



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Criminal Application 43 of 2013

IN THE MATTER OF AN APPLICATION UNDER SECTION 362 OF THE CRIMINAL PROCEDURE CODE CAP. 75 OF THE LAWS OF KENYA AND UNDER ARTICLE 165(6) AND (7) OF THE CONSTITUTION

AND

IN THE MATTER OF EXERCISING REVISION/SUPERVISORY JURISDICTION OVER CRIMINAL PROCEEDINGS IN THE CHIEF MAGISTRATES COURT AT NAIROBI IN (1) MISCELLANEOUS APPLICATION NO. 152 OF 2013: CID-CCK vs. ROYAL MEDIA SERVICES (2) MISCELLANEOUS APPLICATION NO. 153 OF 2013: CID-CCK vs. ROYAL MEDIA SERVICES (3) MISCELLANEOUS APPLICATION NO. 154 OF 2013: CID-CCK vs. ROYAL MEDIA SERVICES and (4) MISCELLANEOUS APPLICATION NO. 155 OF 2013: CID-CCK vs. ROYAL MEDIA SERVICES

BETWEEN

ROYAL MEDIA SERVICES

LTD.....APPLICANT

VERSUS

DIRECTOR OF PUBLIC

PROSECUTIONS.....RESPONDENT

AND

COMMUNICATIONS COMMISSION OF KENYA.....PROPOSED INTERESTED PARTY/APPLICANT

RULING

1. The Application before me is a Notice of Motion dated 13th February 2013 by the Communications Commission of Kenya (CCK), brought under **Articles 159(2)(a) of the **Constitution**, and **Sections 3 and 3A** of the **Civil Procedure Act**. The Applicant seeks the following orders:**

i) That the Communications Commission of Kenya (the Commission) be enjoined as an interested party in **High Court Miscellaneous Application No. 43 of 2013, Royal Media Services Ltd. Vs. Director of Public Prosecutions (the Revision Application).**

ii) That upon the grant of prayer (i) above, the Commission be granted leave to respond to the

Originating Notice of Motion application and the supporting Affidavit thereto all dated 6th February 2013.

iii) That costs for the Application be provided for.

2. The Application is supported by the Affidavit dated 13th February 2013 and sworn by John Omo, the Secretary of the Commission. The Application is premised on the following grounds:

i) The Commission is a body corporate established by the Kenya Information and Communications Act, Cap. 411A and is charged with the responsibility of licensing and regulating broadcasting, e-transactions, radio communications and postal services in Kenya and is therefore a necessary party in (the Revision Application)

ii) The Revision Application stems from warrants issued by the Chief Magistrates Court on 30th January 2013 in **Miscellaneous Applications No. 152 of 2013, 153 of 2013, 154 of 2013 and 155 of 2013**

iii) Royal Media Services Ltd in its Originating Notice of Motion application in (the Revision Application) and the supporting affidavit makes direct reference to the Commission and allegations against the Commission and it is only fair and just that the Commission be enjoined in these proceedings and be granted an opportunity to respond to the said allegations

iv) Royal Media Services Ltd in its Originating Notice of Motion application in the Revision Application impugns on the Commission's exercise of its mandate and therefore the Commission is a necessary party to the proceedings

v) Any findings of this Court in the Revision Application will directly affect the Commission and will have an impact on the Commission's ability to carry out its statutory mandate

vi) The Commission is seized of facts and material that will be of assistance to this Court in making determination in the Revision Application

vii) There is another matter **HC Petition No 59 of 2013, Royal Media Services Ltd v Attorney General and Others** where the Commission is enjoined as the 3rd Respondent and where Royal Media Services Ltd seeks orders similar to the ones sought in the Revision Application.

viii) Royal Media Services Ltd. in the **HC Petition No 59 of 2013, Royal Media Services Ltd v Attorney General and Others** will not suffer any prejudice if the Commission is enjoined as an interested party.

ix) The Application be allowed in the interests of justice.

3. In response, the Applicant filed a Notice of Preliminary Objection on 14th February 2013 urging the Court to strike out the Application by the Communications Commission of Kenya on the following grounds:

i) An interested party is unknown in criminal revision proceedings and has no *locus standi* as held in **Republic vs. Cap. Van International Ltd. [2004] 2KLR 348**

ii) The Criminal Procedure Code and the Kenya Information and Communications Act have not conferred on the intended interested party power to prosecute offences.

iii) Under **Article 157(9) of the Constitution**, the intended interested party can only be a person authorized by the respondent to undertake prosecutions and when the respondent is sued, the intended interested party has no *locus standi*.

