REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 230 OF 2015

IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF GAZETTE NOTICE NO. 58 OF 2015 9 ESTABLISHMENT OF THE ANTI-DOPING AGENCY OF KENYA)

AND

IN THE MATER OF A JUDICIAL REVIEW APPLICATION

BETWEEN

REPUBLIC…….....…….APPLICANT

VERSUS

THE CABINET SECRETARY SPORTS

CULTURE AND ARTS…….....……...1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL….....…..…..2ND RESPONDENT

AND

JAMES WAWERU…….....……..1ST INTERESTED PARTY

DR. MONI WEKESA ……....……...2ND INTERESTED PARTY

DR. SOMANE MUKTAR ISMAIL…....……..3RD INTERESTED PARTY

DOUGLAS WAKIHURI…....…….…….....4TH INTERESTED PARTY

ALEX TUNOI…….……..……..…...5TH INTERESTED PARTY

EXPARTE

JOHN MAVISI OKUMU AND

CAROLINE KOLA

RULING

1. This ruling determines the preliminary objection filed on 9th May 2016 by the 2nd interested party Professor Moni Wekesa. The said preliminary objection notice was amended on 16th May 2016. In the preliminary objection, the 2nd interested party contends that:

> 1. The gazette notice No, 508/2015 the subject matter of this suit was superseded by legal notice No. 256 dated 24th December 2015 as annexed;
>
> 2. That legal Notice No. 256 dated 24th December 2015 on its part has been replaced by substantive legislation- the Anti- Doping Act, 2015 which was assented to on 22nd April 2016 and came into effect on 26th April 2016 as annexed.
>
> 3. That the Gazette Notice No. 508 of 2015, the basis of this suit was revoked by operation of law;
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> 4. That the orders sought by the exparte applicants in their amended Notice of Motion and in particular, prayers No. 1 and 2 have been spent;
>
> 5. That the continuance of this suit beyond 24th December 2015 and more particularly beyond the 26th April 2016 when the Anti- Doping Law took effect is an abuse of the court process.

2. The 2nd interested party prayed that the chamber summons dated 15th July 2015, the amended notice of motion dated 10th August 2015 and any vestiges to the said suit be dismissed with costs.

3. The preliminary objection was argued orally before me on 12th July 2016 with professor Moni Wekesa appearing in person urging the preliminary objection. He submitted that the exparte applicant sought orders to quash the legal notice No. 508 of 2015 and to prohibit the activities based on the said legal notice, which application for judicial review orders of certiorari and prohibition was opposed by the interested parties and the respondents. That his basis of opposition to the said chamber summons was that the impugned legal notice had been overtaken by events to wit, two other legal notices of 156/2015 dated 24th December 2015 which in effect established the Anti-Doping Agency of Kenya through a Presidential decree based on the State s Act; and secondly, that the latter legal notice has since been replaced by a legislation Anti-Doping Act 2016 which was assented to on 22nd April 2016 and which took effect on 26th April 2016.

4. Professor Moni Wekesa submitted that the Act establishes the Anti- Doping Agency of Kenya hence the impugned legal notice was revoked by operation of law. Consequently, it was submitted that the chamber summons is spent and the orders of prohibition too cannot issue.

5. On the contention that the Legal Notice No. 508/2015 has not been revoked as per the affidavit of Catherine Kola, it was submitted that the court must consider whether the person can operate two or more entities using the same name and whether Parliament can vote funds for more than one entity established by different legal instruments. It was submitted that a court of law cannot operate in vain and since there are no orders to make, the existence of this suit beyond 24th April 2016 and 26th April 2016 is an abuse of the court process since the applicants have not even bothered to amend their chamber summons after these facts were brought to their attention.

6. On behalf of the respondents, Ms Chimau supported the preliminary objection raised by Professor Moni Wekesa the 2nd interested party adding that the enactment of the Anti-Doping legislation

effectively revoked the legal notice No. 508/2015 which was interim pending enactment of the substantive legislation hence the Judicial Review application cannot be sustained and that it should be dismissed with costs.

