REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW CAUSE NO. 435 OF 2017

REPUBLIC……..…….....……. APPLICANT

VERSUS

KENYATTA UNIVERSITY…….....….1ST RESPONDENT

MUEMA V. S, HEAD OF PROCUREMENT DEPARTMENT.....2ND RESPONDENT

EX PARTE: AWESOME KENYA LIMITED

RULING

Introduction

1. The applicant herein, **Awesome Kenya Limited**, seeks leave to commence judicial review proceedings vide the Chamber Summons dated 5th July, 2017.

2. According to the applicant, on 12th and 13th June, 2017, the Respondents issued it with Local Purchase Orders to supply branded room slippers and pursuant thereto the applicant ordered and paid for the importation thereof from China. It was averred that the said goods had already been packed and shipped and were due in the country in a few days.

3. However on 29th June, 2017 the Respondents wrote to the applicant purportedly cancelling the said LPO which decision according to the applicant was completely unreasonable, irrational, illegal and unlawful. Further the said decision was not supported by any law.

4. It was the applicant's case that it had a legitimate expectation that having complied with all the requirements of the said LPOs, the same would be accepted by the Respondents. It was averred that the applicant had spent huge financial resources through the entire process from the time its samples were accepted, sourcing and importation from China and if the Respondent were allowed to cancel the said LPOs the applicant would suffer irreparable financial loss.

5. The application was opposed by the Respondents through the following grounds:

> **1. The application is bad in law for having been brought to this Honourable Court without exhausting the requirements of section 167 of the *Public Procurement and Asset Disposal Act, 2015* requiring the ex parte applicant to first file a request for review at the Public Procurement Administrative Review Board in the first instance.**

2. The Honourable Court has no jurisdiction to determine this application.

3. The applicant is not entitled to the reliefs sought on account of concealment and suppression of material facts.

4. The application is incurably defective.

6. Apart from the foregoing grounds the Respondent also averred that since the dispute herein is contractual this is not a proper case for judicial review. It was their case that the termination of the contract was based on the failure by the applicant to perform the contract.

7. On the part of the applicant it was argued that section 167(4) aforesaid is inapplicable to the instant circumstances where a contract has been signed. It was argued that section 174 of the Act permits a party to resort to other remedies. In support of this position the applicant relied on **Republic vs. IEBC & Another ex parte Coalition for Reform and Democracy and 2 Others [2017] eKLR**.

8. The requirement for leave was explained by a three judge bench comprising **Bosire, Mbogholi-Msagha & Oguk, JJ** in **Matiba vs. Attorney General Nairobi H.C. Misc. Application No. 790 of 1993** in which the Court held that it is supposed to exclude frivolous vexatious or applications which *prima facie* appear to be abuse of the process of the Court or those applications which are statute barred. Similarly, in **Republic vs. Land Disputes Tribunal Court Central Division and Another Ex Parte Nzioka [2006] 1 EA 321, Nyamu, J** (as he then was) held that leave should be granted, if on the material available the court considers, without going into the matter in depth, that there is an arguable case for granting leave and that leave stage is a filter whose purpose is to weed out hopeless cases at the earliest possible time, thus saving the pressure on the courts and needless expense for the applicant by allowing malicious and futile claims to be weeded out or eliminated so as to prevent public bodies being paralysed for months because of pending court action which might turn out to be unmeritorious. See also **Republic vs. The P/S Ministry of Planning and National Development Ex Parte Kaimenyi [2006] 1 EA 353.**

9. **Waki, J** (as he then was), on the other hand, in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others Mombasa HCMCA No. 384 of 1996** put it thus:

> **"The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived… Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full *inter partes* hearing of the substantive application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised judicially".**

10. This position was confirmed by the Court of Appeal in **Meixner & Another vs. Attorney General [2005] 2 KLR 189** in which the Court held that the leave of the court is a prerequisite to making a substantive application for judicial review and that the purpose of the leave is to filter out frivolous applications hence the granting of leave or otherwise involves an exercise of judicial discretion.

