



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO 152 OF 2013

REPUBLIC.....APPLICANT

VERSUS

MINISTRY OF HIGHER EDUCATION

SCIENCE & TECHNOLOGY.....1ST RESPONDENT

MINISTRY OF FINANCE2ND RESPONDENT

ATTORNEY GENERAL3RD RESPONDENT

AND

DEVOTRA BVINTERESTED PARTY

EX-PARTE

GATERO INSTRUMENTS LIMITED

JUDGEMENT

On 10th May, 2013 this Court granted leave to the ex-parte applicant Gatero Instruments Ltd to commence judicial review proceedings and seek orders of certiorari and prohibition against the decision of the Ministry of Higher Education, Science & Technology and the Ministry of Finance the 1st and 2nd respondents herein. The Attorney General is the 3rd respondent. Devotra BV is the Interested Party. The leave granted was to operate as stay **“so that the respondents are barred from processing payments to the Interested Party (Devotra B.V.) in respect of the project known as GOK/NL TIVET PROJECT-REHABILITATION AND UPGRADING OF KTTC AND NINE (9) REGIONAL CENTRES OF EXCELLENCE.”**

Subsequently the applicant filed the substantive notice of motion dated 16th May, 2013 in which it seeks orders:

“1. THAT an Order of Certiorari do issue to quash the decision of the Respondents dated 4th April 2013 to lift the suspension of the payments to the Interested Party and the in-country training under the Kenya-Netherlands TIVET project.

2. **THAT an Order of Prohibition do issue to prohibit the Respondents by themselves, their agents, partners, servants, employees, officers or whosoever from processing and/or making payments to the Interested Party, Devotra BV or whosoever until all previous payments are fully accounted for and an independent audit carried out and until the Report of the Verification Committee appointed to check on the status of Devotra equipment delivered to ten (10) public TIVET institutions has been publicized and fully implemented.**

3. **THAT the costs of this application be provided for.”**

The letter which drove the applicant to Court is Ref. No. MST/DTE/6/4 VOL IV/32 dated 4th April, 2013 addressed to the Permanent Secretary of the Ministry of Finance by the Permanent Secretary of the Ministry of Higher Education, Science and Technology. The letter states in part:

“GOK/NL TIVET PROJECT-REHABILITATION AND UPGRADING OF KTTC AND NINE (9) REGIONAL CENTRES OF EXCELLENCE

Please refer to my letter ref. MST/DTE/6/4 VOL. III [75] of 19th January, 2012 to Devotra BV and copied to you suspending further processing of payments to Devotra as a result of a number of issues including a claim by Oret.nl of dishonest project accounting by Devotra through a letter to Devotra ref. 2011-0181/AK/re/mvb of 21st December 2011.

Following this suspension consultation aimed at resolving these issues have been held between the Ministry and Devotra BV under the auspices of the Project’s Steering Committee.

During the second steering committee meeting held on 13th February 2013, it was noted that Devotra BV had complied with most of the requirements of the Ministry that had been minuted during the first Steering Committee meeting of 1st November 2012.....

To date Devotra has completed the installation and commissioning of equipment and training of the institutions’ maintenance officers. The only pending issue regarding this exercise being the replacement of broken equipment parts and replacement of some equipment which is not working or compliant. The firm is expected to correct all the anomalies to facilitate smooth closure of the project.

In view of the foregoing I wish to convey the Ministry’s decision to lift the suspension on the processing of payments to Devotra BV and in-country training. MoHEST will continue to closely monitor the implementation of the project in order to ensure that the Country derives maximum value for money in this investment in this project. In view of the above developments you may, therefore, wish to inform Oret.nl and Devotra BV of the lifting of this suspension.”

According to the applicant the decision to lift the suspension of payments to the Interested Party (Devotra) was arbitrary, illegal, capricious, unjust, oppressive, irrational, and an abuse of power and public resources.

The background to this matter as narrated to Court by the applicant in the statement of facts and the verifying affidavit of the applicant’s director Macaria Mwtotia are as follows. The applicant sometime in the year 2003 initiated consultations with the 2nd respondent with the aim of exploring ways and means of working with the 1st respondent with a view to rehabilitating technical training in Kenya, upgrading the Kenya Technical College and establishing regional centres of excellence. The fruits of the applicant’s work resulted in the rolling out of the project now known as the Kenya–Netherlands Technical Industrial Vocational and Entrepreneurship Training (TIVET).

In 2009 a contract was entered into between the 1st Respondent and the Interested Party for the supply of equipment and technical assistance for the TIVET project.

After the project started, it ran into problems due to lack of accountability, transparency and impropriety on the part of the Interested Party. The Interested Party was accused of failure to account for monies received under the project, supply of substandard equipment and falsifying invoices including those of the applicant in order to extract monies from external financiers such as ORET. This resulted in the suspension of payments to the Interested Party by the respondents through a letter dated 19th January, 2012. According to the letter, the payments were suspended so as to pave way for audit of the project.

