REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 1406 OF 2004

IN THE MATTER OF AN APPLICATION BY MONIER 2000 LIMITED, MAGNATE VENTURES LIMITED, SPELLMAN & WALKER LIMITED, ADSITE COMPANY LIMITED, EAGLE OUTDOOR ADVERTISING LIMITED, CLEAR CHANNEL INDEPENDENT AFRICA LIMITED, ADNET MEDIA LIMITED AND ALLIANCE MEDIA KENYA LIMITED FOR ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA, THE LOCAL GOVERNMENT ACT, THE EXCHEQUER AND AUDIT ACT AND THE EXCHEQUER AND AUDIT (PROCUREMENT) REGULATIONS 2001 AND THE RESTRICTIVE TRADE PRACTICES, MONOPOLIES AND PRICE CONTROL ACT

AND

IN THE MATTER OF MONIER 2000 LIMITED, MAGNATE VENTURES LIMITED, SPELLMAN & WALKER LIMITED, ADSITE COMPANY LIMITED, EAGE OUTDOOR ADVERTISING LIMITED, CLEAR CHANNEL INDEPENDENT AFRICA LIMITED, ADNET MEDIAT LIMITED AND ALLIANCE MEDIA KENYA LIMITED

BETWEEN

REPUBLIC ……………………………….....................…………….. APPLICANT

AND

THE CITY COUNCIL OF NAIROBI ……………………….…….. 1ST RESPONDENT

THE MINISTER FOR LOCAL GOVERNMENT …………….. 2ND RESPONDENT

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

EXPARTE –MONIER 2000 LIMITED, MAGNATE VENTURES LIMITED,

SPELLMAN & WALKER LIMITED, ADSITE COMPANY LIMITED,

EAGLE OUTDOOR ADVERTISING LIMITED, CLEAR CHANNEL INDEPENDENT AFRICA LIMITED, ADNET MEDIA LIMITED AND ALLIANCE MEDIA KENYA LIMITED

JUDGMENT

This is a suit for Judicial Review founded predominantly under Order LIII of the Civil Procedure Rules. The substantive Notice of Motion envisaged in these matters was, for complete record, stated to be brought under Sections 60, 65 and 82 of the Constitution of our Republic, Sections 3 and 3A of the Civil Procedure Act (Cap 21), Section 8(2) of the Law Reform Act (Cap 26), Order LIII Rules 1, 2, 3, 4 and 7 of the Civil Procedure Rules, Sections 4 – 13 of the Restrictive Trade Practices, Monopolies and Price Control Act (Cap 504), Sections 143, 148, 160 and 160 of the Local Government Act (Cap 265), Section 36 of the Exchequer and Audit Act (Cap 412), Regulations 13, 14, 28, 29 and 30 of the Exchequer and Audit (Procurement) Regulations 2001, the inherent jurisdiction of the Court and all other enabling provisions of the law.

To understand the dispute in the case, we will set out the facts – the main points of which are not seriously contested.

As is standard in cases of this nature, the proceedings were preceded by a Chamber Summons application for leave. In the application for leave there were only five Applicants, namely Monier 2000 Ltd, Magnate Ventures Ltd, Spellman & Walker Ltd, Adsite Company Ltd and Eagle Outdoor Advertising Ltd. We will refer to these parties as “the Initial Applicants”. In the caption of that application, the Initial Applicants stated that they were suing on their own and on behalf of and for the benefit of all interested businessmen and rate payers in the city of Nairobi. As the prayers and orders which were granted on the application are important to the decision of the case, we find it necessary to reproduce the prayers made in the application for leave. They were as follows:

> ***“1. This Honourable Court do excuse the failure to file and serve notice of the institution of this application upon the Registrar and/or dispense with service of the same prior to the hearing of this Chamber Summons in view of the urgency of the matter.***
>
> ***2. The Applicants be granted leave to commence and prosecute this application on their own and on behalf of or for the benefit of all interested businessmen and ratepayers in the City of Nairobi.***
>
> ***3. Notice of institution of this application to any such persons on whose behalf or benefit the application is instituted and as may be interested in joining in the same be served upon the said persons by way of substituted service by advertisement in the Local Dailies or as the Court may direct.***
>
> ***4. Any such persons on whose behalf or for whose benefit this application has been instituted be at liberty to apply to be a party to this same within such period of time as this Honourable Court may deem fit.***
>
> ***5. The Applicants be granted leave to apply for an order of certiorari to remove the decision of the Respondents made on 7th October, 2004 to enter into a purported partnership and award the Interested Party a monopoly for life over the entire advertising industry in the City of Nairobi, to beautify the City of Nairobi, to advertise exclusively on street lighting poles and elsewhere on the roads, streets and avenues and road reserves in the City of Nairobi, regulate and control all advertisers and to collect rates/fees payable on all manner of advertising from the said advertisers and the entire public and appropriate 80% of such***

revenue to its own use and annually review such rates/fees and increase the same, for the purposes of it being quashed by the Honourable Court.

