



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION
MISCELLANEOUS APPLICATION NO 651 OF 2017

REPUBLIC.....APPLICANT

VERSUS

OFFICE OF THE DIRECTOR

OF PUBLIC PROSECUTION.....1ST RESPONDENT

INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

CHIEF MAGISTRATE KIBERA LAW COURTS.....3RD RESPONDENT

AND

INTERNATIONAL CENTRE

FOR LAW AND POLICY.....1ST INTERESTED PARTY

ZACHARIA ETALE ELWANGA &

CAROLINE NASIKE NANJALA.....2ND INTERESTED PARTY

MIKE NJERU.....3RD INTERESTED PARTY

EX PARTE:

SYLVIA WAIRIMU NJUGUNA

ALSO KNOWN AS SYLVIA WAIRIMU MULI

AND

TRANSCEND MEDIA GROUP

LIMITED.....PROPOSED 4TH INTERESTED PARTY/APPLICANT

RULING

1. This ruling is the subject of yet another application for joinder of an interested party. This time round, the applicant herein is **Transcend Media Group Limited** (hereinafter referred to as “the Applicant”).

2. The said applicant has moved this Court vide an application dated 12th February, 2018 seeking the following orders:

1) **THAT**, the application be certified as urgent and the same be heard *ex parte* in the first instance and service of the same be dispensed with.

2) **THAT**, the Honourable Court be pleased to grant leave to the Applicant herein to be enjoined as an interested party in these proceedings.

3) **THAT**, the Honourable Court be pleased to grant the Applicant herein leave to file its response to the *ex parte* Applicant’s application for judicial review.

3. According to the applicant, Prosecution Counsel, **Getrude Mueni**, in her affidavit sworn on 14th November 2017 avers that the *ex parte* Applicant was charged with the offence of causing death by dangerous driving contrary to section 46 of the **Traffic Act** in Traffic Case No. 6843 of 2017 - **Republic vs. Sylvia Wairimu Njuguna** on 13th November 2017. On her part, the *ex parte* Applicant avers in the grounds in support of the instant judicial review proceedings that the criminal charges filed against her were instigated by third parties such as the **International Centre for Conflict and Policy (ICPC)**, **Suyianka Lempaa t/a Suyianka Lemapaa & Company Advocates** and **Mike Njeru**.

4. It was further averred that the *ex-parte* Applicant in her further affidavit sworn on 15th January 2018 at paragraphs 25 and 26 thereof avers as follows:

25. ***‘THAT, I verily believe that the belated decision to charge me was instigated by one Mike Njeru, who has for a long period of time blamed me unreasonably and unjustifiably for his failure to clinch commercial contracts with my employer, Safaricom Limited. Currently, one of Mike Njeru’s companies, namely Transcend Media Group has sued my employer and I, along with other employees of Safaricom Limited seeking over Kshs. 1 billion in damages for unsuccessful tenders. I produce at pages 92 to 161 of the Exhibit marked ‘SWN-3’ a copy of the Complaint and Notice of Motion dated 17th November 2016 in HCCC No. 466 of 2016, Transcend Media Group vs. Safaricom Limited and others.***

26. ***‘THAT, at paragraphs 13,14,15,16 and 17 of the Affidavit sworn by one Lai Muthoka on behalf of Mike Njeru’s company in support of the aforestated Notice of Motion, it is alleged that I along with my colleagues unlawfully induces breach of employment contract and pressured a competitor to work with Transcend Media’s former employees.’***

5. According to the applicant, the *ex parte* Applicant has made a number of adverse and prejudicial allegations against the Applicant herein, **Transcend Media Group Limited**, in particular the false claim that **Transcend Media Group Limited** is one of the parties who instigated the *ex parte* Applicant’s arraignment and charging as a result of the commercial suit instituted by **Transcend Media Group** against Safaricom Limited, the *ex parte* Applicant and others - Milimani HCCC No. 466 of 2017. The applicant however denied that it was involved and had a role in the arraignment and charging of the *ex-parte* Applicant in the said Traffic case.

6. It was the applicant’s case that since **HCCC No. 466 of 2017** is pending hearing and determination and is a separate and distinct cause of action, it will be prejudicial for the *ex parte* Applicant to adversely mention the applicant herein without the Applicant being given an opportunity to be heard and to controvert the allegations.

7. The applicant relied on Articles 48 and 50(1) of the Constitution which provides for the right to fair administrative action and the right to be heard as well as Order 53 Rule 3(2) of the **Civil Procedure Rules**

which provides that the ex parte Applicant should serve the pleadings on all persons directly affected in a judicial review application.

8. The applicant disclosed that it has requested that it be served with the pleadings in these judicial review application proceedings which he was not aware of until **5th February 2018**.

9. It was therefore the applicant's case that it is met and in the interest of justice if this Court grants the orders sought.

10. In support of the application **Miss Mugo**, Learned Counsel for the applicant herein relied on the earlier rulings delivered by this Court and submitted that the applicant herein is a separate legal entity from Mike Njeru, the 3rd interested party herein and having been adversely mentioned, there is a probability that an adverse ruling made against it herein might be used against it in the pending Civil Case hence the need for it to be afforded an opportunity of defending itself herein.

