



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

**Misc. 752 of 2006**

**MAGNATE VENTURES LIMITED.....1<sup>ST</sup> APPLICANT**

**UNIKEN MARKETING SERVICES LIMITED.....2<sup>ND</sup> APPLICANT**

**Versus**

**THE CITY COUNCIL OF NAIROBI.....1<sup>ST</sup> RESPONDENT**

**THE MINISTER FOR LOCAL GOVERNMENT.....2<sup>ND</sup> RESPONDENT**

**ADOPT-A-LIGHT LIMITED.....INTERESTED PARTY**

**RULING**

Before me is the chamber Summons Application dated 14<sup>th</sup> December 2006. The exparte Applicants are Magnate Ventures Ltd. and Uniken Marketing Services Ltd. who seek leave of this court to commence Judicial Review proceedings against the City Council of Nairobi, the Minister of Local Government, the Respondents and Adopt-A-Light Ltd is named as the Interested Party. The Applicants seek the following orders:

- 1) The Applicants be granted leave to apply for an order of certiorari to remove into the High Court and quash any such existing arrangement between the 1<sup>st</sup> Respondent and the Interested Party as evidenced by the 1<sup>st</sup> Respondent's letter dated 27<sup>th</sup> October 2006 or otherwise mandating the Interested Party to continue undertaking street pole lighting and advertising on street lighting poles, road reserves or elsewhere on the roads in the City of Nairobi;
- 3) The Applicants be granted leave to apply for an order of mandamus compelling the 1<sup>st</sup> Respondent to terminate and/or otherwise to stop acting on the contract dated 28<sup>th</sup> March 2002, between the 1<sup>st</sup> Respondent and the Interested Party mandating the Interested Party to undertake Street Lighting and Advertising on street lighting poles in the City of Nairobi and/or any such existing arrangement between the 1<sup>st</sup> Respondent and the Interested Party as evidenced by the 1<sup>st</sup> Respondent's letter dated 27<sup>th</sup> October 2006, or otherwise, mandating the Interested Party to continue undertaking street pole lighting and advertising on street lighting poles, Road Reserves, or elsewhere on the roads in the City of Nairobi and to perform its statutory duties of levying rates/fees on such advertising activities by the Interested Party or remove the advertisements placed by the Interested Party in contravention of the law;
- 4) The Applicants be granted leave to apply for an order of prohibition to prohibit the 1<sup>st</sup> & 2<sup>nd</sup> Respondents from removing and/or otherwise acting upon the contract dated 28<sup>th</sup> March 2002, between

the 1<sup>st</sup> Respondent and the Interested Party mandating the Interested Party to undertake street lighting and advertising on street lighting poles in the City of Nairobi and/or implementing any such existing arrangement between the 1<sup>st</sup> Respondent and the Interested Party as evidenced in the 1<sup>st</sup> Respondent's letter dated 27<sup>th</sup> October 2006, or otherwise, mandating the Interested Party to continue undertaking street pole lighting and advertising on street poles, and reserves or elsewhere on the roads in the City of Nairobi;

5) That grant of leave do operate as stay of the renewal and/or implementation of the contract dated 28<sup>th</sup> March 2002, between the 1<sup>st</sup> Respondent and the Interested Party mandating the Interested Party to undertake street lighting and advertising on street lighting poles in the City of Nairobi and/or implementation of any such existing arrangement between the 1<sup>st</sup> Respondent, and the Interested Party as evidenced in the 1<sup>st</sup> Respondent's letter dated 27<sup>th</sup> October 2006, or otherwise, mandating the Interested Party to continue undertaking street pole lighting and advertising on street lighting poles, road reserves or elsewhere on the roads in the City of Nairobi;

6) Costs of the application be provided for.

The Application is supported by a statutory statement which contains the grounds upon which the application is brought and a verifying affidavit sworn by Stanley Kinyanjui, the Managing Director of the 1<sup>st</sup> Applicant and the Secretary of Outdoor Advertising Association of Kenya. He deponed that he was also authorized by the 2<sup>nd</sup> applicant, to swear the affidavit on their behalf. The Applicants were represented by Havi Advocate.

