**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISCELLANEOUS APPLICATION NO. 6 OF 2017**

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

**VERSUS**

**THE CHIEF REGISTRAR, JUDICIARY…..........………..1ST RESPONDENT**

**ATTORNEY GENERAL…………..…......…………………2ND RESPONDENT**

**AND**

**LAVINGTON SECURITY LIMITED**

**EX-PARTE: BEDROCK SECURITY SERVICES LIMITED**

**RULING**

**Introduction**

**1.** By a Notice of Motion dated 18th January, 2017, the ex parte applicant herein sought the following orders:

> **1. An order of certiorari to quash the 1st Respondent's decision declaring M/s. Lavington Security Limited as the sole security company hired to provide security services to the judiciary starting 1st January, 2017 as communicated via undated Internal Memo signed by Harrison Kavosi for Eric Kamande, the principal administration officer.**
>
> **2. An order of certiorari to quash the 1st Respondent's decision to contract M/s Lavington Security Limited to provide security services to the judiciary as communicated in the letter dated 23d December, 2016.**
>
> **3. All other necessary and consequential orders as the Honourable Court may deem just and expedient to gran.**
>
> **4. That the costs of this application be in the cause.**

**2.** From the proceedings it was clear that what provoked these proceedings was the threat to enter into the challenged contract notwithstanding the pendency of proceedings challenging the subject tender before the Public Procurement Administrative Review Board.

**3.** Subsequently the said award was nullified by the Board and the 1st Respondent was directed to re-tender for the said services. In ***The Standard Newspaper*** of 15th February, 2017, the 1st Respondent in fact advertised the Tender No. JUD/039/2016-2017 – Provision of Security Services to the Judiciary.

**4.** It is clear that these proceedings were provoked by the 1st Respondent's decision to proceed with the process of the award of the tender without waiting for the hearing and the determination of the Request for Review pending before the Review Board. As the Board has already made its decision which is being implemented, it follows that these proceedings are nolonger necessary and it would be pointless to keep them alive notwithstanding the ex parte applicant's reluctance to terminate them.

**5.** As is stated in ***Halsbury's Laws of England* 4th Edn. Vol. 1(1) para 12 page 270:**

> **"The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)…are all discretionary. *The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant.* In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. *Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile,* whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow 'contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders."** [Emphasis added].

**6.** This position was reiterated by this Court in **Joccinta Wanjiru Raphael vs. William Nangulu – Divisional Criminal Investigation Officer Makadara & 2 Others [2014] eKLR** where it was held that:

**"… it must always be remembered that judicial review orders being discretionary are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles...*The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders*. Since the court exercises a discretionary jurisdiction in granting judicial review orders, it can withhold the gravity of the order where among other reasons there has been delay and where the a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or *where its path is strewn with blockage* or where it would cause administrative chaos and public inconvenience or *where the object for which application is made has already been realized*, even if merited. *The Court would refuse to grant judicial review remedy when it is no longer* necessary; *or has been overtaken by events; or where issues have become academic exercise; or serves no useful or practical significance*."**

**7. Where it is clear to the Court that the proceedings before it nolonger serve any useful purpose the Court ought to bring the same to end in order to prevent abuse of its process.** As was held by the Court of Appeal in **Muchanga Investments Limited vs. Safaris Unlimited (Africa) Ltd & 2 Others Civil Appeal No. 25 of 2002 [2009] KLR 229**:

> **"A court of law would not be entitled in our view to abdicate its cardinal role of making a determination. Section 57(8) contemplates a speedy process to have the rights of both the**

**caveator and caveatee determined and not a protracted trial. In our view, the often quoted principle that a party should have his day in court should not be taken literally. He should have his day only when there is something to hear. No party should have a right to squander judicial time. Hearing time should be allocated by the court on a need basis and not as a matter of routine. Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice…We approve and adopt the principles so ably expressed by both *Lord Roskil* and *Lord Templeman* in the case of *ASHMORE v CORP OF LLOYDS [1992] 2 ALL E.R 486* at page 488 where *Lord Roskil* states:**

> **"It is the trial judge who has control of the proceedings. It is part of his duty to identify crucial issues and to see they are tried as expeditiously and as inexpensively as possible. It is the duty of the advisers of the parties to assist the trial judge in carrying out his duty. Litigants are not entitled to the uncontrolled use of a trial judge's time. Other litigants await their turn. Litigants are only entitled to so much of the trial judges' time as is necessary for the proper determination of the relevant issues."**

