



**Alibea Services Ltd v National Government Constituency Development Board
(Judicial Review E001 of 2023) [2024] KEHC 8346 (KLR) (12 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8346 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
JUDICIAL REVIEW E001 OF 2023
DO OGEMBO, J
JULY 12, 2024**

BETWEEN

ALIBEA SERVICES LTD APPLICANT

AND

**NATIONAL GOVERNMENT CONSTITUENCY DEVELOPMENT
BOARD RESPONDENT**

RULING

1. The applicant, Alibea Services Ltd, has moved this court by way of Notice of Motion application, dated 6/2/2023, against the Respondent, the National Government Constituency Development Board. The application is brought under several sections of the Law including Article 23 (3) of *the Constitution* of Kenya, the *Fair Administrative Action Act*, Section 8 and 9 of the *Law Reform Act*, Cap 26 and Order 53 Rule 1 and 2 of the Civil Procedure Rules. The application basically, has one prayer (prayer 1) that;

“That the Honourable Court be pleased to issue orders of mandamus against the Respondent, compelling and directing the Respondent to put in place an arbitration panel in Compliance with section 56 (2) of the National Government *Constituencies Development Fund Act*, No. 30 of 2015.”

2. The applicant also prays for directions on costs of this application. It is supported by an affidavit of one Festus Omolo, sworn on 6/2/2023 in which it is deponed that the applicant received a Notice of Award of it tender documents dated 16/2/2017, which notice confirmed award of Tender No. BNGCDF/CLRM/16-17-002, through the Procurement Committee on 27/2/2017 in favour of the applicant at a price of Kshs1,247,770/=. That the applicant proceeded to renovate the class rooms as per the tender award and duly demanded for payment of the work done, and also raised the issue with the Respondent by way of demand notice. That a subsequent suit, filed by the applicant, Siaya HCCC No. E001/2022 was struck out for want of jurisdiction on the basis that the Respondent had



embarked on a dispute resolution mechanism and had allocated the matter for hearing before the Board on 7/4/2022. That there has never been in place any dispute resolution mechanism put in place to hear and determine the complaints raised by the applicant as regards to its non-payment for services rendered and the Respondent has declined to honour the request made. That under Section 56(3) of the National Government Constituency Development Fund Act No. 30 of 2015, it is the Respondent who is mandate to ensure that arbitration mechanism are put in place.

3. The Respondent, through its corporation Secretary filed a replying affidavit sworn on 5/5/2023 in which it was deponed that the Board's mandate does not extend to implementation of projects at the Constituency level nor advertising or awarding tenders at constituency level. That whilst dismissing the applicant's application in the ruling delivered on 22/6/2022, the court acknowledged that the alternative dispute resolution mechanism availed by Section 56 of the Act had not exhausted. That the applicant thereafter, moved to the Respondent as the arbiter, but failed to provide the Respondent with any documents to act on, before proceeding to file this present application. That the Respondent is not a party to the dispute between the applicant and Bondo Constituency Fund Committee and that it is for the parties to appoint an arbitration panel by consensus failure of which either party would be at liberty to apply to the Cabinet Secretary to direct the Board in collaboration with the Office of the Attorney General to commence arbitration.
4. This application was canvassed by way of written submissions. The submissions of the applicant were on two fronts, the role of the Respondent under Section 56 (3) of the Act and whether there has been delay in forming the arbitration panel. It was submitted that under Section 56 (3) of the Act and whether there has been delay in forming the arbitration panel. It was submitted that under Section 56 (3) of the Act, it is clear that disputes of Civil nature are to be referred to the Board in the first instant. Counsel relied on the case of Benedict Wechuli Vs- Navakolo Constituency Development Fund and National Government Constituencies Development Fund Board, ELRC No. 163/2017.
5. Secondly, it was submitted that this matter has taken long in the hands of the Respondent that it should have as the Respondent has continued to show lack of interest and unwillingness to have the matter arbitrated. Reliance was made in the case of R -VS- National Government Constituencies Development Fund Board, JR. Misc. APPL.No. E1101/2020 that when there are no time limits prescribed, an administrative authority and public body is required to act within a reasonable period of time. And that unless this court intervenes, justice for the applicant will continue to be delayed.
6. From the Respondent's side, it was submitted that the applicant is not entitled to leave to institute the judicial review application. Quoting from Lempaa Susienka & 50 others -vs- Nelson Andayi Havi & 14 others (2021) eKLR adopted from IRC -Vs- National Federation of Self Employed and Small Business Ltd;

“Its purpose is to prevent the time of the court being wasted by busy bodies with misguided and trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might left whether they could safely proceed with administrative action while proceedings of judicial review of it were actually pending even though misconceived.”
7. And that judicial review remedies are discretionary and must be interrogated at a preliminary level (AAR Insurance -Vs- Public Procurement Administrative Review Board, HCJR No. E087/2021. Counsel urged that the procedure adopted by the applicant is fatally defectile and the motion ought to be struck out.



