



SGS Kenya Limited v Energy Regulatory Commission & 2 others (Civil Application 39 of 2018) [2019] KESC 45 (KLR) (Civ) (12 February 2019) (Ruling)

SGS Kenya Limited v Energy Regulatory Commission & 2 others [2019] eKLR

Neutral citation: [2019] KESC 45 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA**

CIVIL

CIVIL APPLICATION 39 OF 2018

MK IBRAHIM, JB OJWANG, SC WANJALA, NS NDUNGU & I LENAOLA, SCJJ

FEBRUARY 12, 2019

BETWEEN

SGS KENYA LIMITED APPLICANT

AND

ENERGY REGULATORY COMMISSION 1ST RESPONDENT

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD 2ND
RESPONDENT**

INTERTEK TESTING SERVICES (EA) LIMITED 3RD RESPONDENT

Circumstances in which the Supreme Court could issue orders of stay.

The main issue for determination was the circumstances in which the Supreme Court could issue orders of stay. The Supreme Court held that an order of stay would only issue from the Court to preserve either the subject matter of an appeal, or the appeal itself.

Reported by Flora Weru and Kakai Toili

Civil Practice and Procedure - orders - conservatory orders - orders of stay - issuance of orders of stay by the Supreme Court - what were the circumstances in which the Supreme Court could issue orders of stay.

Brief facts

The 1st respondent advertised an open tender bid in which the applicant and two other bidders participated. In June 2017, the tender was awarded to the applicant. However, the tender awarded was terminated by the 1st respondent and the tender process re-started. Aggrieved by the termination, the applicant filed an application challenging the decision for review of the tender award, at the Public Procurement Administrative Review Board (Review Board) which dismissed the said application. Dissatisfied with the Review Board’s decision, the applicant filed a judicial review application at the High Court. The High court allowed the judicial review



application and quashed the decision of the Review Board and ordered the 1st respondent to proceed with the implementation of the tender.

Aggrieved by the High Court's decision, the 1st respondent appealed to the Court of Appeal which set aside the High Court's decision. Aggrieved by the Court of Appeal's decision the applicant filed a notice of appeal in the court and also filed for certification of the appeal in the Court of Appeal as raising a matter of general public importance and for stay of execution of the judgment of the Court of Appeal.

The Court of Appeal granted certification and leave to appeal to the Supreme Court identifying the matter as one of great public importance. However, the Court of Appeal declined to grant stay on the ground that the court was *functus officio*. Aggrieved by the decision not to grant stay, the applicant filed the instant application for conservatory orders restraining the 1st respondent from completing the tender evaluation process of the tender among other orders pending the hearing and determination of the application.

Issues

What were the circumstances in which the Supreme Court could issue orders of stay?

Relevant provisions of the Law

Constitution of Kenya

Article 163 (4)

Appeals shall lie from the Court of Appeal to the Supreme Court—

1. *as of right in any case involving the interpretation or application of this Constitution; and*
2. *in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5).*

Held

1. The application was properly before the Court having been certified by the Court of Appeal as raising only one question of great public importance; whether tribunals were bound by the doctrine of *stare decisis*. The findings on the instant appeal would therefore be restricted to that single issue and not whether the applicant was entitled to the orders of judicial review at the High Court or Court of Appeal which matter in any event was predicated upon a private contract with no public element in it *ab initio*.
2. An order of stay would only issue from the Court to preserve either the subject matter of an appeal, or the appeal itself.
3. Notwithstanding that the 1st respondent had already signed a new contract on the subject matter of the disputed tender with a third party not involved in the intended appeal, the subject matter of the appeal remained live as did the appeal itself. The grant of the disputed tender did not affect the issue before the Court and, taking all matters in perspective, refusal to grant the orders sought would not render the appeal nugatory. There was no merit in the application.

Application dismissed and costs to abide the determination of the appeal.

