



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CIVIL MISC. APPLICATION NO. 23 OF 2018

IN THE MATTER OF ARTICLES 10, 22(1), 22(2), 23(1)E, 40(3), 47(2), 48 AND 165(3)(B) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTION 96 OF THE COUNTY GOVERNMENTS ACT, NO. 17 OF 2012, LAWS OF KENYA

AND

IN THE MATTER OF SECTION 2 AND SECTION 3(C), 4(1), 4(2), 4(3), 5(2)(B), 6, 7(2)(J), 7(2)(M), 7(2)(N) OF THE FAIR ADMINSTRATIVE ACT NO. 4 OF 2015, LAWS OF KENYA

AND

IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM ACT, CAP 26, LAWS OF KENYA

AND

IN THE MATTER OF THE CIVIL PROCEDURE ACT, CAP 21, LAWS OF KENYA

AND

IN THE MATTER OF ORDER 53 RULE (1)(2)(3)(4) OF THE CIVIL PROCEDURE RULES, 2010

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

CHIEF OFFICER OF LANDS, INFRASTRUCTURE & URBAN DEVELOPMENT

COUNTY GOVERNMENT OF KITUI.....1ST RESPONDENT

THE COUNTY GOVERNMENT OF KITUI.....2ND RESPONDENT

AND

ARIDSUN CONTRACTORS LTD

KATUNGATE CONTRACTORS LTD

SYANO ROADS & BRIDGES CO. LTD

KAMWANDO ENTERPRISES LTD

KONZA WORKS CONTRUCTION & ENGINEERING LTD

FESTO CONSTRUCTION & ENGINEERING COMPANY LTD

WATEMA GENERAL SUPPLIERS LTD

NASICOM LOGISTICS COMPANY LTD

NELLY KAVUU MUTISYA

T/A KITUI GENERAL SUPPLIERS & CONTRACTORS.....EXPARTE APPLICANTS

J U D G M E N T

1. Pursuant to leave of this Court granted on the **10th April, 2018**, the Exparte Applicants filed a substantive motion by way of Notice of Motion dated the **13th April, 2018** seeking orders that:

i) An Order of Mandamus do issue for the unreasonable delay and failure to process payment to the Exparte Applicants for the contracts signed separately on **July 8th, 2016**;

ii) An Order of Mandamus do issue compelling the Respondents to immediately process payment for the undisputed contractual sums due to the Applicants for the contracts signed separately on **July 8th, 2016**.

2. It was the Exparte Applicants' case that the 2nd Respondent pursuant to powers derived from **Section 6** of the **County Government Act, No. 17 of 2012** entered into contracts for the provision of public works including the construction of various roads and bridges on the **July 8th, 2016** separately with the Applicants which were to be finalized within a period of **6 months** after the execution.

3. The Exparte Applicants substantially executed their contractual obligation to the satisfaction of the Respondents who prepared reports recommending payment to be effected to several of the Applicants while awaiting the final certificates after the defects liability period of **6 months**. However, **two (2) years** after completion of the works, the Respondents have failed/neglected to make payment or communicate reasons for failure to process payment. This, in their view is an infringement of their legal rights.

4. The Respondents on their part admitted having entered into contracts with several persons and entities but urged that it was done towards the end of the year **2016/2017** just before elections therefore they were awarded through restricted tendering as no documents could be found in respect of the tenders. As a result the **Ethics and Anti-Corruption Commission (E.A.C.C.)** took all original **LSOs** contained in the book together with all documents including those of the Applicants and most of the Applicants were summoned to record statements. That they are under instructions from **E.A.C.C.** not to honour any demands of payment in respect of the contracts pending conclusion of the investigations. Therefore the demand for payments alleged sums are meant to circumvent the investigation process.

5. Further, it was averred that the Applicants have not attempted to engage them to resolve the issues amicably as provided by **Section 9(2)** of the **Fair Administration Act, 2015**. That their action is intended to circumvent investigations to compel payments over unclear contracts and it is in the interest of justice to have the order sought denied.

6. In a rejoinder the Exparte Applicant urged that they have written severally to the Respondents and **E.A.C.C.** enquiring about the status of the contracts to no avail. That **E.A.C.C.** has given clearance to effect payment which is an indication that the projects were found to be above board and therefore there is no need of a further report as alleged by the Respondents.

7. The Application was canvassed by way of written submissions. It was urged by the Exparte Applicants that the Respondents have demonstrated their reluctance to communicate reasons for the unreasonable delay in effecting payment therefore infringing the Exparte Applicants' right to information as guaranteed by **Article 35** of the **Constitution** and have purposely failed to make the requisite payments per the contracts and **LSOs** issued therefore infringing their rights to a fair administrative action, right to property and livelihood.