6. The Applicants be granted leave to apply for an order of mandamus compelling the Respondents to constitute a proper tender committee under the local Government Act and the Exchequer and Audit Act to reevaluate the award to the Interested Party of a monopoly for life over the entire advertising industry in the City of Nairobi, to beautify the City of ***www.kenyalaw.org Republic v City Council of Nairobi & another ex parte Monier 200 Ltd & 7 others [2005] eKLR 4*** ***Nairobi, to advertise exclusively on street lighting poles and elsewhere on the roads, streets and avenues and road reserves in the City of Nairobi, regulate and control all advertisers and to collect rates/fees from the said advertisers and the entire public and appropriate 80% of such rates/fees and increase the same, and in that regard, compel the Respondents to invite tenders and allow the Applicants and any other interested persons to bid for the street lighting and beautification of the City of Nairobi and/or any other services related or otherwise purportedly now awarded to the Interested Party in a single contract and/or purported partnership.***

7. The Applicants be granted leave to apply for an order of prohibition against the Respondents stopping the said Respondents from lumping up in a single contract and/or purported partnership or in any manner whatsoever the lighting up of the City streets and beautification of the City of Nairobi and advertising in a manner injurious to the Applicants and the advertising industry in general.

8. The Applicants be granted leave to apply for an order of prohibition to stop or prohibit the Respondents from implementing the purported partnership and/or contract with the Interested Party wherein the said Interested Party has been awarded a monopoly for life over the entire advertising industry in the City of Nairobi to beautify the City of Nairobi, to advertise exclusively on street lighting poles and elsewhere on the roads, streets and avenues and road reserves in the City of Nairobi, regulate and control all advertisers and to collect rates/fees payable on all manner of advertising from the said advertisers and the entire public and appropriate 80% of such revenue to its own use and annually review such rates/fees and increase the same.

9. The grant of leave do operate as a stay of the implementation of the purported partnership and/or contract between the 1st Respondent and the Interested Party in which the latter has been awarded a monopoly for life over the entire advertising industry in the City of Nairobi, to beautify the City of Nairobi, to advertise exclusively on street lighting poles and elsewhere on the roads, streets and avenues and road reserves in the City of Nairobi, regulate and control all advertisers and to collect rates/fees payable on all manner of advertising from the said advertisers and the entire public and appropriate 80% of such revenue to its own use and annually review such rates/fees and increase the same.

10. The costs of this application be provided for."

That application was considered by our learned Brother the Honourable Mr Justice Ibrahim on 21st October, 2004. In disposing of the application, Judge Ibrahim generally granted the leave necessary for judicial review and also ordered that the institution of the application be notified to any persons interested in joining to it through the public media.

In the event, some new parties filed Notices to Appear in support of the application so that by the time the Substantive Notice of Motion was presented, there were now eight parties who were described as the Applicants in contrast to the original five.

Now, going to the real matter that generated the suit, our recapitulation is as follows. This is generally collected from the statutory statement dated 19th October, 2004, the Verifying Affidavits of Stanley Kinyanjui, Ramesh Chandra Shah, Garikipati Anand, Medhane Kidane and Peter Odoyo all sworn on

19th October, 2004 as tempered by the Replying Affidavits of Esther Muthoni Passaris sworn on 14th January, 2005, that of Francis Mbae Ndereba sworn on 26th January, 2005 and Zachary Ogongo sworn on the 26th January, 2005.

The Applicants are all limited liability companies. They described themselves as companies engaged in the trade and business of advertising in the city of Nairobi and elsewhere in our Republic. The 1st Respondent is a local authority established under the Local Government Act (Cap 265). The 2nd Respondent is a Minister of Government responsible for Local Government. The Interested Party is also a limited liability company.

On 28th March, 2002, the 1st Respondent entered into what the Applicants described as a **"contract"** with the Interested Party. The Respondents on their part say that the dealing in issue between the 1st Respondent and the Interested Party involved the formation of a **"partnership**" and was not a contract per se. The Interested Party referred to the transaction as an **"Agreement"**. Whatever the tag, the parties to the transaction labeled it as "Project Agreement" and "Memorandum of Agreement" and we believe, that looking at it, it is actually a contract by any other name. That point will become clear immediately as we now propose to set out the essence of the transaction.

In the Agreement, the 1st Respondent granted the Interested Party "the sole and exclusive right to use the street light poles on approved streets" for the purpose set out in the Agreement on terms and conditions. The Agreement was to commence on 1st April, 2002 for a period of 5 years and was to be renewed automatically unless the Interested Party was guilty of what was described as "uncurred breach" i.e. when the Interested Party had breached an obligation of the Agreement and had not cured it to the satisfaction of the 1st Respondent after being given a written notice by the 1st Respondent to do so.

What was the consideration for the deal? The Interested Party was to finance the initial "project set up costs" and the repairs and maintenance – by provision of all materials – for "the adopted street lights" (this was the name of the concept). In the same vein, the 1st Respondent was obliged to provide labour.