- iv) The **Constitution** by **Articles 157(6)** and **(9)** gives control of all criminal proceedings to the respondent to the exclusion of all other persons including the intended interested party
- v) The appearance of an interested party in criminal proceedings, if allowed, would undermine the criminal justice system which is premised on the view that the state is one and acts through the respondent.
- vi) The **Kenya Information and Communications Act** is *ultra vires* **Articles 157(6)** and **(9)** of the **Constitution** to the extent that it purports to confer authority to institute criminal proceedings which is uncontrolled by the respondent
- vii) The CCK is either a purported prosecutor who is not authorized to prosecute by the respondent and the CPC or is a complainant who has no right of audience as held in **Republic vs. Cap International Ltd. [2004] 2KLR 348**

4. The Intended Interested Party contested the Grounds of Opposition based on the following grounds filed on 18th February 2013:

- a) That **Misc Applications Nos. 152, 153, 154 and 155 of 2013** leading to the issuance of the search warrants are not criminal proceedings per se but are merely a step antecedent to the institution of criminal proceedings
- b) There being no existing criminal proceedings, Royal Media Services is not an accused person nor was the Respondent a prosecutor in the subordinate court proceedings leading to the issuance of the search warrants.
- c) The subordinate court proceedings leading to the issuance of the search warrants were therefore quasi-criminal in nature
- d) The supervisory jurisdiction of this Court under **Article 165(7)** of the **Constitution** is not limited only to criminal and civil proceedings pending in the subordinate court but also to such quasi-criminal proceedings as were before the subordinate court leading to the issuance of the search warrants
- e) While there may be an implied bar to a complainant being enjoined in revision proceedings in the High Court which relate to ongoing criminal proceedings, there is no such similar bar, implied or express, to an interested party being enjoined in revision proceedings where the Court is exercising its supervisory jurisdiction with respect to quasi-criminal proceedings
- f) The CCK occupies a unique role as the administrator of the Kenya Information and Communications Act, Cap 411A and as a regulator of licensing, and regulating broadcasting, e-transactions, radio communications and postal services, is a necessary party as it is the only party in a regulatory position capable of assisting the Court on the subject matter of the subordinate court proceedings leading to the issuance of the search warrants.
- g) It is desirable, in an Application such as this one that the widest possible participation be allowed and not restricted to technical rules as the Constitution is a vital framework of governance that any litigation, criminal or civil in nature touching upon it ought to involve such interested parties as may be of assistance to the court.

5. Learned Senior counsel Mr. Kamau Kuria, and learned counsel Mr. Issa appearing for the Applicant, Royal Media Services opposed the Application by the Proposed Interested Party. Mr. Issa submitted that in criminal proceedings, the law only recognizes two parties, the Complainant and the prosecutor, there are no interested parties. If the complainant wishes to address the Court, it should be channeled through the Director of Public Prosecution and the Court has no discretion to allow a private party. In support of his submission, Counsel directed me to the case of **Mohanlal Karamshi Shah vs. Ambalal Chhotabhai Patel and 5 Others, Criminal Appeal No. 249 of 1952** where the Court held that

“The private prosecutor cannot be heard on appeal even if the AG has stated that he does not wish to be heard. If the court enjoins a private party the proceedings before it will be a nullity.”

6. Learned Counsel also argued that the CCK as a complainant has no right of audience before Court and can only communicate through the prosecutor, a reasoning that is supported by the case of **Republic vs. Cap. Van International Ltd. [2004] 2KLR 348**, where the Court held that only two parties are required in law in a revision application, the Republic and the prosecuted person. He urged the Court to dismiss the Application to enjoin the Intended Interested Party.

7. Mr. Kamau Kuria submitted for the Applicant that the Originating Notice of Motion into which the Intended Interested Party seeks to be enjoined is brought under **Section 362** of the **Criminal Procedure Code** under which even an accused person has no right to address the Court since the Court could act *suo moto*. Learned Counsel urged that criminal revision proceedings do not envisage a situation where an Interested Party can be enjoined and further that the Court has duty to preserve the criminal process to only allow parties who are supposed to participate in the process. He cited the case of **Elirema & Another v Republic, [2003] KLR 537**, where the court declared proceedings conducted by police officers who were not authorized to prosecute a nullity.

