REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURT

JUDICIAL REVIEW DIVISION

JR NO. 401 OF 2014

IN THE MATTER OF AN APPLICATION FOR LEAVE TO COMMENCE PROCEEDINGS IN THE NATURE OF JUDICIAL REVIEW

AND

IN THE MATTER OF THE PURPORTED APPOINTMENT OF BOARD MEMBERS OF COMMUNICATIONS AUTHORITY OF KENYA

BETWEEN

REPUBLIC ……..…….. APPLICANT

-VERSUS-

THE CS, MINISTRY OF INFORMATION

& COMMUNICATION…….…….....1ST RESPONDENT

COMMUNICATIONS AUTHORITY OF KENYA..2ND RESPONDENT

THE HON. ATTORNEY GENERAL……..…....3RD RESPONDENT

AND

CAROLE KARIUKI……....1ST INTERESTED PARTY

WILBERT KIPSANG CHOGE…….….2ND INTERESTED PARTY

KENNEDY MONCHERE NYAUNDI..……3RD INTERESTED PARTY

GRACE MWENDWA MUNJURI…..…..…4TH INTERESTED PARTY

PROFESSOR LEVI OBONYO……...……5TH INTERESTED PARTY

HELLEN KINOTI…….……6TH INTERESTED PARTY

BEATRICE OPEE…….……..7TH INTERESTED PARTY

PETER MUNYWOKI MUTIE……..……8TH INTERESTED PARTY

***EX PARTE*: ADRIAN KAMOTHO NJENGA**

RULING

1. On 29th May, 2015, I delivered a judgement in this case in which I granted an order of certiorari removing into this court and quashing the decision and gazette notices Nos. 2915 and 3586 dated 24th April and 20th May 2014 respectively by the 1st Respondent and the 1st Interested Party publishing the names of the shortlisted candidates for appointments to the 2nd Respondent's board and appointing the 2nd to 7th Interested Parties as members of the Communications Authority of Kenya (CAK) Board.
2. Vide an application dated 5th June, 2015, filed by the interested parties herein (hereinafter referred to as "the applicants"), the said applicants seek the following orders:

   1. That the Application be certified as urgent and that it be heard ex parte in the first instance;

   2. That there be a stay of the Judgment of Hon. Odunga, J dated the 29/5/2015 and the subsequent order from the said judgment pending the hearing inter partes of this application.

   3. That there be a stay of the judgment of Hon. Odunga, J dated 29/5/2015 and the subsequent order arising from the said judgment pending the determination of the application.

   4. That the judgment of Hon. Odunga, J dated 29/5/2015 and the subsequent order arising from the said judgment be and is hereby reviewed and set aside and the Ex parte Applicant's Notice of Motion application 24/10/2014 be heard *de novo.*

   5. That the interested parties be allowed to participate in the proceedings.

   6. That costs be provided for.

3. The Application was based on the following grounds:

   i. That the judgment and subsequent orders were obtained on the 29/5/2015

   ii. That the named interested parties have never been served individually or severally with the application culminating into the above order, hearing notices or any other notice from the Judicial Review Division Court on the occasions that the application came up for mention for direction, hearing, mention for submission, judgment or on any other occasion that the application may have formally came up in the court.

   iii. That the judgment has been entered in this matter without the interested parties being accorded an opportunity to be heard as is constitutionally mandatory.

   iv. That it is against natural justice to entertain proceedings which have an impact on the interested parties' basic human rights without them being accorded an opportunity of being heard.

   v. That the orders granted are so adverse *vis a vis* to the interested parties individually and the whole country considering that since their appointments they have been in office

and have been contracting third parties, effectively committing the Kenyan Government to obligations both locally and internationally; the judgment aforesaid would have serious economic repercussions if the above judgment was not to be stayed all together considering that the interested parties were not involved in these proceedings from the outset.

vi. That effectively, there is a likelihood of the interested parties being individually held liable if the judgment is not stayed or is allowed to stand as it is having in mind that all the contractual obligation that the interested parties have participated whilst in the office run to billions of shillings.

vii. That the interested parties verily and rightfully believe that as parties directly mentioned in their respective individual capacity in the Miscellaneous Application they ought to have been individually and personally notified of all the court proceedings so that they could participate in them having personally and individually named them.

ix. That the court record shows that as a matter of fact they were not personally served.

x. That for avoidance of doubt the interested parties did not appoint the law form of Hamilton Harrison and Mathews (incorporating Oraro & Co. Advocates) to act for them at all in the proceedings.

