

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 106/2020 OF 26TH AUGUST 2020

BETWEEN

THE GARDENS AND WEDDINGS CENTRE

LIMITED.....APPLICANT

AND

THE ACCOUNTING OFFICER,

KENYATTA NATIONAL HOSPITAL.....1ST RESPONDENT

KENYATTA NATIONAL HOSPITAL.....2ND RESPONDENT

AND

**KAMTIX CLEANERS CO. LIMITED.....INTERESTED
PARTY**

Notice of Motion Application in Request for Review of the decision of
Kenya National Hospital with respect to Tender No. KNH/T/33/2020 for
Provision of Cleaning Services.

BOARD MEMBERS

- | | |
|----------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Arch. Steven Oundo, OGW | -Member |
| 3. Ms. Rahab Chacha | -Member |

IN ATTENDANCE

1. Mr. Philemon Kiprop

-Holding brief for the Secretary

THE REQUEST FOR REVIEW

M/s The Gardens and Weddings Centre Limited (hereinafter referred to as "the Applicant") lodged a Request for Review dated 21st July 2020 and filed on 22nd July 2020 together with a Supporting Affidavit sworn on 21st July 2020 and filed on 22nd July 2020, through the firm of Karugu Mbugua & Company Advocates, seeking the following orders: -

- a) An order annulling the award made to the Interested Party;***
- b) An order annulling and striking off the due diligence findings against the Applicant, from the tender evaluation process;***
- c) An order directing the Procuring Entity to conduct a fresh evaluation exercise in accordance with the Act;***
- d) An order for costs of the Request for Review application; and***
- e) Any other orders that the Board may deem fit and just to grant.***

In response, the Interested Party lodged a Memorandum of Response dated 28th July 2020 and filed on 29th July 2020, while the Interested Party lodged a Replying Affidavit sworn on 3rd August 2020 and filed on even date, through the firm of CK Advocates.

NOTICE OF WITHDRAWAL OF THE REQUEST FOR REVIEW

The firm of Karugu Mbugua & Company Advocates, representing the Applicant in the Request for Review lodged a Withdrawal Notice dated 3rd August 2020 and filed on 4th August 2020 stating that the Applicant voluntarily withdrew the Request for Review application with no orders as to costs. The same firm also addressed a letter dated 6th August 2020 and filed on 7th August 2020 to the Chairperson of the Board that a consent be recorded showing that the Applicant has voluntarily withdrawn Request for Review No. 106 of 2020, that each party shall bear their own costs and the Request for Review application be marked as duly settled.

NOTIFICATION TO PARTIES OF WITHDRAWAL OF THE REQUEST FOR REVIEW

On 7th August 2020, the Board Secretary notified the 1st Respondent, the Applicant's Advocates and the Interested Party's Advocates of the Notice of Withdrawal Application dated 3rd August 2020 and the consent signed between parties. Pursuant to Regulation 216 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "Regulations 2020"), the Board Secretary notified all parties to the Request for Review that the same was marked as withdrawn. The Board Secretary also addressed a letter Ref: PPRA/ARB/7/106/2020 to the Director of the Applicant, Mr. Daniel Gathogo Mugo, notifying him that the Request for

Review was properly marked as withdrawn on 7th August 2020 pursuant to Regulation 216 of Regulations 2020.

THE NOTICE OF MOTION APPLICATION

The Applicant lodged a Notice of Motion Application dated 25th August 2020 and filed on 26th August 2020, through a Certificate of Urgency dated and filed on even date together with a Supporting Affidavit sworn and filed on even date, through the firm of Rono & Company Advocates on the following grounds: -

- 1. THAT the Applicant is apprehensive that the Respondents are likely to enter into a contract with the Interested Party with respect to Tender No. KNH/T/33/2020 for Provision of Cleaning Services, the subject matter in dispute herein, the appeal for review having been withdrawn erroneously;***
- 2. THAT unless the Application herein is heard on priority basis and orders sought granted in the first instance, the same will be rendered nugatory and the applicant will suffer prejudice;***
- 3. THAT the appeal for review was withdrawn without knowledge and/or express authority of the Applicant who stands to suffer irreparable loss and damage.***

