



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Misc Appli 997 of 2007

ADOPT – A – LIGHT LIMITED.....APPLICANT

Versus

MUNICIPAL COUNCIL OF MOMBASA & ANOTHER.....RESPONDENT

RULING

Before me is the Notice of Motion dated 14th September 2007 in which the 2nd Interested Party, Magnate Ventures Ltd. seeks order that the order issued herein on 6th September 2007 be set aside and the Notice of Motion dated and filed in court on 13th September 2007 pursuant to the said order be struck out and dismissed and costs of the Application be borne by the ex parte Applicant. The Grounds upon which the Application are premised are found in the body of the Application and is also supported by the Affidavit of Stanley Kinyanjui, the Managing Director of the 2nd Interested Party. The 2nd Interested Party also filed skeleton arguments dated 24th September 2007.

The 1st Respondent, Municipal Council of Mombasa also supported the Application and Roba Duba, the Town Clerk of the Council swore an Affidavit dated 5th November 2007 in support of the Notice of Motion and filed skeleton arguments dated 8th November 2007. Mr. Havi argued the Application on behalf of both the 2nd Interested Party, 1st Respondent and 4th Interested Party.

The 2nd Respondent supported the 2nd Interested Party's Notice of Motion and filed skeleton arguments dated 23rd November 2007. Mr. Menge appeared on behalf of the 2nd Respondent. The 4th Interested Party also filed a Replying Affidavit sworn by Francis Raudo, Managing Director of the 4th Interested Party and skeleton arguments dated 4th October 2007 in support of the 2nd Interested Party's Notice of Motion.

The Applicant opposed the 2nd Interested Party's Notice of Motion and Esther Muthoni Passaris the managing director of the ex parte Applicant swore an Affidavit dated 28th August 2007, a further Affidavit dated 1st October 2007, a supplementary Affidavit dated 26th November 2007, and another Affidavit sworn by Kiragu Kimani Advocate on 1st October 2007 and skeleton arguments dated 18th December 2007.

The factual background of this case is that on 6th September 2007, the ex parte Applicant, Adopt A Light approached the court with a Chamber Summons dated 5th September 2007 under certificate of

urgency under the vacation Rules. One of the reasons for the urgency was that an appeal had been preferred against the High Courts decision in **MSA HMISC 1015/06** and if the Chamber Summons was not heard and orders granted on 10th May 2006 the appeal would be rendered nugatory. In the Chamber Summons the Applicant sought the following orders:

- 2) the Applicant be granted leave to apply for an order of certiorari to remove into the court for the purposes of quashing the decision of the 1st Respondent, the Municipal Council of Mombasa, contained in its letters of offer to the Interested Party herein, Vision Advertising, Magnate Valuers Ltd, Alliance Media and Prime Outdoor, dated 5th March 2007 allocating some streets within the Municipality of Mombasa for purposes of lighting and advertisements and any contracts signed pursuant thereto between the 1st Respondent and the Interested Parties.
- 3) The Applicant be granted leave to apply for an order of Prohibition to prohibit the 2nd Respondent herein, the Minister for Local Government from appealing the said decision of the 1st Respondent as contained in its letters of 5th March 2007 to the (Permanent Secretary and against further allocation of the streets by the 1st Respondent to any of the Interested Parties or any other party and to prohibit the implementation and/or further implementation of the said decision of the 1st Respondent to the Interested Parties dated 5th March 2007 and contracts pursuant thereto;
- 4) That the grant of leave do operate as stay of the implementation of the decision of the 1st Respondent as contained its letter of offer dated 5th March 2007 to the Interested Parties herein;
- 5) Costs of the Application to be provided for.

Justice Nambuye granted prayer 2 and 3 of the Chamber Summons and ordered that the issue of leave operating as stay be canvassed inter partes. After the hearing of the substantive motion a temporary stay was granted till 14th September 2007 so that the matter could be heard on the question of stay. The Applicant filed the substantive Notice of Motion on 13th September 2007 and when the matter came up for hearing, it was set for mention on 24th September 2007 for directions and the interim order was extended. Meanwhile on 14th September 2007, the 2nd Interested Party filed the Notice of Motion that is under consideration, seeking to set aside the leave and order of stay issued by the court on 6th January 2007.

