REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APPLICATION NO. 5 OF 2016

IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI AND MANDAMUS

AND

IN THE MATTER OF THE ENGINEERING ACT N. 43, OF 2011 LAWS OF KENYA

AND

IN THE MATTER OF ARTICLE 22 AND 23(3) (C) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE PRINCIPLE OF LEGITIMATE EXPECTATION

BETWEEN

REPUBLIC……………….…………………….………….…….……..APPLICANT

VERSUS

ENGINEERS BOARD OF KENYA..RESPONDENT

EX PARTE: INTERCONSULT ENGINEERING LIMITED

JUDGEMENT

Introduction

1. By a Motion on Notice dated 14th January, 2016 the *ex parte* applicant herein, **Interconsult Engineering Limited**, seeks principally the following orders:

> **1. That an order of certiorari do issue to quash the respondent's decision not to register the applicant as an engineering consulting arrived at on the 24th June, 2015.**
>
> **2. That an order of mandamus do issue compelling the respondent's registrar to register the applicant as an engineering consulting firm.**

3. That costs of the application be provided for.

Ex Parte Applicant's Case

2. According to the Applicant, it is duly registered as a limited liability company within the meaning of the ***Companies Act***. It was averred that the Applicant had previously been registered by the Ministry of Roads, Public Works & Housing as a consulting engineering firm under Category 'B', while the deponent of the verifying affidavit, one of the applicant's directors and a registered engineer with a valid engineering practicing certificate, was a previous Chairman of the Association of Consulting Engineers of Kenya (ACEK).

3. According to the Applicant, since the enactment of the ***Engineers Act*** No. 43 of 2011, the Respondent had frustrated registration efforts undertaken by members of ACEK always insisting that all shareholders in such firms seeking registration as engineering consulting firms should be professional engineers. According to the Applicant, the requirement imposed by the Respondent is broadly *ultra vires* as it goes against section 20(1)(b) of the ***Engineers Act*** which provides stipulates that an engineering consulting firm is to be registered provided it has at least one of its principal shareholder as a registered consulting engineer and who has a valid license in a specified discipline. It was averred that since the Applicant satisfied the requirement set out in section 20 of the ***Engineers Act***, it applied for registration as engineering consulting firm only for the Respondent to decline registering it as such despite the Applicant's director, when as ACEK's Chairman, writing to the Respondent's Registrar on the 18th of November 2013 expressing ACEK's position regarding registration of engineering consulting firms. Furthermore, on the 4th of February 2014, as the then ACEK's Chairman, HE wrote to the Principal Secretary at the Ministry of Transport & Infrastructure, **Eng. John Mosonik**, outlining to him the registration hurdles. In the Applicant's view, the upshot of all the above mentioned correspondence and consultation fora was to discern the best possible way to deal with the registration hurdle which is the subject of this suit. However, whatever efforts undertaken did not bear any fruits, with the Respondent choosing to play hard ball and hence continuing with its broad *ultra vires* act which action had caused the Applicant to miss out on several tenders advertised. And had exposed the Applicant to the risk of missing more tenders.

4. It was averred that as a common feature, all consulting firms that wish to apply for consideration for such tenders they must attach, as a primary requirement, proof of registration by the Engineers Board of Kenya which requirement has locked several deserving firms, the Applicant included, out of tenders advertised and that carry registration by the Engineers Board of Kenya as a primary consideration.

5. The Applicant stressed that this suit therefore was not meant to delay the tendering process, rather its purpose is to ensure that there is a level playing field for any legally deserving firm participates in such tendering process. It however emphasised that the Respondent had acted broadly *ultra vires*, breached the principle of legitimate expectation and acted in gross abuse of the Applicant's right to fair administration and that unless this Court intervened, it as highly likely that the applicant would not only fail to tender its bid for the immediate tender, but it would also fail to tender its bid in future tenders.

1st Respondents' Case

6. In opposition to the application the Respondent averred that it is a state corporation duly established under the ***Engineers Act***, 2011 under which the Respondent is mandated to *inter alia* train, register and licence engineers, regulate and develop the practice of engineers. In exercise of the said mandate, the Respondent can *inter alia* register Engineering Consulting Firms to offer consultancy and advisory services relating to independent professional Engineering works, services or goods, selling or supplying for gain or reward any plan, sketch, drawing, design, specification or other documents relating to any professional engineering work.

