



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO 36 OF 2013

REPUBLIC.....APPLICANT

VERSUS

ENGINEERS BOARD OF KENYA.....RESPONDENT

EX-PARTE

MULTISCOPE CONSULTING ENGINEERS LTD

JUDGEMENT

Multiscope Consulting Engineers Ltd (the ex-parte applicant) filed a notice of motion dated 4th February, 2013 praying for orders as follows:

- “1. THAT the Honourable Court be pleased to bring into this court and quash the purported review report of the proposed structural designs of the proposed University of Nairobi Tower Building as alluded to in the letter dated 18th January 2013 from the respondent to the applicant.**
- 2. THAT an order in the nature of prohibition do issue to prohibit the respondent or anyone claiming under them from taking any disciplinary action against the ex-parte applicant on the basis of its letter dated 18th January 2013 as well as the purported review report on the proposed structural design of the proposed University of Nairobi Towers Building alluded to in the said letter.**
- 3. THAT an order in the nature of mandamus do issue directed at the Engineers Board of Kenya commanding the said Engineers Board of Kenya to comply with the provisions of the Engineers Act, 2011 in the event that they seek to inspect the relevant site and documents and accord the ex-parte applicant a hearing prior to making any report.**
- 4. THAT the costs of this application be provided for.”**

The application is supported by the statutory statement and the affidavit of the applicant’s Managing Director Engineer Samuel Nyanchama Maugo which were filed in Court on 31st January, 2013.

The Respondent, Engineers Board of Kenya (the Board) is a statutory body created by Section 3 of the Engineers Act 2011 (the Act) and is responsible for the registration of engineers and firms, regulation of engineering professional services, setting of standards, development and general practice of engineering. It opposed the application through an affidavit sworn on 11th April, 2013 by its Registrar, Engineer Gilbert M Arasa.

The facts which have come to light through these proceedings and which may not have been known to the applicant prior to the filing of this matter are as follows. The applicant company is essentially an engineering practice belonging to Engineer Samuel Nyanchama Mugo. In the year 2011 together with other persons and under the firm of Waweru & Associates they won a tender for engineering services in respect of a project christened University of Nairobi Towers. The individual firms under the consortium proceeded to sign contracts in respect of the tender.

Through a letter dated 16th October, 2012 the Permanent Secretary of the Ministry of Roads wrote to the Board annexing a letter dated 15th October, 2012 from Engineer A.S. Kitololo querying the inputs of the structural engineering designer and the building services engineer. The Permanent Secretary urged the Board to address the issue raised by Engineer Kitololo.

Consequently, the Board wrote a letter dated 26th October, 2012, under confidential cover, to the Vice Chancellor of the University of Nairobi alerting him of the issues raised by Engineer Kitololo. He advised the University to subject the project to peer-review as well as accredited checking as provided for in the Act. The Board also informed the University that it could seek further information on peer reviewers/accredited checkers.

On 17th November, 2012 the University wrote back to the Board asking to be provided with a list of several independent registered engineers to subject the project to peer review as well as accredited checking. Out of this process a document titled **REPORT ON ACCREDITED CHECKING OF THE PROPOSED UNIVERSITY OF NAIROBI TOWER PROJECT ON PLOT LR NO. 209/18319, NAIROBI** was prepared. The report has several recommendations.

Acting on the said report, the Board wrote a letter dated 18th January, 2013 to the applicant. The letter states as follows:

“REF: PROPOSED UNIVERSITY OF NAIROBI TOWER BUILDING REQUEST FOR INFORMATION.

The Board is aware that you were awarded the Consultancy Contract to carry out structural design of the proposed University of Nairobi Tower Building. Further, the Board has prepared a review report on the proposed structural design of the proposed building.

The review report reveals glaring inadequacies in the structural design. Some of the inadequacies include underdesign and overdesign among others. There is no evidence to show that geotechnical investigations were carried out prior to the design. In addition, it is not clear how the ground bearing capacities used in the design were arrived at. All this is in contravention of the requirements of the Engineers Act, 2011.

Pursuant to *inter alia* Section 7 of the Engineers Act, 2011 you are asked to forward to the Board the following for further necessary action:-

- **Design Calculations**
- **Structural and Architectural Drawings**
- **Site Investigation Report**
- **Materials Test Results**
- **Any other pertinent details relating to consultancy.**

The purpose of this letter is to ask you to submit the information required and show cause why disciplinary action should not be taken against you by the Board.

Your response should be received by the Board within 14 days of the date of this letter. While responding to this letter you are advised to take cognizance of Section 51 of the said Act.”

The applicant replied to the Board’s communication through a letter dated 31st January, 2013. When concluding the lengthy letter, the Applicant’s Managing Director stated:

“By requiring us to show cause why disciplinary action should not be taken against us is being unfair as we have not been furnished with the details of the review report that you have referred to so that we can respond appropriately.

Copies of Registration and Practicing Licence for the principal are attached herewith (UON–Doc 13).

