IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, WARSAME & AZANGALALA, JJ.A)

CIVIL APPEAL NO 36 OF 2002

BETWEEN

GULF ARCHITECTS…….....1ST APPELLANT

WA KIM QUANTICONSULTS……..……..2ND APPELLANT

HILL & ASSOCIATES ……....…….3RD APPELLANT

AND

THE ATTORNEY GENERAL ……..…….RESPONDENT

(an appeal from the judgment of the High Court of Kenya at Nairobi (Onyango Otieno, J.) dated 9th January 2001

in

H.C.C.C. No 65 of 1998)

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JUDGMENT OF THE COURT

By way of a plaint dated 23rd March 1998, the appellants herein sued the respondent for the sum of Kshs 202,872,282.20 plus interest and costs of the suit. The appellants claimed that on 30th May 1994, they were appointed as consultants by the Ministry of Transport and Communications to handle a project for a period five years commencing 1st July 1994. Thereafter, the respondent formally authorized them to submit all the working drawings and bills of quantities, which the appellants did on or around 1st June 1995. On 13th March 1997, the appellants submitted to the respondent interim fee notes in the amount of Kshs 202,872,282.20 for the work already done, which the respondents did not honour. On its part, the respondent denied each of the appellant's claims and averred that it was not bound to pay any interim fees as there was no legal contract between the parties.

The evidence given on behalf of the appellants was that they were contracted by Mr. G.P. Owiti who had previously worked with the first appellant on various projects when the said Mr. Owiti was steering a project for the National Youth Service. Mr. Owiti later moved to the Ministry of Transport and Communications, and on 30th May 1994, he wrote to the appellants to inform them that their firms had

been earmarked to provide consultancy services in their respective fields for a proposed project within the ministry. The appellants claimed to have accepted this offer by way of a letter dated 6th June 1994.

On 16th December 1994, the first and second appellant received communication from Mr. Owiti telling them that the ministry had completed negotiations on the project, and that all the working drawings and bills of quantities ought to be made available. On the strength of this letter, the appellants set to work and delivered the requested work.

Sometime in 1996, Mr. Owiti passed on and in January 1997, the first appellant wrote to the respondent, enquiring about the office which they would be working with henceforth. There was no reply to this letter. On 26th March 1997, the appellants wrote to the respondent, sending their fee notes. The Ministry, through the Permanent Secretary wrote back to the appellant, denying the existence of the project, denying liability for any of the work purported to have been done by the appellants and informing them that they should not send any more fee notes in respect of the said projects.

Mr Owiti, the then deputy secretary Finance & Administration in the Ministry of Transport and Communication notified the 1st appellant (WaKim) that his firm had been earmarked to provide quantity survey and consultancy services for a proposed project, the National Road Safety Project, in the ministry. This was through a letter addressed to them. The appellants accepted the offer. Later on, the appellants received a letter from Mr. Owiti telling them that negotiations for financing had been completed and that the ministry would require all the working drawings as soon as possible. On the strength of this letter, the appellants prepared the bills of quantities. The appellants also claimed to have been shown the proposed scene of the road safety headquarters that they were designing, which were near the metrological site next to the Ngong Race Course. The 1st appellant prepared the bills of quantities and produced copies of the same, and forwarded these to the respondent. However, when the appellants forwarded a fee note to the respondent, the respondent replied that the project on which the appellants were working did not exist. The sum total of the evidence given by the appellants was that the letter written by Mr Owiti constituted a valid contract, that the project on which they worked was existing, and that the person who commissioned them was qualified to do so.

The respondent's evidence was that the late Mr. Owiti did not have any capacity to enter into a contract as claimed by the appellants. Mr. Edward Mwasi (DW1) who took over after Mr. Owiti's death testified that he had no knowledge of the proposed road safety national headquarters. He stated that the letter purported to have been written by Mr. Owiti must not have been written by him since he did not have the authority to write it, and further that the so called project did not appear in the annual budget estimates for the ministry.

The matter was heard by Onyango Otieno, J. (as he then was) who held that Mr. Owiti, being the deputy permanent secretary in the ministry, did not have any authority to sign contracts on behalf of the ministry, and that there did not exit a valid and enforceable contract between the parties. Therefore, the claim against the respondent could not succeed and the suit was dismissed with costs.

The appellants, being aggrieved with the findings of the trial judge, have appealed to this Court, raising eleven grounds of appeal which were argued by Mr. Ogado, learned counsel for the appellants. Mr. Ogado submitted that the first issue that warrants the consideration of this Court is whether or not there was a valid contract between the parties. According to counsel, under section 2 of the Government Contracts Act, the appellants did not require a letter of authority from the respondent in order to infer a binding contract between themselves and the respondent. He further submitted that even though there was no instruction letter from the respondent to the appellants, this should not matter because where a party benefits from the services rendered then it must compensate the service provided. In his view, the respondent was estopped from denying that the Ministry of Transport and Communication had contracted the appellants on the basis of the representations that they had already made to them.

Mr. Kaumba, learned counsel for the respondent, argued that there was no valid contract that was capable of granting the benefits and as such, the rights arising out of the invalid contract could not be enforced.

