



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MUSINGA & J. MOHAMMED JJA)

CIVIL APPEAL NO. 189 OF 2012

BETWEEN

BUFFET PARK LTD.....APPELLANT

VERSUS

REPUBLIC.....1STRESPONDENT

CITY COUNCIL OF NAIROBI.....2ND RESPONDENT

SAVANNAH GOLD LIMITED.....3RD RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nairobi (C. Githua, J.) dated 12th June, 2012

in

J.R. Misc. Application No. 222 of 2011)

JUDGMENT OF THE COURT

The appeal arises from the Judgment of the High Court (C. Githua, J.) dated the 12th June, 2012.

The background to the appeal is that, the appellant successfully bid for tender No. CE/7/003/17-08 that has been advertised by the 2nd respondent, City Council of Nairobi (now County Government of Nairobi) in the "Daily Nation" Newspaper of 22nd October, 2007, for leasing Uhuru Park Restaurant (the suit property), on a Rehabilitation-Operate Transfer basis (ROT). Upon compliance with the tender prerequisites as per the Public Procurement and Disposal Act, 2005 (the Act); the 2nd respondent made an offer to the appellant by a letter dated 16th March, 2008. The appellant accepted the offer vide a letter dated 31st March, 2018. Before execution of a formal lease, M/S Sorrento Limited, in appeal No. 15 of 2008 appealed to the Public Procurement Administrative Review Board (the Board), against the 2nd respondent's award of the tender to the appellant. In a Ruling delivered on 9th May, 2008, the Board nullified the 2nd respondent's award of the tender to the appellant, in favour of M/s Sorrento Limited.

The 2nd respondent commenced Judicial Review proceedings against the Board in H.C. Misc. Application No. 229 of 2008, Republic versus Public Procurement Administrative Review Board Exparte City Council of Nairobi, (JR proceedings). On 9th May, 2008, the High Court issued an order of certiorari quashing the ruling of the Board. The 2nd respondent, instead of executing a lease between them and the appellant, awarded the contract to Savannah Gold Limited, the 3rd respondent (erroneously described as an interested party in the appeal record documents), triggering Judicial Review (JR) proceedings against the 2nd respondent in which the High Court granted orders for certiorari as prayed for, but granted the order of prohibition conditional upon fresh procurement process being undertaken by the 2nd respondent in accordance with the provisions of the Act.

The Judge declined to grant the order of mandamus. Relying on the case of R. Versus Kenya National Examination Council Exparte Geoffrey Gathenji and 9 others [1997] eKLR, on the scope and efficacy of the order of mandamus, the Judge made findings that section 68 of the Act made it mandatory that for a tender process to be valid, it had to be executed in writing within the tender period stipulated for in the offer and acceptance tender documents; that since no lease was executed between the appellant and the 2nd respondent, the 2nd

respondent was under no duty to grant the appellant access to the suit premises after expiry of the tender validity period and lastly, that the High Court in the JR proceedings only declared the decision of the Board null and void without affirming the tender awarded by the 2nd respondents in favour of the appellant.

In light of the above reasoning, the Judge concluded as follows:-

***“in view of the fact that the parties had not yet executed a written contract incorporating the terms of the tender, I find that the respondents did not have either a contractual, public or statutory duty to grant the applicant access to Uhuru Park Restaurant to rehabilitate and carry out reconstruction works therein, or to execute a lease for the said restaurant in favour of the appellant since the respondent had a discretion to select the person or entity it found appropriate to carry out the said rehabilitation and reconstruction works provided it complied with the provisions of the Public Procurement and Disposal Act, I find that compelling it to execute a lease for the suit property in favour of the applicant would be tantamount to compelling it to exercise its discretion in a certain way which is not permissible in law.*”**

For all the foregoing reasons, I find that the applicant has not demonstrated that it is deserving of the orders of mandamus as sought in prayer (c) and I therefore decline to grant the same.”

The appellant filed this appeal against the above decision, raising eleven (11) amended grounds of appeal condensed and paraphrased as follows:-That the learned Judge erred when:

(1) she erroneously declined to grant the order of mandamus as sought.

