



**REPUBLIC OF KENYA**

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

**(MILIMANI LAW COURTS)**

**MISC CIVIL APPLI 463 OF 2005**

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

**AND**

**IN THE MATTER OF THE CRIMINAL CASE NO. 2670 OF 2005 (NAIROBI CHIEF  
MAGISTRATE'S COURT)**

**IN THE MATTER OF THE CONSTITUTION OF KENYA**

**BY**

**NIPUN NAGINDAS PATEL.....APPLICANT**

**V E R S U S**

**THE HONOURABLE THE ATTORNEY GENERAL..1<sup>ST</sup> RESPONDENT**

**THE NAIROBI CHIEF MAGISTRATE.....2<sup>ND</sup> RESPONDENT**

**R U L I N G**

On 29<sup>th</sup> April, 2005, one **NIPUN NAGINDAS PATEL** (the Applicant), obtained orders ex parte for leave to apply for the judicial review orders of Certiorari to remove into the High Court and quash the charges contained in the Charge Sheet dated 31<sup>st</sup> January, 2005 and the said Charge Sheet dated 31<sup>st</sup> January, 2005 (Nairobi Chief Magistrate's Court Criminal Case No. 2670 of 2005 together with the decision of the Republic giving rise to the said Charge Sheet. The said order of leave was *inter alia* to operate as a stay of further proceedings in Criminal Case No. 2670 of 2005 in Nairobi Chief Magistrate's Court, and that costs would abide the outcome of the substantive motion. The said motion was to be filed within 21 days from the date when leave was granted, and the ex parte Applicant was to serve such substantive motion within 8 days of the date of service upon the Respondent and all interested parties if any.

In the even the ex parte Applicant failed to either file the substantive motion, or serve the same upon the Respondent and any interested party within the stipulated period of 21 days and 8 days respectively. Arising from such default, the Applicant herein KEC International Ltd. an interested party who was not served brought the Application the subject of this Ruling seeking orders under the Court's inherent jurisdiction to set aside and discharge the ex parte leave granted on 29<sup>th</sup> April, 2005 to apply for Judicial Review and all other or consequential orders made as prayed for in the ex parte Applicant's Chamber Summons dated 4<sup>th</sup> April, 2005 and to dismiss the said Chamber Summons with costs, and also condemn the said Applicant to costs occasioned by this Application.

The Interested Party's said Notice of Motion dated 18<sup>th</sup> July, 2005 and filed on 4<sup>th</sup> July, 2005 is, in addition to failure by the Applicants to file the substantive motion within the prescribed time, also premised upon two equally serious grounds **firstly** that the ex parte leave was obtained pursuant to the non-disclosure by the Applicant of material facts in respect of which the Applicant was under an absolute duty to make a full, frank and fair disclosure, and **secondly** on the foot of material misrepresentation to the effect that the Court had granted an order for prohibition restraining the Kenya Revenue Authority (KRA) from commencing or instituting any other enforcement actions against Kenya Power and Lighting Company Limited (KPLC) and/or KEC International Ltd. (KEC) on account of the disputed import duties, Value Added Taxes and processing fees for import declaration, and on a **third** ground that in the circumstance it is just and equitable to grant these Applicants, the orders sought, Walter Amoko, learned Counsel for KEC the Interested Party who urged the application before me the reiterated these grounds, which were more extensively explained in the Affidavit of **VANGIPURAM SESHADRI**, the Commercial Manager of KEC, sworn on 1<sup>st</sup> July, 2005. Mr. Amoko also relied on the decision of my brother in the matter of **Econet Kenya Limited (unreported) (Nairobi H.C. Misc. Civil Application No. 1621 of 2004) and Republic Vs. Communications Commission of Kenya, Econet Wireless Kenya Ltd. 1<sup>st</sup> Interested Party) and Kenya National Federation of Cooperatives Ltd.** (Nairobi H.C Misc. Civil Application No. 1570 of 2004), both dealing with the issue of when the court will set aside or discharge ex parte orders for non-disclosure of material facts.

Mr. Okello, learned Counsel representing the Attorney-General and the Nairobi Chief Magistrate, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents respectively associated himself with the submissions by Mr. Amoko with the addition that contrary to Justice Makhandia's order to serve the Respondents and any interested parties within 8 days of filing the substantive motion, the said motion was served upon the Attorney-General as 1<sup>st</sup> Respondent and as Counsel for the 2<sup>nd</sup> Respondent, the Nairobi Chief Magistrate, on 30<sup>th</sup> May, 2005, that is to say, some 30 days after the issue of Hon. Mr. Justice Makhandia's orders on 29<sup>th</sup> April, 2005.

