REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 106 OF 2018

In the matter of an application by Omikko Electronics Limited for Judicial Review Orders of *Mandamus*

and

In the matter of violation of the Right to Access Information under Article 35 of the Constitution

and

In the matter of Milimani Commercial and Tax Division Civil Case number 36 of 2014, Omikko Electronics v Essar Telcom Limited

and

In the matter of Arbitration Act 1995 and an Arbitration between Omikko Electronics Limited and Essar Telecom Kenya Limited

Republic.....Applicant

vs

The Communication Authority of Kenya.....Respondent

and

Safaricom Limited.....1st Interested Party

Airtel Networks Limited.....2nd Interested Party

Essar Telcom Limited.....3rd Interested Party

and

Omikko Electronics Kenya Limited.....*Ex parte* Applicant

JUDGMENT

The Parties

1. The *ex parte* applicant, **Omikko Electronics Kenya Limited,** is a limited liability company duly incorporated in Kenya under the provisions of the Companies Act.[1]

2. The Respondent, the Communications Authority of Kenya (herein after referred to as the Respondent) is the regulatory body for the communications sector in Kenya established under section 3 of the Kenya Information and Communications Act[2] (hereinafter referred to as the KICA). It is a body corporate with perpetual succession, a common seal and is capable of suing and being sued in its corporate name. It has power to take, purchase or otherwise acquire, hold, charge and dispose of movable and immovable property, borrowing or lending money, and doing or performing all such other things or acts for the proper performance of its functions under KICA, which may be lawfully done, or performed by a body corporate.

3. The first Interested Party, Safaricom Limited is a public company. It provides *inter alia* voice, data and financial services to its subscribers via a variety of information and communication technology platforms.

4. The second Interested Party, Airtel Networks Limited is a limited liability company. It provides *inter alia* voice, data and financial services to its subscribers via a variety of information and communication technology platforms.

5. The third Interested Party **Essar Telcom Limited** is a limited liability company licensed by the Respondent as a Network Service Provider, Applications Service Provider and Content Service Provider.

Factual Matrix

6. The *ex parte* applicant states that it filed arbitration proceedings against the third Interested Party and it was awarded Ksh. 6,427,363.51 plus costs determined at Ksh. 1,102,000/=. It states that it subsequently obtained a decree in its favour for the said sum in Civil suit Number 36 of 2014, Omikko Electronics Limited v Essar Telecom Limited.

7. Further, the *ex parte* applicant states that during the pendency of the arbitration proceedings and the subsequent proceedings at the High Court, the third Interested Party (who was the Respondent in the Arbitration proceedings and the defendant in the High Court case), entered into negotiations and subsequently sold its business and assets to the first and second Interested Parties herein. The *ex parte* applicant states that the said sale was subject to the regulatory approval by the Respondent herein, hence, the Respondent has or ought to have in its possession all relevant documents and information that form the basis of the sale and purchase of the third Interested Party's business and assets.

8. The *ex parte* applicant further states that the Respondent being a public body holds such information for and on behalf of the public, which information should be availed to any person seeking the information. It states that it requires the information to enforce its right to property, and, that, despite written requests and reminders, the Respondent has refused to avail the information making it difficult for the *ex parte* applicant to enforce its constitutional rights.

9. Lastly, the *ex parte* applicant states that the Respondent stands to suffer no prejudice if the orders sought are granted and that it is in the interests of justice and fairness that the orders be granted.

Legal foundation of the application

10. The application is predicated on the provisions of Article 35 of the Constitution and the Access to Information Act. [3] The *ex parte* applicant states that Article 35 of the Constitution provides that the information sought should be availed as of right.

The Reliefs Sought

11. The *ex parte* applicant prays for:-

> *a.* ***That*** *an order of mandamus do issue compelling the Respondent herein to supply the ex parte applicant with all the documents, agreements and information about and relating to the sale and transfer of the assets and liabilities of Essar Telecom Limited to the first and second Interested Party.*
>
> *b.* ***That*** *the court be at liberty to make further and other orders as it deems fit to meet the ends of justice.*
>
> *c.* ***That*** *the costs of this application be provided for.*

Respondent's grounds of opposition

12. In its grounds of opposition dated 21st September 2018, the Respondent describes the application as founded in misapprehension of both the law and the Respondent's regulatory role, and, that, the Respondent is not mandated by the law to obtain and or keep the information sought. It also states that that the applicant ought to have invoked the provisions of the Transfer of Business Act, [4] and that the application is an abuse of court process.

The Respondent's Replying Affidavit

13. In addition to the above grounds, the Respondent filed the Affidavit of Francis Wangusi, the Respondent's Director General dated 20thNovember 2018. He averred that the application is without merit, based on misapprehension of the law and the Respondent's regulatory role. He deposed that the law does not require the Respondent to keep the information sought.

14. Mr. Wangusi averred that the first, second and third Interested Parties made applications for approval of certain assets, subscribers, licenses and infrastructure (telecommunication assets) belonging to the third Interested Party. He added that the Respondent was not a party to the transaction between the third Interested Party on one hand and the second and third Interested Parties on the other hand. He added that the Respondent's role was limited to granting regulatory approval of the transfer of assets, subscribers, licenses and infrastructure as per section 9(2) of the Kenya Information and Communication (Licensing and Quality of Service Regulations), 2010.

15. In addition, he deposed that the Respondent issued Gazette Notice Number 6816 dated 24th September 2014, signed by the Director General in accordance with KICA, which reflected the application for the transfer of telecommunications assets of the third Interested Party

to the first and second Interested Parties.

