



**Republic v Alupe University College; Mowens Agencies Limited (Exparte) (Miscellaneous
Judicial Review E006 of 2021) [2023] KEHC 3840 (KLR) (4 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 3840 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
MISCELLANEOUS JUDICIAL REVIEW E006 OF 2021**

WM MUSYOKA, J

MAY 4, 2023

BETWEEN

REPUBLIC APPLICANT

AND

ALUPE UNIVERSITY COLLEGE RESPONDENT

AND

MOWENS AGENCIES LIMITED EXPARTE

JUDGMENT

1. These judicial review proceedings were initiated on January 4, 2022, by way of an ex parte Chamber Summons, dated December 7, 2021, for leave to institute judicial review proceedings for an order of mandamus, to compel the respondent, to pay to the *ex parte* applicant, a sum of Kshs. 2, 234, 540.00, being due and owing, subsequent to completion of works, the subject of a tender. The ex parte application was placed before the Judge, on March 9, 2022, and was allowed. It was directed that the substantive Motion be filed and served within 21 days. The substantive Motion was filed on March 23, 2022, dated March 18, 2022.
2. The factual background is set out in the statutory statement, and the verifying affidavit, by Michael Okoth Abuto, sworn on December 7, 2021. The respondent and the ex parte applicant had entered into a contract, by way of tender, for construction works for laboratories, lecture rooms and associated works. The ex parte applicant performed the works as per the contract, and submitted a claim for Kshs. 31, 120, 050.00 for the works done. Out of the sums claimed, the respondent paid Kshs. 28, 885, 510.00, and declined to pay Kshs. 2, 234, 540.00, arguing that the contract price could not be varied upwards, 12 months from the date of signing. The ex parte applicant asserts entitlement to the sum of Kshs. 2, 234, 540.00, arguing that it was not a contract price variation as contended, but an over expenditure above the contract price.



3. A number of documents are attached to the verifying affidavit, to support the case by the *ex parte* applicant. There is a copy of the contract or agreement, executed by the parties on February 27, 2020, showing the contract price as Kshs. 28, 885, 510.00. There are several copies of documents showing the value of the works done, shown as Kshs. 31, 120, 050.00; the sum paid, shown as Kshs. 28, 885, 510.00; and the amount outstanding, shown as Kshs. 2, 234, 540.00. Finally, there is a demand letter, dated 14th October 2021, from the Advocates for the *ex parte* applicant, addressed to the respondent, for the sum of Kshs. 2, 234, 540.00.
4. The respondent, upon being served, filed grounds of opposition, on May 10, 2022, dated May 5, 2022. It is argued that leave to bring the Motion was not obtained; the court lacks jurisdiction as the transaction, the subject of the application, was subject to an arbitration clause; and the proceedings ought to be terminated, and referred to arbitration, in accordance with the provisions of the [Arbitration Act](#), No. 4 of 1995, Laws of Kenya.
5. Directions were given, on May 10, 2022, for canvassing of the Motion, by way of written submissions. Both sides have filed written submissions, supported by caselaw. I have perused through the written submissions, and the supporting authorities, and I have noted the arguments made.
6. Let me take the issue of jurisdiction first, for, going by *The Owners of Motor Vessel "Lillian S" v Caltex Oil Kenya Limited* (1989) KLR 1 (Nyarangi, Masime & Kwach, JJA), jurisdiction is everything, and determination of the question of jurisdiction may finally dispose of the Motion, without having to advert to its merits. It has been submitted that I have no jurisdiction to handle the matter, as there was an arbitration clause in the subject contract, which necessitated that the matter be referred to an arbitrator. The documents placed on record, by the *ex parte* applicant, by way of evidence to support its case, do not bear the arbitration clause that the respondent refers to, and the respondent did not file any evidence. There is no proof, therefore, that the contract herein was subject to an arbitration clause, which ousts the jurisdiction of the court.
7. The sum of Kshs. 2, 234, 540.00 is contested. The *ex parte* applicant claims entitlement to it, on the basis that it was an over expenditure on the contracted works. The respondent disputes it, saying that it was an illegitimate variation of the contract. The amount that was in the contract document, the contract price, that is to say Kshs. 28, 885, 510.00, was settled, and there is no dispute about it. The Motion before me seeks to have me order the respondent to pay a sum that is disputed. I doubt that I have jurisdiction to do that through judicial review proceedings.
8. It was said, in [Republic v National Housing Corporation & 2 others ex parte Gitonga Akotha & 2 others](#) [2021] eKLR (Bor, J), that parties ought not bring judicial review proceedings to enforce terms of a contract, they should, instead, file ordinary suits for that purpose. Similarly, it was said, in [Adopt-A-Light Ltd v City Council of Nairobi](#) [2007] eKLR (Wendoh, J), that a contested contract must be resolved first in a civil suit or by arbitration, instead of through judicial review proceedings. It was asserted that the validity and enforceability of a contract is a matter for resolution in civil proceedings, and not in judicial review proceedings. That was echoed, in [Republic v Town Clerk, Vihiga Municipal Council ex parte Vihiga Magharibi Enterprises](#) [2009] eKLR (Dulu, J), to the effect that judicial review reliefs and jurisdiction are invoked where a public official or institution fails to perform a public duty at common law or under statute, and that the same does not apply to private contracts, neither does it apply to merits as to whether a contract is enforceable or a contractual amount is payable.
9. There is a dispute as to whether the amount of Kshs. 2, 234, 540.00 is payable or not. The dispute is on whether the same is part of the contracted amount. It is a question as to whether the contract is enforceable against the respondent, with respect to that sum. I cannot resolve that dispute here, the same belongs to the civil court, not the judicial review bench. The respondent cannot be compelled



to pay an amount of money that it is disputing. It has to be established, in the first place, that the respondent owes that amount to the ex parte applicant, and is bound to pay it, before it can be compelled to pay. The jurisdiction, to determine whether an amount of money is owing, does not lie in judicial review proceedings, but in an ordinary civil case, or arbitration, if the dispute is subject to that nature of proceedings.

10. In view of the above, there is no merit in the Motion, dated March 18, 2022, and I hereby dismiss it, with costs.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 4TH DAY OF MAY 2023
W MUSYOKA**

JUDGE

Mr. Arthur Etyang, Court Assistant.

Appearances

Mr. Ayisi, instructed by Namasaka & Kariuki, Advocates for the ex parte applicant.

Mr. Kibe, instructed by Akide & Company, Advocates for the respondent.

