



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION NO. 59 OF 2018**

**IN THE MATTER OF THE CONSTITUTION OF KENYA ARTICLES 1, 2, 3, 10, 19, 20, 21, 27, 35, 46, 73, 74, 201, 202, 206, 213, 214, 220, 225, 227, 232, 258, 259 AND PARAGRAPH 8(e) OF THE FOURTH SCHEDULE (DISTRIBUTION OF FUNCTIONS BETWEEN THE NATIONAL GOVERNMENT AND THE COUNTY GOVERNMENT)**

**IN THE MATTER OF VIOLATION OF FUNDAMENTAL RIGHTS AND FREEDOM**

**IN THE MATTER OF CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

**IN THE MATTER OF THE ENERGY ACT, NO. 12 OF 2006**

**IN THE MATTER OF PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT, NO. 33 OF 2015**

**IN THE MATTER OF PUBLIC FINANCE MANAGEMENT ACT NO. 18 OF 2012**

**IN THE MATTER OF NATIONAL GOVERNMENT LOANS GUARANTEE ACT NO. 18 OF 2011**

**IN THE MATTER OF CONSUMER PROTECTION ACT, 2012**

**IN THE MATTER OF 2018 BUDGET POLICY STATEMENT**

**BETWEEN**

**APOLLO MBOYA.....1<sup>ST</sup> PETITIONER**

**ELECTRICITY CONSUMERS SOCIETY OF KENYA.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**THE CABINET SECRETARY OF**

**THE NATIONAL TREASURY.....1<sup>ST</sup> RESPONDENT**

**MINISTRY OF ENERGY .....2<sup>ND</sup> RESPONDENT**

**CENTRAL BANK OF KENYA.....3<sup>RD</sup> RESPONDENT**

**KENYA POWER & LIGHTING COMPANY LTD .....4<sup>TH</sup> RESPONDENT**

**ENERGY REGULATORY COMMISSION.....5<sup>TH</sup> RESPONDENT**

**KENYA ELECTRICITY TRANSMISSION COMPANY LTD...6<sup>TH</sup> RESPONDENT**

**ATTORNEY GENERAL.....7<sup>TH</sup> RESPONDENT**

AND

GITSON ENERGY LIMITED .....PROSPECTIVE INTERESTED PARTY

**RULING**

**PROSPECTIVE INTERESTED PARTY'S APPLICATION**

1. Before me are two applications by the prospective Interested Party. In the *Application dated 1<sup>st</sup> November 2019* the Prospective Interested Party seeks the following orders:-

- a) That this Honourable Court be pleased to review and set aside the judgment and orders issued on 15<sup>th</sup> November 2018.*
- b) That this Honourable Court be pleased to review and set aside the ruling and consequent orders dated 13<sup>th</sup> June 2019.*
- c) That the costs of this application be provided for.*
- d) That such further and other reliefs be granted to the Applicant as this court deems fit and expedient in the circumstances.*

2. The *second application through Chamber Summons dated 21<sup>st</sup> May 2020*, the Prospective Interested Party's application seek the following orders:-

- a) That this Honourable Court do grant leave to the Applicant/Interested Party to cross examine the 1<sup>st</sup> Petitioner Apollo Mboya on the contents of his affidavit sworn on the 9<sup>th</sup> day of January, 2020.*
- b) That this Honourable Court be pleased to grant any other or further orders as it may deem fit, just and proper in the circumstances.*

**THE 1<sup>ST</sup> PETITIONER'S RESPONSE**

3. The 1<sup>st</sup> Respondent filed response to the application dated 1<sup>st</sup> November 2019 urging the applications are re judicata and is an attempt to reopen a matter that had been adjudicated and determined by the court in a ruling dated 13<sup>th</sup> June 2019. That the Prospective Interested Party is not a party to the proceedings and cannot upset the consent order nor seek a review of the ruling dated 13<sup>th</sup> June 2019.