Subsequently the respondents appointed a Verification Committee on 18th December, 2012 to check on the status of the equipment delivered to ten public institutions under the TIVET project. The Verification Committee visited the projects and tabled a report confirming irregularities and improprieties on the part of the Interested Party.

The applicant contends that before the Interested Party could account for the irregularities the respondents through the letter dated 4th April, 2013 lifted the suspension of payments to the Interested Party.

The applicant argues that the respondents have a duty to protect and preserve public funds as well as the integrity of public projects and processes and the decision to resume payments to the Interested Party is an abrogation of such a duty.

Further, the applicant asserts that the release of the monies to the Interested Party, without proper accounting of the monies previously disbursed and before an audit of the project is a violation of the principles of public finance as found in the Constitution. On that basis the applicant prays for the issuance of the orders sought.

The respondents and the Interested Party opposed the application. Joseph N. Njau the Project Manager of the Kenya-Netherlands TIVET project swore a replying affidavit on 12th July, 2013 on behalf of the respondents.

According to the respondents, the applicant was named in the contract as the Interested Party's local agent and was tasked with coordinating all project activities in Kenya on behalf of the Interested Party. In the agreement the Interested Party was the supplier to the Government of Kenya which was represented by the 1st respondent. The Government of Kenya was the purchaser. The applicant had executed an agency agreement with the Interested Party mandating it as the Interested Party's local agent responsible for the TIVET project in Kenya. According to the agreement the applicant was to be paid by the Interested Party on commission basis. The applicant as the local agent of the Interested Party was a member of the Project Steering Committee. The Interested Party later terminated the agency agreement with the applicant and the applicant thereafter served the 3rd respondent with a notice of intention to sue.

The respondents assert that these proceedings were not commenced in good faith as the contract provided for mediation and arbitration as the preferred means of dispute resolution.

It is the respondents' case that payment to the Interested Party was indeed suspended in January, 2012 until all sums of money expended in the project were fully accounted for. Meetings were held thereafter with a view to resolving the issues that had arisen. In the first meeting held on 1st November, 2012 by the Project Steering Committee among the resolutions made was that the Interested Party was to resend all its invoices and supporting documents to enable the 1st respondent process payment through its system and balance its books. The Interested Party was also to complete installation and training in preparation of final acceptance of equipment as per the contract. The Interested Party was required to write to the 1st respondent indemnifying it from claims by the applicant herein.

The respondents stated that a second Project Steering Committee meeting was held on 13th February,

2013 and it was resolved that since the Interested Party had complied satisfactorily with the recommendations issued in the first meeting then the suspension of payment should be lifted and the project should proceed as per the contract. The respondents submit that the continuation with payment was done upon satisfaction that all the errors alleged to have been committed by the Interested Party were resolved and corrected. The respondents contend that the decision to lift the suspension of payment was done in accordance with the contract and does not infringe any administrative process.

The respondents assert that the decision to lift the suspension on payment was in pursuance of a contractual obligation and judicial review remedies are not available in the circumstances.

The Interested Party opposed the application through a replying affidavit sworn by its Managing Director Patti Van De Werff on 31st July, 2013. The Interested Party confirmed and supported the position taken by the respondents. The Interested Party asserted that the applicant was not responsible for the sound management of the project but was merely an agent as per Clause 10 of the contract signed in October, 2009. Clause 10 provides that:

“The supplier’s local agent, Gatero Instruments Ltd ...will coordinate all project activities in Kenya and will be under the direct control of the supplier. For all project activities in Kenya the first point of contact will be Gatero Instruments Ltd.”

It is the Interested Party’s case that it terminated the agency agreement between it and the applicant after the applicant breached it. It (the Interested Party) thereafter continued to discharge its obligations under the contract and directly corresponded with the 1st respondent. The Interested Party asserts that once the agency agreement was terminated, the applicant no longer had any locus in the contract between it and the 1st respondent.

The Interested Party confirmed that there were some teething problems in the implementation of the contract but those were eventually resolved to the satisfaction of the contracting parties. The Interested Party exhibited several letters showing the discussion between it and the 1st respondent which led to the resolution of the issues that had led to the suspension of payment.

The Interested Party stated that the report of the Verification Committee which had raised issues about the Interested Party’s performance of the contract was discussed by the 1st respondent’s project team and rejected.

