issues raised thereon are arguable. On our part, we have carefully looked at the grounds contained in the memorandum of appeal. We have also considered the rival submissions canvassed before us by the counsel. In our view, the intended appeal is clearly arguable.

What of the nugatory aspect of this matter? *Mr. Ojiambo* argues that if the application is not granted the applicant will be shut out of what otherwise should have been a lucrative contract and would suffer substantial loss and damages would not be adequate remedy. In the cases of <u>*BUTT VS. RENT RESTRICTION TRIBUNAL [1982] KLR I and ORARO & RACHIER ADVOCATES VS. CO-OPERATIVE BANK OF KENYA*</u> *[1999] LLR 118 (CAK)*, the common vein running through them is that each case was considered on its merits as regards the nugatory aspect of the intended appeals and the respective merits of the parties' cases before the discretion to grant stay was made.

It is submitted by *Mr. Kiragu Kimani* that contracts have already been executed by the 2nd respondent and the successful bidders and that it would cause considerable hardship to the 2nd respondent to stop their implementation. He pointed out that it would take at least six months to advertise a new tender. In a replying affidavit *Ms. Beatrice Muendo*, the Assistant Manager, Legal services, of the 2nd respondent has deposed that:-

"*22. It was incumbent upon the second respondent to move with haste to ensure the supply of all the materials necessary for power distribution owing to the fact that there has been an unprecedented growth in the number of customers seeking to be connected to electricity supply. Over the last 9 months the number of persons being connected to electricity supply by the second respondent has increased significantly which was not anticipated. The most notable increase has been in the first 5 months of this year.*

*23. The second respondent has been experiencing a major shortage of its stocks in cables and conductors. It was therefore imperative that new stocks be obtained as a matter of urgency to avoid any further inconvenience. A summary of the current levels of stocks of cables and the duration period of each category of stock is annexed hereto on page 10 of the exhibit "BMM 1".*

*24. Any further delays in the supply and delivery of cables and conductors would have essentially stopped the second respondent's operations as these are the main materials used for connecting new customers and carrying out the repairs and maintenance of existing transmissions and distribution*

*systems.*

*30. The current stocks will not last more than one month.*

*31. The second respondent is at present the only licensed distributor of electricity and it would be undesirable to place it in a position where it has no stocks of cables and conductors."*

We think that in a case like this one we must consider the likely effect of 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 it has the duty to satisfy its ever surging number of consumers of that 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, the 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.

We think that in the particular circumstances of this case, if we allowed the application the consequences of our orders would harm the greatest number of people. In this instance we would recall that 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 have further considered the fact that the value of the items tendered for by the applicant is in the region of Shs.5.9 billion and if the applicant's bid was successful it would have commissioned a new factory which would have employed directly a good number of Kenyans.

We also agree with the applicant that there is genuine fear that its business would be seriously affected in the event that this application is refused.

However, with great respect, we would view any consequent losses upon the applicant as capable of being quantified and are assessable in the event that its intended appeal succeeds.

Accordingly, we reject and dismiss this application. We order the costs of this application to be costs in the intended appeal.

***DATED and DELIVERED at NAIROBI this 31st day of July, 2007.***

***P.K. TUNOI***

**……………………………………..**

***JUDGE OF APPEAL***

***E.O. O'KUBASU***

**………………………………..**

***JUDGE OF APPEAL***

***E.M. GITHINJI***

**…………………………………...**

***JUDGE OF APPEAL***

*I certify that this is a*

*true copy of the original.*