REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civil Appeal 244 of 2006

ZAKHEM CONSTRUCTION (KENYA) LIMITED …....… APPELLANT

AND

PERMANENT SECRETARY, MINISTRY

OF ROADS & PUBLIC WORKS …… 1ST RESPONDENT

CHIEF ENGINEER MINISTRY ROADS

& PUBLIC WORKS …….. 2ND RESPONDENT

(An Appeal from the Ruling and the order of the High Court of Kenya at Nairobi (Emukule, J) dated 23rd October, 2006

In

H.C. Misc. Civil Application No. 612 of 2006)

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JUDGMENT OF THE COURT

On 19th October, 2006, Zakhem Construction (Kenya) Ltd, the appellant before us, went before the High Court by way of an ex parte chamber summons stated to be under "*section 8(2) of the Law Reform Act, Chapter 26 Laws of Kenya, Order 53 Rule 1(2) of the Civil Procedure Rules, the Inherent Power and jurisdiction of the Honourable Court and all other enabling provisions of the Law" a*nd the substantive prayers made in the summons were that:-

"(a) ……..

(b) THAT leave be and is hereby granted to apply for an order of certiorari removing to (sic) this Honourable Court the Respondent's decision made on 9th October, 2006 issuing a fourteen days Termination Notice of the contract for construction of Runda – Whispers Estate Link Bridge and approach Roads entered into with the Applicant on 28th November, 2005 for purposes of being quashed.

(c) THAT leave be and is hereby granted to apply for an order of prohibition stopping and/or restraining the Respondents whether by themselves their agents or servants or howsoever from terminating the said

contract.

(d) THAT the grant of leave aforesaid do operate as a stay restraining the respondents from terminating the said contract at the expiry of 14 days of the notice of termination dated 9th October, 2006 until the hearing and determination of the application for judicial review for orders of certiorari and prohibition.

(e) ……"

The respondents named in the summons were two, namely the Permanent Secretary, Ministry of Roads and Public Works (the 1st Respondent to the appeal) and the Chief Engineer, Ministry of Roads and Public Works (the 2nd Respondent to the appeal). From what we can gather from the record before us, what was being alleged was that on 28th November, 2005, the Appellant entered into a written contract with the two Respondents, obviously on behalf of the Kenya Government, and the subject of the contract was that the Appellant was to construct for the Respondents the Runda-Whispers Estates Link Bridge and the approach roads thereto. The contract was for a specified period and the amounts payable to the Appellant was also specified in the contract. The terms for terminating the contract were also specified in the written agreement. On 9th October, 2006, the two Respondents issued to the Appellant a notice of fourteen (14) days to terminate the written contract at the expiry of that period. That notice provoked the Appellant's summons in chambers seeking the orders we have already set out.

The summons was placed before Emukule, J on the same day, i.e. 9th October, 2006. Mr. Ng'ang'a Advocate appeared for the Appellant.

The learned Judge looked at the matter and immediately made three orders, namely:-

"*1. Application is certified urgent.*

2. Serve the Respondents forthwith.

3. Hearing inter- partes on 23rd October, 2006."

These orders of the learned Judge form the basis of *Grounds 1* and *3* in the Appellant's Memorandum of Appeal where it is alleged that:-

"*1. The learned trial Judge (Emukule, J) erred in*

Law in ordering that the application for leave

to institute judicial review proceedings be

served upon the respondent when Order LIII

rule 1 (2) of the Civil Procedure Rules

provides that such an application shall be

heard ex parte.

3. The learned trial Judge could only make his determination to either grant or deny the application for leave ex parte and did not therefore have jurisdiction to order for proceedings inter-partes and as such the said ruling and order of 23rd October, 2006 are therefore nullity."

We shall deal with these complaints in due course.

On 23rd October, 2006, the matter was once again placed before the same Judge and on that occasion, Mr. Mereka appeared for the Appellant while M/s Muthoni Kimani, a Deputy Solicitor-General, appeared for the Respondents. None of them appears to have addressed the learned Judge but he ordered that:-

This application does not lie in judicial review, but in contract. The application for leave is therefore declined and the application is struck out with no orders as to costs."

This order is the basis of the complaint in Ground 2 wherein it is alleged that:-

"*2. That subsequently the learned trial Judge*

erred in law in disallowing the applicants leave

to institute judicial review proceedings

pursuant to the inter- partes hearing whilst the

proceedings ought to have been ex parte."

Arguing Grounds 1 and 3, first, Mr. Mutua, learned counsel for the Appellant, told us that *Order 53 Rule 1(2)* provides only for ex parte hearing of an application for leave to institute judicial review proceedings and that being so, the learned trial Judge had, in effect, no jurisdiction to order that the chamber summons be served and heard inter-partes as the learned Judge purported to do. *Order 53 rule 1* upon which Mr. Mutua based himself provides, in pertinent parts, as follows:-

"*53(1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefore has been granted in accordance with this rule.*

(2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on. The judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit.

(3) ……..

(4) ……."

Basing himself on *rule 1(2)* above, Mr. Mutua contended that since the application for leave is to be made ex parte to a judge in chambers, it must follow that the same must also be heard ex parte in chambers.

