REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW CASE NUMBER 472 OF 2014

LEGAL ADVICE CENTRE

aka KITUO CHA SHERIA…..……..……..APPLICANT

VERSUS

COMMUNICATION AUTHORITY OF KENYA…….….RESPONDENT

AND

FINSERVE AFRICA LIMITED..…..…….INTERESTED PARTY

RULING

Introduction

1. The Applicant, a Non-Governmental Organization registered as such under the ***Non-Governmental Organizations Co-ordination Act*** whose stated objectives include fighting for social justice, constitutionalism and the rule of law as well as engagement in public interest litigation instituted these proceedings seeking the following orders:

> **1) That this application be certified as urgent.**
>
> **2) That leave be and is hereby granted for the Applicant to apply for an order of certiorari to quash the decision of the Respondent to allow the use of the thin SIM technology by the Interested Party in the mobile telephony communications sector.**
>
> **3) That the grant of leave do operate as a stay of the decision of the Respondent to allow the use of the thin SIM technology by the Interested Party in the mobile telephony communications sector in Kenya**
>
> **4) That the costs of this application be provided for.**

2. What provoked these proceedings was a decision by the Respondent to authorize the use of the thin SIM technology by the Interested Party in the mobile money telephony communication sector in Kenya.

The Applicant's Case

3. According to the Applicant mobile money market currently serves over 25 million people in the country and beyond and these include banks, insurance companies, utility providers as well as security agencies with monthly transactions of approximately Kshs. 200 billion. Therefore it is of utmost importance that any decision taken or made in the context of this sector takes into account the broad public interest that it may affect.

4. The Applicants contended that following the publicity around the foregoing authorization, many members of the public visited the Applicant organization and raised legitimate concerns regarding the security of the information of their already subsisting mobile phone devices, the ability of the thin SIM to intercept their PIN numbers and bank account details arising from the mode of operation of the thin SIM technology. The Applicants also averred that due to these concerns of the members of the public who sought legal advice and opinions from the Applicant, the Applicant undertook a detailed research into the antecedents and the activities subsequent to the authorization by the Respondent for the Interested Party to use the thin SIM technology.

5. The Applicants averred that prior to the permission to the Interested Party to roll out the use of the thin SIM technology, a number of concerns had been raised by technical service providers in the mobile telephone sector among them being that the thin SIM has the capability to intercept communication between the user's phone and the primary SIM card on the phone. The Applicants also alleged that another concern raised was that the thin SIM works by intercepting and modifying the information passing through it as it passes from the phone to the primary SIM and vice versa. It was further averred that since the thin SIM sits between the primary SIM and the phone, all SIM toolkit traffic passes through it and these include the mobile money PINs and as such this exposes all mobile money transfer systems such as MPESA, YU cash with obopay, Orange Money and Airtel Money.

6. The Applicants were also concerned that also worried that USSD codes which are short codes starting with "*" and ending with "#" and which are frequently used to access bank to mobile money systems and vice versa, can be intercepted and stored by the thin SIM since it sits between the primary SIM and the phone and as such it can thus view and modify all USSD transactions. To the applicants, since all SMS messages are stored on the primary SIM, the thin SIM can capture and intercept all SMS communication and that where a thin SIM is in place, all information, PIN numbers, USSD codes, bank account numbers and internet sites visible are first visible to the thin SIM before delivery to the primary SIM which constitutes a breach of privacy. Since it sits between the primary SIM and the phone, a party in control of the thin SIM may choose whether to pass traffic to the primary SIM or not thereby compromising the quality of services and exposing the user to denial of service threats.

7. The Applicants therefore believe that the said authorization was done without a full audit of the security data or security of information on the primary SIM that will be overlaid by the thin SIM and averred that the said authorization was made in spite of legitimate concerns regarding security of data on the primary SIM that shall be overlaid by the thin SIM.

8. The applicants contended that there is an obligation on the Respondent as a public body and regulator to take into considerations all relevant concerns prior to and not subsequent to making a decision that affects the general public.

9. However, subsequent to the said authorization, the Respondent advertised for consultancy services to undertake evaluation of performance and security features of SIM cards in Kenya with specific reference to the concerns and anxiety arising out of the permission to allow the use of the thin SIM technology. It was contended that upon giving the authorization for the Interested Party to roll out and use the thin SIM technology, the Respondent sought a written undertaking from the Interested Party indemnifying the Respondent of among others, the following liabilities: Observing, recording and divulging mobile user pin details; Initiating, recording, manipulating and/or blocking mobile communication including voice calls, SMS, USSD, SIP calls and web sessions; Initiating, intercepting, manipulating and or destroying SIM toolkit instructions; Executing actions without the explicit permission of the mobile user; Recording and disclosing user location information and

Obtaining unauthorized access to the overlaid SIM card and changing authorization settings. Further to the foregoing request for indemnity and assurance, the Respondent informed the Interested Party that should any vulnerability including the six listed above be verified to be due to the use of the thin SIM card, the Authority would cease the operations of the SIM card in the Kenyan market.

10. It was the applicants' position that it was apparent from the demand for indemnity by the Respondent that the decision to authorize the use of the thin SIM failed the test of the precautionary principle where the Respondent had used its powers to authorize a new technology with potential of far reaching consequences to the banking systems and mobile phone customers and then also seeking to iron out or deal with its potential irreparable consequences later to the extreme detriment of the general public, banks, financial institutions as well as security agencies. The Applicants also alleged that the Respondent's decision to permit the deployment of thin SIM technology then subsequently seeking consultancy services to ascertain its security reveals that the decision was taken hurriedly and failed to take into account all relevant considerations. The Applicants were apprehensive that the mobile money market in Kenya which serves approximately 25 million Kenyans was at the risk of exposing the public to the foregoing consequences as a result of the said impugned decision and hence it was of great public importance that the deployment of the said be technology be stayed until the propriety of the decision to deploy is fully interrogated.