7. On behalf of the exparte applicants, Mr Otieno opposed the preliminary objection. He submitted that the legal Notice No. 508/2015 established Anti-Doping Agency of Kenya when the 1st respondent had no jurisdiction to establish the Agency and secondly, the legal notice purported to appoint board members which process was not competitive.

8. That the respondents should have come to court to record appropriate orders instead of enacting legislation to defeat this suit which is mischievous and disrespectful to the court and to the Kenyan Sportsmen. That there are two legal notices have not been disclosed to this court namely 1087 of 10th February 2016 and 1343 of 10th February 2016 which make fresh appointments of Board Members to the Anti- Doping Agency. That those legal notices are the final acts of frustrating this court's findings on the illegal acts of the respondents.

9. That although the legal notices were published early this year, the respondents never brought them to the attention of this court. He castigated the respondents and the 2nd interested party for obstructing justice hence they should be condemned to pay costs if the court finds that the suit herein has been overtaken by events. He relied on JR 2/2014 paragraph 30 and submitted that the respondent's actions are intended to circumvent the judicial process and steal a match on the court and the applicants and meant to defeat justice. He urged this court to adopt Honourable Odunga's decision in JR 2/2014 wherein the learned judge ordered the Cabinet Secretary to pay costs because of their conduct in the proceedings .

10. In a brief rejoinder, professor Moni Wekesa submitted that he was disappointed to learn that a process of legislative making done through public participation could be offensive. Further, that there are no pleadings challenging the legal notices issued in February 2016 and that in any event as a party he had come before court to notify it of the developments since this suit was instituted . That this case is s distinguishable from JR 2/2014 in that this action is meant to bring to order anti-doping issues in the country and that finally, the Anti Doping Law is in force.

Determination:

11. I have carefully considered the preliminary objection raised by the 2nd interested party and as supported by the respondents. I have also considered the objections by the exparte applicant and the respective parties' oral submissions and the statutory law and case law relied on in the arguments.

12. The issue for determination is whether the preliminary objection raised is sustainable and if so, whether the Judicial Review application should be struck out; thirdly, what orders should this court make and last but not lease, who should bear the costs of the preliminary objection.

13. On the first issue of whether the preliminary objection raised is sustainable, the ancillary question is whether the preliminary objection as raised fits the description of a preliminary objection. To answer that question, I am guided by established principles of law as applied from time to time.

14. The definition of a preliminary objection was well set out in the celebrated case of **Mukisa Biscuit Manufacturing Company Ltd V West End Distributors Ltd [1969] EA 696** that:

> ***" so far as I am aware a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication of pleadings, and which if argued as preliminary point may dispose of the suit."***

15. Sir Charles Newbold P. in the same case above stated:

> ***"The first mater related to the increasing practice if raising points, which should be argues in***

the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop."

16. Applying the test set out in the above case to the circumstances of this case, the 2nd interested party contended that as the legal notices upon which the Judicial Review proceedings hereto are premised no longer exists, having been overtaken by enactment of substantive law that establishes the Anti-Doping Agency which the exparte applicants contended had been established without jurisdiction, then the application for Judicial Review is spent as the court cannot make orders in vain.

17. In my humble view, the preliminary objection is well taken for reasons that this court's jurisdiction to determine the Judicial Review application for certiorari and or prohibition is premised on existing administrative decision made by the 1st respondent to gazette an agency called Anti-Doping Agency of Kenya vide legal notice No. 508/2015, which was later Superseded by legal notice No. 256 of 24th December 2015, and which the applicants still challenged.

18. Thereafter, Parliament in its wisdom did vide Act No. 5 of 2016 enact the Anti-Doping Act which establishes the Anti Doping Agency of Kenya , a body corporate with perpetual succession and a common seal with the power to sue and be sued in its corporate name. Section 5(3) of the said Act which took effect on 26th April 2016 provides that the Agency shall be the successor in title to the Anti-Doping Agency established under the Anti- Doping Agency of Kenya Order, 2015 which shall cease to have effect immediately upon the commencement of the Act and the transitional provisions under Section 44(1) of the Act shall have effect upon the commencement of the Act.

