REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 224 OF 2014

REPUBLIC.....APPLICANT

VERSUS

KENYA POWER & LIGHTING CO. LIMITED.....RESPONDENT

EX-PARTE

1. **CORNER ELECTRICAL CONTRACTORS LIMITED**
2. **ACE ELECTRICAL & CONTROL LIMITED**
3. **ABUJA ENGINEERING COMPANY LIMITED**
4. **AWAMBS TECH COMPANY LIMITED**

JUDGEMENT

1. Corner Electrical Contractors Limited, Ace Electrical and Control Limited, Abuja Engineering Company Ltd and Awambs Tech Company Limited who are the 1st to 4th ex-parte applicants in these proceedings were in 2012 prequalified as labour and transport contractors with a view to carrying out construction and maintenance of various lines and installation of distributors and provision of other services to the Respondent, Kenya Power and Lighting Company. Their prequalification was done pursuant to advertisement in the local dailies of Tender No. KP1/6B-B/PROJ/L&T Prequalification 2012/akk/wsc. The prequalification was for five years with effect from 8th August, 2012.
2. Upon prequalification to applicants would be called upon from time to time to perform such works as specified in their individual contracts. Subject to the tender contracts the applicants had to meet additional requirements as security for the prequalification. They were to provide an annual bid bond of Kshs.100,000/=, an annual performance bond of Kshs.200,000/= and obtain an annual insurance policy for kshs.10 million. The applicants complied with the set requirements and when called upon provided services as per their individual contracts.
3. On 11th March 2014, the respondents without notice to the applicants advertised in the Standard newspaper an invitation to tender No. KP1/6-B/PT/01/13-14 for prequalification of labour and transport contractual services. The applicants were already prequalified to provide these services. The advertisement also required the applicants to submit fresh applications for pre-qualification alongside other interested persons.
4. It is the applicants' case that the advertisement and invitation to tender as advertised amounted to an illegal, arbitral and illegitimate unilateral termination and or cancellation of the five year contractual relationship existing between them and the Respondent. The applicants contend that as a result of their prequalification they had heavily invested in insurance policies, performance

bonds and bid bonds.

5. The applicants aver that they were not given any notice before the termination of their prequalification contracts and neither were they given any reason for the termination. They assert they were not given any hearing before the contracts were cancelled. They contend that the Respondent's decision is unfair, arbitrary, capricious and a gross violation of the requirements of the rules of natural justice.
6. The applicants have through the notice of motion application dated 17th June, 2014 therefore prayed for orders as follows:

> **"1. THAT this Honourable Court be pleased to make an Order of Certiorari directed at the Respondent quashing the Respondent's decision to advertise the 'Invitation to Tender' for Tender Number KP1/6-B/PT/01/13-14 for prequalification of Labour and Transport Contractual Service. Which invitation required the applicants who were pre-qualified contractors of Labour and Transport Contractual Services contract No. KP1/6B-B/PROJ/L&T Prequalification 2012/akk/wsc to be re-prequalified.**

2. **THAT this Honourable Court be pleased to make an Order of Prohibition directed at the Respondent, prohibiting the Respondent from cancelling, terminating and/or breaching prequalification of Labour and Transport Contractual Services contract No. KP1/6B-B/PROJ/L & T Prequalification 2012/akk/wsc.**
3. **THAT this Honourable Court be pleased to make an Order of Mandamus compelling the Respondent to maintain all prequalified contractors for Labour and Transport contractual services in its list of contractors without further re-prequalification as advertised by the Respondent on 11th March, 2014.**
4. **THAT costs of this action be borne by the Respondent."**

7. The Respondent opposed the application through grounds of opposition dated 4th July, 2014. Those grounds are as follows:

> **"1. This Honourable Court lacks Jurisdiction to hear and determine the Suit and Application herein pursuant to the provisions of Section 25 as read with Section 93 of the Public Procurement and Disposal Act and the Regulations made thereunder.**
>
> **2. This Honourable Court lacks the jurisdiction to hear and determine the Application as the Judicial Review Application concerns public procurement which is governed by the provisions of the Public Procurement and Disposal Act 2005 and the various Regulations made thereunder which provisions provide for Disputes Resolution Mechanisms including at Sections 25, 36, 53, 93, 102 and 105.**