The 1<sup>st</sup> Respondent did not file any papers in reply. Mr. Adan appearing for the 1<sup>st</sup> Respondent did not oppose the application for leave save that he asked for costs. He conceded the facts as presented by the Applicants.

The 2<sup>nd</sup> Respondent filed grounds of opposition on 27<sup>th</sup> April 2007 and skeleton arguments on the same date and was represented by Mrs. Natome.

The Interested Party vehemently opposed the application and filed grounds of opposition on 18<sup>th</sup> December 2007, replying affidavit sworn by Esther Muthoni Passaris, the Managing Director of the Interested Party dated 2<sup>nd</sup> February 2007 and skeleton arguments filed in court on 23<sup>rd</sup> March 2007. Mr. Kiragu urged the Chamber Summons on behalf of the Interested Party.

The grounds upon which the Chamber Summons application is premised are found in the statutory statement which are inter alia;

1. The Interested Party has continued to erect street lighting poles and/or to advertise on street lighting poles already erected by the 1<sup>st</sup> Respondent and Kenya Power & Lighting Co. Ltd and elsewhere on all roads in the City of Nairobi pursuant to an illegal contract dated 28<sup>th</sup> March 2002, obtained through fraud and corruption by the officers of the 1<sup>st</sup> Respondent in excess of the 1<sup>st</sup> Respondent's authority and ultra vires statute, despite the mutual termination thereof on 7<sup>th</sup> October 2004 and the quashing by the court of the partnership replacing the same on 23<sup>rd</sup> August 2005, or through an illegal arrangement between the 1<sup>st</sup> Respondent and the Interested Party as evidenced in a letter dated 27<sup>th</sup> October 2006, allegedly from the 1<sup>st</sup> Respondent and is curtailing the 1<sup>st</sup> Respondent from performing its statutory duty of levying rates/fees on such advertising activities by the Interested Party or removing the advertisements placed by the Interested Party in contravention of the law;

5. On 28<sup>th</sup> March 2002, the 1<sup>st</sup> Respondent through its then mayor and Town Clerk, respectively, Dick Waweru and Godfrey Mate purportedly entered into a contract with the Interested Party wherein they granted the Interested Party an indefinite and sole exclusive right and/or monopoly to use street lighting poles in the City of Nairobi for the purpose of advertising thereon to the exclusion of the Applicants and

other Interested Parties in the industry;

11. A report dated 5<sup>th</sup> July 2005, released by an extra ordinary inspection team commission by the 2<sup>nd</sup> Respondent to carry out an extraordinary inspection of the 1<sup>st</sup> Respondent recommended and directed the cancellation of the contract for illegality. Again the Interested Party used all means to prevent the recommendation from being acted upon and continued erecting street lighting poles and continued advertising under the contract using the 1<sup>st</sup> Respondent's materials, labour, equipment and electricity in its advertisement without paying for the same;

13. All advertising activities undertaken by the Interested Party on any street lighting poles or elsewhere on the roads in the City of Nairobi after 23<sup>rd</sup> August 2005, are illegal and the same constitutes an offence under the provisions of S. 45 of the Anti-Corruption and Economic Crimes Act No. 3 of 2003;

16. The Interested Party is still advertising on street lighting poles in the City of Nairobi, erected bill boards and advertised on road reserves notwithstanding the illegality of the contract, the termination thereof on 7<sup>th</sup> October 2004 and the quashing of the partnership replacing the same on 23<sup>rd</sup> August 2005;

17. The Interested party has filed HCC 637/06 Adopt A-Light Ltd. v Nairobi City Council seeking to restrain the 1<sup>st</sup> Respondent from removing advertisements placed by the Interested Party on roads not included in the terminated contract, namely Loita Street, Haile Selassie Avenue etc, claiming that the removal constitutes a dispute to be referred to arbitration under the contract despite the termination of the contract on 7<sup>th</sup> October 2004, and the quashing of the partnership replacing the same on 23<sup>rd</sup> August 2005;

