REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS APPLICATION NO. 160 OF 2010

IN THE MATTER OF AN APPLICATION BY G. ISSAIAS & COMPANY (KENYA) LIMITED

IN THE MATTER OF AN APPLICATION BY G. ISSAIAS & COMPANY (KENYA) LIMITED FOR LEAVE TO APPLY FOR

ORDERS OF CERTIORARI AND MANDAMUS

AND

IN THE MATTER OF THE PERMANENT SECRETARY MINISTRY OF FINANCE REPUBLIC OF KENYA

(PURSUANT TO ORDER LIII RULE 1(3) OF THE CIVIL PROCEDURE RULES)

G. ISSAIAS & COMPANY (KENYA) LIMITED.....
APPLICANT
THE PERMANENT SECRETARY MINISTRY OF FINANCE.....RESPONDENT

RULING

The applicant's application dated 10th May, 2010 seeks the following orders:

"(a) An order of certiorari to quash the Respondent's decision on 22nd October, 2009 purporting to conclusively assess the applicant's bill ("the bill") in respect of the project contract Number RD 0330 with the Ministry of Roads and Public Works ("the contract") as not payable and the applicant owed Kshs.38,888,751.63 to the contractor.

(b) An order of mandamus to compel the Respondent to pay the bill which as at 23rd November, 2009 stood at Kshs.127,951,918.00."

The application was supported by an affidavit sworn by **Nicholas Zannetos**, a Director of the applicant. The facts therein may be summarized as hereunder:

Sometimes in 1997 the applicant was contracted by the contractor to undertake the repair and resealing of **Timboroa-Miteitei Songor-Awasi Road** under Contract No. RD 0330. The applicant undertook and completed the said project and presented to the contractor its bill. The contractor never contested any item of the bill. The contractor passed on the bill to the Respondent for payment.

A Pending Bills Committee was set up to review the bill alongside other bills that had been presented to the contractor for payment by other contractors.

On 22nd October, 2009 the Respondent, acting on advice of the said Committee, decided that the applicant's bill was conclusively not payable. The applicant contended that there was no criteria used to evaluate the bill. The applicant attacked the said decision saying that:

(i) it was not afforded an opportunity to be heard.

(ii) no reason was given for the said decision.

(iii) the decision is manifestly unreasonable as there is no dispute between the parties to the contact that the bill is payable.

(iv) in making the decision complained against the respondent assumed the role of an adjudicator which is in breach of the principle of natural justice that no one can be adjudicator in his own cause.

(v) the respondent's decision was made without jurisdiction as the respondent was not a party to the contract.

The respondent opposed the applicant's application and filed a ground of opposition stating that:

"the subject matter, the substratum of these proceedings is contractual hence not amenable to Public law reliefs and/or orders of Judicial Review."

In his brief submissions, **Mr. Ogunde** for the applicant stated that the Pending Bills Committee was a quasi-judicial body and therefore its decision is amenable to an order of certiorari. He cited the decision of Wendo J in **G. ISSAIS CO. (KENYA) vs THE PERMANENT SECRETARY, MINISTRY OF FINANCE & ANOTHER MISC. APPLICATION NO. 29 OF 2008,** where the court quashed a similar decision that had been made in respect of another bill of the same applicant as herein.

Mr. Bosire for the respondent supported the aforesaid ground of opposition by citing the Court of Appeal decision in **ZAKHEM CONSTRUCTION (KENYA) LTD vs PERMANENT SECRETARY,**

MINISTRY OF ROADS & PUBLIC WORKS & ANOTHER, Civil Appeal No. 244 of 2006.

In the case that gave rise to the said appeal, the appellant had filed an application seeking leave to apply for an order of certiorari to quash a termination notice that had been served upon her in respect of a certain road project. Emukule J refused to grant leave saying that the application did not lie in judicial review but in contract. On appeal against that decision, the Court of Appeal upheld the High Court decision and held, *inter alia*:

"If the Appellant thought the Respondent was in breach of the contract by issuing the notice of intention to terminate, the Appellant's remedy did not lie in public law; the remedy lay in private law where the Appellant could be awarded damages if it proved that the contract was unlawfully terminated."

Mr. Bosire further submitted that the contract between itself and the contractor had an arbitration clause and the applicant ought therefore to have referred the matter to arbitration.

The Pending Bills Committee was acting as a quasi-judicial Committee when it was scrutinizing the applicant's bill, among others. The Committee did not afford the applicant opportunity to commend on its bill before it reached a decision that the same was not payable. There was no dispute between the applicant and the contractor as to whether the applicant's bill was payable. Even if for any reason the bill was not payable the least the Committee could have done was to ask the applicant to make its representations on the bill before a decision was made on the same. The right to be heard before a decision affecting one's rights is arrived at is a fundamental one in application of the rules of natural justice. See **RIDGE v BALDWIN [1964] A.C. 40.**

Secondly, no reasons were given for the impugned decision. The duty to give reasons for important decisions has been emphasized in several decisions. In **PADFIELD vs THE MINISTER FOR AGRICULTURE, FISHERIS & FOOD, [1968] AC 997**, Lord Reid said:

"I cannot agree that a decision cannot be questioned if no reasons are given."