The main ground upon which the 2nd Interested Party brought this motion is that the ex parte Applicant failed to make a full and frank disclosure of material facts;

- i) that there is a pending Application by the ex parte Applicant, in the Court of Appeal for stay of the decision made on 5th January 2007 which is yet to be prosecuted;
- ii) the Court of Appeal refused to grant stay as the (AAF) World Cross Country Championship which took place on 24th March 2007 and which was the reason for the urgency in filing the Application has since taken place and the entire City of Mombasa is lit up and there is nothing for the court to quash;
- iii) Whether or not the pending appeal will be rendered nugatory is not a consideration upon which the court can be asked to grant Judicial Review remedies in the present suit because the High Court has no jurisdiction to deal with a matter pending in the Court of Appeal;
- iv) The ex parte Applicant failed to disclose that the procurement of the 2nd Interested Party's Services was done in connection with S. 78 of the Public Procurement and Disposal Act No. 5 of 2005 through a notice published in the Daily Nation of 15th January 2007 and the proceedings are therefore frivolous and vexatious and an abuse of the court process;

v) The ex parte Applicant is said to have misrepresented to the court that the decision of the 1st Respondent was made on 5th March 2007 when in actual fact it was made on 5th January 2007 and that was meant to bring it within the 6 months prescribed under Section 9 of the Law Reform Act.

Based on the Affidavits and annexures by the 2nd Interested Party, the 1st Respondent and the 4th Interested Party, Mr. Havi submitted that the ex parte Applicant failed to disclose that there was pending in Court of Appeal an application for stay in **CA 15/07. ADOPT A LIGHT VS MUNICIPAL COUNCIL OF MOMBASA & ANOTHER.** That Mr. Nyandieka Counsel for the exparte Applicant in the Certificate of urgency stated at paragraph (a) that the Appeal will be rendered nugatory and gave reasons that the contract was quashed in the High Court in Mombasa and the Applicant could not perform it. That further in his Affidavit at paragraph 5 the Counsel depones that the Appeal would be rendered nugatory and nothing to preserve if the orders of leave to operate as stay were not granted. That this is despite the fact that the ex parte Applicant deponed at paragraph 4-10 and 19 of Esther Passaris's verifying Affidavit dated 28th August 2007, that she had filed an Appeal in the Court of Appeal. That since that was the reason for urgency the Applicant should have disclosed to the court that they had an Application for stay pending in the Court of Appeal and the failure to make that disclosure was meant to mislead the court and enable the Applicant to get ex parte orders that the Applicant was otherwise not entitled to.

Counsel urged that the explanation given by Mr. Kimani and Esther Passaris in their Affidavits that Mr. Nyandieka was not made aware of the facts is not acceptable because the duty to disclose rests on the ex parte Applicant but not the Advocate. That in any case, the ex parte Applicant's Affidavit in support of the Application for stay in the Court of Appeal which is annexed to Stanley Kinyanjui's Affidavit indicates that the reason for urgency was that the appeal would be rendered nugatory.

2^{ndly} Mr. Havi submitted that the application for stay had come up for hearing three times before the Court of Appeal but the court had declined to grant the order of stay and that had the judge known that fact, an order for leave and stay would not have been granted.

3^{rdly} Mr. Havi urged that the ex parte Applicant misrepresented to the court that there had been no advertisements for the tender of the project yet there is evidence that the tender was advertised in the Local Dailies as evidenced by annexure to Roba Duba's affidavit dated 5th November 2007 (R D 1) and Stanley Kinyanjui's Affidavit (SK 5). That Mr. Nyandieka admits that there was an advert and no reason was given as to why it was not produced in court. That failure to produce the advert disentitled the ex parte Applicant to the orders.