There was a clause on exclusivity. Under it, the 1st Respondent was to desist from competing with the Interested Party in advertising or permitting others to place any form of advertisement on the designated street poles. There were other terms and conditions under that clause and they are so important to us that we find it necessary to set them out here:

> ***(a) The 1st Respondent was not allowed to renew any existing advertisement contract currently on the street poles on expiry of the existing contract and during the term of the Agreement***
>
> ***(b) The 1st Respondent was not to allow other structures on which advertising is displayed to be erected so close to street poles that the effectiveness of the message displayed in the advertisements on the street poles is adversely affected.***
>
> ***(c) From the commencement of the Agreement, the 1st Defendant was to stop authorizing "the placing of any posters, placards, signs, announcements, stickers or advertising, marketing or promotion of any form on any street poles (apart from advertising its services)". If there was to be any authorization all requests for the same had to be referred to the Interested Party.***

The Agreement also gave authority to the Interested Party "to remove and destroy … unauthorized posters, placards, signs, announcements, stickers or advertising, marketing or promotion of any form, graffiti and other clutter from the designated street poles". Authorization in this regard referred to authorization under the Agreement.

Those were, in brief, some of the terms of the Agreement. In our view, they contain all the ingredients of a contract and we do not hesitate to so hold. (See generally **Halsburys Laws of England** Volume 28 (3rd Edition) Paragraph 926). We will now go to the other aspects of the case.

The Initial Applicants and others were aggrieved by the deal we have set out above. They considered it oppressive, monopolistic and in breach of a certain "agreement and or mutual understanding". So they moved the Commercial Division of this Court at Milimani through their association known as Outdoor Advertising Association of Kenya (hereinafter referred to as "the Association") vide Civil Case No. 131 of 2003 seeking in the main to have that Agreement and another which is not relevant to this suit nullified. That suit was still pending when we heard this one.

Before the suit in the Commercial Court was instituted, the Association appears to have raised the issue of the Agreement between the 1st Respondent and the Interested Party with the 1st Respondent. In one response dated 20th February, 2003, the 1st Respondent denied that it had created a monopoly in favour of the Interested Party saying that "the Project was limited to (certain specified roads) and other roads were open to other players". On why there was no tender for the Project, the 1st Respondent stated that there was no tendering for the same since "it was not a contract but a partnership".

The cropper of all the foregoing was that on 7th October, 2004 the 1st Respondent through a full special meeting of its Council passed a Resolution to enter into a Partnership with the Interested Party which would appear to be substantially along the lines of the Agreement we have referred to with some changes which we do not find necessary to repeat here. The Applicants allege that that was done with the consent of the 2nd Respondent but we have not been shown that that was so. In fact, Mr Mungai who made the substantive submissions on behalf of the majority of the Applicants conceded as much before us. Before we go further, we must find here and now that the 2nd Respondent has not approved the Resolution in question. It is therefore the Resolution of 7th October, 2004 which is the foundation of this suit. The Applicants are aggrieved by the Resolution on numerous grounds set out in the statutory statement dated 19th October, 2004 which was filed on 21st October, 2004 pursuant to the provisions of Order LIII Rule 1 (2) of the Civil Procedure Rules. As those grounds define the Applicant's grievances, we find it necessary to reproduce them verbatim. They were set out thus:

> ***"1. On or about 28th March, 2002 the 1st Respondent with the approval and/or consent of the 2nd Respondent entered into a contract with the Interested Party wherein the 1st Respondent purported to grant to the Interested Party an indefinite and sole exclusive right and/or monopoly to use street light poles in the City of Nairobi for the purposes of advertising thereon to the exclusion of the Applicants and other interested players in the industry. The said contract is oppressive, monopolistic and illegal for the following reasons:-***
>
> > ***(a) The contract gave the Interested Party exclusive advertising rights on street poles in the City of Nairobi for life.***
> >
> > ***(b) The contract exempted the Interested Party from paying advertisement rates/fees and charges.***
> >
> > ***(c) The contract denied the Applicants the right to place any form of advertisements on the street poles in the City of Nairobi.***
> >
> > ***(d) The contract obliged the 1st Respondent not to renew any other existing contracts with regard to any advertising medium on the street poles in the City of Nairobi on expiry of the said existing contracts and during the term of the said contract, which is for life.***
> >
> > ***(e) The contract obliged the 1st Respondent not to allow other structures on which advertisements are displayed to be maintained so close to street poles that the effectiveness of the messages displayed on the Interested Party's advertisements on the street poles would be adversely affected.***
> >
> > ***(f) The contract obliged the 1st Respondent not to authorize the placing of any posters, placards, signs, announcements, stickers or advertising, marketing or***

promotion on any form on any street poles by the Applicants.

(g) The contract obliged the 1st Respondent to remove and to destroy the Applicants posters, placards, signs, announcements, stickers or advertising, marketing or promotion of any form.

(h) The contract obliged the 1st Respondent to refer all requests for authorization to undertake advertising on street lighting poles to the Interested Party.