Article 47(2) of the **Constitution of Kenya, 2010** states that:

"If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given reasons for the action."

I would also agree with the applicant that the decision was unreasonable and was made without jurisdiction. In **ATTORNEY-GENERAL vs RYAN [1980] A.C. 718**, it was held that:

"It has long been settled law that a decision affecting the legal rights of an individual which is arrived at by procedure which offends against the principles of natural justice is outside the jurisdiction of the decision making authority."

The decision complained of was made by an entity that was not a party to the contract and neither was the said Committee an arbitrator. While I agree that the Permanent Secretary in the Ministry of Finance is a party to all contracts signed by any Ministry, it cannot be denied that the decisions of the Committee were

made arbitrarily and without any representations by the applicant.

Turning to Mr. Bosire's argument that the substratum of those proceedings is a contract and therefore not amenable to orders of judicial review, my view is that the parties to the contract were not directly involved in this dispute. If the dispute was between the applicant and the contractor as to the amount payable or regarding any act of breach of contract, I would have had no difficult in agreeing with Mr. Bosire's submission. But the facts herein are different and that is why I believe the case of **ZAKHEM CONSTRUCTION (KENYA) LTD vs PERMANENT SECRETARY, MINISTRY OF ROADS & PUBLIC WORKS (Supra)** is distinguishable. The contract was fully performed and a final bill presented for payment in terms of the contract. The contractor did not dispute the bill. If for any reason the bill was inflated or not payable the matter ought to have been brought to the applicant's attention for discussion and if no agreement was reached then refer the dispute to an arbitrator.

In view of the foregoing, I am satisfied that the decision is amenable to an order of certiorari to quash the same which is hereby granted as prayed.

As regards the prayer for mandamus to compel the respondent to pay the said bill, a mandamus can only issue where it is demonstrated that there is a duty of a public or quasi-public nature or a statutory duty which the respondent has failed to perform and the court has therefore to compel the respondent to perform. It has been said that mandamus deals with wrongful inaction in respect of public duties. Like other prerogative remedies, it is a discretionary remedy and the court has full discretion to withhold it in unsuitable cases. In **ADMINISTRATIVE LAW**, H.W.R. Wade & C.F. Forsyth, Ninth Edition at Page 619, the learned authors state:

"**It may therefore be refused to an applicant who has been guilty of undue delay, as where nine years were allowed to elapse before claiming a refund on tax. It may also be refused where a public authority has done all that it reasonably can to fulfill its duty, or where the remedy is unnecessary, as where a tribunal undertakes to rehear the case according to law after its decision was quashed. …..The court always retains discretion to withhold the remedy where it would not be in the interests of justice to grant it."**

There are instances in which a defective decision may be quashed by an order of certiorari but an order of mandamus may not be granted, even it if is related to the decision quashed.

The contract that is the subject matter of this dispute was entered into sometimes in April 1997 and work commenced in July 1997. The completion date was scheduled to be 2nd January, 1999 but the work was suspended from 8th May, 1998 to 24th January, 2000. The initial tender sum was Kshs.319,999,920/= but the scope of work was revised. The revised contract sum was Kshs.802,408,929/=. The revised completion date was 31st July 2002. However, the substantial completion date was 31st August, 2003. The sum now being claimed is in respect of cost of suspension of the work in terms of Clause 69.4 of the Conditions of Contract, Part I.

Ordinarily, the prerogative order of mandamus is not available where the law provides some other adequate remedy. There is no explanation as to why the applicant did not move to court and file an ordinary civil suit for recovery of any sum that was believed to be due and payable. That would have afforded the respondent an opportunity to file a defence, if any, so that the matter is determined on its merits. If there was a decree that is not subject to any appeal the court would have no difficult in compelling the respondent, by way of an order of mandamus, to satisfy the decree but that is not the case. If this court were to grant prayer (b) of the application in the absence of any decree, that would be tantamount to determining the merits of the applicant's claim regarding the amount of money payable. I say so because the respondent is the one responsible for paying any money that may be payable. That is outside the province of judicial review proceedings.

Whereas it is clear to me that it is a breach of the rules of natural justice for the respondent to simply state that no money is payable to the applicant without giving it an opportunity to be heard, the court cannot order the respondent to pay Kshs.127,951,918/= unless that claim has been established vide a civil suit and a decree to that effect issued.

Consequently, I refuse to grant prayer (b) of the applicant's application. The applicant will be entitled to one half of the costs of the application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4TH DAY OF JULY, 2011.

D. MUSINGA

JUDGE

In the presence of:

Nazi – Court Clerk

Mr. Ogunde for the applicant

No appearance for the Respondent