**At page 493 of the same case *Lord Templeman* delivered himself thus:**

> **…"an expectation that the trial would proceed to a conclusion upon the evidence to be produced is not a legitimate expectation. The only legitimate expectation of any plaintiff is to receive justice. Justice can only be achieved by assisting the judge."**

**…….**

**In the case of *FREMAR CONSTRUCTION CO LTD v MWAKISITI NAVI SHAH 2005 e KLR* at page 6 where the Court said:-**

> **"Trials are not merely held to glorify the hallowed principle that disputes ought to be heard and determined on oral evidence in open court. Unless a trial is on discernible issues it would be farcical to waste judicial time on it."**

**…..In our view he, knowingly and dishonestly used the legal process to accomplish an ulterior purpose to that of the court process, which is to protect the interests of justice… The 1st respondent and *Mr Church* did manifestly exploit the process whereas it was in our view clear to them that they lacked good faith in instituting the Originating Summons thereby causing prejudice and delay. The action was also wanting in *bona fides* and was oppressive to the appellant. All these in our view constitute abuse of process."**

**8.** This was the position adopted by **Nyamu, J** in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728** when he expressed himself as follows:

**"In the long run in the interest of the overriding objectives of case management, no group of litigants no matter how privileged are entitled to more judicial time than any other. Judicial time is an expensive resource which must be apportioned fairly to the entire spectrum of the work in the Court. Every file is important. For Courts to continually inspire confidence of the Court users and litigants, they must have a very sharp sense of proportionality, fairness and equity in the allocation of judicial time."**

**9.** The Court ought therefore to take appropriate steps in order to manage it said resource. This was appreciated by the Court of appeal in **Hunker Trading Company Limited vs. Elf Oil Kenya Limited Civil Application No. Nai. 6 OF 2010** where it held that:

> **"…the applicant cannot be allowed to invoke the "O2 principle" and at the same time abuse it at will...All provisions and rules in the relevant Acts must be "O2" compliant because they**

**exists for no other purpose. The "O2 principle" poses a great challenge to the courts in both the exercise of powers conferred on them by the two Acts and rules and in interpreting them in a manner that best promotes good management practices in all the processes of the delivery of justice. In the court's view <u>this challenge may involve the use of an appropriate summary procedure where it was not previously provided for in the rules but the circumstances of the case call for it so that the ends of justice are met.</u> It may also entail redesigning approaches to the management of court processes so that finality and justice are attained and decisions that ought to be made today are not postponed to another day.** [Underlining mine].

**10.** To quote **Omollo, JA** in the case of **<u>J P Machira vs. Wangethi Mwangi & Another Civil Appeal No. 179 of 1997</u>** although disputes ought to be heard by oral evidence in court, there is no magic in holding a trial and receiving oral evidence merely because it is normal and usual to do so. A trial must be based on issues otherwise it may become a farce.

**11. That the Court may invoke its inherent powers to bring to an end otherwise unnecessary proceedings was also appreciated by Kimaru, J** in **<u>Stephen Somek Takwenyi & Another vs. David Mbuthia Githare & 2 Others Nairobi (Milimani) HCCC No. 363 of 2009</u>** expressed himself as follows:

**"This is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived. The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilised legal process it is the machinery used in the courts of law to vindicate a man's rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract *res judicata* rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it".**

**12. The same Judge** in **<u>Rev. Madara Evans Okanga Dondo vs. Housing Finance Company of Kenya Nakuru HCCC No. 262 of 2005</u>** similarly held that:

**"The court will always invoke its inherent jurisdiction to prevent the abuse of the due process of the court. The jurisdiction of the court, which is comprised within the term "inherent", is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of the substantive law; it is exercisable by summary process, without plenary trial, it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of the court. The inherent jurisdiction of the court enables the court to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process. In sum, it may be said that the inherent jurisdiction of the court is virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."**

**13. In the circumstances, I hereby draw on the powers of this Court reserved under the inherent powers of this Court and strike out these proceedings but with no order as to costs.**

**14. Orders accordingly.**

**Dated at Nairobi this 17th day of February, 2017**

***G V ODUNGA***

***JUDGE***

***Delivered in the presence of:***

***Mr juguna for Mr Nderitu for the applicant***

***Mr Bundotich for the interested party***

***CA Mwangi***