Forwarded herein find one copy each of the following documents:

- **Design Calculations – UON–Doc 14**
- **Structural Drawings – UON–Doc 15**
- **Architecture Drawings (Revised 1/08/2012) - UON–Doc 16**
- **Site Investigation Report – UON–Doc 17**
- **Structural Audit Report – UON–Doc 18**
- **Bar Bending Schedules – UON–Doc 19**
- **Correspondence Letters – UON–Doc 01-12**

As you embark on your intended action, we expect fairness and objectively to be your guiding principles with no vested interest, malice or vendetta. You may want to know that as a consequence of your recommendations, the client has since terminated our services even before we are heard.

Further we are aware from the grapevine that your accredited checkers have now been commissioned to undertake the works, which is completely unethical and is a clear case of supplanting.”

On 31st January, 2013 the applicant moved to this Court and obtained leave to commence these judicial review proceedings.

The applicant’s case as revealed in the statutory statement is that the Board acted without a formal complaint being raised as required by Section 53 (1) of the Act. Consequently, the applicant argues that the Board acted without a complainant.

Further, the applicant contends that it was never involved in the peer review and it was therefore condemned unheard and this contravenes the principles of natural justice.

The applicant accuses the Board of turning itself into an investigator, accuser, prosecutor and judge. The applicant faults the Board’s decision for being unreasonable and contrary to its legitimate expectation. It is therefore the applicant’s case that the Board’s decision is founded on malice.

In response the Board asserted that disciplinary proceedings are yet to commence against the applicant and it is only after proceedings have started that the right to a hearing can be enforced as required by the Act. The Board contends that this application is speculative and actuated by the fear of the perceived disciplinary proceedings by the applicant. The Board also argues that the rights of the applicant have not been infringed and the termination of the contract is a dispute between the University and the applicant and that issue will be ventilated in **NAIROBI HCCC NO. 47 OF 2013.**

The applicant having had the benefit of information contained in the Board’s replying affidavit filed a further affidavit sworn on 8th July, 2013 by its Managing Director. Through the said affidavit, the applicant points out that Engineer A.S. Kitololo who orchestrated the preparation of the peer review report was the person who had moved the Permanent Secretary of the Ministry of Roads to write to the Board raising a complaint about the applicant’s standard of work in respect of the project in question. The applicant also annexed a letter dated 23rd January, 2013 addressed to Engineer A.S. Kitololo of Kitololo Consultants in which the said firm is appointed to provide structural and civil engineering consultancy services for the project. This was after the applicant’s contract was cancelled. The applicant also averred that the report prepared by the peer review panel has never been officially communicated to the company despite asking for it on several occasions.

The question to be answered in this judgment is whether the Board acted within the law and in compliance with the rules of natural justice when peer reviewing the applicant’s work.

It is not disputed that the Board has power to ensure that engineering services and works comply with the Act. In that regard Section 7(1)(g) of the Act states:

“7.(1) The functions and powers of the Board shall be to—
 (a);
 (b);
 (c);
 (d);
 (e);
 (f);
 (g) enter and inspect sites where construction, installation, erection, alteration, renovation, maintenance, processing or manufacturing works are in progress for the purpose of verifying that—
 (i) professional engineering services and works are undertaken by registered persons under this Act;
 (ii) standards and professional ethics and relevant health and safety aspects are observed;
 (h),”

At Section 24(1) the Act provides that:

“Subject to subsection (2), the Board may, upon application, register a person as an accredited checker with powers to review and verify the work of a professional engineer in ensuring that the work is adequate and complies with safety requirements.”

It is therefore clear that the Act envisages a situation where the work of a registered engineer can be reviewed by an accredited checker. The Act does not provide for the circumstances under which an accredited checker can be asked to review and verify the work of a professional engineer. In my view, such a situation would arise where a client has raised a complaint with the Board. In such a situation, Section 53 of the Act would come into play. Section 53 provides the procedure for filing of complaints and conducting of disciplinary proceedings as follows:

“53.Complaints and disciplinary proceedings by the Board
 (1) A person who being dissatisfied with any professional engineering services offered or alleging a breach of the standards of conduct, specified by the Board from time to time, by a registered or licensed person under this Act, may make, in a prescribed manner, a written complaint to the Board.
 (2) Upon an inquiry held by the Board to determine a complaint made under subsection (1), the person whose conduct is being inquired into shall be afforded an opportunity of being heard, either in person or through a representative of his own choice.
 (3) For the purposes of proceedings at any inquiry held under this section, the Board may administer oaths, enforce attendance of persons as witnesses and production of books and documents as evidence.
 (4) A person who fails when summoned by the Board to attend as witness or to produce any books or documents which he is required to produce, commits an offence.
 (5) Subject to this section and rules of procedure made under this Act, the Board may regulate its own procedure in disciplinary proceedings.”

(6)

In my view, the Board can only appoint accredited checkers in the process of inquiring into the professional conduct of an engineer. Although the power is given to the Board to check on the work of engineers, there must be a basis for appointing accredited checkers to review and verify the work of a professional engineer. The most likely reason for appointing accredited checkers is where there is a complaint against a particular engineer or firm. The Board should have very good reasons for appointing accredited checkers where there is no complaint. In the case before me, the accredited checkers were appointed after a complaint was made against the applicant through the Permanent Secretary. The complaint was however not formalized so that Section 53 could be applied.