18. In a letter dated 27<sup>th</sup> October 2006, purportedly authored by the 1<sup>st</sup> Respondent and exhibited by the Interested Party in the said suit, the Interested Party confirms that it has pursuant to the quashed partnership, continued to erect street lighting poles and placed advertisements on street lighting poles erected by the 1<sup>st</sup> Respondent & K.P.L. Co on over 50 roads namely Uhuru Highway, Moi Avenue etc, yet its activities under the terminated contract were limited to four roads only and the partnership replacing the same quashed on 23<sup>rd</sup> August 2005;

19. In its reply to the suit, the 1<sup>st</sup> Respondent has rightfully disowned the letter dated 28<sup>th</sup> October 2006 and the contract dated 28<sup>th</sup> March 2002, on account of illegality and fraud and insisted that no dispute thereunder can be referred to or determined in arbitration;

20. There is a real danger that unless stopped by an order of this Hon. Court, the Interested Party will continue perpetuating an illegality with impunity thereby ridiculing the court's decision quashing the partnership and curtailing the 1<sup>st</sup> Respondent's performance of its statutory duties to the detriment of the Applicants and other rate payers in the City of Nairobi and the Republic of Kenya.

Mr. Havi, Counsel for the Applicant also submitted that based on the undisputed facts contained in the grounds set out above, the test for an arguable case is that set out in the case of NJUGUNA & OTHERS V MINISTER OF AGRIBULTURE CA 144/00. He contended that the contract dated 28<sup>th</sup> March 2002 between the 1<sup>st</sup> Respondent & Interested Party having flouted S.143 of the Local Government Act and Rule 17 of the Exchequer and Public Procurement Regulations, a resolution was made by the 1<sup>st</sup> Respondent and its directors recommending termination of the said contract for its illegality, the contract was revoked by a resolution of the 1<sup>st</sup> Respondent on 7<sup>th</sup> October 2004, replaced by a partnership which was quashed in HMISC 1406/04 on 23<sup>rd</sup> August 2005. But that despite the revocation of the contract, and partnership, the Interested Party continues to provide lighting on the City Streets as admitted by the Interested Party in the affidavit sworn by Esther Passaris on 2<sup>nd</sup> February 2007. Mr. Havi also submitted that the continued advertising on street lighting contravenes S. 143, 148, 162 (c) of the Local Government Act, Regulation 17 (1) of the Public Procurement Rules, S. 32 of the Government Management Act No. 5

of 2004 and Ss. 45 and 46 of the Anti-corruption and Economic Crimes Act.

In reply to the Interested Party's contention that the contract of 28<sup>th</sup> March 2002 is the subject of arbitration, the Applicant contends that a contract which is prima facie void cannot be the basis of an arbitration. For this contention he relied on Professor Fraser P. Davidson's BK on Arbitration in which he says that if one of the parties alleges that the contract is void ab initio on the basis of it being illegal, then the arbitration clause cannot operate and that if the contract is fundamentally invalid the arbiter would have no jurisdiction to deal. On the issue of illegality of the contract and the arbitrator having no jurisdiction counsel relied on PATEL V SINGH (No. 21 (1987) KLR 585; PRODEXPORT STATE CO for FOREIGN TRADE V ED & F MAN LTD (1973), ALLER 355.

As to whether the Applicant has the locus standi to bring this matter, Mr. Havi submitted that this being Judicial Review, it was enough that the Applicant has a sufficient interest but not necessarily a grievance. For this proposition, Counsel relied on ADMINISTRATIVE LAW by H W R Wade 6<sup>th</sup> Ed where at page 625, the professor says that one only needs to show sufficient interest in Judicial Review whereas in private law, one has to show a specific personal right Counsel also cited the case of KENYA BANKERS ASSOCIATION V MINISTER OF FINANCE (4) (2002) 1 KLR 61 where it was observed that in public interest litigation the applicant has to show a nominal interest in the matter. The Counsel further contended that infact the Applicants are aggrieved because they are advertisers who are directly affected.

