Uber BV v Transport Licensing Appeals Board; National Transport and Safety Authority & 2 others (Interested Parties) (Judicial Review E063 of 2023) [2023] KEHC 22538 (KLR) (Judicial Review) (22 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22538 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW E063 OF 2023

JM CHIGITI, J

SEPTEMBER 22, 2023

BETWEEN

UBER BV ..... APPLICANT

AND

TRANSPORT LICENSING APPEALS BOARD ..... RESPONDENT

AND

NATIONAL TRANSPORT AND SAFETY AUTHORITY . INTERESTED PARTY

BOLT OPERATIONS OU ..... INTERESTED PARTY

DAVID MUTERU, JUSTIN NYAGA, PAUL MWAI, DANIEL MANGA, GIDEON NYAGA, WYCLIFFE ALUTALALA, SAMUEL MBURU, FRANCIS KARIUKI, POLYNE NJERU, SARAH MAINA, SAMUEL KARIUKI, EMMANUEL OCHIENG, PETER WAHOME, KINYERU MWAGO, STEPHEN NDONGA, WILBERFORCE NGIE, SAMUEL MWAURA & PETER MWANGI ..... INTERESTED PARTY

RULING

1. The 3rd Interested Parties filed a Notice of Motion Application before this court is dated 21st June, 2023 under Sections 1A, 1B, 3A of the *Civil Procedure Act*, Order 51 Rule 1 and 15 of the Civil Procedure Rules 2010, seeking the following orders:

    1. Thatthis Application be certified urgent and fit to be heard ex parte in the first instance.

    2. Thatthis Court be pleased to set aside the proceedings and subsequent orders made on 25th May 2023 and all consequential orders thereto.

3. Thatthis Court be pleased to dismiss the application in its entirety.

4. Thatthis court imposes suitable sanctions against the Respondent/Applicant as deemed necessary to deter such misleading conduct in the future.

5. Thatin addition and or alternative to prayers 2 and 4 above the court be pleased to order the suspension of any further licences to the Applicant by the 1st Interested Party pending the hearing and determination of this Application.

6. Thatcosts of this Application be provided for.

2. The Application was accompanied by a Supporting Affidavit evenly dated and deponed by David Muteru, on his own and the other Interested Party's behalf. The Application was based on the grounds that the Applicant/Respondent [Uber BV] had moved the court by way of Chamber Summons dated 24th May, 2023 for leave to institute judicial review proceedings and that the said leave do operate as a stay. The same Application was accompanied by a Verifying Affidavit of Imran Mahmood Manji, the head of East Africa at Uber Kenya Limited.

3. However, as per the Applicant [3rd Interested Party], the said deponent of the Verifying Affidavit, had intentionally provided misleading information and/or sworn to falsehoods to this court with the aim of securing the stay order.

4. The 3rd Interested Party/Applicant conceded that it is in the nature of Judicial Review proceedings to be heard ex-parte, and as such, the Applicant/Respondent had an obligation to disclose to the court all material facts in respect of the Application, including facts not in favour of the Applicant.

5. However, that in this instance, the Applicant/Respondent not only failed to make disclosure of all material facts, but through the Affidavit in support of the Application deliberately made incorrect and untrue statements.

6. The 3rd Interested Party/Applicant maintained that it is conceivable that had the Applicant made appropriate and necessary disclosure, the court might not have granted leave to file judicial review proceedings, and/or might not have granted stay of the proceedings before the Transport and Licensing Appeals Tribunal.

7. It is the 3rd Interested Party/Applicant take that the deponent has committed an offense by swearing falsehoods, which is in violation of sections 113 and 114 of the Penal Code. Resultantly, that it is in the interests of justice the 3rd Interested Party/Applicant's application be allowed; and that It is untruthful for the Applicant to say that it was not served.