16. He also averred that the said Gazette Notices, the Respondent indicated that the grant of approval for the transfer of telecommunication assets of the third Respondent may affect institutions or third parties and invited the public to make any objections before the approval of the transfer to the first and second Interested Parties as provided in KICA. He added that the applicant ought to have made its representations or objections before the approval of the transfer.

17. He further stated that the Respondent in carrying out its regulatory role and in approving the transfer from the third Interested Party to the first and second Interested Parties issued approvals in accordance with KICA.

18. Mr. Wangusi further averred that the applicant has not shown why it did not invoke the provisions of the Transfer of Business Act[5] within the time prescribed in sections 3 and 4 of the Transfer of Business Act[6] discussed later in this judgment.

19. He deposed that Gazette Notices Nos 6209 and 6210 in relation to transfer of the said businesses clearly stated that all monies, debts or liabilities due and owing by the Transferor in respect of the said assets up to the date of transfer as set out there in shall be received and paid by the transferor. Further, the Notices provided that the transferee was not assuming nor was it intended to assume any liabilities incurred by the transferor in respect of the said assets up to the date of the transfer.

20. In addition, he averred that the two Notices were in conformity with section 4 (2) (e) of the Transfer of Business Act,[7] and, that, the *ex parte* applicant should have pursued the transferor for any unpaid debts pursuant to the Gazette Notices within the six months stipulated under section 8 of the said act.

21. Mr. Wangusi also averred that pursuant section 46 (6) (a) of the Competition Act,[8] the Director General of the Competition Authority issued Gazette Notices nos. 8014 and 8015 approving the said merger and acquisition.

22. Mr. Wangusi deposed that the applicant had at least three opportunities to make representations or objections, first, the Gazette Notices published by the Respondent. Second, the Gazette Notices published under the Transfer of Business Act.[9] Third, the publication of Gazette Notices under the Competition Act.[10]

23. He deposed that there are no allegations of violation of a right by the Respondent, and that none of the allegations cited touch on the Respondent's failure to exercise its regulatory role. Lastly, he averred that no substantive prayers have been sought against the Respondent to warrant the order sought; hence, the Respondent is not a necessary party in these proceedings.

First Interested Party's grounds of opposition

24. The first Interested Party filed grounds of opposition dated 21st May 2018 stating *inter alia* that the Application is misconceived, incompetent and devoid of merit. It stated that during the pendency of the Arbitration proceedings or HCCC No. 36 of 2014, there was no privy of contract between the applicant and the first Interested Party nor was there a cause of action against it.

25. Further, it stated that the *ex parte* applicant's decree is against the third Interested Party; hence, its remedy lies in section 38 of the Civil Procedure Act[11] and Order 22 of the Civil Procedure Rules, 2010. Lastly, the first Interested Party states that the suit does not raise any constitutional issues

Second Interested Party's grounds of opposition

26. The second Interested Party filed grounds of opposition on 19th May 2018 stating that these proceeding are not recognition and enforcement proceedings as envisaged under section 36 of the Arbitration Act.[12] It also stated that the second Interested Party is neither a judgment debtor nor a director of the third Interested Party to merit the disguised execution proceedings.

27. It further stated that there is no constitutional issue raised in the proceedings nor has the applicant demonstrated breach of duty, and, that, these proceedings are an abuse of court process. Lastly, it state that there exists remedies under the Arbitration Act,[13] which the *ex parte* applicant has since invoked.

The third Interested Party

28. The third Interested Party did not file any pleadings in this case nor did it participate in these proceedings. Service upon the third Interested Party was effect by way of a registered mail with leave of the court granted on 23rd May 2018. The relevant Affidavit of service was filed on 30thMay 2018 dated the same date.

Issues for determination

29. Upon considering the diametrically opposed positions presented by the parties herein, and their respective advocates submissions, I find that the justice of this case will be addressed by distilling and addressing the following issues:-

a) *Whether the ex parte applicant has established a case against the Respondent under Article 35 of the Constitution.*

b) *Whether the ex parte applicant has established grounds for the court to grant the order of Mandamus sought.*

c) Whether there any grounds for the court to exercise its discretion and grant the order of Mandamus

a) Whether the ex parte applicant has established a case against the Respondent under Article 35 of the Constitution.

30. The *ex parte* applicant's counsel submitted that the Respondent holds the information sought in its capacity as the industry regulator. He argued that the Respondent is obligated as a matter of right to avail the information to a citizen who has made a request for the same. Counsel argued that the failure to provide the information is a violation of section 9 of the Access to Information Act.[14] To buttress his argument, he cited *Katiba Institute v Presidents Delivery Unit & 3 Others*[15] and *Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company.**[16]***

31. Counsel referred to the definition of the word citizen in the Access to Information Act[17]which defines it to include a private entity. He also referred to section 4 of the Act which echoes the constitutional right to access to Information. He further relied on *Katiba Institute v Presidents Delivery Unit & 3 Others* (supra) for holding that the right to information is not affected by the reason why a citizen seeks the information or even what the Public officer perceives to be the reason for seeking the information because Article 35 does not limit the right to access information.

32. It was his argument that the gravamen of the application is not what the applicant desires to do with the information nor whether the applicant had other opportunities as this will amount to limiting its rights under Article 35.

33. The Respondent's counsel argued that the Respondent's statutory mandate under section 5 (1) of KICA is to regulate postal, information and communication services in accordance with the act, hence, it is not mandated by the law to obtain and or keep the information sought.

34. He added that the Respondent's role in the circumstances of this case is set out in Regulation 9 (2) of the Kenya Information and Communication (Licensing and Quality of Services) Regulation, 2010, which requires the Respondent to grant regulatory approval of transfer of assets, subscribers, licenses and infrastructure. He further argued that the applicant has not established a nexus between the right to access information and the Respondent's regulatory role. He relied on *Republic v Cabinet Secretary for Internal Security ex parte Gratory Oriaro Nyauchi & 4 Others*[18] for the proposition that a statutory body must only exercise those powers, which are donated to it by the law.

