Case Number:	Miscellaneous Application E1145 of 2020
Date Delivered:	24 Mar 2022
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	Anthony Kaniaru
Citation:	Gibb Africa Limited v Engineers Board of Kenya [2022] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Judicial Review
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application allowed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC.APPLICATION NO. E1145 OF 2020

GIBB AFRICA LIMITED.....APPLICANT

VERSUS

ENGINEERS BOARD OF KENYA.....RESPONDENT

JUDGMENT

1. The motion before court is dated 10th December,2020, filed under Order 53 Rules 3 and 7 of the Civil Procedure Rules,2010, Section 8 &9 of the Law Reform Act and Sections 1,1A,3 & 3A of the Civil Procedure Act. The motion seeks a raft of prayers which are drafted as follows;

***(i) THAT** the Honourable Court be pleased to bring by way of certiorari into this court and quash the decision contained in the Respondent's letter dated 2nd November,2020 to the Applicant.*

***(ii) THAT** an order in the nature of prohibition do issue to prohibit the Respondent from taking any precipitate action against the Applicant on the basis of its letter dated 2nd November,2020.*

***(iii) THAT** an order in the nature of mandamus do issue directed at the Engineers Board of Kenya commanding the said Engineers Board of Kenya to comply with the provisions of the Engineers Act, 2011 and the Engineers Rules, 2019 and register the Applicant as an engineering consulting firm.*

***(iv) THAT** the costs of these proceedings be provided for.*

2. The Application is supported by the grounds on its face, a Statutory Statement and Supporting Affidavit both of which are dated 10th December, 2020.The Affidavit is sworn by Paul Karekezi, the Managing Director of the Applicant.

3. Mr. Karekezi in his affidavit averred that the Applicant herein has been in existence since the 1940s with its headquarters in Nairobi and that it had undertaken over 5000 consultancy agreements. In addition, it was deposed that the company had a total of 149 employees and a number of sub consultants working in different departments.

4. In addition, that the Applicant had paid to the Respondent the sum of Kshs. 359,600/= as subscription fees for 32 engineers for the year 2020.The Applicant is said to currently be providing consultancy projects worth Kshs. 790,250,276/= within Kenya and outside.

5. The Applicant in the year 2019 applied for registration as a consulting firm and in compliance with the provisions of the law paid the requisite registration fee and provided proof that a director was a registered consulting engineer. It is averred that the Respondent declined to accept the registration without giving the Applicant a reason as to the decision taken. In light of this, the Applicant opted to apply and receive a trading license from the Nairobi City County Government for a consulting engineering firm for the year 2019.

6. Subsequently, in the year 2020 the applicant submitted an application for registration in compliance with the Engineers Act,2011

and Engineers Rules, 2019 and in a letter dated 2nd November,2020, the Registrar of the Engineers Registration Board informed the Applicant of the Board's decision to decline the said application.

7. The Registrar communicated that the reasons why the application was not successful was because the Applicant had submitted two sets of CR 12 forms with the names Gibb Africa Limited and Kamase Holdings Limited and that the shareholding structures did not comply with Section 20 of the Engineers Act 2011 and the Engineering Rules,2019.

8. It is urged that a reading of the two provisions shows that 51% of the shareholding of the Applicant should be held by Consulting Engineers and that the Respondent misconstrued the Engineers Rules to mean that a body corporate cannot hold more than 25% shareholding in an Engineering Consulting Firm. It was deposed that the Respondent made the adverse decision in the absence of the Applicant though there was ample opportunity to seek clarification from the Applicant. The Applicant's letter dated 19th November,2020 seeking clarification of the said decision did not elicit any response.