Further, Counsel submitted that the Interested Party has no right to challenge this application since what is alleged is exercise of administrative duty and that since the Applicant seeks leave of the court the Interested Party can only come into these proceedings to set aside leave or by appeal to the Court of Appeal.

As regards the challenge to filing the motion after 6 months, the Applicant's Counsel relied on the case of REP V JUDICIAL COMMISSIONER OF INQUIRY INTO GOLDENBERG AFFAIR ex parte MWALULU MISC APPLICATION 1279/2004 where the Constitutional Court held that certiorari will lie to quash a decision which was a nullity ab initio.

On the question of whether this suit is an abuse of court process, it was Mr. Havi's submission that Judicial Review is a special jurisdiction which will not affect other cases or prevent the court from examining the breaches of statute. Counsel relied on the following authorities;

1. Professor Fraser Davidson, Scottish Universities Law Institute Ltd., Edinburg W. Green 2000;
2. Prodesxport State Co. for FOREIGN TRADE V ED – F MAN LTD (1973) ALL ER 355;
3. PATEL V SINGH (No. 2) (1987) KLR 585;

The above authorities espouse the principle that if a contract is tainted with illegality, or prohibited by statute or contrary to public policy, it is void ab initio and therefore unenforceable.

4. KENYA BANKERS & ASSOCIATION V MINISTER FOR FINANCE (4) (2002) 1 KLR 61 where the court held that in public interest litigation one had to demonstrate that they had a minimal interest. That in this case, the Applicants met the required standard as they are parties aggrieved as advertisers and the contract of 28<sup>th</sup> March 2002 affects their business;

5. Ex parte MWALULU CASE (supra) where the court held that the requirement of 6 months to quash a decision did not apply to administrative decisions.

Mr. Adan Counsel for the 1<sup>st</sup> Respondent did not object to the grant of leave but objected to costs.

Mrs. Natome, Counsel for the 2<sup>nd</sup> Respondent relied on their grounds filed in court on 27<sup>th</sup> April 2007,

which are that the application is bad in law, that the claim is contractual in nature and Orders of Judicial Review cannot issue and that the application is therefore an abuse of the court process. Counsel urged that they do not oppose the grant of leave but opposed an order of stay on the basis that what is challenged is a contract of essential services and if an order of stay is granted, it will cause suffering to the public. In addition, she urged that the 2<sup>nd</sup> Respondent had not made any decision that can be quashed by certiorari.

The Interested Party opposed the entire application for leave and stay. Mr. Kiragu raised several points as to why the above orders cannot be granted. It was Mr. Kiragu's submission that what is challenged is a contract that was entered into over 5 years ago signed on behalf of the 1<sup>st</sup> Respondent by the Town Clerk pursuant to S.129 (4) of the Local Government Act and the Interested Party. On 7<sup>th</sup> October 2004 the contract was said to have been mutually terminated. The Applicants seek stay of its renewal or implementation. Mr. Kiragu submitted that a unilateral decision by one party cannot amount to termination of a contract but repudiation of the same. That the contract has been partially performed and the application is therefore an abuse of the court process. Further, that this suit is an abuse of the court process in that the Applicants are trying to achieve what they failed to achieve in HCC 131/03 OUTDOOR ADVERTISING ASSOCIATION OF KENYA V NAIROBI CITY COUNCIL ADOPT-ALIGHT AND OTHERS. That the complaint in that case was that Nairobi City Council should not have entered into the agreement dated 28<sup>th</sup> March 2002 and 3<sup>rd</sup> June 2002 with the Interested Party who were not members of Outdoor Advertising. The Plaintiff in that suit sought to have the said agreement declared a nullity for being contrary to public policy and in contravention of the Restrictive Trade Practices for trying to create a monopoly in the business. Mr. Kiragu posed the question, why have both the suit in 131/03 and Judicial Review proceedings on the same grievance? That the only reason why they filed this matter is that HCC 131/03 has been struck out and the Applicants are trying to achieve what they failed to achieve in that suit. Counsel drew the court's attention to the fact that apart from HCC 131/03 the contract of 28<sup>th</sup> March 2002 was the subject matter in MISC 1406/04, R V THE CITY COUNCIL OF NAIROBI & MINISTER FOR LOCAL GOVERNMENT & ADOP a Judicial Review application. The ex parte Applicant was Magnate Ventures. However in HCC 1406/04 the court did not decide on the fate of the contract as no order was sought to quash the contract. The other suits that relate to the same contract, subject matter is 637/06 ADOPT A LIGHT V NAIROBI CITY COUNCIL where the Applicant is the Interested Party and 1<sup>st</sup> Respondent is the Defendant and the Interested Party sought orders of injunction to bar the Interested Party from getting injunction to stop the 1<sup>st</sup> Respondent from removing advertisements and the court granted the injunction restraining the removal of the Bill Boards. The application was dismissed on 26<sup>th</sup> November 2007 and Counsel presented the ruling to the court after this application had been heard.

