REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

MISC. APPL. NO. 291 OF 2015

IN THE MATTER OF APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF THE UNIVERSITIES ACT NO. 291 0F 2015

AND

IN THE MATTER OF THE KENYA MEDICAL TRAINING COLLEGE ACT, CAP 261, LAWS OF KENYA

EX PARTE

KENYA UNIVERSITIES AND COLLEGES CENTRAL PLACEMENT SERVICE.....APPLICANT

VERSUS

KENYA MEDICAL TRAINING COLLEGE.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

RULING

Introduction

1. This is a curious case concerning two statutory bodies. Both are funded to an extent by the government of the Republic of Kenya. At the fore currently is whether certain without notice(ex parte) orders should remain in force between now and when the dispute is fully determined or whether the discharge of the without notice orders should effectively determine the dispute, albeit without considering the merits.

2. I hope to be as short as possible in this case. It is however necessary to lay the background and say a little about the genesis of the dispute itself. There is certainly need to understand how this rather unhappy situation arose.

Background

3. The relevant facts and chronology may be stated shortly as follows.

4. The ex parte applicant ("KUCCPS") is a statutory body. It is established under Section 55 of the Universities Act, 2012. The 1st Respondent ("KMTC") is also a body corporate founded under statute, the Kenya Medical Training College Act, Cap 261.KUCCPS claims to be the only body mandated by law to select and place qualified students to be sponsored by the government in various universities and colleges. In the academic year 2014/2015, KUCCPS selected and placed no less than 4, 374 students who were duly admitted by KMTC. Then in the academic year 2015/2016, KUCCPS in exercise of its mandate or purported mandate, placed another 2,305 students to be admitted to courses offered by KMTC. KMTC's reaction was to reject such placement or purported placement by KUCCPS. KMTC selected and set for admission its own batch of students . They numbered 3,721. KMTC's position was that it is not among the colleges under KUCCPS' jurisdiction. KUCCPS was baffled. It moved to court but not before trying to convince KMTC to change its position.

5. A successful application was urged by KUCCPS on 9 September 2015. The application had been filed on 8 September 2015.The application was a without notice application pursuant to the provisions of Order 53 Rule 1(2) of the Civil Procedure Rules. I certified the application as urgent and worthy of hearing during the court vacation. Having considered the merits thereof and on the basis of the documents then filed by KUCCPS as well as the submissions by counsel, in a brief ruling running some six pages, I ordered and directed as follows:

a. *Leave is granted to the applicant to commence Judicial Review proceedings against the Respondents in terms of prayers 2 and 3 of the application dated 8th September 2015*
b. *The leave so granted shall operate as a stay of the decision of the 1st Respondent to admit only the students selected by the 1st Respondent especially as per the list of students attached and marked as " JM-6" to the affidavit of John Muraguri sworn on 8th September 2015 and filed in cpurt on 8th September 2015 or any other student selected and scheduled to be admitted by the 1st Respondent on 15th September 2015*
c. *The applicant shall file and serve a substantive Notice of Motion within the next two days*
d. *That this matter be mentioned on 17th September 2015 for further directions.*

6. Presumably, upon being served with the extracted orders, KMTC also quickly moved to court and without notice sought to have my orders of 9th September 2015 vacated and discharged. The basis was that the orders had been obtained by KUCCPS on the wiles and an absolute lack of candour by KUCCPS and its counsel. I declined to grant any orders and directed that the application be served and heard on short notice. I saw no reason to depart from the rather absolute elementary tenet in the realm of civil proceedings that save in an emergency or where the law expressly provides for it a court should always hear both sides before giving a ruling. There was then not demonstrated to me that irretrievable prejudice was being caused to KMTC .A short notice to KUCCPS would also have occasioned no prejudice either.

7. As it were, as the two statutory bodies wrangle and wade through the legal process, two sets of anxious young Kenyans wait to continue their education circle.

The principal issue

8. The question at the heart of this case is whether there was lack of full and frank disclosure of material facts on the part of KUCCPS and the effect of such non-disclosure, if any. I must then also determine whether to discharge the orders of this court made on 9 September 2015.

9. Secondary to the above issue too, is the question whether KUCCPS' suit is an abuse of the process of this court which ought to be srtuck out, or alternatively stayed pending hearing and determination of Constitutional Petition No. 40 of 2015 filed before the High Court in Nakuru.