Citations

Statutes

None referred to

Advocates

None mentioned

RULING

1. We have before us an Application under certificate of urgency for conservatory orders restraining the 1st Respondent from completing the tender evaluation process of tender No. ERC/PROC/4//3/092 – “provision for petroleum fuels marking and monitoring services” or any other tender by whatever



- number designated and/or the awarding of a new contract for the provision of the said or similar services to any other person, or if awarded, the new contract does not commence pending the hearing and determination of the application.
2. The subject matter of the Appeal is the tender award by the Energy Regulatory Commission (1st Respondent) for tender No. ERC/PROC/4/3/16-17/119. It is alleged that on the 18th of April 2017, the 1st Respondent advertised an open tender inviting bids for the “provision of marking and monitoring of petroleum products” under tender No. ERC/PROC/4/3/16-17/119 in which the Applicant and two other bidders (including the 3rd Respondent) participated. On 30th June 2017, after evaluating both the technical and financial bids placed by the bidder, the Applicant’s bid was assessed as the lowest bid and the Technical Committee of the 1st Respondent recommended that the tender be awarded to the Applicant. However, the Committee, in its recommendation, made a general observation that there is in existence a new technology that can detect jet fuel in motor fuel which was of relevance to the award.
 3. Acting on this general observation of the Tender Committee, the tender awarded to the Applicant was terminated by the 1st Respondent and the tender process re-started with a requirement that the new technology changes be incorporated in the bid documents. The decision to terminate the tender was communicated to all bidders including the Applicant and the Public Procurement Regulatory Authority.
 4. Aggrieved by the termination, the Applicant filed an application challenging the decision aforesaid for review of the tender award aforesaid, at the Public Procurement Administrative Review Board (“the Review Board”) and in an award delivered on 1st August, 2017, the Review Board dismissed the application for review stating that the 1st Respondent was at liberty to re-advertise the tender without notice to any bidder, including the Applicant.
 5. It was the Applicant’s case inter alia that despite citing its earlier decision in *Avante International Technology Inc. v Independent Electoral and Boundaries Commission*, PBAP Review No.19 of 2017 where the review board had laid down principles to be followed in the event of technological change in any tender process, the Board made reference to the case in its award but did not say or explain why it could not follow the said decision.
 6. Dissatisfied with the Review Board’s decision therefore, the Applicant filed a judicial review application – Nairobi Miscellaneous Application No. 496 of 2017 – at the Judicial Review Division and in his Judgment delivered on the 25th September 2017, Mativo J. granted the prayers sought and quashed the decision of the Review Board and ordered the 1st Respondent to proceed with the implementation of tender No. ERC/PROC/4/3/16-17/119 dated 12th May 2017.
 7. Aggrieved by the High Court’s findings, the 1st Respondent appealed to the Court of Appeal vide Civil Appeal No. 341 of 2017. The Court of Appeal, in its Judgment of 11th of May 2018 set aside the High Court Judgment holding that the High Court had exceeded its jurisdiction as Judicial Review is concerned with the process and not the merits of any decision reached. Further, that the order of mandamus directing the 1st Respondent to award the tender to the Applicant was erroneous as it interfered with the exercise of discretion by the procuring entity (the 1st Respondent).
 8. Aggrieved by that Judgment, the Applicant filed a Notice of Appeal in the Supreme Court and also applied vide Civil Application No. 167 of 2018 for certification at the Court of Appeal that the Appeal raises matter of general public importance under Article 163 (4) (b) of the Constitution and for stay of execution of the Judgment of the Court of Appeal.



