



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**MISC. APPLICATION NO. 485 2016**

**IN THE MATTER OF AN APPLICATION BY KENYA NATIONAL UNION OF CO-OPERATIVES**

**STAFF FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION AGAINST**

**THE ENACTMENT OF THE TRAFFIC(MINOR OFFENCES) RULES 2016 BY THE CABINET SECRETARY IN-CHARGE OF TRANSPORT, INFRASTRUCTURE, HOUSING AND URBAN**

**DEVELOPMENT; AND THE NATIONAL TRANSPORT & SAFETY AUTHORITY**

**AND**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE CABINET SECRETARY FOR TRANSPORT, INFRASTRUCTURE**

**HOUSING AND URBAN DEVELOPMENT.....1<sup>ST</sup> RESPONDENT**

**THE NATIONAL TRANSPORT & SAFETY AUTHORITY.....2<sup>ND</sup> RESPONDENT**

**AND**

**KENYA NATIONAL UNION OF CO-OPERATIVES STAFF.....EX PARTE APPLICANT**

**ETHICS AND ANTI-CORRUPTION COMMISSION...INTENDED INTERESTED PARTY**

**RULING**

1. By an application dated 13<sup>th</sup> January 2012, the Ethics and Anti Corruption Commission ( EACC)

seeks from the court orders that it be enjoined to these proceedings as an interested party and that it be served with all the pleadings filed in the proceedings.

2. The application is predicated on the 7 grounds on the face of the notice of motion and supported by an affidavit sworn by Michael Mubea, the Deputy Secretary/Chief Executive Officer in charge of Technical Services at the Ethics and Anti Corruption Commission.

3. According to the deponent, the Commission carried out a study in the problem of corruption on Kenyan Roads which led to the enactment of the new impugned Traffic (Minor Offences) Rules 2016 and therefore it is desirous of being enjoined into these proceedings as the outcome thereof may impact negatively on the fight against corruption by traffic offenders.

4. That as one of the core mandates of the Commission is to prevent corruption, it carried out a study which established that traffic police officers were extorting bribes from traffic offenders due to lengthy criminal process and found that there was a weak legal and regulatory framework and that the lengthy criminal process that criminal offenders were subjected to led to high rates of corruption. That during the study, police corruption was found to be the highest at 36% amongst public institutions and one of the recommendations after the study was that new traffic regulations to enhance the speedy dissemination of justice, improve transparency and accountability of the traffic police be made.

5. That consequently, the new traffic rules were enacted following consultations with various stakeholders and in compliance with the constitutional requirement for public participation for six months under the National Council for Administration of Justice (NCAJ) whose membership is the judiciary, the National Police Service, National Transport Safety Authority (NTSA), Kenya Association of Motorists, among others.

6. That transactions involving corruption on the Kenyan Roads through MPESA amounted to shs 18,363,759, according to the investigations and analysis of 28 police officers involved in corruption in Mariakani and Mlolongo weighbridges within a period of one year.

7. That other jurisdictions like Ohio State in the United States where offenders pay fines on the spot for the offence committed have low corruption rates.

8. That therefore the Commission believes that the impugned Traffic (Minor Offences) Rules, 2016 will deal with the vice of corruption among others through the systemized method of paying cash bails, bonds and fines directly to the Government through MPESA as it provides for accountability, a value underscored by Article 10 of the Constitution.

9. That this is public litigation as matters of corruption affect each and every citizen and the county's economy.

10. That the commission being an investigative agency that is mandated with prevention and the investigative mandate on corruption matters which the impugned Traffic Rules are meant to address within the traffic sector, it is prudent for the Commission to be joined and allowed to participate in these proceedings.

11. The exparte applicant opposed the application by the Ethics and Anti Corruption Commission through a replying affidavit sworn by Honourable Justus Allo Ogeka the General Secretary of the exparte applicant, on 20<sup>th</sup> January 2017, contending that as far as he was concerned, the National Council on administration of justice chaired by the Chief Justice had a Special Working Group Committee which drafted guidelines that would help streamline the traffic sector and that on 2<sup>nd</sup> June 2015 the Chief Justice and Inspector General of Police issued traffic guidelines containing a raft of new directions, in alia, that the traffic courts shall process the payment of traffic fines in open court.

12. That therefore it is not true as deponed by Michael Mubea in his paragraph 7 of the affidavit, that the impugned Traffic Rules were deliberated upon by the National Council for Administration of Justice. To

the contrary, that the impugned Rules are a complete departure from the said noble and salutary guidelines propounded by the National Council for Administration of Justice. That even the Ohio Traffic Rules as annexed mandatorily provide for a court sanctioned process in dealing with traffic offenders as opposed to the impugned Rules that seek to deny alleged traffic offenders a chance to have their day in court.