4. The Petitioners/ Respondents further filed grounds of opposition dated 9<sup>th</sup> January 2020 being thus:-

- a) The issues contained in the application are res judicata and an attempt to reopen a matter that was adjudicated and determined by the court in the ruling dated 13<sup>th</sup> June 2019.*
- b) The Prospective Interested Party was not a party to the proceedings and cannot therefore upset the consent order nor seek a review of the Ruling of the Courts dated 13<sup>th</sup> June 2019.*
- c) There are no pending proceedings for the Prospective Interested Party to be enjoined in after the Consent Order of 15<sup>th</sup> November 2018.*
- d) The Application offends Order 45, rule 1 of the Civil Procedure Rules, 2010 by seeking to review the Ruling dated 13<sup>th</sup> June 2019 while at the same time filing a notice of intention to appeal the same Ruling.*
- e) The applicant in concert with bloggers has relentlessly been scandalizing the court and the 1<sup>st</sup> Petitioner.*
- f) The Applicant has not satisfied the requirements for grant of the orders of review.*
- g) The application is misconceived, scandalous and an abuse of the court process.*

**THE 1<sup>ST</sup>, 2<sup>ND</sup> AND 7<sup>TH</sup> RESPONDENTS RESPONSES**

5. The 1<sup>st</sup>, 2<sup>nd</sup> and 7<sup>th</sup> Respondents filed grounds of opposition setting out six (6) grounds of opposition being as follows:-

- a) The Application has not complied with the requisite rules of this court. In any event, it offends Order 45 Rule 1 of the Civil Procedure Rules, 2010 by seeking to review the Ruling of 13<sup>th</sup> June 2019 while at the same time seeking to appeal against the same ruling.*
- b) The issues contained in the instant application are re judicata as the same had already been adjudicated and determined by*

*this honourable Court in the ruling dated 13<sup>th</sup> June, 2019.*

*c) Having rendered a ruling that conclusively determined the issues raised in the instant Application and the Applicant having shown the desire to file an appeal against the said ruling, this honourable court is functus officio.*

*d) This matter stood concluded vide the Consent Order of 15<sup>th</sup> November 2018. As such, there are no further proceedings available for any other party to be enjoined in for purposes of any further litigation.*

*e) The Applicant was not a party to the impugned proceedings and as such, it is not fit to either implore this court to upset the consent judgment in this matter or seek a review of the impugned ruling.*

*f) The instant Application is misconceived, scandalous and lacks merit. It forms a classical description of an abuse of the court process.*

6. The 1<sup>st</sup>, 2<sup>nd</sup> and 7<sup>th</sup> Respondents filed **Notice of Preliminary Objection dated 2<sup>nd</sup> June 2020** setting out 9 grounds of objection being as follows:-

*a) There is no legal authority by way of a lawful resolution under the lawful seal of GITSON ENERGY LIMITED duly executed by its known directors and accompanied by the requisite minutes that has been availed before this honourable Court authorizing the institution of the two applications against the Petitioners and the Respondents herein.*

*b) There is no legal authority by way of a lawful resolution under the lawful seal of GITSON ENERGY LIMITED duly executed by its known directors and accompanied by the requisite minutes that has been availed before this honourable Court authorizing JAMES GITAU, JEROTICH SEII, ROBERT ALAI & ELVIS B. N. ABENGA or any other person to swear an affidavit or sign any pleading for and on behalf of the Proposed Interested Party herein.*

*c) On the strength of paragraph 2 hereinabove and pursuant to Order 4 Rule 1() of the civil Procedure Rules, 2010, JAMES GITAU, JEROTICH SEII, ROBERT ALAI & ELVIS B. N. ABENGA (the Advocate purportedly on record for the Proposed Interested Party herein) lack the requisite legal authority to swear an affidavit or any affidavit in support of the two Applications on behalf of the Gitson Energy Limited.*

*d) There is no legal authority by way of a resolution or any other legal instrument under the lawful seal of GITSON ENERGY LIMITED duly executed by its known directors and accompanied by the requisite minutes that has been availed before this honourable court authorizing or instructing the firm of BEGI'S LAW OFFICES & CHAMBERS ADVOCATES, anybody or any firm of advocates to file the two Applications for and on behalf of GITSON ENERGY LIMITED, the Applicant herein.*

