



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
CORAM: OMOLO, O’KUBASU J.J.A AND DEVERELL AG. J.A
CIVIL APPLICATION NO. NAI 93 OF 2004 (UR. 52/O4)

BETWEEN

REPUBLIC.....APPLICANT

AND

**THE MINISTER FOR FINANCE,
GOVERNMENT OF KENYA.....FIRST RESPONDENT**

**THE COMMISSIONER FOR
CUSTOMS
& EXCISE.....SECOND RESPONDENT**

**THE PUBLIC PROCUREMENT
COMPLAINTSREVIEWS AND
APPEALS BOARD... ..THIRD RESPONDENT**

AND

**INTERTEK TESTING SERVICES
INTERNATIONAL LIMITED)
BIVAC INTERNATIONAL) INTERESTED PARTIES
SGS SOCIETE GENERALE
DE SURVEILLANCE.....)**

**(Being an application for stay pending the determination
of the appeal against the order/ruling of the High Court
at Nairobi (Aganyanya J.) dated 19th August, 2003
in
MISC. CIVIL CAUSE APPLICATION No. 723 OF
2003)**

RULING OF THE COURT

This is an application under **rule 5 (2) (b)** of the rules of this Court for a stay, pending the determination of an appeal, of the proceedings in **High Court Miscellaneous Civil Case No. 723 of 2003**. The proceedings sought to be stayed are judicial review proceedings aimed at quashing a decision dated 27th June 2004 of the Public Procurement Complaints, Review and Appeals Board ("**the Board**") and at prohibiting the Ministry of Finance from signing the contract awarded by it to Cotecna Inspection S.A. ("**Cotecna**") and to Bureau of Inspection Valuation Assessment and Control ("**BIVAC**"). This last prohibition from signing the contract was overtaken by events since the two year contract was in fact signed on 30th June, 2003.

The party claiming the relief by way of judicial review is Intertek Testing Services International Limited ("**Intertek**") which claims that the tender for the two year contract should have been awarded to it by reason of it being the lowest tenderer.

The applicant in the current application ("the stay application") before us is **Cotecna** whose application was lodged on 29th April 2004. **BIVAC**, which has filed a cross appeal, has indicated that it supports **Cotecna's** application.

The full orders sought in the stay application are as follows:-

"1 The proceedings in the High Court Miscellaneous Civil Case No. 723 of 2003 be stayed pending the determination of the appeal against the order made by Mr. Justice Aganyanya on 19th August 2003 on the grounds that the applicant has valid grounds of appeal with prospects of success and if the stay of proceedings is not granted the applicant's appeal will be rendered nugatory.

2. The order of 19th August 2003 appealed against directs that the application for judicial review be set down for hearing notwithstanding the fact that the applicant's (Cotecna) preliminary objection, application to set aside grant of leave to apply for judicial review and application to strike out portions of the affidavit of Noel Holland made under Order 53 Rule 1 (2) of the Civil Procedure Rules have not been heard on their merits.

3. And for an order that the costs of this application abide the result of the said appeal."

This Court, in considering the stay application, is not at this stage concerned with the merits of the claim for judicial review but is concerned with whether it is arguable that Aganyanya J. made an erroneous ruling to the effect that the application to set aside the ex parte order granting leave to institute judicial review proceedings made by Nyamu J. was not required to be heard by Nyamu J., who granted the leave, and could be dismissed by Aganyanya J. himself and was so dismissed

. If this is not arguable then the applicant will have failed to surmount the first hurdle in successfully obtaining the stay sought.

We are satisfied that the appeal against the decision of Aganyanya J. is not frivolous and is arguable. It is not necessary or desirable that we go into any detail as to the reasons for this view at this stage.

The second limb upon which the applicant must also succeed, relates to whether the intended appeal will be rendered nugatory if no stay is now granted.

In this regard we consider it right to follow the principles applied in *Silverstein . v. Chesoni* KLR 2002 Vol 1 867 at page 973 which we now set out:- -

"On the second limb regarding whether the applicant's intended appeal would be rendered nugatory if it succeeded and we refuse to grant a stay, we must point out that the appeal whose success would be rendered nugatory if we do not grant a stay is the appeal already filed in this Court, not the appeal pending in the High Court. On this aspect of the matter we think we must

follow the decision of this Court in the case of Kenya Commercial Bank Limited v Benjoh Amalgamated Ltd and Another Civil Application No NAI 50 of 2001 (29/2001 UR). That was also an application to stay the proceedings in the High Court pending the hearing and determination of an intended appeal to this Court. In its ruling whether the intended appeal's success would be rendered nugatory if a stay was not granted, the Court stated as follows:

“...The onus of satisfying us on the second condition, that unless stay is granted, the intended appeal would be rendered nugatory, is also upon the applicant. In our view, it has unfortunately failed to discharge this onus. We remind ourselves that each case depends on its own facts and we find it difficult to be persuaded that the appeal on the facts of the present case would be rendered nugatory if stay is not granted. The appeal may be heard, and if successful, the proceedings in the superior court would be determined in accordance therewith. The hearing in the superior court might have been unnecessary for which the appropriate costs can be ordered but the appeal will not have been worthless.”

These remarks aptly apply to the application before us. What will happen if we do not grant the stay sought is that the appeal in the High Court will be heard and will be determined, and if it succeeded, would have been rendered unnecessary, but an appropriate order for costs can be made to remedy that. However, the appeal in this Court would not have been rendered nugatory.”

Turning now to the current case before us, we remind ourselves that the relevant intended appeal here is that against the Aganyanya J. decision in which he declined to permit the review application for setting aside the granting of leave to be heard by Nyamu J.

If a stay is not granted and the applicant, Cotecna, eventually succeeds in the appeal to this Court, the result will be that Nyamu J. will be required to hear and rule upon the application to set aside his earlier grant of leave. If, to take the result sought by Cotecna, Nyamu J. decides to set aside his original ruling granting leave, the hearing of the main judicial review application will not take place unless as a result of a new appeal by Intertek. On these assumptions the absence of any stay order in the current application will not have rendered the appeal nugatory

. If, however, a stay is not granted and after a successful appeal by Cotecna against the Aganyanya J. decision, Nyamu J refuses to set aside his grant of leave, Cotecna may not be any better off but its appeal will not have been nugatory since it succeeded.

If a stay is not granted and the appeal eventually succeeds, the appeal will only appear possibly to have been rendered nugatory if the hearing of the main case has been concluded adversely to Cotecna both before the hearing of the appeal and before the completion of the contract. If this happened Cotecna would have its right of appeal against the judgement and the right to apply for stay of execution of that judgement at that time.

An additional ground for holding that the appeal against the Aganyanya J. decision will not be rendered nugatory is that if the Court allowed the appeal, and ruled that the application to set aside the ex parte order of Nyamu J. should have been heard by Nyamu J., then the Court would be likely to order that Aganyanya J.'s decision, and any subsequent proceedings consequent thereon, be set aside. Appropriate orders as to costs would be made in respect of any proceedings in the High Court rendered unnecessary in the light of the appeal.

It will be clear from the above that we consider that the applicant has failed to establish the nugatory limb. We therefore dismiss the application with costs to the respondent.

Dated and Delivered at Nairobi this 14th day of January, 2005.

R. S. C. OMOLO

JUDGE OF APPEAL

E. O. O’KUBASU

JUDGE OF APPEAL

W. S. DEVERELL

AG. JUDGE OF APPEAL

I certify that this a true copy of the original.

DEPUTY REGISTRAR