



REPUBLIC OF KENYA



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**Republic v Managing Director South Nyanza Company Limited; Adera (Exparte Applicant)
(Judicial Review 1 of 2020) [2023] KEHC 27513 (KLR) (23 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 27513 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
JUDICIAL REVIEW 1 OF 2020**

RPV WENDOH, J

JANUARY 23, 2023

**IN THE MATTER OF AN APPLICATION BY JOHNSON OTIENO
ADERA FOR JUDICIAL REVIEW ORDER OF MANDAMUS**

AND

IN THE MATTER OF ARTICLES 47 AND 22 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, NO. 4 OF 2015

AND

IN THE MATTER OF THE CROPS ACT, NO. 16 OF 2013

AND

IN THE MATTER OF THE SUGAR ACT, NO. 10 OF 2001 (REPEALED)

AND

IN THE MATTER OF THE CROPS (SUGAR) (GENERAL) REGULATIONS, 2018(DRAFT)

AND

IN THE MATTER OF THE ORDINARY AGREEMENTS AND CONTRACTS

**IN THE MATTER OF SUPPLY OF STATEMENTS AND PAYMENTS FOR
ACCOUNT NOS. 14215200/1 (JCC SIGNED ON 9/10/2018 - 26.94 TONS),
87647300/1(JCC SIGNED ON 29/10/2018 - 53.02 TONS), 14124200/1 (JCC
SIGNED ON 24/8/2018 - 64.20 TONS), 11418400/1 (JCC SIGNED ON 13/9/2018
- 143.42 TONS) & 141427300/1 (JCC SIGNED ON 25/11/2019 - 12.08 TONS)**

BETWEEN

REPUBLIC APPLICANT

AND



**MANAGING DIRECTOR SOUTH NYANZA COMPANY
LIMITED RESPONDENT**

AND

JOHNSON OTIENO ADERA EXPARTE APPLICANT

JUDGMENT

1. By a Notice of Motion dated 24/2/2020 filed evenly, the ex-parte applicant seeks the following orders: -
 - a. That an Order of Mandamus be granted to compel the Respondent to issue and deliver up to the Ex-Parte Applicant the statements for sugar cane delivered relating to Account Nos. 14215200/1 (Job Completion Certificate signed on 9/10/2018 - 26.94 tons), 87647300/1 (Job Completion Certificate signed on 29/10/2018 - 53.02 tons), 14124200/1 (Job Completion Certificate signed on 24/8/2018 - 64.20 tons), 11418400/1 (Job Completion Certificate signed on 13/9/2018 - 143.42 tons) & 141427300/1 (Job Completion Certificate signed on 25/11/2019 - 12.08 tons) and make payments based on the said payments within a period of thirty (30) days from the date of order.
 - b. Costs of application be met by the Respondent.
2. The application is based on grounds appearing on the face thereof and is supported by the Verifying Affidavit of Johnson Otieno Adera together with the annexures thereto and statement of facts dated 15/1/2020.
3. According to the ex-parte applicant, he is small scale sugar cane farmer within Migori County and an Advocate of the High Court of Kenya; that between the months of August 2018 and November 2019, he planted sugar cane to maturity and delivered to the respondent at his own cost and the respondent issued him with job completion certificates marked as “J1, J2, J3, J4 and J5”; that despite the delivery, the respondent has refused to issue him with statements in respect of the aforesaid accounts contrary to its statutory, contractual and public duty as a public body; that the consequences of the actions thereof is that he has been denied access to the statements and therefore he is unable to make precise, special claim against the respondent for withholding that information; that since the respondent failed to make the payments within 30 days as required both under statute and contract, the ex-parte applicant issued the respondent with a demand letter “J6.”
4. The ex-parte applicant further deposed that the respondent being a public body is enjoined to the dictates of Article 47 of *the Constitution*, the *Fair Administrative Action Act* and Article 232 of *the Constitution*; that the actions of the respondent of failing to issue statements and making prompt payments in respect of the said statements or even communicating on the delay of payments is a violation to his rights; that the sale agreement “J7” is explicit on the time for making payments and the issuance of statements.
5. The application was opposed. The respondent through its Acting Managing Director, Stephen O. Ligawa swore an affidavit dated 30/3/2022. He deposed that there were no contracts signed between the respondent and the *ex-parte* applicant in respect to account numbers 11418400/1 and 141427300/1 and there were no job completion certificates signed by the ex-parte applicant on 13/9/2018 and 25/11/2019 on the respective accounts; that it is true that the ex-parte applicant’s sugarcane was harvested from Plot No. 1 in Field No. 14215200 on 25/9/2018 and 26/9/2018 and its gross value was Kshs. 116, 111.40/= and after the contractual and statutory deductions, the