8. That the Respondents alleged that they had instructions from **E.A.C.C.** not to effect payments but purposely failed to disclose that **E.A.C.C.** had written to them on **18th May, 2018** not objecting to payments being made in accordance with the requirement of the **Public Finance Management Act, Public Procurement and Asset Disposal Act** and any other relevant legislation of regulation; therefore there is no reason for the delay in payment which calls for issuance of the order sought as the action taken was without any good reason as held in **S. N. vs. Cabinet Secretary for the Ministry of Interior and Co-ordination of National Management Services, Director General, Kenya Citizens & Foreign Nationals Management Services and Attorney General Misc. Civil Application No. 406 of 2015**, where it was stated that:

“Section 6(4) of the Fair Administrative Action Act, 2015 provides that:

(4) Subject to subsection (5), if an administrator fails to furnish the applicant with the reasons for the administrative decision or action, the administrative action or decision shall, in any proceedings for review of such action or decision and in the absence of proof to the contrary, be presumed to have been taken without good reason.

In Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090, the Court held that in the ordinary way and particularly in cases, which affect life, liberty or property, the authority concerned should give reasons and if he gives none the court may infer that he had no good reasons since the authority must act in good faith; extraneous considerations ought not influence him;

and he must not direct himself in fact or law. Similar position was adopted by the Court of Appeal in Onyango Oloo vs. Attorney General [1986-1989] EA 456 where it held that It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided.

It is therefore clear that he Respondents were bound to furnish the applicant with the reasons for making a decision either way and their failure to do so can only be interpreted to mean that they had no reasons for not registering the applicant as a citizen.”

9. That failure to act by the Respondents amount to an abuse of their constitutional mandate.

10. The Respondents on their part urged that the cause of action was founded on contracts allegedly entered into towards end of term of the last County Government in place before elections. That the current County Government despite the principle of continuity of government was not part of the said contracts and was therefore investigating and verifying the propriety, legality and genuineness of the alleged contracts which has not been done. That a complaint was lodged by the E.A.C.C. on the propriety of the said contracts, a matter that is a subject of investigations. That E.A.C.C. is still in possession of the documents a fact within the knowledge of the Exparte Applicants.

11. That the Respondents have given reasons of failure to honour the contracts which include indeterminate nature of the said contracts, unverifiable and ongoing investigations into the said contracts; That being ordered to pay the Exparte Applicants before completion of investigations will be circumventing the process thereby placing liability personally on the agents of the Respondents.

12. That the Court can only review administrative decisions if other mechanism for appeal and review have been exhausted. In this regard they cited the case of **Republic vs. National Environmental Management Authority (2011) eKLR**, where it was held that:

“... where there was an alternative remedy and especially where Parliament had provided a statutory appeal process, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it, ...”

They called upon the Court to decline to grant the orders sought until due process of investigations and verification is complete so that monies are spent for the right purpose.

13. This Court has been asked to obligate the Respondents herein to provide reasons for the delay in processing payments for undisputed contractual sums due to the Exparte Applicants and compel them to act by performing their part of contract. This therefore calls upon me to exercise personal judgment and conscience, ensuring that the discretion I have is not abused. This being a discretionary remedy it must be ascertained that the Application has been made in good faith and not for indirect purposes.

14. In the case of **Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 (1970) EA 543 Goudie, J.** stated thus:

“... Mandamus is a prerogative order issued to compel the performance of a duty. It issues ... where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the Respondent. Thus it is used to compel Public Officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by the Act of Parliament for the benefit of the individual ... whereas mandamus may be refused where there is another appropriate remedy, there is no discretion to withhold mandamus if no other remedy remains. When there is no specific remedy the Court will grant a mandamus that justice may be done. The Construction of the sentence is this: where there is no specific remedy and by reason of the want of specific remedy justice cannot be done unless a mandamus is to go, then mandamus will go ... The Courts are reluctant to direct a writ of mandamus against the Executive Officers of the Government unless some specific act or thing which the law requires to be done had been omitted. Courts should proceed with extreme caution for the granting of the writ which would result in the interference by the Judicial department with the management of the executive department of the Government. The Courts will not intervene to compel an action by the Executive Officer unless his duty to act is clearly established and plainly defined and the obligation to act is peremptory ...”

