



REPUBLIC OF KENYA



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Asphalt Works Investments Limited v Kenya Ports Authority (Judicial Review Application E022, E020, E021 & E023 of 2023 (Consolidated)) [2024] KEHC 4786 (KLR) (30 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4786 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
JUDICIAL REVIEW APPLICATION E022, E020, E021 & E023 OF 2023 (CONSOLIDATED)**

OA SEWE, J

APRIL 30, 2024

BETWEEN

ASPHALT WORKS INVESTMENTS LIMITED APPLICANT

AND

KENYA PORTS AUTHORITY RESPONDENT

RULING

- (1) Before the Court for determination is the Notice of Motion dated 15th February 2024. It is expressed to have brought by the ex parte applicant, Asphalt Works Investments Limited (hereinafter, “the applicant”) under Rule 5(2)(b) of the Court of Appeal Rules, 2022 for orders that:
 - (a) Pending the hearing and determination of Mombasa Civil Appeal No. E021 of 2024: Asphalt Works Investments Limited v Kenya Ports Authority, there be an order of stay of execution of the judgment delivered by this Court on 21st December 2023 and more specifically the order of Mandamus directing the respondent to re-advertise the tenders the subject of the proceedings and the judgment and more specifically the tenders which had been awarded to the applicant being Tender Numbers KPA/136/2021-22/CE-Framework Agreement for Drainage and Water Reticulation, KPA/137/2021-22/CE-Framework Agreement for Road Works, KPA/138/2021-22/CE-Framework Agreement for Concrete Works and KPA/145/2021-22/CE-Framework Agreement for Specialized Painting for Roads and Yard Marking.
 - (b) Pending the hearing and determination of Mombasa Civil Appeal No. E021 of 2024: Asphalt Works Investments Limited v Kenya Ports Authority, there be an order of stay of injunction restraining the respondents from re-advertising the tenders the subject of the proceedings and the judgment and more specifically the tenders which had been awarded to the applicant being Tender Numbers KPA/136/2021-22/CE-Framework Agreement for Drainage and Water Reticulation, KPA/137/2021-22/CE-Framework Agreement for



Road Works, KPA/138/2021-22/CE-Framework Agreement for Concrete Works and KPA/145/2021-22/CE-Framework Agreement for Specialized Painting for Roads and Yard Marking.

- (c) Costs of the application be provided for.
- (2) The application was premised on the grounds that the applicant was among the bidders who tendered for the subject tenders, which had been floated by the respondent. It further averred that, in or about mid November 2022, the respondent notified it that it was successful and had been awarded tender numbers KPA/136/2021-22/CE-Framework Agreement for Drainage & Water Reticulation, KPA/137/2021-22/CE-Framework Agreement for Road Works, KPA/138/2021-22/CE-Framework Agreement for Concrete Works and KPA/145/2021-22/CE-Framework Agreement for Specialized Painting for Roads and Yard Marking for a period of 2 years. The applicant duly acknowledged receipt of the letters of notification for the four (4) tenders and accepted the awards vide its letters of acceptance which were duly received by the respondent.
- (3) The applicant further stated that sometimes in February 2023, it received the draft contracts from the respondent with regard to the tenders which it proceeded to review and promptly reverted as required, confirming that all was in order. The applicant further averred that, on or about the 19th February 2023, the respondent informed it of the extension of the tender validity period and instructed it to collect the contracts on the 20th February 2023 from the respondent's offices, have them executed and returned on the same date; which instructions were strictly complied with on its part. The applicant added that the respondent assured it that the contracts had been duly executed within the tender validity period and that it would be issued with its copies in due course.
- (4) It was the assertion of the applicant that, despite numerous follow-ups and requests to be issued with the executed contracts, the respondent declined to do so. Instead the respondent advertised tenders for the same services in respect of which the applicant had been contracted to offer for a period of 2 years under new tender numbers KPA/177/2022-23/CE-Framework Agreement for Concrete Works, KPA/178/2022-23/CE-Framework Agreement for Road Works, KPA/179/2022-23/CE-Framework Agreement for Specialized Painting for Roads & Yard Marking and KPA/181/2022-23/CE-Framework Agreement for Drainage and Water Reticulation.
- (5) According to the applicant, the respondent's silence following its (the applicant's) acceptance of the award and execution of the contracts amounts not only to unreasonableness but also procedural impropriety; and was solely intended to prejudice its legal rights and legitimate expectation to enjoy economic benefits from the subject contracts. It further complained that the respondent did not give any reasons for failure to issue it with the contracts as set out in the tenders; and therefore has denied it the right to fair administrative action pursuant to Article 47 of *the Constitution* as read with the *Fair Administrative Action Act*, No. 4 of 2015.
- (6) On account of what it perceived to be dilatory tactics on the part of the respondent, the applicant claimed that the principles of public procurement were thereby violated. In particular, the applicant alleged violation of Articles 227 and 232 of *the Constitution* and Sections 3, 44(1)(f)(g), 45(3)(c), 135 and 176 of the *Public Procurement and Asset Disposal Act* (PPADA) as well as Sections 9 and 10 of the *Public Officer Ethics Act*, 2003 which, among others, obligates a public officer to carry out his duties in a way that maintains public confidence in the integrity of his office.
- (7) The applicant further complained that the respondent's act of advertising for procurement proceedings/tendering of similar services that had already been awarded amounts to constructive cancellation or termination, or attempt to constructively terminate or cancel the procurement proceedings in respect of tender numbers KPA/136/2021-22/CE-Framework Agreement for