8. Therefore, its disingenuous of the Applicant in their Verifying Affidavit in support of leave to file judicial review proceedings, to complain that the Applicant was not served while the Applicant had indeed been served and had in addition failed to provide an alternative or other address apart from the one in the Public Notice or at all. The 3rd Interested Party/Applicant maintained that Imran Mahmoud Manji and Imran Manji refer to one and the same person.

9. That by initiating the current judicial review proceedings in this court, the Applicant is effectively seeking to have this court assume the role of an appellate body, reviewing the decision of the Tribunal, yet the Applicant made no objection before the Tribunal.

10. To the 3rd Interested Party/Applicant the Applicant intentionally misled the court to believe that the 3rd Interested Party failed to object to the decision by the 1st Interested Party to licence the Applicant and other TNCs. The Applicant thus falsely deponed to facts which the Applicant had no capacity

to deponed, to which the deponent was therefore not competent to deponed and which are in any event incorrect.

11. That in addition, the Applicant further failed to disclose to this court that there had been a Public Notice (already produced and marked DM2) by which the 1st Interested Party referred any aggrieved parties to the Tribunal in accordance with Regulation 23 of the Regulations. The Public Notice reads clearly at the bottom that pursuant to Regulation 23 of the Regulations, persons aggrieved by any decision of the Authority may appeal to the transport licensing board.

12. The 3rd Interested Party/Applicant averred that the deponent of the verifying Affidavit intentionally deceived the court by falsely affirming that the Tribunal lacks jurisdiction in accordance with the provisions stipulated in section 38(1) of the NTSA Act. The deponent is fully cognizant of the fact that the Applicant, along with other Transport Network Companies (TNCs), operates under the licensing framework of the National Transport and Safety Authority (Transport Network Companies, Owners, Drivers and Passengers) Regulations, 2022.

13. That the deponent has intentionally provided misleading information. The deponent has wilfully misguided the court by falsely asserting that the Applicant is licensed under the NTSA Act, when in fact it is the Regulations that impose the requirement for the Applicant and other TNCs to apply for licenses. By misleading the court, the Applicant sought to blur the distinction between statutory obligations and regulatory provisions, thereby mischaracterizing the legal landscape within which the Applicant operates.

14. According to the 3rd Interested Party/Applicant, it is clear that the Applicant obtained the orders of stay of proceedings in the Tribunal by failing to make full disclosure of all relevant facts, deliberately misleading the court and deponed to facts which the Applicant knew to be untrue.

15. On the question of whether the Tribunal has jurisdiction to determine the appeal, that, it is clear that the matter is premature on account of the fact that there is leave of the Tribunal for us to file an Amended Memorandum of Appeal and that the Tribunal's jurisdiction over the matter is conferred by Regulation 23 of the Regulations cited in the Public Notice, facts which the Applicant deliberately kept away from the court because the facts did not suit the Applicant.

16. In light of these irreconcilable discrepancies, the 3rd Interested Party/Applicant earnestly implore that the court re-evaluates its previous decision to issue the stay order, taking into account the intentional misrepresentation in and deceitful contents of the Verifying Affidavit.

17. It was stated that it is critical that the court review the orders it issued on 25th May 2023 in order to protect the court's dignity and integrity because such deliberate misinformation as contained in the Verifying Affidavit not only undermines the truth-seeking process but also threatens the credibility of the entire judicial system. A review of the orders would be essential in ensuring that justice is served and the truth is upheld.

18. To the 3rd Interested Party/Applicant the Applicant did not come to court with clean hands and that the Applicant's sole intention is to subvert and circumvent the proceedings before the Tribunal and evade being called to account.

19. The 3rd Interested Party/Applicant urged the court to reconsider its position and take into account the presence of intentional falsehoods within the Verifying Affidavit and consequentially set aside the orders of 25th May 2023 granting the Applicant leave to file judicial review and providing that leave operate as stay of the proceedings before the tribunal.