8. It was further submitted that the application is deserving of leave as the circumstances of the case are not deserving of leave. Counsel relied on R –vs- Chief Magistrate Milimani Commercial Courts And 2 others Ex Parte Fredrick Bett, where it was held;

“At this stage, an application for leave to bring Judicial Review Proceedings must first be made. The leave stage, as held by Waki, J. (as he then was) is used to identify and filter out, at an early stage, claims which may be trivial or without merit.”
9. That the ex parte application has not fully exhausted the statutory remedies under Section 56 of the Act and that the application is not merited. That Section 56 (4) of the Act, requires that where parties fail to jointly agree on an arbitrator, any of the parties may apply to the Cabinet Secretary to reconsider the Board’s decision and determine the mater. That the applicant ought to apply to the Cabinet Secretary to reconsider the Respondent’s decision.
10. That the court therefore lacks jurisdiction in this matter (Owners of Motor Vessel “Lilian S” Vs- Caltex Oil (1989) KLRI.
11. On whether the application is fit for the orders of mandamus, it was submitted that whereas the applicant lodged the dispute with the Respondent, under Section 56 of the Act, before the Respondent could act, the Applicant rushed to the court via Siaya HC.C No. E001/2022. That thereafter, the applicant failed to avail the relevant documents relating to its case. And that the Respondent’s mandate is limited to the decision making process and not the merit of the decision (R –vs- Public Procurement Administrative Review Board & 3 others Ex Parte Olive Telecommunications LTD (2014) eKLR. Respondent denied that it refused to act. Respondent urged that this application be dismissed with costs.
12. I have considered this application and the submissions made by the parties. As I understand it, the issues that arise from the application of the applicant are two (2) fold. And the same are:-
 - i. Whether leave to file Judicial Review proceedings by way of mandamus can issue in the manner applied for by the applicant.
 - ii. Whether the order prayed for of mandamus can issue in favour of the applicant and against the Respondent as prayed in plaintiff’s application.
13. Regarding the question leave, it is important to consider the provision of Order 53 Rule 1 under which this application has been brought. The same stipulates:

“No application for an order of mandamus, prohibition or certiorari shall be in accordance with this rule.”
14. It is worth noting that in this case, the applicant has filed an application by way of Chamber Summons seeking leave of the court to institute Judicial Review proceedings (mandamus) against the respondent. Simultaneous to this, the applicant also filed the substantive Notice of Motion application seeking the said orders.
15. By agreement of the parties, submissions have been made by the parties on both applications and it is therefore imperative that this court considers the application for leave before venturing into the substantive application for the orders of mandamus.
16. With regard to the first application for leave, the Respondent has referred this court to persuasive authorities on when leave would issue. In the case of Lempaa Suianka & 5 others –vs- Nelson Andayi



Havi And 14 others (2021) eKRL, the Hon. Justice Ngah held) as seen above) that the purpose of seeking leave is to prevent time of the court being wasted by busy bodies with misguided and trivial complaints of administrative error. And further in the case of AAR Insurance –vs- Public Procurement Administrative Review Board (SUPRA), that judicial review orders are discretionary and that this is partly the reason why it has been clothed with the discretion to interrogate, at a preliminary level, the intended application for prerogative orders.