Drainage & Water Reticulation, KPA/137/2021-22/CE-Framework Agreement for Road Works, KPA/138/2021-22/CE-Framework Agreement for Concrete Works and KPA/145/2021-22/CE-Framework Agreement for Specialized Painting for Roads and Yard Marking; and was therefore a contravention Section 63 of the PPADA, which only permits the respondent to cancel or terminate procurement proceedings before Notification for Award and not after award.

- (8) Aggrieved by the respondent's action of re-advertising the same tenders, the applicant filed the substantive judicial review proceedings herein, seeking inter alia, an order of Mandamus to compel the respondent to issue it with duly executed contracts. The suit was determined on 21st December 2023 and orders given as hereunder:
- (a) That an order in the nature of Mandamus be and is hereby issued compelling the respondent to terminate the procurement for the supply of services in respect of tender numbers KPA/177/2022-23/CE-Framework Agreement for Concrete Works, KPA/178/2022-23/CE-Framework Agreement for Road Works, KPA/179/2022-23/CE-Framework Agreement for Specialized Painting Roads & Yard Marking and KPA/181/2022-23/CE-Framework Agreement for Drainage and Water Reticulation.
 - (b) That an order in the nature of Prohibition be and is hereby issued prohibiting the respondent from sending out invitation to tender for bids or continuing with procurement proceedings in respect of tender numbers KPA/177/2022-23/CE-Framework Agreement for Concrete Works, KPA/178/2022-23/CE-Framework Agreement for Road Works, KPA/179/2022-23/CE-Framework Agreement for Specialized Painting Roads & Yard Marking and KPA/181/2022-23/CE-Framework Agreement for Drainage and Water Reticulation which the applicant had been awarded as tender numbers KPA/136/2021-22/CE-Framework Agreement for Drainage and Water Reticulation, KPA/137/2021-22/CE-Framework Agreement for Road Works, KPA/138/2021-22/CE-Framework Agreement for Concrete Works and KPA/145/2021-22/CE-Framework Agreement for Specialized Painting for Roads and Yard Marking.
 - (c) That an order in the nature of Mandamus be and is hereby issued compelling the respondent to re-advertise the subject tenders to enable all eligible bidders, including the applicant, to participate therein.
 - (d) That each party to bear own costs of these proceedings.
 - (e) The Judgment and Orders issued herein to likewise apply to Judicial Review Applications No. E020, E021 and E023 of 2023.
- (9) The applicant was dissatisfied with that outcome and has accordingly filed an appeal before the Court of Appeal, being Mombasa Civil Appeal No. E021 of 2024: Asphalt Works Investments Limited v Kenya Ports Authority. It concomitantly filed the instant application for stay of execution of the impugned judgment as well as an injunction pending appeal. The aforementioned grounds were explicated in the affidavit of Salmin Salim and the documents annexed thereto; which documents include a copy of the Memorandum of Appeal.
10. The application was resisted by the respondent vide a Replying Affidavit sworn on 7th March 2024 by its Manager, Litigation & Disputes, Michael Sangoro. In his assertion, the application does not meet the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules in that the applicant has not demonstrated a likelihood of suffering substantial and irreparable loss, considering that the applicants are at liberty to openly and competitively participate in the intended procurement process. He further deposed that the applicant has not furnished security for the due performance of the orders



that may ultimately be binding on it. He also pointed out that any stay or injunction would obstruct the respondent's operations and therefore injurious to the public interest, not only in Kenya but also in the regional block served by the Port of Mombasa.