4. The said application was supported by affidavits sworn by the interested parties.
5. According to them, the 3rd to 8th Interested Parties are all directors in the Board of the Communications Authority of Kenya (hereinafter referred to as "the Authority") in their individual capacities. It was affirmed that though the said directors are named as Interested Parties in this suit appearing as 2nd to the 8th Interested Parties, they have never been served individually or severally with the application culminating into the order herein, hearing notices or any other notice from the Judicial Review Division Court on the occasions that the application came up for mention for direction, hearing, mention for submission, judgment or on any other occasion that the application may have formally came up in the court.
6. According to the applicants, under the provisions of Order 53 of the ***Civil Procedure Act***, any party named in such proceedings must be served with the said proceedings. They however clarified that they did not appoint the law firm of Hamilton Harrison & Mathews (Incorporating Oraro & Co. Advocates), also referred to hereinafter as "HHORARO", to act for them at all in the proceedings.
7. The applicants therefore averred that the Judgment and the subsequent order was thus been entered in this matter without them being accorded an opportunity to be heard as is constitutionally mandatory and that it was against natural justice to entertain proceedings which have an impact on their basic human rights without them being accorded an opportunity of being heard.
8. To the applicants, the orders granted are so adverse *vis a vis* to (sic) the interested parties individually and the whole country considering that since their appointments they have been in office and have been contracting third parties, effectively committing the Kenyan Government to obligations both locally and internationally; the judgment aforesaid would have serious economic repercussions if the above judgment and subsequent order was not to be stayed all together considering that the interested parties were not involved in these proceedings from the outset. They were apprehensive that there was a likelihood of the interested parties being individually held liable if the judgment was not stayed or was allowed to stand as it is having in mind that all the contractual obligations that they had participated in whilst in the office run to billions of shillings as no stay was granted at the commencement of these proceedings to stop them from further engaging in working, thus entering contracts with third parties and formulating policy all that have huge financial implication to the country and to them individually as the effect of the order is that we were in office unlawfully *ab initio*.
9. It was the applicants' belief that as parties directly mentioned in their respective individual capacity in the miscellaneous application they ought to have been individually and personally

notified of all the court proceedings so that they could participate in them having personally and individually been named therein. However, the court record shows that as a matter of fact they were not personally served. Having not been served and effectively having not participated in those proceedings, their position was that the only recourse opened to them was to have the judgment and the subsequent order stayed and that substantively the entire judgment and the order be reviewed by being set aside.

10. The applicants contended that their constitutional right of accessing the court stood breached by the omission on the part of the *Ex parte* Applicant and that their right to fair labour practices that include the right of being heard in any matter that would affect their respective labour rights had been trampled on. It was however their case that their rights of access of justice should not be impeded by the omission complained off aforesaid-not serving the named persons at all since in any dispute every person has a right to have that dispute resolved by the application of the law, fairly and impartially.

11. It was the applicants' position that they were properly appointed by the appointing authority and that they were all qualified to hold their respective position in the board. Therefore, the failure to serve them personally as contemptuous by the *ex parte* Applicant as the initiator of these proceedings and that it is him who personally and individually named them; the omission goes against the very spirit of Order 53 that he invoked and the constitution that he relied upon in this application and the same ought not to be countenanced

Ex Parte Applicant's Case

12. In opposition to the application, the ex parte applicant filed the following grounds of opposition:

1. The 2nd to 8th Interested Parties have all along been represented in the proceedings by the firm of Hamilton Harrison & Mathews Incorporating Oraro Advocates in these proceedings by dint of the Notice of Appointment by the said Advocates dated 4th November 2014.

2. The firm of M/S A.I.Onyango & Co. Advocates has not properly placed itself on record as required under Order 9 Rule of the Civil Procedure Rules, as such the subject application is irretrievably defective.

3. No inquiry as to service can be made after appearance in the subject suit was made by the 2nd to 8th Interested Parties through their advocates on record M/s Hamilton Harrison & Mathews Incorporating Oraro Advocates.

4. Public interest in the circumstances weighs in favour of dismissing the subject application as the Applicants have not presented anything that would otherwise validate the same.

5. The application by 2nd to 8th Interested Parties is irredeemably defective for non-compliance with Order 14 Rule (2).

13. The ex parte applicant also relied on a replying affidavit sworn by himself on 17th June, 2015.

14. According to him, the 2nd to 8th Interested Parties are all members of the board of the 2nd Respondent and that it was in that capacity that they were included as Interested Parties. The 2nd Respondent it was deposed is headed by the Director General, who at all material times to this suit has served as the Secretary to the 2nd to 8th Interested Parties as the board of the 2nd Respondent and that his role as the secretary was evidenced in the exhibited minutes of the Interested Parties .

15. According to the *ex parte* applicant, and based on his counsel's advice, the Interested Parties were indeed properly served with the suit papers herein at their place of work with the 2nd Respondent and they appointed the firm of Hamilton Harrison & Mathews (Incorporating Oraro & Co. Advocates) to represent them in the suit as evidenced by the Notice of Appointment dated 4th November, 2014. Subsequently all court process intended to be served upon the Interested Parties

was effected upon the said firm of Advocates.