It is counsel's argument that the filing of many suits over the same subject matter is an abuse of the court process and the different suits filed in respect of this same subject matter are HCC 637/06 ADOPT A LIGHT LTD V NAIROBI CITY COUNCIL; 131/03 OUTDOOR ADVERTISING V NAIROBI CITY COUNCIL and MISC 1406/06 MONIER 2000 LTD MAGNATE VENTURES LTD & OTHERS V NAIROBI CITY COUNCIL. All the above cases touch on the contract of 28<sup>th</sup> March 2002 between Adopt A Light & Nairobi City Council. Mr. Kiragu submitted that the object of these cases is to terminate the contract of 28<sup>th</sup> March 2002 and that amounts to an abuse of the court process. Counsel relied on the case of ASEA BROWN BOVERI LTD V BAWAZIR GLASS WORKS LTD (2001) 2 EA 336 where the court had dismissed an application for summary judgment and the Applicant filed another application seeking to strike out of the defence. The court held that the latter application was an abuse of the court process.

It is also the Interested Party's argument that the Interested Party has installed streetlights at an exorbitant cost and has legal obligations to meet eg loans in the bank towards performance of the contract and if leave and stay are granted, it would effectively be terminating the contract. That the affidavit of Kinyanjui in support of the Chamber Summons confirms the above and the court was urged to exercise its discretion in favour of the Interested Party and decline to grant the orders sought.

Mr. Kiragu also submitted that the Applicant is not entitled to an automatic stay and that stay can only

issue to stop a process but in the instant case, what is sought to be stayed is a contract which has already been completed and it has been performed for over 5 years and renewed.

In respect of the prayer for prohibition, it is the Interested Party's contention that the court order cannot be used to stop renewal of a contract because there was a clause automatically renewing it. That in any case the contract has already been renewed and the said order cannot lie. As for mandamus it is the Interested Party's case that it cannot be used to stop performance of a contract. In conclusion Counsel submitted that the Applicant would not be entitled to any of the reliefs sought because the case is an abuse of the court process.

Mr. Kiragu also submitted that certiorari cannot issue after 6 months of the making of the impugned decision and relied on the decision of *NYAGA V REP* (1991) KLR 291 where the court held that the Law Reform Act does not have provision for enlargement of the 6 months for seeking an order of certiorari. He urged that the *MWALULU CASE* (supra) on which the Applicant relied was not binding on this court and was wrong in that it goes contrary to Court of Appeal cases like in *WILSON OSOLO V JAMES OJIAMBO OCHOLA & AG CA 6/1955*, and the *NYAGA CASE* (supra) where the Court of Appeal held that extension of time was a nullity. The Interested Party urged the court to dismiss the application for leave.

