



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 36 OF 2013

REPUBLIC.....APPLICANT

VERSUS

ENGINEERS BOARD OF KENYA.....RESPONDENT

MULTISCOPE CONSULTING ENGINEERS LTD.....EX-PARTE

2ND JUDGEMENT

1. In these judicial review proceedings, the ex parte Applicant is Multiscope Consulting Engineers Ltd. The Engineers Board of Kenya is the Respondent. The University of Nairobi is the 1st Interested Party whereas Songa Ogoda and Associates is the 2nd Interested Party.
2. This is the second judgement in this matter, the first judgement having been set aside through a ruling delivered by this Court on 16th July, 2015 following an application by the 1st Interested Party. The basis of that ruling is that the initial proceedings which resulted in the judgement delivered on 14th May, 2014 had proceeded without notice to the 1st Interested Party which the court identified as a necessary party. The first judgment was thus set aside and the 1st Interested Party given an opportunity to respond to the substantive notice of motion dated 4th February, 2013.
3. Through the notice of motion application dated 4th February, 2013, the Applicant prays for orders as follows:

“1.THAT the Honourable Court be pleased to bring into this court and quash the purported review report of the proposed structural designs of the proposed University of Nairobi Tower Building as alluded in the letter dated 18th January 2013 from the respondent to the applicant.

2. THAT an order in the nature of prohibition do issue to prohibit the respondent or anyone claiming under them from taking any disciplinary action against the *ex parte* applicant on the basis of its letter dated 18th January 2013 as well as the purported review report on the proposed structural design of the proposed University of Nairobi Tower Building alluded to in the said letter.

3. THAT an order in the nature of mandamus do issue directed at the Engineers Board of Kenya commanding the said Engineers Board of Kenya to comply with the provisions of the Engineers Act, 2011 in the event that they seek to inspect the relevant

site and documents and accord the *ex parte* applicant a hearing prior to making any report.

4. THAT the costs of this application be provided for.”

4. The application is supported by a statutory statement and the affidavit of the Applicant’s Managing Director Engineer Samuel Nyanchama Maugo which were filed in court together with the chamber summons application for leave on 31st January, 2013.

5. The 2nd Interested Party supported the application through a replying affidavit sworn on 12th August, 2015 by Emmanuel Odhiambo a partner in the firm.

6. The Respondent is a statutory body created by Section 3 of the Engineers Act, 2011 and tasked with the responsibility of the registration of engineers and firms, regulation of engineering professional services, setting of standards, development and general practice of engineering. It opposed the application through the replying affidavit of its Registrar, Engineer Gilbert M. Arasa sworn on 11th April, 2013.

7. The 1st Interested Party opposed the application through the replying affidavit sworn on 2nd December, 2015 by Prof. Isaac M Mbeche the Acting Deputy Vice-Chancellor (Administration & Finance).

8. From the papers filed in Court, it emerges that the Applicant is an engineering practice belonging to Engineer Samuel Nyachama Maugo. The 2nd Interested party is a firm of quantity surveyors registered under the Architects and Quantity Surveyors Act, Cap 525.

9. In the year 2011 the Applicant together with other entities under the consortium of Waweru Associates won a tender for provision of engineering services in respect of a project christened University of Nairobi Towers belonging to the 1st Interested Party. The individual firms under the consortium proceeded to sign contracts in respect to the said tender.

10. The 2nd Interested Party who was in the said consortium was tasked with providing quantity survey services. Like the Applicant, the 2nd Interested Party entered into a contract with the 1st Interested Party.

11. Through a letter dated 16th October, 2012 the Permanent Secretary of the Ministry of Roads wrote to the Respondent annexing a letter dated 15th October, 2012 from Engineer A.S. Kitololo querying the inputs of the structural engineering designer and the building services engineer. The Permanent Secretary urged the Respondent to address the issues raised by Engineer Kitololo.

12. Consequently, the Respondent wrote a letter dated 26th October, 2012, under confidential cover, to the Vice-Chancellor of the 1st Interested Party alerting him of the issues raised by Engineer A.S. Kitololo. The 1st interested Party was advised to subject the project to peer review as well as accredited checking as provided for in the Engineers Act. The Respondent also informed the 1st Interested Party that it would seek further information on peer reviewers/accredited checkers.