9. It is contended that the Applicant's directors and shareholding is as hereunder;

*"**GIBB AFRICA LTD***

DIRECTORS

Paul Karezi (Registered Consulting Engineer)

Samuel Mambo (Registered Consulting Engineer)

Maurice Barasa (Registered Consulting Engineer)

SHAREHOLDING

Kamase Holdings Ltd (1,000,000 Ordinary Shares)

KAMASE HOLDINGS LTD

DIRECTORS

Paul Karezi (Registered Consulting Engineer) (61,008 Ordinary Shares)

Samuel Mambo (Registered Consulting Engineer) (23,057 Ordinary Shares)

Maurice Barasa (Registered Consulting Engineer) (12,010 Ordinary Shares)

Sean Trevor Avery (Registered Consulting Engineer) (3,925 Ordinary Shares)

Charles Malinda (Hydrogeologist)

Elizabeth Atieno (Environmental Scientist)

10. It was averred that the Respondent's decision ought to be investigated and quashed as it is contrary to the Constitution, the principles of natural justice, and is unreasonable and founded on irrelevant considerations.

11. In response to the application the Respondent herein filed a Replying Affidavit dated 9th April,2021 sworn by one Eng. Grace Onyango, the Acting Registrar/ Chief Executive Officer of the Engineers Board of Kenya. In the affidavit she deponed that it is the mandate of the Respondent to register Engineering Consulting Firms and that upon scrutiny of the Applicant's application for registration it was identified that the Shareholding of the Applicant did not meet the requirement provided for under sections 20(1)

(a) & (b) of the Act as read together with Rules 5(1) and 5(2) of the Engineers Rules 2019.

12. In conclusion it was deposed that owing to this anomaly, the Board declined to register the Applicant and deferred the application. A clarification as requested by the Applicant was sent on 10th December,2020.

13. The Applicant herein, in support of its application filed written submissions dated 13th May,2021 in which learned counsel argued that there is no law, statute or regulations that specifies that an applicant cannot submit 2 CR12 forms. Further, that a simple reading of Rule 5 (2) (c) (iii) of the Engineers Rules,2019 implies that 51% of the shares of the engineering consulting firm are held by consulting engineers, a minimum of 24% of the remaining 49% must be held by either a professional engineer or a consulting engineer and finally that only a maximum of 25% of the remaining 49% can be held by one person or a company or a person together with the company.

14. Learned counsel identified two issues for determination viz ;whether the Applicant has complied with the Engineers Rules,2019 and Engineers Act and whether the decision to refuse to register the Applicant was lawful, reasonable and in line with principles of natural justice. On the first issue, counsel submitted that Gibb Africa Limited is 100% owned by Kamase Holdings Ltd which is owned by four shareholders who are registered consulting engineers as required by law and as such the Applicant has complied with the requirement on shareholding.

15. In addition, it was submitted that 100% ownership of Kamase Limited is in fact held by four shareholders and therefore the issue of one person/ body corporate owning more that 25% shares does not exist. It was submitted that the intention of the legislature in enacting the said provisions was to ensure that the Respondent has adequate control over engineering consulting firms and that the public is assured that the firm is competent enough to take the responsibilities that come with making engineering decisions. The case of **Republic v Engineers Board of Kenya Ex parte Interconsult Engineering Limited** was cited to support this argument.

16. On the 2nd issue learned counsel submitted that if the misapprehension of Rule 5(2) by the Respondent that a body corporate should not hold more than twenty-five percent of the shares was anything to go by, then a majority of the Engineering consulting firms would be unable to conduct business as many are owned by Holding companies as vehicles to conduct business.

17. In conclusion, it was argued that the Applicant's expectation that the decision by Respondent would be fair and based on the law had been breached and therefore it prayed that the court finds the Board's decision to be unfair and unreasonable and therefore set it aside.

18. The Respondent herein filed written submissions dated 18th June,2021. Reliance was heavily placed on case law with the learned counsel submitting that the criteria for grant of the prerogative orders under judicial review is well settled. These include illegality, impropriety of procedure and irrationality (the three 'I s'). He urged that the grounds were well explained in the case of **Pastoli v Kabale District Local Government Council &Others [2008] 2 EA 300 .**

19. To buttress this argument counsel cited the cases of **Re Bivac International SA (Bureau Veritas) (2005) EA 300, Republic V Public Procurement Administrative Review Board & Another EX parte Gibb Africa Ltd & Another [2012] eKLR, Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR** and **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR.**