At this stage of the proceedings all that the Applicant needs to establish is that they have an arguable case in order for leave to be granted to commence Judicial Review proceedings. The test for grant of leave was set out in the case of *NJUGUNA & OTHERS V MINISTER OF AGRICULTURE CA 144/00 OR* (2000) KLR 352 – where the Court of Appeal said “the test as to whether leave should be granted is whether, without examination of the matter in any depth there was an arguable case that the reliefs might be granted on the hearing of the substantive application.” J Visram adopted this view in the case of *NYAKERIGA & OTHERS V UNHCR* (2001) LLR 1310 and observed that leave should not be granted as a matter of course. Though the parties especially the Interested Party's made very lengthy and elaborate submissions in opposing the Chamber Summons application for leave and stay, this court will not necessarily go into any great length in its findings. If the court were to do so, there would be the danger of going into the merits of the Notice of Motion which is yet to be filed.

There is no doubt that the core of this controversy is the contract entered into between the Interested Party and the 1<sup>st</sup> Respondent, on 28<sup>th</sup> March 2002 for street lighting of Nairobi City. The said contract has been implemented since and was subject to renewal after 5 years if the Interested Party complied with all the terms of the contract. It must have expired in 2007 and renewed if there was no objection to it. Other issues that arise from that contract are whether the said contract was terminated through a resolution made by the Respondent on 7<sup>th</sup> November 2004 and replaced by a partnership. To quash the contract under challenge, the court would require the parties to adduce evidence regarding its legality and/or enforceability which in my view can only be done after vice voce evidence is adduced. The challenge to the contract should be by way of a civil suit where both sides can adduce evidence in support or against the contract and the court would determine the same based on the law of contract. In a recent application by the Interested Party *ADOPT A LIGHT LTD V THE CITY COUNCIL OF NAIROBI MISC 1110/07* where the Interested Party herein was seeking orders to enforce the contentious contract of 28<sup>th</sup> March 2002, this court was of the view that it was a matter that required determination by the civil court and the court declined to grant leave. It seems the parties to these proceedings have been misusing this Judicial Review process either to enforce or terminate the said contract of 28<sup>th</sup> March 2002

That brings me to be question as to whether the Applicant has the necessary locus standi in this matter. In Judicial Review, the standing is much wider than in civil cases so that if a party demonstrated that there is sufficient legal interest or legal right which is threatened or breached, then they can move the court for Judicial Review orders. If this were a purely public law issue, then the Applicants being advertisers and interested in advertising in Nairobi, would have a sufficient interest in the matter. However, it is my view that the Applicants cannot challenge the contract of service by way of Judicial Review because a contract of service is a private matter and a dispute arising from breach thereof lies in the private law and they therefore lack the necessary standing in such matter where they have to show that a specific legal right is threatened or breached arising from a public duty. A contract can only be challenged by the other party to

the contract who is the 1<sup>st</sup> Respondent. However, the 1<sup>st</sup> Respondent has not challenged the said contract in these proceedings but are themselves Respondents. In MISC APPLICATION 534/03 REP V THE COMMISSIONER OF POLICE ex parte NICHOLAS GITUHU KAARIA, Nyamu, Ibrahim & Makhandia JJJ had this to say:

“if there is a tenancy or lease, Judicial Review remedies would be out of reach and unavailable because the performance of a public duty must arise from a statute and not a contract such as a tenancy or lease.” By analogy I would adopt the same words in this case that there is no public duty arising from performance of a contract of service and Judicial Review remedies would not lie.

The Interested Party contended that an order of certiorari would not lie because it is sought after 6 months and contrary to provisions of Order 53 R. 2 Civil Procedure Rules and Sections 8 and 9 of the Law Reform Act. Mr. Kiragu disagrees with the decision of the Constitutional Court in the MWALULU CASE (supra). He argued that the 6 months period cannot be extended. I do agree with the Court of Appeal decision in NYAGA’S CASE (supra) and WILSON OSOLO CASE (supra) that there is no provision for extension of the 6 months period under order 53 Civil Procedure Rules. However that is not exactly what the MWALULU CASE dealt with. The court did not allow extension of time but found that Order 53 Rules 2 and 7 do not deny this court jurisdiction to grant orders of certiorari outside 6 months in relation to administrative orders other than formal judgments, orders, decrees, convictions or other proceedings, of inferior courts or Tribunals. The court said:

“A careful scrutiny of S. 9 of the Law Reform Act, pursuant to which Order 53 Rules were made and in particular 2 and 7 which it is contended denies this court jurisdiction to grant or give the orders of certiorari outside 6 months reveals that only formal judgments, orders decrees, convictions or other proceedings in an inferior court or tribunal fall within the 6 months period stipulated.....Order 53 Rule 2 when prescribes the time limit does not also include anything covered by the principle of ultra vires or any nullities or decisions made without jurisdiction at all.”

