



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 36 OF 2013

REPUBLIC.....APPLICANT

VERSUS

ENGINEERS BOARD OF KENYA.....RESPONDENT

AND

UNIVERSITY OF NAIROBI.....PROPOSED INTERESTED PARTY

MULTISCOPE CONSULTING ENGINEERS LTD.....EX-PARTE

RULING

1. Through the notice of motion application dated 23rd October, 2013 the University of Nairobi prays for orders as follows:

“1. **THAT**, this Honourable Court be pleased to certify this Application as urgent, service of the same be dispensed with and it be heard *ex-parte* in the first instance owing to its urgency.

2. **THAT**, pending the hearing and determination of the application, the arbitral proceedings between University of Nairobi on one part and Multiscope Consulting Engineers Limited and Songa Ogota & Associates on the other part be stayed.

3. **THAT**, the University of Nairobi be granted leave to be joined as an Interested Party.

4. **THAT**, the *ex-parte* Judgment entered herein dated 14.05.14 be set aside *ex debito justitiae*.

5. **THAT**, the matter be heard *de novo*.

6. **THAT**, the costs of the application be in the cause.”

2. The application is supported by the grounds on its face and the supporting affidavit of Prof. P. M. F. Mbithi sworn on 23rd October, 2014.

3. The University of Nairobi’s case is that it is the defendant in Nairobi H.C.C.C. No. 47 of 2013 where it

has been sued by Multiscope Consulting Engineers Ltd, the ex parte Applicant herein. It is also the defendant in Nairobi H.C.C.C. No. 21 of 2013 in which the plaintiff is Songa Ogoda & Associates. By consent of the parties these two matters were referred to arbitration.

4. On 26th August, 2014 the lawyer for Songa Ogoda & Associates indicated to the Arbitration Tribunal that the University's report titled: "**Report on Accredited Checking of the Proposed University of Nairobi Tower Project on Plot L.R. No.209/18319, Nairobi**" had been quashed by this Court in these judicial review proceedings. It is the University's case that the said report which is the central document before the Arbitration Tribunal was quashed without its knowledge of the existence of these proceedings; it would be a miscarriage of justice for the judgment delivered by this Court on 14th May, 2014 to be allowed to stand; and no prejudice will be suffered by the ex-parte Applicant if the said judgment is set aside.

5. The Respondent, the Engineers Board of Kenya supported the application.

6. The ex-parte Applicant opposed the application through the replying affidavit sworn on 4th November, 2014 by its Managing Director, Engineer Samuel Nyachama Mugo. It is the ex-parte Applicant's case that it cannot be true that the University/Applicant was not aware of these proceedings as it has been in cohort with the Engineers Board of Kenya in instituting the botched disciplinary proceedings against the ex-parte Applicant.

7. The ex-parte Applicant asserts that the report in question has already been owned by the Engineers Board of Kenya and the University cannot now be heard to say that the report belongs to it. The ex-parte Applicant contends that the Engineers Board of Kenya was the right party to answer the complaints raised in these judicial review proceedings and the University is just but a busybody and a stranger to this suit. It is the ex-parte Applicant's case that the Engineers Board of Kenya ought to have informed the Court that the University was a necessary party and having failed to do so it cannot be allowed to reopen the case.

8. In the written submissions the ex parte Applicant argued that the University has not alluded to any circumstances which would make the Court reach a different conclusion if it re-opens the case. The ex-parte Applicant relied on the decision in **Nakumatt Holdings Limited v National Environmental & Management Authority KLR (E& L) 1, 668** and urged this Court not to allow the application as this would amount to acting in vain and this would be contrary to the policy that courts should not issue orders in vain.

9. In my view, the question for determination in this application is whether the University of Nairobi was a necessary party to these proceedings. The report that was quashed by the judgment delivered by this Court on 14th May, 2014 was in regard to a construction project that was being undertaken by the University of Nairobi. The two suits instituted by the ex-parte Applicant and Songa Ogoda & Associates are against the University of Nairobi.

10. Order 53 Rule 3(2) of the Civil Procedure Rules, 2010 provides that the notice of motion shall be served upon all persons directly affected by the judicial proceedings. Rule 3(3) provides that an affidavit giving the names and addresses of the persons served shall be filed in court. Rule 6 of the same Order 53 allows for the hearing of any person who desires to be heard in opposition to the motion notwithstanding the fact that the person has not been served with the application.

11. In essence, the rules require that all persons interested in or to be affected by the outcome of judicial review proceedings should be heard. Where a hearing proceeds without the knowledge or service upon an interested party the only logical conclusion is to have the decision of the Court set aside for the interested party to have an opportunity to be heard. It is immaterial whether the rehearing is in all likelihood going to yield the same fruits as the first hearing. The cornerstone of judicial review is fair play and a judicial review Court must and ought to be seen to be at the forefront in treating all the parties fairly.

12. There is no evidence that the University of Nairobi was served by the ex-parte Applicant. As such

the University of Nairobi's notice of motion dated 23rd October, 2014 is determined as follows:

- a. The University of Nairobi is granted leave to join these judicial review proceedings as an Interested Party;
- b. The judgment of this Court dated 14th May, 2014 and delivered on the same date is set aside so that the hearing of the ex-parte Applicant's substantive notice of motion dated 4th February, 2013 can start de novo; and
- c. The costs of the application will be in the cause.

The prayer to stay the arbitral proceedings can be best addressed by the body handling those proceedings. No order will therefore issue in regard to those proceedings.

Dated, signed and delivered at Nairobi this 16th day of July, 2015.

W. KORIR,

JUDGE OF THE HIGH COURT