



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

Misc Appli 1110 of 2007

ADOPT-A-LIGHT LTD.....APPLICANT

Versus

THE CITY COUNCIL OF NAIROBI.....RESPONDENT

RULING

On 3rd October 2007 the ex parte Applicant, Adopt – A – Light Ltd. filed the Chamber Summons dated the same day seeking leave to commence Judicial Review proceedings against the City Council of Nairobi. The orders sought are as follows:-

- 2) The Applicant be granted leave to apply for an order of certiorari to remove into the High Court and quash the entire resolution passed by the City Council of Nairobi on the 3rd April 2007 affirming and approving the policy on Private Public Partnership between the City Council of Nairobi and Advertising Companies on Advertising and Street Lighting;
- 3) The Applicant be granted leave to apply for an order of certiorari to quash the entire decision of the City Council of Nairobi inviting members of public by advertisement of tender CCN/T/084/CE/2006/2006-7 to express their interest in entering into partnership with the City Council of Nairobi to carry out Street Lighting installation along various roads in the City, erect advertisements on Street Poles in accordance with the terms of a build, operated transfer arrangement;
- 4) The Applicant be granted leave to apply for an order of certiorari to quash the decision of the Respondent made on or about 29th September 2007 for the disconnection of power supply to the Lighting Poles managed by the Applicant and the City of Nairobi and the removal of the Light Poles mentioned by the Applicant along Pumwani Road.
- 5) The Applicant be granted leave to apply for an order of prohibition to restrain the City Council of Nairobi from authorizing by resolution any person to carry out, displace or erect advertisement on any of the Street Lighting Poles within the City of Nairobi in the areas allocated to the Applicant pursuant to contracts entered into with the City Council of Nairobi dated 28th March 2002 and 19th November 2002;
- 6) The Applicant be granted leave to apply for an order of certiorari to quash all enforcement Notices issued under the Physical Planning Act, Cap 286 to any of the Applicant's customers including but not limited to Celtel Kenya Ltd., Barclays Bank Ltd., General Motors Ltd., Toyota East Africa Ltd., Cable Television Network Ltd., Coca Cola Ltd., Access Kenya Ltd., Nakumatt Holdings Ltd., Pirelli Tyre (Europe) SA, National Bank of Kenya

Motorola and CFC Life.

- 7) The Applicant be granted leave to apply for an order of prohibition to prohibit City Council of Nairobi from issuing further enforcement Notices to the Applicant or any of its customers;
- 8) The Applicant be granted leave to apply for an order of prohibition to prohibit the City Council of Nairobi through its officers, servants, agents, from carrying out any action adverse to the Applicants rights, and intents arising under contracts entered with the City Council of Nairobi including but not limited to arresting the Applicants employees;
- 9) That the grant of leave do operate as stay of the decision of the Respondent made on 24th September 2007 for the disconnection of power supply to the Lighting Poles managed by the Applicant and the City Council of Nairobi and the removal of light Poles along Pumwani Road and the status quo before such submission be reverted to;
- 10) That the grant of leave do operate as stay of the proceedings and award of tender No. CCN/T/084/CE/2006/2006-2007;
- 11) of leave do operate as stay of the enforcement Notices issued to the Applicants under the Physical Planning Act;
- 12) That grant of leave do operate as stay of the implementation of the Resolution passed by the City Council of Nairobi on 3rd April 2007 affirming and approving the policy on Private Public Partnership between the City Council of Nairobi and Advertising Companies on Advertising and Street Lighting;
- 13) Costs of the Application be provided for.

The Chamber Summons is supported by an Affidavit sworn by Esther Muthoni Passaris, the Managing Director of the Applicant, dated several annexures thereto and the Statutory Statement.

When the Applicant came to court under Certificate of Urgency the court directed that the Chamber summons which is normally heard *ex parte*, be served for hearing *inter partes*. The Respondents who were represented by Mr. Adan, filed 10 grounds of opposition on 5th October 2007.

A brief background of this case is that the Applicant and Respondent entered into a contract on 28th March 2002 which gave the applicant sole and exclusive rights to advertise on the Street Poles within the City of Nairobi and the contract was to be automatically renewed if the Applicant complied with all the terms of the contract and a Supplemental agreement was entered into on 19th November 2002 ('EMP 1'). That the Applicant has complied with all the terms of the contract and its performance recognized by the Respondent and the Head of State. However, in total disregard of the contract, the Respondent on 3rd April 2007 affirmed and approved a policy on Private Public Partnership between the Nairobi City Council and Advertising companies on advertising on Street Light Poles. The Applicant's complaint is that the Respondent's Action breached the rule of natural justice in that the Applicant was not consulted before the said approval and that the policy is *ultra vires*. That in any case adoption of the policy was not part of the agenda in the notice inviting parties to the meeting (Ex EMP 15A) and that offends R 76 (6) of the Local Government Act which provides that no meeting should conduct any other business except that specified in the Notice. That what the Applicants have done is unprocedural.

It is also the Applicant's submission that they have invested heavily in the advertising and inviting other contractors to tender for advertising is oppressive on the Applicant who needs some monopoly on the businesses in order to recoup some of its investment. That on 24th September 2007 the Respondent decided to disconnect power supply to the Advertising Poles. This is in disobedience of a court order in Milimani HCCC 637/06 where the court ordered the Respondent not to interfere with the advertising. The Applicant contends that that is done in bad faith and is oppressive to the Applicants and that it is also intended to circumvent the court orders and the arbitration proceedings that are proceeding.

Also impugned is the decision of the Respondents to serve enforcement notices on the Applicant's

customers under the Physical Planning Act Cap 286 Laws of Kenya asking the customers to pay for City Council Licences for advertising. That this is a collateral attack intended to drive the Applicant out of business. That an order of stay should issue because the Applicant will suffer irreparably and that besides there are collateral benefits like reduction of insecurity, road carnage which would disappear and that if the lights are switched off, the Applicants business will come to a stand still.

In opposing the Chamber Summons Mr. Adan said that the orders sought cannot be granted for the various reasons contained in his grounds. He urged that the Applicant is seeking to stop a tender process but has come to the wrong forum. That the Applicant should have approached the Public procurement Tribunal which is the 1st instance forum than seeking such orders.

As regards the prayer seeking to prohibit enforcement notices, counsel argued that the notices are issued to persons who are not parties to these proceedings. That enforcement notices are issued to developers pursuant to S. 30 of the Physical Planning Act if they carry out any development without the permission of the Council and a display of an Advertisement constitutes a development under S. 3 (d) of the said Act. That the Applicant cannot restrain the Respondent from carrying out its mandate under the Physical Planning Act and that in any event there is a Liaison Committee to which an aggrieved party can appeal.

Mr. Adan also urged that there exists H Misc Application 725/06 before this court where the stakeholder have challenged the Applicants monopolistic engagement with the Respondent in contracts pertaining to advertising. Another case is HCC 637/06 (Milimani) where orders similar to the present have been sought and that the filing of this Judicial Review application amounts to duplicity and should not be allowed as it amounts to an abuse of court process.

It was also Mr. Adan's submission that the contract of 28th March 2002 is illegal and was procured contrary to S. 143 (1) & 4 (b) of the Local Government Act, Cap 265 Laws of Kenya which subjects such contracts of the Council to public procurement tender process. That the contract is a crime under the Anti-corruption and Economic Crimes Act, 2003, Section 45 which makes it an offence for one to acquire public property or public service or benefit fraudulently because the Applicants were exempted from any payment or payment of taxes. Council referred the court to paragraph 4.2 of the contract of 28th March 2002 where the Applicant was exempted from paying the Respondent for any advertisements and clause 5.2.3 which provides that it is the operator to decide on how much to pay for space in different locations of Nairobi. Mr. Adan argued that if the court grants the orders, it would be allowing a waiver of taxes. That the court should reach the same decision as in **R v MUNICIPAL COUNCIL OF MOMBASA ex parte UNIKEN MARKETING SERVICES LTD** where the court declared a contract similar to the present one to be illegal. Counsel also relied on **CHESHIRE, FIFOOT & FURMSTON'S LAW OF CONTRACT 13TH ED** which states at page 387 that the court should veto the enforcement of a contract once it knows it to be illegal and no rights accrue to either party of the contract. Also cited is the **PRINCIPLES OF LOCAL GOVERNMENT LAW 4th ED** by Cross which states that any local authority that enters into a contract in regard to another which is ultra vires the authority, renders it to be null and void and neither party can sue on it.

Mr. Adan also urged that there is no party known as Nairobi City Council as described in the contract of 28th March 2002 and relied on the case of **FOXTONE ENTERPRISES V NAIROBI CITY COUNCIL HC 686/02** in which the Defendants were found to be non suited due to misdescription but asked to amend it and the court did allow an amendment. It is unlike the case of **NAIROBI CITY COUNCIL V CRIS EVARARD HCC 851/02**, where the parties did not seek amendment and the court dismissed the suit for misdescription. In reply Mr. Ongoya said that the Respondent is properly described in the pleadings and in any case the Respondent does describe itself as 'Nairobi City Council' at times and referred the court to the minutes of the council titled as such, dated February and April 2002.

Mr. Ongoya also submitted that all the other decisions pending before the other courts involving the Applicant and Respondent are not similar to the present one which is a Judicial Review Application and does not deal with the merits of the decision but the legality or otherwise of the decisions made by the Respondent.

At this stage of the proceedings, all that the Applicant needs to establish is that prima facie, there is evidence of an arguable case. In the case of **NJUGUNA V MINISTER FOR AGRICULTURE, (2000), EA 184**, the Court of Appeal said;

“The test as to whether leave should be granted to an Applicant for Judicial Review is whether, without examining the matter in depth, there is an arguable case that the reliefs might be granted on the hearing of the substantive Application”. So without delving into the depths of this matter I will consider whether or not the Applicant has demonstrated that they have an arguable case.

Mr. Adan took up the issue of misdescription of the Respondent in the contract of 28th March 2002, the genesis of these proceedings. If this court were to consider and determine whether or not the contract entered into between the parties was valid or not due to misdescription, it would be delving into the merits of that contract which is not the purview of this court. This is a Judicial Review Application which is concerned not with the merits of any decision but review of the process by which the decision was arrived at. As pleaded in the grounds in the Statutory Statement, this court is being invited to consider whether the impugned decisions which were made by Respondent are illegal, were ultra vires the powers of the Respondent and amount to an abuse of power by the Respondent. In any event I would agree with the decision of Justice Ochieng that the Respondents would be estopped from holding themselves out as Nairobi City Council and when they enter into agreements using that name, they purport to deny it to their convenience. The minutes of the Respondent of February to April 2002 confirm that the Respondent sometimes holds itself out as Nairobi City Council contrary to S. 2 of Local Government Act. It would be blowing hot and cold to deny that fact when it does not favour them. In any event, the Respondent is properly described in these proceedings and there is no question of misdescription.

At prayers 6 and 7 of the Chamber Summons, the Applicant seeks orders of certiorari to quash enforcement Notices issued under the Physical Planning Act and an order of prohibition to stop the Respondent from issuing any other such orders against the Applicant’s customers. The enforcement Notices exhibited as Ex EMP 14 are addressed to Pirelli, Toyota Kenya, Access Kenya Group, National Bank of Kenya Group Barclays Bank, Nakumatt Holdings and others. None of them is a party to these proceedings. The Applicant claims that they have an interest in the notices because the Respondent gave the Applicant authority to look for clients. Under S.30 of the Physical Planning Act, an enforcement Notice may be issued on a developer who fails to pay for a licence and the one who puts up an advertisement is said to be a developer under S. 3 (d) of the Physical Planning Act.

The developers are different parties from the Applicant and they are not parties in this Chamber summons and it is upto the developers to show that they have complied with the provisions of the Physical Planning Act. The Applicant has not demonstrated that they have done so. It has not been demonstrated that the Respondents have acted illegally or outside their mandate in issuing the enforcement notices. Besides the said clients have a remedy under the Act, to appeal to the Liaison Committee or appeal to the High Court. The Notices were issued in May 2007 and this Application was only filed on 3rd October 2007 and there is no reason why an appeal has not been preferred to the Liaison Committee or appeal to High Court for all that period. It is not sufficient to allege that the Notices did not state the time within which to appeal when such a long period of inaction by the developers has passed by. The clients or developers are not parties to this Chamber Summons Application and I would agree with my brother Nyamu J. in his ruling in the recent decision of **HON. PETER ANYANG NY’ONG’O & OTHERS V THE MINISTER OF FINANCE HMISC APPLICATION 1078/07** where he said that leave and stay should not be given where proper parties are not before the court. I will find that the proper parties to seek those prayers are not before the court and no arguable case has been disclosed by the Applicant for the grant of leave in respect of prayers 6 and 7.

No doubt there are several cases pending in the courts and all of them revolve around the contracts entered into between the Applicant and the Respondents. The said contract is highly contested by the Respondent and stakeholders in the advertising industry. One of the cases arising out of the contract of 28th March 2002 is HCC 637/06 in Milimani Commercial Court. In that case the Applicant seeks orders of injunction against the Respondent restraining them from removing advertising media installed by the Applicant, or removing them and returning all media that had been removed. All this is towards

enforcement of the contract of 28th March 2002. In that case, the Respondents pleaded that the contract of 28th March 2002 is illegal and not enforceable. The matter is still pending awaiting the award in an arbitration in which the Applicant alleges breach of the contract of 28th March 2002. There is another matter seeking Judicial Review orders in H MISC APPLICATION 725/06 filed by a stake holder Magnagte Ventures, against the Respondent and Applicant. They seek the review of the contracts entered into between the Applicant and Respondent on grounds of illegality and having been entered into unprocedurally.

In **REP V THE MUNICIPAL COUNCIL OF MOMBASA ex parte UNIKEN MARKETING SERVICES LTD MISC APPLICATION 1015**, the Applicant was cited as one of the Interested Parties. In that matter the Applicant sought Judicial Review to quash the decision of the Mombasa Municipal Council made on 19th June 2006 and 26th June 2006 which awarded a contract by way of a resolution of the Council of 19th June 2006 which resulted in signing of a contract on 26th June 2006 between the Council and the Applicant herein. It was challenged as being illegal and contrary to S.143 of Local Government Act, Exchequer and Audit Act and contrary to Public interest and policy. The court found the contract to be ultra vires the Local Government Act and Exchequer & Audit Regulations 2001 and quashed the contract. The contract challenged in the case considered above is of the same nature and involves the Applicant and the grounds of challenge are the same.

These contracts of 28th March 2002 and 19th November 2002 have been the centre of great contention. The Applicant admits having been given exclusive rights to advertise on Street Poles in Nairobi and the contract would be automatically renewed after 5 years if the Applicant complied with all the terms. Further to the above, paragraph 4.2 of the contract exempts the Applicant from paying for Street Advertisements while paragraph 5.2.3 stipulates that it is left in the discretion of the Applicant to decide what to pay for advertising space from location to location. It is also contended that the contract is contested because it was not procured by tender process as required by S.143 of Local Government Act. In **Principles of Local Government Law 4th Ed by CA CR Chapter 10 paragraph 10-04** it is said,

“if an authority enters into a contract in regard to some matter which is ultra vires the authority then the contract is null and void and neither party can sue on it. It is as if no contract has been made.”

Again Cheshire, Fifoot & Furmstons Law of contract 13th Edition states at page 384 **“There is a clear infringement of public policy if it is apparent either directly from the terms of the contract or indirectly from other circumstances, that the design of one or both of the parties is to defraud the revenue, whether national or local”** Again at para 3, page 6, it is stated;

“The general principle founded on public policy, is that any transaction that is tainted by illegality in which both parties are equally involved is beyond the pale of the law. No person can claim any right or remedy whatsoever under an illegal transaction in which he has participated.”

The Respondent’s contention is that the contract that is relied upon to bring these Judicial Review proceedings is an illegality having contravened the Physical Planning Act, the Exchequer Act, the Local Government Act and Law of Contract Act. The legality or otherwise of that contract cannot be determined via a Judicial Review Application which is a public law remedy. It would need determination in a Civil Court where evidence can be adduced by both parties and that court can make a final determination. If the court were to grant the orders sought herein on a contract that is highly contested by the other parties, it would be missing to deal with the real issue before the court and rubber stamping what should really be looked into by the Civil Court or the arbitrator. Filing of one Judicial Review Application after another on this same issue in my view, would be causing unnecessary confusion and delay in resolving the real issues surrounding the controversial contracts and the court would decline to grant leave to the Applicants for the above reasons. Besides enforcement of a contract is a purely private law remedy, not the concern of Judicial Review.

The Applicants are also challenging the resolution by the Respondent, made on 3rd April 2007 to invite

interested parties to tender for advertising on Street Lighting Poles. The Applicant contends that the policy is in breach of the contract of 28th March 2002 giving the Applicant exclusive Rights in that business. Already, the existing contract has been questioned for not complying with S. 143 of the Local Government Act requiring such contracts to be by Public Tender. S. 143 Rule 4 (b) reads “**a local authority shall not consider any tender nor enter into any contract to which this subsection applies until full and similar particulars of the proposed contract have been supplied to every person applying to the local authority therefore within 14 days of the publication of the Notice in accordance with paragraph (9) nor until the expiration of the said period of 14 days, and shall on such expiration consider all tenders which have then been submitted to it.**”

The Respondent has a statutory mandate to enter into contracts of the amount specified in that Section only after a tender process. The contracts under challenge involve millions of monies and should be subject to the tender process. The contract relied upon in bringing this Application, as earlier observed is under challenge for being an illegality for failing to comply with the above quoted Section. For this court to stop the Respondent from carrying out its statutory mandate would in effect be enforcing and ratifying that contract by guise of Judicial Review. I must again stress that the contested contract must be resolved first in a civil court or by arbitration instead of the parties filing a multiplicity of Judicial Review Applications over the same issues.

There was also a complaint about the decision of the Respondent made on 24th September 2007 to disconnect power to the Lighting of the Poles. That also boils down to the contract of 28th March 2002 – its validity and enforceability. As stated above that issue should be resolved in a civil suit and this court would decline to grant leave for the above reason.

For all the reasons that I have considered above, I decline to grant leave to bring Judicial Review proceedings and order the parties to pursue those matters already pending before the courts for determination of the issues.

Costs to the Respondent.

Dated and delivered this 2nd day of November 2007.

R.P.V. WENDOH

JUDGE

Read in the presence of

Daniel: Court Clerk

Mr. Ongoya for Applicant

Mr. Havi holding brief for Mr. Adan for Respondent