2. The contract contravened express and mandatory provisions of the Local Government Act Cap 265, was contrary to public policy and welfare for the following reasons:-

(a) No tenders were ever invited from the Applicants and the public to bid for the services procured.

(b) No monetary consideration was given to the 1st Respondent revenue hence denying the rate paying residents of Nairobi the benefit they would otherwise have derived from such revenue.

(c) The contract effectively denied the Applicant and the rate paying residents of Nairobi a chance of competing fairly in the trade of advertising.

(d) The contract unreasonably prevented or hindered fair business competition in a free market.

(e) The contract excluded the Applicant and other willing and able members of the public from providing street lighting and advertising services to the public.

(f) The 1st Respondent and the Interested Party have pursuant to the contract proceeded to construct advertisement billboards on road reserves, contrary to City Council policy and By-laws, and contrary to the Ministry Roads and Public Works and Housing Regulations.

(g) The contract granted waivers of license fees to the Interested Party in perpetuity.

3. The contract has been challenged by the Applicants through their society and is the subject matter of Milimani HCC No. 131 of 2003, Outdoor Advertising Association of Kenya vs The City Council of Nairobi, Adopt -A- Light Limited and another.

4. The 1st Respondent and the Interest Party have used the contract to frustrate and intimidate the Applicants with a view to driving them out of the advertising industry.

5. On 7th October, 2004, the 1st Respondent with the approval and/or consent of the 2nd Respondent entered into a purported partnership with and awarded the Interested Party a monopoly for life over the entire advertising industry in the City of Nairobi, to beautify the City of Nairobi, to advertise exclusively on street lighting poles and elsewhere on the roads, street and avenues and road reserves in the City of Nairobi, regulate and control all advertisers and to collect rates/fees payable on all matter of advertising from the said advertisers and the entire public and appropriate 80% of such revenue to its own use and annually review such rates/fees and increase the same.

6. The award of the monopoly and entry into the purported partnership was undertaken in cahoots between the 1st Respondent and the Interested Party to further the illegal contract dated 28th March, 2002 and with the intention to destroy the substrum of the pending court case on the same and to defeat the intended purpose therefore, punish and frustrate the Applicants for taking the 1st Respondent and the Interested Party to Court over the

contract.

7. The award of the contract dated 28th March, 2002 by the 1st Respondent to the Interested Party was done in breach of mandatory provisions of the Section 143 of the Local Government Act and Section 36 of the Exchequer and Audit Act requiring the invitation of tenders and competitive bidding for any goods and services required by the 1st Respondent. 8. The award of the monopoly to the Interested Party over the outdoor advertising industry in the City of Nairobi, to beautify the City of Nairobi, to advertise exclusively on street lighting poles and elsewhere on the roads, streets and avenues and road reserves in the City of Nairobi was done in breach of mandatory provisions of the Section 143 of the Local Government Act and Section 36 of the Exchequer and Audit Act requiring the invitation of tenders and competitive bidding for any goods and services procured by the 1st Respondent hence denying the Applicants the opportunity to participate in the bidding and/or challenge the manner in which the monopoly was awarded, through the Public Procurement Appeals Board.

9. The entry into the purported partnership and the award of the monopoly to the Interested Party over the entire advertising industry in the City of Nairobi, to beautify the City of Nairobi, to advertise exclusively on street lighting poles and elsewhere on the roads, streets and avenues and road reserves in the City of Nairobi did not take account of or follow the statutory conditions and basis for pre-qualification for public procurement set out in Section 36 of the Exchequer and Audit Act and Regulations 12-30 made under the Act, requiring the invitation of tenders and competitive bidding for any goods and services procured by a public entity.

10. The entry into the purported partnership and the award of the monopoly to the Interested Party over the entire advertising in the City of Nairobi, to beautify the City of Nairobi, to advertise exclusively on street lighting poles and elsewhere on the roads, streets and avenues and road reserves in the City of Nairobi did not take account of or follow the statutory conditions and basis for pre-qualification for public procurement set out in Regulation 13 (1) of the Exchequer and Audit (Public Procurement) Regulation 2001 under Section 5A of The Exchequer and Audit Act requiring that all intending applicants must be possessed of necessary professional and technical qualifications and competence, financial recourses, equipment and other physical facilities, managerial capacity, experience in the procurement object, reputation and the personnel on the contract.

11. The entry into the purported partnership and the award of the monopoly to the Interested Party over the entire advertising industry in the City of Nairobi, to beautify the City of Nairobi, to advertise exclusively on street lighting poles and elsewhere on the roads, streets and avenues and road reserves in the City of Nairobi did not take account of or follow the statutory conditions and basis for pre-qualification for public procurement set out in Regulation 13 (1) of the Exchequer and Audit (Public Procurement) Regulation 2001 under Section 5A of The Exchequer and Audit Act requiring that all intending applicants should not be insolvent, in receivership, bankrupt or being wound up, their business activities have not been suspended and they are not subject to legal proceedings for any of the foregoing.