Principal grounds of challenge and opposition

10. The parties respective positions may be stated shortly.

11. KMTC contends that the current suit is a replica of and or substantially similar to the proceedings pending and actually on going before two other courts of competent jurisdiction. The pending proceedings are Nakuru High Court Constitutional Petition No. 40 of 2015 and Eldoret High Court Constitutional Petition No. 12 of 2015. The principal ground advanced and followed on by KMTC is that KUCCPS lamentably failed to give a full and frank disclosure of material facts as far as these two proceedings are concerned.

12. It is stated by KMTC that KUCCPS did not disclose to the court the existence of the two court proceedings. It is also stated by KMTC that KUCCPS did not disclose to the court that fact that it (KUCCPS)had sought and had been denied similar ex parte orders . Further, even after the hearing inter partes KUCCPS had not been granted any interim relief. KMTC then says that the same reliefs earlier denied are the same ones KUCCPS sought and were granted by this court on 9 September 2015. Finally, KMTC states that KUCCPS participated in the proceedings before the High Court at Nakuru and was therefore fully aware of the on goings.

13. KMTC then broadens its argument. It adds that the issues raised in the instant suit are similar to and were also ably raised by KUCCPS in the petition pending before the High Court in Nakuru.That was on 2nd September and 9th September 2015. KUCCPS was then represented by its current counsel.

14. KMTC's case as above can be gathered from the grounds outlined on the face of the application dated 11 September 2015. The supporting affidavit of Peter K Tum outlines in more detail KMTC's contentions summarized above.

15. During oral submissions, Mr. Milimo appearing together with Mr. Lilan basically recapped the above arguments. Counsel stressed the point that Prof. Ojienda who appears for KUCCPS in these proceedings also appeared before the court in Nakuru and thus KUCCPS cannot feign ignorance of the Nakuru case. Neither can KUCCPS fail to know the status of the Nakuru case. Counsel also accentuated the fact that the court in Nakuru had on two occasions (Odero and Mulwa JJ , sitting separately) declined to grant any interim orders against KMTC. In counsel's view, the lack of mention of the two cases as well as the lack of mention of the fact that the court had denied KUCCPS any interim orders was itself deceptive.

16. Counsel relied on the cases of **Andrew Ouko v Kenya Commercial bank Limited & 3 Others [2005]eKLR** and also the case of **Velos Enterprises Limited & Another V Nairobi County Government & another [2013]eKLR** for the proposition that where a party fails to fully and frankly disclose material facts whether at an ex parte or inter partes stage the application must fail and where the party had obtained any orders then the order must be discharged. Counsel also referred the court to the case of **Ruth Wachira t/a Amigiri Beauty Parlour v Chairman Business Rent Tribunal [2006]eKLR**. Finally KMTC also relied on the case of **Commercial Spares Limited v Al Nakhil Enterprises & 3 others HCCC No 388 of 2002 (unreported)** , to demonstrate that where there are two similar suits the latter of the two ought to be struck out.

The Response

17. Relying on a Replying Affidavit sworn and filed by on John Muraguri on 17th September 2015, Prof. Ojiend advocating for KUCCPS contended that KUCCPS was not guilty of non-disclosure of material facts. Drawing from the written submissions filed in court on 17 September 2015, counsel also submitted that the application to vacate the orders for stay were premature. According to counsel, the application ought to be advanced at the hearing of the substantive motion. The substantive motion counsel added had already been filed. For this proposition counsel relied on the case of **R. v Nairobi City Council & Another [2014]eKLR**. Counsel contended that it would ne unfair to discharge orders which were properly issued before the dispute is heard on its merits.

18. On the issue of non-disclosure of material facts, counsel was foremost of the view that there was no non-disclosure as KUCCPS disclosed all that was material for purposes of its application which was then

before this court. Counsel submitted that the two cases which had been filed in Eldoret and Nakuru were not similar to the instant case. First, counsel submitted that KUCCPS had never been a party to either suit. In the first of the two suits (Eldoret HC CP No. 12 of 2015), the parties are Hezron Silunya as the Petitioner and KMTC as the respondent. The Petitioner , according to KUCCPS was seeking that good order be restored regarding the admission of students to KMTC's various courses and colleges. In the second of the two suits (Nakuru HCCP No. 40 of 2015), the applicants are two 'students' placed by KUCCPS for admission by KMTC but whose admission has been rejected by KMTC. The two applicants seek declaratory orders that their constitutional rights have been violated by KMTC's refusal to admit them as students in any of KMTC's colleges.