(2) she erroneously reversed the decision in High Court Misc. Application No. 22 of 2008 Republic versus Public Procurement Administrative Review Board exparte City Council of Nairobi.

(3) she misdirected herself in applying section 68 (3) of the Public Procurement and Disposal Act to the proceedings before her.

The appeal was canvassed by way of oral submissions by learned counsel **Mr. S.A. Wamwayi**, appearing for the appellant. There was no appearance for the firm of Aduda & Co. Advocates on record for the 2nd respondent; and the firm of Kivuitu Maundu & Co. Advocates on record for the 3rd respondent served on 27th June, 2018 & 3rd July, 2018 respectively for the hearing of the appeal. The Court, being satisfied that all parties to the appeal had due notice of the hearing date, allowed the appellant to prosecute the appeal.

In support of the appeal, **Mr. Wamwayi** submitted that the Judge wrongly exercised her discretion when she declined to grant the order of mandamus and should therefore be faulted for the failure to properly appreciate that the intervening period when **M/s Sorrento Ltd** challenged the 2nd respondent's award of the tender to the appellant before the Board; and when the 2nd respondent challenged the decision of the Board before the High Court in the JR proceedings were to be discounted when computing the period within which the disputing parties ought to have executed the lease in terms of the tender process documents. It is counsel's view, that had the Judge properly appreciated that position, she would have arrived at the only logical and probable conclusion that the tender period had not in the circumstances expired and on that account allowed the order of mandamus prayed for by the appellant. Secondly, the Judge was also faulted for the failure to fault the 2nd respondent's conduct in failing to timeously process the execution of the lease soon after the completion of the offer and acceptance of the award of the tender process and also soon after the ruling in the JR proceedings.

According to **Mr. Wamwayi**, the appellant's legitimate expectation of the 2nd respondent with regard to the successfully completed tender process, upon the successful completion of the JR proceedings in favour of the 2nd respondent, and which according to **Mr. Wamwayi**, the Judge also failed to properly appreciate, was that the 2nd respondent would honour its commitments under the completed tender process because, according to counsel, the quashing of the decision of the Board by the High Court's order of 9th May, 2008 had the effect of restoring the appellant and the 2nd respondent to their respective former position "ante" to the Pre-Board decision period which in counsel's view, was sufficient basis for the court to grant the order of mandamus.

As this is a first appeal, we are cognizant of our duty to re-evaluate the evidence tendered before the trial Court and reach our own conclusions- See **Selle V. Associated Motor Boat Company Ltd [1968] EA 123**, where the Court outlines the duty of a first appellate court as follows:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanor of a witness is inconsistent with the evidence in the case generally.”

We have anxiously considered the record in light of the sole submission by **Mr. Wamwayi** on behalf of the appellant. The issues that fall for our determination are the same as condensed above.

With regard to issue number two, all that the Judge said of the JR proceedings and correctly so in our view, was that the High Court simply quashed the decision of the Board without affirming the award of the tender in favour of the appellant, which position gave the 2nd respondent leeway in electing either to execute a lease with the appellant notwithstanding, the lapse of the tender period; or alternatively

offer that contract to some other third party as it did in this appeal. We therefore find nothing in the said finding to suggest that the Judge reversed the decision of the High Court or that she either misapprehended or failed to appreciate any position with regard thereto. That argument is therefore rejected.

As for the 3rd issue, it is correct that the Judge construed section 68(3) of the Act. We have revisited the reasoning of the Judge on this issue in light of the above provision and find no error in the Judge's interpretation and application of that provision to the record.

