



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI

CORAM: OMOLO, ONYANGO OTIENO, J.J.A. & DEVERELL, AG. J.A.

CIVIL APPLICATION NAI 13 OF 2005 (UR.7/2005)

BETWEEN

MERIDIAN EXPORT LIMITED APPLICANT

AND

D. CHANDULAL K. VORA & COMPANY RESPONDENT

(An application for a stay of execution pending the lodging
and hearing of an intended appeal from the judgment of the
High Court of Kenya at Nairobi (Mr. Justice Mohammed Ibrahim)
dated 7th January, 2005

in

MISC. H.C.C.C. NO. 1160 OF 2004)

RULING OF THE COURT

This is an application by Notice of Motion dated 28th January, 2005 for a stay of execution pending the lodging and hearing of an intended appeal from the judgment of the superior court (Ibrahim J) dated 7th January, 2005 delivered in Miscellaneous Civil Application No. 1160 of 2004. This case was an application for judicial review pursuant to 0.53 of the Civil Procedure Rules in which **D.CHANDULAL K. VORA & COMPANY LIMITED** (hereinafter “Vora”) (which is the respondent in the present application before us) sought principally an order of certiorari to remove into the High Court, with the purpose to quash, the ruling made on 4th August, 2004 by the Public Procurement Complaints, Reviews and Appeals Board (hereinafter “the Board”).

The background to the litigation was accurately summarised by the superior court as follows:-

“JUDGMENT

The Applicant, Messr. Chandulal K. Vora & Co. Limited was the successful bidder of a tender for the supply of 101,000 single phase electronic energy meters to the Kenya Power & Lighting Company Limited (hereinafter referred to as the “Procuring Entity”) being tender number KPLC/S45/2003.

The Applicant was notified of the award of tender by a letter dated 11th June, 2004 which read as follows:-

11th June, 2004 M/s Chandulal K. Vora & Co. Ltd P.O. Box 80713 MOMBASA

RE: NOTIFICATION OF AWARD OF TENDER
FOR SUPPLY OF SINGLE PHASE ELECTRONIC METERS

We refer to your tender dated 12th January, 2004 and are pleased to inform you that following evaluation, your tender for supply of Single Phase Electronic Meters has subject to the provisions herein been accepted as follows:-

Description Qty Unit Price Total Price

Delivered in Kshs.

VAT Excluded.

Single Phase

Electronic

Meters 101,000 1,925,00 Kshs.194, 425,000 This notification does not constitute a contract and the formal Contract Agreement which is enclosed herewith for your perusal should be executed upon expiry of 21 days from the date hereof (not earlier than 5th July, 2004) pursuant to the provisions of the Exchequer and Audit (Public Procurement Regulations, 2001 – (33) (1).

Yours faithfully,

For THE KENYA POWER AND LIGHTING COMPANY LIMITED

L. K. NJAGI

COMPANY SECRETARY”

The enclosed Contract Form or Agreement was dated 5th July, 2004 and which the Applicant on the same day executed, endorsed its official stamp upon and returned to the Procuring Entity. The following day on 6th July, 2004, the Interested Party in this application Messrs. Meridian Exports Limited through its local representative, Quiver International Limited lodged an Appeal against the decision of the Tender Committee of Kenya Power and Lighting Company in the matter of the award of Tender No. KPLC/S/45/2003 with the Public Procurement Complaints, Review and Appeals Board under the provisions of the Exchequer and Audit Act, Cap.412, Laws of Kenya. The Interested Party was one of the unsuccessful bidders and was aggrieved by the decision of the Procuring Entity awarding the tender to the Applicant herein.

The Appeals Board identified 3 main grounds of appeal and after hearing the 2 parties and the Procuring Entity, delivered its decision on 4th August, 2004. Allowing the said Appeal, The Board found as follows:-

“

In conclusion we find as follows on each of the three grounds:-

Ground 1

The applicant was not the lowest priced tenderer, and it was virtually impossible for the Procuring Entity to determine the price offered by the Applicant, there being so many variables.

Ground 2

The test certificate relied upon by the Procuring Entity lacked evidence of certification and does cast doubt whether its issuer was an accredited body. Upon failure of this certificate to meet the tender requirements, the winning tenderer’s submission was non-responsive. Ground 3

The two grounds on abuse of the tender process fail.”

Accordingly, we conclude that the tender evaluation was entirely flawed, and is hereby annulled pursuant to Regulation 42(5) (d). The tender is to be re-tendered under the supervision of the Public Procurement Directorate.

.....
.....”

The decision of the Board to annul the tender by Vora gave rise to the judicial review application heard by Ibrahim J seeking to quash the Board’s decision.

In a long and closely reasoned judgment the superior court came to the conclusion that the Board’s decision was a nullity.

The principal reason for this decision was that the Board had failed to establish whether or not it had jurisdiction to hear the complaint by Meridian against the award of the tender to Vora. Regulation 40(3) provides:-

“(3) Once the procuring entity has concluded and signed a contract with the successful tenderer, a complaint against an act of omission in the process leading up to that stage shall not be entertained through administrative review.”

The superior court did not itself decide that the contract between KPLC and Vora had been concluded and signed prior to the Board entertaining the complaint by Meridian.

The superior court held that it was a condition precedent that the Board considers the question of whether such a contract exists before taking any other step in the proceedings. The superior court further held that the failure by the Board to inquire into the question as to whether there existed a concluded contract rendered the decision a nullity.

We consider that whether this was a valid basis for setting aside the Board’s decision is an issue which is arguable in the intended appeal.

The remaining issue upon which we need to be satisfied before granting the stay sought is whether the intended appeal will be rendered nugatory if no stay is granted.

The present position is that Vora was notified that its tender was accepted but the tender was then annulled by the Board. That annulment by the Board was then quashed by the superior court resulting in the restoration of the tender and its acceptance. Subject to any issues of a contractual nature as between the Procuring Entity, Kenya Power & Lighting Co. Ltd (hereinafter “KPLC”) and Vora, the result is that since the delivery of the superior court judgment on 7th January, 2005 Vora may or may not be able to claim that it is entitled to supply the meters in accordance with the its original tender or, alternatively, may or may not be able to sue for damages for breach of contract.

Evidence has been put before us in the affidavit dated 7th February, 2005 sworn by the Company Secretary of KPLC, Laurencia Njagi, to the effect that on 27th August, 2004 KPLC advertised a new tender for the supply of electricity meters. The successful bidder in this tender process was Holley Metering of China Ltd. This tender was for the supply of 150,000 meters. KPLC has entered into a contract with Holley Metering of China Ltd which contract was signed by both parties on 3rd December, 2004. In the same affidavit it was also stated that KPLC’s annual consumption is approximately 150,000 meters.

It is not in evidence before us whether Vora or the applicant Meridian took part in this tender. Having taken into account all these circumstances we find that the applicants have failed to satisfy us that, at this stage, an interim revival of the quashed order of the Board which nullified the Vora tender and ordered a re-tendering will necessarily benefit Meridian.

Meridian has failed to satisfy us that its appeal will be rendered nugatory if a stay of the superior court judgment pending the appeal against it is not granted.

We do not consider that a decision of the appeal in favour of Meridian will be rendered nugatory by refusal of the stay sought.

For these reasons we hereby dismiss the application for stay of execution and order the applicant to pay the respondents costs of the application.

Dated and delivered at Nairobi this 18th day of March, 2005.

R.S.C. OMOLO

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

W. S. DEVERELL

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AG. JUDGE OF APPEAL

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

DEPUTY REGISTRAR