16. It was contended that from the documents annexed by the applicants herein, the Interested Parties seemed to have been regularly briefed about the matters pending in courts against the 2nd Respondent. It was deposed that the 2nd Respondent's Director General who was also the 2nd to 8th Interested Parties' collective secretary as a board was fully aware of the subject proceedings as he swore the 2nd Respondent's Replying Affidavit to the substantive Notice of Motion Judicial Review application. It was disclosed that by dint of Section 9 of the ***Kenya Information and Communications (Amendment) Act 2013***, the Director General is actually an Appointee of the board and that the substance of his Replying Affidavit to the substantive Notice of application in this suit, sworn on 9th December, 2014, was instructive of the passive participation in the proceedings through their advocates.
17. To the *ex parte* applicant, the said Director General in swearing the said replying affidavit swore it on behalf of the entire 2nd Respondent as an organization including its board which comprised of the 2nd to 8th Interested Parties. He was of the view that the inclusion of the Interested Parties in the suit was solely in their capacity as appointees to the 2nd Respondent's board and had no role to play in the said appointments. Accordingly, they were properly served in their place of work and they proceeded to appoint advocates who participated in the suit on their behalf. It follows that the Interested Parties would similarly have no say in the matter challenging their appointment. Based on advice from his legal counsel, the ex parte applicant asserted that the very definition of an "Interested Party" in the interpretation of the Constitution and by extension other laws divests any need of such party to participate in any proceedings if they chose not to, since they are not called upon to respond to the grievance at hand.
18. The *ex parte* applicant's view was that contrary to their allegations, there is no chance that the 2nd to 8th Interested Parties would be held liable for any action taken while they were in office as members of the 2nd Respondent's board as they did not have a role in their appointments to the said board. In any case, it was contended that there is no matter that the Interested Parties can possibly raise that would change the outcome of the subject suit as there is nothing that can possibly legitimize their appointments and to allow the subject applications would merely perpetuate an illegality.
19. The Court was therefore urged to disallow the subject application.

Determination

20. It was contended by the ex parte applicant that the applicants did not raise anything that would validate the impugned appointment. In other words the ex parte applicant's case was that there was no matter that the applicants could raise that would change the outcome of the subject suit. With due respect that is not the law. It is not the uselessness of one's case which dictates whether one is to be afforded an opportunity of being heard. Rather the right to be heard is a fundamental human right principle which cannot be taken away by one's perception of the other person's case. This was the position in **Onyango Oloo vs. Attorney General [1986-1989] EA 456** where the Court of Appeal expressed itself as follows:

"The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...*A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at*...It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated...*Denial of the right to be heard renders any decision made null and void ab initio.*" [Emphasis mine].

21. This was a restatement of **Lord Wright's** decision in **General Medical Council vs. Spackman [1943] 2 All ER 337** cited with approval in **R vs. Vice Chancellor JKUAT Misc. Appl. No. 30 of 2007** that:

"If the principles of natural justice are violated in respect of any decision, it is, indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principles of justice. The decision must be declared as no decision."

22. In **Ridge vs. Baldwin [1963] 2 All ER 66** at 81, **Lord Reid** expressed himself as follows:

"Time and again in the cases I have cited it has been stated that a decision given without the principles of natural justice is void."

23. However, as was held by the Court of Appeal in **Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998**:

"Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it."

24. Therefore the question for determination in this application is whether the applicants were afforded an opportunity of being heard and not whether such an opportunity would have changed the outcome of the application.
25. It was further contended that the applicants' advocates who filed this application were not properly on record. This was due to the fact that the firm of advocates which was on record at the time of the judgement was still on record. The ex parte applicant relied on the provisions of the ***Civil Procedure Rules*** in support of this contention. First and foremost this being judicial review application, the provisions of the ***Civil Procedure Act*** and the Rules thereunder save for Order 53 of the ***Civil Procedure Rules*** are inapplicable. Section 3 of the ***Civil Procedure Act*** provides:

In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other law for the time being in force.