Further, the Applicant sought for the following orders in the Notice of Motion Application: -

- 1. An order reviewing and setting aside and/or vacating the consent judgement entered into on 7th August 2020 in its totality and all consequential orders be issued declaring that the actions of withdrawal of suit by the applicant through the firm of M/s Karugu Mbugua & Co. Advocates was without instructions;***
- 2. An order directing that the appeal for review be reinstated and parties be allowed to file further pleadings and/or affidavits for the matter to proceed for a full hearing;***
- 3. Such orders that the Board may deem fit to grant in the circumstances in favour of the Applicant; and***
- 4. The costs of the Applicant be provided to the Applicant.***

In response, the Interested Party lodged Grounds of Opposition dated 31st August 2020 and filed on even date together with a Replying Affidavit sworn on 31st August 2020 and filed on even date, through the firm of CK Advocates. The Respondents did not file any pleadings in response to the Notice of Motion Application.

BOARD'S DECISION

Having considered parties' pleadings filed in support of and in opposition to the Notice of Motion Application, the provisions of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") and

Regulations 2020, the Board finds that the following issue calls for determination: -

Whether the Board has powers to reinstate a Request for Review Application that is already marked as withdrawn

The crux of the Applicant's Notice of Motion Application, is that the Applicant instructed the firm of Karugu Mbugua & Company Advocates to file a Request for Review Application before this Board on 22nd July 2020 but that the same was purportedly withdrawn by the said Advocates on 7th August 2020 without the Applicant's knowledge. The Applicant avers at paragraph 6 of its Supporting Affidavit that it inquired from the said Advocates when the Request for Review was scheduled for hearing but the Advocate was reluctant to inform the Applicant of the hearing date. According to the Applicant, it visited the Board's Offices on 12th August 2020 where it learnt that the Board scheduled the matter for hearing on 10th August 2020, however, a consent to withdraw the Request for Review was filed by the firm of Karugu Mbugua & Company Advocates on 7th August 2020, hence the hearing would not take place. In the Applicant's view, it was not privy to such consent because it had not instructed the firm of Karugu Mbugua & Company Advocates to execute a consent to withdraw the Request for Review. The Applicant further avers that on the same date of 12th August 2020, it addressed a letter to the Board stating that it was not privy to the alleged consent and that the Applicant never

gave instructions to the firm of Karugu Mbugua & Company Advocates to withdraw the Request for Review, therefore urged the Board to proceed with hearing of the Request for Review.

In response, the Interested Party avers at paragraph 2 of its Grounds of Opposition that the Notice of Motion Application is an abuse of this Board's process since a consent was entered into following the Applicant's withdrawal notice. According to the Interested Party, an advocate has implied general authority to compromise on behalf of his client, as long as he is acting bonafide and not contrary to express negative direction. The Interested Party deposes at paragraph 5 of its Replying Affidavit that on 3rd August 2020, Mr. Daniel Gathogo Mugo (the Applicant's Director), Mr. Karugu Mbugua, (the Applicant's Advocate representing it in the Request for Review Application), Mr. Adan (the Interested Party's Company Representative) and the Interested Party's Advocate representing it in the Request for Review Application held a meeting in a restaurant located in Yala Towers where it was mutually resolved that; (a) the Applicant was to withdraw the Request for Review with the understanding that the Interested Party would meet the Applicant's filing and settlement costs which agreement was acknowledged by Mr. Daniel Gathogo Mugo and (b) the Applicant would file a notice of withdrawal on 4th August 2020. According to the Interested Party, the Applicant is dishonest by alleging that Mr. Karugu Mbugua, (the Applicant's Advocate representing it in the Request for Review Application) did not have instructions to withdraw the Request for Review application despite having attended the aforementioned settlement meeting and receiving payment from the

Interested Party as filing and settlement costs. At paragraph 13 of its Replying Affidavit, the Interested Party depones that a consent judgement cannot be set aside unless there is tangible evidence that a fraud was committed prior to withdrawal of the Request for Review. In its conclusion, the Interested Party urged the Board to dismiss the Notice of Motion Application.