11. The Applicants detested the fact that the decision to permit the use of the thin SIM technology was made prior to a complete satisfaction as to its security and in their view, this was a critical failure and improper use of the regulatory power and the same was therefore unlawful under Section 31 of the ***Kenya Information and Communications Act*** and the ***Consumer Protection Regulations 2010*** that were issued with respect to the restrictions against interception of messages and the unauthorized disclosure of customer information including PIN.

12. It was the applicants' case that there was a real and present danger that unless the application was heard in a timely manner and stay orders issued, before any eventual remedy is secured, data on the primary SIMs of millions of mobile phone customers risked being compromised in an irreparable manner.

13. On 17th December, 2014, I heard learned counsel for the Applicant, **Mr Ongoya**, ex parte and granted leave to apply for judicial review orders sought in the Chamber Summons dated the same date and directed that the grant of the said leave would operate as a stay of the action in question.

Notice of Motion by the Interested Party

14. Aggrieved by the said decision, the Interested Party herein **Finserve Africa Limited**, filed a Notice of Motion dated the 23rd of December 2014 seeking the following orders from the court:

> **1) The application be certified urgent and be heard ex parte at first instance.**
>
> **2) The ex-parte orders made on 17th December 2014 be set aside; Or in the alternative**
>
> **3) Order Number 2 of Ex-parte orders made on 17th December 2014, to the effect that the leave granted to the ex-parte applicant do operate as a stay of the decision of the Respondent to allow the use of the thin SIM technology by the Interested Party, be set aside**
>
> **4) The Ex-Parte applicants do pay the Interested Party the costs of this application and of the suit.**

15. It was the Interested Party's case that in obtaining the order of the 17th December 2014, the ex-parte Applicant failed to make full frank and fair disclosure of all the material facts which were or

ought to have been within its knowledge and had all material facts been placed before the court then the court would have arrived at a different decision.

16. According to the Interested Party it did not intend to roll out the Thin SIM technology to the mass market any time now as alleged by the ex-parte Applicant as the thin SIM technology was still in the development phase. The authorization granted by the Respondent to the Interested Party, it was disclosed, was for a one year trial period during which period the technology would be strictly under the observation of the Respondent to test its strength and vulnerabilities.

17. The Applicant was accused of not attaching the complete press statement as released by the Respondent which showed that after careful investigations and analysis of representations made by all the parties and after taking into account technical advice of the Global System for Mobile Communication Association (GSMA), other mobile network operators and stakeholders in the telecommunications industry, the Respondent found that the thin SIM set to be used by the Interested Party complied with all minimum mandatory international standards and that there was no risk of interception or interruption of communication or data relating to the primary SIM. Further the thin SIM intended to be used by them were tested by the China National Computer Quality Supervising Test Centre as well as the Bank Card Test Centre of China and the tests showed that it complied with the applicable International Standards Organization (ISO) and European Telecommunications Standards Institute (ETSI).

18. It was explained that the Preliminary Security Assessment on the thin SIM technology made by the GSMA on the 7th of August 2014 was a preliminary draft intended for internal use and later superseded by the final report by the GSMA dated 18th August 2014in which report the GSMA reported that in conducting the security assessment, the GSMA had not considered the technical details of any individual overlay SIM implementation including the thin SIM to be used by the Interested Party. The Interested Party also averred that in the report GSMA stated that the risks highlighted in the report were theoretical and would only arise in cases where the thin SIM is poorly or maliciously designed to intercept data and that the GSMA was not in a position to ascertain if any individual thin SIM was unsafe or not.

19. The Interested Party relied on advice from its Counsel that all the facts on this matter were clarified in the papers filed by the parties in **High Court Nairobi Petition Number 503 of 2014 Bernard Murage vs. Finserve Africa Limited & 3 Others** (hereinafter referred to as "the earlier suit") which papers the applicant had access to as some of the copies therein were produced in this case. However, the selection thereof was skewed and prejudicial to the Interested Party.

20. In the Interested Party's view, the mobile banking services sought to be rolled out by the Interested Party using the thin SIM technology is optional and available only to customers who sign up for the service hence the intended service was not going to be imposed on any member of the public as the relationship between the customer and the Interested Party is purely contractual and as such there is no public interest element in this case.

21. Since the decision by the Respondent to allow the Interested Party to use the thin SIM technology was made on the 22nd of September 2014, more than three months before, it was averred that the Interested Party had made a lot of investments and preparations in a bid to comply with the conditions imposed by the Respondent and had gone to great lengths to ensure the robustness of the technology and compliance with the Respondents' requirements and the measures it had undertaken included thorough end-to-end testing of the thin SIM pilot users; visits to several overseas banks and mobile operators to understand the best practices; inspection of the manufacturing facility which is also used for production of credit cards by major international banks; issuance of a letter of indemnity in favour of the Respondent by both the Interested Party and the manufacturer of the thin SIM; security and compliance assessment carried out by major credit card association leading to certification and approval of the thin SIM usage by the same card association; several meetings with World Bank/IFC who is a shareholder in the company distributing the thin SIM to banks in China; launched production of first batch of 400,000 thin SIMs and incurred a cost of USD 2 Million to secure future capacity;

carried out extensive software development work and legal preparatory work for the roll out of the new mobile banking service relying on the thin SOM for a total cost exceeding 2.5 Million USD.