20. In response to, and opposing the Application, the 2nd Interested Party filed their Grounds of Opposition dated 27th June, 2023 on the basis that:

    I. That the core essence of the review application is the order/ direction made by the respondent on 19 May 2023 that usurped the role of the 1st Interested party as regulator;

    II. That it is that decision on account of which judicial review proceedings are taken out;

    III. The stay issued by the court herein is to ensure that there is this court determines the validity of the decision of the respondent, the setting aside of the stay shall render the proceedings before this court academic as the respondent to the appeals before the respondent shall be obliged to comply with an order/directive that usurps the regulatory role of the 1st Interested party;

    IV. The grant of an order for leave to operate as stay is to safeguard against prejudicial progression that affects the proceedings before this court, no good reason has been made out to justify setting aside the stay issued herein.

21. Additionally, responding to, and opposing the Application, the ex-parte Applicant/Respondent (Uber BV) filed their Replying Affidavit dated 3rd July, 2023 deponed by Imran Mahmood Manji, Head of East Africa at Uber Kenya Ltd.

22. It was averred that they (Applicant) were not properly served, while still conceding that the address provided by them (Applicant) for purposes of obtaining a license from the 1st Interested Party is P.O. Box 13410-00800, 1st Floor, The Riverfront Building, Prof. Wasawo Road, Nairobi. The Applicant has in the various contractual agreements that it has signed with the 3rd Interested Party provided a specific address for service of court process, such as the Appeal.

23. The ex-parte Applicant/Respondent (Uber BV) asserted that pursuant to a Services Agreement--signed between the Applicant and users of the Applicant's technology (the Uber App) --their (Applicant's) official address is Meester Treublaan 7, 1097 DP, Amsterdam, The Netherlands; and as such, that this this would be the proper address for service for purposes of the Appeal.

24. That therefore, the Applicant's position, that it was not properly served with the Appeal, was correct and not misleading or false as alleged by the Interested Party. And that the issue of the validity of service of the Appeal filed in the Transport and Licensing Appeals Tribunal (TLAB) Proceedings is arguable.

25. Further, that there was no obligation for Uber Kenya Limited and/or its legal representative to furnish the 3rd Interested Party with the address for service of the ex-parte Applicant/Respondent (Uber B.V.) which is a separate legal entity; and that Uber Kenya Limited and the ex-parte Applicant are distinct and separate legal entities.

26. As per the ex-parte Applicant, the fact that the firm of Oraro & Company Advocates and/or lawyers at the said firm represent both Uber Kenya Limited and Uber B.V. (the Applicant) is irrelevant and cannot override the legal requirements of service of court process on a party to a suit or legal proceeding.

27. The deponent stated that the fact he is the Country Head of Uber Kenya Limited (claiming to be a marketing arm of Uber B.V., [the ex-parte Applicant herein) is wholly irrelevant for purposes of establishing whether the Applicant was properly served as Uber Kenya Ltd, and the Applicant are separate and distinct entities. That this fact does not dispense with the obligation imposed on the 3rd Interested Party and/or the Tribunal to properly effect service of the Appeal on all parties, including the ex-parte Applicant.

28. The ex-parte Applicant asserted that in regarding the scope of the Appeal and the jurisdiction of Tribunal to hear the Appeal are properly the subject matter of the Judicial Review filed by the Applicant herein; and cannot form the basis of an interlocutory application to set aside the Orders, such as the one at hand.

29. It was conceded that the 3rd Interested Party were granted leave to file an Amended Appeal, the fact, therefore, that the 3rd Interested Party are yet to file their Amended Appeal, is in the circumstances immaterial. That it is incorrect that any issues surrounding the jurisdiction of the Tribunal to entertain the Appeal could only be addressed by the Tribunal itself. That pursuant to Article 165(6) of *the Constitution* of Kenya, 2010 this Honourable Court exercises a supervisory jurisdiction over judicial and quasi-judicial bodies (such as the Tribunal) and is therefore the proper forum to determine the matter.