19. This court notes that by Presidential Gazette Notice No. 256/2015 dated 24th December 2015, the President did, pursuant to Section 3(1) of the State Corporations Act Cap 446, establish the Anti- Doping Agency of Kenya , under paragraph 3 of that Executive Order. The exparte applicant's counsel argues that the respondents are in essence stealing a match on the court and on the adverse party.

20. I have examined the Gazette Notice No. 256/2015 dated 24th December 2015. It does not appoint any members to the Anti- Doping Agency Board. However, the Gazette Notice No. 508/2015 dated 22nd January 2015 published on 30th January 2015 did appoint Board members among them the 2nd interested party.

21. In the amended Notice of Motion dated 10th August 2015, the applicants sought to have this court to quash the Gazette Notice No. 508/2015 published on 30th January 2015 establishing the Anti-Doping Agency of Kenya; and to prohibit the respondents from enforcing or implementing the said Gazette Notice No. 508 of 2015 .

22. According to the 2nd interested party and the respondents, the above Legal Notice was overtaken by the Legal Notice No. 256 of 2015 which latter is an Executive Order signed by the President and that since the enactment of substantive law establishing the Anti-doping Agency of Kenya, the Agency purportedly established under the impugned Legal Notice is nonexistent. Further that there are no proceedings challenging the legal Notice No. 256 of 2015 by the President.

23. I quite agree that the Agency in question being a public entity as established under the Anti-Doping Act 2016 can only be one such Agency by such name, capable of drawing public funds from the exchequer. That being the case, I find that all other such agencies by the name Anti- Doping Agency of Kenya established by Gazette Notices whether by the Cabinet Secretary or by the President's Executive Order are superseded by the enactment of substantive legislation, the Anti-Doping Act No. 5 of 2016 which came into force on 26th April 2016.

24. This court also takes judicial notice of the pressure that the Government of Kenya was under from the International community to which we are a part of, to establish institutional mechanisms for addressing doping issues within the sports arena in the country and hence the Gazette Notices appointing the Chairman and Members of the then Anti- Doping Agency as established by Presidential Executive Order of the President vide legal Notice No. 256/2015.

25. That being the case, it is expected that the exparte applicants would challenge the Executive Order vide LN 256/2015 which was being implemented by the subsequent LN Nos 1342/2016. That was not done. Since the two Legal Notices were independent of each other, nothing prevented the applicants from challenging the LN No. 256/2015 and the two implementing legal notices No. 1342/2016 and 1342/2016.

26. And with the enactment of the Anti- Doping Act No. 5 of 2016, which establishes the Anti-Doping Agency of Kenya, I find that the previous legal notices are effectively spent.

27. Section 10 of the Act now establishes a Board of the Agency and the composition and qualifications for appointment of Board members and its chairman are also set out there under. It therefore follows that any person of interest can and has an opportunity, if they so wish to challenge the new legislation or any action taken by a public authority in the implementation of that legislation which is now in force.

28. It would, in my humble view, be a mere academic exercise to proceed to hear and determine the merits of the notice of motion as amended seeking to quash legal Notice No. 508/2015 and to prohibit its implementation when, in essence there is nothing capable of being implemented under that Legal Notice.

29. I must however mention that from the pleadings by the exparte applicants, I have no doubt in my mind that the action of issuing Legal Notice No. 508/2015 which was being challenged by the applicants herein was overtaken by events of the publication of the subsequent LN No. 256/2015, after the applicant's challenged the Cabinet Secretary's decision. The subsequent Legal Notice was in my view, intended to correct the illegality earlier on committed by the Cabinet Secretary.