15. The Exparte Applicants brought this Application by virtue of having been contractors that were engaged by the 2nd Respondent to carry out construction work which was done but no payment was made. It is urged that the Respondents have demonstrated reluctance to communicate the reasons for unreasonable delay on effecting payment which is viewed as an infringement of the Exparte Applicants' rights to fair administrative action. There is evidence of a response to the demand letter sent where the Legal Advisor to the 2nd Respondent wrote to the Exparte Applicants' Legal Representative promising to look into the contracts and revert.

16. It is not denied by the Respondents that the contracts were duly entered into. The explanation given for the payment not being made was that documents used in awarding the contracts that were done through restricted tendering could not be traced by the current regime/government. It is contended that as a result of what transpired the **Ethics and Anti-Corruption Commission (E.A.C.C.)** commenced investigations, took possession of the original LSOs for the projects and all documents relating to the contracts that were entered into by the Applicants and even caused the Exparte Applicants to record statements in respect of the stated contracts. A letter dated the **26th February, 2018** from E.A.C.C. addressed to the County Secretary, Kitui County stating that the commission had been investigating allegations touching on Kitui County on procurement irregularities for various drifts and road works projects by the **Ministry of Lands, Infrastructure and Urban Development (L.I.U.D.)**. The Commission required to question some officers following the request made by the County for clearance of contracts that could be settled for payment. It is important to note that less than two (2) months to the time of filing of this Application, investigations were still ongoing.

17. The Respondents have been faulted for concealing the letter dated **18th May, 2018** which stipulates thus:

“... As you are aware we have been investigating allegations of procurement irregularities at your county. The allegations are in relation to various drifts and roadworks project by the County’s department of Lands, Infrastructure & Urban Development (LIUD) in the financial year 2015/2016.

Owing to the fact that the investigations have taken longer than initially anticipated and threats of court action from contracts, we wish to advise that the Commission has no objection to you paying contractors for the work done as long as the payment is lawful and is done in accordance with the requirement of the Public Finance Act, Public Procurement and Asset Disposal Act and any other relevant legislation or regulation.

Please note that as the Accounting Officer you are ultimately responsible for and may be held liable for any public funds that may be paid to any undeserving contractor. The Commission on its part will endeavour to complete the investigation as soon as practicable and make appropriate recommendation. ...”

18. This letter was written on **18th May, 2018** when this matter was already in Court.

19. It is true **Section 4** of the **Fair Administrative Action Act** mandates an administrator to provide written reasons for a decision taken failure to which the decision taken will be presumed to be made without a good reason. It is not denied that the Exparte Applicants were aware of the investigations that were going on regarding their contracts and payment could be made on completion of the investigations. When they sent a demand letter to the Respondent they responded therefore they did not disregard their quest. In the case of **Re Hordial Singh and Others (1979) KLR 18; (1976-80) 1 KLR 1090**, the Court held that:

“in the ordinary way and particularly in cases, which affect life, liberty o property, the authority concerned should give reasons and if he gives none the Court may infer that he had no good reasons since the authority must act in good faith; extraneous considerations ought not influence him; and he must not direct himself in fact or law. Similar position was adopted by the Court of Appeal in Onyango Oloo vs. Attorney General (1986-1989) EA where it held that it is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the Appellant and others guessing about what matters could have persuaded him to decide in the manner he decided.

It is therefore clear that the Respondents were bound to furnish the Applicant with the reasons for making a decision either way and their failure to do so can only be interpreted to mean that they had no reasons for not registering the applicant as a citizen.”

20. As aforesaid the explanation given was plausible therefore the Respondents were not influenced by extraneous considerations. Bad faith could not be imputed on their part. There is absolutely nothing to suggest that the Respondents deliberately abused their constitutional mandate by acting cautiously prior to making necessary payments.

21. In the case of **R (Regina) vs. Dudsheath Ex Parte, Meredith (1950) 2 ALL ER 741** where **Lord Goddard C.J.** held:

“It is important to remember that ‘mandamus’ is neither a writ of course nor a writ of right, but that it will be granted if the duty is in the nature of a public duty, and specially affects the rights of an individual, provided there is no more appropriate remedy. This Court has always refused to issue a mandamus if there is another remedy open to the party seeking it.”

22. It has been demonstrated that by a letter dated **18th May, 2018** received by the Respondent on the **22nd May, 2018**, though that fact was concealed when the response to the Application was filed, that the Respondents were authorized to effect payments for the work done. This paves way for processing of payments. The Respondents will therefore be expected to act in good faith by ensuring that it is done.

23. From the foregoing internal mechanism and/or remedies have not been exhausted; therefore I decline to issue orders sought with no orders as to costs.

24. It is so ordered.

Dated, Signed and Delivered at Kitui this 31st day of January, 2019.

L. N. MUTENDE

JUDGE