- (11) In his Supplementary Affidavit sworn on 15th March 2024, the applicant averred that, contrary to the allegations at paragraphs 3 and 6 of Mr. Sangoro's Replying Affidavit, the provisions of Order 42 Rule 6 of the Civil Procedure Rules do not apply to these judicial review proceedings; and therefore the threshold set in Order 42 Rule 6 for granting stay do not apply herein. At paragraph 7 of the Supplementary Affidavit, the applicant averred that the respondent has earnestly commenced the tendering process by putting up Tender No. KPA/177/2023-24/CE dated vide a notice dated 11th March 2024. Hence, it asserted that the appeal will be rendered an academic exercise if stay is not granted.
- (12) Pursuant to the directions given herein on 26th February 2024, the application was canvassed by way of written submissions. Hence, the applicant relied on its written submissions dated 15th March 2024 in which it proposed one issue for determination, namely, whether the orders of stay and injunction pending appeal as sought by the applicant should be granted. The applicant reiterated its stance that Order 42 Rule 6 of the Civil Procedure Rules do not apply to judicial review proceedings. In support of this posturing, the applicant relied on *Evans Kaleka Sogomi v District Land Registrar & 6 Others* [2017] eKLR. He added that the Court has inherent jurisdiction to entertain and determine the instant application whose intention is to serve the ends of justice.
- (13) The respondent, on its part, insisted that the applicable procedural law in respect of applications for stay of execution pending appeal from the judgment of the High Court is provided for in Order 42 Rule 6(2) of the Civil Procedure Rules; and therefore the applicant was under obligation to prove substantial loss as well as provide security. The respondent relied on *Mukuma v Abuoga* [1988] KLR 645, *Congress Rental South Africa v Kenyatta International Convention Centre & Another* [2019] eKLR and *Mohamed & Another v Haidara* [1972] EA 166. The Court was also urged to take into account the public interest nature of the suit and decline any further cause for delay in procurement.
- (14) The background facts are not in dispute and have been set out in detail herein above. One of the orders issued by the Court in its judgment dated 21st December 2023 was an order in the nature of *Mandamus* compelling the respondent to re-advertise the subject tenders to enable all eligible bidders, including the applicant, to participate therein. This is the order that the applicant wishes to challenge on appeal. The applicant also demonstrated that an appeal has already been filed, being *Mombasa Civil Appeal No. E021 of 2024: Asphalt Works Investments Limited v Kenya Ports Authority*.
- (15) Accordingly, the single issue for determination is whether the applicant has shown sufficient cause for the grant of the orders prayed for in the Notice of Motion dated 15th February 2024.
- (16) Needless to say that judicial review proceedings are *sui generis*; and therefore not well suited for consideration under Order 42 Rule 6 of the Civil Procedure Rules. In *Republic v Kahindi Nyafula, ex parte Kilifi South East Farmers' Cooperative*, High Court, Malindi, Jud. Rev. 3 of 2013 (2014) eKLR, the point was underscore thus:

“Judicial Review proceedings under Order 53 of the Civil Procedure Rules are a special procedure. A party, other than invoking the provisions of Order 53 cannot invoke the provisions of the *civil Procedure Act* and the Rules made thereunder.”



- (17) Similarly, in *Wellamondi v The Chairman, Electoral Commission of Kenya*, (2002)1 KLR 286, Ringera J. (as he then was) held:

“I agree that Judicial Review Proceedings under Order 53 of the Civil Procedure Rules are a special procedure. The provisions of the order are invoked whenever orders of certiorari, mandamus, or prohibition are sought. That may be so in either civil or criminal proceedings. So in the exercise of its power under the order, the court is exercising neither a civil nor a criminal jurisdiction in the strict sense of the word. It is exercising a jurisdiction *sui generis*. It follows therefore that it is incompetent to invoke the provisions of section 3A and order 1 rule 8 of the Civil Procedure rules. It is equally incompetent to invoke section 42 79 and 80 of *the constitution* of Kenya...”

- (18) It is equally inapt, in my considered view, that the application was premised under Rule 5(2) of the Court of Appeal Rules, 2022. Nevertheless, the Court is not powerless, for it has residual powers under its inherent jurisdiction to make such orders as may be necessary to meet the ends of justice. In Halsbury’s Laws of England, 4th Edn. Vol. 37 Para. 14 the authors state:

“The jurisdiction of the court which is comprised within the term “inherent” is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law; it is exercisable by summary process, without plenary trial; it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process ... In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.”