*e) Order 19 Rules 2 & 9 of the Civil Procedure Rules, 2010 can only be invoked by parties to the proceedings and NOT by strangers thereto.*

*f) The instant application for joinder is res judicata as the same had already been adjudicated and determined by this honourable court in the ruling dated 13<sup>th</sup> June, 2019. Therefore, the Applicant herein has no lawful right of audience before this honourable court.*

*g) Having rendered a ruling that conclusively determined the issues raised in the instant Application for joinder and the Applicant having shown the desire to appeal against the said ruling, this honourable court is functus officio.*

*h) The Applicant's Application for review offends Order 45 Rule 1 of the Civil Procedure Rules, 2010 by seeking to review the Ruling of 13<sup>th</sup> June, 2019 while at the same time seeking to appeal against the same ruling.*

*i) This matter stood concluded vide the Consent Order of 15<sup>th</sup> November 2018. As such, there are no further proceedings available for any other party to be enjoined in for purposes of any further litigation.*

#### **THE 4<sup>TH</sup> RESPONDENT'S RESPONSE**

7. The 4<sup>th</sup> Respondent filed **grounds of opposition dated 17<sup>th</sup> July 2020** raising 9 grounds of opposition as follows:-

*a) There is no legal authority by way of a lawful resolution under the lawful seal of GITSON ENERGY LIMITED duly executed by its known directors and accompanied by the requisite minutes that has been availed before this honourable Court authorizing the institution of the said application against the 4<sup>th</sup> Respondent herein.*

*b) There is no legal authority by way of a lawful resolution under the lawful seal of GITSON ENERGY LIMITED duly executed by its known directors and accompanied by the requisite minutes hat has been availed before this honourable Court authorizing JAMES GITAU, JEROTICH SEII, ROBERT ALAI & ELVIS B. N. ABENGA or any other person to swear an affidavit or sign any pleading for and on behalf of the Proposed Interested Party herein.*

*c) On the strength of paragraph 2 hereinabove and pursuant to Order 4 Rule 1(4) of the Civil Procedure Rules, 2010, JAMES GITAU, JEROTICH SEII, ROBERT ALAI & ELVIS B. N. ABENGA (the Advocate purportedly on record for the Proposed*

**Interested Party herein) lack the requisite legal authority to swear an affidavit or any affidavit in support of the two Applications on behalf of the Gitson Energy Limited.**

**d) There is no legal authority by way of a resolution or any other legal instrument under the lawful seal of GITSON ENERGY LIMITED duly executed by its known directors and accompanied by the requisite minutes that has been availed before this honourable Court authorizing or instructing the firm of BEGI'S LAW OFFICES & CHAMBERS ADVOCATES, anybody or any firm of advocates to file the two Applications for and on behalf of GITSON ENERGY LIMITED, the Applicant herein.**

**e) Order 19 Rules 2 & 9 of the Civil procedure Rules, 2010 can only be invoked by parties to the proceedings and NOT by strangers thereto.**

**f) The instant application for joinder is res judicata as the same had already been adjudicated and determined by this honourable court in the ruling dated 13<sup>th</sup> June, 2019. Therefore, the Applicant herein has no lawful right of audience before this honourable court.**

**g) Having rendered a ruling that conclusively determined the issues raised in the instant Application for joinder and the applicant having shown the desire to appeal against the said ruling, this honourable court is functus officio.**

**h) The Applicant's Application for review offends Order 45 Rule 1 of the Civil Procedure Rules, 2010 by seeking to review the Ruling of 13<sup>th</sup> June, 2019 while at the same time seeking to appeal against the same ruling.**

**i) This matter stood concluded vide the Consent Order of 15<sup>th</sup> November, 2018. As such, there are no further proceedings available for any other party to be enjoined in for purposes of any further litigation.**

#### **THE 5<sup>TH</sup> RESPONDENT'S RESPONSE**

8. The 5<sup>th</sup> Respondent filed grounds of opposition dated 21<sup>st</sup> September 2020 setting out 4 grounds of opposition being as follows:-