30. The ex-parte Applicant stated that it is incorrectly averred by the 3rd Interested Party, that an objection was raised by them (3rd Interested Party) at the point in time that the Applicant applied for a license as a Transport Network Companies (TNC) from the 1st Interested Party. That save to state that Regulations are secondary legislation which by their very nature must arise from the provisions of an underlying Statute (which is the primary legislation), the Applicant disputes the fact that it is the Regulations that imposed the requirement for the ex-parte Application as well as other Transport Network Companies (TNCs) to apply for licenses to operate in Kenya. It was further denied that the ex-parte Applicant has sought to blur the distinction between statutory obligations and regulatory provisions as alleged by the 3rd Interested Party.

31. The ex-parte Applicant denied that they obtained the Orders through misrepresentation and/or falsehoods, as claimed by the 3rd Interested Party; and that the 3rd Interested Party have failed to demonstrate that the ex-parte Applicant has approached this Honourable Court with unclean hands.

32. Therefore, the ex-parte Applicant urged this Honourable Court to find that 3rd Interested Party's Application herein lacks merit, is frivolous, vexatious, and the allegations made therein are entirely unsubstantiated; therefore, that the same ought to be dismissed forthwith, with costs to the ex parte Applicant.

Analysis and determination:

33. Following are the issues that call for the determination of this court:

    A. Whether this court should set aside the proceedings and subsequent orders made on 25th May 2023 and all consequential orders thereto.

    B. Whether this court should dismiss the application in its entirety.

    C. Whether this court should impose suitable sanctions against the Respondent/Applicant as deemed necessary to deter such misleading conduct in the future.

    D. Whether this court should can in addition and or alternative be pleased to order the suspension of any further licences to the Applicant by the 1st Interested Party pending the hearing and determination of this Application.

34. Order 53 rule 1(4) of the Civil Procedure Rules provides that the grant of leave under this rule to apply for an order of Prohibition or an order of Certiorari shall, if the Judge so directs, operate as a stay of the proceedings in question until the determination of the application or until the Judge orders otherwise.

35. The grounds upon which stay orders issued under Order 53 rule 1(4) may be set aside, are similar to those which an injunction may be varied, reviewed or set aside and include non-disclosure of material facts, concealment of material documents, misrepresentation and where the application is an abuse of court process. The principles upon which such orders may be made were set out in the case of Republic vs Vice Chancellor Moi University & 3 others Ex-Parte Benjamin J. Gikenyi Magare [2018] eKLR where the Court stated:

> "I will not attempt to re-invent the wheel regarding the issue of setting aside stay orders issued when leave has been granted to operate as stay. I say so because a host of judicial decisions have now settled the position that setting such stay orders would only be merited if: -(a) There is non-disclosure of material facts (b) Concealment of material documents (c) Misrepresentation"

36. In the case of Republic vs Cabinet Secretary Ministry for Education & another Ex Parte George Bala; Attorney General & 4 others (Interested Parties) [2022] eKLR where the Court stated that:

> "I entirely agree with the sentiments of H. Omondi J in Republic v Vice Chancellor Moi University & 3 others Ex-Parte Benjamin J. Gikenyi Magare [2018] eKLR, where in an application to vacate stay orders in a judicial review application she stated;
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> "To request the court to re-look at the background leading to the issuance of stay, is in my view not asking the court to sit on appeal on orders of a court of equal status. It is simply telling the court to reconsider the orders issued in light of the fact that the beneficiary of those orders concealed or did not disclose all the material facts prevailing. All the other issues raised will be better addressed at the hearing of the main motion."
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> ...
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> > "Finally, on the issue of jurisdiction to review its own orders in judicial review, it is trite Law that the Court's role is to do justice to the parties before it. The Court has inherent powers to meet the ends of justice and in my view such powers are available for deployment in judicial review proceedings. The Court should in exercising such inherent powers be in a position to remedy any injustice that may be occasioned by the Court's orders at the ex parte stage in judicial review proceedings."