22. To the Interested Party, the benefits of the thin SIM technology are widely recognized the world over and its launch is eagerly awaited in Kenya as can be seen from the posts on social media.

23. It was submitted on behalf of the interested party that the Applicant acted in bad faith and ought not to derive any advantage from this court. The Interested Party argues that when seeking ex-parte orders a duty is placed upon the ex-parte applicant to make full disclosure of all relevant information in its possession whether or not it assists its application. The Interested Party in support of its submissions relied on the holding in **Kenya National Federation of Co-operatives Ltd & Others (2004) 2 EA 128.**

24. While appreciating that the jurisdiction to set aside ex-parte leave to commence judicial review proceedings will be exercised sparingly and judiciously where it is clear to the court that important matters escaped the Judge's attention, the Interested Party nevertheless submitted that the court has jurisdiction to do so. Similarly, it submitted the court has jurisdiction to set aside the order of stay and that this power may be exercised where there has been non-disclosure of material facts or the application is an abuse of court process or where it is in the public interest to set aside the orders.

25.The Interested Party submitted that the suggestion that the Applicant was not a party to the above proceedings is not sufficient to exonerate the Applicant from the obligation to make full and frank disclosure. The Interested Party urged this court to take cognizance of the fact that the Respondent only authorized the rolling out of the technology on a trial basis and that this rolling out of the technology was for purposes of observation and for identifying any vulnerabilities in the technology.

26. The Interested Party asserted that the Applicant is a legal advice centre run by Advocates and it is their duty to conduct due diligence including research to ensure that it had all the necessary information before instituting these proceedings. The Interested Party also urges this court to adopt the principle that costs follow the event.

Respondent's Application

27.The Respondent similarly filed a Notice of Motion dated the 14th of January 2014 in which it sought the following orders:

> **1) That there be a stay of the present proceedings pending the hearing and determination of High Court Nairobi Petition Number 503 of 2014 Bernard Murage vs. Finserve Africa Limited & 3 Others**
>
> **2) That the Ex-Parte order of this Honourable Court given on the 17th December 2014 be set aside**
>
> **3) That the costs of this application be provided for**

28. The Respondent averred that there an earlier instituted suit filed by Bernard Murage on the 18th of October 2014 being **High Court Nairobi Petition Number 503 of 2014 Bernard Murage vs. Finserve Africa Limited & 3 Others** in which the issues raised herein were substantially in issue and in which judgement was pending for delivery on 22nd January 2015.

29. It was disclosed that the Petitioner in the earlier suit was contesting the authorization given by the Authority to Finserve Africa Limited allowing it to roll out its services using the thin SIM technology alleging that it is flawed as the said authorization preceded the appointment of a security audit firm to audit the performance and security features of the thin SIM technology which according to the Respondent is the core issue in the instant application. The Respondents relying on their

Counsel's advice believed that the orders sought in both the earlier suit and the present proceedings if granted would have the effect of quashing the decision taken by the Communications Authority of Kenya allowing the roll out of services offered by the Interested Party herein via the thin SIM technology. There was therefore n justification, according to Respondent, to allow both proceedings to proceed parallel to each other.

30.According to the Respondent and based on its counsel's advice, where there are two parallel suits in which the matter in issue is directly and substantially in issue in a subsequently instituted suit, Section 6 of the ***Civil Procedure Act 2010*** provides that the Honourable Court has to stay the subsequently instituted suit pending the determination of the earlier suit. The Respondents also averred that the objective of Section 6 of the ***Civil procedure Act 2010*** is *inter alia* to prevent courts of concurrent jurisdiction from simultaneously trying two parallel suits between the same parties or parties claiming through them whose subject matter is directly or substantially the same as in the present circumstances. To the Respondent, multiplicity of suits is a violation of the overriding objective which is tailored to ensure that cases are dealt with expeditiously and fairly and that the available judicial and administrative resources are utilized efficiently.

31. The Respondent therefore contended that the orders issue herein should be set aside because the Applicant failed and/or neglected to bring the existence of the earlier suit to the attention of this court and obtained orders through material non-disclosure. The Respondents averred that filing a subsequent suit over the same subject matter and involving essentially parties litigating under the same title as in the earlier suit is an abuse of court process and prejudices the Authority who is essentially vexed twice.

32.It was submitted on behalf of the Respondent that the present proceedings run afoul of the *sub judice* rule expounded under Section 6 of the ***Civil Procedure Act 2010*** and its overriding objectives. The Respondents submitted that section 6 is couched in mandatory terms and as stated in **Kiama Wangai vs. John N Mugambi & Another (2012) eKLR** that where a court finds that a matter falls within the confines of the said Section 6 the court has no discretion in the matter but to stay the subsequent suit.

33. To the Respondent, it is trite law that Section 6 of the ***Civil Procedure Act*** applies where the entire subject matter in the subsequent suit must be covered by the previously instituted suit and relied on **Barclays Bank of Kenya vs. Elizabeth Agidza & 2 Others** where the learned Judge held that:

> **"….if the controversy in the subsequent suit can be conveniently and properly adjudicated upon in the previous suit…..(and) if a substantial part of the matters in issue of controversy in the subsequent suit is covered by the previous suit, Section 6 should be invoked to save the precious judicial resources."**

34.Further reliance was placed on **Thika Min Hydro Co. Ltd vs. Josphat Karu Ndwiga (2013) eKLR** in which the Court opined:

> **"It is not the form in which the suit is framed that determines whether it is sub judice. Rather it is the substance of the suit and looking at the pleading in both cases."**

