



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

Miscellaneous Civil Application 57 of 2011

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW IN THE NATURE OF MANDAMUS

AND

IN THE MATTER OF CONSTITUENCIES DEVELOPMENT FUND ACT NO. 10 OF 2003

AND

IN THE MATTER OF THE CIVIL PROCEDURE RULES, 2010 LAWS OF KENYA

AND

IN THE MATTER OF THE CONSTITUENCIES DEVELOPMENT FUND BOARD

AND

IN THE MATTER OF WEST MUGIRANGO CONSTITUENCY DEVELOPMENT FUND COMMITTEE

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE CONSTITUENCY DEVELOPMENT BOARD.....1ST RESPONDENT

THE WEST MUGIRANGO CONSTITUENCY

DEVELOPMENT FUND COMMITTEE.....2ND RESPONDENT

EX-PARTE.....HEARP CONSTRUCTION WORKS LIMITED

RULING

The 2nd respondent has filed an application dated 28th July, 2011 seeking orders that:

- i. *Stay of execution of the orders of this Honorable Court issued on 18/7/2011;*

ii. *The Court Order issued on 18/7/2011 be set aside;*

iii. *Costs of the application*

The application is premised on the grounds *inter-alia* that on 18th July 2011 this Honorable Court issued an order of Judicial Review in the nature of mandamus compelling the respondents to release in full payment the entire Kshs. 665,927/= being the first interim payment (certificate 1) owing to the *ex-parte* applicant and an order of Judicial Review in the nature of mandamus compelling the respondents to cause full payment of Kshs.2,476,200/- being the contract sum less payment for 1st certificate owing to the *ex-parte* applicant due to breach of the contract by the respondents.

It is the respondent's contention that the *ex-parte* applicant sought to enforce a contract by way of Judicial Review and therefore the court lacked jurisdiction to grant the orders in the said application. That the orders were obtained in abuse of the court process by seeking the enforcement of a civil debt out of an alleged breach of contract through an application for prerogative orders. That the *ex-parte* applicant is guilty of material non-disclosure and outright concealment of material facts ancillary to the performance of the contract in issue and pending complaints and legal proceedings.

The 2nd respondent's application is supported by a Supporting Affidavit sworn on 28/7/2011 by **Evans Onduko Oire** who depones that he is the Chairman of West Mugirango Constituency Development Fund Committee of West Mugirango Constituency.

The *ex-parte* applicant filed a Replying Affidavit sworn on 15th September, 2011 by **Henry Atunga Obisa** who deponed that he was the Managing Director of the *ex-parte* applicant Company. He depones that the instant application lacks merit and should be dismissed for reason that the deponent's selection as chairman was illegal and so declared by the High Court in Misc. (Nrb.) Civil Application No.264 of 2004. That an order of Judicial Review in the nature of mandamus is to compel the Respondents (applicant herein) to release, in full payment, the amounts owing to the *ex-parte* applicant company.

This application came up for hearing on 21st September, 2011 when counsel for both parties consented that the motion be canvassed by way of written submissions. Parties filed and exchanged submissions which I have read and considered along with the authorities attached thereto.

The genesis of this matter was an application for leave to bring Judicial Review application sought by the *ex-parte* applicant Company. Leave was obtained on 30th June, 2011. The *ex-parte* applicant was directed to serve the motion upon the respondents. When the application came up for hearing on 18th July, 2011, there was no appearance from the respondents, neither had they responded to the application though duly served. The application therefore stood unopposed and the court allowed it. The *ex-parte* applicant satisfied the court that the respondents had been duly served. The court considered the application unopposed and granted prayers 2, 3 and 4 in the Notice of Motion. The prayers were namely:

2. *That the honourable court be pleased to grant an order of Judicial review in the nature of mandamus to issue compelling the respondents to release, in full payment, the entire kshs. 665,927 being first interim payment (certificate 1) owing to the exparte applicant.*

3. *That the honourable court be pleased to grant an order of Judicial Review in the nature of mandamus to issue compelling the respondents to cause full payment of kshs. 2,476,200 being the contract sum (less payment for 1st certificate) owing to the exparte applicant due to the breach of the contract by the respondents.*

4. *That the exparte applicant be at liberty to apply to the honourable court for all necessary and/or consequential orders that the honourable court may deem fit and just to grant.*

The main question for determination is whether this court has jurisdiction to set aside the Judicial Review order of Mandamus granted by this Court on 18th July, 2011.

The 2nd respondent (applicant herein) has argued that this court under its inherent power has jurisdiction to set aside or review any order including orders granted in Judicial Review. It quoted a number of authorities in support of its arguments **Kenya Bus Services Limited & 2 Others – Vs – AG and the Minister for Transport & 220 Others H.C Misc. Application No. 413/2005; R – Vs – Director of Pensions Ex-parte Charles Wanjohi Mwangi (2005) eKLR; R – Vs – Registrar of Societies ex-parte Justus Nyagaya & 3 others (2005) eKLR**

In his submissions, the applicant (respondent herein) submitted that this court has no jurisdiction to hear or deal with a Judicial Review matter where orders have been granted, and that the only avenue remaining for the 2nd respondent (applicant herein) is an appeal to the Court of Appeal. He referred this court to Section 8(3) of the **Law Reform Act** and quoted the case of **R -Vs- Minister for Local Government & Another Ex-parte Mwahima (No.2) Mombasa H.C Misc. Civil Application No. 149 of 2002 KLR Pg. 574.**

These divergent views were findings of Honorable Judges of concurrent jurisdiction with this court. These authorities which I have considered are therefore not binding but persuasive.

It is true that this court has inherent jurisdiction to protect its judicial functions of administering justice according to the law, however judicial review proceedings are governed by specific provisions of law that is Section 8 and 9 **Law Reform Act** and Order 53 **Civil Procedure Rules**. The court cannot invoke its inherent jurisdiction to set aside a final order of *Mandamus*. Section 8(5) **Law Reform Act** is very clear. Any person aggrieved by an order made by the High Court in exercise of its civil jurisdiction under Section 8(1) shall appeal against the same.

This view was also held by the judges sitting in **Methangathia and 4 others vs District Land Adjudication and Settlement Officer Meru North Nyambene District and 3 others (2000) KLR. 500** who held that the High court has no jurisdiction to stay, arrest, recall, review, set aside or quash a prerogative order which has already been made or granted. Such an order is final and subject only of the right of appeal.

Notwithstanding the fact that the instant Judicial Review was not determined on merits and that the matter is of significant public interest, I hold the view that this court's hands are tied and that the orders sought herein can only be sought in the Court of Appeal.

The application is therefore dismissed with costs.

Judgment dated, signed and delivered at Kisii this 21st day of September, 2012.

R. LAGAT-KORIR
JUDGE

In the presence of:

..... for applicant

..... for respondent

..... court clerk

R. LAGAT-KORIR
JUDGE