12. The 1st Respondent awarded the Interested Party the monopoly and entered into the purported partnership with the said Interested Party to beautify the City of Nairobi, to advertise exclusively on street lighting poles and elsewhere on the roads, streets and avenues and road reserves in the City of Nairobi, to regulate and control all advertisers and to collect rates/fees payable on all manner of advertising from the said advertisers and the entire public and appropriate 80% of such revenue to its own use and annually review such rates/fees and increase the same whereas the Interested Party would not have been legible to tender for such contract or enter into any such partnership with the 1st Respondent under the provisions of Section 143 of the Local Government Act and in terms of

Regulation 13 (1) of the Exchequer and Audit (Public Procurement) Regulation 2001 under Section 5A of The Exchequer and Audit Act due to its adverse and poor reputation in outdoor advertising, the provision or street lighting and beautification services as a result of its failure to complete and perform the contract awarded to it on 28th March, 2002 and in view of the fact that the said contract has been challenged in court.

13. The Respondents resorted to a single sourcing system in awarding the Interested Party the monopoly and entering into the purported partnership and/or contract with it in a mysterious departure from the government's firm commitment to fight corruption by ensuring that public procurement is done only through public tendering and competitive bidding.

14. The Interested Party does not have the necessary professional and technical qualifications and competence, financial resources, equipment and other physical facilities, managerial capacity, experience, reputation and the personnel to undertake the street lighting, advertising and beautification project worth the sum of Kshs.3,240,000,000.00 per year, let alone collect revenue payable on all manner advertising.

15. No evaluation was conducted to establish and/or verify the Interested Party's potential to undertake the monopoly (which in any event cannot be maintained in law) or perform in the purported partnership with the 1st Respondent.

16. The award to the Interested Party of the 1st Respondent's statutory power to regulate advertising and collect revenues was done ultra vires as the powers delegated to the 1st Respondent by Parliament under Sections 148 and 162 of the Local Government Act cannot be further delegated and any such purported delegation thereof is not permissible since in doing so, the 1st Respondent would be transferring its powers and functions to private body over which is has a limited control of only 20% and which said body private would not be subject to the supervisory control of the Court.

17. The Respondents applied their statutory powers for an improper purpose.

18. The Respondents did not take into account all relevant considerations and took into account irrelevant considerations in the award of the monopoly and in entering into the purported partnership with the Interested Party.

19. The Respondents failed and/or refused to undertake the evaluation of the Interested Party's potential to offer the procured services and perform in the purported partnership in a fair, balanced, objective and wholesome manner as envisaged by the relevant statutes in flagrant breach of the statutory provisions directly on the point.

20. The Respondents erred and breached the rule against bias that "no man shall be the judge in his own cause" by awarding the Interested Party rates/fees collection and regulatory powers over the Applicants, the Interested Party's competitors, knowing very well that the Interested Party does not pay to the 1st Respondent or any other body whatsoever any rates/fees for the advertising it undertakes on the street lighting poles and elsewhere on the roads in the City of Nairobi and that the ***Applicants are embroiled in legal tussle with the 1st Respondent and the Interested Party over that arrangement.***

21. The Interested Party contrived in cahoots with the Respondents to secure the award of the monopoly and the entry into the purported partnership by an illegal and improper process that was conducted in flagrant breach of the statutory provisions directly on the point and the rules of natural justice.

22. The Respondents misdirected themselves on the law in awarding the monopoly and entering into the purported partnership.

23. The Respondents unlawfully and unreasonably fettered their discretion in awarding the monopoly and entering into the purported partnership.

24. The Respondents failed to fulfill their statutory duties in awarding the monopoly and entering into the purported partnership thereby promoting the profit making interests of a private company at the expense of the interest of the ratepayers.

25. There were no procedural safeguards in the award of the monopoly and entry into the purported partnership to ensure the attainment of fairness and protection of the interests of the Applicants and other ratepayers in the City of Nairobi

26. The Respondents frustrated the statutory intention to collect revenue and expend the same for the benefit of the public and not a private company.

27. The Respondents reached and made the decision to award the monopoly to the Interested Party and enter into the purported partnership with it in bad faith, on improper motives, illegally, unreasonably and irrationally.

28. The award of the monopoly was made to an unfit and unsuitable party and the entry into the purported partnership was made with an unsuitable and unfit party with the result that the 1st Respondent will be denied the revenue and the Applicants and ratepayers in the City of Nairobi swindled by the partnership of over Kshs.3,240,000,000.00 per year.

29. The entry into the purported partnership with the Interested Party to beautify the City of Nairobi did not take into account the fact that the 1st Respondent's Environment Committee has been allocated a sum of Kshs.14,000,000.00 to undertake the same project.

30. The award of the monopoly was made to a party without any sound financial standing in the advertising industry and/or street lighting and the purported partnership entered into with a party without any sound financial standing and whose operations and undertaking in the advertising industry in Nairobi have demonstrably and publicly failed.

