



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JR CASE NO. 365 OF 2014

**IN THE MATTER OF AN APPLICATION BY TRANSGLOBAL CARGO CENTRE LIMITED
FOR JUDICIAL REVIEW ORDER OF MANDAMUS AND PROHIBITION**

AND

IN THE MATTER OF THE KENYA AIRPORTS AUTHORITY ACT, CAP 395

AND

**IN THE MATTER OF AN EXTENDED CONCESSION AGREEMENT FOR GROUND
HANDLING SERVICES AT JOMO KENYATTA INTERNATIONAL AIRPORT**

BETWEEN

REPUBLIC.....APPLICANT

AND

KENYA AIRPORTS AUTHORITY.....RESPONDENT

EX PARTE TRANSGLOBAL CARGO CENTRE LIMITED

RULING

1. When this matter came up for directions on 23rd October, 2014, **Mr Philip Murgor**, learned counsel for the intended Interested Parties, **Kenya Airways, Kenya Aerotech, Tradewinds Aviation Ltd, Eurocraft Agencies** and **Swissport Kenya** (hereinafter referred to as the interested parties) made an oral application for the said parties to be joined to these proceedings in the said capacities.
2. According to **Mr Murgor**, from the application filed herein there is extensive reference in both the pleadings and the documents exhibited to the said intended interested parties either directly or indirectly since the said interested parties are players in the sectors in issue and have been objecting to the applicant's purported contract. Since the interested parties' businesses are likely to be affected by the orders sought herein they are parties interested in these proceedings. Learned counsel referred the Court to various documents on the record which according to him refer to the said interested parties.
3. The application was however opposed by **Mr Mohamed**, learned counsel for the Applicant who was of the view that the said parties ought to make a formal application. According to **Mr Ibrahim** the issue in dispute in these proceedings is purely between the applicant and the Respondent and has nothing to do with the intended interested parties.
4. On his part **Mr Mohamed Nyaoga**, learned counsel for the Respondent did not object to the

joinder of the said parties since in its view the mere joinder of the said parties would not preclude the Court from making a decision as to whether their positions are merited or not.

5. I have considered the foregoing.
6. Order 53 rule 3(2) and (4) of the **Civil Procedure Rules** provide:

(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.

7. Therefore whereas subrule (2) of Order 53 rule 3 aforesaid restricts persons who should be served to those who are “***directly affected***”, subrule (4) on the other hand gives the Court wide discretion to order that the application be served on any other person notwithstanding that that person ought to have been served under subrule (2) or not and the Court’s decision to do so is only subject to ***such terms (if any) as the court may direct***. It is therefore my view that unlike under subrule (2) the Court has unfettered powers under subrule (4) and in my view this power is meant to ensure that justice is done. Therefore where the Court is of the view that a person ought to be joined to the proceedings the Court is properly entitled to direct that that person be joined notwithstanding that such a person has not made an application to Court. Under such circumstances a formal application is not necessary
8. However where an application is made under subrule (2), it is incumbent upon a person who alleges that he or she ought to have been served to show how the proceedings directly affect him or her. The mere fact, however that a person has made such an application does not preclude the Court from invoking its unfettered discretion under subrule (4) to have such a person joined to the proceedings even if the applicant does not satisfy the Court that the person is directly affected thereby. The word “direct” is defined by ***Black’s Law Dictionary***, 9th Edn. page 525 as “straight; undeviating, a direct line, straightforward, immediate.” Since judicial review orders are concerned with the decision making process rather than the merits of the decision, a party who contends 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 to ordinary civil litigation.
9. From the application itself it is clear that the cause of action arises from an alleged Ground Handling Concession Agreement which the Respondent has purportedly declined to finalise so as to extend the operations to all licensed transit shed operators hence promoting monopolistic tendencies. It is alleged that the Respondent is conducting itself in a discriminatory manner. Prima facie, it is evident that there are some players in the sector who it is being alleged are being treated in a preferential manner to the detriment of the applicant.
10. The documents filed herein mention certain entities among them the intended interested parties as those whom the Respondent has licensed to do ground handling.
11. In my view, to hear and determine these proceedings without bringing the said parties on board when allegations are made that they are the beneficiaries of the Respondent’s alleged differential treatment would amount to abetting the very conduct which the applicant complains of – selective treatment of persons without considering the positions of the other players in the subject undertaking.
12. In the premises I am of the view that not only are the intended interested parties persons directly affected by these proceedings but that they ought to be joined to these proceedings in the interest of justice thus they have satisfied the criteria under Order 53 rule 3(2) and (4) of the **Civil Procedure Rules**.
13. Accordingly I grant the oral application made herein and direct that **Kenya Airways, Kenya**

Aerotech, Tradewinds Aviation Ltd, Eurocraft Agencies and Swissport Kenya be and are hereby joined to these proceedings as the 1st to 5th Interested Parties respectively.

Dated at Nairobi this 24th day of October, 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ibrahim for the ex parte applicant

Mr Mogere for the Respondent

Mr Ouma for Mr Murgor for the interested parties

Cc Patricia