The applicant filed a supplementary affidavit sworn by Macaria Muotia on 25th March, 2014. He annexed to that affidavit the **Report of the Auditor General on the Financial Statements of the Kenya–the Netherlands Technical, Industrial, Vocational and Entrepreneurship Training (TIVET) Project (Loan No. KE/GZ07010) for the year ended 30th June 2012, Ministry of Higher Education, Science & Technology.** In the report dated 27th December, 2013, the Auditor-General gives an adverse opinion about the execution of the project and concludes that:-

“In my opinion, because of the significance of the matters discussed in the Basis for Adverse Opinion paragraph, the financial statements do not present fairly, in all material respects, the receipts and payments relating to the project for the year ended 30 June 2012 in accordance with International Public Sector Accounting Standards (Cash Basis of Accounting Method) and the expenditure does not conform to the Financing Agreement.”

In response to this Mr. Joseph N, Njau on behalf of the respondents swore a supplementary replying affidavit on 26th March, 2014. Mr. Njau drew the Court’s attention to the fact that the Auditor-General’s report was for the year ending 30th June, 2012 and that after the said report was prepared the Permanent Secretary of the 1st respondent appointed a Ministerial Inspection and Acceptance Team which inspected the machines supplied under the TIVET project. The team subsequently prepared a report which addressed the issues raised in the report of the Auditor-General. Further, the respondents assert that any

anomalies or financial improprieties that were identified by the team were brought to the attention of the Interested Party and had been rectified.

The Managing Director of the Interested Party also swore a supplementary affidavit on 28th March, 2014 and averred that Mr. Macaria Muotia was not responsible for the financial management of the project as he continues to allege.

The parties also filed submissions which I have perused. In my view, the question to be answered is whether judicial review remedies are available to the applicant in the circumstances of this case and if so whether the orders sought should be granted.

The picture created at the outset by the applicant is that it is a public spirited person interested in protecting the finances of the people of Kenya from being subjected to waste. After the respondents and Interested Party filed their papers a different picture emerged. That picture shows that the applicant was the local agent of the Interested Party in respect of the contract entered between the Interested Party and the Government of Kenya. Whether to grant or not to grant the orders sought will therefore be determined by the circumstances of the case.

The respondents posed a question as to whether judicial review is available against a decision made under a contract like the one before this Court. The comment of the Court of Appeal in **REPUBLIC v MWANGI S. KAIMENYI EX-PARTE KENYA INSTITUTE FOR PUBLIC POLICY AND RESEARCH ANALYSIS (KIPPRA) [2013] eKLR** to the effect “ **that judicial review has no application to disputes arising out of contractual relationships, since these relationships are governed by the law of contract**” is cited in support of this argument. One should, however, understand the context under which that statement was made by the Court. The case involved a dispute between an employer and an employee and the contract in question was on employment contract.

The question as to whether judicial review orders can issue in other contractual relationships is a matter of great debate and I do not find it necessary to address the issue in this matter as this application can be determined on other grounds.

The respondents and the Interested Party through the affidavits and documents filed in Court demonstrated that the decision to lift the suspension on payments to the Interested Party was arrived at after the Interested Party had addressed the concerns that had been raised about its performance of the contract. A Verification Committee and a Ministerial Inspection and Acceptance Team reviewed the performance of the Interested Party and noted some anomalies. The Interested Party was then asked to rectify those anomalies before payments were resumed. It is apparent that the 1st respondent acted reasonably in the circumstances of the case. The decision being challenged in these proceedings was arrived after following the correct procedure. The 1st respondent cannot be faulted for making that decision.

The respondents were correct in pointing out that the report of the Auditor-General, which was for the financial year ending 30th June, 2012, could not assist the applicant’s case as the issues raised in the report were subsequently addressed. I even doubt whether this Court can issue orders based on the report of the Auditor-General. Is this Court an implementing agency of the reports of the Auditor-General? In the circumstances of this case, I do not think so.

It is noted that the applicant appears to be asking this Court to supervise the performance of a contract. That is a bit tricky considering that the contract contained mechanisms for ensuring its performance. Judicial review is not an ideal remedy in such circumstances.

Judicial review remedies are discretionary in nature. One of the reasons for not exercising discretion in favour of an applicant is where there is an effective alternative remedy. Another reason for not exercising discretion in favour of an applicant is where the leave obtained is based on non-disclosure of material facts.

In the application, the applicant created the impression that it was “**responsible for the sound financial management of the project.**” During the hearing, it however emerged that the applicant was a local agent of the Interested Party. The applicant had no other function apart from taking care of the interests of the Interested Party in the contract.

Secondly, the applicant also failed to disclose to the Court that the agency agreement between it and the Interested Party had been terminated. Had this material fact been disclosed the applicant would have been advised to seek an alternative remedy. In short, the applicant approached this Court without disclosing all the facts. Even if the applicant had established grounds for the grant of the orders sought, the same would not have been issued for the reason that the Court cannot exercise its discretion in favour of a party who has not placed all its cards on the table.

In summary I find that the application before the Court has no merit. The same is therefore dismissed with costs to the respondents and the Interested Party.

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

W. KORIR,

JUDGE OF THE HIGH COURT