35. Lastly, the Respondent's counsel argued that the applicant has not demonstrated violation of Article 35 of the Constitution and Access to Information Act[19] because the Respondent is not mandated in law to keep the information sought. He argued that the applicant has not established a nexus between the applicant's access to information and the Respondent's regulatory role.

36. Counsel for the first Interested Party did not directly address this issue. Counsel for the second Interested Party submitted that the right to access information is not absolute, but is subject to section 6 of the Access to Information Act.[20]

37. For a better understanding of the applicant's claim for access to information and the Respondent's refusal, it is necessary at the outset to outline the legal basis for the claim. The right of access to information held by the state or another person is guaranteed by Article **35** of the Constitution which provides:-

> ***35.*** *(1) Every citizen has the right of access to—*
>
> *(a) information held by the State; and*
>
> *(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.*

38. The importance of this right was explained by the constitutional court of South Africa in *Brümmer vs Minister for Social Development and Others*[21] as follows:- *"...access to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights..."*

39. Access to Information Act[22] was enacted to give effect to Article **35** of the Constitution. It provides a framework for public entities and private bodies to proactively disclose information that they hold and to provide information on request in line with the constitutional principles.

40. Section **4** provides that Access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost. More important is the wording of subsection **(4)** which provides that the Act shall be interpreted and applied on the basis of a duty to disclose and non-disclosure shall be permitted only in circumstances exempted under section **6** of the Act.

41. This Court has on several occasions in the past pronounced upon the proper approach to constitutional construction embodying fundamental rights and protections. What is to be avoided is the imparting of a narrow, artificial, rigid and pedantic interpretation; to be preferred is one which serves the interest of the Constitution and best carries out its objects and promotes its purpose. All relevant provisions are to be considered as a whole and, where rights and freedoms are conferred on persons, derogations there from, as far as the language permits, should be narrowly or strictly construed.[23]

42. In peremptory terms, the constitution imposes an obligation on all courts to promote ?the spirit, purport and the objects of the Bill of Rights, when interpreting legislation. In *Phumelela Gaming and Leisure Ltd v Gründlingh and Others*[24]the S.A. constitutional court observed: ?

> *"A court is required to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation, and when developing the common law or customary law'. In this no court has a discretion. The duty applies to the interpretation of all*

legislation and whenever a court embarks on the exercise of developing the common law or customary law. The initial question is not whether interpreting legislation through the prism of the Bill of Rights will bring about a different result. A court is simply obliged to deal with the legislation it has to interpret in a manner that promotes the spirit, purport and objects of the Bill of Rights. The same applies to the development of the common law or customary law."

43. A clear reading of Article 35 of the Constitution and section 4 of the Access to Information Act[25] shows that the Respondent must hold the information sought. In fact, Article 35 provides *every* citizen has the right of access to— information **held by the State**; and information **held by another person** and required for the exercise or protection of any right or fundamental freedom. The question that warrants consideration is whether it has been established that the Respondent holds the information sought for the *ex parte* applicant to lay its claim on the information.

44. Where the information is held by the State or any person, the burden of establishing that the refusal of access to information is justified rests on the state or any other party refusing access. This position was clearly expressed by the Constitutional Court of South African in *President of the Republic of South Africa & Others vs M & G Media Limited* [26] where it was held that:-

"The imposition of the evidentiary burden of showing that a record is exempt from disclosure on the holder of information is understandable. To place the burden of showing that a record is not exempt from disclosure on the requesting party would be manifestly unfair and contrary to the spirit of... the Constitution. This is because the requester of information has no access to the contents of the record sought and is therefore unable to establish that it is not exempt from disclosure under the Act. By contrast, the holder of information has access to the contents of the record sought and is able to establish whether or not it is protected from disclosure under one or more of the exemptions .... Hence ...the evidentiary burden rests with the holder of information and not with the requester."

45. Thus, where the Respondent holds the information, it has a burden and a duty to demonstrate that the information sought falls within the exceptions under section **6** of the act. However, the circumstances of this case are rather peculiar. The Respondent cited its statutory mandate and insisted that its role was to grant approval to the transaction and not to keep the documents or information sought. Simply put the Respondent states that it does not hold the information sought.

46. At the risk of repeating myself, I find it necessary to restate the substance of the ex parte applicants claim to so as to place it in proper perspective as I consider the Respondent's position that its statutory mandate does not extend to retaining the information sought. The *ex parte* applicant case is that during the pendency of the arbitration proceedings and the subsequent proceedings at the High Court between itself and the third Interested Party, the Interested entered into negotiations and subsequently sold its business and assets to the first and second Interested Parties herein. It is the *ex parte* applicant case that the said sale was subject to the regulatory approval by the Respondent, hence, the Respondent has or ought to have in its possession all relevant documents and information that form the basis of the sale and purchase of the third Interested Party's business and assets.

47. It is notable that the *ex parte* applicant uses the phrase "the Respondent has or ought to have in its possession all relevant documents and information that form the basis of the sale and purchase of the third Interested Party's business and assets." The words "has or ought" to have suggest that the *ex parte* applicant is not sure whether the Respondent holds or has in possession the information sought.

48. The architecture and design of Article 35 of the Constitution and section 4 of the Access to Information Act[27] is very clear. The Respondent must hold the information.