9. In a Ruling delivered on 19th December 2018, the Court of Appeal granted certification and leave to Appeal to the Supreme Court identifying the following as the matter of great public importance: whether tribunals are bound by the doctrine of stare decisis. However, the Court of Appeal declined to grant stay on the ground that the court was functus officio.
10. It is now the Applicant's case that it had been providing fuel marketing and monitoring services to the 1st Respondent from the 1st of July 2015 to date initially based on an original 2 year contract with the subsequent one and a half year extension done, pending the hearing of this dispute before the Review Board, the High Court and Court of Appeal, respectively.
11. It is the Applicant's further case that during the hearing of the Application for certification and leave before the Court of Appeal, the 1st Respondent indicated that it did not intend to extend the Applicant's contract pending the hearing of the intended Appeal to this Court and as such, the new contract with the new provider would commence on 1st January, 2019 after the extended contract to the Applicant lapsed on 31st December, 2018 hence the urgency for this Application and the reason for seeking restraining orders as against the 1st Respondent without which, they argue, their case would be rendered nugatory and academic in the event their Appeal succeeds.
12. It is the Applicant's other submission that the Review Board was bound by the doctrine of stare decisis as the doctrine relates to uniformity, predictability and certainty of law which will ensure justice and fairness. It also cites the case of *Sweney v The Department of Highways, Middleton J. A* at the Ontario Court of Appeal in support of that proposition. Further, that its intended appeal is arguable as it will determine the question of stare decisis (as regard tribunals) identified by the Court of Appeal as well as other Constitutional questions to be raised on the hearing of the Appeal. The Applicant also filed a Case Summary and a bundle of authorities in support of its arguments.
13. In response, the 1st Respondent filed a Replying Affidavit dated 9th January 2018 sworn by Edward Kinyua, Acting Director of the 1st Respondent, written submissions and a bundle of authorities opposing the Application. He deponed that the Application has been overtaken by events as they have already accepted fresh bids following the decision of the Court of Appeal. That the said process has since been finalized, a letter of award issued and a contract duly signed and performance commenced on 2nd of January 2019.
14. It is the 1st Respondent's other case that its contract with the Applicant was for 2 years dating back from 1st of July 2015 with an option to extend for a further year. That the effect of the numerous extensions already made was that the 1st Respondent has exhausted the cumulative time allowable under Section 139 (4) (a) and (e) of the Public Procurement and Asset Disposal Act (and even exceeded it by over half the period) and as such, the 1st Respondent could legally not extend the Applicant's contract even as an emergency measure hence the practical necessity for the then procurement process to be strictly followed and to be finalized expeditiously.
15. That in any event the prayers sought by the Applicant are an attempt at reviving an expired contract through the Court, which amounts to an abuse of the Court process. Further, that the Public Procurement Regulatory Authority has also specifically advised (through an annexed letter) that engaging the Applicant for any extended period under a direct procurement would not be legal with the 1st Respondent alleging that even public interest would militate against grant of the orders.
16. On our part we note that the 2nd and 3rd Respondent's filed no response to the Application and having considered the Application and the rival submissions before the Court, and drawing from this Court's jurisprudence in the case of *Board of Governors, Moi High School, Kabarak & Another v Malcolm*



Bell, SC Application Nos. 12 & 13 of 2012 on the principles for grant of conservatory orders and also the cases of Gatirau Peter Munya v Dickson Mwenda Kithinji and 2 others [2014] eKLR; Nathif Jama Adam v Abdikhalim Osman Mohamed and 3 others [2014] eKLR, as well Teachers Service Commission v Kenya National Union of Teachers & 2 others, Application No.16 of 2015, it is our opinion that;

- i) The Application is properly before us having been certified by the Court of Appeal as raising only one question of great public importance; whether tribunals are bound by the doctrine of stare decisis.
- ii) Our findings on the intended appeal will therefore be restricted to that single issue and not whether the Applicant was entitled to the orders of judicial review at the High Court or Court of Appeal which matter in any event is predicated upon a private contract with no public element in it ab initio.
- iii) In *Basil Criti cos v Independent Electoral and Boundaries Commission & 2 others*, Sup. Ct. Petition No.22 of 2014, we stated thus (para 51):

“ An order of stay will only issue from this Court to preserve either the subject matter of an appeal, or the appeal itself.”

- iv) It is the 1st Respondents’ case that it has already signed a new contract on the subject matter of the disputed tender with a third party not involved in the intended appeal. That fact notwithstanding, the subject matter of the appeal, as stated above, remains live as does the appeal itself. The grant of the disputed tender does not affect the issue before us and it is also our view that, taking all matters in perspective, refusal to grant the orders sought would not render the appeal nugatory.

17 Having so stated, we see no merit in the Application and consequently, we make the following orders:

- a) The Notice of Motion dated 20th December 2018 is hereby dismissed.
- b) Costs shall abide the determination of the Appeal.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF FEBRUARY, 2019.

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M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

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J. B. OJWANG

JUSTICE OF THE SUPREME COURT

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S. C. WANJALA

JUSTICE OF THE SUPREME COURT

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NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT



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I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

The Registrar

Supreme Court of Kenya

