



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 45 OF 2016

BETWEEN

OKIYA OMTATAH OKOITI.....PETITIONER

VERSUS

COMMUNICATIONS AUTHORITY OF KENYA.....1ST RESPONDENT

THE CABINET SECRETARY, INFORMATION,

COMMUNICATION AND TECHNOLOGY.....2ND RESPONDENT

HON. ATTORNEY GENERAL.....3RD RESPONDENT

AIRTEL NETWORKS KENYA LIMITED.....4TH RESPONDENT

BEN NGENE GITUKU.....5TH RESPONDENT

AND

WILBERT KIPSANG CHONE.....1ST INTERESTED PARTY

KENNEDY MONCHERE NYAUNDI.....2ND INTERESTED PARTY

GRACE MWENDWA MUNJURI.....3RD INTERESTED PARTY

HELLEN KINOTI.....4TH INTERESTED PARTY

BEATRICE OPEE.....5TH INTERESTED PARTY

PETER MUNYWOKI MUTIE.....6TH INTERESTED PARTY

LEVI OBONYO.....7TH INTERESTED PARTY

RULING

Introduction

1. By way of notice of motion dated 25th February 2016, the petitioner herein sought the following orders:

1. THAT the application be certified as urgent and be heard exparte and in priority to any other pending issue.

2. THAT pending the hearing and determination of this Application and/or the Petition herein the Honourable Court be pleased to issue an interim mandatory order compelling the 1st respondent to produce the resolution of its Board of directors appointing and instructing the law firm of Ahmednassir Abdikadir advocates or any other law firm in representing the 1st respondent herein.

3. THAT pending the hearing and determination of this Application and/or the Petition herein the Honourable Court be pleased to issue temporary order of prohibition prohibiting the law firm of Ahmednassir, Abdikadir advocates or any law firm(s) in claiming to act under their authority from representing the 1st respondent in the proceedings herein before the 1st respondent produces in the court the resolution of the Board of Directors appointing and instructing the law firm(s) to represent 1st respondent.

4. THAT Consequent to the grant of the prayers above the honourable court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders and or favour the cause of justice.

5. THAT the costs of this application be in the cause.

Applicant's Case

2. According to the applicant, legal representation in proceedings before court of law is a matter that lies at the heart of the administration of justice and rule of law and it is fundamentally contrary to the constitution for any firm of advocate(s) of the High Court to purport to represent a party more so an independent statutory body without appointment and instructions done in a procedural and legal way. In the applicant's view, his intention is to ensure that the 1st respondent is represented in a manner that does not undermine the public interest in the autonomy of the 1st respondent.

3. It was the applicant's contention that if the Court hears any other application prior to the instant application, public interest in the rule of law will suffer great prejudice as the law firm purporting to represent the 1st Respondent will be given audience without establishing its standing or status herein. In his view the instant application raises the fundamental issue of the capacity in law of advocates of High court purporting to represent litigants without proper appointment and/or instructions. He added that it was of extreme public importance and at the heart of judicial independence that the question as to jurisdiction of the Court to hear advocates who are not properly appointed to represent litigants be determined by the Court.

4. The applicant contended that Public procurement being a matter of huge public interest must be done strictly according to the law and that given the current controversy involving the Board of the 1st respondent , which has even been locked out of it offices, there are great and grave risks of self-seekers and other "do-no-gooders" hijacking the process of procuring legal services for the 1st Respondent to improper motives and corrupt practices. It was averred that it is important for the Court to know exactly who it is dealing with and that no nefarious forces undermining the public interest in the autonomy of the

1st Respondent are allowed to hide behind advocates of the High Court of Kenya.

5. It was asserted that the Communication Authority of Kenya is an independent statutory body pursuant to articles 34(5) of the constitution of Kenya 2010 and section 5A(1) of the **Kenya Information and Communications Act** and that its decisions made by the 1st respondent are via resolutions of its Board of directors and are implemented by its the management, the secretariat. However, the said secretariat or management has no capacity to appoint advocates to represent the 1st respondent in this matter in which the appointment of the Board is in issue. To the Applicant, by law management of the 1st respondent is supposed to play absolutely no role in the appointment or removal of the Board of Directors.

6. It was the applicant's view that grave conflict of interest will inevitably ensue if the management/secretariat are allowed to play any role in the appointment or removal of the Board of Directors of the 1st Respondent. It was contended that any instructions to an advocate or firm of advocates to act herein must be by a clear resolution of the Board the Directors of the 1st respondent.

1st and 5th Respondents' Case

7. On behalf of the 1st and 5th Respondents (hereinafter referred to as "the Respondents"), it was revealed that in the letter dated 10th February, 2016, the 1st respondent duly instructed the firm of **Mohammed and Kinyanjui Advocates** to represent it together with the 5th respondent. Consequently on 11th February 2016, the firm of **M/s Mohammed and Kinyanjui Advocates** filed a Notice of Appointment on behalf of both 1st and 5th respondent and that the said firm, upon realizing the complexity of the matter, requested Senior counsel **Ahmednasir M Abdullahi** practicing in the name and style of **Ahmednasir, Abdikadir and Company Advocates** to act as the lead counsel in the matter. Accordingly, as lead counsel the firm of **Ahmednasir Abdikadir and Company Advocates** did not file any notice of appointment. To the Respondents, under Article 27(1) of the Constitution of Kenya 2010, the Court cannot deprive a litigant of his right to be represented by counsel of their choice without a clear and valid reason for so doing.

