REPUBLIC OF KKENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Misc Appli 29 of 2008

G. ISSAIAS CO (KENYA)……………………….....................................………APPLICANT

Versus

THE PERMANENT SECRETARY, MINISTRY OF FINANCE & ANOTHER...RESPONDENTS

JUDGMENT

The Notice of Motion before me is dated 25th January 2008 brought by Issaias & Co. Ltd. against the Permanent Secretary, Ministry of Finance and the Permanent Secretary, Ministry of Public Works, 1st and 2nd Respondents. The ex parte Applicant seeks the following orders against the Respondents-

1. An order of certiorari to quash the 1st Respondent's decision of 25th July 2007 purporting to conclusively assess the Applicant's bill for Kshs.476,597,615 in respect of project contract No. RD 0295 with the Ministry of Roads and Public Works ("the contract") as not payable;

2. An order of mandamus to compel the Respondent to pay the Applicant's bill for Kshs.589,739,979 in respect of project contract No. RD 0295 with the 2nd Respondent;

3. Costs.

The motion is predicated on the statutory statement dated 24th January 2008 a verifying affidavit sworn by Paris Issais, a director of the Applicant and submissions filed in court on 25th October 2008. Despite the fact that the Respondents were served with the motion and Mr. Onyiso came on record for the Respondents, there was no reply or submissions filed. Counsel for the Respondent was present when the hearing date was taken but he did not attend court on the hearing date and the hearing proceeded ex parte. The facts on record are not controverted. The 2nd Respondent and the Applicant entered into a contract for repair of Ahero-Kisii Road. There were stoppages and delays caused in the repair and it was a term of the contract that such delays would be added to the contract price . The bill was presented to the 1st Respondent for payment after the 2nd Respondent approved it. That on 25th July 2007, the 1st Respondent made a decision that the Applicant's bill of Kshs. 589,739,979/= was not payable. It is the Applicants' case that the 1st Respondent was not party to the agreement and made the decision without jurisdiction. That even if the 1st Respondent had jurisdiction, the Applicant was not afforded an opportunity to be heard, that the 1st Respondent did not give any reasons for his decision and yet the (2nd Respondent had admitted the bill and informed the Applicants that it had been sent to the 1st Respondents for payment. Without hearing the Applicant, the 1st Respondent made the impugned decision thus flouting rules of natural justice.

I have considered the statement, the verifying affidavit and the huge bundle of annextures which was filed by the Applicant. The facts are not controverted as respects the contract between the Applicant and the 2nd Respondent for the repair of Ahero-Kisii Road. As noted above, the Applicant exhibited huge bundles to their affidavit without pointing out to the court exactly when and who actually signed the said contract. But since there is no denial or contravention by the Respondents, the affidavit will be taken to have been admitted by the Respondents as the factual truth.

I have seen the impugned decision dated 25th July 2007. The letter reads in part;

"………….After careful examination and analysis of all the information submitted in support of your claims, the Pending Bills Closing Committee has evaluated the claims according to the provisions of the contract Agreement executed between you and the employer. Accordingly, your dues on the two claims have been assessed as indicated below:-

CLAIM AMOUNT PAYABLE KSHS

1. Costs of delay nil

2. interest from July 2001 to Dec. 2008 nil

Total amount payable nil

As indicated above, the committee has concluded that you are not entitled to payment of the amounts you have claimed. Accordingly, your claim has been conclusively assessed as not payable.