Generally speaking and particularly in Kenya, unlike in the United Kingdom where these rules have been amended, Mr. Mutua would appear to be right – on the prima facie reading of the provision. But when we inquired from him if there are any authorities in which the interpretation of *rule 1(2)* has directly been in issue, Mr. Mutua told us he was not aware of any such authority. There is clearly authority of this Court on the matter. In SHAH VS. RESIDENT MAGISTRATE, NAIROBI, [2000] EA 208, Ole Keiwua, JA, citing the case of O'REILLY VS. MACKMAN & OTHERS [1982] 3 ALL E.R 1124 stated as follows at page 211 of the Report:-

"*In my respectful view, it is within the discretion of a judge to adjourn the whole application for leave, and for that leave to operate as a stay of proceedings for hearing inter partes but I do not think that that discretion extends to enable such a judge to hear that application both ex parte and inter partes as was about to happen in this case before Aluoch, J."*

The stress on "*the whole application*" being adjourned is in relation to the fact that the Judge in the SHAH case (supra) had granted leave ex parte but postponed the issue of whether or not the leave she had granted ought to act as a stay to be heard inter-partes. The Court had previously held in REPUBLIC VS.

COMMISSIONER OF CO-OPERATIVES [1997] LLR 2227 (CAK) that it was not permissible to grant leave ex parte and then postpone the issue of whether the leave so granted ought to act as a stay for hearing inter- partes. What is before us to-day is whether a judge has jurisdiction to adjourn the whole application for hearing inter partes. As is obvious from what Ole Keiwua, JA said in the SHAH case (supra), and the other two members of the Court agreed with him, a judge has discretion to adjourn the whole application for hearing inter-partes. In O'REILLY VS. MACKMAN & OTHERS (supra), LORD DIPLOCK with whom all the other Law Lords agreed stated at pg. 1130 of the Report:-

"*First, leave to apply for the order was required. The application for leave, which was ex parte but could be, and in practice often was adjourned in order to enable the proposed Respondent to be represented had to be supported by a statement setting out ……."*

So even in the United Kingdom and even before amendment of the rules, there was a power to adjourn an application for leave for hearing inter partes. This Court accepted that position in the SHAH Case and it was not correct for Mr. Mutua to say there was no authority on the matter. We add as a matter of interest that Mr. Mutua readily conceded that the hearing of the application inter-partes occasioned no prejudice at all to the Appellant. Grounds 1 and 3 in the Memorandum of Appeal must accordingly fail.

Ground 2 has occasioned us some anxiety in the sense that before refusing to grant leave, the learned Judge does not appear to have given any hearing to the parties in spite of his earlier order that the matter be heard inter-partes and both parties were present before him. However, because of the view we take of the whole matter, we do not think the failure to hear the parties actually caused any prejudice to the Appellant. As we said at the beginning of this judgment, the matter between the Appellant and the Respondents was purely based on a written contract. There was even an arbitration clause for the settlement of any disputes that might arise between the parties. It was not suggested before us that the Government cannot enter into a contract with individuals or some other entities such as the Appellant herein. By their contract the parties had made all the provisions they thought sufficiently covered the interest of each of them. If the Appellant thought the Respondent was in breach of the contract by issuing the notice of intention to terminate, the Appellant's remedy did not lie in public law; the remedy lay in private law where the Appellant could be awarded damages if it proved that the contract was unlawfully terminated. Mr. Mutua particularly relied on Clause 44.1 which dealt with "*Extension of Time for Completion*." That Clause provided:-

"*In the event of*

(a) the amount or nature of extra or additional work, or

(b) any cause of delay referred to in these conditions, or

(c) exceptionally adverse climatic conditions, or

(d) any delay, impediment or prevention by the Employer, or

(e) other special circumstances which may occur, other than through a default of or breach of contract by the Contractor or for which he is responsible, being such as fairly to entitle the Contractor to an extension of the time for completion of the works, or any section or part thereof, the Engineer shall, after due consultation with the Employer and the Contractor, determine the amount of such extension and shall notify the Contractor accordingly, with a copy to the Employer."

It was the submission of Mr. Mutua that these provisions for extension of time implied the application of the rules of natural justice and that because of that the Respondents were under a duty to hear the Appellant before issuing the notice to terminate the contract. With the greatest respect to Mr. Mutua, these provisions were part and parcel of the contract and if it was the Appellant's contention that the Respondent was in breach of the provisions, all that would amount to would be that the Respondents were in breach of the contract itself and as we have said the remedy for breach of contract does not lie in the process of judicial review. If parties to a contract want to have the process of judicial review applicable

to their contract there is nothing to stop them from expressly providing in the written contract. We can find nothing in the provisions of Clause 44.1 which would make us think and hold that the parties intended that if one of them intended to terminate the contract the other party to the contract had to be heard first. Emukule, J was of the same view and that must be why he was prepared to hold, even without hearing the parties, that the matter lay in contract and the process of judicial review could not provide the Appellant with a remedy for an alleged breach of the contract. That holding was clearly correct and we can find no reason whatsoever for interfering with the same. In the event, the appeal before us has no merit and we order that it be and is hereby dismissed with costs to the Respondents. Those shall be the orders of the Court.

Dated and delivered at Nairobi this 15th day of February, 2007.

R.S.C. OMOLO

……

JUDGE OF APPEAL

E.O. O'KUBASU

……..

JUDGE OF APPEAL

P.N. WAKI

……

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.