



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO.59 OF 2018

**IN THE MATTER OF THE CONSTITUTION OF KENYA ARTICLES
1,2,3,10,19,20,21,27,35,46,73,74,201,202,206,213,214,220,225,227,232,258,259 AND PARAGRAPH 8(e) OF THE FOURTH
SCHEDULE (DISTRIBUTION OF FUNCTIONS BETWEEN THE NATIONAL GOVERNMENT AND THE COUNTY
GOVERNMENT)**

IN THE MATTER OF VIOLATION OF FUNDAMENTAL RIGHTS AND FREEDOM

**IN THE MATTER OF CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREESOMS)
PRACTICE AND PROCEDURE RULES, 2013**

IN THE MATTER OF THE ENERGY ACT, NO. 12 OF 2006

IN THE MATTER OF PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT, NO.33 OF 2015

IN THE MATTER OF PUBLIC FINANCE MANAGEMENT ACT NO. 18 OF 2012

IN THE MATTER OF NATIONAL GOVERNMENT LOANS GUARANTEE ACT NO.18 OF 2011

IN THE MATTER OF CONSUMER PROTECTION ACT, 2012

IN THE MATTER OF 2018 BUDGET POLICY STATEMENT

BETWEEN

APOLLO MBOYA.....1ST PETITIONER

ELECTRICITY CONSUMERS

SOCIETY OF KENYA.....2ND PETITIONER

AND

CABINET SECRETARY OF

THE NATIONAL TREASURY.....1ST RESPONDENT

MINISTRY OF ENERGY.....2ND RESPONDENT

CENTRAL BANK OF KENYA.....3RD RESPONDENT

KENYA POWER & LIGHTING

COMPANY LTD.....4TH RESPONDENT

ENERGY REGULATORY COMMISSION...5TH RESPONDENT

KENYA ELECTRICITY

TRANSMISSION COMPANY LTD.....6TH RESPONDENT

ATTORNEY GENERAL.....7TH RESPONDENT

RULING

1. The Prospective Interested party **GITSON ENERGY LIMITED** through an application dated 17th December 2018 and filed on 15th January 2019 brought to court pursuant to section 3, 3A of the Civil Procedure Act; Order 51 of Civil Procedure Rules and all enabling provisions of the law seeks the following orders:-

- a) THAT this matter be certified as urgent, service be dispensed with and be heard *ex-parte* in the first instance.
- b) THAT this court be pleased to stay consent orders entered on 15th November, 2018, pending the hearing of the application dated 19th February 2018.
- c) THAT the hearing of this application be consolidated with the hearing of application dated 19th February 2018.
- d) THAT this court be pleased to make any orders and grant any reliefs that it deems fit in exercise of this inherent discretion.

2. The application is premised on the grounds on the face of the application *inter alia*:- that the application is under certificate of urgency dated 7/11/2018; that on 8th November 2018 the Applicant was instructed to serve the application to all parties to the suit entered on 15th November 2018 the other parties to the petition entered into a consent to settle the petition without first disposing off the application. The application is further supported by supporting affidavit by James Gitau, sworn on 17th December 2018.

3. The Respondents are all opposed to the application. The petitioner filed grounds of opposition dated 19th February 2019 raising 7 grounds of opposition and a Replying affidavit dated 8th April 2019. The 1st, 2nd and 7th Respondents filed grounds of opposition dated 18th April 2019 Raising 9 grounds of opposition. Similarly the 4th Respondent filed grounds of opposition dated 22nd February 2019 raising 6 grounds of opposition. The 5th Respondent also filed grounds of opposition dated 25th March 2019 setting out 7 grounds of opposition. The 6th Respondent is opposed to the application.

4. I have very carefully considered the prospective interested party's application, the Respondents grounds of opposition and Replying affidavits, counsel rival written submissions, as well as the oral submissions made before the court, and from the above the issues for consideration can be summed up as follows:-

- a) **Whether the circumstances justify the joinder of the prospective Interested Party/Applicant in the instant proceedings?**
- b) **Whether the Honourable court had become functus officio as at the time of filing the application?**
- c) **Whether the consent order dated 15th November 2018 should be set aside by the Honourable Court?**
- d) **Whether the prospective interested party is guilty of non-disclosure of material facts with respect to Nairobi High Court Judicial Review No. 324 of 2018 Gitson Energy Ltd vs Cabinet Secretary of National Treasury and 5 others?**
- e) **Whether the application dated 11/12/2018 is misconceived and an abuse of the court process?**

A) Whether the circumstances justify the joinder of the prospective Interested Party/Applicant in the instant proceedings?