Joseph K. Kinyua CBS

P/S/TREASURY"

It is the Applicant's contention that the Permanent Secretary (1st Respondent) had no jurisdiction to make that decision. The Applicant does admit that the 2nd Respondent referred their bill to Treasury for payment. There must be good reason why the bill was sent to the 1st Respondent for payment. It is evident from the decision made on 25th July 2007 that the 2nd Respondent is not the final person to determine whether or not a bill was payable but a committee constitued under the Permanent Secretary Treasury, the 1st Respondent. The question is whether the Permanent Secretary Treasury is bound to pay a bill referred to it or it has power to look at it again and consider whether or not it is payable. The powers of the Treasury are provided for under the Exchequer and Audit Act Cap 412. S 4 provides for the powers of the Treasury and the Permanent Secretary, Treasury. It reads as follows-

"4 (1) All persons concerned in the collection, receipt, custody and payment or issue of public moneys, stores, stamps, securities or other Government property shall obey all such instructions as they may from the time receive from the Treasury in respect of public money, shares, loans , securities or other Government property or accounting of the same.

(2) The Permanent Secretary to the Treasury or any officer of the Treasury authorized by him, shall be entitled to inspect all offices and to have such access to all official books, documents and other records as may be necessary for the exercise of the power and duties of the Treasury under this Act.

(3) The Treasury shall so superintend the expenditure of public money as to ensure that proper arrangements for accounting to the National Assembly for such expenditure are made."

It is clear from the above provisions that it is the Permanent Secretary, Treasury, who is the accounting officer, and has the statutory mandate to superintend all collection and expenditures of public money. When the 2nd Respondent said the Applicant's bill to the 1st Respondent to decide whether or not to pay the Applicants, it was within the 1st Respondent's mandate to do so. The 1st Respondent cannot be said to have acted outside his powers or ultra vires . It is also contended by the Applicant, that they were not heard before the decision was made. A reading of the letter dated 25th July 2007 clearly shows that the decision was made by a committee that seems to be charged with that duty to decide whether or not a bill is payable. The sums claimed are colossal, ie 476,597,615.00 which included costs of delay and interest. The 1st Respondent having not been party to the Agreement, it is my view, such a decision would require the Applicant to justify the delay, the claim made and even the interest charged. There is no evidence that the Applicant was given a chance to defend his claim because circumstances had changed such that it was no longer the fixed contract agreed upon with the 2nd Respondent in the beginning.

Halsburys Laws of England Vol 1 (1) at para 96 states that a person determining a justiciable controversy between parties must give each party a fair opportunity to put his own case and to correct or contradict any relevant statements. The decision of the 1st Respondent was depriving the Applicant of large sums of money which the Applicant believed it had earned and the Respondens should have given the Applicant a hearing especially taking into account that the 2nd

Respondent whom the Applicant dealt with, had not objected to the payment. The right to be heard is fundamental and denial thereof renders the resulting decision to be unfair and unreasonable.

Having failed to hear the Applicant on their claim, I find that the 1st Respondent was in breach of rules of natural justice and that decision is amenable to be quashed by an order of certiorari.

It is the Applicant's contention that the Respondents had a legal obligation to pay and that is why an order of mandamus is sought. However, in my view, the very fact that the 1st Respondent declined to acknowledge the sums allegedly owed, is indicative of the fact that the sums claimed are disputed and this court would not be in a position to grant an order of mandamus. This court would only grant such order if it was clear that the Respondent had an obligation to pay for example if it was not disputed that the sums were owed or if the Applicant had a decree.

As observed above, though the 2nd Respondent may have agreed to the payment being made, the ultimate say seems to lie with the 1st Respondent. Accordingly, I find that the Applicant has not demonstrated that the Respondents have a statutory obligation to pay him the sums owed and that they have neglected or refused to pay. It is worth noting that this claim arises out of a contract for repair of roads. This court cannot enforce the said contract which seems to be in dispute. This court can only intervene if the legal obligation has concretized. For that reason I find that the Applicant is not deserving of an order of mandamus and the same will not be granted.

The upshot is that prayer I of the Notice of Motion, that is, the decision of the Respondent dated 25th July 2007 is hereby called up and quashed by an order of certiorari. Prayer 2 is not granted. The Applicant will also have costs of the Notice of Motion.

Dated and delivered this 1st day of July 2009.

R.P.V. WENDOH

JUDGE

Present

Mr. Oginde for the Applicant

Mr. Lenzi: Court Clerk