Turning to issue number 1, which is the core issue in this appeal, the principles that guide the High Court in the exercise of judicial review Jurisdiction are as were aptly restated by this Court in **Kingdom Kenya 01 Limited versus the District Land Registrar, Narok & Fifteen (15) others [2018] eKLR** as follows:-

“Judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. See the Commissioner of Lands –versus Hotel Kunste [1997] eKLR. The purpose of JR is to ensure that the individual is given fair treatment by the Authority to which he has been subjected. JR as a remedy is available, in appropriate cases, even where there are alternative legal or equitable remedies. See David Mugo t/a Manyatta Auctioneers –versus Republic – Civil Appeal No. 265 of 1997 (UR). JR being a discretionary remedy, it demands that whoever seeks to avail itself/himself/herself of this remedy has to act with candour or virtue and temperance. See Zakayo Michubu Kibwange –versus Lydia Kagina Japheth and 2 others [2014] eKLR. JR as a remedy may also be invoked where the issues in controversy as between the parties are contested. See Zakayo Michubu Kibwange case (Supra). The remedy of judicial review is only available where an issue of a public law nature is involved. Further, that a person seeking mandamus must show that he has a legal right to the performance of a legal duty by a party against whom the mandamus order is sought or alternatively, that he has a substantially personal interest and that the duty must not be permissive but imperative and must be of a public nature rather than of a private nature. See Prabhul Gulabuland Shah –versus Attorney General & Erastus Gathoni Mlano, Civil Appeal No. 24 of (1985) (UR). Following the promulgation of the Kenya Constitution, 2010, judicial review is available as a relief to a claim of violation of the rights and fundamental freedoms guaranteed in the Constitution of Kenya 2010. See Child Welfare Society of Kenya –versus- Republic and 2 others, Exparte Child in Family Forces Kenya [2017] eKLR.”

Judicial review being a discretionary remedy, our mandate when determining as to whether the trial Judge exercised her discretion judiciously when she declined to grant the order of mandamus was set out in **United India Insurance Company Limited –versus East African Underwriters Kenya Ltd [1985] KLR 898** which we fully adopt. These are that we can only interfere with the exercise of that discretion if we are satisfied that the Judge misdirected herself in law, misapprehended the facts, took account of considerations which she should not have taken into account, failed to take into account a consideration of which she should have taken into account, or that her decision, albeit a discretionary one, is plainly wrong.

As observed by the trial Judge and correctly so in our view, the principles that guide the Court when dealing with the scope and efficacy of an order of mandamus is as crystalized by this Court in **National Examination Council versus Republic Exparte Geoffrey Gathenji Njoroge & 9 others** (supra), namely:

“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”

Further that:

“The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”

The reasons the Judge gave for declining to accede to the appellant's request for the order of mandamus are as already highlighted above. We have considered these in totality in light of the above principle. Our findings thereon are as follows: it is not disputed that the appellant was awarded a tender by the 2nd respondent, on the terms as stipulated in the respective offer and acceptance tender documents. These terms were, however, never subsequently incorporated into a written contract or lease pursuant to the provisions of **section 68(3)** of the Act because of the intervening circumstances alluded to above.

As correctly found by the Judge, and affirmed above by us, all that the High Court did in the JR proceedings was simply to quash the decision of the Board without affirming the award of tender by the 2nd respondent in favour of the appellant, which in our view, and as correctly held by the Judge, gave the 2nd respondent leeway to either proceed on and formalize a lease in favour of the appellant, notwithstanding that the tender period had lapsed; or alternatively, elect to award the contract to some other 3rd party as it did in the circumstances of this appeal.

Learned counsel, **Mr. Wamwayi**, does not dispute the fact that the tender period stipulated in the tender documents had expired as at the time the 2nd respondent successfully challenged the decision of the Board. His complaint is that the Judge should have first of all, discounted the period taken by the litigation both before the Board and the High Court; and secondly, the 2nd respondent's conduct of failing to act timeously to process the execution of the lease, upon the successful conclusion of the offer and acceptance tender process, in the first

instance and secondly, soon after the conclusion of the JR proceedings.