49. Before formulating the standard to assess whether the Respondent has properly discharged its burden by insisting that, it does not hold the information sought, it is desirable to consider foreign jurisprudence dealing with comparable legislation. Foreign jurisprudence is of value because it shows how courts in other jurisdictions have dealt with the issues that confront us in this matter. At the same time, it is important to appreciate foreign case law will not always provide a safe guide for the interpretation of our Constitution. When developing our jurisprudence in matters that involve constitutional rights, as the present case does, we must exercise particular caution in referring to foreign jurisprudence.[28] Lastly, I am alive to the fact that the cases cited in the comparable jurisprudence discussed below dealt with the equivalent of section 6 of our Access to Information Act[29] in the various countries referred to. However, the principles in the cited cases are relevant and can offer useful guidance.

50. The United States has well-developed access to information jurisprudence. Its Freedom of Information Act (FOIA) contains nine exemptions to disclosure. The FOIA places on the agency the burden to demonstrate to the court that it has properly relied on the exemption claimed by the agency refusing the information request. The agency claiming the exemption can discharge its burden only by presenting the court with evidence that the information withheld falls within the exemption claimed, and either contrary evidence on the record or evidence of bad faith on the part of the agency should not controvert such evidence.[30]

51. In *Hayden vs National Security Agency*,[31] the District of Columbia Circuit Court of Appeals summarised the appropriate procedures to be used by trial courts in determining whether documents should be released. It said: ?**(1)** The trial court must make a *De novo* review of the agency's classification decision, with the burden on the agency to justify nondisclosure. **(2)** In conducting this review, the court is to give substantial weight to affidavits from the agency. **(3)** The court is to require the agency to create a full public record as possible, concerning the nature of the documents and the justification for nondisclosure. **(4)** If step **(3)** does not create a sufficient basis for making a decision, the court may accept classified affidavits in camera, or it may inspect the documents In camera. This step is at the court's discretion . . . **(5)** The court should require release of reasonably segregable parts of documents that do not fall within FOIA exemptions..[32]

52. The Canadian Access to Information Act[33]just like our Access to Information Act[34] provides for a number of exemptions to disclosure, as well as judicial review of a refusal of access to information.[35] The Act stipulates that the burden of establishing that a challenged refusal is authorised rests with the government institution refusing access.[36] Unlike in both the United States and South Africa, where courts engage in a *de novo* review of the lawfulness of the refusal, Canadian courts limit their review to whether or not the refusal was

reasonable.[37] As in the United States, to establish proper reliance upon a discretionary exemption from disclosure, the government must provide evidence that the record falls within the description that is contemplated by the statutory exemption invoked.[38] The government must provide actual direct evidence of the confidential nature of the information at issue,[39] which must disclose a reasonable explanation for exempting the record.[40]

53. In Australia, the Freedom of Information Act 1982 governs requests for access to government records.[41] Australian courts have held that the test for determining whether a refusal was justified is a reasonableness test, and the state's burden is not discharged merely by showing that the refusal was not irrational, absurd, or ridiculous.[42] Rather, it must go further to show that, in light of the public interest, there were reasonable grounds for the refusal. Even where a government minister has certified refusal on the grounds of public interest, the court must still ask itself whether, in the light of countervailing factors in the public interest, there were reasonable grounds for the refusal. [43]

54. It is apparent from this comparative analysis of the standards applied by courts in other jurisdictions with legislation comparable to ours that the state may discharge its evidentiary burden only when it has shown that the record withheld falls within the exemptions claimed. Exemptions are construed narrowly, and neither the mere *ipse dixit* of the information officer nor his or her recitation of the words of the statute is sufficient to discharge the burden borne by the state[44] or any person. Even in jurisdictions like Canada, where courts do not engage in a *de novo* reconsideration of the merits of an exemption claimed, the refusal of access to information held by the state must be reasonable.[45] This is consistent with the importance placed in the Constitution on the right of access to information, as well as with the scheme of the act, according to which disclosure is the rule and exemptions from disclosure are the exception.[46]

55. The limitation claimed must satisfy the provisions of article **24** of the constitution and must be reasonable and justifiable. In order to discharge its burden under section **6**, the state or a Respondent must provide evidence that the record in question falls within the description of the statutory exemption it seeks to claim.

56. As stated above, the defence raised in this case does not fall under the exceptions. The defence as I understand it is that the Respondent does not have the information sought. As pointed out earlier, the ex parte seems not to have been sure whether the Respondent has holds the information. I based this conclusion on the ex parte applicant's choice of words.

57. The proper approach to the question whether the Respondent has discharged its burden is therefore to ask whether the Respondent has put forward sufficient evidence for a court to conclude that, on the balance of probabilities, it does not hold the information. My understanding of the *ex parte* applicant's case as evidence by its choice of words highlighted earlier is that the *ex parte* applicant proceeded on the assumption that the Respondent held the information sought. However, the ground upon which the *ex parte* applicant stood shook the moment the Respondent cited its statutory mandate and stated that it does not extend to retaining the information sought.

58. This warrants a scrutiny of the relevant provisions. Section 5 of KICA provides that the Respondent's mandate is to licence and regulate postal, information and communication services in accordance with the provisions of the Act. Also relevant is Regulation 9 (2) of the Kenya Information and Communication (Licensing and Quality of Services) Regulation, 2010 which provides as follows:-

9. Change in shareholding.

> *1. A licensee shall ensure that its shareholding complies, at all times with the Government's Communications Sector Policy, published from time to time.*
>
> *2. A licensee shall notify the Commission of any proposed change in ownership, control or proportion of shares held in it, at least thirty days before the change is effected. Provided that— (a) Any change in shareholding exceeding fifteen per centum of the issued share capital; or (b) The acquisition by an existing shareholder of at least five per centum of additional shares; shall require the prior written consent of the Commission and the Commission shall notify the applicant of its acceptance or refusal, stating the reasons for its decision, within thirty days of receipt of the request for consent.*

59. In addition, Regulation 10 provides as follows:-

10. Transfer or assignment of a licence.

> *1. A licensee shall not transfer or assign a licence granted under the Act without the written consent of the Commission.*
>
> *2. The Commission may, when considering an application for the transfer or assignment, consider the same requirements and terms as if considering an application for the grant of a new licence.*
>
> *3. The Commission shall communicate its decision on an application for the transfer or assignment of a licence to an applicant within thirty days of receipt of the application and state the reasons for the decision.*

60. The task for the courts is to construe the content and scope of the instrument conferring the duty or power upon the decision-maker. The instrument will normally be a statute or Regulations. The courts when exercising this power of construction are enforcing the rule of law, by requiring public bodies to act within the ''four corners'' of their powers or duties. They are also acting as guardians of Parliament's will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of Parliament's enactments. One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation.