19. Counsel for KUCCPS concluded by stating that KUCCPS had been prudent enough and had indeed filed the substantive motion. Counsel also stated that KUCCPS had all along acted in good faith.

20. In support of KUCCPS' case , counsel relied on the the decisions of this court in **James Mburu Gitau t/a Jambo Merchant v Subcounty Public Health Officer Kiambu [2013]eKLR, Joyce Liku Janda v care International [2009]eKLR** and **R. v Nairobi City Council & Another [2014]eKLR.**

Law and governing principles.

21. Before summarizing the relevant legal principles and safeguards relevant to the instant issues, I must state and emphasize the high duty of candour fixed upon any applicant to court, appearing ex parte. A party appearing before the court without notice to the other(ex parte) must exhibit a high quality and degree of sincerity and honesty. He must be guileless. He must be frank. He must be open.He must keep nothing that touches on the matter away from the court.He must act in utmost good faith. If he does not so act, he does so at his own risk.

22. In the case of **Esther Muthoni Passaris V Charles Kanyuga & 2 Others ELC 1256 of 2014 [2015]eKLR**, I cited amongst other authorities the masterly judgment of Warrington LJ in the case **Rex v Kensington Income Commissioners, Ex parte Princiss Edmond De Polignac [1917] 1 K B 486** and stated as follows:

> ***[14] There is no controversy that there exists a court made rule that if a party moves the court for restraining or injunctive orders ex parte (without notice) then that party is obligated to disclose all facts which the court thinks are most material to enable the court to fairly form its judgment. Where a party does not observe this rule, he disentitles himself from the relief which he asks the court to grant and such relief will not even be visited by the court at the inter partes stage. This rule which has existed since Castelli –v- Cook [1849] 68 E.R. 36 and was intended to ensure that parties who appear ex parte before the court are not deceitful and do not break faith with both the court and the other parties to the litigation, has been followed in various subsequent cases both outside and within our jurisdiction. See for example R. –v- Kensington Income Tax Commissioners ex parte Princess Edmond De Polignac [1917] 1 KB 486, Smith –v- Croft (No. 1) [1986] 1 WLR 58, Boreh –v- Djibouti [2015] EWHC 769, Tiwi Beach Hotel Ltd –v- Stamn [1990-94] EA 565, The Owners of the Motor Vessel Lilian S –v- Caltex Oil (K) Ltd [1989] KLR 1 and Bonde –v- Steyn [2013] 2 KLR 8, among others. See also the treatise on Civil Procedure by Adrian Zuckerman, Zuckerman on Civil Procedure: Principles of Practice, the 3rd edition thereof at Chapter 10 on interim injunctions.***
>
> ***[15] So strong is the rule that where disclosure has not been met the court will not even decide the applicant's application on its merits. In Ex parte Princess Edomond de Polignac [1917] 1 KB 486, Washington L. J stated as follows at page 509:***
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> ***"It is perfectly well established that a person who makes an ex parte application to the court that is to say, in the absence of the person who will be affected by that which the court is asked to do is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge and if he does not make that fullest disclosure then he cannot obtain any advantage from the proceedings and he will be deprived of any advantage he may have already***

obtained by means of the order which has thus wrongly been obtained by him"

23. I then wound up as follows:

> ***[16] I would agree entirely and add that it is to be noted too that even as a party is expected to fully investigate the cause of action and the facts relied on, he is also expected to make full disclosure. He sieves any facts at his own risk because it is the court that determines what is material and not the party applying. The party must nonetheless act in utmost good faith without appearing to steal a march on the court or on the other party. I also hasten to add that even when invoking the rule as to full and free disclosure of material facts, the court must also exercise caution not to cause injustice to either party, including the applicant***.''

24. Though stated in the context of an application for an injunction, that view of the law is correct and, in my view, still prevails generally.