We have considered the above complaint in light of the prerequisites for granting the relief of mandamus as set out in the case of **R. Versus Kenya National Examination Council Exparte Geoffrey Gathoni & 9 others** (supra), and more particularly as aptly summarized by **G.V. Odunga, J.** in the case of **Republic versus the Commission of Lands and another exparte Kithinji Mungu Miagere Nairobi H.C. Misc. Application No. 395 of 2012** as follows:

(i) An order of mandamus can issue from the High Court commanding a body or person to do that which it is its or his/her duty to do. (ii) the issue of an order of mandamus is discretionary (iii) an order of mandamus is not an order of specific performance like in a contract situation; a party in a JR proceeding seeking an order of mandamus must show the existence of a statutory duty conferred or vested by a statute upon some person, body of persons or tribunal which such person, body of persons or tribunal has failed to perform; (iv) it is a peremptory order requiring the respondent to perform a specific public duty;(v) it depends on whether the duty as expressed or implied gives the applicant the right to complain;(vi) its purpose is to compel the performance of a public duty or any act contrary to or in evasion of the law; (vii) it does not lie against a public officer as a matter of course;(viii) Courts of law are usually reluctant to direct an order of mandamus against the executive officers of a government (also read County Government) unless some specific act or thing which the law requires to be done has been omitted. Courts of law would normally proceed with extreme caution whenever the court's jurisdiction is invoked for the granting of the writ of mandamus where such an order would result in interference by the courts with the management of the executive departments of the government. Save where there is demonstration that the public officer has failed to perform his duty, and that there is no alternative remedy available to the applicant; (ix) It may be refused if the enforcement of the order will present problems like lack of adequate means to supervise its performance; (x) it is employed to enforce the performance of a public duty which is imperative, not optional or discretionary with the authority concerned; (xi) it may be employed to enforce a mandatory duty which may not necessarily be a statutory duty, but which has " a public element in it directed at any person or body of persons having legal authority to determine questions affecting the rights of subjects; (xii) it may also issue directly to the concerned authority directing it to act according to law; and lastly; (xiii) the aggrieved person must have demanded justice which was refused."

See also the Tanzania Court of Appeal decision in the case of **Ngurangwa and others versus Registrar of the Industrial Court of Tanzania and others [1999] 2EA 245**, for the holding, *inter alia*, as follows:

"It is now trite that the order of mandamus is of a most extensive remedial nature, and is, in form, of justice, directed to any person, corporation or inferior tribunal requiring him or them to do some particular thing thereon specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right and it may issue in cases, where although there is an alternative legal remedy yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way."

Applying the above threshold to the appellant's complaints set out above, in light of the reasons the trial Judge gave for the failure to grant the order of mandamus, it is our finding that the Judge cannot be faulted on the conclusions reached, reason being that, the appellant does not dispute that as at the time the JR proceedings were concluded, the period stipulated in the offer and acceptance tender documents as the tender period had expired, a position which as already stated above, gave the 2nd respondent an option either to proceed on and grant a lease for those very works to the appellant or award the contract to some other third party. Secondly, there was nothing in the offer and acceptance tender process documents stipulating that, any intervening circumstances like the one alluded to above, stopped the tender period from running. Thirdly, since the appellant does not dispute that there was no written contract validity between them in terms of **section 68 (3)** of the Act, no statutory duty or contract validity arose for the performance of the 2nd respondent in favour of the appellant to attract the issuance of an order of mandamus in terms of the principle highlighted above.

Turning to the issue of a conditional prohibitory order, the scope and efficacy of prohibition as set out in the **Kenya National Examination Council case** (supra), is as follows:

"It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings"

Applying the above threshold to the conditional order of prohibition as granted by the Judge, we find nothing in the above principle that mandated the Judge to correct both the course and an apparent wrong decision arrived at by the 2nd respondent in awarding the tender to the 3rd respondent as opposed to re-tendering for the same. We therefore find the condition attached to the order of prohibition were therefore misplaced, notwithstanding that these are severable and therefore inconsequential to the ultimate result of the appeal.

The upshot of the above is that the appeal herein lacks merit. It is accordingly dismissed. Each party to bear own costs of the appeal.

Dated and delivered at Nairobi this 10th day of May, 2019.

R.N. NAMBUYE

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR.