



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

MISC CIVIL APPLI 800 OF 2007

MOHAMED KORIW NUR.....APPLICANT

Versus

ATTORNEY GENERAL.....1ST RESPONDENT

KENYA ANTI CORRUPTION COMMISSION.....2ND RESPONDENT

CHIEF MAGISTRATE'S COURT MAKADARA.....3RD RESPONDENT

RULING

These are Judicial Review proceedings commenced by the ex parte Applicant, Mohamed Koriow Nur. In the Notice of Motion dated 27th August 2007 he seeks orders of certiorari to quash the entire proceedings in CRC 17/07, an order of certiorari to issue to quash the decision of the 1st Respondent made on 13th March 2007 to charge the ex parte Applicant in CRC 17/07; an order of prohibition to issue barring the 3rd Respondent or any other subordinate court from hearing the CRC 17/07. The Attorney General, the Anti Corruption Commission and Chief Magistrate's Court Makadara are named as the 1st to 3rd Respondent.

On 16th October 2007, Northern Construction Company Limited filed a Notice of Motion seeking to be admitted to these Judicial Review proceedings as a person directly affected on account of pleadings filed by the 2nd Respondent and prays that the Notice of Motion filed by the ex parte Applicant be served on them.

The Application is supported by the Affidavit of Asha Abdullahi, a director in the said Company. Whereas Mr. Kamau Counsel for the ex parte Applicant made submissions in support of this Application, Mr. Bryant and Mr. Murei Counsel for the Respondents opposed the Application.

Asha deponed that the 2nd Respondent by its Affidavit, sworn by Jeremiah Kaluma Buchianga and filed in court on 15th May 2007, adversely mentions the Affected Party and insinuates that the ex parte Applicant who is a director and shareholder of the Company (Affected Party) engaged in corrupt and criminal activities on behalf of and for the benefit of the company. That the said Inspector Buchianga was asked to investigate allegations of an illegal alienation of Public Land to a private developer and that among the documents annexed to his report are letters written on behalf of the company by the ex parte Applicant. That the principal offender is the company and there are civil proceedings pending before the court that relate on accounts of the company and that the alleged entrapment of the Applicant by 2nd Respondent as a result of which he was charged in Makadara court occurred when the Applicant was

acting as an agent of the Affected Party. Counsel urged that the Affected party is an affected party and should be allowed a chance to controvert what is alleged in the Judicial Review Application. Secondly the Affected Party claims to have a genuine interest in the matter, the Applicant being its director and shareholder. Counsel relied on the case of **MEME V REP (2004) 1 KLR 367** where the constitutional court observed that public interest should be given a wider Application in constitutional matters which are of a public nature. In **HYPOOLITO CASSINO DE SOUZA V CHAIRMAN & MEMBERS OF TANGA COUNCIL (1961) EA 377**, it was held that a fair opportunity should be given to the parties to a controversy to correct or contradict any statement prejudicial to their view.

Mr. Kamau Counsel for the ex parte Applicant supported the Motion and the Affected Party's submissions. He submitted that the case involves serious allegations of corruption and any decision that may be made against the Applicant affects the Affected Party and that the issues raised in the constitutional Application which is pending in that Application are of grave importance in Judicial Review and the intended Affected Party should be heard to assist the court in resolving the issues.

Mr. Bryant, counsel for the 1st Respondent filed grounds of opposition to the Notice of Motion dated 16th October 2007 and submitted that the intended Affected Party is not affected by the Judicial Review proceedings in any way. Counsel submitted that the ex parte Applicant is charged with corrupting a public officer. While the intended Affected Party is only concerned with the allegation of illegal acquisition of Racecourse Primary School and that the Affected Party has never been investigated for bribing an investigation officer. That the Affected Party can only be heard in a matter where they are directly affected, that is, if it touched on acquisition of Racecourse Primary School. That there is no agency relationship pleaded as between the ex parte Applicant and the Affected Party and there will not be any prejudice suffered by the Affected Party if the order sought is not granted.

In respect of the Constitutional application, that is pending, Counsel said that it does not affect the Affected Party. In response to the **MEME CASE**, Counsel said that the Constitutional Court was dealing with a Constitutional Application unlike the instant one which is a Judicial Review Application. Counsel added that under Order 53 Rule 6, Civil Procedure Rules, a party who wants to be enjoined to a Judicial Review Application must be opposing the Application but not supporting it and yet that is what the affected party purports to do.

Mr. Murei, Counsel for the 2nd Respondent opposed the Application for joinder of the Affected Party and agreed with the submissions made on behalf of the 1st Respondent. He urged that in the Judicial Review Application, there are no orders sought against the Affected Party as no charge was preferred against the Affected Party and is therefore a busy body in this Application. That the Affected Party has not demonstrated that they are directly affected by the orders sought and that the **MEME CASE** is distinguishable from the instant case because the orders sought in that case were questioning the constitutionality of Kenya Anti-Corruption Commission and the Kenya Anti-Corruption Commission was therefore a directly Affected Party. According to him, this Application is frivolous.

Under Order 53 rule 3 (2) Civil Procedure Rules, the Applicant is required to serve the Notice of Motion on all persons directly affected. The Applicant who is the director and shareholder in the "intended Affected Party (Company)" did not deem the Company to be a person directly affected by the Notice of Motion and did not serve the Motion on them. Since the Affected Party is seeking to be heard in the Notice of Motion they should therefore have moved the court to be enjoined under Order 53 Rule 6 Civil Procedure Rules which states:

"on the hearing of any such motion as aforesaid, any person who desires to be heard in opposition to the motion and appears to the High Court to be a proper person to be heard shall be heard, notwithstanding that he has not been served with the notice or summons, and shall be liable to costs in the discretion of the court if the order should be made."

The Applicant moved the court under Order 53 R 3 (2) and 3 (4) Civil Procedure Rules which are not relevant in the circumstances, but that notwithstanding, the court will consider whether or not the Affected Party should be joined under Rule 6. Who is the proper person to be enjoined to these

proceedings? I believe it would be a person with a direct or genuine interest in the outcome of the Judicial Review proceedings or a person who would be directly affected by the outcome of the Judicial Review proceedings.

It is noteworthy that the proposed Affected Party is not charged before the Criminal Court in Makadara where the Applicant is charged, which charge is impugned in the Judicial Review Application. The charges before the Makadara court only relate to the ex parte Applicant. In the Notice of Motion dated 30th July 2007, the Applicant seeks to quash the proceedings in CRC 17/07, by Order of certiorari, and an order of prohibition to bar the 3rd Respondent from hearing the Criminal Case or any other court or related case. If this court grants these orders, then it means that the Criminal proceedings pending in Makadara court will be done away with as well as the decision of the 1st and 2nd Respondent to charge and prosecute the Applicant. The intended Affected Party has not demonstrated how they would be directly affected by such an order. If the court declines to grant the Judicial Review orders, the Criminal Case in Makadara will proceed to hearing as against the Applicant alone but not the intended Affected Party. The intended Affected Party has not shown how they will be affected by any order flowing from the Judicial Review Application.

The intended Affected Party's case is that they are adversely mentioned in the Affidavit of the Investigating Officer, Jeremiah Buchianga in CRC 17/07 where he depones at paragraph 4 & 6 how he was instructed to investigate LR 209/16441) which had been illegally alienated to a private developer and that he came across a letter signed by M K Nur, a director of Northern Construction Company. Those two paragraphs merely explain how the said Investigating Officer came into contact with the Applicant herein that ultimately ended in the Applicant being charged. At no stage does the Affidavit suggest that the offence which the Applicant is charged with in CRC 17/07 was allegedly committed while the Applicant was acting as an agent of the intended Affected Party. The intended Affected Party is a company which is a legal entity, different from its shareholders or directors- See (**SALMON V SALMON**). The Applicant has been charged in his individual capacity and not while acting as an agent of the intended Affected Party. Again, apart from an allegation that the intended Affected Party is adversely mentioned, the intended Affected Party has not shown any direct interest in the Judicial Review proceedings or Criminal Case pending before the Makadara case. No orders would be made against the intended Affected Party either in the Judicial Review Application or the Criminal case. If there is any interest or effect on the intended Affected Party, it is very remote, not direct.

Lastly Order 53 rule 6 clearly provides that one seeking to be heard should be opposing the Application. It is clear that the intended Affected Party has no intention of opposing the Application but intends to support it. I find there to be no basis for the joinder as the intended Affected Party is not directly affected by the Judicial Review proceedings. I believe the party can only support a Judicial Review Application if enjoined under order 53 Rule 3 (2) Civil Procedure Rules.

Since the orders sought in the Judicial Review Application are unlikely to affect the intended Affected Party in any way, I find that the constitutional Application arising in the Judicial Review proceedings questioning the procedure under Order 53 does not affect them in any way and even if it does touch on matters of public interest, the Applicant who has raised the issues should be the party to deal but not any busy body to come in to assist in arguing of that Application.

In the **MEME CASE**, the Kenya Anti-Corruption Commission whose constitutionality was challenged was a directly affected party and that case is distinguishable from the instant case as the intended Affected Party has not shown any interest in the matter. As observed above, the Judicial Review Application is unlikely to affect the intended Affected Party's interest in any way and I hereby find no merit in the Application and decline to grant the same. The intended Affected Party to meet the costs of the Notice of Motion dated 16th October 2007.

Dated and delivered this 20th day of November 2007.

R.P.V. WENDOH

JUDGE

Read in the Presence of:-

Ms Aulo holding brief for Kamau for the Applicant ex parte

Mr. Atudo for intended Interested Party for the Applicant

Mr. Murei for the 2nd Respondent

Mr. Maina Kirori for the 1st Respondent

Daniel: Court Clerk