In reply, to the arguments by Counsel for the Interested Party, and the Respondents, Mr. Billing learned Counsel for the ex parte's Applicant was gracious enough to admit that the ex parties substantive motion dated 20<sup>th</sup> May, 2005 was filed on 23<sup>rd</sup> May, 2005, that is to say two days outside the prescribed time in terms of Order LIII, rule 3 (3) of the Civil Procedure Rules, and also failed to serve the same within the prescribed period of 8 days in terms of terms of the Order LIII rule 3 (1). Mr. Billing sought to mitigate the failure by stating that he only came on record on 4<sup>th</sup> April, 2006 and was neither a party to nor aware of the antecedents.

In further mitigation of the seriousness of the matter in particular on the grounds of non-disclosure and misrepresentation of material facts. Mr. Billing submitted, and I, with respect find favour with that part of his argument, that the court or judge granting leave was satisfied at the threshold or leave stage that the Applicant had established a ***prima facie*** or ***an arguable*** case before leave was granted, that for this reason alone my Court should exercise its discretion and allow the Applicant's substantive motion to be prosecuted, and dismiss the Interested Party's Notice of Motion with costs as against the Applicant.

The issue for determination here is what considerations the court should take into account in setting aside or discharging ex parte orders granted at the leave stage.

Having perused the pleadings herein, including the Chamber Summons dated and filed on 4<sup>th</sup> April,

2005 which gave rise to the grant of leave, the orders granted by Hon. Mr. Justice Makhandia on 29<sup>th</sup> April 2005, and issued on 12<sup>th</sup> 2005, the Interested Party's Notice of Motion the subject of this Ruling, the grounds and the Supporting Affidavit of Vangipuram Sheshadri, aforesaid, together also with the Replying Affidavit of ex Parte Applicant **NIPUN NAGINDAS PATEL** sworn and filed on 13<sup>th</sup> July, 2005, I have no hesitation in saying that the ex parte orders granted by my brother Hon. Mr. Justice Makhandia should be set aside and discharged forthwith.

The grounds adduced by the ex Parte Applicant of financial constraints and economic hardship are hardly convincing. There is no indication of the kind of hardship the applicant was suffering or undergoing. There is no provision for extension of time for filing a judicial review application Order LIII rule 3(1) is derived from the provisions of Section 9 (1) of the Law Reform Act (Cap. 26) and does not confer upon the Court any discretion to extend time for example as provided under order XLIX, rule 5 of the Civil Procedure Rules for extension of time in civil actions has no application to Judicial Review matters. To say as the Applicant says in paragraph 7 of his Replying Affidavit that he has applied for extension of time to file his Notice of Motion is no defence to an application to vacate and discharge ex parte orders. Having failed to file the substantive motion albeit by two days, the leave granted automatically lapsed, and the foundation or substraction upon which to found the Notice of Motion is removed and it cannot stand. It must be dismissed on that ground alone.

There is another ground why the ex parte orders must be set aside, vacated and discharged. It is on the grounds of non-disclosure of material facts and misrepresentation of those facts at the leave stage. In the **matter of Econet Kenya Limited** (supra), my brother made reference at page 23-25 to the cases of **R –Vs- METROPOLITAN POLICE FORCE DISCIPLINARY TRIBUNAL ex parte LAWRENCE (1999) EWHC Admin.588, Professor Michael Fordham JUDICIAL REVIEW HANDBOOK, 3<sup>rd</sup> Edition Paragraph 21.5) R. Vs. LEEDS CITY COUNCIL ex parte [1994] Admin. Law R. 444D, and R Vs. GENERAL COMMISSION FOR THE PURPOSES OF INCOME TAX ACTS FOR THE DISTRICT OF KENSINGTON ExP. Princess Edmond De Polignac [1917] I.K.B. 487** which all discuss in similar language the duty of candor to the Court in ex Parte applications. I will take two examples-

In R. Vs. **METROPOLITAN POLICE FORCE DISCIPLINARY TRIBUNAL** ex parte Lawrence (supra) the court observed-

***“.....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 matters to the court.”***

In Judicial Review, 3<sup>rd</sup> Edition at page 352, Professor Michael Fordham, reiterates the principle that in an ex parte application, a claimant is under a duty to make full and frank disclosure to the court of all material facts and matters. At paragraph 21.5 the learned author says of the claimant's duty of candour-

**“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 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;**

In facing up to adverse points, the claimant will have an early opportunity to explain why those points are not fatal and why the case should be permitted to proceed (*ie “confess and avoid”*)

Although the duty of “full and frank disclosure” harks to the time when (*in England*) an application for permission to judicial review was “*ex parte*” (which is no longer the case in England, by virtue of the 1977 Amendments to Order 53 of the Rules of the Supreme Court, gave discretion to the Court to direct an *inter partes* hearing even at the leave stage), the duty of full and frank disclosure is even of more significance in our situation because the rules still require that an application for leave be made *ex parte*.

