REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LA COURTS

JUDICIAL REVIEW DIVISION

JR CASE NO. 507 OF 2015

IN THE MATTER OF AN APPLICATION BY SYMPHONY TECHNOLOGIES LIMITED (KENYA)

& UNITED TELECOMS LIMITED (INDIA)

REPUBLIC……..……..……APPLICANT

VERSUS

PUBLIC PROCUREMENT ADMINISTRATIVE

REVIEW BOARD ……..……....…..……RESPONDENT

AND

NATIONAL TRANSPORT

AND SAFETY AUTHORITY (NTSA)…….....…1ST INTERESTED PARTY

NATIONAL BNK OF KENYA…….....…….2ND INTERESTED PARTY

OKIYA OMTATA…….....…….…….3RD INTERESTED PARTY

EX PARTE:

SYMPHONY TECHNOLOGIES LIMITED (KENYA) & UNITED TELECOMS LIMITED (INDIA)

BILDAD KAGAI ….....…PROPOSED INTERESTED PARTY /APPLICANT

RULING

Introduction

1. By a Notice of Motion filed in his Court on 15th March, 2016, the applicant herein, **Bildad Kagai**, seeks an order that he be joined to these proceedings as an interested party.

2. According to the applicant, he was the applicant's General Manager through the donated special Power of Attorney, a copy of which he exhibited, but resigned from the said position on or around 25th February, 2016.
3. According to him, his interest in these proceedings is also public interest with respect to the determination of two unprecedented issues that the Respondent failed to address which were: If the tenderer in a public procurement can offer a financial guarantee in the form of a bid bond to and by itself and secondly, if a public bank ca offer a financial guarantee to an entity it holds more than 25% of the shareholding contrary to the ***Banking Act***.
4. The applicant contended that as a business development manager he has an interest in ensuring the above two issues are addressed and determined by the Court as they are pertinent and have not been addressed by any other Court in Kenya before. According to him this Court ought to address the said issues in the event that the parties withdraw and settle the matter out of court.
5. According to Mr Onyango, the applicant's learned counsel, the applicant's power of Attorney has not been revoked. It was learned counsel's view that the applicant was being excluded from these proceedings yet he was entitled to know the fate of these proceedings.
6. While not siding with any of the parties to these proceedings, **Mr Okiya Omtata**, the 3rd interested party herein urged the Court to consider that the subject of these proceedings are matters of great public interest.
7. On his part **Mr Mabera**, learned counsel for the *ex parte* applicant opposed the application. According to him, the application was lacking in merit and was ill-advised. He averred that the applicant herein was the deponent of the verifying affidavit sworn in support of these proceedings and that all the issues he proposed to address were well set out in the statement of facts filed herein which facts the applicant himself confirmed. To learned counsel, the applicant's information was obtained courtesy of his employment with the *ex parte* applicant hence the issues he intends to address can be represented adequately by the *ex parte* applicant as well as the 3rd interested party.
8. To the ex parte applicant the joinder of the instant applicant in his personal capacity.
9. The ex parte applicant also took issue with the authenticity of the Power of Attorney relied upon since according to learned counsel, the same was not executed by the parties thereto.
10. **Mr Agwara**, learned counsel for the 1st interested party similarly opposed the application. According to him, the application was an abuse of the process of the Court. Judicial review being proceedings *sui generis*, it was contended that under rule 6 of Order 53 the only person who can be joined to such proceedings are those who wish to be heard in opposition to the application. Apart from that the said person must demonstrate that he is a proper person to the proceedings.
11. In this case whereas the applicant was an employee of the *ex parte* applicant that mere fact does not amount to a sufficient cause otherwise judicial review proceedings would be bought to a halt. In this case, there was no demonstration of how the applicant intended to assist this Court hence it would be improper to join him to these proceedings. Since Court decisions are applied in the whole Republic, it was contended that the applicant need not participate in these proceedings in order to know the outcome of these proceedings.
12. **Mr Sisule**, learned counsel for the 2nd interested party was similarly of the view that the application ought not to be allowed According to him, the applicant as an employee of the *ex parte* applicant participated in all the stages of the proceedings by swearing affidavits in which the issues he intends to raise were raised. According to learned counsel, the issue that the parties herein may compromise these proceedings was speculative and cannot be the basis of the joinder of the applicant.
13. In a rejoinder, **Mr Onyango** reiterated that the issues raised herein are issues of great public interest and hence every Kenyan is entitled to participate in these proceedings.

Determination

14. I have considered the foregoing.
15. Order 53 rule 3(2) and (4) of the ***Civil Procedure Rules*** provides:

> ***(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 on 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.

