



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISCELLANEOUS CIVIL APPLICATION NO. (JR) 137 OF 2011

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW AND FOR ORDERS OF
CERTIORARI AND**

PROHIBITION

IN THE MATTER OF: THE KENYA COMMUNICATIONS ACT (NO. 2 OF 1998)

**IN THE MATTER OF: THE LAW REFORM ACT (CHAPTER 26 OF THE LAWS OF
KENYA)**

**IN THE MATTER OF: THE RE-APPOINTMENT OF CHARLES J.K. NJOROGE AS
DIRECTOR GENERAL OF THE COMMUNICATIONS COMMISSION OF KENYA BY THE
MINISTER FOR INFORMATION AND COMMUNICATIONS**

BETWEEN

IBRAHIM MWANGI ATHUMANI.....APPLICANT

VERSUS

THE MINISTER FOR INFORMATION AND COMMUNICATIONS.....RESPONDENT

CHARLES J.K. NJOROGE.....INTERESTED PARTY

RULING

On 7th June, 2011 the ex parte applicant filed an application through **J.A. Guserwa & Company Advocates** seeking leave to apply for:

“(a) AN ORDER OF CERTIORARI do issue to remove into the High Court and quash

the decision (and consequential acts, processes and effects of the said decision) of the Minister for Information & Communication dated 07th April, 2011 which purported to renew the contract of the Director-General of the Communications Commission of Kenya, Mr. Charles Njoroge, and for consequential orders to issue to give effect to the quashing of the said decision.

(b) AN ORDER OF PROHIBITION do issue directed at the Minister for Information and Communication prohibiting him from proceeding to reappoint Mr. Charles Njoroge for a second contract term as the Director-General of the Communications Commission of Kenya against the advise of the Board of Directors of the Communications Commission of Kenya.

(c) THAT the leave so granted to apply for the said Orders of Certiorari and Prohibition do operate as a stay of the decision of the said Minister for Information and Communication purporting to renew the term of the said Mr. Charles Njoroge for a second contract term as the Director-General of the Communications Commission of Kenya.”

The application was premised on grounds that:

“(i) the actions of the Respondent are illegal null and void.

(ii) the decision of the Respondent is against well-settled practice in the management of public affairs.

(iii) the decision of the Respondent is capricious, lacking in transparency and calculated at bestowing an unfair advantage upon a “friend” of the Respondent.”

The application was supported by an affidavit sworn by the ex parte applicant.

On the same day, **Mrs. Guserwa**, the ex parte applicant’s learned counsel, appeared before this court and argued the said application. The court granted leave to apply for the aforesaid judicial review orders of certiorari and prohibition. The court directed that the application be served for purposes of arguing prayer (c) on 9th June, 2011. Come the said date, **Mr. Nguyo**, the respondent’s learned counsel, sought an adjournment to enable him take full instructions.

While Mrs. Guserwa was not opposed to the application for adjournment, she pointed out that if Mr. Njoroge’s re-appointment is gazetted before the application is heard, the substratum of the application will be lost.

The court adjourned the hearing of the application to 14th June, 2011 but ordered that the status quo regarding Mr. Njoroge’s re-appointment be maintained until the aforesaid date. That in essence meant that Mr. Njoroge would continue to be in office as the Chief Executive Officer of the Communications Commission of Kenya but the respondent was not to publish anything in the Kenya Gazette regarding extension of his term until prayer (c) of the said application was heard and determined. The court further directed that Mr. Njoroge be served with the application.

On 14th June, 2011 **Mr. Majanja** appeared for Mr. Njoroge. He sought an adjournment to enable him file his client’s replying affidavit. The court granted the application and ordered that the interim orders of maintenance of the status quo be extended until 7th July, 2011 when the application regarding stay was scheduled to be heard.

On 7th July, 2011 Mr. Majanja informed the court that prior to filing the present application, the ex parte applicant had filed a constitutional application in the Court of Appeal sitting as the Supreme Court seeking an advisory opinion regarding the appointment of Mr. Njoroge as the Director-General of the Communications Commission of Kenya. He submitted that the filing of the judicial review application before this court was a violation of the provisions of **Section 6** of the **Civil Procedure Act** which states as follows:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

Mr. Majanja further submitted that there was material non-disclosure on the part of the ex parte applicant and added that his application is an abuse of the court process. Counsel urged the court to vacate the orders of maintenance of status quo which it had issued and stay the hearing of the application.

