



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**JUDICIAL REVIEW APPLICATION NUMBER 178 OF 2021**

REPUBLIC..... APPLICANT

VERSUS

PONANGIPALLI VENKATA RAMANA RAO.....1<sup>ST</sup> RESPONDENT

SARRAI GROUP.....2<sup>ND</sup> RESPONDENT

TUMAZ & TUMAZ ENTERPRISES LIMITED.....EX PARTE

**JUDGMENT**

1. The Applicant was granted leave to apply for the prerogative writs of certiorari, prohibition and mandamus following an ex parte chamber summons dated 29th December 2021. Contemporaneously with the grant of leave an order was issued to the effect that the leave was to operate as a stay of the impugned decision. The orders elicited an avalanche of Preliminary Objections (P.O) and counter applications being the 1<sup>st</sup> Respondent's application dated 7<sup>th</sup> January 2022 and their P.O of even date, the 2<sup>nd</sup> Respondent's application dated 31<sup>st</sup> December 2021 and their P.O dated 12<sup>th</sup> January 2022 and a contempt application by the Applicant dated 5<sup>th</sup> January 22. Upon evaluation of the developments in the matter, the court was of the view that the wider interests of justice would be met by prioritizing the matter and hearing the main application which action would subsume and resolve the other applications and P.Os. The applications or the P.Os would be treated as support or opposition to the main application as the case maybe.

2. By a Notice of Motion application dated 29<sup>th</sup> December, 2021 the Applicant seeks the following orders:

(i) **CERTIORARI** in the High Court to remove in this Honourable Court and quash the decision of the 1<sup>st</sup> Respondent herein made on 22<sup>nd</sup> December, 2021 in respect to the leasing and operation of the assets of Mumias Sugar Company Limited (in Receivership), to the extent that the said decision declared the 2<sup>nd</sup> Respondent the winner of the bidding process for the leasing of the assets of the Company.

(ii) **PROHIBITION** prohibiting and/or restraining the 1<sup>st</sup> Respondent either by himself, his servants, agents, principal, employees or otherwise howsoever from implementing his decision made on 22<sup>nd</sup> December, 2021 and/or from issuing a Lease Agreement to the 2<sup>nd</sup> Respondent and/or from executing a Lease Agreement with the 2<sup>nd</sup> Respondent.

(iii) **MANDAMUS** compelling the 1<sup>st</sup> Respondent to undertake fresh bidding process in respect to the leasing and operation of the assets of Mumias Sugar Company Limited (in Receivership).

(iv) *Any other and/or further Order that is just and equitable.*

(v) *The costs of this application to abide the final outcome of the substantive motion.*

3. The application is supported by a statutory statement dated 29<sup>th</sup> December 2021 and verified by the affidavit of even date and sworn by Julius Mwale, (hereinafter Mwale) a Director in the Applicant Company on behalf of other directors.

4. In the affidavit, Mwale averred that the Applicant is a limited liability company under the Companies Act and carrying on business in Kenya. It was deposed that it was one of the 8 bidders of Mumias Sugar Company Limited, (hereafter, MSCL) and that it placed the highest bid of 27.6 Billion Kenya Shillings.

5. He deposes that MSCL was placed under receivership and in a bid to revive it the Respondent decided to lease out the company's assets. An invitation for submission of bids in respect to the said assets was done and during this period parties were directed to submit their physical bids together with a Banker's Cheque for Kshs. 25,000(USD 250) on or before 31<sup>st</sup> August, 2021. It is said that the Ex parte Applicant herein submitted a complete outline of the mandatory requirements which included the technical bid, financial bid and the bid security.

6. Mwale further avers that on 30<sup>th</sup> August,2021 Justice Okwany in **High Court Civil Suit Number E697 OF 2021; Gakwamba Farmers Cooperative Society Limited v. Ponangipalli Venkata Raman Rao** directed that the bids be opened by the 1<sup>st</sup> Respondent in a transparent manner in the presence of bidders who may wish to be present at the event at a date and time to be communicated to all bidders. Further, that the financial information contained in the bids be shared with the bidders and be made available to the public and an invite extended to the State Committee on Agriculture, Livestock, Fisheries to attend the bid opening.

7. In his statement, the Director indicated that on 10<sup>th</sup> September,2021 the 1<sup>st</sup> Respondent convened a meeting at Trademark Hotel for purposes of announcing the bid values for Leasing of the assets of MSCL. A subsequent meeting to announce the MSCL asset leasing particulars was convened at Movenpick hotel on 6<sup>th</sup> October,2021 after being rescheduled from the day before.

8. It was contended that the bid opening was not transparent as the bids were opened in secrecy without the confirmation of those who were present. He argued that it was only the financial aspects of the bid that were disclosed to all who were present. In addition, those present were directed to sign against the financial pages only and thus there was no way to tell that the bidders submitted the required documents or not. Mr. Mwale averred that the Respondent's decision is illegal, procedurally unfair and violated the Applicant's legitimate expectation and principles of natural justice. Further that it is not possible to ascertain whether or not the documents submitted were responsive or not.

9. It is urged that the 1<sup>st</sup> Respondent's report was tainted with fraud, mistakes and misrepresentation as the same does not disclose what actually transpired on the material day. It also indicated that the meeting convened on 6<sup>th</sup> October, 2021 was for purposes of bid opening yet the same had already been done on 10<sup>th</sup> September, 2021. The deponent contended that the said meeting was convened for purposes of announcing the particulars of the Bid, which the Respondent failed to do.

10. Mwale averred that in light of a Ruling by Mabeya J directing that the 1<sup>st</sup> Respondent was at liberty to proceed with the process of leasing subject to the strict observance of the Competition Act, the Ex parte Applicant wrote a letter dated 23<sup>rd</sup> November,2021 to the 1<sup>st</sup> Respondent enquiring on the way forward in respect of evaluation of the bids.

11. He adds that in response to the letter dated 23<sup>rd</sup> November 2021, the 1<sup>st</sup> Respondent in an email dated 1<sup>st</sup> December,2021 communicated to the Ex parte Applicant that he was in the process of evaluating the bids and that he would communicate in due course. It is alleged that the Ex parte Applicant never heard from the 1<sup>st</sup> Respondent within the 21 days as is stipulated under the law or at all until on or about 22<sup>nd</sup> December,2021 when it is averred that the Ex parte Applicant learnt that the tender had illegally been awarded to the 2<sup>nd</sup> Respondent in unclear circumstances.