8. The senior counsel also relied on the provisions of **Section 85** of the **Criminal Procedure Code** which gives the DPP power to appoint a prosecutor. In this regard, Counsel cited the case of **Democratic Alliance v the President of South Africa [2011] ZASCA 241**, in which the appointment of the National Director of Public Prosecution was challenged, and the Court held that the qualities required of a candidate for that position must exist before an appointment can be made. Mr. Kamau Kuria further submitted that under **Section 85 (2)** of the **Criminal Procedure Code**, only a natural person can be appointed as a prosecutor and further that a person other than a duly appointed prosecutor to appear before it, that would be in cases of private prosecutions.

9. Mr. Kuria further submitted that according to **Article 157(6)** of the **Constitution** the DPP is vested with absolute control of criminal proceedings and cited the case of **Gregory & Another v Republic thro’ Nottingham & 2 Others [2004] 1 KLR 547** where the Court among others held that:

“although criminal prosecutions may be commenced by a person other than the Attorney General, such occasions must be few and limited and even when they come to pass, the Attorney General’s authority remains entirely uncompromised and he can at his own discretion take over the case in question...”

Counsel submitted that the Intended Interested Party has no *locus standi* to appear in revision proceedings in that the CCK would be the complainant in proceedings that have led to the Application pending before this Court. He urged that all prosecutions are governed by the **Criminal Procedure Code** and urged the Court to dismiss the application by the Intended Interested Party.

10. In reply, Mr. Kilonzo for the Intended Interested Party opposed the Preliminary Objection and relied on the grounds filed. He submitted that the Notice of Motion seeking to be enjoined was brought under **Articles 165(6)** and **(7)** of the **Constitution** which refers to any proceedings and does not distinguish between criminal and civil proceedings. He submitted that the constitutional provisions are therefore broader in application than **Section 362** of the **Criminal Procedure Code** to cover proceedings of quasi-judicial nature and as such parties that were before the subordinate court whose proceedings are the subject matter before this court are the necessary parties in the Application before Court.

11. Mr. Kilonzo further submitted that **Section 118** of the **Criminal Procedure Code** implies the existence of another party before the subordinate court, the investigator since the section does not indicate who can provide proof to the subordinate court in an application for a search warrant. He also submitted that since there are no criminal proceedings yet, there is no accused person, or a prosecutor; thus, the proceedings are quasi-judicial in nature, antecedent to criminal proceedings.

12. Learned Counsel urged that those parties who were before the subordinate court ought to be the

parties in the proceedings before this court. He cited the case of **Manfred Walter Schmidt & Another v Republic, & Another Criminal Revision No. 569 of 2012**, and urged that applying the reasoning of the Court to the circumstances of this matter, the CCK ought to be made a party in that the inspectors of police who sought the search warrants acted upon information obtained from officers of the CCK.

13. Learned Counsel also cited my ruling in the case of **Samuel Muriithi Watatua & Another v Republic Misc. Criminal Application No. 185 of 2012**, where the Court allowed an application by an applicant to be enjoined in a criminal application for the interest of justice to be served. Counsel also cited the case of **Meme v Republic, & Another Misc. Criminal Application No. 495 of 2003**, and urged that where the applicant has demonstrated legitimate interest for joinder, they ought to be enjoined.

14. Mr. Kilonzo submitted that since the Intended interested Party Applicant had approached the Court under **Article 165 of the Constitution**, it ought to be considered in the widest interpretation of the law. He challenged the authorities relied upon by the other parties as inapplicable as they relate to already ongoing criminal proceedings. He urged the Court to dismiss the Preliminary Objection with costs.

15. In rejoinder, Mr. Kamau Kuria submitted that revision proceedings invoked under **Section 362 of the Criminal Procedure Code** are pegged on existence of criminal proceedings in the lower court and that the court's jurisdiction cannot be increased by reference to **Article 165(6) of the Constitution**. He distinguished the decision cited by Counsel for the Intended Interested Party. Counsel submitted that in the case of **Meme v Republic**, all parties were required to come in, and that the proceedings before this court are not judicial review in nature. While in **Manfred Walter Schmidt & Another v Republic, & Another**, the Court did not introduce a new procedure but stated that what was in issue was the procedure in review cases.

16. The issue for determination at this stage is whether the, the CCK, ought to be enjoined as an Interested Party in the revision proceedings before this court. To further address myself to the issues before me, I need to underline the scope of revision proceedings under the **Criminal Procedure Code**.

Section 362 provides that:

“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.”