11. The circumstances which guide the grant of leave to apply for judicial review remedies were enumerated in **Mirugi Kariuki vs. Attorney General Civil Appeal No. 70 of 1991 [1990-1994] EA 156; [1992] KLR 8** as follows:

"If he [the Applicant] fails to show, when he applies for leave, a *prima facie* case, on reasonable grounds for believing that there has been a failure of public duty, the Court would be in error if it granted leave. The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables the Court to prevent abuse by busybodies, cranks and other mischief-makers…"

12. In **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK)**, the Court stated:

"Application for leave to apply for orders of judicial review are normally *ex parte* and such an application does restrict the Court to threshold issues namely whether the applicant has an arguable case, and whether if leave is granted, the same should operate as a stay. Whereas judicial review remedies are at the end of the day discretionary, that discretion is a judicial discretion and, for this reason a court has to explain how the discretion, if any, was exercised so that all the parties are aware of the factors which led to the exercise of the Court's discretion. There should be an arguable case which without delving into the details could succeed and an arguable case is not ascertained by the court by tossing a coin or waving a magic wand or raising a green flag, the ascertainment of an arguable case is an intellectual exercise in this fast growing area of the law and one has to consider without making any findings, the scope of the judicial review remedy sought, the grounds and the possible principles of administrative law involved."

13. *This position was appreciated by* ***Majanja, J*** *in Judicial Review Misc. Civil Appl. No. 139 of 2014 between* ***Vania Investments Pool Limited and Capital Markets Authority & Others*** *in which the learned Judge expressed himself as follows:*

"I do not read the Court of Appeal to be saying that the Court should not have regard the facts of the case or have at best a cursory glance at the arguments. As I stated in Oceanfreight Transport Company Ltd vs. Purity Gathoni and Another Nairobi HC Misc. Appl JR No. 249 of 2011 [2014] eKLR, "In my view, the reference to an "arguable case" in W'Njuguna's Case is not that the issue is arguable merely because one party asserts one position and the other takes a contrary view." The duty of the court to consider the facts is not lessened by the mere conclusion that the case is frivolous, or that leave is underserved by examining the facts...Indeed, if leave was to be considered a matter of right then the purpose for which leave is required would be rendered otiose."

14. What comes out clearly from the foregoing is that the grant of leave to commence judicial review proceeding is not a mere formality and that leave is not granted as a matter of course. The applicant for leave is under an obligation to show to the court that he has a *prima facie* arguable case for grant of leave.

15. Whereas he is not required at that stage to go into the depth of the application, the applicant must disclose the existence of *prima facie* grounds for the grant of judicial review reliefs. Such grounds must *prima facie* be based on the facts as averred by the applicant in the verifying affidavit. It is therefore not enough to simply throw the grounds for the grant of judicial review and contend that a *prima facie* case has been made out. A *prima facie* case, in my view is made out when the applicant's case if true may justify the grant of the orders of judicial review. Where the facts disclosed, even if true cannot possibly justify the grant of judicial review remedies, a *prima facie* case, for the purposes of judicial review cannot be said to have been made out.

16. Section 167(1) of the ***Public Procurement and Asset Disposal Act, 2015*** provides as hereunder:

Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.

17. However subsection (4) of the said section provides that:

> ***(4) The following matters shall not be subject to the review of procurement proceedings under subsection (1)—***
>
> ***(a) the choice of a procurement method;***
>
> ***(b) a termination of a procurement or asset disposal proceedings in accordance with section 62 of this Act; and***
>
> ***(c) where a contract is signed in accordance with section 135 of this Act.***

18. In this case it is contended that a contract had already been signed. If that is the position, it is clear that section 167(1) would not apply. Section 174 of the ***Public Procurement and Asset Disposal Act, 2015*** provides as hereunder:

> ***The right to request a review under this Part is in addition to any other legal remedy a person may have.***

19. This provision was the subject of the decision in **Republic vs. IEBC & Another ex parte Coalition for Reform and Democracy and 2 Others** (supra) where the Court expressed itself as hereunder:

> **"…a person who would otherwise be locked out from invoking the provisions of the *Public Procurement and Asset Disposal Act* is not barred from seeking alternative remedy under other provisions of the law. This was the position adopted by this Court in *Elias Mwangi Mugwe vs. Public Procurement Administrative Review Board & 5 Others [2016] eKLR* where the Court expressed itself as hereunder:**
>
> **'…any person who has no automatic right to participate in the review proceedings may properly resort to other available modes of ventilating his rights.'"**