12. The Ex parte Applicant is said to have subsequently written to the 1<sup>st</sup> Respondent seeking confirmation of the position but the Respondent declined to disclose the outcome of its bid in violation of the Ex parte Applicant's right to information as stipulated under Article 35(1) of the Constitution, 2010. It is only until 24<sup>th</sup> December, 2021 that the 1<sup>st</sup> Respondent informed the Ex parte Applicant that the leasing of the assets had been finalized in favour of the 2<sup>nd</sup> Respondent. No reasons for the decision were given to

the Ex parte Applicant.

13. Further, Mwale maintains that to date no reasons and/or explanation has been advanced by the 1<sup>st</sup> Respondent informing the Ex parte Applicant that it was unsuccessful or its bid was incomplete or non-responsive. In conclusion, it was averred that the 1<sup>st</sup> Respondent's conduct is tainted with opaqueness, lack of transparency and therefore the proceedings for annulment and commencement of a fresh bidding process before this court are justified.

## **RESPONSES**

14. The 1<sup>st</sup> Respondent in response to the said motion filed a Replying Affidavit dated 5<sup>th</sup> January, 2022 sworn by Ponangipalli Venkata Ramana Rao (hereafter Rao) and a Preliminary Objection dated 7<sup>th</sup> January, 2022.

15. The preliminary objection is premised on grounds that the application before court is incompetent for being brought against the 1<sup>st</sup> respondent who is an agent of a disclosed principal. The application is said to offend section 560(1)(d) of the Insolvency Act in that no consent of the Administrator of the company nor the approval of the Insolvency Court was obtained prior to the filing of the suit. It is urged that these proceedings are parallel to the ones in the Insolvency Court in Insolvency Petition No. E004 of 2019 and that since the leasing of the assets of the company is a commercial transaction, within the receivership and administration of the company by the 1<sup>st</sup> Respondent, any disputes arising therefrom are commercial in nature and ought to be dealt with by the Insolvency Court. The ex parte applicant is accused of running foul of the doctrine of exhaustion. For the reasons above, it is urged that this court has no jurisdiction to entertain the application.

16. In his Replying affidavit Rao avers that by a ruling delivered on 19<sup>th</sup> November, 2021 in **Nairobi Insolvency Petition No. E004 of 2019 Kimeto Associates Advocates v PVR Rao & KCB Bank**, the Court appointed the deponent herein, as the administrator of the Company having issued an administration order against it. Further, that the application herein is incompetent as the same is brought against an agent and not the company itself. It was also contended that the bids were all addressed to the Company and during the whole process the Ex parte Applicant was aware it was dealing with company.

17. It is urged that the Application is incompetent as the Ex parte Applicant failed to seek the consent of the 1<sup>st</sup> Respondent herein as an administrator or the approval of the Insolvency court before commencing the proceedings before this court. In addition, it was also argued that the Ex parte Applicant has filed parallel proceedings on the same subject matter and between the same parties before the High Court and before the Public Procurement Administrative Review Board yet it has failed to disclose this fact before either of the two forums.

18. It is contended that the filing of the two parallel proceedings was likely to obstruct or humiliate the administration of justice, particularly if the two fora reach incompatible or contradictory conclusions. Also that the Company's affairs were being overseen by the High Court (Mabeya J) under the provisions of the Insolvency Act. It was also deposed that that the Insolvency court had previously in its judgement of 19<sup>th</sup> November, 2021, allowed the Respondent to complete the leasing process.

19. It was deposed that although it was true that the High Court (Okwany J) had issued orders regarding the opening of bids on 30<sup>th</sup> August, 2021 in **HCCC No. E697 of 2021; Gakwamba Farmers Cooperative Society Limited v Ponangipalli Venkata Ramana Rao & Others**, the Ex parte Applicant's Statutory Statement does not provide a full picture of the court's orders and the entire process of opening and announcing the bids.

20. It was averred that after Okwany J's order of 30<sup>th</sup> August, 2021, the deponent convened a meeting with the bidders on 10<sup>th</sup> September, 2021 at Trademark Hotel and opened the bids in the presence of six out of eight bidders, including the Ex parte Applicant. The deponent averred that the details of the bids were not announced in the said meeting as the court orders at the time restricted him from evaluating or taking action on the bids. Rao states further that he asked the bidders to sign the pages containing the financial proposals of each bid in order to secure the integrity of the bids and enhance the confidence of the bidders in the process.

21. Mr. Rao averred that on 27<sup>th</sup> September, 2021, he was summoned by the Senate and directed to hold the bid announcement exercise on 30<sup>th</sup> September, 2021 and to also involve the Senate. He avers that he invited all bidders to a bid announcement exercise on 30<sup>th</sup> September, 2021 but some of the bidders felt that the notice was short and expressed concerns. Rao adds that by orders of

Court issued on 23<sup>rd</sup> September,2021 and 30<sup>th</sup> September,2021, he was granted authority to conduct the bid announcement without any interference from the Senate and on a date to be fixed by himself. The bid announcement date was therefore rescheduled to 5<sup>th</sup> October, 2021 on which date the deponent averred to have received a letter from the National Treasury requesting that the bid announcement be postponed to 6<sup>th</sup> October, 2021 so that a representative could be present. The Kenyan Government, through the National Treasury, holds 20% of the Company's shares.

22. It was deposed that in order to accommodate the National Treasury which is not only a shareholder in the Company but also represents the Government of Kenya and ultimately the people of Kenya, Rao made a decision to postpone the bid announcement exercise to 6<sup>th</sup> October, 2021. It was the 1<sup>st</sup> Respondent's case that all bidders present during the meeting and those who were not present were informed of the postponement of bid announcement and on the said date seven of the eight bidders, including the ex parte Applicant, were represented at the event. There was also attendance by a representative of the Senate. The deponent deposed that the bid announcement on 6<sup>th</sup> October 2021 was conducted in a transparent manner in accordance with the court orders and that there was a declaration of the names of the bidders and the nature of their bids. He swore to have announced the financial proposal given by each bidder and showed the bidders the financial page of each bid during which the bidders were asked to confirm their signatures.

23. The deponent contended that the Ex parte Applicant was aware of the court orders that informed his actions in the bid opening and announcement process. Further that, the failure by the Ex parte Applicant to make reference to the court orders, especially the Court order of 23<sup>rd</sup> September,2021 directing that opening of bids should include a transparent declaration or disclosure of the names of the bidders and the nature of their bid and also that the court only stopped the evaluation of the bids pending the outcome of the application, amounts to non-disclosure of material facts.