His position is that section 2 of the Government Contracts Act stipulates two conditions: the first is that the contract must be sealed, and the second is that the contract must be signed by the authorized officer, or on his behalf. Mr. Kaumba submitted that these two conditions were not fulfilled because the letter from which the appellants claim to have authority for the projects was signed by G.P. Owiti, the deputy permanent secretary in the ministry, but was not a letter of authority; there was no evidence on the validity of the contract and as such, no benefit can accrue from the contract.

This is a first appeal, and we are required to reevaluate the evidence tendered before the High Court and arrive at our own independent findings and conclusions of the matter. See ***Nicholas Njeru v Attorney General & 8 others*** ***[2013] eKLR (Civil Appeal No. 110 of 2011).*** It is with this duty in mind that we have summarized the facts forming the background of this dispute.

The first issue that arises for consideration is whether or not there was a valid contract between the parties. The appellants have referred the court to the authority of ***Union of India v J.K. Gas Plant 1980 AIR 1330***. In that case, the Government of India had supplied some material to respondent for manufacturing gas plants. Part of the price for the material remained unpaid, so the respondent sued for the amount. The government of India denied liability on the basis that the provisions of section 175(3) of the Government of India Act, which requires contracts with the government to be in particular form, were not complied with.

The Indian High Court held that even though the provisions of section 175 were not complied with, the agreement resulting from the correspondence which took place between the company and the officers of the government was good, and therefore, the company was entitled to recover the proceeds of the goods from the government. This decision was affirmed by the Supreme Court of India. Now the the appellants argue that in the present appeal, this Court ought to follow this course, bearing in mind that the respondent had already benefited from the output of the appellants.

In determining whether or not there was a valid contract between the parties, we shall first consider Section 2 of the Government Contracts Act, Chapter 25 of the Laws of Kenya, which provides as follows:

"2. Contracts made in Kenya for the Government Subject to the provisions of any other written law, any contract made in Kenya on behalf of the Government shall, if reduced to writing, be made in the name of the Government of Kenya, and shall be signed either by the accounting officer or by the receiver of revenue of the Ministry or for the department of the Government concerned, or by any public officer duly authorized in writing by such accounting officer or receiver of revenue, either specially in any particular case or generally for any contracts below a specified value in his department or otherwise as my be specified in such authorization.

From this provision, it is clear that any contract entered into on behalf of the government must first, be entered into by an authorized officer. The authorized officer is either the accounting officer, the receiver of revenue in the ministry or any public officer to whom the accounting officer, or the receiver of revenue, has delegated authority in writing. It is not in dispute that in this case, the authorized officer would be the permanent secretary of the ministry concerned as was testified by the Deputy Secretary, Engineer Edward Mwasi. It was never suggested that Mr. Owiti was the receiver of revenue in the ministry, and similarly there was nothing in evidence to show that the deceased Mr. Owiti had been authorized by either the accounting officer or the receiver of revenue to enter into a contract with the appellants.

We therefore entertain no doubt that there could not have been a valid contract between the appellants and the deceased Mr. Owiti. To our minds, it does not matter what the intention of Mr. Owiti was in corresponding with the appellant as he did. It is a principle of contract law that a court cannot enforce a contract that has been impliedly or expressly prohibited by statute. In ***St John Shipping Corporation v***

Joseph Rank Ltd ***[1957] 1WB 267*** this principle was stated thus:

"The second principle is that the court will not enforce a contract which is expressly or impliedly

prohibited by statute. If the contract is of this class it does not matter what the intent of the parties is; if the statute prohibits the contract, it is unenforceable whether the parties meant to break the law or not. … [O]ne has to consider not what acts the statute prohibits, but what contracts it prohibits; but one is not concerned at all with the intent of the parties; if the parties enter into a prohibited contract, that contract is unenforceable." *(emphasis ours)*

It is manifestly clear from section 2 of the Government Contracts Act that a contract with the government must not only be reduced into writing, but it must be entered into with an authorized officer. The statute therefore prohibits contracts that are entered into with unauthorized officers. This provision of law is reinforced by section 4 of the same Act which provides that:

"No contract made after the commencement of this Act shall, unless made in the manner hereinbefore provided, be deemed to be made by the authority of the Government."

Therefore, the letter written by Mr. Owiti cannot be said to have conferred any contractual rights to the appellants as he clearly had no authority to enter into any contracts on behalf of the government.

In addition, it is clear from the evidence a contract between the parties could not be inferred. The letters upon which the appellants rely contain no specifications of the contract; we were shown no instruction letter, and even if by some stretch of imagination, those letters were to be construed as instruction letters, we have already found that they could not constitute a valid contract under the law. In addition, those letters contain no specification of the nature and the extent of the work that would be carried out by the appellants.

We have also considered the respondent's evidence that the alleged project was never authorized by the treasury, and that even the person who took over from Mr. Owiti had no knowledge of it. There is no evidence to suggest that the respondent utilized the drawings and sketches that were forwarded to them by the appellants. For this reason we cannot accept the appellants' invitation to find, as was found in

Union of India v J.K. Gas Plant (supra) that the respondent benefited from the appellants and therefore they should be required to pay.

An evaluation of the evidence leads us to the conclusion that there could have been no contract for provision of services between the appellants and the respondent. For this reason, the appeal herein is without merit, and it fails in its entirety. It is hereby dismissed with costs to the respondent.

Dated and Delivered at Nairobi this 29th day of April, 2016

H. OKWENGU

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL F. AZANGALALA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR