



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL MISC. APPLICATION NO. 761 OF 2007

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW BY

WAY OF AN ORDER OF MANDAMUS

REPUBLIC.....APPLICANT

VERSUS

THE ATTORNEY GENERAL.....RESPONDENT

EX PARTE

SHIV CONSTRUCTION COMPANY LIMITED

RULING

1. The Notice of Motion dated 13th November, 2015 seeks orders that:-

a. An order of Mandamus directed against the Principal Secretary, Ministry of Health, through the Honourable Attorney General requiring him to pay to the Applicant the sum of Kshs.4,347,582.10/= with interest thereon at the rate of 12% per annum plus other costs incurred by the Applicant from 12th April 2007 upto and including 6th day of June 2007.

b. The Honourable Court be pleased to give further Orders and Directions as it deems fit and just to grant.

c. The costs of this application be provided for.

2. According to the statement of facts and the verifying affidavit, the *ex parte* Applicant (hereinafter Applicant), **SHIV CONSTRUCTION COMPANY LTD** entered into an agreement on 13th May 1998 with the Ministry of Health for the construction of a Health centre at SIMOTWO in Keiyo District on behalf of the Ministry of Health. That the Respondent agreed to pay the sum of Kshs.9,500,000/= to the Applicant for the construction works. That in the course of the construction works the Applicant was issued with two certificates for the sum of Ksh.7,745,310/=. The Applicant was not paid the said sum of money and suspended the construction works but remained on the site and requested the Respondent to take over the site.

3. The dispute between the Applicant and the Respondent was subsequently referred to arbitration. The

dispute was heard and determined and Awards made on 28th July 2005, 25th October 2005 and 28th September 2006. The Awards were subsequently adopted as a decree of the court. That the Respondent failed to satisfy the Awards and the Applicant moved to court to seek an order of Mandamus vide Notice of Motion dated 27th August 2007 to compel the Principal Secretary at the Ministry of Health to make good the payment. The Applicant informed the Respondent vide letter dated 14th February 2008 that the total claim was Ksh.16,767,485.08/= which was inclusive of Ksh.4,347,582.10 being additional costs incurred during the two year period that the Respondent had failed to take possession of the site. It is stated that the said costs were for keeping a watchman and a foreman on site.

4. It is further stated that the Respondent paid the Applicant's claim but failed to pay the additional costs of Ksh.4,347,582.10. That is what triggered the filing of the application at hand. According to the Applicant, the sum of Ksh.4,347,582.10 was part and parcel of the Arbitration Award as per paragraph No. 18.4 of the Award dated 28th July 2005.

5. The application is opposed. According to the replying affidavit, the total Award in favour of the Applicant was for a total sum of Ksh.7,420,247.95. That the Arbitrator later published a supplementary Award to factor in Value Added Tax (VAT) which increased the total amount payable to Kshs.8,607,487.60. Subsequently, an amended Award of costs was published by the Arbitrator at Ksh.747,056/=. That on 14th March 2007 all the aforesaid Awards were adopted as a judgment of the court and a decree issued for the sum of Ksh.10,307,659.86/=.

6. That on 12th November 2008, the court issued an order of Mandamus compelling the Principal Secretary Ministry of Public Health and sanitation to pay the sum of Ksh.10,367,659.86 with simple interest on the principal sum at 12% per annum from 12th April 2007. That the Respondent complied with the said order of Mandamus and paid the Applicant the sum of Kshs.13,141,838.10/= in full and final settlement.

7. According to the Respondent, the claim for Ksh.4,347,582.10/= consists of a new dispute as the same did not form part of the Arbitration Award. That the dispute on further costs as a result of the delay in taking over the site was never heard and determined by the Arbitrator since the said dispute arose after the Award had been published. It is further deponed that the claim of Ksh.4,347,582.10 was not included in the decree issued by the court on 14th March 2007.

8. During the hearing of the application, the parties opted to proceed by way of written submissions.

9. In the said submissions, the Applicant identified the sole issue for the court to determine as whether the sum of Ksh.4,347,582.10 is payable to the Applicant. It is argued that the court granted the application made on 12th March 2009 wherein the Applicant prayed that the Respondent do pay the costs of Ksh.4,347,582.10. On the other hand the Respondent's argument is that the claim of Ksh.4,347,582.10 has not been determined nor the Applicant furnished any proof in support of the said claim. That the Arbitration Tribunal did not quantify the delay period nor award the Applicant any special damages in the sum of Ksh.4,347,582.10. According to the Respondent the claim for Ksh.4,347,582.10 is a new claim which was not specifically pleaded and proved before the Arbitration Tribunal and which was not awarded.

10. The Applicant has exhibited a copy of a decree given on 14th March 2007 and issued on 25th April, 2007 (annexture "JKK-3") which reflects the following orders:-

1. THAT the Respondent do pay the Applicant the sum of Kshs.10,367,659.86 as more particularly set forth hereunder together with interest thereon at the rate of 12% per annum from 12th April, 2007 until payment in full.

2. THAT costs of the Arbitration assessed at Kshs.747,056.00 be paid by the Respondent to the Applicant within 60 days from the 22nd August 2006 in default the same will attract interest at 12%

annum on simple rate basis until payment in full.

11. It is not in dispute that the Respondent has paid the Applicant the amount stated in the said decree. The sum of Ksh.4,347,582.10 is not reflected in the aforesaid decree. There is no document exhibited by the Applicant that reflects any determination in respect of the sum of Ksh.4,347,582.10. The proceedings herein reflect that the application dated 12th March 2009 was heard ex parte on 16th June 2009 and was allowed in terms of prayers 1, 2, and 3. The only application on record dated 12th March 2009 is an ex parte Chamber Summons which sought the following orders:-

1. THAT the Applicant be granted leave to apply for an order that the Permanent Secretaries in the Ministry of Public Health and Sanitation and the Ministry of Medical Services be committed for contempt of the order of mandamus made by Hon. Mr. Justice Dulu on 18th July 2008 herein.

2. THAT the Applicant be granted to apply for order of sequestration that the properties of the Permanent Secretaries in the Ministry of Public Health and Sanitation and the Ministry of Medical Services be attached pending the purging of the contempt or in the alternative that the said Permanent Secretaries be arrested and committed to civil jail until they purge the contempt.

3. THAT costs provided for.

12. The above Application does not reflect the position put forward by the Applicant. The Applicant has not exhibited any application with prayers for the payment of Ksh.4,347,582.10 which it claims was allowed as prayed.

13. I have perused the Arbitration Awards. Paragraph No. 18.4 of the Award made on 28th July 2005 which the Applicant referred to in its affidavit in support states as follows:-

“The Respondent is advised to, if not already done, organize the handover of the project from the Claimant as soon as convenient, to avoid incurring further costs and expenses.”

14. My understanding of the above paragraph is that the Respondent was given advice. There is no evidence of any quantification of the delay period. Consequently, I agree with the Respondent's submissions that the claim for Kshs.4,347,582.10 remains undermined.

15. For the above stated reasons, I find no merits in the application and dismiss the same with costs.

Dated, signed and delivered at Nairobi this 14th day of June, 2017

B. THURANIRA JADEN

JUDGE