24. It was deposed that the leasing process was done in accordance with the orders of Okwany J and Mabeya J. Further, that in a ruling delivered on 3<sup>rd</sup> November,2021 in the Okiya Omtatah case, Okwany J declined to grant interim orders stopping the leasing process and directed that instead the status quo in respect to the bids for the lease be maintained pending the decision in the Insolvency Petition. It was the 1<sup>st</sup> Respondent's case that the Ex parte Applicant has not demonstrated any breach of the said directions.

25. Following the deponent's evaluation of the bids, Sarrai Group (the 2<sup>nd</sup> Respondent herein) emerged as the victorious bidder and the decision was communicated to each bidder. Mr. Rao deposes that he issued a press statement on 22<sup>nd</sup> December,2021 informing the public of the decision. It was contended that the Ex parte Applicant's offer did not meet the request for bids' criteria as the bids were not presented in the prescribed form, sealed, and accompanied by a Kshs. 500 million Bid Bond, which was a mandatory term of the tender.

26. The 1<sup>st</sup> Respondent averred that the financial proposal is not the only determinant of a successful bidder. If the financial proposal was all that mattered, there would be no reason to evaluate the bids and the successful bidder would have been known on 10<sup>th</sup> September, 2021 or 6<sup>th</sup> October,2021 when the bids were opened. The Ex parte Applicant has not provided the particulars of the alleged lack of transparency nor has it shown this court how the bidding process was tainted with fraud, mistakes and illegalities.

27. It is urged that the evaluation of the bids and the entire leasing process was done in accordance with the Competition Act as directed by Mabeya J, the terms of the tender and the security documents upon which the 1<sup>st</sup> Respondent was appointed and which allow him to, *inter alia*, lease the assets of the company. It is contended that having evaluated the bids, the 1<sup>st</sup> Respondent in exercise of his powers and duties as the Receiver selected the 2<sup>nd</sup> Respondent as the successful bidder and awarded the lease to them in the interests of the stakeholders. It is urged that the Ex parte Applicant's bid did not comply with the condition of the bids requiring that the bids be submitted in the prescribed form, sealed and physically delivered. The Ex Applicant's bid is faulted for failing to provide a bid bond of KSH 500 million, a mandatory term of the tender.

28. Rao deposes that the alleged trade squabbles between Kenya and Uganda are unsubstantiated and irrelevant and are an attempt to sensationalize the matter and the same is disrespectful to the court if the same was done in the belief that it would sway the court's opinion against the 2<sup>nd</sup> Respondent merely because the 2<sup>nd</sup> Respondent is a Ugandan entity.

29. On the alleged infringement of constitutional rights, it is urged that Article 35 of the Constitution only applied to citizens, which the Ex parte Applicant is not. It was also argued that for a violation of the right of access to information to be proven, the citizen who alleges violation of the right must demonstrate that a request for information that complies with the requirements of the

Constitution and the Access to Information Act was made but such information was not provided. In addition, the Ex parte Applicant, in addition to not being a citizen, has not demonstrated that any such request for information was made but not provided.

30. The 1<sup>st</sup> Respondent argued that **Article 50** of the Constitution, strictly refers to the treatment of parties in dispute resolution processes which is not the case between the Ex parte Applicant (as a bidder) and him (the receiver) as the evaluator of the bids. He also contended to have complied with the provisions of **Section 4 (6)** of the **Fair Administrative Actions Act**.

31. Rao adds that he entered into a lease with the 2<sup>nd</sup> Respondent on 21<sup>st</sup> December, 2021 and handed over the site to the 2<sup>nd</sup> Respondent. It was argued that by the time the Application before this court was made, the lease had already been concluded and the site handed over.

32. It is contended that the Ex parte Applicant's failure to ascertain the facts on the ground before making the application before this court or the deliberate failure to disclose material information was intended to lead the court into stopping the leasing to the 2<sup>nd</sup> Respondent which order would be unenforceable as it has already taken place.

33. Further that the leasing of the Company's assets is the exercise of enforcement and recovery measures by a secured creditor under agreements between the creditor and the Company. The secured creditor is exercising a contractual right contained in loan agreements and debentures created by the Company over its assets as security for the loans.

34. The 2<sup>nd</sup> Respondent's response is contained in the Replying Affidavit of Rakesh Kumar Bvats (hereinafter, Bvats). He deposes that the decision to award the lease to the 2<sup>nd</sup> Respondent does not amount to a quasi-judicial decision that can be the subject of judicial review and also that the said process was not marred with illegalities and procedural unfairness as alleged.

35. Bvats contended that the application herein seeks to challenge the merits of the decision by the 1<sup>st</sup> Respondent and not the process followed in reaching the decision and as such the same does not fall within the purview of judicial review. It was also the deponent's case that bidding is not limited only to financial evaluation but also to preliminary and technical evaluation.

36. It is the 2<sup>nd</sup> Respondent's case that the Ex parte Applicant has failed to demonstrate the alleged procedural unfairness and that the reliefs sought are mala fides, vexatious, full of falsehoods and ought not to be granted. He further averred that the Ex parte Applicant is fully aware of **Milimani High Court Commercial Suit No. E004 OF 2022** where the 2<sup>nd</sup> Respondent herein has been stopped from operating Mumias Sugar Company Limited.

37. Further, it is urged that the Ex parte Applicant has failed to inform this court that its bid was declared non-responsive for failure to meet mandatory preliminary requirements. It was contended that the Ex parte Applicant can therefore not have a legitimate expectation where it has acted in breach of the terms and conditions of the bidding process. In conclusion it was urged that if the orders sought are granted, the 2<sup>nd</sup> Respondent will suffer great prejudice.

38. In a supplementary affidavit sworn by Mwale, the Ex Parte Applicant impugns the subject bidding and evaluation process for being marred with secrecy and lack of public participation. It is urged that the bid opening exercise was postponed repeatedly without reasons and even after the opening the reading was postponed without just cause. Mwale adds that the process was conducted in breach of court orders issued by Okwany J and contrary to the stipulations by Mabeya J.

39. Mwale further states that the 1<sup>st</sup> Respondent deliberately failed to promptly furnish the Ex parte Applicant with essential information and documentation in order to enable it take an informed view of its fairness and legality of the bid process. Further that the failure to provide reasons for the decision raises questions as to transparency and clarity of the bidding process. It was urged that failure to give reasons is contrary to Section 4 of the FAAA,2015.

40. It was further contended that the Ex parte Applicant's rights under **Article 50** can only be realized if the information held by the 1<sup>st</sup> Respondent and Senate is availed. It was deposed that the Bid Document annexed in the 1<sup>st</sup> Respondent's replying affidavit clearly shows that the salient features in respect to the leasing of assets and the leasing of each facility was to be finalized after obtaining the required consent and regulatory approvals before the lease is operationalized.