According to the Respondent, for any entity to be registered as an Engineering Consulting Firm, it is a requirement under section 20 of the said Act at least one partner or principal shareholder must be registered as a consulting engineer with a valid licence in a specified discipline and it must fulfil any

other conditions as may be stipulated by the Board.

8. It was averred that in exercise of its statutory mandate aforesaid and in accordance with the provisions of the said Act, the Respondent did stipulate the conditions that must be fulfilled by any entity before it can be registered by the Respondent as an Engineering Consulting firm one of them being that the all shareholders must be professional engineers and the Principal shareholder should be a consulting engineer who should have the power of attorney. In the Respondent's view the aforesaid condition is meant to avoid any mischief that may arise in the process of discharging professional engineering works or engineering consultancy services by engineers since under the ***Engineers Act, 2011***, engineering consultancy services can only be offered by a professional engineer or a consulting engineer.

9. It was averred that upon the enactment of the ***Engineers Act, 2011,*** any entities hitherto registered as Engineering consultancy firms either by the former Engineers Board of Kenya and/or any other Infrastructure procurement entity like the former Ministry of Roads, Public Works and Housing and wishes to continue carrying out Engineering consultancy services must comply with the statutory requirements and evaluation criteria set forth by the Respondent before their licences can be renewed. Similarly, any new entity, like the Applicant, that wishes to be registered as engineering consulting firm must comply with the statutory requirements and the conditions set out by the Respondent before it can be registered.

10. It was contended that it was apparent from its certificate of Registration that the Applicant was registered as a limited liability company on 7th September, 1994. However, with intent to deceive the Respondent, on or about 2nd May, 2013, **Engineer Kariuki Muchemi**, a shareholder of the Applicant, applied to the Respondent as Interconsult Engineers to be registered as an Engineering Consulting Firm to offer Civil/ Structural Engineering consultancy services. In the said application, **Engineer Kariuki Muchemi** intimated to the Respondent and indeed made a statutory declaration to the effect that he was the sole proprietor of **Interconsult Engineers**. However, upon perusal of the documents submitted to it by the said **Eng. Kariuki Muchemi**, the Respondent deferred the registration of the said Interconsult Engineers as an Engineering Consulting Firm and sought clarification from the said **Eng. Kariuki Muchemi** about the true legal status of Interconsult Engineers but the said **Eng. Kariuki Muchemi** did not clarify on the issues alluded to hereinabove. It was disclosed that on or about 22nd September, 2014, and subsequent thereto, the Applicant applied to be registered as an Engineering Consulting Firm to also offer Civil/Structural Engineering consultancy services and upon perusal of the Applicant's application aforesaid, it was noted inter alia that the shareholders of the Applicant Company were **Eng. Kariuki Muchemi** and **Isabel Wanjiku Muchemi each of whom h**old one share each in the Applicant Company and that **Isabel Wanjiku Muchemi** was a counselling psychologist. It was however noted that in its objectives in the Articles and memorandum of Association, the Applicant had not be registered to undertake and/or offer Engineering consultancy services hence the Applicant's application aforesaid was not approved and/or was declined by the Respondent and the Applicant was duly notified by a letter dated 8th October, 2015.

11. To the Respondent, if it were to register the Applicant as an Engineering Consulting firm and **Isabel Wanjiku Muchemi** commits any mischief, negligence or gross misconduct, the Respondent would not have any rights and/or powers to admonish her since she is not an engineer. Further, the mere fact that **Eng Kariuki Muchemi** is a duly registered engineer and/or possesses a valid engineering practicing licence and/or has been the chairman of the Association of Consulting Engineers of Kenya (ACEK) does not *per se* entitle him and/or the Applicant or any of the entity fronted by him to be registered as an Engineering Consulting firm if he/it doesn't comply and/or fulfil the statutory requirements and/or the conditions set out by the Respondent in exercise of its statutory mandate. In addition, the mere fact that the Applicant had hitherto been registered by the then former Ministry of Roads, Public Works and Housing as a consulting engineering firm does not *per se* entitle it to be registered as an Engineering Consulting firm by the Respondent unless it complies and/or fulfils the current statutory requirements and/or the conditions set out by the Respondent in exercise of its statutory mandate.