37. In view of the above, it is clear that this court has powers to vary, set aside or discharge orders issued in judicial review proceedings. The 3rd Interested Party/Applicant claimed that the ex-parte Applicant obtained the orders issued on 25th May, 2023 by non-disclosure of material fact, and by giving false facts to the court.

38. Certainly judicial review is about fair treatment, and whether leave granted to commence such proceedings should operate as stay is a judicial discretionary function. I will not attempt to re-invent the wheel regarding the issue of setting aside stay orders issued when leave has been granted to operate as stay. I say so because a host of judicial decisions have now settled the position that setting such stay orders would only be merited if: - (a) There is non-disclosure of material facts (b) Concealment of material documents (c) Misrepresentation. In the cases of Pius Wanjala Vs Cleophas Mailu and Anor [2016] eKLR, and Republic Vs Registrar of Societies Exparte Justus Nyangaya and 3 Other [2005] eKLR.

39. In the case of Ex parte Hay management consultants(pty.) Ltd. 2000(3) SA 501(W) it held thus:

> I consider Copeland v Smith [20001 2 All ER 457 (CA) a judgment which had been delivered by a Judge who had not been told of a relevant decision of the Court of Appeal (reported in [1998] 2 All ER 124 (CA) and [1998] 1 WLR 1540).
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> > "It is going to be increasingly important with the regime under the new Civil Procedure Rules that Judges dealing with interlocutory issues are afforded up to date assistance on the law by advocates appearing in front of them .... In these circumstances it is quite essential for advocates, who hold themselves out as competent to practise in a particular field, to bring and keep themselves up to date with recent authority in their field.... "It is not only in contested cases that counsel has a duty to direct the Court's attention to any relevant authority ... The Judge in a Motion Court relies on counsel, especially in ex parte applications and in those cases where there is no appearance for the respondents, to inform the Court of any cases of which the effect may be that they are not entitled to"

40. The cardinal principle in ex-parte Applications is that it is the duty of the ex-parte Applicant to lay all the material facts before the court so that the court may have full knowledge of the circumstances of the case before making its order.

41. At the critical no notice phase, an applicant requests the court to be heard ex-parte dispensing with service upon the Respondent. The court exercises its discretion pegged on the evidence that is tendered by the Applicant. The orders issued by the court are temporary in nature for obvious reasons. The Respondent has room to apply to set aside the ex-parte orders in instances where the ex-parte Applicant obtained the orders through structures or craft that is for all intents and purposes misleading to the court.

42. An Applicant who approaches the court ex-parte must be beyond reproach. He must approach the court with clean hands. Such an applicant must lay bare all the evidence that is relevant to the application so to help the court to grant the temporary orders. The duty owed by the ex-parte Applicant to the court at this level is even higher.

43. Unfortunately, many litigants usually obtain the conservatory orders through non-disclosure hoping that the truth will never come out. The legislator foresaw this mischief when coming up with Order 53 of the Civil Procedure Rules that reserved the court's jurisdiction to reopen and to set aside orders that have been improperly obtained ex-parte.

44. The Applicant argues that it is deeply misleading and inconsistent for the ex parte Applicant to claim that the 3rd Interested Party did not object to the 1st Interested Party's decision to grant them a licence, while simultaneously stating in their replying affidavit that they were unaware of the objections raised.

45. Blackwell J opined in Power, NO v Bieber & Others 1955(1) SA 490(W) at 503-4

> " The utmost good faith must be observed by litigants making ex parte applications in placing material facts before the Court; so much so that if an order has been made upon an ex parte application and it appears that material facts have been kept back, whether wilfully and mala fide or negligently, the Court has a discretion to set the order aside on the ground of non-disclosure."

