



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 658 OF 2017

IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL RIGHTS NAD FREEDOMS UNDER ARTICLES 2, 10, 22, 27(1), 47, 165(3) AND 232 OF THE CONSTITUTION OF KENYA.

AND

IN THE MATTER OF: THE LAW REFORM ACT CHAPTER 26, LAWS OF KENYA SECTIONS 8 AND 9

AND

IN THE MATTER OF: THE PUBLIC PROCUREMENT AND ASSEST DISPOSAL ACT, 2015, LAWS OF KENYA NAD THE RULES AND REGULATIONS MADE THEREUNDER

AND

IN THE MATTER OF: ARTICLE 10, 27, 28, 40, 47, 50, 157 & 224 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT, NO. 4 OF 2015, LAWS OF KENYA.

AND

IN THE MATTER OF: THE DECISION BY THE MINISTRY OF INFORMATION, COMMUNICATION&TELECOMMUNICATION TO EXCLUDE AND/OR EXPUNGE X-NEWS FROM ADVERTISEMENT MODULE/CONTRACT UNDER THE SCHEMES KNOWN AS MYGOV.

AND

IN THE MATTER OF: THE DECISION BY THE MINISTRY OF INFORMATION,COMMUNICATION &TELECOMMUNICATION ILLEGALLY AND UNLAWFULLY AWARDDING CONTRACTS

BETWEEN

THE REPUBLIC.....APPLICANT

VERSUS

1. MINISTRY OF INFORMATION, COMMUNICATION &

TELECOMMUNICATION.....RESPONDENT

EX-PARTE APPLICANT.....XTRA PUBLISHING LIMITED

RULING

1. Pursuant to leave granted on 14th December, 2017, the ex-parte applicant filed a Notice of Motion dated 10th January, 2018 brought under Section 8(2) of the Law Reform Act and Order 53 Rule 3 of the Civil Procedure Rules seeking the following orders:

- a) An order of certiorari to remove to this court and quash the proceedings, directions, decision and policies of the Respondent to exclude/expunge the Applicant from MyGov schedule/module of advertisement.
- b) An Order of mandamus to compel the Respondent to specifically include the Applicant into MyGov schedule/module on the same basis and terms as other publishers on the schedule.
- c) An order restraining the Respondent from acting or continuing to act in breach of duty imposed upon the Respondent under inter alia the Public Procurement and Asset Disposal Act, 2015 and the Fair Administrative Actions Act No. 5 of 2015.
- d) An order of compensation for the loss of profits and income for the entire duration the Applicant was unlawfully excluded from the MyGov schedule/module.
- e) The costs of this application be borne by the Respondents in any event.

The application is premised on the grounds set out therein and those in the Statutory Statement and affidavit of PAUL MARSHALL sworn on 17th November, 2017.

2. The Applicant alleges that it was incorporated in 2010 with the purpose of providing independent news and information to Kenyans and the world at large free of charge. To that end, the ex-parte applicant claims to have created a publication under the name X-News under which the publications were made. The applicant states that since the publications were available to readers free of charge it relied wholly on advertisement contracts for subsistence which contract were mainly from government ministries and corporate institutions.

3. The ex-parte applicant claims that in or about February, 2017 a policy decision and/or directive was issued by the government merging all government advertising into one government lift out referred to as MyGov and any person desirous of offering advertisement service for government programs had to go through that central agency.

4. The ex-parte applicant alleges that he was unjustifiably left out from MyGov scheme upon its creation while several companies with similarities to it were taken on board. The ex-parte applicant contends that the decision to exclude it from MyGov and include other companies is an abuse of power, an action made in bad faith and is malicious.

5. Further, the ex-parte applicant states that the decision made by the Respondent is in breach of laws of procurement laid down in the Public Procurement and Asset Disposal Act, 2015.

6. The ex-parte applicant alleges that there is no justifiable reason given for the exclusion of the Applicant from MyGov platform and therefore the decision is materially unreasonable. Also, the ex-parte applicant takes issue with the Respondent for failing to afford it an opportunity to be heard before issuing the decision. It is for these reasons that the ex-parte applicant opined that the Respondent acted unreasonable, in bad faith and with malice.

