



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 661 OF 2009

REPUBLICAPPLICANT

VERSUS

INDUSTRIAL PROPERTY TRIBUNALRESPONDENT

AND

SANITAM SERVICE (E.A) LIMITEDINTERESTED PARTY

EX-PARTE CHEMSERVE CLEANING SERVICES LIMITED

RULING

The Interested Party, Sanitam Services (E.A) Limited through the notice of motion application dated 16th February, 2012 brought under **Order 45 Rules 1 and 2** of the Civil Procedure Rules prays for orders:

- “1. THAT the court’s orders of 1st December 2010 be reviewed and set aside and appropriate orders be made permitting the Interested Party to make necessary submissions on the ex-parte Applicant’s substantive Notice of Motion.**
- 2. THAT the Interested Party was a substantive party in the proceedings before the Industrial Property Tribunal and indeed raised the preliminary objection on the Tribunal’s jurisdiction.**
- 3. THAT the Interested Party’s interest in the Patent has been affected yet no opportunity was given to it to make its input in the issue.”**

The application is also supported by the affidavit of the Interested Party’s director Mr. Samson Kamau Nganga sworn on 16th February, 2012.

According to the affidavit, the ex-parte Applicant, Chemsolve Cleaning Services Limited, filed the substantive notice of motion dated 15th December, 2009, without the knowledge or information of the Interested Party. The Interested Party was never served with the papers in this case even though the ex-parte Applicant was aware that these proceedings affected it as it was the registered proprietor of Patent No. AP 773 the subject of the proceedings. At some point, the Interested Party came across this matter on the cause list and instructed R. M. Mutiso & Company Advocates who filed a notice of appointment of advocates dated 9th December, 2009.

As the Interested Party was not served with any papers or any hearing notice, the matter proceeded in its absence. It is the Interested Party's case that the rules of natural justice requires that it should be heard in respect to the substantive notice of motion dated 15th December, 2009 and the decision delivered by this Court on December, 2010 should be vacated. The Interested Party's director averred that the Court's judgment had recently come to the attention the Interest Party.

The Respondent, Industrial Property Tribunal did not file any response to the application. On 5th March, 2014 Mr. Wanga informed the Court that Ms Chimau who was acting for the Respondent was not going to file any submissions in response to the application.

The ex-parte Applicant did not file any reply to the application. The ex-parte Applicant did however file submissions dated 17th April, 2012 in which it opposed the application.

It is the ex-parte Applicant's case that the Interested Party has not demonstrated how the decision by this Court affected its interest in the patent. Further that the dispute about the patent will be addressed by the Respondent as the Court's decision simply quashed the Respondent's findings that it did not have jurisdiction to hear the dispute. At page 2 of the submissions, the ex-parte Applicant submits that:

“Order LIII rule 3(4) of the Civil Procedure Rules provides that if, on the hearing of the motion the Court is of the opinion that any person who ought to have been served therewith had not been served, it has the discretion to adjourn the hearing in order that the notice may be served on that person.

At no point did the Court, upon hearing the Ex-parte applicant's notice of motion, order for any other party and in particular the Interested Party to be served with the notice and proceeded to hear and determine the matter.

The Ex-parte applicant's application to revoke Patent No. AP 773 can only be ventilated at the Industrial Property Tribunal. The Interested Party has not shown in its application what, if any, grounds it would raise in the Judicial Review proceedings to counter this.”

The ex-parte Applicant contends that **Order 53** of the **Civil Procedure Rules** is the only Order applicable to judicial review proceedings and any other Order of the Civil Procedure Rules, including **Order 45**, is not applicable to judicial review proceedings. The ex-parte Applicant contends that even if review was available to the Interested Party, then the same would still not issue on the grounds that the Interested Party has not met the conditions for granting a review as per **Order 45** of the **Civil Procedure Rules**.

Looking at the Court file and the papers filed in the instant application, I think the decision will turn on whether the Interested Party was entitled to be heard, and whether it was given an opportunity to be heard. Although the application is framed as having been brought under **Order 45** of the **Civil Procedure Rules**, it is apparent that this is not an application for review as envisaged by the said Order. In my view, the Interested Party has invoked the inherent power of this Court to do that which is just.

At page 4 of his ruling dated 1st December, 2010, D. Musinga, J (as he then was) observed:

“The respondent as well as Sanitam Services East Africa Limited were served with the applicant's Notice of Motion aforesaid. The respondent did not enter appearance and neither did it file any replying affidavit. Sanitam Services East Africa Limited appointed Messrs R. M. Mutiso and company advocates who filed a notice of appointment of advocates on 9th December, 2009. However, the said advocates did not file any replying affidavit. In effect, the ex-parte applicant's Notice of Motion was not opposed.”

This passage appears to give the impression that the Interested Party was indeed involved in the proceedings from the beginning. The Court proceedings however show otherwise. The proceedings were

between the ex-parte Applicant and the Respondent and it does not look like the Interested Party was involved. There is no evidence that the pleadings or hearing notices were ever served on the Interested Party. The Interested Party stated that its counsel only entered appearance after seeing the matter on the cause list. This may indeed be the correct position.

It is very clear that the Interested party was a party to the proceedings before the Respondent. It ought to have been made a party as a matter of right to these proceedings. In **MUTISO v MUTISO [1984] KLR 536** the Court of Appeal held that it is a fundamental principle of justice that before an order or decision is made the parties and particularly the party against whom the decision is to be made should be heard.

The Interested Party herein had successfully persuaded the Respondent that it did not have jurisdiction to hear the dispute that the ex-parte Applicant had referred to it vide **Industrial Property Tribunal at Nairobi Case No. 57 of 2008, CHEMSERVE CLEANING SERVICES LTD v SANITAM SERVICES (EA) LIMITED**. The ex-parte Applicant being aggrieved by the Respondent's decision moved this Court seeking to quash the ruling delivered on 1st October, 2009 by the Respondent. On 1st December, 2010 this Court ruled that the Respondent had jurisdiction to hear the dispute.

The Interested Party had filed a preliminary objection before the Respondent arguing that the Respondent had no jurisdiction. It is therefore clear that the Interested Party was directly affected by these judicial review proceedings. Its voice, whatever it was worth, ought to have been heard. The Interested Party was never heard and neither was it given an opportunity to be heard. Indeed the ex-parte Applicant in a passage of its submissions already produced in this ruling admitted that the Interested Party was never heard.

The logical conclusion is that the application dated 16th February, 2012 succeeds. The judgment delivered by this Court on 1st December, 2010 is set aside. The Interested Party to file and serve its response plus submissions to the substantive notice of motion dated 15th December, 2009 within 21 days from the date of this ruling. The costs of this application will be in the cause.

Dated, signed and delivered at Nairobi this 13th day of February , 2015

W. KORIR,

JUDGE OF THE HIGH COURT