61. Differently put, whether an act, omission, decision or conduct is invalid is determined by an objective enquiry into its conformity with the Constitution[47] or the relevant statutory provisions.

62. The language of the text of the statute should serve as the starting point for any inquiry into its meaning.[48]Courts generally assume that the words of a statute mean what an "ordinary" or "reasonable" person would understand them to mean.[49] If the words of a statute are clear and unambiguous, the court need not inquire any further into the meaning of the statute.

63. My reading of the above provisions leaves me with no doubt that the role of the Respondent is to grant approval as provided in the Regulations 9 and 10 reproduced above. There is no express requirement that the Respondent retains the information sought while granting the approval nor is there evidence that the information was presented to the Respondent at the time of granting the approval. Further, as stated above, the *ex parte* applicant premised its case on an assumption. It is my finding that such an assumption cannot form the basis for the court to find in favour of the *ex parte* applicant.

b. Whether the ex parte applicant has established grounds for the court to grant the order of Mandamus sought.

64. The substance of the *ex parte* applicant's counsel submissions dwelt on Articles 35 of the Constitution and the Access to Information Act. It is only in his conclusion that he referred to *Katibia Institute v Presidential Delivery Unit an 3 Others* (supra) and *Nairobi Law Monthly Compy Limited v Kenya Electricity Generating Company* (supra) and argued that the application has merit and ought to be allowed. He submitted that the Respondent has a duty to comply with the Constitution and Access to Information Act. Counsel did not address the question whether the application meets the tests for the court to grant the orders of *mandamus* sought.

65. The Respondents counsel argued that *mandamus* can only issue in case of breach of a statutory duty and that it cannot lie, where there are other remedies. To buttress his argument, he cited *Republic v Attorney General & Another ex parte Ongata Works Limited*.[50] He also cited *Newton Gikaru Githiomi & Another v Attorney General/Public Trustee*[51] for the proposition that the court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining, and, that, the discretion must be exercised on sound legal principles. He argued that the applicant has not demonstrated a breach of legal or statutory duty imposed on the Respondent.

66. Counsel for the first Interested Party did not directly address the issue under consideration. He however submitted that the *ex parte* applicant has no cause of action against the first Interested Party. He relied on *Drummond Jackson v British Medical Association*[52]for the proposition that a cause of action is an act on the part of the defendant, which gives the plaintiff his cause of complaint.

67. The second Interested Party's counsel cited *Kenya National Examination Council v Republic ex parte Geoffrey Gathenji Njoroge & 9 Others*[53] and *Shah v Attorney General (No. 3) Kampala*[54] in support of the proposition that *mandamus* issues to compel public officers to perform duties imposed upon them by the common law or statute an. He argued that, for *mandamus* to issue, there must be a public duty imposed by the law on an officer or authority, and, there must be failure to perform the said duty to the detriment of a party who has a legitimate expectation on the performance of the said duty.

68. Counsel further argued that public duty arises out of statute or common law and where such a duty is missing, the courts will be reluctant to grant orders of *mandamus* as was held in *Republic v Cabinet Secretary for Internal Security ex parte Gragory Oriaro Nyauchi & 4 Others*. [55]

69. It is common ground that an order of *Mandamus* will issue to compel a person or body of persons who has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.[56] *Mandamus* is a judicial command requiring the performance of a specified duty, which has **not been** performed. Originally, a common law writ, *Mandamus* has been used by courts to review administrative action.[57]

70. *Mandamus* is employed to compel the performance, when refused, of a Ministerial duty, this being its chief use. It is also employed to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way, nor to direct the retraction or reversal of action already taken in the exercise of either.[58]

71. *Mandamus* is an equitable remedy that serves to compel a public authority to perform its public legal duty and it is a remedy that controls procedural delays. The test for *mandamus* is set out in *Apotex Inc. vs. Canada* (*Attorney General*),[59] and, was also discussed in *Dragan vs. Canada* (*Minister of Citizenship and Immigration*).[60] The eight factors that must be present for the writ to issue are:-

(i) There must be a public legal duty to act;

(ii) The duty must be owed to the Applicants;

(iii) There must be a clear right to the performance of that duty, meaning that:

a. *The Applicants have satisfied all conditions precedent; and*

b. There must have been:

I. *A prior demand for performance;*

II. A reasonable time to comply with the demand, unless there was outright refusal; and

III. An express refusal, or an implied refusal through unreasonable delay;

(iv) *No other adequate remedy is available to the Applicants;*

(v) The Order sought must be of some practical value or effect;

(vi) There is no equitable bar to the relief sought;

(vii) On a balance of convenience, mandamus should lie.

72. *First*, in the instant case, there are doubts as to whether the information sought is held by the Respondent. The word "held" appears in Article 35 of the Constitution and the Access to Information Act. For a person to be compelled to release the information, it must be clear that the information is within its custody, control or power. The drafters of Article 35 and the Act were clear that a Respondent must hold the information. As held earlier, the applicant casually approached this issue even after it was raised in the Replying Affidavit.