35. In light of the above holdings the Respondents called upon this court to note that the matter in issue in the earlier suit is the decision of the Authority to allow the Interested Party herein, on a trial basis, to roll out its mobile telephony services using the thin SIM technology. In like terms, the Applicant herein impugns the decision of the Authority to allow the use of the thin SIM technology on a trial basis. The Respondent therefore concluded that both the present suit and earlier suit were based on the grounds that there is real possibility of legitimate concern of data contamination/security of data resulting in data transmission to third parties. Further as both suits relied on the same exhibits it was clear that the matter substantially in issue both in the present suit and the earlier suit was the decision to allow the roll out of the thin SIM card albeit on a one year trial period. The Respondents therefore held the opinion that the likelihood of having two different conclusions on the same issue is

real and the same would result in what **Mabeya, J** in **Barclays Bank of Kenya vs. Elizabeth Agidza & 2 Others** termed as:

> **"……embarrassing to the judicial process (and) would also be in violation of the overriding objective of the Civil procedure Act which requires under Section 1B that there be an efficient use of the available judicial and administrative resources."**

36. While appreciating that Section 6 of the ***Civil Procedure Act*** does not define the words **"…….***the same parties or between parties under whom they or any of them claim, litigating under the same title…..…***"** the Respondent sought to rely on section 7 thereof in which the it is provided that:

> ***Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall for the purposes of this section, be deemed to claim under the persons so litigating.***

37. To the Respondent, in the present suit as in the earlier suit the parties sought orders in the public interest thus the fact that the ex-parte Applicant herein is not a party in itself in the earlier suit is of no consequence as it is deemed that the Applicant was claiming under the party litigation on the same substratum and other the title of public interest. (sic)

38.That the Applicant has attached the actual documents used in the earlier suit, it was contended was an indication that it was aware or was deemed to be aware of the existence of the earlier suit and the proceedings thereon. On this basis, the Respondent was convinced that the Applicant failed to disclose to this court that in fact there was an application made in the earlier suit for conservatory orders of the exact nature as Order Number 2 in the present proceedings and that the court in the earlier suit refused to grant the same on the basis that there was neither an urgency nor the need for it. As the Applicant was guilty of material non-disclosure it was submitted based on **Hussein Ali & 4 Others vs. Commissioner of Lands, lands Registrar & 7 others (2013) eKLR** that the Applicant was disentitled to the orders granted based on the holding that:

> **"It is well settled that a person who makes an ex-parte Application to court, that is to say in the absence of the person who will be affected by that which the court is asked to do is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage by him. That is perfectly plain and requires no authority to justify it."**

39. On the authority of **Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others (2014) eKLR** the Respondent urged that this Court be guided by the principle that:

> **"….the award of costs would normally be guided by the principle that 'costs follow the event': the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails…."**

40. It is these two applications which is the subject of the present ruling.

Applicant's Case

41. On the part of the Applicant, it was contended that the application dated 17th December 2014 disclosed a prima facie case and was a sound basis for the grant of leave and the conservatory stay orders and the same ought not to be set aside. According to the Applicant, the Interested Party's application dated 23rd December 2014 ignored the express averment in the Applicant's affidavit sworn on 17th December 2014 regarding the source of material and data, the authenticity of which material was not impugned. It averred that that all the documents that were brought to the attention of the Applicant by the concerned members of the public were accurately reproduced and annexed to the

application for leave in the form that they were availed and therefore the issue of want of full frank and candid disclosure of material facts in this circumstances did not arise.

42. The Applicant denied being aware of the proceedings in **High Court Nairobi Petition Number 503 of 2014 Bernard Murage vs. Finserve Africa Limited & 3 Others** and averred that the said suit was not part and parcel of the material made available to them. It was the Applicant's view that the fact that one of the annextures was itself a derivative or appears to be derived from the previous suit did not in and of itself mean that the applicant was in possession of and suppressed the material in the other suit. The Applicant also pointed out that it was curious that the Interested Party had not endeavoured to avail the entire of the pleadings, affidavits and other material filed in the previous suit to which it was a party for their full tenor and purport in the framework of the current application.

43.The Applicant averred that on the 30th of November 2014 the Interested Party's advocate made an appearance before this court and the court sought to know whether the judgment in the said Petition Number 503 of 2014 would accordingly determine this case and the Interested Party's counsel replied that it would not necessarily determine this application an indication the Applicant believed cast doubt on the alleged similarity between this suit and the alleged earlier suit.

44. To the Applicant, the allegation that they failed to explain with precision how the Interested Party proposes to use the thin SIM and in particular that the persons who will use it will do so pursuant to contracts that they will enter into does not answer the issues of public concern raised. There however, was no evidence that the Interested Party does not intend to roll out the thin SI to the mass market.

45.According to the Applicant, the contention by the Interested Party of a purely contractual nature of the use of the thin SIM fails to take into account that amongst the poor mobile telephone handsets are shared and as such any technology that jeopardizes the security of data will be a danger beyond merely the contracting parties.

46. It was submitted that since the Respondent and the Interested Party had not responded to the Application, the same ought to be declared the uncontested. To the Applicant, the prayers sought by the Respondents are conflicting. Whereas in prayer (a) of the Respondent's application what was sought was merely that these proceedings be held in abeyance until the alleged constitutional petition is heard and determined, in prayer (b) thereof the Respondent sought that the orders obtained by the Applicants when they sought leave be set aside. The effect of the grant of the latter prayer, it was submitted would be collapse of the substantive motion, a course which would lead to conflicting orders.

47. The Applicant in its submissions relied on the Court of Appeal decision **Aga Khan Education Service Kenya vs. Republic & Others Civil Appeal Number 257 of 2003.**

48. It was submitted that the Respondent had all along conceded that the subject matter of this litigation raised public interest concerns as shown by the contents of the letter dated 22nd September 2014 and sought indemnity for matters of concern to the general public in the mobile telephone industry. Further the impugned decision was made by the Respondent pursuant to an exercise of its functions under the ***Kenya Information Communications Act*** which is a public function that inherently generates public interest. The foregoing, it was contended allude to this matter being of high public interest.