In response, Mrs. Guserwa stated that she was not aware of the other matter before the Court of Appeal. She said that Mr. Majanja brought it to her attention when they were already in court and sought time to peruse the court file and respond substantively thereafter. There being no objection to the application the court directed that the matter be mentioned on 11th July, 2011 to enable the ex parte applicant’s advocate verify the actual position regarding the constitutional application.

When the matter came up for mention on 11th July, 2011 **Mr. Waweru Gatonye** had taken over the conduct of the application on behalf of Mr. Njoroge in place of Mr. Majanja. Mr. Gatonye reiterated the arguments that had earlier been advanced by Mr. Majanja and added that an applicant who conceals material facts cannot be allowed to continue to enjoy the benefits of orders issued by court due to his misconduct. He added that if the applicant had disclosed to this court that he had filed the aforesaid matter before the Court of Appeal sitting as the Supreme Court, this court would not have granted leave to commence these judicial review proceedings, leave alone the orders restraining the respondent from gazetting the appointment of Mr. Njoroge. He further pointed out that in the aforesaid constitutional application, on 8th July, 2011 the Court of Appeal sitting as the Supreme Court made the following order:

“In view of the fact that there now exists the Supreme Court of Kenya and judges thereto have been appointed and gazetted, it is doubtful whether the Court of Appeal sitting as the Supreme Court is still seized of the jurisdiction to hear and determine this application. In the circumstances this application is stood over *sine die*.”

Mr. Gatonye urged the court to protect its process by vacating the leave granted and the order restraining the Minister from gazetting the interested party as the Director-General of the Communications Commission of Kenya.

Responding to the said submissions, Mrs. Guserwa stated that having perused **Constitutional Application No. 1 of 2011**, she established that it was filed by the **Commission for the Implementation of the Constitution (CIC)**, wherein the CIC sought advisory opinion on a number of questions relating to the nomination and appointment of constitutional office holders, officers of State and public officers. The Court of Appeal sitting as the Supreme Court directed, *inter alia*, any person or group of persons who may wish to seek a right of audience before the court to file a notice of intention to do so on or before 8th April, 2011. Pursuant to that order the ex parte applicant herein filed a notice of intention to seek audience of the Supreme Court. The same was filed on 8th April, 2011. On the same day he also filed a memorandum on behalf of **The Phonebook Limited**. The notice of intention and the memorandum were filed through Churchill Midwa & Company as **“Advocates for Ibrahim Mwangi Athumani”**. In the memorandum, the ex parte applicant requested for determination of the following:

“1. Whether the decision of the Hon. Mr. Samuel Poghiso, Minister for Information and Communication, in re-appointing Mr. Charles Njoroge in total disregard of the collective decision of the Board of Directors of CCK, violates the mandatory requirements of Articles 73 and 259 of the Constitution.

2. What are the principles to be applied in the appointments of public officers in State organs in both levels of government and in all State corporations under Article 232(2) of the Constitution of Kenya?”

Mrs. Guserwa further stated that the ex parte applicant did not tell her about the aforesaid memorandum. She added that the oral application made by Mr. Gatonye ought to be made formally so that she can seek instructions and respond appropriately. She further pointed out that her attention had been drawn to a letter dated 9th July, 2011 by Churchill Midwa & Company Advocates addressed to the Deputy Registrar of the Supreme Court. The said letter simply reads as follows:

“REF: CONSTITUTIONAL APPLICATION NO. 1 OF 2011

IN THE MATTER OF ADVISORY OPINION OF THE COURT UNDER ARTICLE 163(6) OF THE CONSTITUTION, COMMISSION ON IMPLEMENTATION OF THE CONSTITUTION VERSUS THE ATTORNEY GENERAL AND OTHERS

We act for Ibrahim Athumani who wishes to withdraw his memorandum filed on 8th April, 2011.