13. On 17th November, 2012 the 1st Interested Party wrote back to the Respondent asking to be provided with a list of several registered engineers to subject the project to peer review as well as accredited checking. It appears that the work of the Applicant was subsequently subjected to peer review resulting in a document titled: Report on Accredited Checking of the Proposed University of Nairobi Tower Project on Plot LR No. 209/18319, Nairobi (“the Report”). The Report made several recommendations.

14. The Respondent acted on the Report by writing a letter dated 18th January, 2013 to the Applicant requiring submission of certain information and asking the Applicant to show cause why disciplinary action should not be taken as a result of the findings contained in the Report.
15. The Applicant responded to the Respondent's communication through a letter dated 31st January, 2013. On the same day, the Applicant commenced these judicial review proceedings.
16. Prior to the commencement of these judicial review proceedings, the 1st Interested Party had on 23rd January, 2013 terminated the contracts between it and the Applicant and the 2nd Interested Party.
17. On 4th February, 2013, the 2nd Interested Party instituted a civil claim against the 1st Interested party vide **Nairobi High Civil suit No. 21 of 2013**. This was followed on 18th February, 2013 by the Applicant's **Nairobi High Court Civil Case No. 47 of 2013** in which the 1st Interested Party was named as the 1st Defendant and the Respondent was named as the 2nd Defendant. One Stephen Nyarangi Onsomu and the Centre for Multi-Party Democracy later filed **Nairobi High Court Petition No. 222 of 2013** against the 1st Interested Party, its Vice-Chancellor and six others. The Petition raised issue with the termination of the contracts of the Applicant and 2nd Interested Party by the 1st Interested Party.
18. The Applicant's case is that the Respondent acted without a formal complaint being raised as required by Section 53 (1) of the Engineers Act. Further, that it was never involved in the peer review and it was therefore condemned unheard thus breaching the rules of natural justice. According to the Applicant, the Respondent turned itself into an investigator, accuser, prosecutor and judge. The Applicant faults the decision of the Respondent for being unreasonable and contrary to its legitimate expectation. It is also the Applicant's view that the Respondent's decision is founded on malice.
19. In response to the application, the Respondent contended that disciplinary proceedings were yet to commence against the Applicant and it was only after the proceedings start that the right to a hearing can be enforced as required by the Engineers Act. The Respondent's position is that the application is speculative and actuated by the fear of the Applicant in regard to the impending disciplinary proceedings. The Respondent also argued that the rights of the Applicant have not been infringed and the termination of the contract is a dispute between the 1st Interested Party and the Applicant which would be ventilated in **Nairobi HCCC No.47 of 2013**.
20. The 1st Interested Party opposed the application. It is the 1st Interested Party's case that the suits filed against it by the Applicant and 2nd Interested Party have been referred for arbitration and the Report prepared by the accredited checkers is central to those cases and its defence. It is the 1st Interested Party's position that the arbitration had been stayed pending the hearing and determination of all the applications in court. It is further the 1st Interested Party's view that the Applicant is abusing the court process.
21. The 2nd Interested Party supported the Applicant's case on the ground that the accredited checkers performed their work in complete disregard of the rules of natural justice. According to the 2nd Interested Party, the accredited checkers made adverse findings against its work without giving it an opportunity to be heard.
22. Another ground upon which the 2nd Interested Party supports the application is that there is no evidence that the persons appointed to do the checking were registered in accordance with the requirements of Section 24 of the Engineers Act.
23. In specific reference to its case, the 2nd Interested Party contends that it is made up of quantity

surveyors who are registered under the Architects and Quantity Surveyors Act, Cap 525 and regulated by the Board of Registration of Architects and Quantity Surveyors. According to the 2nd Interested Party, the accredited checkers acted in error of law and in excess of their authority by purporting to evaluate its work.

24. Two issues emerge for determination in this judgement. The first issue is whether the Respondent acted within the law and in compliance with the rules of natural justice when peer reviewing the work of the Applicant and the 2nd Interested Party. The second issue is whether judicial review is the most efficacious remedy in the circumstances of this case.

25. I will start with the second issue, for it might as well dispose of this matter. One of the annexures to the replying affidavit of the 1st Interested Party is the plaint in **Nairobi HCCC No. 21 of 2013**. At paragraph 9 of the said plaint, the 2nd Interested Party states that:

“The Plaintiff contends that the letter of termination is unlawful in the circumstances as the same were done capriciously and arbitrarily without due regard not only to the provisions of the Contract for erection and completion of the University of Nairobi Towers which governed the award of the tender but was effected without giving the Plaintiff an opportunity to be heard contrary to the rules of natural justice.