20. Various case law were cited for the proposition that judicial review does not touch on the merits of a decision and neither is it an appeal from the decision of the relevant body. It was emphasized that the remedy of judicial review is to ensure that the individual is given fair treatment by the authotity to which he has been subjected. The cited cases were; **Seventh Day Adventist Church (East Africa) Limited v Permanent Secretary, Ministry of Nairobi Metropolitan Development & another [2014] eKLR, Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996, Prabhulal Gulabchand Shah vs. Attorney General & Erastus Gathoni Miano Civil Appeal No.24 of 1985, Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543, Republic v. Director – General of East African Railways Corporation, ex parte Kaggwa (1997) KLR 194, R (Regina) vs. Dudsheath, ex parte, Meredith [1950] 2 All E.R. 741, at 743.**

21. In conclusion it was argued that the Applicant has failed to prove any of the above discussed grounds for judicial review and that the decision not to register the applicant was within the law. Learned counsel submitted that the application before this court does not meet the basic tenets of a judicial review application and as such it should be dismissed in its entirety with costs to the

Respondents.

DETERMINATION

22. From the pleadings, affidavit evidence and learned submission by counsel, the broad issue for determination is whether the applicant has established sufficient ground(s) for the grant of the prerogative orders sought.

23. The Respondent herein is established under section 3 the Engineers Act,2011 and its object and purpose provided under section 6 is as follows;

"The Board shall be responsible for the registration of engineers and firms, regulation of engineering professional services, setting of standards, development and general practice of engineering."

24. The Board under section 7 (1) (a) has the following functions and powers;

"(1) The functions and powers of the Board shall be to—

(a) receive, consider, make decisions on applications for registration and register approved applications"

25. It is not in contention that the Applicant made an application to the Respondent to be registered as an Engineering Consulting Firm on 21st July,2020 and that subsequently, the Respondent through its Registrar in a letter dated 2nd November, 2020 declined to approve the said application on grounds that the same did not comply with section 20 of the Engineers Act,2011 and with the Engineer Rules, 2019. A further clarification on the Board's decision was also given to the Applicant by the Respondent vide a letter dated 10th December,2020. It is Worth of note that the Respondent's mandate to undertake the said duty has not been challenged by the Applicant and therefore the Board was acting well within its power.

26. The Applicant was however aggrieved by the said decision hence the filing of the application now before this court challenging the decision in the said letter dated 2nd November,2020. The grounds raised are that the Respondent's decision was unlawful, unreasonable and not in line with the principles of natural justice as the Respondent had misinterpreted the provisions of section 20 of the Engineers Act,2011.

27. The traditional scope of judicial review is clearly captured in the case of **Pastoli v Kabale District Local Government Council and Others [2008]2 EA 300** where the Court held as follows;

"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety....Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission....Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards....Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."

28. Thus the scope of a judicial review court is ordinarily limited to instances where the procedure applied in reaching the impugned decision was tainted with illegality, irrationality and procedural impropriety. It is trite that a judicial review court ought not to interfere with the independence of a statutory body mandated to undertake a particular function unless the said decision was reached illegally, irrationally or without observance of the rules of natural justice.

29. Post 2010 Constitution of Kenya, there is a marked departure from the traditional judicial review perspective that gives allowance to merit evaluation of impugned decisions in deserving cases. This was acknowledged by the court of appeal in **Godfrey**

Ajoung Okumu & another v Engineers Board of Kenya [2020] Eklr where it remarked;

''But a reading of the post 2010 decisions will show a clear and consistent trend and a departure from the previous approach to the scope of judicial review, as we shall shortly demonstrate.''

30. Applicant's case is challenging the Respondent's interpretation of section 20 of the Engineers Act,2011 and Rules 5(1) and 5(2) (c) of the Engineers Rules 2019 the basis upon which the Respondent denied the applicant registration. In the response to the application no attempt is made to support that the interpretation by the respondent of section 20(1) (a) and (b) and Rules 5(1) and 5 (2) (c) was correct. In my view a clear misapprehension of the law that forms the basis of a decision which adversely affects a party is a legal anomaly that the court has powers to correct in judicial review.I say this clearly aware that this court under the judicial review jurisdiction is not sitting on appeal on the impugned decision.