Yours faithfully,

**(Signed)
CHURCHILL MIDWA**

**cc. Deputy Registrar
High Court of Kenya
Law Courts
Nairobi.**

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Commenting on the said letter, Mr. Gatonye stated that the same cannot suffice for purposes of withdrawing the memorandum. This is because in the Court of Appeal until an order by the court is made a matter cannot be withdrawn by way of a letter. The purported withdrawal of the memorandum is therefore null and void.

I have given due consideration to the above submissions. I do not doubt the sincerity of Mrs. Guserwa’s contention that the ex parte applicant never told her about the application or memorandum which he had filed before the Court of Appeal sitting as the Supreme Court way back on 8th of April, 2011. She pointed out that Mr. Majanja informed her of that issue on 7th July, 2011 when they were already in court. She acted appropriately when the issue of the other application was brought to her attention. However, whichever way one looks at it, the ex parte applicant stands correctly accused of failing to make material disclosure in his application dated 6th June, 2011 seeking leave to commence these judicial review proceedings. The ex parte applicant swore a lengthy affidavit in support of that application but did not deem it appropriate to disclose that he had already filed a memorandum before the Court of Appeal sitting as the Supreme Court, raising more or less the same issues as in these proceedings. It was the responsibility of the ex parte applicant to bring that issue to his advocate’s attention as well as to this court’s knowledge at the time of seeking leave.

In **UHURU HIGHWAY DEVELOPMENT LIMITED v CENTRAL BANK OF KENYA & 2 OTHERS, Civil Appeal No. 140 of 1995**, the Court of Appeal held that where a party goes to court in the absence of another he assumes a heavy burden and must put before the judge all relevant materials including materials against him. Omollo JA. held as follows:

“I also agree, the applicant went before Githinji J. (as he then was), on 6th January, 1995 pleading urgency. It obtained an ex parte injunction. Order 39 rule 3(2) of the Civil Procedure Rules (revised) permits the granting of ex parte injunction but must clearly be understood that a party who goes to a judge in the absence of another side assumes a heavy burden and must put before the

judge all relevant materials including material against him.... Once the learned judge was satisfied as he was that the applicant had obtained the order by concealing other relevant material, he was entitled not to consider the applicant's application any further, the courts must be able to protect themselves from parties who are prepared to deceive, whatever their motive for doing so may be and whatever the merits of the case might be.... If the case is meritorious there can be no reason to conceal some parts of it from the court.”

In R v KENSINGTON INCOME TAX COMMISSIONERS ex parte PRINCESS EDMOND DE POLIGNAC [1917] 1 KB 486, the court held as follows:

“Where an ex parte application has been made to this court for a rule nisi or other process, if the court comes to the conclusion that the affidavit in support of the application was not candid and did not fairly state the facts, but stated them in such a way as to mislead the court as to the true facts, the court ought, for its own protection and to protect an abuse of its process, to refuse to proceed any further with the examination of the merits. This is a power inherent in the court, but one only which should be exercised in cases which bring conviction to the mind of the court that it has been deceived.”

There can be no denial that the ex parte applicant was well aware of the memorandum that he had filed before the Court of Appeal sitting as the Supreme Court nearly two months before he filed the application seeking leave to apply for the orders of certiorari and mandamus. Had the ex parte applicant disclosed that issue in his affidavit this court would not have granted leave to apply for the said orders. It appears to me that the ex parte applicant was playing lottery with the courts and that kind of practice is not acceptable.

The memorandum is still pending before the Court of Appeal. The matter was merely adjourned *sine die* for reasons aforesaid. I agree with Mr. Gatonye that the ex parte applicant's letter dated 9th July, 2011 cannot cause the court to mark the memorandum as withdrawn. The ex parte applicant must move the court for an appropriate order. In the circumstances, this application offends the provisions of **Section 6** of the **Civil Procedure Act**. It is also an abuse of the court process.

Being so persuaded, I hereby vacate the leave that was granted to the ex parte applicant to commence these judicial review proceedings. The interim order for maintenance of the status quo is also vacated. The ex parte applicant shall bear the costs of this application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF JULY, 2011.

D. MUSINGA
JUDGE

In the presence of:

Nazi – Court Clerk

Mrs. Guserwa for the Ex Parte Applicant

Mr. Waweru Gatonye for the Interested Party

No appearance for the Respondent