The applicant is right in arguing that the Board moved against it without a formal complaint. A complaint launched under Section 53 would be investigated with all the safeguards of a fair hearing protecting the accused engineer. It would then follow that the report that was prepared by the peer review panel was prepared in contravention of the provisions of Section 53 which provides that the person whose conduct is being inquired into shall be afforded an opportunity of being heard. The Board has indeed admitted that it never communicated to the applicant about the appointment of accredited checkers to review its professional services and works in respect of the project in question.

Assuming that a professional engineer can be peer reviewed without being informed can one say the report prepared by the peer review panel in this matter met the bear minimum requirements of the rules of natural justice? It must be stated from the outset that the said report has had consequences on the applicant's practice.

The University through a letter dated 23rd January, 2013 terminated the applicant's consultancy services on the ground that the accredited checkers had found anomalies in the applicant's structural designs thus making the project not buildable. The termination of the applicant's contract, which is the subject of separate court proceedings, was solely based on the report of the accredited checkers. Through the said letter it is indicated that the Board had through a letter dated 19th December, 2012 concurred with the findings of the accredited checkers. All these things were happening without the knowledge of the applicant. On that score alone it is clear that the applicant was condemned unheard.

There are other things that make the report bad in the eyes of the law. The originator of the complaint Engineer A. S. Kitololo was appointed by the Board to review and verify the work of the applicant. He is listed as the convener in the signature page of the report. The other accredited checkers were A. S. Marjan a quantity surveyor, Eng. A. W. Ogwayo an electrical engineer, Eng. J. M. Litondo a mechanical engineer and Eng. Dr. I. Ismail a geotechnical engineer. As if the appointment of engineer A. S. Kitololo to lead the team of accredited checkers was not bad enough, the report of the accredited checkers was used to terminate the applicant's contract and the same contract was awarded to Engineer A. S. Kitololo's firm. The applicant's contention that the Board acted as the accuser, the prosecutor, the judge and the executor is therefore confirmed. The Board not only denied the applicant a hearing but also went ahead to use a person with interest in the outcome of the matter to review the applicant's work. This was in clear breach of the rules of natural justice.

There is no way that the applicant's work could have been fairly reviewed by the panel of accredited checkers appointed by the Board. There is evidence on record to the effect that Engineer A. S. Kitololo had lost the tender to the consortium of Waweru & Associates in which the applicant was a member. He then went ahead and lodged a complaint against the work of the applicant. Instead of being a witness, he was appointed to lead the panel of accredited checkers that was appointed by the Board. His team then made a report whose findings included the statement that the **“project as tendered is not buildable.”** On the strength of this report the applicant's contract was terminated. Engineer A. S. Kitololo's firm was then awarded that contract. This is the height of unfairness. No person should be subject to such an unfair process as the applicant was subjected to.

Judicial review is a powerful tool that has been developed over time to check the exercise of power by public bodies like the Board herein. It ensures that public authorities act legally, rationally and in

compliance with the rules of natural justice. When a tribunal or public authority acts illegally, irrationally or in breach of the rules of natural justice the Court will issue orders to right such wrongs.

The respondent cannot be heard to say that the applicant was not entitled to be heard during the inquiry since it would be given an opportunity to be heard once proceedings are commenced. The applicant has already suffered injuries out of the respondent's actions and it ought to have been heard from the time the decision was made to peer review its work. The damage is already done and any hearing that may be given to the applicant at a later stage will be of no use to the applicant.

Odunga, J in **REPUBLIC V MINISTER OF IMMIGRATION AND REGISTRATION OF PERSONS [2013] eKLR** powerfully demarcated the playing field of judicial review in the following words:

“In order to succeed in an application for judicial review, the applicant has to show that the decision or the act complained of is tainted with illegality, irrationality and procedural impropriety. Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction, or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards. Procedural Impropriety is when there is a failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.”

Considering the facts of the case before me it is clear that the Board handled the applicant's matter in defiance of the rules of natural justice. The applicant was not heard and the leader of the panel of peer reviewers that made the decision that condemned the applicant had interest in the outcome of the proceedings. The applicant could not get a fair assessment of its work from such a team. The applicant's case was placed before a biased panel. The applicant was not taken through a fair process by the panel of the peer reviewers which was appointed by the Board.

The application before this Court therefore succeeds. The report titled **REPORT ON ACCREDITED CHECKING OF THE PROPOSED UNIVERSITY OF NAIROBI TOWER PROJECT ON PLOT LR NO. 209/18319, NAIROBI** signed between 3rd and 5th December, 2012 by a panel of five persons led by Engineer A. S. Kitololo is called into this Court and quashed. Having issued the said order, issuance of orders of prohibition and mandamus as proposed by the applicant will be superfluous. The prayers for orders of prohibition and mandamus are therefore dismissed.

This case demonstrates how power can be used to attain unjustified ends. The applicant is awarded costs of the proceedings against the respondent.

Dated, signed and delivered at Nairobi this 14th day of May, 2014

W. KORIR,

JUDGE OF THE HIGH COURT