8. It was the said Respondent's case that to enable competent legal representation, the 1st Respondent from time to time. However, in order to aid in efficient and effective selection and management of external counsel it prequalifies, the Board's predecessor in title approved and adopted the policy on selection and management of the commission's external counsel in 2012, which policy mandates its management to instruct any firm on its list of prequalified external counsel to represent its interest in various matters including litigation. To the said respondents, the 1st Respondent's Board's role in the management of external counsel is only oversight and limited to specific roles as provided in the said Policy.

Determinations

9. I have considered the issues raised in this application. In **The Delphis Bank Limited vs. Channan Singh Chatthe Civil Application No. Nai. 136 of 2005 [2005] 1 KLR 521**, the Court of Appeal expressed itself as follows:

"The starting point (in an application to have an advocate disqualified) is first and foremost the constitutional right to a litigant: the right to a legal representative or advocate of his choice. In some cases the right may be put to serious test if there is a conflict of interests, which may endanger the equally hallowed principle of confidentiality in advocate/client fiduciary relationships or where the advocate would double as a witness...There is otherwise no general rule that an advocate cannot act for one party in a matter and then act for the opposite party in subsequent litigation as the test is whether real mischief or real prejudice will in all human probability result. Each case turns on its facts to establish whether real mischief and real prejudice will result."

10. In the said case, the Court went on to dismiss the application seeking to disqualify the advocate since

in its view, there were no facts to consider before the drastic decision of interfering with a party's constitutional right to counsel of his choice could be taken.

11. It is therefore clear that the power to disqualify a party's legal representative can only be taken on cogent grounds and ought not to be invoked on flimsy grounds since the right to legal representation is a Constitutional right. In this case, the 1st and 5th Respondents have adduced evidence in documentary form which confirm that the power to assign advocate matters is reposed in the management as opposed to the Board. It is not contended and the applicant admitted in his oral submissions that the firm of **Mohammed and Kinyanjui Advocates** was in the panel of advocates for the 1st Respondent. A reading of the application seems to suggest that the applicant is unhappy with the participation of **Ahmednasir Abdulahi, SC** appearing in this matter on behalf of the 1st Respondent. The 1st Respondent has however contended that the said Counsel was retained by its counsel in the panel, as leading counsel in the matter. This issue calls for the role of a leading counsel. Normally counsel instructed as leading counsel more often than not is not the advocate on record. In such circumstances, the leading counsel is not required to file a notice of appointment.

12. If therefore the firm of **Mohammed and Kinyanjui Advocates** was properly retained as advocates for the 1st and 5th Respondents, the former must of necessity be deemed to have ostensible authority to take necessary measures to protect the interest of the client including instructing leading counsel. Since it is the applicant who contends that the 1st Respondent did not instruct the said counsel, it was upon the applicant to adduce credible evidence on the basis of which such a finding can be made. It is not sufficient for the opposite party to contend that the advocates of the person he has sued ought to prove that he has been duly instructed unless the opposite party raises the issue.

13. Where an issue arises as to whether the services of counsel were properly procured, it is my view that the issue ought to be taken under the procedure provided for under the **Public Procurement and Asset Disposal Act**. Complaints regarding lack of compliance with the said Act ought to be dealt with by the **Public Procurement Regulatory Authority** pursuant to section 9(h) of the said Act and not by this Court. In **Diana Kethi Kilonzo vs. IEBC and 2 others, Constitutional Petition no. 359 of 2013** it was held that:

“We note that the constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the constitution found it fit that the powers of decision making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for the other authorities.”

14. In matters where the Constitution confers rights and fundamental freedoms, it is not enough to question the same based on speculation and conjectures. A party intending to question the same ought to adduce positive evidence on the basis of which the Court can be expected to make a finding in favour of the objector. I must say that to allow the application in the manner sought would amount to proceeding on a fishing expedition and that is not the role of the Court more so where there is material placed before the Court which tend to show *prima facie* that the advocate on record was properly appointed or retained.

15. I wish to remind parties that public law litigation ought to be heard and determined expeditiously in order not to place the public authorities in limbo as to whether they can proceed with their actions or not. Whereas parties have the right to make interlocutory applications, side shows in such matters ought to be reduced to a minimum and the Court ought as much as possible be addressed on the core issues for determination so as not to unnecessarily place the said public authorities in a state of uncertainty.

16. I have considered the material placed before me and there is no basis upon which the orders sought in this application can be allowed.

17. In the result the application dated 25th February, 2016 fails and is dismissed with costs.

18. Orders accordingly.

Dated at Nairobi this 11th Day of March, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr. Omtatah, the petitioner present in person

Mr. Tebino for Mr. Ahmednasir, SC for the 1st and 5th Respondents

Mr. Onyango for the 1st to 7th interested parties

Cc Mutisya