



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**(MILIMANI COMMERCIAL & TAX DIVISION)**

**WINDING UP CAUSE NO. 34 OF 2010**

**IN THE MATTER OF THE COMPANIES ACT (CAP 486 LAWS OF KENYA**

**AND**

**IN THE MATTER OF WINDING UP OF KENYA DATA NETWORKS LIMITED**

**R U L I N G**

On 7<sup>th</sup> February, 2011 the Company's advocate Mr. Philip Murgor submitted that there have been certain developments that have taken place that will have an impact on these proceedings. According to the learned counsel, these developments relate to the fact that the petitioner continues to be represented by Mr. Ahmed Nassir Abdillahi through the firm of Ahmed Nassir, Abdikadir & Co. Advocates. Further to the above, the learned counsel referred this court to Gazette No. 16956 in which his Excellency, The President appointed *inter alia* Ahmed Nassir Abdulahi and Florence Muoti Mwangangi to serve on the Judicial Service Commission. Mr. Murgor conceded that there was an election of the Law Society of Kenya to pick their representatives and that all the members were free to avail themselves as candidates. It is his contention that the Departmental Committee on Legal Affairs had a report that was considered on 22<sup>nd</sup> December, 2010. The same was subsequently adopted and on page 3 it provides the members of the committee. Among the members of that committee is Mr. Abdikadir Ahmed who is a consultant in the firm representing the petitioner in this matter. That apart Mr. Murgor also referred this court to page 13 of that report which states that legislation be considered to address the question of conflict of interest for advocates to serve in the Judicial Service Commission. According to Mr. Murgor when the two advocates were appointed by the President it was based on the conditions of approval. On 21<sup>st</sup> January 2011, the companies' lawyers wrote a polite letter to Mr. Ahmed Nassir and highlighted the relevant report and the *hansard*. The learned counsel is of the view that the mere possibility or appearance of influence has to be considered by this court. He concluded his submissions by stating that he has nothing personal against Mr. Ahmed Nassir and Mr. Sagana.

In response, Mr. Sagana stated that he did not understand the submissions by his learned senior and secondly, he did not know whether the learned counsel seeks that Mr. Ahmed Nassir ceases to be their partner in the firm. Besides the above, Mr. Sagana stated that the Judicial Service Commission usually sets up the requirements of the member and that advocates are also given conditions to practice. He also

submitted that there is nothing in the Constitution which precludes Mr. Ahmed Nassir from practicing. Further to the above, he also submitted that in his nomination, Parliament did not impose any conditions for him not to practice. However, Parliament conceded that there was need for legislation in the matter and they also made suggestions for necessary legislation. He also wondered aloud that the Attorney General is also a member of the Judicial Service Commission. He wondered whether that argument will be stretched to cover him. According to Mr. Sagana, he is aware that Mr. Murgor has addressed the same issue with Parliament, Justice Ministry and the Law Society of Kenya. He contended that these are simply personal matters that should not be brought to this court. He also stated that extraneous matters should not be under consideration. He concluded his statement by stating that the issues raised are meant to delay the hearing of this matter.

This court has carefully considered the opposing submissions by the learned counsels. Apart from the above, this court wishes to admit that it received two letters yesterday from both learned counsels who are on record. At the outset, I wish to state categorically that I never considered the correspondence that was sent to me by the said advocates. The position taken by the court is deliberate and was meant to shield this court from any influence by extraneous matters. As a matter of practice, I do not engage in any correspondence with any law firms. All the correspondence received in this division is normally dealt with by the Deputy Registrar of this court. Coming to the issues which have been raised in this court, I wish to state as follows:

Firstly, the historical background in this country is that previously the Judicial Service Commission membership was restricted. However, after a lot of agitation and enhancement of the democratic space in this country, the Commission has been expanded to enhance more transparency and accountability. In that regard the membership has been expanded to include *inter alia*, Law Society of Kenya, the Civil Society and representatives from various echelons of the judiciary. This court is very much aware of all the new commissioners who have been sworn in office to be on the Judicial Service Commission. Up to this stage, this court has not heard any complaints relating or directed at any of the new Commissioners.

Secondly, I do wish to state clearly that there has not been any legislation so far to bar any Commissioner from performing his or her former functions. This court is grateful that some literature has been availed which shows the deliberations of a key parliamentary committee. That committee made some proposals and suggestions. However well intended those suggestions are, they are not part of the laws of Kenya. As of today, there is no law in this country to bar any Commissioner from engaging in legal practice before appointment. There must be a clear distinction between what the law is and what the law ought to be.

Thirdly, I do wish to state categorically that the fact that the petitioner has filed his petition through the firm of Ahmed Nassir and Abdi Kadir Advocates is neither here nor there. Having served on the bench for nearly three decades, I am very much aware and alive to the Constitution and the laws of this country. NOBODY can intimidate this court in the discharge of its functions. In any event, the advocate being complained of has not even appeared in this court. For avoidance of doubt, the powers of the High Court are clearly stipulated in not only the Constitution but also the laws of this country.

Lastly, I do wish to appeal to all the counsels appearing in this petition to focus their minds and energies on the issues involved in this matter. The reason is simple. This case will be decided on its own merit after all the parties have been heard. I would want to assure all the parties that no extraneous matters will be considered before this case is decided. In view of the above, this court will proceed with this case on suitable dates to be given today.

Those are the orders of this court.

**MUGA APONDI**

**JUDGE**

**Ruling read signed and delivered in open court this 9<sup>th</sup> day of February 2011 in the presence of:**

Mr. Sagana - Petitioner's Counsel

Mr. Murgor & Owino – Applicant's/Company's Counsel

**MUGA APONDI**

**JUDGE**

**9<sup>TH</sup> FEBRUARY 2011**