26. It follows that where there is a special jurisdiction or power conferred, or any form or procedure prescribed, by or under any other law, the provisions of the ***Civil Procedure Act*** are inapplicable. It must be remembered that apart from Order 53 of the ***Civil Procedure Rules***, the provisions of the ***Civil Procedure Act*** and the Rules made thereunder do not apply to judicial review proceedings. Accordingly the provisions of the ***Civil Procedure Rules*** do not apply to these types of proceedings. In **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486**, the Court held that Judicial review is a special procedure and as the Court is exercising neither a civil or criminal jurisdiction in the strict sense of the word, the invocation of the provisions of section 3A and order 1 rule 8 of the ***Civil Procedure Rules*** rendered the application wholly incompetent. Similarly in **Kuria Mbae vs. The Land Adjudication Officer, Chuka & Another Nairobi HCMCA No. 257 of 1983** the court held that where proceedings are governed by a special Act of Parliament, the provisions of such an Act must be strictly construed and applied and therefore the provisions of the ***Civil Procedure Act*** and Rules do not apply unless expressly provided by such an Act and the provisions of the ***Civil Procedure Act*** and rules cannot be applied merely because the special

procedure does not exclude them. I therefore do not agree with the ex parte applicant that the provisions of the ***Civil Procedure Rules*** relied upon are applicable.

27. The most important issue however is whether the applicants/interested parties were afforded an opportunity of being heard.

28. It is not disputed that there was a notice of appointment filed by the firm of **Hamilton Harrison and Mathews (incorporating Oraro & Co. Advocates)** which confirmed that it was retained to act for the 1st and 2nd Respondents and all the interested parties. That notice of appointment remained valid till the time of the judgement. Although the applicants/interested parties have contended that they never instructed the said firm, there is no affidavit from the said firm confirming this contention. It has not been contended that the said firm declined to swear an affidavit in these proceedings. In **Samuel Ndirangu vs. Patrick Wachira Nderitu Civil Application No. Nai. 89 of 2004, Deverell, JA** held that where the record shows that judgement was delivered in the presence of an advocate holding brief for the applicant and no affidavit was obtained from either the former advocate or the advocate who was holding brief, extension of time could not be granted on the basis that neither the applicant nor the advocate was aware of the date of delivery of judgement as the affidavit filed was lacking veracity. Similarly, the Court of Appeal in **Kidogo Basi Housing Corporative Society Ltd. & 11 Others vs. Samuddin Gulamhussein Pothiwalla & Others Civil Application No. Nai. 168 of 2000** expressed itself as follows:

> **"It is quite clear from the replying affidavit that was filed herein that the applicant's then advocates filed a memorandum of appearance for the defendants, and a written statement of defence which was filed thereafter left no doubt that the said firm was representing all the defendants. Besides, after the decision against which an appeal is intended was given, counsel for the respondent in this application sought and got a clarification from the then advocates that they were acting for all the respondents. In view of the foregoing the submissions by the then advocates for the applicants that they have all along been acting for the 1st applicant alone, is clearly untenable and a mischievous attempt to obtain orders from the court unfairly. He cannot seek to strike out the appeal on the ground that not all the defendants were served."**

See also **Gerphas Alphonse Odhiambo vs. Felix Adiego Civil Application No. Nai. 352 of 2005.**

29. Without an affidavit sworn by the advocates who filed the Notice of Appointment explaining their source of instructions to act for all the interested parties this Court is left in the dark as to whether the applicants' contention that they never instructed the said firm is valid. In other words the applicants have not placed before this Court material upon which the Court can exercise its discretion in their favour. I associate myself with the position adopted in **Mohamed Bwana Bakari vs. Abu Chiaba Mohamed & Others Mombasa HCEP No. 3 of 2003 [2003] KLR 557** that the purpose of service is to let the other party involved in the litigation upon whom orders are sought to know that the dispute is before the Court and that way he has a right to take action he may deem right to defend his rights or take any position he deems necessary as it is fundamental requirement in keeping with the principles of rules of natural justice and the practice of the rules of law. When an advocate indicates that he has been instructed by a party and files a notice to that effect, the adversary is not expected to and it is not proper to serve the party in person.

30. To insist on personal service in the face of a duly filed notice of appointment by an advocate would, in the words of ***Mbogo vs. Shah [1967] EA 116*** at ***123,*** amount to seeking assistance by a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice.

31. In the absence of an explanation as to the circumstances under which the firm of HHORARO notified this Court that "**COMMUNICATIONS AUTHORITY OF KENYA** the 1st Respondent herein **and all the Interested Parties** have appointed the firm of HHORARO to act for them in this suit" and that "**ALL CORRESPONDENCES** and processes should henceforth be served upon the said firm of Advocates", this Court must deem that the said firm was properly instructed since this Court is not expected to speculate as to the reasons and circumstances under which the said firm acted in the manner it did. In fact apart from the said notice it is clear from the proceedings that the interested parties/applicants were duly represented throughout the

proceedings leading to the judgement.

32. In the premises I find no merit in the application dated 5th June, 2015 which I hereby dismiss but with no order as to costs.

Dated at Nairobi this 6th day of July, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kabathi for the ex parte Applicant

Mr Onyango for the 2nd to 8th Interested Parties

Cc Patricia