13. That the interested party should not support Rules which promote non- accountability, corruption by the police on the roads; and are openly an affront to the Rule of Law.

14. That there is nothing special in the interest of the intended interested party to warrant their joinder to these proceedings as their interests can adequately be addressed by the Cabinet Secretary for Transport, Infrastructure, Housing and Urban Development as the maker of the impugned Rules, and the National Transport & Safety Authority that implements policies relating to road transport and safety who are already parties to these proceedings. That where a party's interests are already catered for by another person already a party to Judicial Review proceedings, there is no need to join such a party.

15. That the joinder of the Ethics and Anti Corruption Commission will open a flood gate of unnecessary litigation and clog or delay the matter, contrary to the overriding objectives of the court and the public interest in expeditious performance of administrative functions.

16. That joinder of the Ethics and Anti Corruption Commission will unnecessarily escalate costs of litigating the matter to the utter detriment of the exparte applicant.

17. That the proposed interested party has deliberately sought to mislead the court on the implication of the impugned Rules vis avis the Directions on traffic cases by the National Council for Administration of Justice and therefore the grounds for the proposed joinder are completely misplaced.

18. That no substantial benefit will be served by the proposed joinder of Ethics and Anti Corruption Commission as it will only delay expeditious disposal of this suit.

19. That the proposed interested party has annexed to its affidavit classified documents and deliberately distorted facts based on falsehoods hence the application should be dismissed with costs as no prejudice will be suffered by Ethics and Anti Corruption Commission if it is not joined to the cause.

20. The parties advocates canvassed the application orally on 24<sup>th</sup> January 2017 with Mrs Odipo counsel for the proposed interested party submitting, relying wholly on the grounds, the supporting affidavit and a bundle of authorities filed which I need not reproduce herein as the submissions are a replica of the grounds and the supporting affidavit.

21. Mrs Odipo maintained that the joinder will enable the court arrive at a fair decision. She relied on petition **No. 416/2008 Mastermind Tobacco Company Ltd Vs Attorney General** where Okwengu J (as she then was) allowed joinder of an interested party on the ground that the orders sought by the petitioner may be adverse to the interest of the intended parties who appear to have been at the fore front in the legislation of the Tobacco control Act.

22. Further reliance was placed on **JR 365 Republic Vs Kenya Airports Authority Exparte Transglobal – Cargo Centre Limited of 2014** where G.V. Odunga J considered an oral application for joinder and allowed it on the ground that to hear and determine the proceedings without bringing in the parties when allegations are made that they are beneficiaries of the respondent's alleged differential treatment would amount to be abetting the very conduct which the applicant complained of- selective treatment of persons without considering the positions of the other players in the subject undertaking. The learned judge allowed the joinder of **Kenya Airways, Kenya Aerotech, Tradewinds Aviation Ltd, Eurocraft Agencies and Swissport Kenya** as parties to those proceedings.

23. The intended party also relied on **JR 3/2015 Republic Vs National Land Commission Exparte Lomoto Limited 1962** and **members of Kokwembei Community** where Munyao Sila J allowed joinder of a proposed interested party because it had an interest in the outcome of the litigation and that it may have some material that may assist the court in appreciating the issues and in arriving at the decision whether it was proper for the National Land Commission to hear the complaint presented by the intended interested party.

24. The exparte applicant's counsel Mr Midenga submitted in opposition to the application by the intended interested party, relying wholly on the replying affidavit of Honourable Justus Allo Ogeka and the authorities.

25. Mr Midenga laid emphasis that albeit the court has unfettered discretion to join any party to the proceedings, that discretion must be exercised judiciously. That there is no direct interest sought to be litigated by the Ethics and Anti Corruption Commission in these proceedings, which interest is speculative.

26. Further, that there are already parties to these proceedings who are directly affected by the impugned Rules hence the Ethics and Anti Corruption Commission interests are catered for.

27. Further, that this application is a deliberate intention to confuse the impugned Rules and guidelines made by National Council for Administration and delay these proceedings. Reliance was placed on **Republic vs Central Bank of Kenya & Others[2016]eKLR** where Odunga J dismissed an application for joinder of a party Kenya Tea Development Agency Holdings Limited as an interested party on the ground that the court was not satisfied as to the position of the alleged subsidiary companies in the proceedings. The learned judge stated.