46. Closer to home, the court in Halima Haji Sarah v Multiple Haurliers (E.A) Limited & Another [2022] eKLR quoted the Court of Appeal in Bahadurali Ebrahim Shamji v Al Nour Jamal and 2 others

Civil Appeal No. 2010 of 1997 where the court of appeal had the following to say on material non-disclosure:

> It is perfectly well-settled that a person who makes an ex parte application to the court – that is to say, in the absence of the person who will be affected by that which the court is asked to do – is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make the fullest possible disclosure then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained. ...and the applicant must state fully and fairly the facts, and the penalty by which the court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the court will set aside any action which it has taken on the faith of the imperfect statement...In considering whether or not there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to include; (i) The duty of the applicant is to make full and fair disclosure of the material facts. (ii) The material facts are those which it is material for the judge to know in dealing with the application made; materiality is to be decided by the court and not the assessment of the applicant or his legal advisers. (iii) The applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made sufficient inquiries...

47. It is not clear as analysed later on in the judgment whether or not proper service was effected upon the ex-parte Applicant or whether it was notified of the proceedings before the Respondent and whether they were served through the contact information they gave to the 1st Interested Party, which a public authority.

48. The Applicants argument that The ex-parte Applicant at, paragraph 11 of the verifying affidavit stated that it was not served with the pleadings, yet the Third interested party has produced a copy of an email indicating the contrary clearly demonstrates conflicting positions. At the ex-parte stage the court exercised its discretion on the basis of the prima facie evidence in granting the orders.The issue of the address is in dispute and none of the parties can determine the correct position.It is not in order to accuse the Exparte Applicant for advancing what they believe is the correct position.

49. The Applicant argues that, contrary to what the ex-parte Applicant swears, on 19th May, 2023 the ex-parte Applicant was properly represented by Ms. Arora of Oraro & Co. Advocates appearing for Uber Kenya Ltd and holding brief for Ms. Lubano for Uber BV. I am in agreement with the ex-parte Applicant that the fact that the firm of Oraro & Company Advocates and/or lawyers represent both Uber Kenya Limited and Uber B.V. (the Applicant) is irrelevant and cannot override the legal requirements of service of court papers on a party to a suit.

50. The Applicant's argument that the ex-parte Applicant failed to disclose to the court that there had been a public notice by which the 1st Interested Party referred any aggrieved parties to the Tribunal in accordance with regulation 23 of the regulations. This is a disputed fact. The Ex parte applicant advanced what it innocently believed was the correct/accurate position.

51. The Applicants invited the court to note that the ex-parte Applicant previously filed a constitutional petition (HCCHRPET/E432/2022) wherein Imran Manji the same deponed swore an affidavit on September 2, 2022 and at paragraphs 22, 37, 40, 41, and 92 of that affidavit, it became abundantly clear that the ex-parte Applicant fully comprehends the profound implications of the regulations at hand.

52. At the leave stage this court was not invited to look at the pleadings in constitutional petition (HCCHRPET/E432/2022) simply because that is a totally different suit in another division of the High Court. To ask all ex-parte Applicants who move the court for leave to institute judicial proceedings under Order 53 of the Civil Procedure Rules to introduce and disclose all the suits they are involved in would be to ask for too much. Read differently, the fact that a litigant does not list out other cases that it is or has been involved in before cannot be classified as a dishonest none disclosure.

53. Furthermore, Regulation 23 in the fifth part explicitly states that a person dissatisfied with any decision made by the Authority (the 1st Interested Party herein) under these regulations has the right to appeal to the Appeals Board.

54. The argument by the Applicant that it is disingenuous for the ex-parte Applicant to come before this court and claim non-compliance with section 38(1)(b) of the NTSA Act thereby attempting to mislead the court regarding the legal framework within which the Applicant operates. The ex-parte Applicant is attempting to misrepresent the legal landscape to their advantage. In Logie v Priest 1926 AD 312 at 323, it was held thus:

> "It is trite law that in an ex-parte Application the utmost good faith must be observed by an applicant. A failure to disclose fully and fairly all material facts known to him (or her) may lead, in the exercise of the court's discretion, to the dismissal of the application on that ground alone."

