



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

**Misc. Appli. 80 of 2008**

**REPUBLIC.....APPLICANT**

**Versus**

**THE CITY COUNCIL OF NAIROBI.....RESPONDENT**

**OUTDOOR ADVERTISING ASSOCIATION OF KENYA AND**

)

**MAGNATE VENTURES LIMITED ).....EX PARTE**

**RULING**

On 3<sup>rd</sup> March 2008 the ex parte Applicant, Peter Odoyo and Stanley Kinyanjui suing on behalf of Outdoor Advertising Association of Kenya and Magnate Ventures Ltd, 1<sup>st</sup> and 2<sup>nd</sup> Applicants, moved this court by Chamber Summons dated 28<sup>th</sup> February 2008 seeking leave to commence Judicial Review proceedings for an order of certiorari to remove into this court and quash the Respondent's decision contained in its letters dated 25<sup>th</sup> September 2007, 15<sup>th</sup> November 2007, 18<sup>th</sup> February 2008 or any other further letters authorizing the Interested Party to install advertisements on road reserves; leave to apply for an order of prohibition to prohibit the Respondent from implementing or acting upon the letters of 25<sup>th</sup> September 2007, 15<sup>th</sup> November 2007 and 18<sup>th</sup> February 2008 and any other letter allowing the Interested Party to install advertisements on road reserves; and that the said leave do operate as stay. The Respondent is the City Council of Nairobi while ENG Kenya Ltd was named as the Interested Party.

On 3<sup>rd</sup> March 2008 the court granted leave to the Applicant to commence the Judicial Review proceedings and leave was to operate as stay for 60 days. The substantive Notice of Motion was filed on 5<sup>th</sup> March 2008. On 14<sup>th</sup> April 2008 the Interested Party, Eng Kenya Ltd. through their Advocate, Agimba and Associates filed the Notice of Motion dated 10<sup>th</sup> April 2008 seeking orders that the orders issued by this court on 4<sup>th</sup> March 2008 be set aside and the court grant any other orders it deems fit plus costs of the application. The Notice of Motion was premised on the grounds that the Applicant did not make a full disclosure of all material facts; That the facts upon which the leave and stay were granted were erroneous and that the orders are prejudicial to the Interested Party because the Interested Party is incurring great losses due to inability to make good its investment. The application was supported by the affidavit of Philip Muchimuti, a Senior Manager of the Interested Party.

The complaint of the ex parte Applicant in the Notice of Motion dated 5<sup>th</sup> March 2008 is that on 20<sup>th</sup>

February 2006 the Respondent published a public notice prohibiting the placement of advertisements on road reserves and directed removal of all such advertisements and the Respondent removed all the advertisements placed by the 1<sup>st</sup> Applicant despite protests. However, by the letters of 25<sup>th</sup> September 2007, 15<sup>th</sup> April 2007 and 18<sup>th</sup> February 2008, the Respondent approved applications for and authorized the Interested Party to install advertisements on road reserves contrary to the said decision of 20<sup>th</sup> February 2008; that the approval of the Interested Party is a contract procured contrary to the provisions of the Local Government Act, Public Procurement and Disposal Act No. 3 of 2005 and Anti-Corruption and Economic Crimes Act No. 3 of 2003. That the said decision is discriminatory, is unfair and oppressive, irrational and made in bad faith. That is why the Applicant wanted the Interested Party and Respondents stopped by the quashing of the decision of the Respondent.