30. However, it cannot be said that the enactment of the Anti-Doping Act was intended to defeat this suit since legislative making process in this country involves public participation and the enactment of any law is the preserve of Parliament. The Cabinet Secretary is not a Member of Parliament and neither is the Attorney General. Both are nonetheless key stakeholders at policy and legislative making process levels just as the exparte applicants and the interested parties herein are. The Honourable Attorney General being the Principal Legal Advisor to the Government is expected to advise Cabinet and the Government at large on procedures and on legal consequences of acting outside the established law. I would in the premise not find the Act of enacting legislation while this suit was pending to be in contempt and or an affront to judicial process as was held by Odunga J in JR 2/2014 and Kimaru J in **Stephen Somec Takwenyi & Another Vs David Mbuthia Githare & 2 Others HCC 363/2009** since the role of Parliament is to make law, and for as long as it was not prohibited from doing so, this court does not find any fault in such enactment. Furthermore, the matter before the court did not concern the legality and or constitutionality of enacting Anti Doping Law.

31. On the other hand, unless there is evidence of malice on the part of the Cabinet Secretary and the Attorney General in advising the President to issue Legal Notice No. 256/2016, I find that the act of correcting an illegality that is subject of court proceedings is not contemptuous and neither would it be an affront to judicial process. Each case has to be looked at independently, on its own facts and circumstances noting that Judicial Review proceedings are not intended to determine the merits and or demerits of actions or inactions of public officers/institutions/authorities but the legality of those processes and or the fairness of the process adopted in arriving at the administrative decisions.

32. In my humble view, It would not be in the interest of justice for the court to be unduly sensitive to actions of parties which actions are not necessarily in contempt of court orders, and to insist that every action done touching on a matter pending before court must be with the blessings of the court. In this

case, there was no order barring the Cabinet Secretary or even the President from correcting the error which gave rise to the challenge before the court. There was also no order barring Parliament from enacting the Anti-Doping legislation. That being the case, I decline to find that the respondents did not act in good faith. In my humble view, the respondent's subsequent actions demonstrate a sense of being prepared to face the consequences of their actions, not necessarily by battling it in court to justify their actions , but that upon the realization that whatever action had been taken was improper, or unprocedural, they opted to rectify. It would, in my humble view, be too harsh to conclude that the respondents acted with impunity. Justice demands that courts must be fair and level headed in their decisions.

33. In the end, I find that the preliminary objection was well taken and sustainable. Having found the preliminary objection sustainable, it follows that the Notice of Motion as amended seeking for judicial Review Orders of certiorari and prohibition touching on legal Notice No. 508/2015 cannot stand as there is no substratum with the enactment of the Anti- Doping Act 2016 and the establishment of the Anti Doping Agency of Kenya.

34. Accordingly, the preliminary objection by the 2nd interested party and as supported by the respondents succeeds.

35. Therefore, the notice of motion dated 31st July 2015 and as amended is hereby struck out as it was overtaken by operation of law. Costs are in the discretion of the court. The applicants urged the court to order that the respondents be condemned to pay costs to the applicants. Whereas I agree that the preliminary objection scuttled the applicant's challenge to the LN 508/2015, I decline to award costs to the applicants for reasons that the respondents have not been shown to have acted maliciously.

36. I also find that the respondents were acting in the public interest while bowing to the overwhelming international pressure to establish an institutional framework that would deal with the issue of doping in sports, which is not just a domestic issue but a public good matter, only that the respondents were not properly advised on what procedure to adopt, having regard to the current constitutional imperatives in Kenya where nearly every action by the state or state organ tends to infringe or threaten the infringement of the Constitution or the constitutional guaranteed rights in one way or the other hence, the need for checks and the exparte applicants cannot be faulted for being vigilant in that regard.

37. However, there is no real or perceived loss or prejudice that the exparte applicants have or would suffer as a result of being vigilant in matters of sports. In the end, I order that each party shall bear their own costs of the preliminary objection and of the Judicial Review proceedings which are hereby marked as effectively closed.

Orders accordingly.

Dated, signed and delivered at Nairobi this 6th day of September 2016.

R.E. ABURILI

JUDGE