41. Mwale averred that the handover was illegal as the award of the Lease clearly goes against the main objective which was to ensure quick revival of the Company's operations. The 2<sup>nd</sup> Respondent's bid was faulted as incredibly low and it goes against the directions of Mabeya, J in respect to the Competition Act. Further that the monthly lease rent was not disclosed contrary to the stipulations in the bid document, it is urged that the Lease ought to have clearly outlined the socio-economic obligations of the Lessee in undertaking the quick revival.

42. Further, it was also deposed that the Respondent failed to obtain consents from the Competition Authority of Kenya, the Insolvency Court and Capital Market Authority. It was contended that the 1<sup>st</sup> Respondent failed to direct himself properly in law and the decision was therefore unjust and thus the contract entered between the Respondents cannot be said to be valid and enforceable or devoid of any illegalities.

43. It was further averred that it is not the first time that the 1<sup>st</sup> Respondent has attempted to lease the company's assets and that in May, 2021 he attempted to do so without public participation and accountability and that it is only after public outcry that the exercise was abandoned.

44. He averred that the Request for Review was lodged before the proceedings herein were filed and as such the Ex parte Applicant is not guilty of material non-disclosure. The Company according to the deponent was declared a public Company and the said issue is before an appellate court.

45. He contended that there are no parallel proceedings in respect of the same cause as the Public Procurement Board determined that it did not have jurisdiction to hear the Request for Review. Further the effect of Mabeya J's ruling of 19<sup>th</sup> November, 2021 was that the Ex parte Applicant's appeal was grounded and therefore it cannot be faulted for pursuing a Request for Review before the Board. In conclusion, it was averred that the two equal status courts have case-wide jurisdiction to hear and determine any additional issues raised primarily in their areas of specialization even if those issues normally fall outside their jurisdiction.

## **SUBMISSIONS**

46. The Application was canvassed by way of written submissions with brief oral highlighting. The Ex parte Applicant filed written submissions dated 3<sup>rd</sup> February, 2022, the 1<sup>st</sup> Respondent also filed submissions dated 31<sup>st</sup> January, 2022 while the 2<sup>nd</sup> Respondent filed two sets of written submissions dated 12<sup>th</sup> January, 2022 and Supplementary submissions dated 4<sup>th</sup> February, 2022.

47. The Ex parte Applicant in its submissions contended that the proceedings herein have not been taken out against the Company under administration neither are the proceedings against the execution and distress of the Insolvent Company's property. It was submitted that the proceedings fall under the general rule as the wrongdoer is himself in control of the Company. The 1<sup>st</sup> Respondent, it was contended was acting outside the scope of his authority. To buttress this argument, learned counsel cited the case of **Ajay Shah v Deposit Protection Fund Board as Liquidator of Trust Bank Limited (In Liquidation) [2016] eKLR**.

48. It was submitted that following the irregularities, deceit and fraud, perpetuated by the Administrator of the Company, he stands on the same footing as the Company itself. The cases of **Jones & Another v. Lipman & Another [1962] 1 W.L.R 833** and **National Social Security Fund Board of Trustee v Ankhan Holding Limited & 2 Others [2006] eKLR** were cited to support this argument.

49. Learned counsel argued that the Ex parte Applicant could not bring a challenge to the bidding process in the insolvency proceedings court because it is not a party to the proceedings and the proceedings herein primarily seek to enforce fundamental rights and freedoms over which this court has jurisdiction as stipulated under **Article 23** of the Constitution of Kenya, 2010. The case of **Masai Mara (SOPA) Limited v. Narok County Government [2016] eKLR** was cited in support of this argument. Counsel also cited **Article 258** of the Constitution on enforcement of the Constitution.

50. It was urged that the Fair Administrative Actions Act, 2015 which gives effect to **Article 47** of the Constitution applies to any person exercising administrative authority, performing a judicial or quasi-judicial function or whose action, omission or decision affects the legal rights or interests of any person to whom such a decision relates. The case of **Republic v. Kenya Roads ex parte John Harun Mwau** was cited on the power of the judicial review court to scrutinize laws and executive acts.

51. The Ex parte Applicant argued that the 1<sup>st</sup> Respondent's failure to furnish it with the information it had requested infringed on its Constitutional right as envisaged under **Article 35** of the Constitution. To support this argument, the cases of **Katiba Institute v Presidents Delivery Unit & 3 Others [2017] eKLR** and **Nairobi Law Monthly Company Limited v. Kenya Electrical Generating Company & 2 Others [2013] eKLR** were cited.

52. Learned counsel argued that to date the Lease Agreement remains concealed, the 2<sup>nd</sup> Respondent's bid document has not been disclosed neither has the bid evaluation report been produced. It was contended that what is produced before court by the 1<sup>st</sup> Respondent is the first page and signature page only. The need for substantial and tangible evidence was emphasized by counsel and to buttress this argument the case of **Re Nakumatt Holdings Limited [2017] eKLR** was cited.

53. It is submitted that the 1<sup>st</sup> Respondent's decision was made without granting members of the public an opportunity to contribute to the said decision. This was in contravention to **Article 10** of the Constitution. To support this argument counsel cited the cases of **Okiya Omtata Okoiti vs. Commissioner General, KRA & Others** and **Poverty Alleviation Network & Others v. President of the Republic of South Africa & 19 Others**.

54. It was the Ex parte Applicant's case that by using different modes to communicate the outcome of the bid the 1<sup>st</sup> Respondent is guilty of procedural impropriety as well as acting unfairly. Reliance was placed on the case of **Roche Diagnostics Ltd vs. Mid Yorkshire Hospitals NHS [2013] EWHC 933 TCC ALL ER 133 April [2013] PTSR D.35** which was cited in **Republic v. Public Private Partnership Petition Committee (The Petition Committee) & 3 Others Ex parte APM Terminals [2015] eKLR** where the court laid down applicable principles to requests for early specific disclosures in procurement proceedings.

55. Learned counsel submitted that there was no bid more competitive than that of the Ex parte Applicant herein as Kruman – Finance offered Kshs.19 billion while Sarrai Group (2<sup>nd</sup> Respondent herein) offered 5.84 billion. Mumias Sugar Company Limited therefore lost over 20 billion through the bidding process and this is a clear indication that the 1<sup>st</sup> Respondent acted irrationally and reached an unreasonable decision.

56. It is urged that the 1<sup>st</sup> Respondent's failure to abide by the laid down procedure infringed upon the Ex parte Applicant's right to a fair administrative action and to support this argument counsel cited the cases of **Judicial Service Commission v Mbalu Mutava & Another [2014] eKLR** and **Al-Mehidswi v. Secretary of State for the Housing Department [1990] AC 876**.