25. It is perhaps unnecessary to give a repertory of the principles governing non-disclosure of material facts on an application made ex parte, but a brief outline will nonetheless suffice. A review of various authorities and in particular the Court of Appeal's decision in **Bahadurali Ebrahim Shamji vs. Al Noor Jamal & 2 Others Civil Appeal No. 210 of 1997** would quickly reveal the following:

? There is a compelling duty on the applicant " to make a full and fair disclosure of all material facts" : see **Rex v Kensington Income Commissioners, Ex parte Princiss Edmond De Polignac [1917] 1 K B 486; Castelli v Cook [1849] 7 Hare 89** and also **Re Kenya National Federation of Cooperatives Ltd & Others [2004]2 EA 128**

? Materiality of facts is to be decided by the court not by assessment of the applicant or his advocates. Facts are generally material when it is material for the judge to know to know about it in dealing with the application as made.

? It is for the applicant to exercise due diligence and investigate the facts relevant to his case and any additional facts which he could have known if he had made inquiries are part of the material facts.

? 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) nature of the case which the applicant is making when he makes the application and (b) the order for which the application is made and the probable effect of the order as the Respondent: see **Columbia Pictures Industries Inc –v- Robinson [1987] Ch 38.**

? If material non- disclosure is shown the court must exercise its good judgment and incisively ensure that an applicant who obtains an exparte order without full disclosure is deprived of any advantage he may have derived by the breach: see **Bank Mellat –v- Nikpour [1985] FSR 87.**

? Whether or not the fact(s) not disclosed is of sufficient materiality to justify or require immediate discharge of the ex parte order depends on the importance of the fact(s) to the issues which were to be decided by the court on the application.

? Lastly, it is not for every omission that the ex parte order will be automatically discharged. "A locus poenitentiae may sometimes be afforded": per Lord Denning in **Bank Mellat V Nikpour (supra).** The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the discharge of the ex parte order nevertheless to continue my order or even make a new order on terms.

Discussion

26. Having considered the arguments of the parties and read their respective pleadings and affidavits and

having also laid out the basic principles, I will now relate the same to the facts of this case but not before a cautionary statement.

A Caution

27. Ex parte applications under urgency, even where not expressly provided for as under Order 53 of the Civil Procedure Rules, are widespread. The likelihood of abuse is not latent. The procedure of proceeding ex- parte is inherently unfair for being a violation of the elementary rule of natural justice that a party should never be condemned unheard. Cases commenced ex parte tend to be noxious from the start. The respondent, especially where adverse orders have been issued is often disappointed and looks to counteract. The respondent may be tempted to move the court to discharge the ex parte order on grounds of the most trifling of errors. It includes immediately moving the court to allege non- disclosure on rather willowy grounds. A lot of care must thus be exercised lest the flimsy of all grounds may lead to an injustice at the respondent's prompting. There is a risk of potential unfairness, apparently to both sides. The respondent being condemned unheard and on hidden facts on the one hand , with the applicant also being robbed of a potentially deserved order on the basis of a rather slender and warranted ground of non disclosure on the other hand. The court should therefore always proceed with a lot of caution and ensure that the proceedings are conducted proportionately by both parties, toxic as the proceedings may already appear.

28. This leads me to the first point raised in objection by counsel of KUCCPS, Prof. Ojienda.

29. He stated that the application by KMTC was premature and the issues raised by KMTC ought to be decided in the substantive motion for judicial review. Counsel referred to a passage in Odunga J's ruling in the case of **R –v- Nairobi City Council & Another [2014] e KLR** which read as follows:

> ***[14]….However, it is not in doubt that such an order, if granted ex parte, may be set aside at a later stage if the Court finds that the stay ought not to have been issued in the first place or that the change in circumstances nolonger warrant the continued existence of the orders of stay. Parties and their counsel are, however, cautioned that the grant of an order of stay ought not to be followed by an application seeking to vacate the same. It is only in cases where the Court is convinced that the conduct of the applicant at the ex parte stage when the stay was granted does not justify the grant either by non-disclosure of material facts or misrepresentation of the same or due to subsequent events that the Court will set aside the stay granted. This is due to the fact that Courts do not grant orders of stay as a matter of course and where the Court is in doubt, the Court is now at liberty to direct that the prayer seeking the stay be heard inter partes even in cases where the leave has been granted.***

30. I understood counsel to submit and stress that KMTC's objections to the ex parte order ought to be heard at the hearing of the substantive motion. Further, it was counsel's view that there was no change in the circumstances to warrant a discharge of the impugned ex parte orders.