It was also Mr. Havi's submission that the ex parte Applicant failed to disclose the fact that they participated in the process of allocation of streets for purposes of the project.

Lastly tht the ex parte Applicant failed to disclose that at the time they came to court, the streets of Mombasa were already lit and the court was making an order of stay in vain. The 2nd Respondent exhibited photographs of the City to the affidavit of Roba Duba (D.D 4) Counsel relied on the following authorities:

- 1) **OWNERS OF THE MOTOR VESSEL "LILLIAN S" V CALTEX OIL (K) LTD CA 50/1989 and (1989 KLR 1** where the court held that failure to make disclosure may result in the discharge of any order made upon ex parte Application.
- 2) **BAO INVESTMENTS & OFFICE MANAGEMENT SERVICES LTD VS HOUSING FINANCE OF KENYA LTD HC 75/05.** The court again reiterated that failure to disclose relevant and material facts disentitles one to ex parte orders.
- 3) **NIPUN NAGINDA PATEL V AG HCMISC 463/05** the court also held as in the above cited cases.

Mr. Menge, Counsel for the 2nd Respondent supported the Notice of Motion by the 2nd Interested Party and the submission of the 2nd IPS. He relied on the submissions filed in court on 26th November 2007.

Mr. Nyandieka, Counsel for the ex parte Applicant opposed the Notice of Motion filed by the 2nd Interested Party. In respect of the allegation that the ex parte Applicant failed to disclose the existence of an Application for stay before the Court of Appeal, Counsel submitted that the Application was made under Certificate of urgency at a time when time for seeking Judicial Review was about to lapse. That the deponent of the Affidavit travelled out of the country the day before and Mr. Kimani who had handled the Appeal did not brief him of the stay order. That what is before court is in respect of the Order made on 5th March 2007 by way of letters exhibited from page 23-82 of the Verifying Affidavit and that the Appeal is in respect of a matter that is not in court. That the matter that came to court on 5th March 2007 arose after the Mombasa matter had been determined.

In respect to the advertisement, Mr. Nyandieka admitted that the matter was brought to his attention but he did not have a copy of the advert. That the Applicant has deponed that strict procedures of procurement were not followed despite the fact that there was an advertisement.

On the question of which decision was challenged it was submitted that the only decision known to the Applicant is the one dated 5th March 2007 which relates to the offer. It was denied that any decision was ever made by the minutes annexed by Roba Duba on his Affidavit of 6th November 2007 because the minutes are incomplete.

It is also Mr. Nyandieka's submission that the court did not grant a permanent stay but an interim one which pends the hearing inter partes. But that in light of the Court of Appeals decision in **SHAH V ARM NRB (2000) IEA 209 & AGA KHAN EDUCATION SERVICES V REP (2004) IEA 1** that the question of leave and stay be canvassed at the same time, this court should extend the stay order till the hearing of the substantive Notice of Motion which has already been filed and served.

I have now considered the Affidavits, the annexures thereto, the submission by all sides. The key issue here is whether the ex parte Applicant failed to disclose material facts to the court at the time the Applicant appeared before the High Court seeking ex parte orders for leave to bring Judicial Review proceedings and stay and whether the ex parte also misrepresented facts to the court. In the case of **OWNERS OF MOTOR VESSEL 'LILLIAN S' (supra)** the Court of Appeal held that failure to disclose may result in the discharge of any order made upon an ex parte Application.