73. *Second*, the duty to release the information can only arise within the meaning and scope of Article 35 and the provisions of the Act. The Respondent carefully explained its role under the enabling statute and Regulations. It stated that its role is limited to approving the transaction, a position supported by the relevant provisions of the law.

74. *Third*, the Respondent cannot be held to have failed to disclose the information in such circumstances where the legal duty does not exist or has not been established.

75. *Mandamus* can only issue where it is clear that there is legal duty to act, and, despite the existence of the duty, it is established that there is a *wilful* or *implied* refusal and or *unreasonable* delay. Consequently, I find and hold that the *ex parte* applicant has not satisfied the conditions for grant of order of *Mandamus*.

c. Whether there any grounds for the court to exercise its discretion and grant the order of Mandamus

76. Despite the fact that *mandamus* is a discretionary remedy, the *ex parte* applicant's counsel did not address his mind on the question whether this is a proper case for the court to exercise its discretion in favour of the applicant and grant the orders sought.

77. The Respondent's counsel argued that the applicant failed to invoke alternative remedies within the prescribed timelines. He argued that before granting the approvals in question, the Respondent issued a Gazette Notice in accordance with the law, hence, the *ex parte* applicant should have made representations or objections as provided in the said Notes.

78. In addition, he argued that the applicant failed to invoke the provisions of the Transfer of Business Act[61] within the prescribed timeframes provided under sections 3 and 4 of the said act as provided in the two gazette notices relating to the said transaction, (Gazette Nos 6209 and 6210). He submitted that section 8 of the act stipulates a period of six stipulated in the act.

79. Counsel added that the applicant had a third opportunity under the Competition Act,[62] after the Director General of the Competition Authority issued Gazette Notices Nos 8014 and 8015 approving the proposed sale and transfer. Under the said act, the applicant had any opportunity to raise his objections but failed to do so. He cited *Benjoh Amalgamated Limited & Another v Kenya Commercial Bank Limited*[63] for the proposition that equity aids the vigilant, not the indolent and that delay defeats equity.

80. The first Interested Party's Advocates argued that the *ex parte* applicant's remedies lies under section 38 of the Civil Procedure Act[64] and Order 22 of the Civil Procedure Rules, 2010. He argued that the first Interested Party was not a party to the Arbitration proceedings or HCCC No 36 of 2014, nor was there privy of contract between the *ex parte* applicant and the first Interested Party. Further, he argued that no complaint has been raised against the first Interested Party. Counsel placed reliance on *Time Magazine International Ltd and Another v Michael F Rotich and Another*[65] in which the court defined reasonable cause of action to mean a cause of action with some chance of success.

81. The Second Interested Party's Advocates did not address the discretionary nature of the orders sought and whether this court can or should not exercise its discretion in favour or against the applicant.

82. The discretionary nature of the Judicial Review remedy sought in this application means that even if a court finds a public body has acted wrongly, it does not have to grant any remedy. Examples of where discretion will be exercised against an applicant may include where the applicant's own conduct has been unmeritorious or unreasonable, for example where the applicant has unreasonably delayed in applying for judicial review, where the applicant has not acted in good faith, or where a remedy would impede the authority's ability to deliver fair administration, or where the judge considers that an alternative remedy could have been pursued.

83. In this case, the *ex parte* applicant failed to utilize three legal options availed to it. *First*, it failed to raise objections after the publication of the Gazette Notices by the Respondent. The Gazette Notices expressly invited objections. It never explained this failure at all.

84. *Second*, the *ex parte* applicant failed to invoke the provisions of section 3 & 4 of the Transfer of Business Act.[66] The sections provide as follows:-

3. Transferee of business to be liable for liabilities of transferor unless notice given

1. Whenever any business or any portion of any business is transferred, with or without the goodwill or any portion thereof, the transferee shall, notwithstanding any agreement to the contrary, become liable for all the liabilities incurred in the business by the transferor, unless due notice in accordance with this Act has been given and has become complete.

2. The liability of the transferee under subsection (1) shall cease immediately notice given in accordance with this section has become complete:

Provided that should proceedings be instituted against the transferee before such liability has ceased the said notice shall (for the purposes of such proceedings but for such purposes only) be deemed incomplete pending the final determination of such proceedings, including all possible appeals, and pending the expiration of all periods during which such appeals may be brought.

3. Nothing in this section shall have the effect of relieving the transferor from any liability to which he would otherwise be subject.

85. Section 4 of the Act provides as hereunder:-

4. Provisions regarding notices

1. The notice required by section 3 to be given shall contain the particulars specified in subsection (2) of this section, and shall be given by publication, either before or after the date of the transfer, in the Gazette and in such newspaper or newspapers circulating in Kenya as may from time to time be prescribed by the Registrar-General, and shall, subject to the proviso to subsection (2) of section 3, be deemed to be complete upon the expiration of two months from the publication of the notice in the manner aforesaid.

2. The particulars to be contained in a notice are as follows— (a) the name and address of the transferor; (b) the nature of the business, and the name or style under which, and the address at which, the transferor has carried on the business; (c) the name and address of the transferee; (d) the address where the transferee intends to carry on the business; and (e) a statement as to whether the transferee is assuming or is intended to assume all the liabilities incurred in the business by the transferor.

86. Also relevant is section 5 of the Act which provides that:-

5. Evidence

The production of the Gazette containing the notice shall be prima facie evidence as against both the transferor and the transferee of the statements contained in the notice.