26. The 2nd Interested Party repeats this allegation at Paragraph 13 thus:

“The Plaintiff proffers that upon the award of tender on China Wu Yi Company Ltd, the Defendant failed to adduce any opportunity for the Plaintiff to be heard on the premature termination of the said Contract.”

27. On the other hand the Applicant pleaded in **Nairobi HCCC No. 47 of 2013** *inter alia*:

“13. The plaintiff further avers that the second defendant has induced a breach of contract in that it:-

a) Purported to inspect the plaintiff’s documents and purported to draw a review report thereto without any reference to the plaintiff in violation of the rules of natural justice.

b) In collusion with the first defendant and/or other parties with interest in the subject project caused the plaintiff to be supplanted, an act which is contrary to law and professionalism.”

28. Although the two cases were filed after the commencement of these proceedings, it is clear that the Applicant and the 2nd Interested Party both raised the issue of the validity or legality of their treatment by the Respondent and the 1st Interested Party. Specifically the claim that the Respondent acted in breach of the rules of natural justice is submitted to the court for determination through the pleadings.

29. No doubt, the Applicant has raised an issue that can be determined by way of judicial review. There is an inherent risk in dealing with this matter and making a decision as to whether or not judicial review orders should be granted. Contradictory opinions over the same issue may be arrived at by the bodies to which the matter has been submitted thus leading to ridicule of the judicial process. The 1st Interested Party disclosed that the accredited checkers’ Report which is the subject of these proceedings is one of its exhibits in the arbitral proceedings. Assuming that this matter is considered and the Report is quashed wouldn’t that not amount to tilting the scales of justice in favour of one of the parties?

30. On the other hand, the arbitrators are entitled, upon review of the entire evidence to be placed

before them, not to admit the Report on the ground that its preparation did not comply with the rules of natural justice. The Applicant and 2nd Interested Party are therefore not without a remedy. As was stated at page 600 by H.W.R. Wade & C.F. Forsyth in the 10th Edition of Administrative Law, “[t]he quashing order and the prohibiting order have as their primary purpose the preservation of order in the legal system by preventing excess and abuse of power, rather than the final determination of private rights.”

31. What the Applicant and the 2nd Interested Party have done is to mount direct and collateral challenges to what they perceive to be maladministration. By filing these proceedings, they have mounted a direct challenge. On the other hand, the civil cases have also raised the issue of the legality or validity of the actions of the Respondent and the 1st Interested Party. That amounts to collateral challenge. The direct and collateral challenges launched almost at the same time will prejudice the Respondent and 1st Interested Party if one process is not retired in favour of the other.

32. What amounts to direct and collateral challenge was explained by B. L. Jones and K. Thompson at page 173 of the 9th Edition of Garner’s Administrative Law as follows:

“On grounds such as those outlined earlier in this chapter a suitable applicant may challenge, normally by way of an ‘application for judicial review’, the *vires* or ‘legality’ of acts of the administration. The order of the reviewing court may be to issue certiorari to quash a decision taken, or prohibition to prevent anticipated *ultra vires* action, or mandamus to compel performance of a public duty....

In addition to such ‘direct’ challenge we need also consider the concept of ‘collateral’ challenge. This notion may be explained as follows. The question of the legality or the validity of acts or decisions of the administration may come before the courts not only in cases where the matter is directly challenged, but may also arise as a crucial issue collaterally in other proceedings....”

33. At page 174, the authors observed that:

“Collateral challenge is a fundamentally important feature of our system of administrative law. The issue that arises collaterally will be decided by a judge before whom it has arisen. There is no question of the matter being referred to a specialist ‘administrative’ court for decision.”

34. It would therefore not be proper for this Court to venture into the question as to whether or not the Respondent acted in breach of the rules of natural justice for to do so would amount to prejudicing the arbitral proceedings. The issue has already been placed before another Court of similar jurisdiction and that Court has ordered that the matter goes for arbitration. The Applicant and 2nd Interested Party are not without remedy. Let findings on their allegations of maladministration be made in those matters.

35. The Applicant’s notice of motion dated 4th February, 2013 is therefore dismissed. There will be no order as to costs.

Dated, signed and delivered at Nairobi this 26th day of Feb., 2016

W. KORIR,

JUDGE OF THE HIGH COURT