16. Therefore whereas subrule (2) of Order 53 rule 3 aforesaid restricts persons who should be served to those who are "***directly affected",*** subrule (4) on the other hand gives the Court wide discretion to order that the application be served on any other person notwithstanding 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.*** It is therefore my view that unlike under subrule (2) the Court has unfettered powers under subrule (4) and in my view this power is meant to ensure that justice is done. Therefore where the Court is of the view that a person ought to be joined to the proceedings the Court is properly entitled to direct that that person be joined notwithstanding that such a person has not made an application to Court. Under such circumstances a formal application is not necessary
17. However where an application is made under subrule (2), it is incumbent upon a person who alleges that he or she ought to have been served to show how the proceedings directly affect him or her. The mere fact, however that a person has made such an application does not preclude the Court from invoking its unfettered discretion under subrule (4) to have such a person joined to the proceedings even if the applicant does not satisfy the Court that the person is directly affected thereby. The word "direct" is defined by ***Black's Law Dictionary***, 9th Edn. page 525 as "straight; undeviating , a direct line, straightforward, immediate." It must be kept in mind that judicial review orders are concerned with the decision making process rather than the merits of the decision. Therefore judicial review proceedings ought not to be modified into a vehicle through which matters which ought to be ventilated in other forums are determined.
18. Since judicial review orders are concerned with the decision making process rather than the merits of the decision, a party who contends that he or she is directly affected by the proceedings ought to bring himself or herself within the ambit of the judicial review jurisdiction and ought not to apply to be joined thereto with a view to transforming judicial review proceedings into ordinary civil litigation. 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 is directly affected. The Court cannot be expected to act in the dark by joining such a person with a view to satisfying itself as to the effect of the orders sought on the applicant at a later stage of the proceedings.
19. However, the decision whether or not to join a party is an exercise of discretion and if no substantial purpose or benefit will be gained by the joinder of a person to the proceedings and where the said 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 reluctant to join the intended party to the proceedings. Therefore whereas it is true that any Kenyan has a right to institute legal proceedings where the Constitution has been contravened or threatened with contravention, where proceedings already exist, any person who seeks to be joined to the proceedings must satisfy the Court that the issues he intends to address cannot be adequately addressed by the already existing parties to the proceedings. As was held by **Nyamu, J** (as he then was) in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728 and Mureithi & 2 Others vs. Attorney General & 4 Others [2006] 1 KLR (E&L) 707: "***Speed and promptness are the hallmarks of judicial review.***"** Judicial review, it has therefore been held**,** acknowledges the need for speedy certainty as to the legitimacy of the target activities and requires the parties and to such proceedings and those who intend to participate therein to act promptly. See **Mutemi Kithome vs. The District Land Adjudication & Settlement Officer Mwingi District & Others Nairobi HCMA No. 1108 of 2004 [2006] 1 EA 116.**

20. Such proceedings, in my view cannot be determined speedily, if the Court readily permits person whose participation will not add any value to the proceedings to participate therein. These being public law proceedings, dealing with the process rather than the merits of the case, it is the issues to be canvassed that determine whether parties ought to be joined as opposed to mere personal aggrandisement. 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**:

> **"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.'**

Unless a trial is on discernable issues it would be farcical to waste judicial time on it.

21. Accordingly where the joinder of the parties will only serve to unnecessarily delay the trial, the same ought not to be permitted.
22. In my view, it is not enough in judicial review to simply cite enabling legal proceedings in an application of this nature but the applicant ought to adduce some material upon which the Court can determine whether the applicant is directly affected by the proceedings. Whereas the role of the applicant in assisting the Court to effectively and completely adjudicate the matter may be a consideration in an application under Order 1 rule 10 of the ***Civil Procedure Rules***, in judicial review especially where a party's interests can be catered for by another person already a party to the proceedings, there would be no reason to join the party intending to join the proceedings as a party thereto.
23. I have considered the applicant's case and apart from bare allegations the applicant does not contend that the already existing parties to these proceedings cannot adequately address his concerns. Apart from that the applicant's unique position of being a former employee who actively participated in the proceedings right from inception require more than bare allegations for the Court to be satisfied that there are issues over and above those already raised by the ex parte applicant through him which would justify his being joined to these proceedings in his personal capacity.
24. With respect to the issue of the Power of Attorney, there is no evidence that the exhibited document meets the legal criteria of a valid power of attorney since it is a bare piece of paper without signatures. In any case, the *donee* of the power of attorney can only institute and conduct legal proceedings in the name of the *donor*. See **Govindji Malhirada vs. N M Patel HCCS No. 94 of 1964; Jones vs. Gurney [1913] W.N72; Daley's Agency Law in East Africa [1966]; Abdalla Wilji Hirji vs. Dhanji Buwji & Co. [1921] 8 EALR 206; Turn Sidpra & Anor vs. Uganda Rehabilitation Development Foundation Kampala HCCS No. 199 of 1993.**
25. As was held in **Francis Kamande vs. Vanguard Electrical Services Ltd. Civil Appeal No. 152 of 1996**, a *donee* of power of attorney cannot sue in his own name unless the debt is assigned to him.
26. The applicant contends that there is a risk of these proceedings being compromised before the issues herein are determined. In my view that contention is based on conjecture and speculation and cannot be the basis of joinder of parties. In any case it is doubtful whether a person who has

neither sought nor obtained leave to institute judicial review proceedings can bar a party to whom leave has been granted from deciding not to proceed with his cause. The position here is not necessarily akin to Constitutional petitions or election disputes.

27. With respect to the need to monitor the outcome of these proceedings, these proceedings are public in nature and the applicant is free to observe the same without necessarily being a party hereto.
28. In a nutshell the applicant has not shown any legal interest in these proceedings or the value which his participation will add to the outcome of these proceedings that cannot be input by the parties already participating in these proceedings.
29. In my view, I am not satisfied that the presence of the applicant is necessary for the determination of the issues in these proceedings. I am further not satisfied that the applicant is a person directly affected by these proceedings.

Order

30. In the premises I decline to join the applicant to these proceedings. Consequently, the undated Notice of Motion filed on 15th March, 2016 fails and is dismissed but as the applicant is not yet a party to these proceedings there will be no order as to costs. I must however send a warning to persons who deliberately set out to abuse the court process by making applications which they know or ought to know are not geared towards the vindication of real issues in controversy but meant for collateral purposes that the Court will not hesitate to take appropriate measures to prevent its processes from being abused and one of the measures readily available in such circumstances is the imposition of costs.

Dated at Nairobi this 4th day of April, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Mabera with Mr Kosgey for the ex parte applicant

Mr Onyango for the intended Interested Party/Applicant

Mr Ochieng for Mr Agwara for the 1st Interested Party

MrSisule for the 2nd Interested Party

Mr Okiya Omtata the 3rd Interested Party

Cc Mutisya