



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU

MISC. CIVIL APPLICATION 24 OF 2014 (JR)

SASAH GENERAL MERCHANTS LTD.....APPLICANTS

VERSUS

SUB-COUNTY PROBATION OFFICER KISUMU WEST.....1ST RESPONDENT

DIRECTOR OF PROBATION.....2ND RESPONDENT

THE COUNTY WORKS OFFICER, KISUMU COUNTY.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

J U D G M E N T

By its notice of motion dated 19-9-2014 the applicant prays for the following orders:

1. **The honourable court be pleased to grant an order of Judicial Review in the nature of mandamus to issue against the 1st and 2nd respondents herein to compel same to satisfy and or settle the amount of Kshs. 3 million only at the foot of interim certificate number 05 dated 10-5-2012 in respect of Project Number Ksm/West DPO/35/2009/2010, relating to the construction and completion of District Probation Office Maseno.**
2. **The honourable court be pleased to grant an order of Judicial Review in the nature of mandamus to issue against the 3rd respondent therein to compel same to prepare and undertake the process relating to the preparation of the Final Account and the payments of the amounts due to and in favour of the Applicant, relating to Project Number Ksm/West/DPO/35/2009/2010.**
3. **The Honourable court be pleased to set a timeline and or duration within which the 1st, 2nd and 3rd respondents herein, do comply with payment and the attendant preparation of the Final Accounts relating to Project Number Ksm/West/DPO/35/2009/2010.**
4. **Costs**

the application is supported by the statements of facts and the verifying affidavit of Samuel A. Odhiambo, the applicant's Managing Director. Earlier on the applicant had been granted leave to institute this Judicial Review proceedings.

The applicant's case is that it entered into a contract with the respondents herein in which it agreed to

construct the District Probation Office at Maseno in the year 2009/2010. The applicant then proceeded to undertake the project and concluded in January 2013. The respondent then based on the work done issued certificates which it proceeded to pay except for the interim certificate No. 5 dated 10th May 2012 for Kshs. 3 million which it has refused to settle hence this application. According to the applicant this was a public duty which the respondent could not avoid but was simply obliged to pay.

The respondents filed a replying affidavit through one Vincent Omamo dated 20th January 2015 which has raised various issues. Substantially, the respondent does not deny the contractual agreement between the parties herein. They however argue that this matter ought to have been referred to Arbitration pursuant to clause 37 of the contract. Further, that the only balance due and owing to the applicant is the sum of Kshs. 763,342.10/= and not Kshs. 3 million as per the applicant.

I have perused the application together with the attendant annexures as well as the parties written submissions. The issues which needs determination are:

- a. **whether in light of clause 37 of the contract this matter ought to have been referred to arbitration.**
- b. **Whether this court in light of the conflicting amount allegedly due ought to grant the orders sought.**

As earlier alluded the question of the contractual agreement between the parties herein is well settled. What is further advanced by the applicant is that the work seemed to have been concluded and therefore it ought to be paid its certificate. The respondent argues that there no back up for the amount of Kshs. 3 million demanded. Mr. Omamo argues that there were certain variations in the cause of the exercise pursuant to the government directions which “resulted into more savings/omissions from the contract sum”.

This court obviously at this juncture is not called to adjudicate over the mathematics or accounts in dispute herein. It is not the province of judicial review law to compute figures as presented by the parties. The proper forum lies elsewhere. This court's interest is whether the writs of mandamus can issue in light of the facts obtaining herein.

For now it appears that there are two conflicting accounts as enumerated above. As earlier alluded the respondent's argument was that this matter ought to have been agitated through an arbitration process per clause 37 of the contract which states as follows:

“In case of any dispute or difference shall arise between the Employer or the Project Manager on his behalf and the contractor, either during the progress or after completion or termination of the works, such disputes shall be notified in writing by either party to the other with a request to submit it to arbitration and to concur in the appointment of an Arbitrator within thirty days of the notice. The dispute shall be referred to the arbitration and final decision of a person to be agreed between the parties.....”

Section 37.9 goes further to state:

“The award of such Arbitration shall be final and binding upon the parties”

Reading wholesomely the clause on Settlement of Disputes (37) it is clear that the parties when appending signatures had agreed that any dispute between them ought to be referred to arbitration for settlement. As indicated above the issue regarding the computation of the figures and the work done is not for this court at this juncture. Those can be ventilated by the arbitrator or any other forum that the parties may deem fit.

To this extent therefore I find that this court would have no jurisdiction to determine the matter. The court however has jurisdiction to determine whether the respondent has acted ultra vires its public

responsibility. As much as the clause on arbitration oust this court's ability to determine the accounts and other minute mathematical details involved in the contract, it can nevertheless determine the question of whether the respondent blatantly breached any administrative authority.

On the contrary I do not see any breach by the respondent. From the affidavit evidence on record, which apparently, was never challenged by the applicant it appears that the figure or the balance of Kshs. 763,342.10/= is what the respondent believes it owes the applicant. If further argued that there was no back up for certificate number 5 while the earlier certificates are settled. It infact goes ahead to lay blame on the applicant for not submitting the final accounts to the Project Manager per clause 321 of the contract.

Based on the above uncontroverted facts I do not think that it would be open for this court to issue the orders of mandamus against the respondent. I do not respectfully see how they breached the contract. I find the explanation given for not settling the certificate plausible.

Consequently, and in light of the above observations I do not think that the application is meritorious. I find the same to have been premature. This application is therefore dismissed with costs.

Dated, signed and delivered at Kisumu this 30th day of April, 2015.

H.K. CHEMITEI

JUDGE