



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
JR CASE NO. 222 OF 2014

REPUBLICAPPLICANT

VERSUS

CABINET SECRETARY, MINISTRY

OF DEVOLUTION & PLANNING RESPONDENT

AND

CDF COMMITTEE RUARAKA CONSTITUENCY....INTERESTED PARTY

EX-PARTE

SAMSON RAGAMA T/A SACONE CONTRACTORS

JUDGMENT

1. Through the notice of motion application dated 30th June, 2014, the ex parte Applicant Samson Ragama T/a Sacone Contractors prays for an order of mandamus to compel the Respondent, the Cabinet Secretary in charge of the Ministry of Devolution and Planning to appoint an arbitration panel to consider the dispute between him and the former Kasarani Constituency CDF Committee. The Applicant also prays for costs. The CDF Committee, Ruaraka Constituency was on 3rd March, 2015 enjoined as an Interested Party in these proceedings.

2. In brief, through a letter dated 17th October, 2008, the former Kasarani CDF Committee offered the Applicant a contract for construction of Kasarani Girls High School for the sum of Kshs.38 million. A contract was signed on 20th October, 2008.

3. The school was to be constructed at Mathare North Ward within the former Kasarani Constituency. The construction was not completed following a dispute over the land on which the school was to be constructed.

4. It is the Applicant's case that he had moved into the site and expended some monies towards the execution of the contract but the former Kasarani Constituency Development Fund Committee refused to pay for the expenses he had incurred. It was then that he forwarded the matter to the Constituency

Development Fund Board (“the Board”) as per the provisions of Section 52(1) of the Constituency Development Fund Act, 2003 (“CDF Act, 2003”). The matter was heard on 20th December, 2012 and on 7th January, 2013 the Board issued a decision dismissing his claim.

5. It is the Applicant’s case that his advocates immediately wrote to the Respondent’s predecessor, namely the Minister for Planning, asking for constitution of an arbitration panel, as per Section 52(2) of the CDF Act, 2003, to look into the matter. According to the Applicant, the Respondent has failed, refused and or neglected to perform this statutory duty and that is why he seeks an order of mandamus to compel the Respondent to act.

6. Through grounds of opposition dated 29th April, 2015 the Respondent opposed the motion on the grounds that the application is defective, does not meet the basic tenets of a judicial review application, lacks merit and is an abuse of the court process. It is also the Respondent’s assertion that an order of mandamus is not efficacious in the circumstances of this case.

7. The Interested Party opposed the application through a replying affidavit sworn by its Secretary Mr. Peter Runkin on 20th March, 2015. Through the said affidavit, the Interested Party asserts that the dispute herein is between the Applicant and Kasarani Constituency Development Fund Committee and it has thus been wrongly enjoined in the matter.

8. The circumstances under which an order of mandamus will issue were well enunciated by the Court of Appeal in **Kenya National Examination Council v Republic ex-parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR** when it stated that:

“The next issue we must deal with is this: What is the scope and efficacy of an ORDER OF MANDAMUS? Once again we turn to HALSBURY’S LAW OF ENGLAND, 4th Edition Volume 1 at page 111 FROM PARAGRAPH 89. That learned treatise says:-

“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”

At paragraph 90 headed “the mandate” it is stated:

“The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”

What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.”

9. In short, an order of mandamus will issue to compel a public officer to perform a statutory duty which he/she has refused to perform to the detriment of an applicant.

10. The Applicant’s case is premised on Section 52 of the CDF Act, 2003. The relevant part of that Section provided that:

“52. Dispute resolution

(1) All complaints shall be forwarded to the Board.

(2) Disputes shall be referred to the Board in the first instance and where necessary an arbitration panel shall be appointed by the Minister who shall consider and determine the matter before the same is referred to court.

(3)”

11. The CDF Act, 2003 was repealed by Section 50 of the Constituencies Development Fund Act, 2013 (CDF Act, 2013).

12. According to Section 1 of the CDF Act, 2013, the Act was to **“come into operation immediately after the first elections for Parliament under the Constitution.”** Parliamentary elections under the 2010 Constitution were held in March, 2013. The Applicant’s chamber summons application for leave was filed on 9th June, 2014 and leave to commence these proceedings was given on the same date. That means that at the time the Applicant filed his case, the same was premised on an Act of Parliament which was no longer in existence, the same having been repealed in March, 2013. There is therefore no statutory basis for compelling the Minister to appoint an arbitration panel as prayed by the Applicant.

13. The Applicant’s application should therefore fail at this stage. However, assuming the Applicant had moved the court under the correct law, his application would have been premised on Section 49 the CDF Act, 2013.

14. For record purposes, I must state that I am aware that this Court (Lenaola, Ngugi & Majanja, JJ) in a judgement delivered on 20th February, 2015 in the case of **Institute of Social Accountability & another v National Assembly & 4 others [2015] eKLR** invalidated the CDF Act, 2013 for being unconstitutional. The order of invalidation was, however, suspended for twelve months and as of now the said Act still remains in force.

14. Section 49 of the CDF Act, 2013 states:

“49. (1) All complaints and disputes by persons arising due to the administration of this Act shall be forwarded to the Board in the first instance.

(2) Complaints of a criminal nature shall be forwarded by the Board to the relevant government agencies with prosecutorial powers.

(3) Disputes of a civil nature shall be referred to the Board in the first instance and where necessary an arbitration panel whose costs shall be borne by the parties to the dispute, shall be appointed by consensus of the parties to consider and determine the matter before the same is referred to court.

(4) Notwithstanding subsection (3), parties shall be at liberty to jointly appoint an arbitrator of their choice in the event of a dispute but where parties fail to jointly agree on an arbitrator, the Cabinet Secretary may appoint an arbitrator whose costs shall be jointly borne by the parties.

(5)....”

15. A reading of the cited Section shows that disputes of a civil nature shall be referred to the Board in the first instance and where necessary an arbitration panel shall be appointed by consensus of the parties to consider and determine the matter before the same is referred to court. Sub-section (4) provides that where the parties to a dispute fail to agree on an arbitrator, the Cabinet Secretary may appoint an arbitrator.

16. From the facts placed before the Court it is apparent that the Applicant has not complied with Section 49 of the CDF Act, 2013. The Cabinet Secretary cannot therefore be compelled to appoint an arbitrator as there is no evidence that the parties have attempted to appoint an arbitration panel through consensus. It is only after the parties to a dispute fail to appoint an arbitration panel that they can ask the Cabinet Secretary to exercise his/her discretion to appoint an arbitrator for them. Before the parties have explored the possibility of appointing an arbitration panel, no duty lies upon the Cabinet Secretary to consider appointing an arbitrator.

17. I have not considered the Interested Party's assertion that it is not the proper party in this matter. That is an issue to be dealt with by an arbitration panel if such a panel will eventually be appointed.

18. For the reasons above stated I find that the Applicant has not met the conditions for the issuance of an order of mandamus against the Respondent. His application therefore fails and the same is dismissed. There will be no order as to costs.

Dated, signed and delivered at Nairobi this 22nd day of Oct., 2015.

W. KORIR,

JUDGE OF THE HIGH COURT