Having considered parties' pleadings, the Board observes that the Request for Review Application together with the Supporting Affidavit was filed by the firm of Karugu Mbugua & Company Advocates on 22nd July 2020 on behalf of the Applicant. The Board Secretary, through a letter dated 22nd July 2020 notified the 1st Respondent of the existence of the Request for Review and suspension of procurement proceedings in the subject tender pursuant to section 168 of the Act requesting the 1st Respondent to forward all confidential documents relating to the subject procurement process as required by section 67 (3) (e) of the Act. Through letters dated 3rd August 2020, the Board Secretary informed all bidders of the existence of the Request for Review and their right to file documentation in support or in opposition to the Request for Review. It is also worth noting that even though the Board scheduled hearing of the Request for Review on 10th August 2020, the same firm of Karugu Mbugua & Company Advocates, representing the Applicant in the Request for Review lodged a Withdrawal Notice dated 3rd August 2020 and filed on 4th August 2020 stating that the Applicant voluntarily withdrew the Request for Review application with no orders as to costs and also addressed a letter dated 6th August 2020 and

filed on 7th August 2020 to the Chairperson of the Board that a consent be recorded showing that the Applicant has voluntarily withdrawn Request for Review No. 106 of 2020, that each party shall bear their own costs and the Request for Review application be marked as duly settled.

From the foregoing sequence of events, the Board observes that the firm of Karugu Mbugua & Company Advocates was the Advocate acting on behalf of the Applicant in the Request for Review and the same firm that filed a withdrawal notice in the Request for Review. The Court in **Hiten Kumar Raja -V- Greenspan Limited & 4 Others [2014] KLR** while considering the authority of an advocate to act on behalf his or her client held that: -

"An advocate acting for a party is clothed with general authority to represent the client and whatever actions he takes on behalf of the client as long as the same fall within the scope of his authority binds the client. If in taking the action the advocate acts negligently that cannot affect the validity of the action. In such a situation where an advocate acts negligently to the prejudice of the client such a client has a separate cause of action against the advocate for negligence and/or professional misconduct. Such action for negligence and/or professional misconduct cannot be properly prosecuted in the same suit where the advocate represented the client."

Having considered the finding in the above case, the Board notes that the Applicant and/or any party who has appointed an advocate has the duty and obligation to follow up with his advocate to ensure that the Advocate is giving effect to his instructions in the conduct of the Request for Review application. That notwithstanding, the Board observes that the Applicant never filed any Notice of Change of Advocates as evidence that it had withdrawn instructions from M/sKarugu Mbugua & Company Advocates after the said firm filed the Request for Review. This means that, M/sKarugu Mbugua & Company Advocates were at all material times the Advocates on record for the Applicant including the time M/sKarugu Mbugua & Company Advocates filed a Withdrawal Notice at the Board's offices on 4th August 2020 and a letter dated 6th August 2020 and filed on 7th August 2020 to the Chairperson of the Board that a consent be recorded showing the Applicant has voluntarily withdrawn Request for Review No. 106 of 2020, that each party shall bear their own costs and the Request for Review application be marked as duly settled.

It is also worth noting that, the Applicant did not make any rebuttal to the allegations by the Interested Party that a meeting was held wherein the Applicant's Director and M/sKarugu Mbugua & Company Advocates were present and that the Applicant's Director received compensation from the Interested Party as filing and settlement fees. Even if the Applicant's allegations that M/sKarugu Mbugua & Company Advocates acted fraudulently without instructions from the Applicant were to be considered, the appropriate cause of action against the advocate would be for

negligence and/or professional misconduct in another appropriate dispute resolution forum, but not before this Board.

The Board received a Withdrawal Notice at the Board's offices on 4th August 2020 and a letter dated 6th August 2020 and filed on 7th August 2020 signifying parties' consent to withdraw the Request for Review, marked the Request for Review as withdrawn and duly notified all parties to the Request for Review on 7th August 2020. Both documents were filed by M/s Karugu Mbugua & Company Advocates who were the Advocates on record for the Applicant. This therefore leads the Board to address the question; what is the effect of a Request for Review application duly marked as withdrawn by the Board Secretary?