**a) The Petition was determined and concluded by the Consent Order dated 15<sup>th</sup> November 2018. The court is functus officio and cannot issue the orders sought.**

**b) The Consent Order dated 15<sup>th</sup> November 2018 had the effect of fully determining the proceedings in the above matter and as such there are no pending proceedings to warrant any application in the matter.**

**c) The Application is otherwise untenable and unmerited.**

**d) The Application is frivolous, vexatious and otherwise amounts to an abuse of the court process.**

#### **ANALYSIS AND DETERMINATION**

9. I have very carefully perused the pleadings in respect of the two applications dated 1/11/2019 and 27<sup>th</sup> May 2020 as well as the rival submission in support and in opposition of the two applications. The issues arising thereto for consideration can be summed up briefly as follows:-

**a) Whether the application dated 1<sup>st</sup> November 2019 is barred by res judicata?**

**b) Whether the prospective Interested Party can institute the review and appeal at the same time?**

**c) Whether the prospective Interested Party has met the threshold for Review?**

**d) Whether the orders sought by the Prospective Interested Party in both applications should issue?**

#### **A. WHETHER THE APPLICATION DATED 1<sup>ST</sup> NOVEMBER 2019 IS BARRED BY RES JUDICATA?**

10. In the instant Petition the Petitioner was compromised in terms of a settlement agreement by the parties to the Petition through a consent order entered and adopted on 15<sup>th</sup> November 2018 by all parties to the suit as an order of this Honourable Court.

11. The Prospective Interested Party filed an application seeking to set aside the aforesaid consent order which application was dismissed vide the ruling of this Honourable Court delivered on 13<sup>th</sup> June 2019. It is against the backdrop that the prospective Interested Party filed these two present applications.

12. I now turn to consider whether the application dated 1<sup>st</sup> November 2019 is Res judicata. The Petitioners; and Respondents herein urge that the application dated 1<sup>st</sup> November 2019 is Res judicata. It is their contention that the issues raised in the application dated 1<sup>st</sup> November 2019 were raised and/or ought to have been raised in the application dated 7<sup>th</sup> November 2018 and 17<sup>th</sup> December 2018. This Court by its ruling of 13<sup>th</sup> June 2019 in respect of a similar application dated 7<sup>th</sup> November 2018 and 17<sup>th</sup> December 2018 declined to review or stay the

orders of 15<sup>th</sup> November 2019 and further declined to join the prospective Interested Party as a Party to the proceedings.

13. The doctrine of res judicata is clearly set out under **Section 7 of the Civil Procedure Act** which provides as follows:-

***“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”***

14. In the case of **Kenya Commercial Bank Limited versus Muiri Coffee Estate Limited & 3 Others [2013] eKLR**, the Honourable Court stated thus:-

***“If a court of competent jurisdiction has adjudicated over a matter between parties or parties through whom they claim and determined the issue raised in such matters then the same parties or others litigating through them are barred from re-litigating the same issues before any other court. Such a determination inevitably includes any judgments or orders issued following consent of the litigating parties.”***

15. In matters raised in these applications are res judicata in the light of this court’s ruling dated 13<sup>th</sup> June 2019 as the same issues have already been determined by a court of competent jurisdiction and further the court clearly noted the prospective Interested Party was never a party to the proceedings leading to consent orders entered into on 15<sup>th</sup> November 2018. The consent order effectively determined the proceedings in this matter and as such there are no pending proceedings to warrant the grant of the orders sought.

16. In view of the foregoing I find that the Petitioners and Respondents have demonstrated that the application herein is barred by being res Judicata.

#### **B. WHETHER THE PROSPECTIVE INTERESTED PARTY CAN INSTITUTE THE REVIEW AND APPEAL AT THE SAME TIME?**

17. It is Petitioners and Respondents contention that upon delivery of the impugned Ruling of 13<sup>th</sup> June 2019, the prospective Interested Party filed a Notice of Appeal on 19<sup>th</sup> June 2019. The prospective Interested Party has now proceeded to file the present application dated 1<sup>st</sup> November 2019 seeking the review of the Ruling of 13<sup>th</sup> June 2019.