49. The Applicants went on to disclose that it was common knowledge that the Respondent granted the Interested party permission to deploy the thin SIM technology and that the use of the thin SIM was not restricted to a limited population on experimental basis but to all members of the public who would be the Interested Party's clients. Thereafter, Respondent sought to be indemnified by the Interested Party against a wide range of losses that may hit the general public and the Applicants believe that the Interested Party cannot indemnify the public itself. The Applicant submitted that it

was in the public domain that the Respondent then advertised for a consultancy to commission a study of the security aspects of the use of the thin SIM technology. It was the Applicant's position that the foregoing reasons, which the Applicant used to obtain, leave to file for judicial review orders, have not been shaken by the alleged non-disclosure of facts on the part of the Applicant. Neither has the Respondent demonstrated that the undisclosed facts have been in the knowledge of the Applicant. The Applicant was of the view that the fact that there exists another set of facts that the court may take into account in determining the application on merits is not a basis for setting aside ex-parte orders.

50.To the Applicant, this matter is not *sub judice* and in any Order 53 has no inbuilt provisions on the principle of *res sub judice.* To the Applicant, applying the provisions of Section 6 of the ***Civil Procedure Act***, this Court ought to order consolidation of the two matters and arrest the judgment in the Petition so that the same is delivered upon hearing the ex-parte applicant herein on the allegations.

Determination

51. I have considered the applications filed by the Respondent and the Interested Party herein. I wish to determine the Respondent's application before dealing with the Interested Party's.

52.The Respondent contends that in light of the proceedings in **High Court Nairobi Petition Number 503 of 2014 Bernard Murage vs. Finserve Africa Limited & 3 Others,** these proceedings are *sub judice* pursuant to section 6 of the ***Civil Procedure Act***. The said section provides as follows:

> ***No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.***

53. *Sub judice*, strictly speaking is provided under section 6 of the ***Civil Procedure Act*** which in the preamble to the Act is "*An Act of Parliament to make provision for procedure in civil courts"*. It is, however, now well settled that judicial review applications are neither criminal nor civil in nature. See **Commissioner of Lands vs. Kunste Hotels Ltd (1995-1998) 1 EA 1.**

54.In **Commissioner of Lands vs. Hotel Kunste Ltd** (supra) and **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354** it was held that judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal and the ***Civil Procedure Act*** does not apply since it is governed by sections 8 and 9 of the ***Law Reform Act*** being the substantive law and Order 53 of the ***Civil Procedure Rules*** being the procedural law. Therefore strictly speaking section 6 of the ***Civil Procedure Act*** does not apply to judicial review proceedings. See **Republic vs. Judicial Service Commission *ex parte* Pareno [2004] 1 KLR 203-209** and **Re: National Hospital Insurance Fund Act and Central Organisation of Trade Unions (Kenya) Nairobi HCMA No. 1747 of 2004 [2006] 1 EA 47.**

55. This, however, does not take away the Court's inherent powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the its process. Whereas *sub judice* may not, pursuant to section 6 aforesaid, be invoked in judicial review proceedings, the Court retains an inherent jurisdiction to make such orders as necessary for the ends of justice including termination of proceedings or stay of the same. One of the principles guiding the exercise of judicial authority as enunciated in Article 159(2)(b) of the Constitution is that justice delayed is justice denied. The effect of filing several proceedings seeking the same or substantially the same orders would be to delay the course of justice and the Court is constitutionally obliged to take actions that would expedite the disposal of matters before it including termination of unnecessary proceedings and staying multiple suits filed by the same partes seeking the same or substantially the same orders. Accordingly, the principle of *sub judice* may well be achieved by applying the constitutional principles.

56.By taking such action the Court would be invoking its inherent jurisdiction which is not a

jurisdiction conferred by section 3A of the ***Civil Procedure Act*** as such but merely reserved thereunder. In **Kenya Bus Services Ltd & Others vs. Attorney General and Others [2005] 1 EA 111; [2005] 1 KLR 743** it was held:

> **"It is trite law that an *ex parte* order can be set aside by the judge who gave it or by any other judge. The Civil Procedure Rules provide for this. Our Constitution does assume the existence of supportive Civil Procedure regime in so far as the same is not inconsistent with the Constitution. There is nothing inconsistent with the Constitution in the act or principle of setting aside of *ex parte* orders for good reasons. If an order obtained in a Constitutional application is incompetent or improperly obtained there cannot be any valid reason why the court would not have the jurisdiction to set it aside. Setting aside would be properly justified on grounds of doing justice and fair play and good administration of justice and therefore in furtherance of public policy...Where there is no specific provision to set aside the courts power or jurisdiction would spring from the inherent powers of the court. Whereas ordinary jurisdiction stems from the Act of Parliament or statutes, the inherent powers stem from the character or the nature of the court itself – it is regarded as sufficiently empowered to do justice in all situations. The jurisdiction to exercise these powers was derived, not from statute or rule of law, but from the very nature of the court as a superior court of law, and for this reason such jurisdiction has been called "inherent". For the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent the process being obstructed and abused. Such a power is intrinsic in a superior court, its very lifeblood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction, which is inherent in a superior court of law, is that which enables it to fulfil itself as a court of law. The judicial basis of this jurisdiction is therefore the authority of the Judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner. The need to administer justice in accordance with the Constitution occupies an even higher level due to the supremacy of the constitution and the need to prevent the abuse of the Constitutional provisions and procedure does occupy the apex of the judicial hierarchy of values. Therefore the Court does have the inherent powers to prevent abuse of its process in declaring, securing and enforcing Constitutional rights and freedoms. It has the same power to set aside *ex parte* orders, which by their very nature are provisional." See *The Reform of Civil Procedure Law and Other Essays in Civil Procedure (1982) By Sir Isaac J H Jacob*** and **WEA Records Limited vs. Visions Channel 4 Limited & Others (1983) 2 All ER 589; R vs. Land Registrar Kajiado & 2 Others Ex Parte John Kigunda HCMA No. 1183 of 2004.**