17. The issue is therefore whether the application of the Applicant is trivial as to be unmeritorious in the first place. I have considered the case of the applicant as declared by the applicant. That it was awarded a tender by Bondo Constituency Fund Committee on 27/2/2023 to renovate three (3) class rooms at Ksh1,247,770/= which work he did, but that despite demand for payment, they are yet to be paid. And that the applicant has raised this dispute with the Respondent and shared its certificate of incorporation and the Notice of the Award. If this is the case, then this court is convinced on a prima facie basis, that the applicant has raised a genuine and substantive dispute with the Respondent, and that the dispute of the applicant is in no way trivial or frivolous. To that extent, this court is convinced that the applicant’s application for leave has merit. The objection of the Respondent that the application lacks merit on the basis that it is speculative having been filed simultaneously with the main application for judicial review, being an objection only based on a technicality therefore cannot be allowed to stand against the prima facie evidence submitted by the applicant. In any case, the two applications have been jointly submitted on by the parties. In the circumstances, I allow the application by way of Chamber Summons of the applicant and issue leave to the applicant to institute Judicial Review proceedings against the Respondent as prayed.
18. Regarding the 2nd application on whether the orders of mandamus can rightly issue against the Respondent as prayed in the Notice of Motion, the submissions of the parties appear to be on whether the applicant has exhausted the procedure provided by the law in solving the dispute. The parties are further agreed that Section 56 of the National Government Constituencies Development Fund Act, 2015, gives the guidelines for the dispute resolution of the nature of the plaintiff’s. It is in order to reproduce the said provision of the law.

Section 56 (1) of the Act provides:-

“All complaints and disputes by persons arising due to the administration of this Act shall be forwarded to the Board in the first instance

- (2) Complaints of a criminal nature shall be forwarded by the Board to the relevant government agencies with prosecutorial powers.
- (3) Dispute of a Civil nature shall be referred to the Board in the first instance and where necessary an arbitration panel whose costs shall be borne by the parties to the dispute, shall be appointed by consensus of the parties to consider and determine the matter before the same is referred to court.
- (4) Notwithstanding sub-section (3), parties shall be at liberty to jointly appoint an arbitrator of their choice in the event of a dispute but where parties fail to jointly agree on an arbitrator, any of the parties may apply to the Cabinet Secretary to reconsider the Board’s decision and determine the matter.”

19. From the submissions of the parties, the applicant has duly lodged a complaint or dispute with the Respondent who has duly registered the same. It is the applicant’s case that the Respondent has, however failed to constitute the relevant Board which can guide the arbitration process. The Respondent, on the other hand, has maintained that despite requests being made to the applicant, the



applicant has failed to submit and or avail the relevant documents and particulars that that relate to the tender.

20. This scenario dictates that the above provision of the law (Section 56) be discerned to determine the extend responsibilities of the Respondent and the Board in relation to this Alternative Dispute Resolution Mechanism. It is clear from the provision of the Act that the Board is a crucial organ in the dispute resolution mechanism. All complaints and disputes are forwarded to the Board in the first instance. It is before the Board that the arbitration panel shall be appointed, and it is after the decision of the Board that a party may apply to the Cabinet Secretary for reconsideration and determination of the matter.
21. It is clear from the submissions made by the parties herein that as matters stand regarding this arbitration panel constituted. At least the Respondent has not disclosed the existence of any. The respondent has only maintained that the applicant has failed to submit the relevant particulars. This to me, is tantamount to the Respondent moving into the arena of taking evidence from the parties even before the arbitral panel is put in place.
22. It is therefore the opinion of this court that once the applicant registered his complaint or dispute with the Respondent, it would be the responsibility of the Respondent to put in place the arbitration panel who would then receive the necessary evidence from the parties before carrying on with the resolution of the dispute as provided for in the law as seen above. Failure to institute the panel has the effect of stalling the whole dispute resolution mechanism. The Respondent has given no reason whatsoever on why it has failed to establish the relevant panel even after registering the applicant's complaint. The Respondent must be held liable for its inaction.
23. An order of mandamus is aimed at compelling a statutory body who has failed to carry out its statutory duty to do so. As seen above, the Respondent herein has failed to institute the arbitration panel to arbitrate over the complaint and dispute of the applicant. It is for this reason that I am convinced that the Notice of Motion of the applicant dated 6/2/2023 has merit and that the orders of mandamus prayed for therein can rightly issue. I so find and allow the application as prayed under prayer 2 of the same. I also award the applicant costs of this application. It is so ordered.

DATED, SIGNED AND DELIVERED THIS 12TH DAY OF JULY, 2024.

D. O. OGEMBO

JUDGE

11/7/2024

Court.

Ruling read out in Court in the absence of the parties in view of the fact that this date was given in the presence of both advocates.

D. O. OGEMBO

JUDGE

11/7/2024