87. It is common ground that a Notice pursuant to the above provisions was given after which the provisions of sections 3 (2) and 4 above came into play. In addition, section 8 of the Act provides for Limitation of actions. It provides that notwithstanding the provisions of the Act or of any other written law, no proceedings shall be brought against a transferee in respect of any liability imposed by the Act after the expiration of six months after the date of the transfer concerned.

88. A clear reading of section 8 cited above shows that no proceedings can be brought under the Act or any other written law against the Interested Parties after the said period. The suit against the Interested Parties offends the above section. In my view, this suit was carefully crafted against the Respondent so as to evade the consequences of section 8 discussed above. The fact that the *ex parte* applicant failed to seize and utilize the window created by the above provisions is a ground for this court to decline to exercise its discretion in its favour.

89. Third, pursuant section 46 (6) (a) of the Competition Act,[67] the Director General of the Competition Authority issued Gazette Notices nos. 8014 and 8015 approving the said merger and acquisition. The section provides as follows:-

46 (6) The Authority shall— (a) give notice of the determination made by the Authority in relation to a proposed merger— (i) to the parties involved in the proposed merger, in writing;

and

(ii) by notice in the Gazette; and

(b) issue written reasons for its determination— (i) if it prohibits or conditionally approves a proposed merger; or (ii) if it is requested to do so by any party to the merger.

90. The *ex parte* applicant for the third time in a row, failed to raise objection(s) upon publication of the said Notices. It is evident that the *ex parte* applicant is guilty of indolence. Equity does not aid the indolent. The *ex parte* applicant slept on its rights.

91. *Fourth*, the court will not grant a Judicial Review remedy where an applicant could have obtained an alternative remedy. Judicial review orders are remedies of a last resort. The *ex parte* applicant has a decree in its favour. It can lawfully enforce the said decree as the law provides. The remedy sought is not the most efficacious in the circumstances of this case.

92. The grant of the orders or *Certiorari*, *Mandamus* and *Prohibition* is discretionary. The court is entitled to take into account the nature of the process against which Judicial Review is sought and satisfy itself that there is reasonable basis to justify the orders sought. In this regard, in addition to the above infractions on the part of the applicant, the court takes the view that the Judicial Review order sought is not the most

efficacious in the circumstances of this case. The existence of other legal methods of enforcing the applicant's rights and the failure to seize the options enumerated above disentitle the exercise of this courts discretion in favour of the *ex parte* applicant.

Conclusions

a. A clear reading of Article 35 of the Constitution and section 4 of the Access to Information Act [68] *leaves no doubt that the Respondent must hold the information sought. Article 35 provides every citizen has the right of access to— information* ***held by the State****; and information* ***held by another person.***

b. Whereas the statutory mandate of the Respondent is to approve the transfer of the business, there is nothing to show that the Respondent is obligated to keep details of the assets and liabilities of the transferor. Indeed, section 5 of KICA on the mandate of the Respondent and Regulations 9 and 10 does not show that in the circumstances of this case, the Respondent was obligated to keep the said information.

c. The ex parte applicant premised its case on an assumption, which cannot form the basis for the court to find in its favour. There is nothing to show that the Respondent holds the information sought. On the contrary, as the law provides, the Respondent's role was to approve transfer of business.

d. Mandamus can only issue where it is clear that there is legal duty to act, and, where it is established there is a wilful or implied refusal and or unreasonable delay to act. The ex parte applicant did not satisfy the conditions for grant of order of Mandamus.

e. Even if the ex parte applicant had satisfied the conditions for grant of mandamus, the court would be reluctant to exercise its discretion in its favour because of its conduct. The ex parte applicant failed to utilize three legal options availed to it. First, it failed to raise objections after the publication of the Gazette Notices by the Respondent. Second, it failed to raise objections as provided under the Transfer of Business Act after Gazette Notices were published under the said Act. Third, it failed to raise to the occasion and raise its objections under the Competition Act after the Director General of the Competition Authority issued Gazette Notices under the Act.

f. The suit offends the provisions of section 8 of the Transfer of Business Act to the extent that it has named the Interested Parties. In the same vein, to the extent that the substance of the claim flows from a suit that is barred by section 8 of the Transfer of Business Act, the claim against the Respondent is unsustainable and incurably defective. This is because these proceedings are simply aimed at breathing life to dead proceedings.

g. The existence of other legal methods to enforce the applicant's rights and the failure to seize the options enumerated above disentitle the exercise of this court's discretion in favour of the ex parte applicant. The ex parte applicant also has the option of executing the decree. Judicial Review orders are remedies of last resort and cannot issue where other remedies exist.

h. The ex parte applicant is guilty of indolence. Equity does not aid the indolent. The ex parte applicant slept on its rights and failed to seize the three opportunities accorded to him by the law. The discretionary nature of the Judicial Review remedies means that even if a court finds a public body has acted wrongly, it does not have to grant any remedy. Examples of where discretion will be exercised against an applicant may include where the applicant's own conduct has been unmeritorious or unreasonable, or where the applicant has unreasonably delayed in applying for judicial review or where the judge considers that an alternative remedy could have been pursued, or, where, the claim against the principle party is statute barred as in this case. This is because there is a risk of the orders if granted, resuscitating a dead or legally frail claim.

i. The orders sought if granted have a potential effect of resuscitating a statute barred suit against other parties and open doors for endless litigation, which amounts to abuse of court process.

93. The upshot is that the *ex parte* applicant's application dated 28th March 2018 fails. Accordingly, I dismiss the said application with costs to the Respondent and the first and second Interested Parties.

Orders accordingly

Signed, Delivered and Dated at Nairobi this 24th day of September 2019

John M. Mativo

Judge

---

[1] Act No. 17 of 2015. The commencement date of this Act was 15th September 2015. It repealed the Companies Act, Cap 486, Laws of Kenya. See the transitional provisions.