57. As was stated by **Kimaru, J** in **Stephen Somek Takwenyi & Another vs. David Mbuthia Githare & 2 Others Nairobi (Milimani) HCCC No. 363 of 2009**:

> **"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".**

58.I associate myself with the holding in **Karuri & Others vs. Dawa Pharmaceuticals Company Limited and Others [2007] 2 EA 235** that nothing can take away the courts inherent power to prevent the abuse of its process by striking out pleadings or striking out a frivolous and vexatious application and that baptising such matters constitutional cannot make them so if they are in fact plainly an abuse of the court process.

59.Accordingly the Court may in proper cases invoke its inherent jurisdiction to make such orders as may be necessary for the ends of justice or to prevent abuse of its process and this may be done where the principles of *sub judice* would be applicable. As was held by the High Court of Uganda in **Nyanza Garage vs. Attorney General Kampala HCCS No. 450 of 1993**:

> **"In the interest of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter is to be avoided. It is in the interest of the parties because the parties are kept at a minimum both in terms of time and money spent on a matter that could be resolved in one suit. Secondly, a multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matters, and creating and or adding to the backlog of cases courts have to deal with. Parties would be well advised to avoid a multiplicity of suits."**

60. This then leads me to the issue whether the said principles apply to this case. For the doctrine to apply the following principles ought to be present:

(1). There must exist two or more suits filed consecutively.

(2). The matter in issue in the suits or proceedings must be directly and substantially the same.

(3). The parties in the suits or proceedings must be the same or must be parties under whom they or any of them claim and they must be litigating under the same title.

(4). The suits must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

61. There is no doubt that conditions (1) and (4) hereinabove are common in the two suits under consideration. In these proceedings the applicant seeks an order of certiorari to quash the decision of the Respondent to allow the use of the thin SIM technology by the Interested Party in the mobile telephony communication sector in Kenya. In the petition the substantive orders which the petitioner seeks are a declaration that article 31(c) and (d) are in force and are mandatory that for their realisation a data protection law be enacted and a conservatory order restraining the 1st and 2nd Respondents (Finserve Africa Limited and Equity Bank) from rolling out the thin sim technology pending the enactment of the data protection law. A cursory look at the said prayers would on their face show that they are not exactly the same. However the principle of *sub judice* does not talk about the "prayers sought" but rather "the matter in issue". In **Re the Matter of The Interim Independent Electoral Commission Constitutional Application No. 2 of 2011 [2011] eKLR** the Supreme Court cited with approval the Australian decision in **Re Judiciary Act 1903-1920 & In re Navigation Act 1912-1920 (1921) 29 CLR 257** where it was held:

> **"…we do not think that the word 'matter'…means a legal proceeding, but rather the subject matter for determination in a legal proceeding. In our opinion there can be no matter…unless there is some right, duty or liability to be established by the determination of the Court…"**

62. It is therefore my view that in determining whether or not *sub judice* applies, it is the substance of the claim that ought to be looked at rather than the prayers sought. In both proceedings it is clear that the applicant/petitioner are aggrieved by the decision by the Communication Authority of Kenya to authorise Finserve Africa Limited to roll out the use of the thin SIM technology in the mobile money telephony communication sector in Kenya without allaying the petitioner/applicant's

apprehension with regard to the security of the said system. It is therefore my view that the matters in both proceedings are substantially the same.

63.With respect to the issue whether the parties in the proceedings are the same or are parties under whom they or any of them claim and whether they are litigating under the same title although a superficial look at the parties shows that they are not, my view is that one of the thinking driving forces underlying the principle of *sub judice* is the need to avoid making conflicting decisions from the same or similar facts. The Respondent relied on explanation 6 to section 7 of the *Civil Procedure Act* as locking out any pretence by the Applicant that the parties in both proceedings are not the same. The said explanation states:

> ***Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.***

64. In my view, for this explanation to apply, the claim must either be in respect of a public right or if in respect of a private right, it must be claimed in common for the applicant/petitioner and others. It is only then that the requirement that the parties litigate under the same title can be said to have been fulfilled.

65.The Applicant in this case is Legal Advice Centre aka Kituo Cha Sheria which describes itself as **"a Non-Governmental Organization registered as such under the Non-Governmental Organizations Co-ordination Act whose objectives include fighting for social justice, constitutionalism and the rule of law as well as engagement in public interest litigation."** The Applicant also goes on to say in Paragraph 5 of its Verifying Affidavit that, **"That it is of utmost importance that any decision taken or made in the context of this sector takes into account the broad public interest that it may affect."** The petitioner in the earlier suit in presenting his petition described himself as: **"***The Petitioner is a Kenyan male adult of sound mind, and an account holder with the 2nd Respondent and a concerned law abiding citizen and who presents the petition as a constitutional right as per Article 258 of the Constitution of Kenya 2010.***"** Article 258 of the Constitution of Kenya provides:

> ***(1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.***
>
> ***(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—***
>
> ***(a) a person acting on behalf of another person who cannot act in their own name;***
>
> ***(b) a person acting as a member of, or in the interest of, a group or class of persons;***
>
> ***(c) a person acting in the public interest; or***
>
> ***(d) an association acting in the interest of one or more of its members.***

66. Although Article 258 of the Constitution is cited in the petition, the said provisions allows *inter alia* a party to present a petition in his/her own interest. It is not clear the capacity in which the petitioner, **Benard Murage**, presented his petition. He did not purport to bring the petition on behalf of any other person apart from himself. In the premises I am unable to find that in both proceedings the claimants were/are litigating under the same title.