31. In my judgment, such an approach would be faulty and misconceived. First, that certainly was not what the learned judge meant in his statement above quoted in the case of **R –v- Nairobi City Council & Another(supra)**. Secondly, the learned judge was relatively clear that an ex parte order may be set aside and discharged if non disclosure of material facts is proven. Thirdly, the rule as to full and frank disclosure and that an ex parte order will be discharged if it was obtained without full disclosure serves two critical purposes. It helps to deprive a wrong doer of an advantage improperly obtained. It also serves as a deterrent to ensure applicants who do not adhere to it to realize that there are consequences. More for the first purpose than any other reason, it would be unreasonable to allow a non compliant party to enjoy the advantage of orders improperly obtained. The respondent can thus move with expedition to have the ex parte orders discharged. It is however for the court to exercise vigilance and ensure that the "judge made rule of itself does not become an instrument of injustice".

32. The application by KMTC is consequently validly and perfectly before the court. It may be determined without necessarily waiting for the substantive motion.

A case of sub judice?

33. KMTC's first line of attack was that KUCCP claim and the dispute herein was already under judgment (*sub judice*) before a court of competent jurisdiction. Reference was made by counsel to two pending Petitions filed separately before the High Court in Nakuru and Eldoret (I will revert to the two cases more in detail later in this ruling). Counsel submitted that it would be a waste of the limited resources to proceed with KUCCPS' claim and dispute herein when the same matters are already being urged before the court's of competent jurisdiction. Counsel then referred the court to the provisions of Section 6 of the Civil Procedure Act (Cap 21) of the Laws of Kenya and exhorted the court to strike out KUCCPS' application for being an abuse of the process. Alternatively and following a prompting by the court, counsel urged that the proceedings herein be stayed pending determination of the Nakuru and the Eldoret cases.

34. In a pithy response, KUCCPS' submitted that the court had no jurisdiction to act as urged. KUCCPS also stated that it is not a party to either of the earlier proceedings but had applied to be enjoined as an Interested Party in the Petition filed in Nakuru. Counsel also stated that the substance in the two cases was not similar to the current claim by KUCCPS.

35. I have perused the pleadings in both cases. The substratum of the claims are apparently similar even though the parties are distinctly different and pursuing in my view different legal interests, imagined or otherwise. There is also no dispute that KUCCPS is not a party to either of the two earlier filed petitions even though there is pending an application to have KUCCPS joined as a party to the proceedings before the Court in Nakuru.

36. Under ordinary civil litigations and proceedings it would be appropriate to invite the application of Section 6 of the Civil Procedure Act. However all the suits before the three courts are not of the ordinary civil proceedings. In Nairobi, there is filed a judicial review application. In Eldoret as in Nakuru there subsist Constitutional Petitions. A distinction can be drawn. The question then becomes whether the provisions of the Civil Procedure Act may be invoked in such instances.

37. That question has been addressed previously by both this court and the Court of Appeal. In the cases of **Commissioner of Lands vs. Hotel Kunste Ltd [1995-98] 1 EA 1** and **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354** , the Court of Appeal and the High Court respectively were firm that judicial review proceedings are sui generis proceedings and the provisions of the Civil Procedure Act are not applicable.

38. More recently, in the case of **Legal Advice Centre aka Kituo Cha Sheria v Communication Authority of Kenya and Another JR Misc No 472 of 2014 [2015]eKLR** ,Odunga J faced with a question of whether the rule as to *sub judice* under Section 6 of the Civil Procedure Act applied in the case of an existing Constitutional Petition and a Judicial Review Application held as follows:

> ***"****……. judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal and the* ***Civil Procedure Act*** *does not apply since it is governed by sections 8 and 9 of the* ***Law Reform Act*** *being the substantive law and Order 53 of the* ***Civil Procedure Rules*** *being the procedural law. Therefore strictly speaking section 6 of the* ***Civil Procedure Act*** *does not apply to judicial review proceedings. See* ***Republic vs. Judicial Service Commission ex parte Pareno [2004] 1 KLR 203-209*** *and* ***Re: National Hospital Insurance Fund Act and Central Organisation of Trade Unions (Kenya) Nairobi HCMA No. 1747 of 2004 [2006] 1 EA 47."***

39. I would agree. The grounds upon which judicial review proceedings are always pegged would not dictate otherwise. The fact that often than not it is the process under challenge would lead one to conclude that to restrict judicial review proceedings by the medium of application of Section 6 of the Civil Procedure Act, procedural and technical injustice may likely be fetched upon litigants. The doctrine of sub judice in view of the foregoing would not be applicable to this case.