57. On legitimate expectation, it was submitted that the Ex parte Applicant was under the impression that the 1<sup>st</sup> Respondent would give due consideration to the highest bidder and as such the Company would be able to clear the Company's debt with KCB group and earn it an excess balance of Kshs. 24 billion after settling the defaulted loan. It was contended that the decision does not comply with the provisions of the Public Finance Management Act which requires that public participation is mandatory. Learned counsel supported this argument with the case of **Republic v. Public Procurement Administrative Review Board & Another Ex parte SGS Kenya Limited [2017] eKLR**.

58. In addition, it was also submitted that the Ex parte Applicant had legitimate expectation that an adequate notice of bid opening and bid declarations would be given. Further, that the bidders would be heard and make presentations on information, material and evidence to be relied on by the 1<sup>st</sup> Respondent. Counsel cited **De Smith, Woolf and Jowell** in **Judicial Review of Administrative Action 5<sup>th</sup> Edition** on when legitimate expectation arises.

59. The Ex parte Applicant submitted that it was its legitimate expectation that the Company's assets would not be handed over immediately or in contravention of the laid down procedures of evaluation and approval by the Capital Markets Authority. Also it was contended that the Capital Market Authority, the Competition Authority and Insolvency Court were not involved in the leasing determination.

60. Counsel contends that the 1<sup>st</sup> Respondent's decision defies logic and moral standards as he failed to take into account relevant matters. To support this argument counsel cited the cases of **Municipal Council of Mombasa v Republic & Another [2002] eKLR** and **Narok County Government & Another v Richard Bwogo Birir & Another [2015] eKLR**. The 1<sup>st</sup> Respondent in handing over immediately acted illegally, irrationally and unreasonably as Victoria Commercial Bank (PLC), Ecobank Kenya Limited and Société De Promotion et De Participation Pour La Cooperative Economique Sa (Proparco) appointed Harven Gadhoke as the Receiver of the Co-Gen Plant and the Ethanol Plant a few days prior to the award the Lease of the 2<sup>nd</sup> Respondent.

61. It was submitted that it was the duty of the 1<sup>st</sup> Respondent to inform bidders on this development and its effect on the bidding process as the 1<sup>st</sup> Respondent had offered the entire company for lease and not just some of its assets. It was argued that the Sugar Factory and Co-gen plant cannot be leased separately as it is the plant that powers the factory and as such the 1<sup>st</sup> Respondent's decision is unreasonable.
62. On non-disclosure it was submitted there was no relevance in the Ex parte Applicant disclosing that it had filed a suit in Kakamega High Court as the same had been withdrawn. Further, that the Respondent has failed to demonstrate that the Orders of the Court were granted upon an affidavit which is not candid or that the Ex parte Applicant has misled this Court.
63. Learned counsel submitted that the matter before court ought not to be determined solely on the basis of the alleged non-disclosure considering the grave issues in the process under scrutiny. Further, it was submitted that the Respondents have not shown this court that the omissions are crucial to the determination of the dispute before this court. In conclusion, learned counsel submitted that an Order of Mandamus ought to issue compelling the 1<sup>st</sup> Respondent to carry out fresh bidding.
64. In his submissions the 1<sup>st</sup> Respondent began by contending that a court cannot continue without jurisdiction and to buttress this argument counsel cited the case of **Owners of the Motor Vessel 'Lillian S v Caltex Oil(Kenya) [1989] KLR 1**.
65. It was further submitted that an application for leave to institute judicial review proceedings must be distinguished from an application for leave as envisaged under **Section 560 (1)(d) of the Insolvency Act**. It was urged that the application herein ought to be made before the Insolvency Court as it is best placed to consider the factors under **Section 560A** before either granting or denying leave. Learned counsel submitted that the purpose for the requirement for leave is to safeguard the interests of various parties, including the company, its creditors and the party seeking leave.
66. Counsel submitted that leave under the said section may only be granted by the court after hearing and determination of the administrator which was not the case in the instant suit. The case of **Benson Gicheru Muchomba v Tahir Sheikh Said Grain Millers Ltd [2019] eKLR** was cited in support of this position.
67. It is the Ex parte Applicant's case that the proceedings herein having been commenced without consent of the administrator or leave of court are incompetent. The proceedings are further impugned for having been brought against an agent of a disclosed principal, and it offends the principle of res judicata and sub judice as the issues that the Ex parte Applicant seeks to raise in these proceedings have either been determined or are pending in other proceedings, including the Insolvency Petition, Gakwamba Farmers and Okiya Omtatah cases. Further, that they offend the principle of avoidance of constitutional issues (the principle of exhaustion of other remedies). In support of the submission that the 1<sup>st</sup> Respondent is only an agent of the Company counsel cited the cases of **City Council of Nairobi v Wilfred Kamau Githua t/a Githua Associates & Another [2016] eKLR; Lochab Brothers v Kenya Furfural Co Ltd [1983] eKLR; and Manuel Anidos v Kinangop Windpark Limited (In Receivership) & 2 others [2019] eKLR**.
68. On the principle of avoidance of constitutional issues learned counsel submitted that a party must first exhaust the possibilities of ordinary legal relief, including the indirect application of the Bill of Rights. Counsel supported this argument with case of **Bernard Murage v Fineserve Africa Limited & 3 others [2015] eKLR**. It was argued that the Ex parte Applicant is only trying to avoid approaching the correct forum which is the Insolvency court.
69. It was submitted that if the facts concealed or misrepresented had been brought before the court it would not have granted leave to commence the judicial review proceedings as an order obtained in the said manner ought to be discharged or set aside. The cases of **Republic v Kenya National Federation of Co-operatives Limited ex Parte Communications Commission of Kenya [2005] 1 KLR 242, Bahadurali Ebrahim Shamji v Al Noor Jamal & 2 Others Civil Appeal No. 210 of 1997 and Abraham Mutai & 5 others v Paul M. Mutwii & 34 others [2015] eKLR** were cited to that effect.
70. It was submitted that it is a basic principle of constitutional law that where a petition does not disclose any cause of action, that is, an infringement of a right or of the constitution, it ought to be struck out. To support this argument learned counsel cited the case of **Sanitam Services (EA) Limited v Tamia Limited & 16 others [2012] eKLR**. It was urged that in the instant case, the Application alleges but does not disclose any infringement of rights and that for an allegation of violation of rights to be valid, the petition (or, in this case, the Application) must meet the requirements set out in the **Annarita Kirimi Njeru** case. The case of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** was also cited.