The **High Court in Civil Case No. 230 of 2015, Kofinaf Company Limited & another v Nahashon Ngige Nyagah & 20 others [2017] eKLR**, while considering the effect to withdrawal of a suit pursuant to the Civil Procedure Rules, 2010, held as follows: -

"The filing of a notice to withdraw or discontinue a suit terminates the suit and there cannot be, thereafter, setting aside of the notice to withdraw or discontinue a suit. The following is what the learned author Stuart Sime in the book "A Practical Approach to Civil Procedure" 9th edition stated:

'Notice to discontinue takes effect and brings the proceedings to an end as against each defendant, on the date it is served upon the defendant'.

In this case the Notice of the Withdrawal or discontinuous had the effect of terminating this appeal. The appeal having terminated it cannot in my humble view be reinstated or resuscitated. On that ground the Appellant's Notice of Motion is unmerited and misconceived. It is dismissed with costs to the Respondent."

According to the High Court in the aforementioned case, the filing of a notice to withdraw or discontinue a suit terminates the suit and there cannot be, thereafter, setting aside of the notice to withdraw or discontinue the suit. In the instant case, the Notice of Withdrawal of the Applicant's Request for Review was made pursuant to Regulation 216 of Regulations 2020 which states as follows: -

"216 (1) A request for review may be withdrawn at any time before or during the hearing by notice in writing to the Review Board Secretary signed by the applicant

(2) The withdrawal under paragraph (1) shall be based on consentsigned between parties concerned and registered with the Review Board

- (3) Upon such a withdrawal notice under paragraph (1) being received by the Review Board Secretary the request for review shall be deemed to have been withdrawn***
- (4) When a request for review is withdrawn the Review Board Secretary shall forthwith inform the Review Board and all parties to the review of the withdrawal”***

Having interrogated the requirements for withdrawal of a Request for Review under Regulation 216 of Regulations 2020, the Board observes that; (i) a Notice of Withdrawal was filed by M/s Karugu Mbugua & Company Advocates (acting on behalf of the Applicant as the firm on record before the Board), (ii) a Withdrawal Consent signed by M/s Karugu Mbugua & Company Advocates (acting on behalf of the Applicant as the firm on record before the Board), the Interested Party's Advocates, M/s CK Advocates (acting on behalf of the Interested Party as the firm on record before the Board) and the Respondents through its Chief Executive Officer together with an accompanying letter dated 6th August 2020 on the letterhead of M/s Karugu Mbugua & Company Advocates were filed with the Board requesting the Board Secretary to mark the Request for Review as withdrawn and (iii) the Board Secretary notified all parties to the Request for Review that the same was marked as withdrawn pursuant to Regulation 216 of Regulations 2020. In essence, all the elements for withdrawal of a Request for Review outlined in Regulation 216 of Regulations 2020 were satisfied.

The Board takes cognizance of section 173 of the Act, which provide as follows: -

"Upon completing a review, the Review Board may do any one or more of the following—

- (a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;***
- (b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;***
- (c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;***
- (d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and***
- (e) order termination of the procurement process and commencement of a new procurement process."***

Section 173 of the Act and Regulations 2020 do not give the Board powers to reinstate a Request for Review application once the same is duly marked as withdrawn in accordance with Regulation 216 of Regulations 2020.

Having found that the requirements of Regulation 216 of Regulations 2020 were duly satisfied and that the Request for Review was duly marked as withdrawn by the Board Secretary on 7th August 2020, the Board observes that the said notice of withdrawal marked the end of proceedings in Request for Review No. 106 of 2020 and the same cannot be reinstated by this Board.

The upshot of the foregoing is that the Applicant's Notice of Motion Application lacks merit and the same is hereby dismissed.

FINAL ORDERS

In exercise of the powers conferred upon it by section 173 of the Act, the Board makes the following orders: -

- 1. The Notice of Motion Application filed by the Applicant on 26th August 2020 in Request for Review Application No. 106 of 2020 with respect to Tender No. KNH/T/33/2020 for Provision of Cleaning Services, be and is hereby dismissed.**
- 2. Each party shall bear its own costs in the Request for Review.**

Dated at Nairobi this 17th day of September 2020

CHAIRPERSON

SECRETARY

PPARB

PPARB