Philip Muchimuti a Senior Manager with Eng Kenya Ltd. deposed that Eng is an outdoor communications Solutions Company and it applied to the Respondent to be allowed to install suburb signs under their letter of 22<sup>nd</sup> August 2007 ( M 2(a)). They sought approval of 500 sites. After undertaking a due diligence exercise, the Respondent gave approval of 324 sites under its letter of 25<sup>th</sup> September 2007 (PM 3). Further approvals of other sites (PM 4 & 5) were made by the Respondent. That the Interested Party paid the requisite fees for installation of the suburb signs and commenced installation. That after the Applicants filed the motion in this matter the Interested Party sought to find out the reason for the enforcement notices issued to the Applicants and the Respondent replied stating the reasons to be to curb proliferation of adverts and other illegal structures that were being arbitrarily installed within the road reserves without the City Engineers approval as evidenced by picture Ex No. 8. The Interested Party objects to the insinuation made by the Applicants that approvals granted to the Interested Party was going to result in the Interested Party becoming a monopoly because the Interested Party only got approval to install suburb signs which is one type of advertising media while other members of the Applicant have obtained the approval for suburb signs like Alliance Media (PM 9 a ), while Magnate Ventures applied to put up Bus matters in the suburbs and it was approved by the 1<sup>st</sup> Respondent (PM 9b). That even after the notice of 20<sup>th</sup> February 2006, the Applicants have made applications and installed advertisements on road reserves. The Interested Party has attempted to show that they have invested heavily in the project and the stay order of 4<sup>th</sup> March 2008 is causing them great losses. The Interested Party has also deposed that the 2<sup>nd</sup> Applicant had entered into negotiations with the Interested Party when the Interested Party wanted to buy a stake in the 2<sup>nd</sup> Applicant but the negotiations fell apart and it is the Interested Party's contention that the application is made in bad faith. The Email message at DM 20 – dated 2<sup>nd</sup> December 2008 is evidence of the flopped negotiations. Counsel for the Interested Party urged that if the court finds that the order of leave and stay should remain, then the Applicants should be asked to provide security for costs.

Mr. Mobeia, Counsel for the Respondents relied on the affidavit of Charles Mugo Chiuri dated 18<sup>th</sup> April 2008 and supported the Interested Party's application and adopted their submissions. He submitted that it is the enforcement notice issued pursuant to the Physical Planning Act Cap 280 Laws of Kenya, which precipitated the Judicial Review application. Under S.3 of that Act defines what a development means and that it includes the putting up of bill boards for advertisements which under 13(1) of the Act as read with S.38 (4) required that the developer seeks the permission from the Respondent to put them up and if the permission was not granted, an appeal lies to the Liaison Committee. That the Applicant by- passed that Committee and instead moved the court for Judicial Review orders and did not draw the court's attention to that remedy. That the Judicial Review application has been brought with bad intentions to be used by the Applicant for monopolistic purposes. That bad faith is manifested by the Applicants by the fact of non disclosure of material facts.

Mr. Havi, Counsel for the Applicants, in opposing the Notice of Motion relied on the affidavit of Stanley Kinyanjui, the Managing Director of the 2<sup>nd</sup> Respondent, Magnate Ventures, a member of the 1<sup>st</sup> Applicant, dated 18<sup>th</sup> April 2008. Counsel submitted that the Notice of Motion is a disguised appeal against the grant of leave. He submitted that some approvals were given to members of their association after leave and stay were granted in this application and they were not with the Applicants' knowledge. Counsel urged the court not to set aside leave because doing so will be striking out the application

summarily.

I have now considered all affidavits sworn in support and in opposition to the motion filed by the Interested Party, and the submissions made by all Counsel. The Applicants are challenging the Respondents decision to grant the Interested Party permission to install suburb signs, contained in the letters of 25<sup>th</sup> September 2007 15<sup>th</sup> November 2007 and 18<sup>th</sup> February 2008. They were aggrieved by the decisions of the Respondent for allegedly favouring the Interested Party and yet they had been asked to remove their adverts by notice of 20<sup>th</sup> February 2006. The Interested Party and Respondent have demonstrated that infact even after the notice of 20<sup>th</sup> February 2006, the Respondent still approved applications by members of the 1<sup>st</sup> Applicant and 2<sup>nd</sup> Applicant, to install their advertisements on road reserves. For instance at paragraph 17 of Mr. Muchimuti's affidavit, he exhibited approvals to Alliance Media Kenya Ltd. made by the Respondent after the notice of 20<sup>th</sup> February 2006. Some of the approvals are dated 12<sup>th</sup> September 2006, 22<sup>nd</sup> July 2006. At Exhibit 9 b thereof, the 2<sup>nd</sup> Applicant applied to the Respondent for approval to put up bus shelters within Nairobi by letter of 20<sup>th</sup> February 2008, and by letter of 2<sup>nd</sup> April 2008 the Respondent granted them that permission to erect bus shelters. In his affidavit, Charles Chiuri, the City Engineer of the Respondent has exhibited CMC 2 documents which show approvals of suburb demarcation signs, directional signs and other advertisement signs on road reserves by members of the 1<sup>st</sup> Applicant. All these were installed after the notice of 20<sup>th</sup> February 2006. The Respondent has explained that the notice of 20<sup>th</sup> February 2006 was merely meant to curb proliferation of advertisements and other illegal structures that were being installed on road reserves without approval of the City Engineer. If members of the 1<sup>st</sup> Applicant and 2<sup>nd</sup> applicant allege to have been denied permission to continue installing their adverts even with the notice of 20<sup>th</sup> February 2006 having been issued then the allegation by the Applicant that the Respondent is acting in discriminatory manner or unfairly and giving the Interested Party a monopoly cannot be true. Further, the Interested Party has demonstrated that due process was followed in their applications for suburb signs in accordance with the Local Government Act and that members by Applicants are also engaged in advertising suburb signs and others as shown by the exhibits .