31. The award of the monopoly and entry into the purported partnership with the Interested Party frustrated the public interest and public polity as envisaged by the Constitution and Statute that the implementation and enforcement of laws and collection and use of taxes be undertaken by the Central Government and/or the local government and not a profit making private company.

32. The Respondents frustrated the purpose and intention of public procurement rules and open tendering in awarding the monopoly and entering into the purported partnership with the Interested Party thereby circumventing the same and denying the Applicants the opportunity to bid for the services procured by the 1st Respondent thus denying the ratepayers the best services in the market."

So when the Applicants filed the substantive Notice of Motion, they prayed for the following prerogative orders:

"1. An order of certiorari be issued to bring up and quash the decision of the Respondents made on 7th October, 2004 to enter into a purported partnership with and award the Interested Party a monopoly for life over the entire advertising industry in the City of Nairobi, to beautify the City of Nairobi, to advertise exclusively on street lighting poles and elsewhere on the roads, streets and avenues and road reserves in the City of Nairobi, regulate and control all advertisers and to collect rates/fees www.kenyalaw.org Republic v

payable on all manner of advertising from the said advertisers and the entire public and appropriate 80% of such revenue to its own use and annually review such rates/fees and increase the same.

2. An order of mandamus be issued compelling the Respondents to constitute a proper tender committee under the provisions of the Local Government Act and the Exchequer and Audit Act, to re-evaluate the award to the Interested Party of a monopoly for life over the entire advertising industry in the City of Nairobi, to beautify the City of Nairobi, to advertise exclusively on street lighting poles and elsewhere on the roads, streets and avenues and road reserves in the City of Nairobi, regulate and control all advertisers and to collect rates/fees payable on all manner of advertising from the said advertisers and the entire public and appropriate 80% of such revenue to its own use and annually review such rates/fees and increase the same, and in that regard, compel the Respondents to invite tenders and allow the Applicants and any other interested persons to bid for the street lighting and beautification of the City of Nairobi and/or any other services related or otherwise purportedly now awarded to the Interested Party in a single contract and/or purported partnership.

3. An order of prohibition be issued against the Respondents stopping the said Respondents from lumping up in a single contract and/or purported partnership or in any manner whatsoever the lighting up of the City streets and beautification of the City of Nairobi and advertising in a manner injurious to the Applicants and the advertising industry in general.

4. An order of prohibition be issued to stop or prohibit the Respondents from implementing the purported partnership and/or contract with the Interested Party wherein the said Interested Party has been awarded a monopoly for life over the entire advertising industry in the City of Nairobi, to beautify the City of Nairobi, to advertise exclusively on street lighting poles and elsewhere on the roads, streets and avenues and road reserves in the City of Nairobi, regulate and control all advertisers and to collect rates/fees payable on all manner of advertising from the said advertisers and the entire public and appropriate 80% of such revenue to its own use and annually review such rates/fees and increase the same.

5. Costs of this suit be paid by the 1st Respondent and the Interested Party jointly and severally."

When the suit came up for hearing before us the parties were represented by the following Counsel. Mr Njoroge was present holding brief for Mr Singh for Alliance Media (K) Ltd which was one of the Applicants who joined in the suit after the leave had been granted; Mr Mungai appeared for all the Initial Applicants and the two others who joined after leave had been granted; Mr Adan appeared for the 1st Respondent; Miss Mbiyu appeared for the 2nd Respondent; and Mr Ochieng Oduol appeared for the Interested Party.

First things first. It was submitted before us that there was no need for us to trouble our minds with the case it being argued that the application was incompetent. Starting with Mr Adan, it was argued that the application should not be considered by the court as it was brought under the wrong provisions of the law – In his view, only Order LIII of the Civil Procedure Act and Sections 8 and 9 of the Law Reform Act (Cap 26) were applicable and that the other provisions cited on the Notice of Motion were irrelevant. For this submission, Mr Adan referred us to the case of ***Joram Mulati Welamondi vs The Chairman Electoral Commission of Kenya Bungoma*** ***HCMA No. 81 of 2002*** in which the Honourable Justice A G Ringera said as follows in respect of a similar submission when he was still a member of this court:

"Counsel for the respondent's view on the other hand is that none of the provisions of the Civil Procedure Act and the rules (apart from order 53 and the rules there under) and or of the constitution of Kenya can be invoked in the Judicial Review Proceedings before the court. For my self, I accept the submissions of counsel for the respondent in

> **that regard. I agree that Judicial Review Proceedings under Order 53 of the Civil Procedure Rules are a special procedure. The provisions of the order are invoked whenever orders of certiorari, mandamus or prohibition are sought. That may be so in either civil or criminal proceedings. So in the exercise of its power under the order, the court is exercising neither a civil nor a criminal jurisdiction in the strict sense of the word. It is exercising a jurisdiction *sui generic*. It follows therefore that it is incompetent to invoke the provisions of sections 3 A and order 1 rule 8 of the civil procedure rules. It is equally incompetent to invoke sections 42, 79 and 80 of the constitution of Kenya. To the extent that the motion before the court invokes those provisions of the law to introduce the procedure of enforcement of the perceived fundamental rights of the applicant and other Matete Division voters in an application for Judicial Review under order 53, the motion is wholly incompetent and fatally defective."**