In **JUDICIAL REVIEW, 3RD ED pg 352**, Professor Michael Fordham states as follows:

“21-5 claimants duty of condour. A Claimant for permission is under an important duty to make full and frank disclosure to the court of all material facts, and matters. It is especially important to draw attention to matters which are adverse to the claim in particular:

- (1) Any statutory restriction on the availability of Judicial Review;**
- (2) Any alternative remedy;**
- (3) Any delay or lack of promptness and so need for extension of time.**

The Court in **NIPUN CASE (supra)** adopted the above principle and discharged an ex parte order that had been issued without the Applicant making a full and frank disclosure of the material facts. In another case of **UHURU HIGHWAY DEVELOPMENT LTD V CBK HCC 29/1995**, the court considered the issue of non disclosure of material facts. The court adopted the decision of Viscount Reading C.J. **THE KING V G.C. FOR CUSTOMS PURPOSES OF INCOME TAX 1917 1 KB** where he said at page 495

“Before I proceed to deal with the facts I desire to say this, 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 prevent an abuse of its process, to refuse to proceed any further with the examination of the merits. This is the power inherent in the court, but one which should only be used in cases which brings to the mind of the court that it has been deceived. Before coming to that conclusion a careful examination will be made of the facts as they are and as they have been stated in the applicant's Affidavit, and everything will be heard that can be urged to influence the view of the court where it reads the affidavit and knows the true facts. But if the result of this examination and hearing is to leave no doubt that the court has been deceived, then it will refuse to hear anything further from the Applicant in proceedings which has only been in motion by means of a misleading Affidavit."

From an examination of the different decisions of the courts, that are cited above, the court proceed to hear a case based on non disclosure of material facts or misrepresentations for protection of its own dignity and the party who may be adversely affected by the orders that may be or may have been given.

In the instant case the ex parte applicant is alleged to have failed to disclose several facts, which if the court had known, it would not have granted the leave and stay orders. In his Affidavit in support of the certificate of urgency, Mr. Nyandieka, Counsel for the ex parte Applicant at paragraph 3 deponed that if the matter was not heard without delay, the appeal by the Applicant against the High Court decision in **MSA HCAMISC 1015/06** would be rendered nugatory. At paragraph 4 thereof Counsel went on to say that he had been informed by the Managing Director of the Applicant, Esther Passaris that if stay was not granted, the decision of 5th March 2007 would be implemented. At paragraph 6 of the same Affidavit he deponed that the object of the Judicial Review and pending appeal in the Court of Appeal may well be defeated if the matter was not heard urgently. The basis upon which the court heard the matter is clear from this Affidavit of Mr. Nyandieka. Despite the above Esther Passaris had deponed in the verifying affidavit in support of the Chamber Summons at paragraph 6-20 that an appeal had been filed against the Mombasa High Court decision in 1015/06 in **MSA CA 49/07**. That Affidavit did not disclose that there was an application for stay that had been made in the Court of Appeal. It is however apparent from the Affidavit of Esther Passaris dated 19th January 2007 in support of Notice of Motion for stay that the ex parte Applicant would suffer substantial loss unless an order of stay was granted (See paragraph 26-27). The explanation given for failure to disclose the fact that an Application for stay was pending in Court of Appeal is that the ex parte Applicant had so instructed Mr. Nyachieka, the Counsel in record as Mr. Kiragu the other Counsel was out of the country and the Managing Director of the ex parte Applicant travelled out of the country the day before the making of the Application. I do agree with Mr. Havi that the duty of disclosure falls squarely on the claimants shoulders, not the Counsel.

Mr. Nyandieka deponed in his affidavit that he was relying on matters sworn by Esther Passaris in her Verifying Affidavit. It was immaterial that the Managing Director of the ex parte Applicant was outside the country at the time of the filing of the Chamber Summons or the Counsel was also out of the country. The ex parte applicant should have adequately instructed Counsel. Besides it was expected that all the relevant facts would be contained in the Affidavit of Esther Passaris but for reasons known to her, she avoided making reference to the Application for stay that was pending in the Court of Appeal.

To compound it all, by the time the ex parte Applicant came to the High Court to seek Judicial Review orders, the Court of Appeal had declined to grant orders of stay in the matter three times on 28th February 2007, on 20th March 2007 and on 10th May 2007. The matters of hearing notices in Court of Appeal were exhibited by Stanley Kinyanjui as SK 3 and the same have not been denied. I find that the applicant intentionally failed to disclose to the Court that granted leave that there was an Application for stay pending in the Court of Appeal and that stay had been denied by that court three times. Had the Court known of all these facts it is unlikely that it would have granted the orders of leave and stay as it meant that the Applicant was moving two courts for similar orders at the same time thus abusing the court's process.