40. There is the rider though that the court must always retain the its inherent powers to ensure that there

is no abuse of process . This point was also alluded to by Mr Milimo. In the circumstances of this case and considering the litigation history before the three courts of even jurisdiction, I am not convinced that there was or exists abuse on the part of KUCCPS in commencing and proceeding with the instant judicial review case. True, the case before the court in Eldoret was commenced by a litigant who described himself as acting in the public interest, Even if that were so, I am not convinced that KUCCPS falls to be one of the 'persons' anticipated under Articles 22 and 258 of the Constitution. KUCCPS is a public body and I am unable to discern how possibly the individual litigant would litigate on its behalf.

41. I now come to the issues around non-disclosure.

Was there non- disclosure of material fact(s)?

42. Firstly, it was contended by KMTC that KUCCPS failed to disclose the existence of Constitutional Petition No. 12 of 2015("CP No. 12 of 2015"). This Petition was filed before the Eldoret High Court. It was filed by one Hezron Silunya. I have read a copy of the Petition. It is 'annexture' JN-I to the Replying Affidavit of John Muraguri. A copy was also annexed to the application by KMTC. The petitioner therein alleges breaches or potential breaches of various Articles of the Constitution. The Petition was filed against KMTC. KUCCPS is not a party to the Petition. It has also not been expressly alleged that KUCCPS was aware of the same petition.

43. It is not in dispute that KUCCPS did not bring the fact of the existence of CP No. 12 of 2015 to the court's attention on 9 September 2015. During the oral submissions, counsel for KMTC stated that KUCCPS was aware of CP No. 12 of 2015. Counsel for KUCCPS however expressly denied knowledge of this CP No. 12 of 2015. The denial was made on behalf of KUCCPS as well. I am unable to agree to submissions that KUCCPS could have been aware of this particular Petition. Even extreme due diligence could not easily have lead KUCCPS to become aware of this Petition. I note though that KMTC in its reply to the Constitutional Petition No. 40 of 2015 filed in Nakuru made. There is however no indication that the said Replying Affidavit was also served upon KUCCPS, even though an order seems to have been made to that effect on 2 September 2015. There is no deposition to like effect. As an applicant is only expected to disclose such information or material fact that is within his knowledge or reasonably expected to be within his knowledge upon inquiry, I do find and hold that as far as CP NO. 12 of 2015 was concerned KUCCPS is not guilty of any non- disclosure of material fact.

44. Secondly, KMTC also contended that KUCCPS did not disclose the fact of the existence of Constitutional Petition No. 40 of 2015 filed before the High Court in Nakuru. From the documents filed in court by KUCCPS on 8 September 2015 no mention whatsoever of this CP No. 40 of 2015 was made by KUCCPS. There was no disclosure at all.

45. There is no doubt in my mind that KUCCPS was aware of this particular petition's existence. Prof. Ojienda appeared before the court in Nakuru in Petition No. 40 of 2015. That was on 2nd September 2015. He also appeared on 9th September 2015. Certainly, KUCCPS having made an application to be enjoined as an Interested Party to the proceedings in CP No. 40 of 2015 was aware of the said case. This fact of knowledge on the part of KUCCPS is apparently also not denied. What is denied is the materiality of the existence of those proceedings, that is to say CP 40 of 2015. Counsel for KMTC contended that relevant or not, KUCCPS should have disclosed the existence of CP No. 40 of 2015 to this court when it appeared before the court without notice (ex parte) .

46. First, I would accept Prof. Ojienda's submissions that it may be quite proper for different, not the same, parties to bring proceedings separately in two courts of even jurisdiction. It is then for the courts to arrest the situation by determining whether there is a multiplicity of suits if the subject matter is parallel. The filing of separate suits, in my judgment, should only happen when both parties are unaware of each other's move.

