



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISCELLANEOUS CIVIL APPLICATION 487 OF 2008**

**IN THE MATTER OF AN APPLICATION BY VIHIGA MAGHARIBI ENTEPRISES**

**FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

**AND**

**IN THE MATTER OF CONTRACT NUMBER MCV/LATF/20060/01**

**AND**

**IN THE MATTER OF LOCAL GOVERNMENT ACT**

**AND**

**IN THE MATTER OF**

**REPUBLIC..... APPLICANT**

**VERSUS**

**THE TOWN CLERK, VIHIGA MUNICIPAL COUNCIL..... RESPONDENT**

**EX-PARTE VIHIGA MAGHARIBI ENTERPRISES**

**R U L I N G**

Before me is a Notice of Motion dated 25<sup>th</sup> August, 2008 filed by Kwengu & Company advocates for the ex parte applicant Vihiga Magharibi Enterprises. The respondent is named as **THE TOWN CLERK, VIHIGA MUNICIPAL COUNCIL**.

The application was filed on 26<sup>th</sup> August, 2008 under Order LIII Rules 1, 2 and 3 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act (Cap. 21). The orders sought are as follows-

- 1. An order of mandamus to compel the Town Clerk, Vihiga Municipal Council to pay the applicant the sum of Kenya shillings six hundred thousand only being the contract sum in contract Number MCV/LATF/2006/2007.**
- 2. An order of mandamus to compel the Town Clerk, Vihiga Municipal Council to honour the terms**

**of contract Number CU/LATF/2006/2007.**

The application is grounded on the **STATEMENT** dated 13<sup>th</sup> August, 2008 filed with the Chamber Summons for leave as well as the **VERIFYING AFFIDAVIT** sworn by **HENRY ANGOWA AMBENGE**, the proprietor of the applicant partnership on 13<sup>th</sup> August, 2003, also filed with the Chamber Summons for leave. The contention is that the applicant was awarded by the **VIHIGA MUNICIPAL COUNCIL** a contract to rehabilitate a road and completed the work on 22<sup>nd</sup> March, 2007; that when approached to pay the **COUNCIL** refused to pay for the work on the allegation that the contract was illegally awarded; that the **TOWN CLERK** acted ultra vires in refusing to pay, among other reasons.

The application was opposed and a replying affidavit sworn by **LESLEY A. KHAYADI** the Town Clerk on 3<sup>rd</sup> September, 2008 was filed. It was deponed in the affidavit, inter alia, that the tender was not awarded in accordance with the Public Procurement and Disposal Act 2005; that the alleged tender was awarded vide a letter dated 22<sup>nd</sup> February, 2007 signed by **DISMAS MABELE** who did not have authority to do sign the said letter; that this being a dispute on award of a contract, it is not a matter that can be solved through the judicial review reliefs.

On the hearing date, Mr. Kwengu appeared for the ex parte applicant, and nobody appeared for the respondent.

This application will fail. Judicial review reliefs and jurisdiction can only be invoked in the case of a public official or institution failing to perform a public duty either at common law or under statute. It does not apply to private contracts, and certainly not to the merits as to whether the contract is enforceable or the contractual amount is payable or not – See **MEIXNER –VS- AG [2004] 2 KLR 189** at page 194 where the Court of Appeal stated-

***“As the learned Judge correctly stated, judicial review is concerned with the decision making process and not with the merits of a decision itself. Judicial review deals with the legality of decisions of bodies or persons whose decisions are susceptible to judicial review.”***

Our present case resolves around the validity and alleged breach of a contract for construction or repair of a road and failure to pay the alleged contractual sum, not a complaint on a failure by a public official to comply with requirements of discharging a public duty. That is a matter for the civil court, and the applicant is better advised to approach the civil court for remedies, if any. Judicial review remedies are limited to certiorari, mandamus and prohibition, which are public law remedies, and do not cover enforcement of private contracts.

I find and hold that the judicial review court cannot entertain this application and grant judicial review reliefs. I will therefore disallow the application.

Consequently, the Notice of Motion herein is dismissed.

Parties to bear their own costs, as respondents did not appear at the hearing.

Dated and delivered at Nairobi this 22<sup>nd</sup> day of June, 2009

**GEORGE DULU**

**JUDGE.**