***“.....In my view, for a party to be joined to the proceedings under Order 53 Rule 3(2) aforesaid the applicant ought to disclose to the court how he or she is directly affected by disclosing upfront its legal position in the matter and what it intends to place before the court that makes his case distinct from the case presented by the other parties to the proceedings in other words, there ought to be material disclosure of the intended case.”***

28. The exparte applicant submitted that nothing had been shown to the court on how these proceedings affect the Ethics and Anti Corruption Commission and therefore justice should not be delayed and denied by allowing the application by the Ethics and Anti Corruption Commission.

29. It was further submitted that in any event the Ohio Rules advocate for court sanctions unlike the impugned Rules. Further, that the Ethics and Anti Corruption Commission will not add value to these proceedings as there is no evidence of public participation in the preparation of the impugned Rules.

30. That no bona fide claim has been shown hence the application should be dismissed with costs.

31. The respondents did not oppose the joinder of Ethics and Anti Corruption Commission.

32. In a rejoinder, Mrs Odipo submitted that the issue of the corruption is within the mandate of Ethics and Anti Corruption Commission hence its interests cannot be represented by others.

33. Further, that their position is that the impugned Rules will reduce and not promote corruption. She concluded that Ethics and Anti Corruption Commission has a bonafide claim and interest in the matter. Counsel urged the court to allow the application for joinder.

### **Determination**

34. I have considered the application for joinder, grounds, supporting affidavit, submissions and annexures. I have also considered the exparte applicant's serious opposition thereto as per his replying affidavit, oral submissions and the authorities relied on by the parties' advocates in their submissions.

35. The main issue for determination is whether Ethics and Anti Corruption Commission should be enjoined to these proceedings as an interested party.

36. Order 53 Rule 3(2) and (4) of the Civil Procedure Rules stipulates:

***“ (2) The notice shall be served on all persons directly affected, and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein; the notice of motion shall be served on the presiding officer of the court and in all parties to the proceedings.***

***(4) If on the hearing of the motion the High Court is of the opinion that any person who ought to have been served therewith has not been served, whether or not he is a person who ought to have been served under the foregoing provisions of this rule, the High Court may adjourn the hearing, in order that the notice may be served on that person, upon such terms (if any) as the court may direct.”***

37. It follows that whereas Subrule(2) of Order 53 of the Civil Procedure Rules restricts persons who should be served to those who are ***“directly affected,”*** Subrule (4) gives the court wide discretion to order that the application be served on any person notwithstanding the fact that that person ought to have been served under Subrule 2 or not and the court’s decision to do so is only subject to ***“such terms (if any) as the court may direct.”***

38. It therefore follows that unlike the provisions of Order 53 Rule (2) of the Civil Procedure Rules, the court has unfettered discretion under Subrule (4), which power is intended to ensure that justice is done, to permit any other person who ought or ought not to have been served, to be served to participate in the proceedings.

39. In other words, the court is given the power to allow joinder of any person to the proceedings whether that person applies or not, as long as it is satisfied that the party is a necessary party.

40. However, where there is a formal application under Subrule (2), it is upon the person who claims that they ought to have been served or that they have a legitimate interest in the proceedings, to demonstrate how the proceedings affect them.

41. The court, nonetheless, has the last word, under Subrule (4) to order for joinder of the person to the cause. It must however, be noted that a party who wishes to be enjoined to Judicial Review proceedings, which is concerned with the process and not the merits of the decision, is not seeking to transform Judicial Review proceedings into ordinary civil litigation. The person must demonstrate how the proceedings directly affect them, their rights or interests.

42. The court must also be satisfied that there will be substantial benefit to be gained by the joinder of a person to proceedings but where the joinder will militate against the expeditious disposal of the said proceedings which by their nature ought to be heard and determined speedily, the court will be unwilling to enjoin the intended party to the proceedings.

43. Where the intended interested party’s interests can sufficiently be catered for by another party who is already a primary party to the proceedings there would be no reason to join the intended interested party.

44. In **Macademia Nuts Dealers Vs Horticultural Crops Development Authority & Others [2014] e KLR** the court held:

***“An interested party is a party who has a stake/interest directly in the matter before the court, though he or she is not a party to the case. He must be a party who is likely or who will be affected by the decision of the court and he or she is enjoined (sic) in the matter, his***

***or her interest will not be well articulated or protected unless she or he is made a party to ventilate his or her cause.”***

45. According to the intending interested party, the Ethics and Anti Corruption Commission, it will be affected by the outcome of these proceedings because, among other reasons, it is mandated by the Constitution to prevent corruption.

46. Further, that in its investigative role, it carried out a research which established that the long time taken to conclude minor traffic offences was contributing to corruption by the traffic police officers hence the instant fines payment through MPESA would reduce corruption on our roads.