It is the 2nd Interested Party's case that the ex parte Applicant misrepresented facts to the court that there had been no advertisement for the projects yet there is evidence that the project was advertised in the daily newspapers. Roba Duba (of the 1st Respondent) in his Affidavit dated 5th November 2007 exhibited the said document RDI. The advert invited stakeholders to make proposals on how to partner with the 1st Respondent. Stanely Kinyanjui (for 2nd Interested Party) also exhibits the advert as (SM 5). The ex parte Applicant failed to bring this advert to the attention of the court. Failure to exhibit the advert was to move the court to find that procedure was not followed. Failure to disclose that advertisement of the project was non disclosure of a very relevant and material fact to the court that would have helped the court decide whether or not to grant the orders sought. In the Australian Case of **THOMAS A EDISON LTD V BULLOCK 15 ELR 679** the court said:-

“.....It is the duty of a party asking for an injunction ex parte to bring under the notice of the court all facts material to the determination of his right to that injunction, and it is no excuse for him to say he was not aware of their importance. Uberrimae fides is required, and the party inducing the court to act in the absence of the other party, fails in his obligation unless he supplies the place of the absent party to the extent of bringing forward all the material facts which that party would presumably have brought forward in his defence to that application. Unless that is done, the implied condition upon which the court acts in forming its judgment is unfulfilled and the order so obtained must almost invariably fail.”

Though the above case dealt with injunctions, it is an order that was, given ex parte just like the order of leave and stay. I have considered several authorities to underscore the importance of good faith on the part of an applicant who were the ex parte owners.

It is also the 2nd Interested Party's case that the ex parte Applicant failed to disclose to the court that it took part in the allocation of the streets for lighting. Both Roba and Kinyanjui have deponed that all the interested parties in the project were given evidence to ballot but that the ex parte Applicant declined to do so claiming that they had the monopoly following the contract of 26th June 2006 which had been quashed by the Court on 5th January 2007. That fact has not been contraverted by the ex parte Applicant. The Applicant had a duty of candour that they miserably failed to.

It is also alleged that by the time the Applicant went to court, the streets of Mombasa city had already been lit up because the project had been completed. This is because the project was awarded to the 2nd Interested Party to be performed within 120 days from 6th March 2007. (See letter of offer dated 5th March 2007 Verifying Affidavit). Stanley Kinyanjui exhibited photographs of the lights along the Roads. The Application for stay was filed on 6th September 2007 over 120 days since the award of the tender.

The street lighting was meant to be done before the AAF world Cross Country Championships. The Court of Appeal has declined to grant stay in the Application before it for reasons that those games are long over. The project having been performed, the court's order of leave and stay was being issued in vain.

It was the 1st Respondents contention that the ex parte Applicant deliberately misled the court to believe that the 1st Respondent made its decision to award street lighting on the Interested Parties on 5th March 2007 so as to bring the decision within 6 months when the decision was actually made on 23rd February 2007. I have seen RD 3, the minutes held in Mombasa by all stakeholders regarding beautification of the city on 23rd February 2007. Unfortunately the minutes are complete and this court cannot confirm whether any decision was made on that date. That allegation by the 1st Respondent has not been established and therefore with no basis.

In conclusion this court is satisfied that the ex parte applicant did not come to court in good faith and failed to disclose material facts to the court and also made misrepresentations to the court which if the court had known otherwise, may not have granted leave or the interim order of stay. To protect the

dignity and of the court, the courts orders of 6th September 2007 must be set aside or vacated. The ex parte applicant to bear all costs relating to these proceedings.

Dated and delivered this 13th day of March 2008.

R.P.V. WENDOH

JUDGE