12. The Respondent therefore denied the allegation that since the enactment of the ***Engineers Act***, 2011, the Respondent has frustrated registration efforts undertaken by the members of ACEK as alleged by the

Applicant. To the Respondent, since the enactment of the ***Engineers Act, 2011***, the Respondent had registered over one thousand (1,000) entities, which had satisfied, fulfilled and/or met the conditions set out under the Act and/or the conditions stipulated by the Respondent.

13. In the Respondent's view, it had exercised its mandate in accordance with the law and in particular section 20 of the ***Engineers Act*** hence the allegations by the Applicant in paragraph 8 of the verifying affidavit by the said **Eng. Kariuki Muchemi** that the Respondent has acted *ultra vires* are without basis, legal or otherwise. According to the Respondent at all material times and/or when the Applicant submitted its application for registration as an Engineering Consulting firm, it was privy to the conditions, requirements and criteria for the registration of Engineering Consulting firms, in particular the condition that any entity so applying must have a principal shareholder or one partner who must be a consulting engineers and all the other shareholders must at least be professional engineers, which condition and/or requirement the Applicant did not and/or has not complied with to-date. It was therefore asserted that the Applicant had satisfied the requirements set out under section 20 of the ***Engineers Act, 2011*** as alleged or at all. Further, it not true that it is the Respondent who has caused the Applicant to miss out on several tenders advertised as alleged and that the Respondent has no mandate and/or control, legal or otherwise over Kenya Urban Roads Authority (KURA) or any other procurement entity in the awarding of any tenders, whether to carry out engineering consultancy services or otherwise.

14. The Respondent therefore denied that it had breached the Applicant's legitimate expectations have not been breached and that legitimate expectations cannot override the express provisions or requirements of the law. The Respondent's position was that it had always exercised its mandate within the law hence its decision was fair, reasonable and within the ambit of its powers under the ***Engineers Act, 2011*** while it was clear that the Applicant and the said **Engineer Kariuki Muchemi** had always acted mala fides hence this Court should not grant the Applicant the sought orders.

15. The Respondent asserted that it could not be stopped or restrained from carrying out its proper administrative functions and/or exercising its statutory duties and mandate as required by the law hence the Court was urged to dismiss the said application with costs to the Respondent.

Determinations

16. I have considered the application, the affidavits, the submissions and authorities cited herein.

17. The first issue to be determined by this Court is the competency of these proceedings. Order 53 rule 7(1) of the ***Civil Procedure Rules*** provides:

> ***(1) In the case of an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the High Court.***

18. The Respondent has submitted that this requirement which is couched in mandatory terms was not complied with. The rationale for the requirement that what is sought to be quashed is to be exhibited is informed by the fact that the Court ought to be satisfied that there is in fact a decision that has been made and exists whose quashing is to be done since the court does not ordinarily grant orders in vain. Secondly, the court must be satisfied that what is exhibited is in fact the correct decision. Thirdly, the court must be satisfied as to the exact time when the decision was made in light of the limitation period of six months stipulated under the ***Law Reform Act*** Cap 26 Laws of Kenya.

19. In this case the applicant has exhibited a copy of the letter dated 8th October, 2015 from the Respondent in which the Respondent acknowledged receipt of an application for registration as an Engineering Consulting Firm from the Applicant. From the letter it is clear that the application was made on 22nd September, 2014 and the decision disapproving the application was made on 24th June, 2015. From the said letter, it is clear that the reason for declining the application was that not all shareholders

were Professional Engineers. It is therefore not in doubt that there was a decision made by the Respondent and the date of the decision is also clear from the record. Whereas the failure to exhibit a copy of the decision sought to be quashed may well render an application incompetent, where from the proceedings, the existence of the decision, its nature and the date it was made can be discerned from the proceedings, it is my view that it would amount to elevating procedural rules to fetish if on that ground alone the proceedings which are otherwise merited would be disallowed. It was in light of the foregoing that **Nyamu, J** (as he then was) in **Republic vs. The Commissioner of Lands Ex Parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998,** held that a decision to alienate or to allocate land, it was held, is not formal because the commissioner may in most cases issue titles without necessarily identifying the decision and the date he made the decision formal and therefore the time limitation would not apply to such a decision and the question of attacking it under order 53 rule 7 would not arise and there is nothing capable of being exhibited under Order 53 rule 7.