47. However once a party is aware of the existence of any proceedings relevant to its own cause of action then although he may opt to file his own action, it is a highly material matter to be considered by a judge when granting relief to the latter party on an ex parte application that there are proceedings either actually

taking place or even contemplated before another court. That ought to be so for the basic reason that the Judge in exercising his discretion to grant ex parte orders ought to be satisfied that the respondent who is then absent is not subjected to the orders of more than two courts. It becomes oppressive, if the orders are similar. It becomes confusing if the orders are not.

48. I am satisfied that there was undoubtedly non- disclosure of a material fact in the case of CP No. 40 of 2015. In my judgment, KUCCPS fell short of a full and frank disclosure. There was a manifest failure by KUCCPS to provide material information to the court on 9 September 2015.

What is the consequence of non-disclosure?

49. Would full disclosure have influenced my decision of 9th September 2015 in any way?

50. There is the fact that an application for interim orders to restrain KMTC from admitting students selected and enlisted by KMTC. This application was scheduled for hearing inter partes. True it was being urged by a party other than KUCCPS but the effect was going to be the same. Besides, KUCCPS was already participating in the proceedings. KUCCPS had filed an application to be joined to the proceedings before the High Court as an Interested Party. As far as I can remember and determine, an interested party is one with a genuine and true grievance or concern. He is however not a party to the proceedings and may not be directly involved in the litigation: See **Rule 2** of **The Constitution of Kenya(Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** as well as **The Attorney General of Gambia v Njie [1961] AC 617**.

51. KUCCPS was certainly a concerned party hence its application to be enjoined in the proceedings before the court in CP No 40 of 2015. As to whether it had a genuine grievance and an identifiable stake or legal interest, the court is yet to (but will) determine. That aside it was incumbent upon KUCCPS to disclose the existence of the proceedings in CP No 40 of 2015 as well as the status of the same.

52. The fact that KUCCPS was not a party yet to the proceedings certainly would have been relevant in my determination as to whether to grant wholly the orders granted on 9 September 2015. The orders then sought by KUCCPS before me were majorly for leave to commence judicial review proceedings. This has its own determination lines. I need not elaborate on the same but only state that once a court is satisfied that a party has a prima facie and arguable case based on the grounds for the intended review, the court may grant permission for the impugned process or decision to be challenged formally. I hold the considered and open view that notwithstanding the subsistence of CP No 40 of 2015, I still would have granted the leave to commence judicial review proceedings even if the existence of the said cause and its status had been brought to my attention.

53. The fact too that the High Court in Nakuru had declined to grant any orders ex parte as well as when the parties appeared after short notice was also material in the circumstances of this case. KUCCPS ought to have disclosed the same to the court.

Of counsel and the duty of disclosure

54. Before making a final determination in view of the fact that I have found that there was material non disclosure , it would be important also to relate the veiled criticism leveled against KUCCPS' counsel.

55. I see some force in the criticism leveled by counsel Mr. Milimo for KMTC against counsel for KUCCPS for also not observing the duty of disclosure as counsel. There is an incumbent duty cast upon an advocate to assist the court by reference to relevant authorities, statutory provisions, practice directions as well as existing court orders. In the context of what ought to be disclosed by the advocate in an application made without notice (ex parte) there must also exist a duty to disclose relevant matters to the court. In my view, a court hearing a matter ex parte must have full confidence and faith "in the thoroughness and objectivity of those presenting the case for the applicant. Once that confidence in undermined the court is lost'': see **Tate Access Floors Inc –v- Boswell [1991] Ch 512** as well as Ibrahim J (as he then was) in **Republic vs. Kenya National Federation of Co-Operatives Limited ex Parte**

Communications Commission of Kenya [2005] 1 KLR 242.

56. The duty on a litigant to fully and frankly disclose material facts correlates with the duty on the advocate presenting the clients case also not to break faith with court. Even though the latter duty appears to be primarily a matter of professional discipline, ordinarily a court should not be in a hurry to distinguish between the litigant and his advisers when it comes to issues of disclosure and especially where it is shown that the facts not disclosed was within the adviser's knowledge. Besides, if any one is to suffer for the failure of the advocate, it is better that it be the client than another party to the litigation. As it were the consequence of non- disclosure once proven seeks to ensure not only that the client does not benefit from the orders obtained under the wind of such non- disclosure but also that the other party to the litigation is protected.