55. Whether or not the ex-parte Applicant knowingly misrepresented that the 3rd Interested Party had not complied with Section 38(1)(b) and whether or not the ex-parte Applicant intentionally deceived the court by falsely affirming that the tribunal lacks jurisdiction in accordance with the provisions of section 38(1) of the NTSA Act are points of around jurisdiction which the parties are at liberty to canvass during the substantive hearing of the suit.

56. Being a legal question that is in dispute it would not be right to conclude that the ex-parte Applicant knowingly misrepresented. The ex-parte Applicant simply asserted what it believed to be the applicable law and made out a prima facie case that persuaded the court to issue the temporary orders so as to preserve the subject matter in the suit in the interest of justice.

57. Through the Affidavit of Imran Mahmood Manji, the Head of East Africa at Uber Kenya Ltd the ex-parte Applicant argues that it was not properly served, while still conceding that the address provided by them (Applicant) for purposes of obtaining a license from the 1st Interested Party is P.O. Box 13410-00800, 1st Floor, The Riverfront Building, Prof. Wasawo Road, Nairobi. The Applicant has in the various contractual agreements that it has signed with the 3rd Interested Party provided a specific address for service of court process, such as the Appeal.

58. The ex-parte Applicant/Respondent (Uber BV) asserted that pursuant to a Services Agreement--signed between the Applicant and users of the Applicant's technology (the Uber App) --their (Applicant's) official address is Meester Treublaan 7, 1097 DP, Amsterdam, The Netherlands; and as such, that this this would be the proper address for service for purposes of the Appeal.

59. I It is this court's finding that the issue of the validity of service of the Appeal filed in the Transport and Licensing Appeals Tribunal (TLAB) Proceedings is arguable.

60. Further Uber Kenya Limited and the ex-parte Applicant are distinct and separate legal entities. The fact the deponent is the Country Head of Uber Kenya Limited (claiming to be a marketing arm of

Uber B.V., [the ex-parte Applicant herein) cannot form a basis on which this court can determine nor establishing whether the Applicant was properly served as Uber Kenya Ltd.

61. I find that the ex-parte Applicant's argument, that it was not properly served with the Appeal is an issue that can only be settled on a deeper enquiry and investigation at a different level. A debatable fact cannot be the basis of an accusation that a party misled the court so as to secure leave and a stay. That being the case, then the Applicant cannot safely accuse the ex-parte Applicant of misleading the court and seek to set aside its orders where proof of non-disclosure depends on proof of facts which are themselves in issue in the action as is the case before this court.

62. In the case of Halima Haji Sarah v Multiple Haurliers (E.A) Limited & Another [2022] eKLR quoted the Court of Appeal in Bahadurali Ebrahim Shamji v Al Nour Jamal and 2 others Civil Appeal No. 2010 of 1997 where the court of appeal had the following to say on material non- disclosure:

> It is perfectly well-settled that a person who makes an ex parte application to the court – that is to say, in the absence of the person who will be affected by that which the court is asked to do – is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make the fullest possible disclosure then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained. ...and the applicant must state fully and fairly the facts, and the penalty by which the court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the court will set aside any action which it has taken on the faith of the imperfect statement...In considering whether or not there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to include; (i) The duty of the applicant is to make full and fair disclosure of the material facts. (ii) The material facts are those which it is material for the judge to know in dealing with the application made; materiality is to be decided by the court and not the assessment of the applicant or his legal advisers. (iii) The applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made sufficient inquiries...

63. This court finds that the ex-parte Applicant made a full and fair disclosure to the extent possible of the material facts within its knowledge when it moved the court at the ex-parte stage. This court applied its mind to the material place before it at the ex-parte stage and made a finding in favour of the Applicant in granting the orders of 25th May 2023.