71. On the right to access information, it was submitted that this right is only available to citizens as opposed to corporate bodies or non-citizens. For this proposition, learned counsel cited the cases of **Federation of Women Lawyers-Kenya & 28 others v Attorney General & 8 others [2015] eKLR** and **Famy Care Limited v Public Procurement Administrative Review Board & Another Petition No.43 of 2012**.
72. Learned counsel submitted that there is no right guaranteed under **Article 50** that the Ex parte Applicant can claim with reference to its relationship with the 1<sup>st</sup> Respondent. Further, that there are no proceedings of the nature that **Article 50** deals with in guaranteeing the right to fair hearing. It was argued that the Ex parte Applicant has also failed to plead with specificity how its rights under the FAAA,2015 were violated making it difficult for the 1<sup>st</sup> Respondent to effectively respond to the allegations of violations.
73. In addition, learned counsel also submitted that a legitimate expectation must be based on the law. Further that the Ex parte Applicant was not the highest bidder. To support this argument counsel cited the Supreme Court case of **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR** where it was held that legitimate expectation cannot override the law. It was urged that there could not have been any legitimate expectation as there was no express, clear and unambiguous promise given by any public authority, and that there was an evaluation process to be conducted before deciding the winning bidder. In addition, the law also requires various things to be considered in the evaluation process before determining the winning bidder. Counsel cited the case of **Republic v Public Procurement Administrative Review Board & 2 others, ex-parte Coast Water Services Board & another [2016] eKLR** on the Procuring Entity's obligation to consider all aspects of the tender.
74. In conclusion, it was submitted that the Application and these proceedings in general are an improper attempt to use a public law tool that is concerned with process for commercial law disputes based on the outcome of a leasing process.
75. The 2<sup>nd</sup> Respondent in its written submissions urged that a Court cannot craft its own jurisdiction and that when there is no jurisdiction the court downs its tools. It was submitted that a party should institute its matter in the lowest competent Court or Tribunal competent to hear it. Further, that where there is redress of any particular grievance prescribed by the Constitution or an Act of Parliament it ought to be strictly followed. To support this argument counsel cited the case of **Samuel Kamau Macharia & Another v Kenya Commercial Bank & 2 Others Application No.2 of 2011, Kenya Revenue Authority Ex parte Keycorp Real Advisory Limited [2019] eKLR**, and **Republic v. Benjamin Washiali, Majority Chief Whip, National Assembly & 4 Others Ex parte Alfred Kiptoo Keter & 3 Others [2018] eKLR**.
76. Learned counsel also submitted that the prerogative orders cannot issue against either the 1<sup>st</sup> and 2<sup>nd</sup> Respondent as it is not demonstrated that they acted as quasi-judicial bodies. To support this argument counsel cited the case of **Higawa Enterprises Limited v. Kenya Ports Authority & 6 Others [2018] eKLR**, and **Republic v. Nairobi City County Ex parte Registered Trustees of Sir Ali Muslim Club [2017] eKLR**.
77. It was urged that the Ex parte Applicant cannot forum shop by the art and craft of pleadings to give or deny court jurisdiction. To buttress this argument counsel cited the cases of **Kibos Distillers Limited & 4 Others vs. Benson Ambuti Adege & 3 Others [2020] eKLR** and **Benson Ambuti Adege & 2 Others v Kibos Distillers Limited & 5 Others [2020] eKLR**.
78. Counsel submitted that within the meaning of Section 525 of the Insolvency Act, the position of an administrator is that of an officer of the Court.
79. On material non-disclosure learned counsel urged that the Ex parte Applicant was under an obligation to disclose everything before the Court as is required under Order 53 of the Civil Procedure Rules. To support this argument counsel cited the cases of **Kenya Revenue Authority Ex parte Keycorp Real Advisory Limited supra**, **Republic v. County Director of Education, Nairobi County & 2 Others [2021] eKLR**, **Republic v. County Director of Education, Nairobi County & 2 Others [2021] eKLR** and **Republic v. Joseph Mumo Kivai & Another [2021] eKLR**,
80. It was submitted that the prohibitory order of stay could not have been granted at all when the event sought to be stayed had already happened. To support this argument counsel cited the case of **Republic v. Joseph Mumo Kivai & Another supra**.

81. On abuse of court process, learned counsel cited the case of **Satya Bhama Gandhi v. Director of Public Prosecutions & 3 Others [2018] eKLR**. In conclusion it was argued that the 2<sup>nd</sup> Respondent will be highly prejudiced as the Ex parte Applicant has not incurred any costs in developing the leased property.

82. Further, in the 2<sup>nd</sup> Respondent's supplementary submissions counsel submitted that the Ex parte Applicant's failure to produce before court the decision subject of judicial review meant that there is nothing to quash. On the Orders of Certiorari, Prohibition and Mandamus counsel cited the cases of **Republic v. Kenya Revenue Authority & Another Ex parte Tradewise Agencies Limited [2013] eKLR**, **Kenya Association of Music Producers (KAMP) & 3 Others Ex parte Pubs Entertainment and Restaurants Association of Kenya (PERAK)** and **Lucy Mirigo & 550 Others v Minister for Lands & 4 Others [2014] eKLR**.

83. It was further submitted that the Public Procurement Review Board has since determined that Mumias Sugar Company Limited is not a public Company and as such any decision made by the 1<sup>st</sup> Respondent is not amenable to judicial review. This court it was submitted cannot therefore interfere with the dealings of a private entity. In addition, it was argued that the Ex parte Applicant has not pleaded any statutory obligation bestowed upon the 1<sup>st</sup> Respondent that has been violated or that he has failed to perform. The case of **Lucy Mirigo & 550 Others v Minister for Lands & 4 Others supra** was cited to support this argument.

### **ANALYSIS AND DETERMINATION**

84. I have had occasion to consider the pleadings, the affidavit evidence and learned submission by counsel. The issues for determination distilled therefrom are in two limbs being the legal questions on the one hand and the merit based questions on the other. These issues are;

- i. Whether this court is properly seized of jurisdiction to determine the matter.
- ii. Whether the application herein is sub judice and/or *res judicata*.
- iii. Whether the application is incompetent for being brought against the 1<sup>st</sup> Respondent.
- iv. Whether the applicant has made out a case to warrant the grant of the orders sought in the Substantive Motion.

#### **Whether the Court has jurisdiction:**

85. It is trite law that this question should be determined at the earliest. This is particularly so as jurisdiction is everything and a court with no jurisdiction cannot continue with proceedings. (See Owners of Motor Vessel 'Lillian S' vs. Caltex Oil (Kenya) Ltd 1989 KLR 1.