We gave anxious consideration to what the Learned Judge was saying in those words and, it is with profound respect to him, that we humbly disagree with him that such an important and fundamental issue giving rise to an application for judicial review can be dismissed summarily as incompetent only because it was stated to be brought under "other" provisions of the law which do not apply to judicial review proceedings. That would be even more difficult to justify when the application was in fact brought under the proper provisions but with additional provisions which did not apply like in this case. In our view, where that is the case, the court can choose to ignore the inapplicable provisions or order them struck out and proceed to consider the case taking into account only the provisions which the court deems applicable. We had support of abundant authority in this view but we do not wish to cite all of them here but if one were to care, one would find that in the famous case of ***D. T. Dobie & Company vs Muchina & Another* (1978) LLR 9** where the Honourable former Chief Justice of this country the Honourable Mr Justice Madan said as follows:

> **"A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally, a suit is for pursuing it …"**

Although the learned Judge in that case was considering a "normal" suit under the general provisions of the Civil Procedure Act (Cap 21), we are confident to say that what he said there holds true for a suit of Judicial Review like the one before us. As we are not bound by the case of ***Jotham Mulati Welamond***i on the point, we shall not follow it. We shall say no more on that point.

Then came the turn for Ms Mbiyu for the 2nd Respondent. She supported Mr Adan's submissions and had something for herself to say on the competency of the application. Firstly, she said that the application was premature as the 2nd Respondent had not made any decision which was liable to be quashed. We agree with her to that extent only. We think that the motion is one which should go on as we shall decide, when we get there, whether other orders such as mandamus and prohibition which were also sought, could be available to the Applicants against the 2nd Respondent. She also said that her client was not party to the partnership – which we agree, but we think that her client's position in the case is important to be considered on merit as we shall do later.

Lastly, it was Mr Ochieng Oduol who tried to convince us to wash our hands and say there was no case. He started with the fact that the new Applicants who joined the suit after leave had been granted "had no business here." We did not take him seriously on the point. Firstly, we asked ourselves, what would be its effect if we agreed with him? Would it bring the suit to an end? No. The Initial Applicants would still be able to proceed with it. Then, and more importantly, it is clear from the Order which our Learned Brother Justice Ibrahim made at the stage when he granted leave, that he directed that Notice of the institution of the application for leave was to be given in the public media so that those person who desired to join in it could do so. When that was done, the new Applicants filed Notices to Appear in support of the Application and we do not see the problem with that. We reject the submission.

Next, Mr Ochieng Oduol argued that the Applicants were obliged to exhaust remedies under the Exchequer and Audit (Procurement) Regulations 2001 before they could come before us. Mr Mungai supplied a complete answer to that. The Applicants could only be www.kenyalaw.org Republic v City

Council of Nairobi & another ex parte Monier 200 Ltd & 7 others [2005] eKLR 21 bound to the Regulations if they had been candidates in a tendering process. Here, they were not. As already seen, this was a case where only the Interested Party was invited to the deal and it is only the one which could refer to the Regulations if it was aggrieved which is not the case here. As Mr Ochieng Oduol had relied on the case of ***Zambia National Holding Ltd & Another vs A G Zambia*** ***(1994) 1 LRC*** to support the submission in this respect, we are of the view that the same is irrelevant in view of what we have already said on the point.

The last objection by Mr Ochieng Oduol was that this suit was an abuse of the court process and would amount to duplicity in view of the suit in the Commercial Court which we mentioned earlier. Again, we consider this submission as a red herring. In the case before us, the Applicants are challenging the decision which was made by the 1st Respondent on 7th October, 2002. In the suit at the Commercial Court, the parties there are concerned with the Agreement of 28th March, 2002. Those are different matters.

We believe that we have dealt with the Preliminary issues as exhaustively as we could. We now propose to consider the merits of the case.

Mr Mungai made very useful and clear submissions which were condensed in written skeletal arguments which were filed in court on 5th July, 2005. The main thrust of his arguments was that the Resolution under challenge was ultra vires as it was contrary to the provisions of Sections 143 and 148 of the Local Government Act (Cap 265) and The Exchequer and Audit (Public Procurement) Regulations, 2001 made under Section 3 A of the Exchequer and Audit Act (Cap 412).

Section 143 (4) (a) of Cap 265 says as follows:

> ***"… a local authority shall … before entering into any contract for the execution of any works or the supply of any goods to the value of ten thousand or more, give not less than fourteen days notice in one or more newspapers or journal of such proposed contract and the purposes and other relevant particulars thereof, and shall, by such notice, invite any persons willing to undertake the same to submit a tender thereof by a stated date to such local authority …"***

The Exchequer and Audit (Public Procurement) Regulation also requires that public entities such as the 1st Respondent should employ open tendering in procurement of services or goods except special cases. Where there is a special case, there is a requirement that the speciality be recorded in writing {See Regulation 17 (1) and (2)}.