64. The additional facts which the ex-parte Applicant would have known if he had made sufficient inquiries in this suit are facts which are in dispute such as the issues of applicable law, the question of service. In order to arrive at conclusions on whether these were relevant would have called for a mini trial which would have jeopardised the Applicant which is not what the court should do at the ex-parte stage.

65. My finding is buttressed by the finding in the case of Kazakhstan Kagazy PIc V. Arip [20141 EWCA Civ 381-

> 36. As long ago as 1990 Sir Nicholas Browne- Wilkinson V.C asked this court for guidance about the right approach to be taken to the inevitably lengthy hearings which were then growing in relation to non-disclosure in respect of

freezing and search and seizure orders, see Tate Access Inc v Boswell [1991] Ch. 512, 5331-534D. 1 am not aware that this court has ever answered that cri-de-coeur and we did not receive any argument which would enable us to do so authoritatively in the present case. The judge adopted the approach of Toulson I (as he then was) in Crown Resources A G y Vinogradsky (15th June 2001) for cases of any magnitude and complexity and I am content to do the same:

> ... issues of non-disclosure or abuse of process in relation to the operation of a freezing order ought to be capable of being dealt with quite concisely. Speaking in general terms, it is inappropriate to seek to set aside a freezing order for non-disclosure where proof of non-disclosure depends on proof of facts which are themselves in issue in the action, unless the facts are truly so plain that they can be readily and summarily established, otherwise the application to set aside the freezing order is liable to become a form of preliminary trial in which the judge is asked to make findings (albeit provisionally) on issues which should be more properly reserved for the trial itself (pages 4 5 of the transcript).

66. I have re-looked at the background leading to the issuance of impugned orders and I am convinced that the ex-parte Applicant did not mislead the court. It is important also not to allow a dispute about full and frank disclosure to turn into what is sometimes euphemistically described as a "mini' trial of the merits.

67. Contrary to the Applicants allegations that it is conceivable that had the ex-parte Applicant made appropriate and necessary disclosure, the court might not have granted leave to file judicial review proceedings, and/or might not have granted stay of the proceedings before the Transport and Licensing Appeals Tribunal it is this court's finding that the ex-parte Applicant made appropriate and necessary disclosure.

68. Having arrived at the above finding this court declines to dismiss the application; and having found no fault on the part of the Ex-parte Applicant this court cannot impose sanctions against the exparte applicant to deter it from such misleading conduct in the future. This prayer lacks merit and the same is disallowed.

69. The last issue is whether this court can in addition and or in the alternative order the suspension of any further licences to the Applicant by the 1st Interested Party pending the hearing and determination of this Application.

70. The issues of issuance,suspension and cancellation of licences is one of the core businesses of the 1st Interested Party. It is equipped with the requisite statutory machinery for that work. The rules of fair administration and the rule of law must be followed before a licence is suspended. Due process calls for the hearing of the aggrieved and the affected parties to be heard before adverse action is taken under Article 47 and 50 of *The Constitution*.

71. The Applicant is invited to move the right forum for the purposes of seeking orders to the suspension the ex-parte Applicants licence where the issue will be heard and determined on merit. In any event this court will be offending the doctrine of exhaustion as provided for under Section9 of the *Fair Administrative Action Act* if it issues grants this order. This prayer is declined.

Disposition:

72. The Application dated 21st June, 2023 lacks merit.

Order:

1. The Application dated 21st June, 2023 is dismissed with costs.
2. Parties shall comply with the directions 4 through to 9 of the order issued on 25th May 2023.
3. The case will be mentioned 28th November, 2023 on to report compliance.

DATED, SIGNED, AND DELIVERED THIS 22ND DAY OF SEPTEMBER 2023

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J. CHIGITI (SC)

JUDGE

In presence of:

Lekaram/Nyabuto – Court Assistants

Ms. Orora h/b for Oraso SC for Ex parte Applicant

Oluka h/b for Ms. Wambui Kibicho for 3rd Interested Party

N/A for Respondent

N/A for 1st & 2nd Interested Parties