[2] Act No. 2 of 1998.

[3] Act No. 31 of 2016.

[4] Cap 500, Laws of Kenya.

[5] Cap 500, Laws of Kenya.

[6] Ibid.

[7] Cap 500, Laws of Kenya.

[8] Act No. 12 of 2010.

[9] Cap 500, Laws of Kenya.

[10] Act No. 12 of 2010.

[11] Cap 21, Laws of Kenya.

[12] Act No. 4 of 1995.

[13] Ibid.

[14] Act No. 31 of 2016.

[15] {2017} e KLR.

[16] Pet No. 278 of 2011.

[17] Act No. 31 of 2016.

[18] {2017} e KLR.

[19] Act No. 31 of 2016.

[20] Ibid.

[21]{2009} ZACC 21; 2009 (6) SA 323 (CC); 2009 (11) BCLR 1075 (CC).

[22] Act No. 31 of 2016

[23] See *Rattigan & Ors v Chief Immigration Officer & Anor* 1994 (2) ZLR 54 (S) at 57 F-H, 1995 (2) SA 182 (ZSC) at 185 E-F, GUBBAY CJ.

[24] {2006} ZACC 6; 2007 (6) SA 350 (CC); 2006 (8) BCLR 883 (CC).

[25] Act No. 31 of 2016.

[26] CCT 03/11 {2011} ZACC 32 Heard on : 17th May 2011 Decided on : 29th November 2011.

[27] Act No. 31 of 2016.

[28] Ibid

[29] Ibid.

[30] See U.S.C. § 552 at (a)(4)(B) (burden is on the agency to sustain its action).

[31] 608 F 2d 1381 (DC Cir 1979).

[32] Id at 1384. For guidelines articulated by the District of Columbia Circuit Court of Appeal in respect of a court‘s exercise of discretion to conduct in camera inspection of documents

[33] R.S.C., 1985, c. A-1 (Access to Information Act)

[34] Supra

[35] See section 41 of the Access to Information Act.-Canada

[36] See section 48 of the Access to Information Act.-Canada

[37] Section 45 of the Access to Information Act provides that applications for court review of refusals shall be heard and determined in summary proceedings and section 50 deals with court orders where reasonable grounds for refusal are not found.

[38] *Canada (Information Commissioner) v Canada (Prime Minister)* [1993] 1 FC 427 (FCA) at 439.

[39]*Canada (Information Commissioner) v Atlantic Canada Opportunities Agency* [1999] 250 NR 314; 177 FTR 159 at para 3.

[40] *Wyeth-Ayerst Canada Inc v Canada (Attorney General)* [2003] FCA 257; 305 NR 317 at para 21

[41] Act 3 of 1982. The Australian Freedom of Information Act provides for two levels of review once an information request has been refused by a government agency. The requesting party can lodge a request for review by the Information Commissioner (IC), and if the IC upholds the refusal then the requesting party can appeal the IC‘s decision to the Administrative Appeals Tribunal. See Parts VII (Review by Information Commissioner) and VIIA (Review by the Tribunal). At both levels, the refusing agency bears the burden of showing that its refusal was justified. See sections 55D (Procedure in IC Review—onus) and 61 (Onus).

[42] See *McKinnon v Secretary, Department of Treasury* 228 CLR 423 at 428 (per Gleeson CJ and Kirby J), 445 (per Hayne J) and 468 (per Callinan and Haydon JJ).

[43] Ibid.

[44] Supra note 21

[45] Ibid.

[46] Ibid.

[47] *Ferreira vs Levin NO and Others; Vryenhoek and Others vs Powell NO and Others* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) (Ferreira v Levin) at para 26.

[48]Katharine Clark and Matthew Connolly, Senior Writing Fellows, April 2006, *"A guide to reading, interpreting and applying statutes"* https://www.law.georgetown.edu/academics/academic-programs/legal-writing-scholarship/writing-center/upload/statutoryinterpretation.pdf.

[49] Plain meaning should not be confused with the “literal meaning” of a statute or the “strict construction” of a statute both of which imply a “narrow” understanding of the words used as opposed to their common, everyday meaning. Supra note 1.

[50] {2016} e KLR.

[51] Nairobi HC JR 472 OF 2014.

[52] {1970} 2 WLR 688 at 676.

[53] {1997} e KLR.

[54] {1970} EA 543.

[55] {2017} e KLR.

[56] See *Kenya National Examinations Council vs R ex parte Geoffrey Gathenji Njoroge & 9 Others* {1997} eKLR.

[57]W. G. & C. Byse, *Administrative & Review Law, Cases and comments* 119-20 (5th ed. 1970). Originally, mandamus was a writ issued by judges of the King's Bench in England. American courts, as inheritors of the judicial power of the King's Bench, adopted the use of the writ.

[58] *Wilbur vs. United States ex rel. Kadrie*, 281 U.S. 206, 218 (1930). See also Jacoby, The Effect of Recent Changes in the Law of "Non-statutory" Judicial Review, 53 GEO. IJ. 19, 25-26 (1964).

[59] 1993 Can LII 3004 (F.C.A.), [1994] 1 F.C. 742 (C.A.), aff'd 1994 CanLII 47 (S.C.C.), [1994] 3 S.C.R. 1100.

[60] 2003 FCT 211 (CanLII), [2003] 4 F.C. 189 (T.D.), aff’d 2003 FCA 233 (CanLII), 2003 FCA 233).

[61] Cap 500, Laws of Kenya.

[62] Act No. 12 of 2010.

[63] {2014} e KLR.

[64] Cap 21, Laws of Kenya.

[65] {2000} e KLR.

[66] Cap 500, Laws of Kenya.

[67] Act No. 12 of 2010.

[68] Act No. 31 of 2016.