- (19) Likewise, in *Kenya Bus Services Ltd & Others v Attorney General and Others* [2005] 1 EA 111; [2005] 1 KLR 743 it was held:

“Whereas ordinary jurisdiction stems from the Act of Parliament or statutes, the inherent powers stem from the character or the nature of the court itself – it is regarded as sufficiently empowered to do justice in all situations. The jurisdiction to exercise these powers was derived, not from statute or rule of law, but from the very nature of the court as a superior court of law, and for this reason such jurisdiction has been called “inherent”. For the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent the process being obstructed and abused. Such a power is intrinsic in a superior court, its very lifeblood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction, which is inherent in a superior court of law, is that which enables it to fulfil itself as a court of law. The judicial basis of this jurisdiction is therefore the authority of the



Judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner.”

20. And, in *Evans Kaleka Sogomi v District Land Registrar & 6 Others* [2017] eKLR, it was held:

“I do find that this court has inherent powers not created by any law to do justice...This is not a case to be determined on substantial loss or payment of security as the provisions of the Civil Procedure Rules 2010 do not apply. I do find that this is a case for grant of stay of execution pending appeal under the court’s inherent power to do justice and therefore the court grants a further stay of execution of 90 days pending the filing and serving of a record of appeal.”

(21) However, to invoke the discretion of the Court, it was incumbent upon the applicant to show justifiable cause for the orders sought. In the persuasive decision of *Nken v Holder, Attorney General*, 556 U.S. (2009) the Court stated:

“A stay is not a matter of right, even if irreparable injury might otherwise result. It is instead an exercise of judicial discretion, and the propriety of its issue is dependent upon the circumstances of the particular case....

The fact that issuance of a stay is left to the court’s discretion does not mean that no legal standard governs that discretion..... A motion to a court’s discretion is a motion, not to its inclination, but to its judgment; and its judgement is to be guided by sound legal principles....those legal principles have been distilled into consideration of four factors: (1) whether the stay applicant has made a strong showing that he is likely to succeed on merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether the issuance of stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.”

(22) The grounds upon which the instant application is premised are set out at paragraphs 16 to 20 of the application. The same grounds were reiterated at paragraphs 19 to 23 of the applicant’s Supporting Affidavit. In essence, the applicant has impugned the judgment of the Court and went on to state how the Court committed improprieties. Its basic complexion is that the appeal has overwhelming chances of success. That being the case, the petitioner ought to have approached the Court of Appeal, noting that that Court would be best placed to gauge the merits of the appeal.

(23) I therefore entirely endorse the position taken by Hon. Korir, J. (as he then was) in *Republic v Kenya Vision 2030 Delivery Board & 2 others Ex-parte Judah Abekah* [2015] eKLR that:

“In a situation where the application for stay is made before the Court whose decision is the subject of the intended appeal, the question as to whether the applicant has an arguable appeal is a dicey one. The Court is put in an awkward situation when it is invited to make a finding as to the chances of success of an appeal against its judgement. In my view, the best Court to make a decision on the question of the arguability of an appeal is the Court that will hear the appeal.”

(24) The same viewpoint was expressed by Hon. Odunga, J. (as he then was) in *Republic v Attorney General & 4 others ex-parte Diamond Hashim Lalji* [2014] eKLR (at paragraph 42) thus:

“It was however argued that since the applicants have not shown that their appeal is arguable this Court ought not to grant the orders sought. On this issue I agree with the applicants’



view that under Order 42 rule 6 aforesaid it is not a condition for grant of stay that the applicant satisfies the Court that its appeal or intended appeal has chances of success. In my view the omission to include such a condition is for good cause. It is in my view meant to insulate the Court from which an appeal is preferred from the embarrassment of holding a mini-appeal as it were. Accordingly whereas the Court of Appeal is in a better position to gauge the chances of success of an appeal or intended appeal, this Court in an application seeking stay of execution of its decision pending an appeal to the Court of Appeal is not enjoined to consider such condition. In fact it would be highly undesirable to do so.”

(25) In the result, the Notice of Motion dated 15th February 2024 fails and is hereby dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 30TH DAY OF APRIL 2024.

OLGA SEWE

JUDGE