67.In the premises, the application of the principle of *sub judice* fails.

68. That leads me to the issue of non-disclosure which is the subject of the Interested Party's application. That this Court has jurisdiction to set aside leave and/or stay granted in judicial review

proceedings is not in doubt. The Court of Appeal made this clear in **R vs. Communications Commission of Kenya & 2 Others ex Parte East Africa Televisions Network Ltd. Civil Appeal No. 175 of 2000 [2001] KLR 82; [2001] 1 EA 199** where it held:

> **"Leave should be granted if, on the material available, the Court considers, without going into the matter in depth, that there is an arguable case for granting leave. The appropriate procedure for challenging such leave subsequently is by an application by the Respondent under the inherent jurisdiction of the Court, to the Judge who granted leave to set it aside."**

See also **Njuguna vs. Minister for Agriculture Civil Appeal No. 144 of 2000 [2000] 1 EA 184.**

69. However as was expressed in **Nakumatt Holdings Limited vs. Commissioner of Value Added Tax [2011] eKLR**:

> **"Although leave granted *ex parte* can be set aside on an application, that is a very limited jurisdiction and will obviously be exercised very sparingly and on very clear cut cases unless it be contended that judges of the Superior Court grant leave as a matter of course which is not correct. Unless the case is an obvious one, such as where an order of *certiorari* is being sought and it is clear to the court that the decision sought to be quashed was made more than six months prior to the application coming to court and there is, therefore, no prospects at all of success, the court would discourage practitioners from routinely following the grant of leave with application to set aside. Fortunately such applications are rare and like the Judges in the United Kingdom, the court would also point out that the mere fact that an applicant may in the end have great difficulties in proving his case is no basis for setting aside leave already granted."**

70.Similar sentiments were expressed by the same Court in **Aga Khan Education Service Kenya vs. Republic & Others** (supra) where the court pointed out that:

> **"We would, however, caution practitioners that even though leave granted ex parte can be set aside on an application, that is a very limited jurisdiction and will obviously be exercised very sparingly and on very clear-cut cases, unless it be contended that judges of the superior court grant leave as a matter of course. We do not think that is correct. Unless the case is an obvious one, such as where an order of certiorari is being sought and it is clear to the court that the decision sought to be quashed was made more than six months prior to the applicant coming to court, and there is, therefore, no prospects at all of success, we would ourselves discourage practitioners from routinely following the grant of leave with applications to set leave aside. Fortunately such applications are rare and like the judges in the United Kingdom, we would also point out that the mere fact that an applicant may in the end have great difficulties in proving his case is no basis for setting aside leave already granted."**

71. The law is however clear that where a party, at the *ex parte* stage of an application fails to disclose relevant material to court and thus obtains an order from the court by disguise or camouflage the court will set aside the ex parte orders so obtained. This was appreciated in **Republic vs. Kenya National Federation of Co-Operatives Limited ex Parte Communications Commission of Kenya** (supra) where the court held that:

> **"It is of fundamental importance that applications for judicial review should be made with full disclosure of all material available to the claimant. This is a case which I can properly use in order to send a message to those who are making applications to this court reminding them of their duty to make full disclosure; failure to do so will result, in appropriate cases, in the discretion of the Court being exercised against (a claimant) in relation to the grant of (a remedy)."**

72.I also associate myself with the position adopted in **Hussein Ali & 4 Others vs. Commissioner of Lands, lands Registrar & 7 others** (supra) that:

"It is well settled that a person who makes an ex-parte Application to court, that is to say in the absence of the person who will be affected by that which the court is asked to do is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage by him. That is perfectly plain and requires no authority to justify it."

73. However, what is material and what is not must depend on the particular circumstances of the case. The issue was deliberated upon at length in **Bahadurali Ebrahim Shamji vs. Al Noor Jamal & 2 Others Civil Appeal No. 210 of 1997** where the Court of Appeal stated:

"It is perfectly well-settled that a person who makes an ex parte application to the court – that is to say, in the absence of the person who will be affected by that which the court is asked to do – is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make the fullest possible disclosure then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained. It has been for many years the rule of court, and one which it is of the greatest importance to maintain, that when an applicant comes to the Court to obtain relief on an ex parte statement he should make a full and fair disclosure of all the material facts – facts, not law. He must not misstate the law if he can help it – the court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts, and the penalty by which the court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the court will set aside any action which it has taken on the faith of the imperfect statement…In considering whether or not there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to include; (i) The duty of the applicant is to make full and fair disclosure of the material facts. (ii) The material facts are those which it is material for the judge to know in dealing with the application made; materiality is to be decided by the court and not the assessment of the applicant or his legal advisers. (iii) The applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made sufficient inquiries. (iv) The extent of the inquiries which will be held to b proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application, (b) the order for which the application is made and the probable effect of the order on the defendant, and (c) the degree of legitimate urgency and the time available for the making of the inquiries. (v) If material non-disclosure is established the court will be astute to ensure that a plaintiff who obtains an ex parte injunction without full disclosure is deprived of any advantage by that breach of duty. (vi) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to issues which were to be decided by the judge in the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented. (vii) Finally, it is not every omission that the injunction will be automatically discharged. A *locus pentitentiae* (chance of repentance) may sometimes be afforded. The Court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to make a new order on terms: when the whole of the facts, including that of the original non-disclosure, are before it, the court may well grant such a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed… In the instant case the so-called material facts repeatedly alleged to have been either suppressed, concealed or not disclosed by the respondents are only two pending applications