3. **The Application herein is mischievous, ill-conceived and a blatant abuse of court process as the right to institute Judicial Review in procurement proceedings can only lie after the Public Procurement and Administrative Review Board has rendered its decision pursuant to Section 100 of the Public Procurement and Disposal Act 2005.**
4. **The Application is incompetent, misconceived and bad in law as the decision complained of was neither of a ministerial, administrative, legislative, judicial or quasi-judicial nature and did not in any way fall under the purview of public law.**
5. **The issue of alleged termination of contract is a purely private/civil/contractual matter and is not amendable to Judicial Review Jurisdiction.**
6. **The Respondent was not exercising a public duty but rather a private right and its decision in regard thereto cannot therefore be amendable to Public Law.**
7. **An order for prohibition and/or mandamus cannot lie as the Respondent herein has unfettered discretion in the manner and/or mode in which it chooses to pre-qualify contractors.**
8. **The Application filed is fatally defective as the Statutory Statement filed in support thereof is incompetent as it discloses facts contrary to Order 53 of the Civil Procedure Rules, 2010.**

9. **The Applicants are parties to High Court Civil Suit No. 131 of 2014 which suit involves similar issues and the Application filed herein is therefore frivolous, vexatious and an abuse of court process."**

8. There is also a replying affidavit sworn on 28th July, 2014 by the Respondent's Acting Principal Legal Officer Owiti Awuor. Through the said affidavit the Respondent in the first instance submitted that this Court lacks jurisdiction to hear and determine the applicants' case. The Respondent asserts that the relationship between the parties herein is governed by the provisions of the Public Procurement and Disposal Act, 2005 (PP&DA). In accordance with the said Act, the Public Procurement & Administrative Review Board ("the Board") is the body mandated to handle any complaints arising from a procurement process. Consequently, the Respondent submits that any grievance in relation to the applicants' pre-qualification and the threat to terminate the same ought to be ventilated before the Board. In support of this argument they cite the decision in **Plan 'B' Holdings & 10 others v Kenya Power and Lighting Company, Kisumu H.C.C.C. No. 13 of 2014.** The Respondent goes ahead to aver that the only way this Court's jurisdiction can be invoked in procurement proceedings is through Section 100 of the PP&DA and as such, the application before this Court is premature.
9. Secondly, the Respondent contends that the applicants' grievance is not amenable to judicial review. On this point, the Respondent's case is that the grievance of the applicants is founded on an alleged private contractual relationship between the parties and judicial review is only available in acts of a public nature and not private nature. The Respondent relied on the decision in **Republic v Kenya Cricket Association & 2 others [2006] eKLR** to support the contention that where the relationship is contractual and therefore of a private nature, the same would not be susceptible to judicial review which deal with public rights.
10. The decision of the Court of Appeal in **Staff Disciplinary Committee Maseno University & 2 others v Prof. Ochong' Okello [2012] eKLR** was also used to buttress this argument. In that case, the Court (Visram, JA) stated that:

> **"However, orders of judicial review are orders used by the Court in its supervisory jurisdiction to review the lawfulness of an act or decision in relation to the exercise of a public act or duty. In this case, the contract of employment between the respondent and Maseno University was a contractual relationship governed by private law. The dispute between the respondent and the appellants arose from the performance of the respondent's contract of employment. While it is true that the public has a general interest in the University being run properly, that interest does not give the public any rights over contractual matters involving the University and other parties.**
>
> **The trial Judge appears to have been moved by the fact that the respondent is "a *senior citizen and a senior lecturer who has dedicated his service to the public by imparting knowledge to us and to our children*". This may well be so. Nonetheless, that fact does not make the contractual relationship between the respondent and the applicant which is governed by terms and conditions agreed by the parties a matter of public duty or matter governed by public law. Moreover, if one were to accept the reasoning of the trial Judge that the treatment of the respondent becomes a matter of public law because of the public expectation that the University would act lawfully and fairly towards the respondent, then it is not the respondent but the public who would have a right of action for orders of judicial review based on breach of their expectation."**

11. Other cases cited in support of this argument are **Mombasa Seaport Duty Free Limited v Kenya Ports Authority [2006] eKLR** and **Republic v Moi Teaching and Referral Hospital Board ex-parte Joseph Ochenge Ogaro [2010] eKLR.**
12. The Respondent asserts that its source of power in placing the advertisement for an invitation to tender was contractual and it had no duty of a public nature to the applicants and was not exercising public law functions in making the said decision but rather was exercising its rights and power as a procuring entity pursuant to the PP&DA. As such, the applicants have failed to

establish that the Respondent's decision is amenable to judicial review.