Mr Mungai argued that since the Resolution under reference was to form a partnership between the 1st Respondent and the Interested Party for the formation of a limited liability company that would undertake, among other things, the works of erecting and maintaining street lights which is a function bestowed upon the 1st Respondent by Section 160 (p) (i) of Cap 265, it would amount to the 1st Respondent procuring without complying with the laws governing the same which have been set out above. That was even so, in his view, where the company to be formed was not to be wholly owned by the 1st Respondent but one in which the 1st Respondent was to be a minority shareholder. In his view, the Resolution was a flowed scheme to avoid open tendering as required by the law.

We believe Mr Mungai is right. Mr Adan and Mr Ochieng Oduol tried to argue that this was not a case of procurement per se as no public funds were involved but one can easily see that under the deal 80% of the revenue which was to be collected (and ideally this should have been revenue due to the 1st Respondent) would go to the company to be formed. That is public funds. It was not shown before us that this was a case which was exceptional to warrant a deviation from the standard form of procurement by the 1st Respondent as required by the law we have already referred to. As Mr Mungai pointed out, there is no record of the speciality of the case as required by the emergency provisos to Section 143 of Cap 265 and Regulation 19 (1) (b) of the Procurement Regulations.

As to Section 148 of Cap 265, Mr Mungai submitted that the Resolution under challenge was equally defective as it purported to delegate a statutory power conferred upon the 1st Respondent, a power which he said could not be delegated. According to him, Cap 265 did not authorize the 1st Respondent to delegate its power to collect its revenue which was part of the effect of the Resolution we are considering. He gave comparison to Sections 153 (b) and 160 (p) (i) of Cap 265 which allows the 1st Respondent to delegate some of its services or functions and said that Section 148 of Cap 265 did not allow delegation. It was wrong, he said, for the 1st Respondent to empower the company which was to be formed pursuant to the partnership between it and the Interested Party to collect all advertising rates or fees payable on all manner of advertising. For this proposition, he referred us to the case of ***Credit Suisse & Another vs Waltham Forest London Borough Council (1996) 4 AII ER 176*** where the Court of Appeal of England said that where parliament had made detailed provisions as to how certain statutory functions were to be carried out, there was no scope of implying the existence of additional powers which lay wholly outside the statutory code. Again, we agree. We think that if Parliament intended to authorize the 1st Respondent to outsource its revenue collection functions, nothing would have been easier than to say so. By doing what it had no authority to do, the 1st Respondent was out of the law and this court believes that it has power and authority to step in and ensure that nothing is done outside the law.

So, it follows that the Resolution made by the 1st Respondent on 7th October, 2004 must and is hereby brought to this Court by an order of certiorari and quashed. We consequently grant prayer No. 1 of the Notice of Motion dated 8th November, 2004 as far as it relates to the 1st Respondent but dismiss the same as far as it refers to the 2nd Respondent since the 2nd Respondent did not make the decision and had not made any in any event that could be quashed.

Now, we refused to stop the case against the 2nd Respondent summarily and we now propose to give our reasons for doing so. It is common ground that for the decision in issue to be effective, it was subject to the approval of the 2nd Respondent. The 1st Respondent having made the decision, there was justified apprehension that when presented to the 2nd Respondent he was to make a decision thereon. We do not want to second guess the 2nd Respondent who occupies an important office in our country but we believe that the Applicants were entitled to come before us to seek by way of an order of prohibition to stop the 2nd Respondent from making a decision that would be tainted with illegality. For the efficacy of the order of prohibition, please see ***Kenya National Examinations Council vs Gathenji & Others (1996) LLR 483 and The Commissioner of Lands & Another vs Coastal Acqua-culture Ltd Civil Appeal No. 252 of 1996***.

So, we think that prayer No. 4 could be available to the Applicants against the 2nd Respondent to stop him from giving approval to the offending Resolution which we have considered. We grant it to the Applicants against both Respondents.

We did not see the place of prayer Nos. 2 and 3 and we do not think they were serious. We do not think that this court has the authority to tell the 1st Respondent how to perform its statutory functions so long as they are performed according to law. We reject those prayers. We award the Applicants costs of the suit to be paid by the 1st Respondent and the Interested Party equally.

In conclusion, we wish to record our appreciation to counsels for their able submissions and research, which we found beneficial. We wanted to note that in deciding this case, as in any other Judicial Review case, the court is concerned with the process, and not the decision, and to ask itself whether the process followed was in accordance with the law. The decision may be a good one, and we do not want to pretend that the scheme envisaged hereof bringing light to this once glorious city was not a good one. It was a creative scheme, and it is not our intention to stifle creativity and initiative. But the law must be followed, and that is all that we ask.

Dated and delivered at Nairobi this 23rd day of August, 2005.

JOYCE ALUOCH

JUDGE

ALNASHIR VISRAM

JUDGE