In the case at hand, it is the Interested Party’s case which was not challenged by the Replying Affidavit of ***NIPUN NAGINDAS PATEL*** sworn and filed on 13<sup>th</sup> July, 2005, and I therefore take those charges of non-disclosure as correct that-

**(a) He did not inform either KEC International Limited (KEC) of the Kenya Power and Lighting Co. Ltd. (KPLC) that the goods had been released on the basis of bonds given by Mukhi and accepted by Kenya Revenue Authority (“KRA”).**

**(b) On the contrary, it was represented to both KEC and KPLC that Mukhi had made their impugned payments to KRA. The Applicant provided KEC with forged KRA receipts on the basis of which he sought reimbursement from KEC.**

**(c) On the basis of forged receipts, and with respect to the impugned payments, KEC paid MUKHI an aggregate sum of Kshs.166,832,625/=**

**(d) When KRA began to question the authenticity of the aforesaid receipts provided by the Applicant, the Applicant assured KEC that payment had been made-**

**(i) by two letters dated 19<sup>th</sup> December, 2002 and 24<sup>th</sup> December 2002 Mr. Shital Desai wrote to KEC, on the Applicant’s behalf assuring them that payment had been made;**

**(ii) By a letter dated 2<sup>nd</sup> July, 2003 the Applicant forwarded to KEC purported copies of banker’s cheques from Giro Commercial Bank Ltd. (Mombasa “GCBL”) as evidence that the impugned payments had been made to KRA. By a further letter dated 8<sup>th</sup> July, 2003, the Applicant forwarded a letter purportedly from GCBL confirming that it had issued the said cheques. By a letter dated 10<sup>th</sup> July, 2003, GCBL, repudiated the said cheques as well as the letter.**

**(iii) the Applicant gave KEC a copy of a letter dated 16<sup>th</sup> June, 2003 purportedly from the KRA and signed by a Deputy Commissioner of Customs, M.G. Kitenga relieving KPLC of its obligations to make the impugned payments. By a letter dated 24<sup>th</sup> June, 2005, Mr. Kitenga categorically denied ever writing the said letter.”**

In the absence of any challenge to the above contentions as already observed above, it is quite clear that the ex parte orders granted at the leave stage, were obtained on the foot of material misrepresentation that the court had granted an order for prohibition restraining KRA from commencing or instituting any enforcement actions against KPLC and or KEC on account of disputed Import Duties, Value Added Taxes and processing fees for import declaration.

In the totality therefore of the Notice of Motion dated 1<sup>st</sup> July, 2005 and filed on 4<sup>th</sup> July, 2005 by or on behalf of KEC International Ltd, the grounds therein, and the Supporting Affidavit therein of **VANGIPURAM SESHADRI**, the flagrant non-observance of the terms of the order granting leave, and on the grounds of non-disclosure of facts material to the application, and the material misrepresentation it is but proper to invoke the Applicant's last ground, that in the circumstances, it is just and equitable to grant the relief sought.

For all those reasons, the ex parte leave to the Applicant on 9<sup>th</sup> April, 2005 to apply for judicial review orders and all other consequential orders made as prayed for in the Applicant's Chamber Summons dated 4<sup>th</sup> April, 2005 are hereby set aside and discharged. The said Chamber Summons, and the subsequent Notice of Motion based upon the orders obtained in the said Chamber Summons (as herein set aside and discharged) dated 20<sup>th</sup> May, 2005 and filed on 23<sup>rd</sup> May, 2005 is also struck out.

The ex parte Applicant **NIPUN NAGINDAS PATEL**, shall bear all the costs occasioned to and incurred by the Interested Party KEC International Limited.

There shall be orders accordingly.

Dated and delivered at Nairobi this 6<sup>th</sup> day of March, 2007.

M.J. ANYARA EMUKULE

JUDGE.