13. In the alternative, it is submitted that orders of prohibition and mandamus cannot issue where a body is vested with unfettered discretion as to the mode and/or manner of performing a duty. The Respondent contends that the PP&DA only requires it to prequalify but the discretion in respect of the prequalification is left to it and this discretion is unfettered.
14. Thirdly, the Respondent contends that the application is fatally defective as the statutory statement filed contains matters of fact and this is in breach of Order 53 Rule 1 of the Civil Procedure Rules, 2010 (CPR) which states that the statement should only contain the name and description of the applicant, the relief sought and the grounds on which it is sought. It also breaches the requirement by the same Rule that the facts to be relied upon should be found in the verifying affidavit. In support of this proposition, the statement of the Court (M.S.A. Makhandia, J (as he then was)) in **Peter Gitahi Kimaitha v Secretary, Public Service Commission & 2 others [2010] eKLR** is cited. In that case the Court stated:

> **"However what do we have before us? Yes there is a statement of facts. That statement contains the name and description of the applicant. It does not contain the relief sought and the grounds thereof. Thereafter [it] contains what the applicant refers to as facts relied on. These are required to be in the verifying affidavit and not the statement. That being the case again, the applicant has failed to comply with the mandatory provisions of the law and statement is liable to be struck out."**

15. Fourthly, the Respondent avers that the application is frivolous, vexatious and an abuse of the court process for various reasons. It is contended that the applicants are parties to Nairobi **HCCC No. 131 of 2014 Eotech Limited v Kenya Power & Lighting Limited** which suit raise issues similar to those raised in these proceedings. For that reason, the Respondent asserts that the applicants are guilty of material non-disclosure and are not deserving of the remedies sought in the application. The Respondent avers that the applicants are also guilty of material non-disclosure for failing to disclose the fact that the High Court at Kisumu in **Plan 'B' Holdings Limited & 10 others (supra)** was categorical that no contract is formed between parties by virtue of pre-qualification.
16. The Respondent submits that the applicants' remedy, if any, lies in a claim for damages and not judicial review. Further, that the applicants are in essence asking the Court to reinstate a contract which has already been terminated and such a remedy does not lie in judicial review.
17. The Respondent wraps up its case by asserting that there are alternative remedies which the applicants should have resorted to instead of seeking judicial review. It is argued that the applicants had the option of presenting their grievance to the Board. On this proposition the Respondent relies on the decision of A.O. Muchelule, J in **Plan 'B' Holdings Limited & 10 others (supra).**
18. The Respondent avers that judicial review is a remedy of last resort and where another remedy is available the judicial review route should be avoided. The decision in **R v Epping and Harlow General Commissioner ex-parte Goldstraw [1983] 3 ALL E.R. 257** was cited in support of this argument. In that case the Court stated that:

> **"The application for judicial review was within the residual jurisdiction of the court, but, save in exceptional circumstances, that jurisdiction would not be exercised where other remedies were available and had not been used."**

19. Other cases cited in support of this argument are **R v Birmigham City Council ex-parte Ferro Ltd [1993] 1 ALL E.R. 530**; **Scott & others v National Trust for Places of Historic Interest or Natural Beauty and another [1998] KBD 486**; **Kenya Telecommunication Investment Group Ltd v Communications Commission of Kenya, Misc. Application No. 1267 of 2003**; and **The Speaker of the National Assembly v James Njenga Karume, Civil Appeal No. 92 of 1992.**
20. The applicants commenced their submissions by stating that the Respondent is a public body whose actions, where applicable, are amenable to judicial review. Their counsel cited various authorities in support of this argument. I do not seem to see anything in the Respondent's pleadings and submissions to suggest that the Respondent is not a public body or is not amenable

to judicial review. There is thus no dispute that the Respondent is a public body and is therefore amenable to judicial review in circumstances attracting those orders.