17. **Section 365** provides further that in revision proceedings,

“No party has a right to be heard either personally or by an advocate before the High Court when exercising its powers of revision:

Provided that the court may, when exercising those powers, hear any party either personally or by an advocate, and nothing in this section shall affect section 364 (2)”

18. I have considered the submissions of all parties and their supporting authorities and wish to restrict myself to the matter in issue before me. Revision proceedings are not stand-alone proceedings, they arise out of already existing proceedings. The Applicant in the Miscellaneous Applications before the subordinate court through which the search warrants were granted were the Criminal Investigations Department and the Communications Commission of Kenya. Ordinarily in all matters pertaining to criminal proceedings, the Director of Public Prosecutions represents the state and the complainants.

19. Learned Counsels for the Applicant referred me to several cases in this regard. I wish to highlight the reasoning of Hon. Justice Kimaru in **Republic vs. Cap. Van International Ltd. [2004] 2KLR 348**. In this matter, the Attorney General sought to have the order by which the lower court had allowed release of recovered stolen goods before the hearing of a criminal case against the accused persons before another court revised. The Judge in finding that the lower court had erred determined that,

“Whatever application the said applicants would wish to make, they can only make the same through the honourable Attorney General. In a criminal case, there are only two parties who are recognized in law, the Republic (which prosecutes the case) and the person who has been charged, who is known as the accused. The complainant has no right of audience before a court conducting a criminal case.”

20. The above case and others cited by the Applicant were similar in as far as challenging the position of the Intended Interested Party in criminal proceedings. I wish to deal with the matter before in perspective. The above decision is distinguishable since the circumstances before me are peculiar to the issues that have resulted in the pending proceedings and different from the matter before the Honourable Justice Kimaru.

21. What is before me is a revision application arising from a miscellaneous application before a lower court that sought search warrants to enable investigation into alleged criminal acts. There are as yet, no criminal proceedings that have been instituted and as such, strictly speaking, there is no complainant or prosecutor. Were such the case, the Intended Interested Party would be required to approach the Court through the prosecutor as reasoned by the Learned Judge.

22. Furthermore, the Intended Interested Party is not seeking to be enjoined as a prosecutor. An interested party is a party who has a stake in the matters being considered while the prosecutor represents the state in criminal proceedings.

23. The Criminal Procedure Code is an ***“An Act of Parliament to make provision for the procedure to be followed in criminal cases.”*** A narrow consideration of the issue for determination would limit the court to the existence of criminal cases in applying the law, in this case, **Section 118**. The Code makes provisions for processes precursor to the commencement of criminal proceedings, as is the case in the said **Section 118** and **Sections 89 and 90** of the **Kenya Information and Communications Act, Cap. 411A**. The Intended Interested Party also invoked the provisions of **Article 159 (2)** of the **Constitution**. In determining whether or not to grant this Application to be enjoined, I must be guided by the constitutional principles of administration of justice at all times including access to justice to all and expedient delivery of justice, among others.

24. The role of the Intended Interested Party arose out of its authority as the body charged with the implementation of the **Kenya Information and Communications Act**. The Applicants in the lower court that sought for search and seizure warrants are the Criminal Investigation Department and the Communications Commission of Kenya. The Intended Interested Party in the grounds responding to the Applicant’s Grounds of Opposition stated that it wishes to among others provide material assistance to the Court having been the one involved in the matters that are now before me.

25. While this fact was disputed by the Applicant, who submitted that the Intended Interested Party seeks to bring confusion into the process, I am not persuaded that there has been demonstrated any ill intention in seeking the enjoining of the CCK as an interested party. On the contrary, I am of the view that the inclusion of the Intended Interested Party will serve the interests of justice in this matter and will not prejudice the Applicant in any way.

26. The Intended Interested Party also submitted that the Applicant has made reference to other proceedings before another court, namely **High Court Petition No. 59 of 2013, Royal Media Services v Attorney General and Others**, where it is named as the 3rd Respondent, that also stem from the proceedings in the lower Court that are now being challenged by the Applicants in the Revision Application. Mr. John Omo, the CCK’s Secretary deponed in his Supporting Affidavit that the Applicant has made direct reference to the CCK and impugns the CCK’s exercise of its mandate. I therefore find, that the inclusion of the CCK as an interested party, will not obscure the interests of justice in this matter and it is in furtherance of justice since the CCK is also the authorized body charged with administering the **Kenya Information and Communications Act**.

27. The Notice of Motion dated 13th February 2013 is therefore granted and the CCK is allowed to respond to the Originating Notice of Motion dated 6th February 2013 within 7 days and serve the

Applicant and the Director of Public Prosecutions.

SIGNED, DATED and DELIVERED in open court this **27th** day of **February 2013**

L.A. ACHODE

JUDGE