18. Looking at the application dated 1<sup>st</sup> November 2019 and considering that the prospective Interested Party filed a Notice of Appeal on 19<sup>th</sup> June 2019, it is clear that the prospective Interested Party’s application of 1<sup>st</sup> November 2019 offends the provisions of **Order 45 Rule 1(2) of the Civil Procedure Rules, 2010**, which provides:-

***“A party who is not appealing from a decree or order may apply for review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review”.***

19. The Courts have time and again exhaustively pronounced themselves on the issue as was enunciated in the case of **Serephen Nysani Menge v Rispah Onsase [2018] eKLR**, where Justice J. M. Mutungi held as follows;

***“In my view a proper reading of Section 80 of the Act and Order 45 Rules 1 and 2 makes it abundantly clear that a party cannot apply for review and appeal from the same decree or order. In the present case, the applicant exhausted the process of review up to appeal and now wishes to go back to the same order she sought review and failed and to try her luck with an appeal. The applicant wants to have a second bite of the cherry. She cannot be permitted to do so. Her instant application constitutes an abuse of the process of the court and the same must surely fail. The applicant had her day in court when she chose to seek a review of the order that she now wishes to appeal against. Litigation somehow must come to an end and for the applicant, the end came when she applied for review and appealed the decision made on the review application. Litigation cannot be conducted on the basis of trial and error. That is why there are provisions of the law and the procedure to be adhered to. The applicant invoked the provisions of the law and the procedure thereto and the court rendered itself on the basis of the law and the evidence.”***

20. From clear reading of **Order 45 of the Civil Procedure Rules** it is revealed that an aggrieved party’s cannot apply for review and appeal from the same decree or order concurrently as this would be an abuse of the court process and a waste of precious judicial time.

#### **C. WHETHER THE PROSPECTIVE INTERESTED PARTY HAS MET THE THRESHOLD FOR REVIEW?**

21. **Order 45 of Civil Procedure Rules** sets out the grounds that must be met for a review. The prospective Interested Party’s application for review dated 1<sup>st</sup> November 2019 sets out the grounds on which review is sought. The Prospective Interested Party in the application allege that there is discovery of new and important evidence to qualify review and/or setting aside of the orders of 15<sup>th</sup> November 2018 and 13<sup>th</sup> June 2019.

22. The Prospective Interested Party was never a party to the proceedings leading to consent order entered on 15<sup>th</sup> November 2018. It cannot therefore be correct for the prospective Interested Party to contend there is discovery of a new and important matter which upon the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made.

23. Upon considering the prospective Interested Party's application I find that the applicant has not met any of the requirements enumerated under **Order 45 of Civil Procedure Rules** to justify review of the Court's orders sought in its application. The prospective Interested Party has failed to demonstrate any new matter that were not within its knowledge at the time the order were made and at any rate it was not a party to the Court's proceedings then.

**D. WHETHER THE ORDERS SOUGHT BY THE PROSPECTIVE INTERESTED PARTY IN BOTH APPLICATIONS SHOULD ISSUE?**

24. The Prospective Interested Party was never a party to the Petition herein nor was it a party to the consent entered into by the parties on 15<sup>th</sup> November 2018. The consent order had a contractual effect and can only be set aside on application by parties to the consent and not third parties.

25. It therefore follows that mere and circumstantial allegations of fraud, collusion by a stranger to the proceedings cannot amount to a valid ground for setting aside the consent. Judgment.

26. Having found that there is no merit for the substantive application dated 1<sup>st</sup> November 2019 I find that there would be no basis to allow the application dated 27<sup>th</sup> May 2020 seeking leave to cross examine the 1<sup>st</sup> Petitioner herein. ***I find that the current applications are without basis; are vexatious, frivolous, scandalous and an abuse of the court process.***

***27. The upshot is that the Prospective Interested Party's applications dated 1<sup>st</sup> November 2019 and 27<sup>th</sup> May 2020 are without merit and are accordingly dismissed with costs to the Petitioners and Respondents.***

**Dated, Signed and Delivered at Nairobi on this 21<sup>st</sup> day of January, 2021.**

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**J. A. MAKAU**

**JUDGE**