21. The next issue the applicants dealt with was whether the Respondent's action is subject to review. The applicants' counsel submitted that whereas the Respondent had a right to terminate the contracts it had with them, the manner it adopted in terminating the contracts is subject to review. Citing the decision in **Republic v Kenya Revenue Authority ex-parte Yaya Towers Limited [2008] eKLR** the applicants asserted that the remedy of judicial review is concerned with reviewing not the merits of the decision but the decision making process.
22. The applicants also referred to the decision of the Court of Appeal in **Municipal Council of Mombasa v Republic & Umoja Consultants Ltd [2002] eKLR** where it was stated that in judicial review:

> **"The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review."**

23. The applicants submitted that owing to the improprieties in the procedure adopted in reaching the decision to terminate their contracts, the Respondent's action is subject to review.
24. Relying on the decision of Nyamu, J (as he then was) in **Republic v Ministry of Planning & another ex-parte Mwangi S Kimenyi [2008] eKLR,** the applicants urged this court to find that the place of judicial review in the supervision of public entities is wide enough to take care of the issues they have raised. In the said case, the learned Judge quoted with approval the decision in **R v Someset [1995] QBD 513** where it was stated that:

> **"It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake at every turn, all of its dealings constitute the fulfillment of duties which it owes to others; indeed it exists for no other purpose."**

Consequently, the applicants contend that this Court has jurisdiction to hear this matter and provide appropriate relief.

25. As to whether the applicants are entitled to the orders sought, they submit that they are. It is their case that the Respondent acted in excess of jurisdiction and failed to comply with the rules of natural justice. The applicants submitted that they were not given an opportunity to be heard and this contravened the rules of natural justice which dictates that a person who is affected by a decision ought to be granted a fair hearing before the decision is made. They relied on the decision the case of **Republic v Chief Justice of Kenya & 6 others ex-parte Moijo Mataiya Ole Keiwua [2010] eKLR.**
26. The applicants averred that the Respondent terminated their contracts arbitrarily and without notice and the applicants only learned of the termination through an advertisement in the dailies. They asserted that they were not informed of the intention to terminate their contracts and neither were they given an opportunity to state why the contracts should not be cancelled.
27. In the applicants' view, although the Respondent was entitled to issue the tender notice, it could not do so without complying with the rules of natural justice. This proposition is supported by the decision in **R v Commission for Racial Equality ex-parte Hillingdon London Borough Council [1982] AC 779** where it was stated at page 787 that:

" ... where an Act of Parliament confers upon an administrative body functions which involves making decisions which affect to their detriment the rights of other persons.....there is a presumption that Parliament intended that the administrative body should act fairly towards those persons who will be affected by their decision."

28. The applicants asserted that the Respondent being a public body cannot exercise its power with utter discretion like a private person. It must act within the law and comply with the principles of natural justice. The decision in **Keroche Industries Limited v Kenya Revenue Authority & 5 others [2007] eKLR** was cited to support this argument.
29. I will first address the issue as to whether judicial review is available to the applicants before proceeding to address the issues that will finally dispose of this matter.
30. The Respondent has blown hot and cold as to whether there was a contract between it and the applicants. On one hand the Respondent's case is that what is before this Court touches on a contractual relationship between it and the applicants. The contrary position it takes is that as decided by the Court in **Plan 'B' Holdings Limited and 10 others (supra)** pre-qualification does not give rise to a contract and there was therefore no contract between it and the applicants.
31. The decision in **Plan 'B' Holdings Limited & 10 others** clearly stated the law on that issue. A.O. Muchelule, J quoted the decision of Havelock, J in **Getrio Insurance Brokers Ltd v Mwalimu National Co-operative Savings and Credit Society Limited & another**, **Nairobi Milimani H.C.C.C. No. 38 of 2012** where the learned Judge cited an extract from Halbury's Laws of England, 3rd Edition, Volume 8 at page 71 where the learned authors opined that:

"An advertisement inviting tenders for supply of goods extending over a period of time is not an offer, but an invitation for offers. A tender for the supply of goods as may be required, no quantity being specified, is not an offer which may be accepted generally so as to form a binding contract, but is a continuing offer, which is accepted from time to time whenever an order is given for any of the goods specified in the tender. An acceptance of such a tender merely amounts to an intimation that the offer will be considered to remain open during the period specified and that it will be accepted from time to time by orders of specific quantities, and does not bind either party unless and until such orders are given."