11. In the alternative, learned counsel urged this Court to expunge the offending paragraphs 25 and 26 in the further affidavit of the ex parte applicant filed herein.

12. The application was supported by **Mr Maingi**, Learned Counsel for the 3rd interested party.

13. The application was however opposed by the *ex parte* applicant on the following grounds:

a. The proposed 4th Interested Party has no special, director identifiable stake or interest in the judicial review proceedings.

b. No adverse mention or allegation has been directed to the proposed 4th Interested Party and as such, it is not directly affected by the proceedings before this court.

c. The application does not sufficiently disclose the relevance and distinction of the submissions it intends to make before the court.

d. The proposed joinder will unnecessarily crowd the proceedings and delay determination of the pending substantive motion.

14. On behalf of the ex parte applicant, **Mr Njoroge Regeru**, based on various authorities submitted that the threshold for joinder in judicial review application as an interested party had not been met. It was his submissions that the paragraphs referred to by the applicant herein did not in any way adversely mention the applicant and that reference to the applicant therein was with respect to the role played by the 3rd interested party and nothing more.

15. It was submitted that as no adverse reference has been made against the applicant there is no justification in expunging the said paragraphs.

Determination

16. I have considered the issues raised hereinabove.

17. The facts of this case have been reproduced in the earlier rulings in which applications were made for joinder of parties as interested parties. However for completion of the record Order 53 rule 3(2) and (4) of the **Civil Procedure Rules** provides:

(2) The notice shall be served on all persons directly affected, and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein, the notice of motion shall be served on the presiding officer of the court and on all parties to the

proceedings.

(4) If on the hearing of the motion the High Court is of the opinion that any person who ought to have been served therewith has not been served, whether or not he is a person who ought to have been served under the foregoing provisions of this rule, the High Court may adjourn the hearing, in order that the notice may be served on that person, upon such terms (if any) as the court may direct.

18. As this Court has held in the said rulings, it must always be kept in mind that judicial review orders are concerned with the decision making process rather than the merits of the decision. Therefore these kinds of proceedings ought not to be transmuted into an avenue for ventilating merit oriented issues. It therefore follows that a party who alleges that he or she is directly affected by the proceedings ought to bring himself or herself within the ambit of the judicial review jurisdiction and ought not to apply to be joined thereto with a view to transforming judicial review proceedings into ordinary civil litigation.

19. It is therefore necessary in an application for joinder that the applicant discloses to the Court how he or she is directly affected by the proceedings at the stage of the application for joinder. Accordingly, it behoves the applicant to place before the Court satisfactory material upon which the Court can determine whether or not the applicant is directly affected by the proceedings. Secondly, the applicant must go further and satisfy the Court that the issue he or she intends to canvass in the proceedings, which issues are relevant to the matter for determination before the Court, cannot possibly be adequately canvassed by any other party participating in the proceedings

20. In this case, it is clear that the 3rd interested party herein, **Mike Njeru**, has an interest in the applicant herein. Whereas it is true that they are separate legal entities, that is not the distinction that warrants the joinder of parties; otherwise the whole world may well seek to be joined to such proceedings notwithstanding the mutuality of their interests therein. It has not been contended that the 3rd interested party cannot adequately deal with the issues raised against the applicant herein in paragraphs 25 and 26 of the further affidavit, assuming that those averments adversely affect the applicant herein.

21. Apart from that I have considered the said paragraphs and with due respect I cannot see any allegation therein that even remotely alludes to the fact that the applicant herein played a role in the institution of the criminal proceedings the subject of these proceedings. In paragraph 25 it is simply averred that the applicant herein has sued the *ex parte* applicant in damages. That averment is not denied by any of the parties herein. In fact it is admitted. In paragraph 27 it is simply disclosed that in the same proceedings, it is alleged that the *ex parte* applicant along with her colleagues unlawfully induced breach of employment contract and pressured a competitor to work with Transcend Media's former employees.

22. In my view, it would be stretching these averments too far to contend that these paragraphs infer that the applicant herein has instigated the commencement of the criminal proceedings. In order to justify the joinder of a person as an interested party, the applicant must show that it is directly affected. The word "direct" is defined by **Black's Law Dictionary**, 9th Edn. page 525 as "*straight; undeviating, a direct line, straightforward, immediate.*" In this case, I am not satisfied that the said averments bring the applicant within the meaning of the word "direct" in order to justify its joinder to these proceedings.

23. In the premises the application dated 12th February, 2018 fails and is dismissed with costs to the *ex parte* Applicant.

24. Orders accordingly.

Dated at Nairobi this 27th day of February, 2018

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Moibi for the ex parte applicant

Miss Spira for Mr Ashimosi for the 1st and 2nd Respondents

M Chelloti for the 2nd interested party

Mr Nyaberi for Mr Maingi for the 3rd interested party

Miss Mugo for the proposed 4th interested party/applicant

CA Ooko