5. The Applicant in this matter is seeking to be heard on its application dated 7/11/2018 citing its right to be heard under Article 50 of the Constitution of Kenya; urging that the parties consent order dated 15th November 2018 has locked the prospective interested party out of the suit.

6. The law gives court power to enjoin any party to a suit in exercise of its discretion at any stage of the proceedings and court can even do so even without a party applying; but this must be done before delivering of a judgment. In doing so however, the circumstances must justify the joinder, in the claim and defence before trial court, and which must raise a doubt as to which of the party is liable in the final outcome of the dispute.

7. Upon perusal of the court file, it is evident, that the matter was heard and determined by a consent order which the court adopted as a judgment of the court on 15th November 2018. Once the consent was adopted as judgment of this court, it meant, that there was no pending proceedings to warrant an entertainment of the applicant's application to be enjoined. The application had been filed on 7/11/2018 and the same was on 8/11/2018 before court, which court set the hearing of the suit on 15/11/2018 in presence of the Applicant who did not attend hearing on 15/11/2018. The recording of the consent order, in my view, meant the Applicant's application was spent and there is nothing pending hearing.

8. In the case of **Edward Acholla vs Sogea Satom Kenya Branch & 2 others [2014] eKLR**, the Industrial Court held;

"Consent becomes a judgment or order of the court once adopted as such. Once consent is adopted by the court, it automatically changes character and becomes a consent judgment or order with contractual effect and can only be set aside on grounds which would justify setting aside, or if certain conditions remain unfulfilled, which are not carried out."

9. I find in this matter, the Applicant was not a party to the suit over which a consent order and subsequent judgment was made. A party seeking to be enjoined in a suit must do so at any time during the pendency of the suit but not after the suit has been concluded, as joining a party after conclusion of the suit cannot serve any useful purpose. Similarly a pending application if not determined before recording a consent order; as the intended party is not a party in the suit, the application serves no purpose and is deemed in my view as spent (**Lilian Wairimu Ngatho & another vs Moki Savings Co-operative Society Limited & another (2014) eKLR**).

10. The court by an order issued on 12th January 2018 the court invited any joinder of parties, however the Applicant did not file any application till 8th November 2018 and court did on 8th November 2018, in presence of the Applicant reserve the hearing of the Applicant's application. On 15th November 2018 the Applicant and his counsel did not attend to prosecute its application, which is a clear evidence of indolence on the Applicant's part and lack of interest in participating in the instant proceedings. That a consent was issued on the same day, adopted by consent and upon entering judgment closed all the pending proceedings before the court. The Applicant in its present application has not offered any reasonable explanation on account of its indolence in filing the application so late and its subsequent failure to attend court on 15th November 2018. I find "*Equity aids the Vigilant and not the indolent*". Secondly I am alive to the principle, that no suit shall be defeated by reason of misjoinder or non-joinder of a party.

11. Upon considering the above I am satisfied the circumstances of this case do not justify the joinder of the prospective Interested Party/Applicant in the instant proceedings.

B) Whether the Honourable court had become functus officio as at the time of filing the application?

12. There is no dispute in this matter a consent order was issued on 15th November 2018 fully settling the dispute and before the Applicant had been joined as a party to the proceedings. The court upon entering judgment had fully determined the suit and there was nothing else pending determination. The present application was filed when there were no pending proceedings as the consent judgment was entered on 15th November 2018. The court therefore has become *functus officio* as the court has no further authority to hear or determine any matter attendant on any proceeding in the instant petition.

13. In supporting the above paragraph in the case of **Raila Odinga & 2 others vs Independent Electoral & Boundaries Commission & 3 others [2013] eKLR** where the Honourable Court in considering the concept of *functus officio* cited the case **Jersey Evening Post Limited vs A1 Thani [2002] JLR 542 at 550** where in the doctrine was aptly summarized as follows:

"A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available."

14. In view of the above, I am satisfied, that upon entry of judgment in this matter, following parties consent, the court become *functus officio*. The proceedings in this matter were fully concluded and court had performed all its duties as required upon pronouncing itself on the matter when it determined the matter and pronounced its final decision on the matter.

C) Whether the consent order dated 15th November 2018 should be set aside by the Honourable Court?