31. Am in that regard aware of the decision of the Court of Appeal in the case of **Rentco East Africa Limited, Lantech Africa Limited, Toshiba Corporation Consortium V Public Procurement Administrative Review Board & another [2017] eKLR** held as follows;

"Save for a limited scope, which we shall return to later, the court considering a judicial review application must never consider its role as an appellate court or tribunal and must avoid any temptation to go into the substance of the impugned decision itself or to ask questions, whether there was or there was not sufficient evidence to support the decision of the public body concerned. It is not for the court or individual judges to substitute their opinion for that of the public body constituted by law to decide the matter in question. See ***Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited*** *(supra). In judicial review proceedings, the mere fact that the public body's decision was based on insufficient evidence, or on misapplication of evidence, cannot be a ground for granting judicial review remedies. Whether that decision was right or not, the affected party ought to challenge it on appeal. In reaching its determination, it must however, be recognized that a tribunal or statutory body or authority has jurisdiction to err and the mere fact that in the course of its inquiry it errs on the merits is not a ground for quashing the decision by way of judicial review as opposed to an appeal. It is only an appellate tribunal which is empowered and in fact enjoined in cases of the first appeal to re-evaluate the evidence presented at the first instance and arrive at its own decision on facts, of course taking into account that it had no advantage of seeing the witnesses and hearing them testify. Whereas a decision may properly be overturned on an appeal, it does not necessarily qualify as a candidate for judicial review. See* ***East African Railways Corp. vs. Anthony Sefu Dar-Es-Salaam*** *HCCA No. 19 of 1971 [1973] EA 327.*

32. In reviewing the interpretation of the law by the respondent , this court would, in my understanding, be venturing into acceptable levels of merit review of administrative action in the new constitutional dispensation. This finds support in the Court of appeal's sentiments in **Godfrey Ajoung Okumu & another v Engineers Board of Kenya** (supra) where the court stated;

'' We reiterate, by way of background, that prior to the enactment of the Fair Administrative Action Act, the substantive basis for judicial review applications in Kenya was the Law Reform Act. Upon the enactment of the Fair Administrative Action Act, one would have expected to see in the new law some transitional or consequential provisions specifically in relation to the Law Reform Act or at least some reference to it. But this is not so, save for section 14 of the Fair Administrative Action Act in which it is stipulated that all proceedings pending at the time of the coming into force of the new Act, the provisions of the Act will apply, without affecting the validity of anything previously done. Similarly, it saves the practice and procedure obtaining before its enactment. We venture to state, as we have observed elsewhere in this judgment, that with the passage of the Fair Administrative Action Act, the statutory grounds for judicial review in Kenya are now found, in addition to the common law in that Act. Those grounds are the same ones in the Constitution. This important conceptual development in modern judicial review theory and practice has been interpreted to mean a shift from exclusively reviewing the process by which a decision is made, to reviewing, in appropriate cases, the merits of the decision in question.'' (emphasis added)

33. I have looked at section 20 (1)(a) and (b) of the Engineers Act 2011 as well as Rules 5(1) and 5(2) (c) of the Engineers Rules 2019. I have had due regard to the shareholding in the applicant and the qualifications of the shareholders as detailed in the annexed documents. From the plain language of the statute and ascribing to it a meaningful and purposive interpretation as juxtaposed with the qualifications of the shareholders of the applicant and interpreting the statute in a manner giving effect to its objective, am satisfied that the applicant meets the prescription in the law. In their interpretation, the respondent misapprehended the law and the decision reached stems from an error of law. It is unlawful and unreasonable.

34. In light of the foregoing, the application before court has merit. The same is allowed and I make the following orders;

1. ***THAT*** *an order be and is hereby issued to bring by way of certiorari into this court and quash the decision contained in the Respondent's letter dated 2nd November,2020 .*

2. THAT *an order in the nature of mandamus be and is hereby issued directed at the Engineers Board of Kenya commanding the said Engineers Board of Kenya to comply with the provisions of the Engineers Act, 2011 and the Engineers Rules, 2019 and register the Applicant as an engineering consulting firm.*

3*. The applicant shall have the costs of these proceedings.*

DATED, SIGNED and DELIVERED at NAIROBI this 24th March 2022.

A. K. NDUNG'U

JUDGE