32. As the pre-qualification did not in any way amount to a contract, the Respondent's assertion that the relationship between it and the applicants fell into the private law realm does not hold any water. In any case the Court had ruled that there was no contract between the parties. The applicants did not therefore have a remedy in civil law.
33. The Respondent also claimed that judicial review is not available to the applicants as there was an alternative remedy provided by the PP&DA. The Respondent is correct in stating that judicial review is a remedy of last resort and where there is an efficacious alternative remedy and an applicant has not pursued it then judicial review may be denied. But do the applicants have any recourse to the PP&DA? The answer is in the negative. The Board which is established by PP&DA is given jurisdiction by Section 93 as follows:

"93. (1) Subject to the provisions of this Part, any candidate who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the regulations, may seek administrative review as in such manner as may be prescribed.

(2) The following matters shall not be subject to the review under subsection (1)—

(a) the choice of a procurement procedure pursuant to Part IV;

(b) a decision by the procuring entity under section 36 to reject all tenders, proposals or quotations;

(c) where a contract is signed in accordance to section 68;

and

(d) where an appeal is frivolous."

34. Section 3 of the same Act defines a "**candidate**" to mean "**a person who has submitted a tender to a procuring entity.**" At the time the Respondent took the action complained of by the applicants, the applicants were not candidates in respect of any particular tender. The Board did not therefore have jurisdiction to deal with their complaint.
35. If the Respondent's assertion that this Court has no jurisdiction is accepted, where does the applicants' remedy lie? The applicants have demonstrated that they had a relationship with the Respondent. They have also shown that the Respondent without any notice to them proceeded to terminate that relationship. They believe, and correctly so, that there are entitled to some remedy. I agree with them that judicial review is available to them. Judicial review is a tool for promotion of good governance. Where a public body acts in a manner which injures those who interact with it, and there is no other adequate remedy to right such injury, judicial review will step in to right the wrong. Compliance with the principles of natural justice is a sign of good governance by a public body.
36. The parties herein agree that there was some sort of understanding between the applicants and the Respondent. The applicants were already pre-qualified in respect of labour and transport services. The pre-qualification was to last for five years. However, the Respondent on 11th March, 2014 placed an advertisement in the Standard newspaper in respect of the same services.
37. The applicants concede that the Respondent was entitled to expand the list of pre-qualified contractors. They however, contend that the same advertisement thrashed their earlier prequalification by calling on them to apply for prequalification afresh. Their argument is valid. The Respondent was wrong in terminating the agreements they had with the applicants without asking them for their views and without giving them reasons. The applicants had legitimate expectation that once they were pre-qualified, and so long as they met the conditions for pre-qualification, they would remain pre-qualified for a period of five years.
38. The question that follows is whether the applicants are deserving of judicial review orders. The Respondent put forward other reasons why the applicants should not be granted the orders sought. One of the grounds is that the application is defective as it did not comply with Order 53 Rule 1(2) CPR which states that an application for leave **"shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on."**
39. According to the Respondent the facts are contained in the statutory statement thus breaching the said rule. This argument was supported by the decision of M.S.A. Makhandia, J (as he then was) in **Peter Gitahi Kamaitha (supra).** The facts of that case are different from those of this case. In that case the statutory statement did not contain the relief sought and the grounds thereof. The facts were also contained in the statement instead of the verifying affidavit. In the case before me the statutory statement is compliant as it has the names and description of the applicants, the relief sought and the grounds on which it is sought. It does indeed have some facts but this is just superfluous information curable by Article 159(2)(d) of the Constitution. There is an affidavit verifying the facts relied on. In my view this argument by the Respondent is unmerited and I reject it.
40. There were two other arguments which were interrelated. The first limb is that the applicants are guilty of material non-disclosure for failing to disclose the cases in Kisumu High Court and Nairobi High Court. The second limb is that the decision by the applicants to file these proceedings while other cases had been filed amounts to abuse of the court process.
41. I have perused the chamber summons application for leave, the statutory statement, the verifying affidavit and the accompanying documents which were filed on 9th June, 2014 and it is clear that the applicants did not disclose anything about these two cases.
42. In regard to **Place 'B' Holdings Limited & 10 others (supra)** the non-disclosure can be excused on two grounds. The first ground is that although the applicants had applied to be enjoined in that matter, their application was not granted and they were therefore not parties to that case. Secondly, this matter was filed after a ruling had been delivered on 30th May, 2014 striking out that case. There was no active case and the issues raised had not been determined.