An Applicant for ex parte orders has a duty of candour, to make a full and frank disclosure of all the material facts. Michael Fordham in his Book Judicial Review Handbook 3<sup>rd</sup> Edition, says as follows of the duty of disclosure – pg 352 paragraph 21-5

#### “CLAIMANTS DUTY OF CANDOUR

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 the attention of the court 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, lack of promptness and so need for the extension of time.

In facing up to adverse points the claimant will have an early opportunity to explain why these points are not fatal and why the case should be permitted to proceed. The duty of full and frank disclosure harks back to the time when permission for Judicial Review was ex parte. That has changed”.

The position in Kenya has not changed. Leave to commence Judicial Review is still obtained ex parte and hence the need for a party moving the court for the orders to disclose all material facts, be they adverse to his case or not.

In R V HORSHAM DISTRICT COMMISSION ex parte WENMAH (1995) 1 WLR 680 (QBD) P 710 the court said,

“..thirdly, it is common place that in proceedings like these, all material matters must be placed before the judge who is being invited to grant leave ex parte.....”

Again in KNFC V ECONET WIRELESS KENYA LTD. HMISC 1621/05, the court adopted the decision in R V METROPOLITAN POLICE FORCE DISCIPLINARY TRIBUNAL ex parte LAWRENCE 1999 HC ADM p 555, where the High Court in England had this to say,

“It is essential that parties who seek leave to move for Judicial Review should appreciate that they have a duty to make full disclosure of all potentially material facts to the court.”

In the instant case, the Applicants set out to make false representations to the court when they knew very well that the Respondent was still approving their Applications to put up advertisement signs even after the notice of 20<sup>th</sup> February 2006 which they had not even challenged. Their intention is obvious it is meant to lock out the Interested Party from business as they managed to do when they obtained stay orders based on falsehoods and it seems the Applicants want to monopolize the advertising business. Mr. Havi’s submission was that some of the applications by their members for approval to install signs were made after the Judicial Review application was made in court but without their knowledge. That is not true because it is clear from the annexures that Magnate Ventures, the 2<sup>nd</sup> Applicant made an application on 20<sup>th</sup> February 2008, and it was approved on 2<sup>nd</sup> April 2008. I have seen receipts issued to other advertisers in 2007 (C2). The Counsel cannot claim not to have been aware of such applications by their members and approvals by the Respondent when he was instructed by them. The Interested Party has also demonstrated that they have followed due process in their applications. Failure by a party to make a frank and full disclosure disentitles them to the exercise of this court’s discretion. The Applicants do not deserve to be accorded audience by this court because of their conduct. They have acted in bad faith in telling court blatant lies and the court exercised its discretion in granting leave and stay based on their falsehoods and that cannot be condoned. The court has not been convinced why any of the orders of leave and stay should subsist in light of the Applicants conduct and I hereby set aside both leave and stay orders issued to the Applicants on 3<sup>rd</sup> March 2008. The result is the Notice of Motion dated 5<sup>th</sup> March 2008 is no more. The ex parte Applicants to bear costs of this application.

**Dated and delivered this 28<sup>th</sup> day of July 2008.**

**R.P.V. WENDOH**

**JUDGE**

Read in the presence of

Mr. Njoroge for applicant

Mr. Mubea for Respondent

Mr. Agimba for Interested Party

Daniel: Court Clerk