which were never heard nor determined by the superior court. It is submitted that the court was consequently misled but the court cannot understand how this could be so…It is accepted that in cases of ex parte proceedings there must be full and frank disclosure to the court of all material facts known to the applicant but in the instant case everything was in the court record and was available to the learned judge for perusal. There was no deliberate concealment on the part of the respondents. Both the applications were on record and the notice of discontinuance accompanying the latest application clearly showed what applications were being discontinued and they were not in any sense misleading. Granted that the respondents did not inform the learned Judge of the pending applications, the issue is: were the material facts those, which it was material for the learned judge to know in dealing with the application as, made? The answer to this must be in the negative since the learned Judge was satisfied that the pending applications did not preclude him from doing justice to the parties especially in that the applications and the suit had not been heard on merit. He was also concerned that injury to the respondents, which could not be compensated for damages, could be occasioned by a delay. This mode of approach to the matter before him cannot be faulted".

74.In this case what is claimed to have not been disclosed was the fact of the pendency of the Petition in which similar issues were raised. In this case, one of the documents exhibited as "GNA-1" bore a stamp clearly indicating that it was an exhibit in an affidavit sworn by one **Bernrd Murage** on 10th October, 2014. Proper inquiries from the advocate might have revealed the existence of **Nairobi High Court Petition Number 503 of 2014 Bernard Murage vs. Finserve Africa Limited & 3 Others** and I have found hereinabove that the issues in this application and in the said petition are substantially the same. This exhibit in my view ought to have put the applicant's advocates on notice that probably there were pending proceedings and the advocate as an officer of the court owed the Court a duty to prod his client as to the existence of such proceedings in order to disclose to the Court all relevant material. When on the face of the instructions given to the advocate it would appear that the said instructions form the basis of existing court proceedings, the failure by the advocate to pursue such course may well amount to a failure to disclose material facts if it turns out the existence of other proceedings were material to the determination of the matter especially at an *ex parte* stage. In any case, the non-disclosure of material fact is not to be pegged on the facts known to an advocate but the facts as known to the part instructing an advocate. Where a party fails to disclose material facts to his counsel such non-disclosure cannot be excused on the ground that counsel was not appraised of the existence of the said facts.

75. This position as appreciated by **Ibrahim, J** (as he then was) in **Republic vs. Kenya National Federation of Co-Operatives Limited ex Parte Communications Commission of Kenya [2005] 1 KLR 242** where he held:

"Full disclosure must be linked with fair presentation. The judge must be able to have complete confidence in the thoroughness and objectivity of those presenting the case for the applicant and once that confidence is undermined, he is lost. The court must insist on strict compliance with the rules pertaining to non-disclosure to afford protection to the absent parties at the *ex parte* stage…An applicant and its counsel are required to carry out a diligent inquiry on all the facts including the applicable law before making an *ex parte* application and it is the duty of an applicant to inquire as to whether there exists an alternative remedy."

76.Accordingly, it is my view that the existence of the petition ought to have been disclosed to the Court. The Court however, in considering the nature of the orders to grant where there is non-disclosure of material facts ought to take into account the principle of proportionality and see where the scales of justice lie. The law is now that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory that ultimate end of justice. The Court, in exercising its discretion, should always opt for the lower rather than the higher risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.**

77. The applicant urged this Court to arrest the judgement in the petition and direct the consolidation

of these proceedings with the said petition. With respect that is a jurisdiction which cannot be exercised in such a superficial manner. Arresting a judgement and any judicial process for that matter is a power which ought not to be exercised lightly. In Musa Misango vs. Eria Musigire and Others Kampala HCCS No. 30 of 1966 [1966] EA 390, **Sir Udo Udoma**, CJ held:

> **"It is unquestionable that, both under the inherent power of the court, and also under a specific rule to that effect, the court has a right to stop an action if it is wantonly brought without the shadow of an excuse, so that to permit the action to go through its ordinary stages up to the trial would be to allow the defendant to be vexed under the form of legal process when there could not at any stage be any doubt that the action was baseless. But from this to the summary dismissal of actions because the judge in chambers does not think that they will be successful in the end lies a wide region, and the courts have properly considered this power of arresting an action and deciding it without trial as one to be very sparingly used, and rarely, if ever, excepting in cases where the action is an abuse of legal procedure. They have laid down again and again that this process is not intended to take the place of the old demurrer by which the defendant challenged the validity of the plaintiff's claims as a matter of law. It is evident that our judicial system would never permit a plaintiff to be "driven from the judgement seat" in this way without any court having considered his right to be heard except in cases where the cause of action was obviously and almost incontestably bad."**

78.I am not satisfied that this is a proper case in which I ought to arrest the judgement in the Petition.

79.Accordingly, doing the best I can in the circumstances the order which commends itself to me and which I hereby grant is that this Court ought not to take the drastic step of setting aside leave with the consequences that these proceedings would be automatically terminated. I however vacate the directions given herein that the grant of leave herein operates as a stay of the proceedings in question.

80. The costs of the two applications will be in the cause. It is so ordered.

Dated at Nairobi this 11th day June, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ongoya for the Applicant

Mr Kilonzo and Miss Okimaru for the Respondent

Mr Amoko and Miss Kashindi for the Interested Party

Cc Richard