15. The consent order made on 15th November 2018 was made before the Applicant was enjoined as a party to the proceedings. The Applicant has never been enjoined as a party to this matter to date. The consent order binds all the parties since it has become a judgment of the court. The circumstances under which a consent order can be set aside is now settled. The circumstances under which a consent judgement can be set aside was set out in the case of **Timothy Manyara & 144 others vs Pyrethrum Board of Kenya (2005) eKLR** where the court observed as follows;

The law on setting aside of consent judgment is as set out in the **Brook Bond Liebig (T) Limited vs MALLYA [1975] E.A** that:

"The circumstances in which a consent judgment may be interfered with were considered by this court in **Hirani vs Kassam [1952], 19 E.A.C.A 131**, where the following passage from Seton of judgments and Orders, 7th Edition, Vol. I, p. 124 was approved:-

"Prima facie, any order made by fraud or collusion, or by an agreement contrary to the policy of the court...or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement" in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them...and cannot be varied or discharged unless obtained"

16. For the purpose of considering a proper consent in the sense of the law, I find it is the one in which it is made in the presence and with consent of all parties in a matter and/or their counsel. That such a consent binds all parties to the proceeding, or action and those claiming under them. In this matter the Applicant was not a party at the time the consent was entered into but is now seeking to be joined for the

purposes of setting aside the consent order in question. A consent order can only be applied to be set aside by the parties who made the same but not by strangers to the consent order, as is the case of the Applicant. It is my finding, that a stranger cannot seek to set aside consent order in which it was not a party. The consent order of 15th November 2018 cannot in my view be set aside on the Applicant's application being not a party to it and not a party in the suit.

D) Whether the prospective interested party is guilty of non-disclosure of material facts with respect to Nairobi High Court Judicial Review No. 324 of 2018 Gitson Energy Ltd vs Cabinet Secretary of National Treasury and 5 others?

17. The petitioner and the 4th Respondents contend, that the prospective Interested Party/Applicant is guilty of material non-disclosure pertinent to the **Nairobi High Court Judicial Review No. 324 of 2018 Gitson Energy Limited vs Cabinet Secretary of National Treasury & 5 others** filed on 7th August 2018 after the institution of the instant petition, in which it is seeking similar prayers to those in these settled proceedings.

18. In the case of **Brinks-MAT Ltd vs Elcombe [1988] 3 ALL ER 188**, the Court set out what the court has to consider to be material non-disclosure as follows:-

"In considering whether 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 me to include the following. (i) The duty of the applicant is to make a 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 by 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 such inquiries. (iv) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on the circumstances of the case including (a) The nature of the case which the applicant is making when he makes the application. (b) The order for which application is made and the probable effect of the order on the defendant, and (c) The degree of legitimate urgency and the time available for the making of inquiries....."

19. The prospective Interested party/Applicant has not contested the existence of Judicial Review No. 324 of 2018, in which he is said to be seeking similar prayers to those in these concluded proceedings. I find that the petitioner and Respondents have established material non-disclosure by the prospective Interested Party/Applicant and as such, a party who has deliberately refused, and neglected to disclose material facts, relevant to a matter pending before court is guilty of non-disclosure and should be deprived of any advantage he may derive by that breach of duty. The Applicant contention, that in the present application he is after right to fair hearing cannot stand in view of the existence of Judicial Review 324 of 2018, as he has another forum and opportunity to ventilate its grievances, which matter the parties have submitted is still on going. In view of the foregoing, I find and hold due to concealment, misrepresentation and non-disclosure of material facts by the Applicant, the applicant stands deprived of any advantage he delve by that breach of duty. The Applicant would not be prejudiced by any adverse orders in this matter as it has right to fair hearing and an opportunity to ventilate its case in the **Judicial Review No.324 of 2018**.

E) Whether the application dated 11/12/2018 is misconceived and an abuse of the court process?

20. The prospective Interested Party/Applicant in its application dated 17th December 2018 seek to stay consent orders entered on 15th November 2018 pending hearing of the application dated 19th February 2018 and prays that this application be consolidated with the application dated 19th February 2018. The petitioner and the Respondents contended, that there is no pending application or any application dated 19th February 2018, that can be stayed or be consolidated with present application. The Applicant has not attached such an application or exhibited the same to the court. The Applicant has not disclosed the nature of the said application. That upon perusal of the court file I found that there was none at all.

21. In absence of existence of pending application dated 19th February 2018, the basis of seeking stay in this matter as well as consolidation, I find the application is not based on any pending matter before this court. The application is hanging in the air and cannot stand. I find that the application is misconceived and an abuse of the court process.

22. The upshot is that the application is without merits. I proceed to make the following orders:-

a) The application dated 17th December 2018 is scandalous, vexatious, frivolous and an abuse of the court process and same is accordingly dismissed.

b) Costs of the application to the Petitioner and the Respondents to be borne by the prospective Interested Party/Applicant.

Dated, signed and delivered at Nairobi this 13th day of June, 2019.

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J .A. MAKAU

JUDGE