20. Similarly in **Republic vs. Kajiado Lands Disputes Tribunal & Others Ex Parte Joyce Wambui & Another Nairobi HCMA. No. 689 of 2001 [2006] 1 EA 318** expressed himself as follows:

> **"Judicial review deals with decisions and the decision making process and where the award has merged with the Judgement and no certiorari is sought against the Judgement an order prohibiting further steps in enforcing the Judgement, decree, or order would only hang in the air without an order for certiorari against the award and the Judgement…..If an award is made without jurisdiction, it is a nullity and anything out of a nullity is a nullity due to the maxim *ex nihilo nihil fit* – out of nothing comes nothing…..Despite the irregularities the Court cannot countenance nullities under any guise since the High court has a supervisory role to play over inferior tribunals and courts and it would not be fit to abdicate its supervisory role and it has powers to strike out nullities."**

21. I however agree with the Respondents that the manner in which the Applicant presented its case was rather vague and lacked in specificity. For example there is no express averment made in behalf of the Applicant that it applied for registration and that the application was declined. Without the letter from the Respondent referring to the application for registration and the decision declining the same, this Court would not have been in a position from the manner in which the verifying affidavit was drawn this Court would not have been in a position to find that there was in fact such application made and that the same was rejected.

22. It is however clear that the Respondent did stipulate the conditions that must be fulfilled by any entity before it can be registered as an Engineering Consulting firm one of them being that the all shareholders must be professional engineers and the Principal shareholder should be a consulting engineer who should have the power of attorney. That the Applicant was well aware of the existence of these conditions is not in doubt.

23. In these proceedings however, the Applicant is challenging the respondent's decision not to register the applicant as an engineering consulting firm which decision was arrived at on the 24th June, 2015. That decision was clearly arrived at as a result of the aforesaid conditions. In other words the impugned decision was simply an implementation of the conditions set by the Respondent for the registration of an Engineering Consulting firm. As has been held time and again, where what is sought to be quashed is simply the implementation of a decision, which decision itself is not sought to be quashed judicial review order of certiorari ought not to be granted. As was held in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**:

> **"Where a decision is made and its making has been made known to the Respondents who did not challenge the same within 6 months of its being made by way of *certiorari* to have it moved into the High Court and be quashed, it is not open for them to seek to have the Appellant prohibited from implementing the decision..."**

24. Since the Applicant is not in these proceedings challenging the conditions themselves, it is my view that it would not serve any useful purpose to simply quash the decision implementing the said conditions

without quashing the conditions themselves. According to ***Halsbury's Laws of England*** **4thEdn. Vol. 1(1) para 12 page 270:**

> **"The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)…are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. *Another consideration in deciding whether or not to grant relief is the effect of doing so*. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow 'contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders."** [Emphasis added].

25. This position was reiterated by this Court in **Joccinta Wanjiru Raphael vs. William Nangulu – Divisional Criminal Investigation Officer Makadara & 2 Others [2014] eKLR** where it was held that:

> **"… it must always be remembered that judicial review orders being discretionary are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles...*The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders*. Since the court exercises a discretionary jurisdiction in granting judicial review orders, it can withhold the gravity of the order where among other reasons there has been delay and where the a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realized, even if merited. *The would refuse to grant judicial review remedy when it is no longer necessary; or has been overtaken by events; or where issues have become academic exercise; or serves no useful or practical significance*."** [Emphasis added].

26. It is therefore my view that even if this Court quashes the respondent's said decision, nothing would prevent the Respondent from arriving at the same decision as long as the said conditions remain undisturbed.

27. Without quashing the decision, an order of *mandamus* would not issue. This was the position of the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** where it was held as follows:

> **"...an order of *mandamus* cannot quash what has already been done...Only an order of *certiorari* can quash a decision already made."**

28. In my view the orders sought herein will not be efficacious in the circumstances of this case and I accordingly, in the exercise of my discretion decline to grant the same.

Order

29. Consequently the Motion on Notice dated 14th January, 2016 fails but as the merits of the Respondent's decision remains unresolved there will be no order as to costs.

30. Orders accordingly.

Dated at Nairobi this 8th Day of September, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ogoti for the Applicant

Mr Kamwendwa for the Respondent

Cc Mwangi