- payment came to Kshs. 28,409.48/= which was paid on 25/9/2019 and 26/9/2019 through the ex-parte applicant's account no. 01243045412100 at the National Bank of Kenya, Awendo Branch.
6. It was also deposed that the ex-parte applicant's sugarcane from Plot No. 1 in Field No. 14124200 on 2/8/2018, 3/8/2018, 4/8/2018 and 6/8/2018 and its gross value was Kshs. 276,702/= and its value after contractual and statutory deductions was Kshs. 166,285.01/= which was paid on 2/8/2018, 3/8/2018, 4/8/2018 and 6/8/2018 through the ex-parte applicant's account no. 01243045412100 at the National Bank of Kenya, Awendo Branch; that the ex-parte applicant's sugarcane from Plot No. 1 Filed No. 87647300 was harvested on 28/9/2018, 29/8/2018, 1/10/2018, 2/10/2018, 3/10/2018, 6/10/2018 and 7/10/2018 and its gross value was Kshs. 228,516.20/= and its net value after the contractual and statutory deductions was Kshs. 225,435.74 which was paid on 28/9/2018, 29/8/2018, 1/10/2018, 2/10/2018, 3/10/2018, 6/10/2018 and 7/10/2018 through the ex-parte applicant's account no. 01243045412100 at the National Bank of Kenya, Awendo Branch.
 7. The respondent deposed that the Farmers' statements are ordinary; that the ex-parte applicant has never sought the relevant statements from the respondent and had he done so, the same would have been furnished to him; that the grievance, the subject of this application is private law conflict between a private natural person and a legal person and does not fall within the domain of public law; that therefore the application is incompetent and the Judicial Review order of mandamus cannot be granted. The respondent argued that the applicant is scandalous, vexatious and an abuse of the court process.
 8. Both parties filed their respective submissions. In his submissions of 23/5/2022, the *ex-parte* applicant relied on the cases of *Kenya National Examination Council vs Republic ex-parte Geoffrey Gathenji Njoroge & 9 Others* Civil Appeal No. 226 of 1996 and the *Halsbury Laws of England*, 4th Edition, Vol. 1, pp. 111 to explain the principles to be considered before the grant of an order of mandamus; that the instant application meets all the above principles for the grant of the prerogative order of mandamus.
 9. The *ex-parte* applicant further submitted on the various statutes which impose on the respondent a duty to act, the respondent has a public duty to pay within 30 days of harvest which is an administrative duty imposed on the respondent as a public officer; that the failure of the respondent to give reasons to the ex-parte applicant under Section 4(3) of the *Fair Administrative Action Act* is a violation of the ex-parte applicant's constitutional and statutory rights. The ex-parte applicant submitted that the available remedy is that of mandamus and he has demonstrated and established the principles for the award of the judicial review order of mandamus.
 10. The respondent filed its submissions dated 18/7/2022. The respondent reiterated the contents in the replying affidavit of Stephen O. Ligawa sworn on 30/3/2022.
 11. I have duly considered the application dated 24/2/2020, the Statement of Facts, the Verifying Affidavit of Johnson Otieno Odero together with the annexures thereto, the Replying Affidavit of Stephen O. Ligawa dated 30/3/2022 and its annexures and the arguments for and against the application. The issues for determination are: -
 - a. Whether the application is merited.
 - b. What orders can be issued.
 12. The *ex-parte* applicant is seeking an order of mandamus to compel the respondent to issue and deliver up to the ex-parte applicant the statements for sugar cane delivered relating to Account Nos. 14215200/1 (Job Completion Certificate signed on 9/10/2018 - 26.94 tons), 87647300/1 (Job Completion Certificate signed on 29/10/2018 - 53.02 tons), 14124200/1 (Job Completion Certificate signed on 24/8/2018 - 64.20 tons), 11418400/1 (Job Completion Certificate signed on 13/9/2018 -