86. In the 'Lilian S' case above, Nyarangi JA in defining what jurisdiction is stated;

*"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given"*

87. The jurisdiction of this court under Judicial Review is a creature of the constitution under **Article 165 (6) and (7)**. The Article provides:

*“(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.*

*(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”*

**88.** Article 47 (1) provides for the right of every person to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair and the Fair Administrative Action Act was enacted as per the dictates of **Article 47(3)** as a legislation giving effect to the right under **Article 47 (1)**.

**89.** In a nutshell, therefore, this court’s jurisdiction under judicial review extends to supervising subordinate courts and any person, body or authority exercising judicial or quasi-judicial function and to protect every person from administrative action that does not conform to **Article 47(1)** and the FAAA.

**90.** The Public Procurement and Asset Disposal Act provides for procedures for efficient Public Procurement and for Assets disposal by public entities. Under the said Act, a person aggrieved by a decision made by the Public Procurement Review Board may seek judicial review by the High Court within 14 days from the date of the Review Board’s decision.

**91.** It is opportune to state at this early stage in this analysis, that despite approaching the Public Procurement Administrative Review Board in application no. 163 of 2021, and having the request for review struck out for want of jurisdiction, the ex parte applicant herein has not mounted a challenge under **Section 175(1)** of the Act against the finding of the Board in this court but has sought prerogative writs of Certiorari, Prohibition and Mandamus targeted against the 1<sup>st</sup> Respondent’s decision made on 22<sup>nd</sup> December, 2021 in respect to the leasing and operation of the Assets of Mumias Sugar Company Limited (in receivership).

**92.** With this background, it is possible to put the issues for determination in perspective and I start by answering question whether this court has jurisdiction over this matter.

**93.** It is common ground that the 1<sup>st</sup> Respondent is the Receiver, and by order of court dated 19<sup>th</sup> day of November, 2021 the Administrator of MSCL. The 1<sup>st</sup> Respondent invited bids on 2<sup>nd</sup> August 2021 for the leasing and operation of the Company’s assets. A challenge to the leasing process was filed in court in **HCCC no. E697 of 2021 Gakwamba Farmers Cooperative Society Limited v. Ponangipalli Venkata Ramano Rao and others** (Gakwamba case) and in **HCCC no. E003 of 2021 Okiya Omtatah Okoiti v. Ponangipalli Venkata Ramano Rao and others** (The Okiya Omtata case)

**94.** On the 30<sup>th</sup> August 2021, the court in the Gakwamba case directed the 1<sup>st</sup> Respondent to receive the bids in a transparent manner and to open them in the presence of all bidders who may wish to be present on a date and time to be communicated to the bidders.

**95.** In a ruling dated 23<sup>rd</sup> September, 2021, Okwany J, again in the Gakwamba case, directed the 1<sup>st</sup> Respondent to conclude the opening of the bids in accordance with observations made in that ruling.

**96.** In the Okiya Omtata case, Okwany J, declined to issue orders stopping the leasing process as the same issue was the subject of an ongoing case in Petition No. E004 of 2019.

**97.** The court (Mabeya, J) in Insolvency Petition no. E004 of 2019 in a ruling dated 19<sup>th</sup> November, 2021 ordered, inter alia, that the 1<sup>st</sup> Respondent herein was at liberty to proceed with the process of leasing the company’s assets subject to strict observance of the Competition Act, 2010.

**98.** The above observations are a clear demonstration that the leasing and operation of the assets of MSCL was a process that had found its way into the management of and supervision by the High Court in HCCC no. E697, HCCC no. E003 of 2021 and in Insolvency Petition no. E004 of 2019.

99. There were clear orders by the court directed at the 1<sup>st</sup> Respondent on how he was to conduct the subject process. To my mind, any one dissatisfied with the conduct of the process by the 1<sup>st</sup> Respondent ought to raise the grievances before the court that had directed the threshold required to attain a flawless exercise. In other words, the Receiver/administrator was at the time, and is still is, under the control of the High court and any infractions by him was under the purview of the High Court.

100. The invite to this court to review by way of judicial review the decision of the 1<sup>st</sup> Respondent is one that must be resisted for the reason that this court has no supervisory jurisdiction over the High Court.

101. Mr. Havi submitted for the ex parte applicant that the decision of the 1<sup>st</sup> Respondent should be quashed for being arrived at unprocedurally. The obligation to act fairly was not met. It was urged that the nature of power exercised by the Receiver is public and it must be procedurally fair. I agree with counsel that this court ordinarily has jurisdiction to superintend over process to ensure legality, rationality, procedural fairness and reasonableness of decisions of persons or bodies taking administrative action and supervisory jurisdiction over subordinate courts and over any person, body or authority exercising judicial or quasi-judicial function. Indeed, in so far as procurement matters are concerned, the court routinely exercises this jurisdiction on applications premised on section 175 of the Public Procurement and Asset Disposal Act. A distinction must be made in respect of this case. From the disclosed facts, the leasing of the assets herein was, as per the various orders of court referred to, under the supervision of the High court. The law is clear that this court has no supervisory jurisdiction over a superior court.

102. With benefit of hindsight, had the details in the High Court litigation been ventilated at the exparte hearing, it is highly unlikely that this court would have granted leave to apply for judicial review orders ex parte or at all.

103. The process under challenge was already under the supervision of the High Court by the time these proceedings were filed. The referenced matters are indeed live in court with an additional one, being **HCCC no. E004 of 2022 Lambert Lwanga Ogochi & 4 others vs. Ponangipalli Venkatta Rao and 8 others**, which has been filed recently and in which the ex parte applicant has applied to be enjoined.

104. Looked at from another prism, a valid question arises as to whether in the discharge of his duties, the 1<sup>st</sup> respondent was performing a public function. I would agree with Mr. Kiragu Kimani in his submission that a Receiver once appointed steps in the shoes of the directors of the company, in this case MSCL. Judicial review being a public law remedy is generally not applicable to bodies that derive their powers from private contractual arrangements. The new constitutional dispensation under the Constitution of Kenya ,2010 expanded the bill of rights and entrenched judicial review order as a relief in enforcement of the bill of Rights (Art. 23(3)(f)) and recognized the right to Fair Administrative Action under Art. 47.

105. I agree with Mr. Kiragu Kimani's sentiments that there is a widespread common misconception that in the new constitutional dispensation, judicial review was no longer just a public law affair but could be invoked in private law matters.

106. In my view, this misconception is what it is, a misconception. While I acknowledge that judicial review is one of the reliefs available to an aggrieved party under the bill of rights, such relief should be obtained in a constitutional petition claiming infringement of the bill of rights.

