

REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Application 446 of 2012

AVTECH SYSTEMS LIMITED PETITIONER

AND

MINISTRY OF PUBLIC WORKS 1ST RESPONDENT

PARLIAMENTARY SERVICE COMMISSION 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

RULING

1. The Chamber Summons before the Court is dated 17th December 2012 and it is made under **Order 53 rule 1 and 2** of the **Civil Procedure Rules**. The *ex-parte* applicant seeks leave to institute judicial review proceedings being orders of certiorari to quash the decision of the Ministry of Public Works to leave it out of the list of contractors to be paid out on account of a contract No. WP ITEM D29 JOB No. 0284AS, Modernisation and Refurbishment of the National Assembly Chamber of Kenya. The *ex-parte* applicant also seeks orders of prohibition to restrain payment of the other contractors and an order of mandamus compelling the Ministry to effect payment.
2. When this matter first came up on 27th December 2012, I directed the *ex-parte* applicant to furnish the court with a further affidavit setting out the nature of the contract between the parties as this was the basis of the relationship between the parties and the foundation of the *ex-parte* applicant's case. The *ex-parte* applicant has now furnished a copy of the subject contract and it is one dated 28th June 2010. According to the contract, the *ex-parte* applicant is a sub-contractor of the EPCO Builders Limited and it is subcontracted to supply, install and commission multi-media digital congress network and associated services.
3. The gravamen of the *ex-parte* applicant's case is that it has been left out the list of payments for work done on account of the said contract despite having carried out the work.
4. The question whether I should grant leave is a matter of discretion and the court should grant leave where the *ex-parte* applicant demonstrates that it has an arguable case. Other factors the court is entitled to consider is whether there exists an alternative remedy.
5. I have perused the contract, it is in the form of a Standard Agreement and conditions of subcontract for Building Works prepared by the Kenya Association of Building and Civil Engineering Contractors. It contains a dispute resolution clause at page 18 – Clause 31.0 which lays down an elaborate procedure for the resolution of disputes including disputes where payments has not been effected. Arbitration is an effective means of enforcing contractual rights and there is no reason why the public law remedies should be invoked when no attempt has even been made to invoke contractual provisions.
6. I am also guided by the Court of Appeal decision in ***The Staff, Disciplinary Committee of Maseno University and Others v Prof. Ochong' Okello Kisumu CA Civil Appeal No. 182 of 2004 (Unreported) [2012] eKLR*** where the Court held that contractual matters, which are matters of private law, should not be enforced through proceedings for judicial review.

7. In the circumstances, the Chamber Summons dated 17th December 2012 lacks merit. Leave to commence judicial review is rejected and the application is dismissed with costs to the respondents.

DATED and **DELIVERED** at **NAIROBI** this 4th day of January 2013

D.S. MAJANJA

JUDGE

Mr Owuor instructed by Masika and Koross Advocates for the ex-parte applicant.

Mr Mwendwa, Advocate instructed by the 2nd respondent.

Mr Wanga, Litigation Counsel, instructed by the 1st and 3rd respondents.