- 143.42 tons) & 141427300/1 (Job Completion Certificate signed on 25/11/2019 - 12.08 tons) and make payments based on the said payments within a period of thirty (30) days from the date of order.
13. The *ex-parte* applicant's position is that the respondent failed to undertake its public duty of issuing the statements and making payments within 30 days thus, an order of mandamus should be issued. The respondent argued that this is more of a private contract and therefore, the orders cannot be issued.
14. Judicial Review does not concern itself with reviewing the merits of the decision made but the process of arriving at the said decision. The Court of Appeal in *Uwe Meixner & another v Attorney General* (2005) eKLR described what Judicial Review is as follows: -
- ...judicial review is concerned with the decision-making process and not with the merits of the decision itself. Judicial review deals with the legality of decisions of bodies or persons whose decisions are susceptible to judicial review.”
15. The grievances of the *ex-parte* applicant is based on a Growers Cane Farming Contract “J7” dated 23/3/2010. The *ex-parte* applicant took issue with the respondent for failing to adhere to its contractual obligation in Clause 3.1.10 to make payments within 30 days of delivery of the sugar cane. The applicant further took issue with the failure of the respondent to submit to him various statements for the sugar delivered. Therefore, the originating document which gave rise to this application is the contract dated 23/3/2010.
16. Judicial Review, being a public law remedy, is meant to supervise activities of public officers or bodies. The said public officers or body in carrying out their duties, must have done them contrary to the rules of natural justice or in breach of statutory provisions. The actions which a public body does for the process of Judicial Review to commence, should be acts of illegality where the public body is guilty of an error of law and irrationality where the public body in its decision-making process acts unreasonably.
17. In *R-vs- The Commissioner of Police ex parte Nicholas Gitubu Karia* HMISC Application (2004) eKLR the court held: -
- if there is a tenancy or lease, Judicial Review remedies would be out of reach and unavailable because the performance of a public duty must arise from statute and not contract such as a tenancy or a lease”
18. In *Berkshire ex parte Walsh* (1985) QB 152 quoted with approval by this court in *Maurice Okello v Permanent Secretary Ministry of Lands and Housing* (2008) eKLR where the applicant moved the court for Judicial Review orders after being dismissed from work, the court held:-
-an applicant for Judicial Review has to show that a public law right which he enjoyed had been infringed: but a distinction had to be made between infringement of statutory powers giving rise to public law rights and those that arose solely from breach of contract of employment.”
19. This court holds the same view as it did in the case of *Maurice Okello (supra) and Shadrack Kibichi Bundotich v Permanent Secretary Ministry of Lands & Housing* (2007) eKLR that the Applicant has come to the wrong court for enforcement of his rights under a contract. If he has any redress, it lies in the ordinary Civil Courts where he can ask for specific performance, breach of contract or refund of his monies, or damages. There is nothing for a Judicial Review Court to address where there is a breach of contract since there was no decision-making process done when the respondent allegedly breached the contract to warrant Judicial Review orders.



20. As stated above, Judicial Review is concerned with the decision-making process not the merits or demerits of the said decision. The best avenue for the ex-parte applicant to enforce his rights is in an ordinary civil suit to seek damages for breach of contract.
21. I therefore find that the remedy which the applicant seeks cannot be sought in a Judicial Review court. The application is disallowed. The second issue for determination therefore falls by the way.
22. The consequence, therefore, is that the application is dismissed with costs to the respondent.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 23RD DAY OF JANUARY, 2023

R. WENDOH

JUDGE

Judgment delivered in the presence of;

No appearance for the Ex-Parte Applicant.

Mr. Odero for the Respondents.

Nyauke Court Assistant.