43. As for the Nairobi case **HCCC No. 131 of 2014 Eotech Ltd and others** (supra) it is clear that it was still subsisting at the time these proceedings were filed. The applicants herein were parties to that case. As averred in paragraph 11 of the replying affidavit sworn on 28th July, 2014 by Owiti Awuor the 1st Applicant herein is the 41st Plaintiff, the 2nd Applicant is the 3rd Plaintiff, the 3rd Applicant is the 2nd Plaintiff and the 4th Applicant is the 12th Plaintiff in that matter. The issues raised in that case are the same with the issues herein.
44. The applicants have not rebutted these facts. In failing to disclose the existence of the case in which they are parties, the applicants failed the test of candour which is an important principle of judicial review. A party who approaches the court in judicial review should place all the cards on the table. The moment the applicants decided to approach this Court for judicial review orders, they had a duty to make full and frank disclosure.
45. The importance of full disclosure was discussed in **Brink's-Mat Ltd v Elcombe and others [1988] 3 All ER 188** where it was stated that:

> **"In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following. (i) The duty of the applicant is to make 'a full and fair disclosure of all the material facts': see *R v Kensington Income Tax Comrs, ex p Princess Edmond de Polignac* [1917] 1 KB 486 at 514 per Scrutton LJ. (ii) The material facts are those which it is material for the judge to know in dealing with the application as made; materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see the *Kensington Income Tax Comrs* case [1917] 1 KB 486 at 504 per Lord Cozens-Hardy MR, citing *Dalglish v Jarvie* (1850) 2 Mac & G 231 at 238, 42 ER 89 at 92, and *Thermax Ltd v Schott Industrial Glass Ltd* [1981] FSR 289 at 295 per Browne-Wilkinson J. (iii) The applicant must make proper inquiries before making the application: see *Bank Mellat v Nikpour* [1985] FSR 87. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries. (iv) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application, (b) the order for which application is made and the probable effect of the order on the defendant: see, for example, the examination by Scott J of the possible effect of an Anton Piller order in *Columbia Picture Industries Inc v Robinson* [1986] 3 All ER 338, [1987] Ch 38, and (c) the degree of legitimate urgency and the time available for the making of inquiries: see *Bank Mellat v Nikpour* [1985] FSR 87 at 92-93 per Slade LJ. (v) If material non-disclosure is established the court will be 'astute to ensure that a plaintiff who obtains ... an ex parte injunction without full disclosure is deprived of any advantage he may have derived by that breach of duty ... ': see *Bank Mellat v Nikpour* (at 91) per Donaldson LJ, citing Warrington LJ in the *Kensington Income Tax Comrs* case. (vi) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented. (vii) Finally 'it is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded': see *Bank Mellat v Nikpour* [1985] FSR 87 at 90 per Lord Denning MR."**

46. I also agree with the Respondent that by filing this matter during the pendency of the civil case the applicants abused the court process. As was stated in **Kenya National Examination Council v Republic Ex-parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR,** it has always been

a policy of the law to prevent a multiplicity of suits on one issue. A multiplicity of suits between the same parties concerning the same issues is not only a waste of judicial time but is likely to put the courts into disrepute where conflicting decisions are issued in those cases.

47. Judicial review remedies are discretionary in nature and in giving the orders the Court will also consider the conduct of the parties. In this case, the applicants are guilty of material non-disclosure and abuse of the court process. They have not approached the Court in good faith and they appear to being playing lottery with the Court process. Such behaviour cannot be entertained. This Court cannot exercise its discretion in favour of such parties.
48. For the foregoing reasons, the application fails and the same is dismissed with costs to the Respondent.

Dated, signed and delivered at Nairobi this 28th day of April , 2015

W. KORIR,

JUDGE OF THE HIGH COURT