57. Having reviewed all the documents presented by the parties herein. Having also considered the brief litigation history and chronology of the proceedings in CP No. 40 of 2015 at Nakuru. And considering further that there was no controversy on the chronology as detailed by counsel for KMTC, I also hold the strong impression that there was a lapse of duty on the part of counsel which duty is synonymous with the duty to fully and frankly disclose material facts to the court.

Disposal

58. I started by stating that this is a curious case. I end so as well. KMTC would want to see the ex parte orders discharged. KMTC would also want to see the suit filed herein struck out or in the alternative stayed for being sub judice. I have found that KUCCPS is not a party to any of the previously filed suits, both commenced as Constitutional Petitions. I also hold the view that the current suit is not *sub judice*. KMTC's prayers to have the instant matter struck out or stayed must therefore fail.

59. With regards to the issue of non disclosure, I have found that there was non disclosure of the fact that there was pending a suit commenced by way of Petition before the Nakuru High Court being CP. No. 40 of 2015 and KUCCPS though not a party was fully aware of the same. KUCCPS as well as its advocate were guilty of non disclosure. The non-disclosed fact was material. Discharge of any orders made ex parte is however not automatic on any non-disclosure being established of any fact known to an ex parte applicant which is found by the court to have been material: see the Court of Appeal in **Bahadurali Ebrahim Shamji vs. Al Noor Jamal & 2 Others Civil Appeal No. 210 of 1997** and also Odunga J in **Legal Advice Centre aka Kituo Cha Sheria v Communication Authority of Kenya and Another (supra).**

60. Every omission ought to and must be considered by the court in light of the circumstances of the case. The court has the discretion and a balancing task to perform. The court has to ensure that no injustice befalls either party, even though the incline may be towards setting aside the ex parte order.

61. In the instant case, it is relevant to take into account the circumstances that led to the litigation in the first place. New legislation prompted it all. The Universities Act came into force on 13 December 2012. By its provisions, KUCCPS claimed the exclusive rights to the placement of students (government sponsored) in all institutions of higher learning including colleges. To KUCCPS , KMTC had no role to play. It was subservient when it came to placement of government sponsored students. It is unclear what happened for purposes of the academic year 2013/2014. For the academic year 2014/2015, KUCCPS exercised the claimed mandate. Then it attempted a repeat of that mandate for the academic year 2015/2016. To this KMTC raised an objection and confusion reigned , prompting the instant proceedings. Should such state of affairs be allowed to reign?

62. I am not considering the substantive motion. It is an intermediary motion. I must refrain from making any conclusive or apparently conclusive findings in law or fact. As was stated in the case of **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589** the court, so far as possible, should secure that any transitional motions before the Court do not render nugatory that ultimate end of justice. The Court, in exercising its discretion, should always opt for the lower rather than the higher risk of injustice.

63. Herein, the ultimate end of justice dictates that the lingering confusion is brought to an end. It is in the wider interest of the public that with certainty it is resolved which of the current two antagonists is entitled to obtain the placement of government sponsored students to KMTC. If I set aside the stay orders of 9 September 2015, KUCCPS' substantive may be rendered nugatory. It may very well then turn out that the wrong lot of students have been placed for government sponsorship. On the other hand a delay, albeit temporary, may help see a rather sanity filled end to this litigation. It is unfortunate that two public organs funded by the public continue to disagree . In a perfect world that should not happen and neither should it be encouraged.On the basis of the principle of proportionality, I v iew it that public interest would dictate that the stay orders of 9 September 2015 are allowed to subsist. I so order.

Costs

64. KUCCPS was in breach of the 'golden rule' as to identification of material facts and disclosure thereof. It has not been shown that it was an innocent breach. I would deem it appropriate that KUCCPS suffers some sanction in the form of being condemned to costs. I so order that KUCCPS will bear the costs of the application by KMTC.

65. The application by KMTC dated 11th September 2015 otherwise fails and is dismissed but with costs to KMTC.

66. For purposes of better case management and to expedite the hearing of this matter, I direct that the same be mentioned before the presiding judge of the Judicial Review division on Friday 25 September 2015 for further directions.

Dated, signed and delivered at Nairobi this 23rd day of September, 2015

J. L. ONGUTO

JUDGE