20. Therefore nothing bars the applicant from seeking other alternative legal remedies where a contract has been signed. However, in **Re Preston [1985] AC 835 at 825D Lord Scarman** was of the view that a remedy by judicial review should not be made available where an alternative remedy existed and should only be made as a last resort. In **Nasieku Tarayia G vs. Board of Directors Agriculture Finance Corporation & Another [2012] eKLR** the Court was of the view that judicial review is a remedy of last resort and where an alternative remedy exists, the court has to be satisfied that judicial review is the more convenient, beneficial, efficacious alternative remedy available. That was also the position in the English case of **R (Regina)vs. Dudsheath**, ex parte**, Meredith [1950] 2 ALL E.R. 741, at 743, Lord Goddard C. J.** said -

> ***"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. "***

21. Here it is not lost to the Court that one of the reliefs that the applicant intends to seek is one of mandamus. That the matter herein revolves around breach of contract is not in dispute. That is the distinction between this case and **Republic vs. IEBC & Another ex parte Coalition for Reform and Democracy and 2 Others** (supra). In that case there was no question of breach of contract but whether the decision was made in accordance with the Constitution. In **Zakhem Construction (Kenya) Limited vs. Permanent Secretary, Ministry of Roads & Public Works & Another [2007] eKLR** the Court expressed itself inter alia as follows:

> **"As we said at the beginning of this judgment, the matter between the Appellant and the Respondents was purely based on a written contract…If the Appellant thought the**

Respondent was in breach of the contract by issuing the notice of intention to terminate, the Appellant's remedy did not lie in public law; the remedy lay in private law where the Appellant could be awarded damages if it proved that the contract was unlawfully terminated…If parties to a contract want to have the process of judicial review applicable to their contract there is nothing to stop them from expressly providing in the written contract. We can find nothing in the provisions of Clause 44.1 which would make us think and hold that the parties intended that if one of them intended to terminate the contract the other party to the contract had to be heard first…Emukule, J was of the same view and that must be why he was prepared to hold, even without hearing the parties, that the matter lay in contract and the process of judicial review could not provide the Appellant with a remedy for an alleged breach of the contract. That holding was clearly correct and we can find no reason whatsoever for interfering with the same. "

22. In **Maurice Okello vs. Permanent Secretary Ministry of Lands and Housing [2008] eKLR** the **Wendoh, J** expressed herself as follows:

"The issue before the court is one of contract which is a private law matter. On the other hand Judicial Review is a public law remedy which only lies to supervise activities of public bodies or public officers when performing public duties and if the offices/bodies do so contrary to rules of natural justice or in breach of statutory provisions…In the instant case, the Applicant seeks to enforce a private contractual right, that the Respondent has refused to sell to him the house in question…The right sought to be enforced is a private contractual right of sale of a house, between two parties. If this court were to intervene, it would be seeking to create a contract, that the Respondent do allocate the house to the Applicant. In my view, that would be forcing the Respondent to enter into contract, thus forcing an unwilling party to enter into a contract of sale. This is matter of contract which as in the private law realm and cannot be subject to Judicial Review and therefore even if the Applicant were qualified to get the house this court would not intervene…The grounds upon which the Judicial Review orders are sought are inter alia that the Respondent was in breach of the contract of sale between the Applicant and Respondent…I find…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."

23. In **R vs. East Berkshire ex parte Walsh [1985] QB 152** it was held that:

"An Applicant for judicial review had to show that the public have a right which he enjoyed had been infringed;…but a distinction had to be made between infringement of statutory provisions giving rise to public law rights and those that arose solely from breach of contract of employment."

24. The point here is whether the applicant has another remedy other than judicial review relief. It is clear that the applicant is perfectly entitled to file a suit for damages occasioned by the action of the Respondent for the alleged breach of contract. Section 9(2), (3) and (4) of the ***Fair Administrative Action Act, No. 4 of 2015*** bars this Court from reviewing an administrative action or decision unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. That being the position this Court cannot grant leave where what is intended to be sought is expressly barred by the law since in such events there would not be a prima facie case for the purpose of leave.

Order

25. Accordingly, Chamber Summons dated 5th July, 2017 fails and is dismissed but with no order as to costs.

26. It is so ordered.

Dated at Nairobi this 28th day of September, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Wangila for Mr Ojienda for the applicant

Mr Mwathe for Mr Kibe Mungai for the Respondent

CA Ooko