107. When the challenge is over an infringement arising from an administrative action, such a claim falls under the purview of judicial review as a right recognized under **Article 47(1)** of the constitution and given effect by the Fair Administrative Action Act. This jurisdiction is also to be invoked under the Supervisory powers of this court under **Article 165(6) and (7)** of the constitution.

108. It is important to restate the scope of judicial review and I find solace in the words of the Court of appeal in **Kapa Oil Refineries vs Kenya Revenue Authority [2019] eKLR** where the court stated;

*“Judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. See the Commissioner of Lands –versus Hotel Kunste [1997] eKLR. The purpose of JR is to ensure that the individual is given fair treatment by the Authority to which he has been subjected. JR as a remedy is available, in appropriate cases, even where there are alternative legal or equitable remedies. See David Mugo t/a Manyatta Auctioneers –versus Republic – Civil Appeal No. 265 of 1997 (UR). JR being a discretionary remedy, it demands that whoever seeks to avail itself/himself/herself of this remedy has to act with candour or virtue and temperance. See Zakayo Michubu Kibwange –versus Lydia Kagina Japheth*

*and 2 others [2014] eKLR. JR as a remedy may also be invoked where the issues in controversy as between the parties are contested. See Zakayo Michubu Kibwange case (Supra). The remedy of judicial review is only available where an issue of a public law nature is involved. Further, that a person seeking mandamus must show that he has a legal right to the performance of a legal duty by a party against whom the mandamus order is sought or alternatively, that he has a substantially personal interest and that the duty must not be permissive but imperative and must be of a public nature rather than of a private nature. See Prabhulal Gulabuland Shah –versus Attorney General & Erastus Gathoni Mlano, Civil Appeal No. 24 of (1985) (UR). Following the promulgation of the Kenya Constitution, 2010, judicial review is available as a relief to a claim of violation of the rights and fundamental freedoms guaranteed in the Constitution of Kenya 2010. See Child Welfare Society of Kenya –versus- Republic and 2 others, Exparte Child in Family Forces Kenya [2017] eKLR.”*

109. The examples given by Mr. Kiragu Kimani on whether a dispute between Safaricom company and Airtel could be subjected to judicial review owing to the public interest such a dispute would attract, or a challenge to a will and the hilarious one about the possibility of his gardener being subjected to judicial review for attacking a neighbor clearly demonstrate the need to rein in judicial review to its rightful territory. Am persuaded that such territory does not include supervision of acts of a receiver/Administrator in circumstances like the ones before this court.

110. The court’s judicial review jurisdiction has been irregularly invoked. As held in Samuel Kamau Macharia and Another v Kenya Commercial Bank and 2 others, Application no. 2 of 2011;

*“68. A Court’s jurisdiction flows from either the constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law.....where the constitution exhaustively provides jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.....”*

111. It is also open to doubt whether, having filed a request for review at the Public Procurement Administrative Review Board (PPARB) and failed, the ex parte applicant could properly approach this court under judicial review other than through Section 175 (1) of the Public Procurement and Assets Disposal (PPAD) Act. In my view this amounts to forum shopping and an abuse of the court process. Matters are not helped by the disclosure by the respondents, (and not the ex parte Applicant), that the ex parte Applicant filed **Kakamega High Court Civil Case no. 10 of 2021, Tumaz & Tumaz Enterprises Limited v ponangipalli Venkatta Ramana Rao** and has subsequently made an application for joinder in **Nairobi HCCC No. E004 of 2021, Lambert Lwanga Ogochi & 4 Others v Ponangipalli Venkatta Ramana Rao**, both of which cases challenge the leasing process. This in itself is an abuse of the court process and an acknowledgement by the ex parte Applicant that their remedy lies elsewhere and not in these proceedings.

112. What constitutes abuse of the court process" The Court of appeal in **Muchanga Investment Ltd vs Safaris Unlimited (Africa) Ltd and 2 Others (2009) KLR 229**, case had this to say on the subject;

*“The term abuse of the Court process has the same meaning as abuse of the judicial process. The employment of the Judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious and oppressive. The term abuse of process has an element of malice in it.....The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice. Examples of the abuse of the judicial process are:*

- (i) Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.*
- (ii) Institution of different actions between the same parties simultaneously in different Courts even though on different grounds.*
- (iii) Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent’s notice.*

(iv) *Where there is no iota of law supporting a Court process or where it is premised on frivolity or recklessness.*

**113.** No doubt the exparte applicant is guilty of examples (i) and (ii). The court can in no circumstances allow a party to play lottery with judicial process. Accommodating that trend would surely bring judicial process to public odium and cause loss of confidence and faith in the justice system, a major blow to the rule of law.

**114.** I reach the inescapable conclusion that this court has no jurisdiction to review the decision of the 1<sup>st</sup> Respondent herein since his conduct and decision were and still are under the supervision of the High Court in HCCC No. E697 of 2021, HCCC NO. E003 of 2021, Insolvency Petition no. E004 of 2019 and lately, HCCC no. E004 of 2022.

**115.** While this finding is enough to dispose of the matter, I find it necessary to make a brief comment on the other legal questions for determination and I start with the question whether the matter herein is sub judice and/or res judicata.

**116.** While the respondents have not been able to demonstrate that the issues raised have been conclusively determined by a competent court and involving the same parties and are thus res judicata, evidence abounds that the issues in controversy are live in 4 different but related suits. The matter in issue is directly and substantially in issue in the 4 suits listed above. The application herein is thus sub judice.

**117.** Is the respondent properly suited" It is common ground that the 1<sup>st</sup> Respondent is a receiver and administrator of MSCL. The impugned acts arose in his execution of his duties as a receiver and administrator of the company and therefore as an agent of the company. As held in *City Council of Nairobi v. Wilfred Kamau Githua T/A Githua and Associates* (2016) eKLR an action may not be brought against an agent of a disclosed or known principal. In any event, having found that the duties of a Receiver are not by their very nature amenable to judicial review, the 1<sup>st</sup> Respondent is improperly sued in these proceedings. In light of this, the proceedings are incompetent.

**118.** From the foregoing, and for reasons above stated, I find and hold that this court has no jurisdiction to entertain the judicial review proceedings herein. Without jurisdiction, I must down my tools. In view of this finding, it is unnecessary to delve into the question whether a case has been made out for the grant of the orders sought.

**119.** With the result that the application for judicial review orders is dismissed with costs to the respondents.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF MARCH 2022.**

**A.K. NDUNGU**

**JUDGE**



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