I agree with the judges in the MWALULU CASE that the rule limiting the challenging of administrative decisions within 6 months by way of certiorari is limited to the specific orders listed in those rules (R 2 and 7) ie formal orders, judgments etc. So that any other decision would be amenable to an order of certiorari even if brought outside the 6 months period. In the instant case, if what was challenged was an order by a public authority but not a contract the same would have been amenable to Judicial Review even if challenged after 6 months because it does not fall within the orders listed under Rules 2 and 7.

There is no doubt that the contract of 28<sup>th</sup> March 2002 has been the subject of litigation in several cases, which Mr. Kiragu Counsel for the Interested Party addressed at length in his submissions. In HCC 131/03, the Applicants had by a plaint, sought a declaration that the contract of 28<sup>th</sup> March 2002 was null and void and against public policy. According to Mr. Kiragu the same was struck out and is subject of an appeal in CA 335/05. In 1406/04 REP V CITY COUNCIL OF NAIROBI MINISTER OF LOCAL GOVERNMENT & ADOPT A LIGHT – the Applicant was one of the ex parte Applicants, it was a Judicial Review application challenging the resolution made on 7<sup>th</sup> October 2004 which related to the contract of 28<sup>th</sup> March 2002. There is yet another suit HCC 637/06 pending in Milimani Court, which has been stayed pending arbitration on the issue of the contract of 28<sup>th</sup> March 2002. There is obviously a multiplicity of suits involving basically the same parties over the contract of 28<sup>th</sup> March 2002. I would adopt the finding in Misc Application 898/03 REP V HON THE ATTORNEY GENERAL & P.M.’S COURT MAKADARA where the judge Lord Bingham, Lord Chief Justice where he considered what an abuse of the court process is. He said;

“Although the term abuse of the court process is not defined in the rules or practice direction it has been explained in another context as,

”using that process for a purpose or in a way significantly different from its ordinary and proper use.”

“It is an abuse to bring vexatious proceedings i.e. two or more sets of proceedings in respect of the same subject matter which amount to harassment of the defendant in order to make him fight the same battle more than once with the defendant multiplication of costs time and stress. In this context it is immaterial whether the proceedings are brought concurrently or severally.”

I totally agree with the above observation. This application is an abuse of the court process and so that if the Applicant wanted to challenge the contract of 28<sup>th</sup> March 2002 they should pursue the arbitration proceedings which are already pending. Mr. Havi was of the view that the contract being void, cannot be subject of arbitration but it is my view that the arbitration can be addressed on the question of jurisdiction or the Milimani Court and if the Arbitrator or the Commercial Court finds that they have no jurisdiction, the matter, will be resolved in the matter that has been stayed in Milimani Commercial Courts, HCC 637/06 awaiting the outcome of the Arbitration proceedings. I would also agree with the Interested Party’s observation that the Applicants are trying to have a second bite at their cake after HC 131/03 was struck out. This court must not allow parties to abuse its process and for that reason alone the Applicants are not entitled to leave to commence Judicial Review proceedings. There were other avenues through which they can challenge the contract of 28<sup>th</sup> March 2002 which are more effective and efficacious than Judicial Review and this court will dismiss the application with the Applicants bearing the costs.

Dated and delivered this 26<sup>th</sup> day of May 2008.

**R.P.V. WENDOH**

**JUDGE**

Read in the Presence of:

Mr. Njoroge holding brief for Mr. Havi for Applicant

Mr. Adan for Respondent

Mr. Kiragu for Interested Party

Daniel: Court Clerk