47. Further, that the process of coming up with the impugned rules was a consultative one through National Council for Administration of Justice stakeholders hence it participated in the preparation of the impugned Rules and therefore it should be enjoined to these proceedings in order for Ethics and Anti Corruption Commission to articulate its interests which cannot be articulated by the respondents.

48. On the other hand, the exparte applicant maintains that the joinder of Ethics and Anti Corruption Commission to these proceedings is a delaying tactic to delay these proceedings; the Ethics and Anti Corruption Commission has no stake in these proceedings; that in any event, their interests if any are catered for by the respondents herein; and that the National Council for Administration of Justice never participated in the making of the impugned Rules.

49. Further, it is contended that in any event, there was no public participation in the process of the making of the impugned Rules and that even the Ohio Rules have court sanction unlike the impugned Rules which oust the participation of the courts in the implementation of the said Rules.

50. On page 1 of the exparte applicant's annexures is the impugned legal notice No. 162 of 23<sup>rd</sup> September 2016 and on page 6 is a write up by Francis Meja, the Director General National Transport & Safety Authority. In that write up, it is clear from the initial paragraphs that there is justification for the instant fines, *whether that is legal or not*, owing to massive corruption experienced on our roads and which is partly attributed to the delays in our courts in processing minor traffic offences.

51. The intending party (Ethics and Anti Corruption Commission) has also annexed to its application a copy of research findings and recommendations for dealing with corruption on our roads.

52. In my humble view, whereas at this stage the court is not expected to delve into the merits or demerits of the main motion, it is clear to me that prima facie, the Ethics and Anti Corruption Commission have an identifiable interest or stake in the outcome of this case since the Commission is constitutionally mandated to prevent corruption and to investigate all cases related to corruption and economic crime.

53. The applicant's application raises very serious issues of law and the Constitution. In my humble view, it cannot be said that the interest of Ethics and Anti Corruption Commission are taken care of by the Cabinet Secretary Transport; and National Transport & Safety Authority. Ethics and Anti Corruption Commission is a constitutional commission established pursuant to Chapter six of the Constitution on Leadership and Integrity (Article 79 of the Constitution).

54. Matters of corruption affect values and principles of Governance espoused in Article 10 of the Constitution among others, good governance, integrity, transparency, and accountability. It cannot, therefore, be said that Ethics and Anti Corruption Commission is a busy body intending to delay these proceedings or that it has no direct stake in these proceedings when it is clear that it was involved in research that brought about recommendations on how to tackle the menace of corruption on our roads. This is not to say that their interest must carry the day in court, but that infact, there is no prejudice to be occasioned to the exparte applicants if the Ethics and Anti Corruption Commission are enjoined to these proceedings as they have ably demonstrated their interest in these proceedings. It is therefore

only fair and just that the court accords them an opportunity to ventilate their grievances on the challenge of the impugned Rules.

55. All the decisions relied on by both parties are relevant to these proceedings but a careful reading thereof reveals that the decisions clearly establish different circumstances in which the court exercised its discretion in either allowing joinder or refusing to join an intending interested parties to Judicial Review proceedings. I am therefore persuaded that Ethics and Anti Corruption Commission has made out a case that it deserves to be enjoined to these proceedings as interested parties. The issue of delay does not arise as there is a pending application seeking to vacate orders of this court granting leave to the exparte applicant to institute Judicial Review proceedings and to set aside the order that stayed the implementation of the impugned Rules. That has not been caused by the EACC. Expedition must be balanced with the ultimate goal-justice for all.

57. Accordingly, I allow the application dated 13<sup>th</sup> January 2017 and order that the Ethics and Anti Corruption Commission be and is hereby enjoined to these proceedings as an interested party.

57. I further order that in order to avoid any more delay to this case, the Ethics and Anti Corruption Commission herein joined as interested party do file and serve its replying affidavits and submissions to the exparte applicant's notice of motion dated 27<sup>th</sup> October 2016 and to the respondent's notice of motion dated 18<sup>th</sup> November 2016 with 7 days from the date hereof.

58. The exparte applicant and the respondents have 7 days from date of service to file and serve further affidavits if any, upon the interested party, together with submissions.

59. The respondent's motion shall be heard on 14<sup>th</sup> March 2017 together with preliminary objection filed by the exparte applicant.

60. Each party to bear their own costs of the notice of motion.

Orders accordingly.

Dated, Signed and Delivered at Nairobi this 13<sup>th</sup> day of February 2017.

**R.E. ABURILI**

**JUDGE**

In the presence of:

Mr WACHIRA h/b for Midenga for the exparte applicant

Mrs Odipo for the Interest party

Miss Ngelechei for the Respondent

CA: George