7. The ex-parte applicant claims that the decision by the Respondent is unfair and is in breach of the applicant's right to fair administrative action under Article 47 of the Constitution.

8. It is the ex-parte applicant's case that it has expended a lot of money and committed immense resources towards its work therefore the decision by the Respondent will negatively affect its ability to carry out its day to day functions as it is continually losing millions of shillings in income.

9. The Respondent neither responded to the application nor participated in the proceedings.

Submissions

10. The ex-parte applicant filed submissions on 12th April, 2018. Mr. Odongo learned Counsel for the ex-parte applicant submitted that the purpose of judicial review is to ensure every entity or person is given fair treatment. Counsel cited the case of **Kevin K. Mwiti v. Kenya School of Law & 2 others [2015]eKLR** where the court held that:

“The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. It is meant to uplift the quality of public decision making and thereby ensure for the citizen civilized governance, by holding the public authority to the limit prescribed by law.”

11. Mr. Odongo contended that the decision by the Respondent to exclude it from the MyGov platform is unreasonable and irrational as no reason was given for the decision. To emphasize this assertion, Counsel pointed that the decision's unreasonableness meets the test set out in the case of **Associated Provincial Picture Houses Ltd v. Wednesbury Corporation [1948] 1 K.B. 223**.

12. Further, Mr. Odongo submitted that the decision violated the principles of natural justice since the Applicant was not given an opportunity to be heard. Mr. Odongo submitted that the decision by the Respondent was a violation of the principles of proportionality. Counsel argued that the Respondent did not strike a fair balance between the Respondent's interests and the wider obligations of the Respondent. He stated that the Respondent also failed to consider the proper/correct law and as result unreasonably excluded the applicant from the MyGov platform.

13. Mr. Odongo urged the court to exercise its supervisory jurisdiction over the Respondent and direct the Respondent to accommodate the

ex-parte applicant on its platform as they had previously done.

The Determination

14. The ex-parte applicant is aggrieved by the purported decision of the Respondent to exclude it from MyGov platform. According to the ex-parte applicant, prior to the establishment of the MyGov platform it used to provide advertisement services to the government. These services sustained the ex-parte applicant's operation as its major business of publishing information did not generate any income.

15. The ex-parte applicant contends, in summary, that the decision made by the Respondent violated the principles of natural justice as the applicant was not heard before the decision was made. Also, the applicant claims the decision was unreasonable, irrational, and malicious and made in bad faith.

16. To begin with, this Court must address its mind to the scope of judicial review. As correctly put by the ex-parte applicant, the purpose of judicial review is to uplift the quality of the decision making process. It is to ensure that the process is not tainted by any irregularities or illegalities and that the process is conducted within the confines of the law. In **Municipal Council of Mombasa V Republic and Another [2002] eKLR, 223 Civil Appeal No. 185 OF 2001** the Court of Appeal discussed the scope of judicial review as follows:

“...as the Court has repeatedly said, judicial review is concerned with the decision -making process, not with the merits of the decision itself. Mr. Justice Waki clearly recognized this and stated so; so that in this matter, for example, the court would not be concerned with the issue of whether the increases in the fees and charges were or were not justified. The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review.”(emphasis added)

17. In my view, this court cannot go into the issue of whether the ex-parte applicant ought to have been excluded or included in the MyGov platform. To do this would be tantamount to go into the merits of the decision which is outside the scope of judicial review as correctly expressed above in the appellate decision.

18. Moving on to the process of decision making, the court notes that the impugned decision has not been annexed to the application by the ex-parte applicant. This Court has no way of knowing or accessing the decision complained of. Order 53 Rule 7 is categorical that an applicant shall not question the validity of any record and seek for the same to be quashed if the applicant has not lodged a copy of the record with the court. Where the applicant fails to lodge a copy, the applicant must explain the failure to do so to the satisfaction of the court. The ex-parte applicant did not give any reasons for the failure to lodge the copy of the decision. Does the failure to lodge a copy of the decision fatal to this matter? Varied decisions have been made on this issue. In **Republic Vs Ruiru District Land Disputes Tribunal & Another Ex Parte Lucia Waithira Muiruri & Another [2014] eKLR**, the Court opined that the failure to comply with Order 53 Rule 7 was fatal as the Court could not determine whether the decision existed. Yet in **Ashraf Savani & Another Vs Chief Magistrate's Court Kibera & 4 Others [2012] eKLR**, the court was of a contrary opinion. The court held as follows:

“In my understanding Order 53 Rule 7 of the Civil Procedure Rules does not provide that the order sought to be quashed by Orders of Certiorari must be attached to the application seeking leave. It only provides that a copy of such an order must be lodged with the courts registrar verified by an affidavit before hearing of the motion in which validity of the order is being challenged.

From a reading of Order 53 Rule 7(1) of the Civil Procedure Rules, I find that though a party challenging validity of an order or decision seeking to have the same quashed by orders of certiorari may attach the impugned decision or order to the verifying affidavit sworn to verify facts in the statutory statement in the application for leave, a party who fails to do so at the leave stage may still do so at a later stage provided copy of the said order or decision verified by affidavit is lodged with the courts registrar before hearing of the Notice of Motion for Judicial Review or a satisfactory reason is given to the court regarding why this has not been done”.

19. In my view, the failure to lodge a copy of the decision with the application does not mandatorily make the proceedings fatal. Each case must be looked at independently and the court must address its mind to the unique circumstances that may constrain the applicant in relation to accessibility of the decision. It behooves the applicant to explain to the court the reasons as the failure to lodge a copy of the decision. Reasons given must be concrete to enable the court find that despite exercising all due diligence the applicant could not access the decision. In the instant case, the applicant has not given any reasons for the failure to lodge a copy of the decision. This Court cannot affirmatively hold that the decision does exist. However, this court notes that at paragraph 11 of the Supporting Affidavit of PAUL MARSHALL sworn on 17th November, 2017, the deponent makes reference to the decision averring that the decision to exclude and/or expunge the Applicant was communicated unofficially, unprofessionally”. The ex-parte applicant seems to imply that the decision does exist and it had access to the same. This court cannot speculate on the existence of the decision. The court must be certain that the decision exists. In **Republic Vs Mwangi S. Kimenyi Ex-Parte Kenya Institute for Public Policy and Research Analysis (KIPPRA) [2013] eKLR**, the Court of Appeal found that a court must ascertain that the decision complained of does exist. The court observed as follows:

“The learned judge in his judgment was correct in stating that the court cannot act in vain against a non-existent decision. There was no decision or letter dated 24th August, 2005 that could be called and removed into the High Court to be quashed. This being so, the learned judge erred in quashing the alleged decision of 24th August, 2004 when the said decision is non-existent. Further, the learned judge erred in issuing orders to quash the letter of 16th December, 2004 when the court had

not determined that the decision made on 3rd December, 2004 was in existence. A court of law should not descend into the realm of speculation. The decision to be quashed must first be ascertained and determined to be in existence. This is the rationale for calling and removing into court a decision to be quashed. We hold that the learned Judge erred and it was not appropriate to issue the judicial review orders in this matter”.

20. Similarly in this matter, without the decision, this Court cannot know whether the Respondent is the author of the decision and subsequently whether the orders are sought against the proper respondent. Further, this court cannot interrogate the claims by the applicant that the purported decision was unlawful, unreasonable, malicious, and irrational and made in bad faith. To do that would be speculative on the quality of alleged decision.

21. Importantly, the ex-parte applicant has not informed the court of the process that led to the alleged decision. The court is left with more questions than answers in this matter; Were applicants required to apply to join the MyGov platform? If yes, Did the applicant submit an application? Was there a criteria for approval of entities or persons that joined the MyGov platform? If yes, Did the applicant meet the criteria? These are background information relevant to this application.

22. For the foregoing reasons, the Court finds that the application dated 10th January, 2018 is not merited. The application is dismissed with costs.

Dated, Signed and Delivered in Nairobi this 21st day of November, 2018.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Odongo to for the Ex parte Applicant

N/A for Respondent

Ms. Lovender Court Assistant