



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**Misc Civil Application No. 73 Of 2012**

**IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI**

**IN THE MATTER OF**

**REPUBLIC.....APPLICANT**

**VERSUS**

**COMMUNICATION COMMISSION OF KENYA.....RESPONDENT**

**EX PARTE CHAPEX LIMITED**

**JUDGEMENT**

1. By a Notice of Motion dated 27<sup>th</sup> March, 2012 filed on 28<sup>th</sup> March 2012, the *ex parte* applicant herein, **Chapex Limited**, seeks the following orders:
1. **This Honourable court do issue Orders of Certiorari to remove into Court and to have quashed the decision of the Respondent, Communications Commission of Kenya issued vide the Kenya Gazette Notice No. 9824 dated 12<sup>th</sup> of August, 2011 and communicated by letter dated 22<sup>nd</sup> September, 2011 revoking the ex-parte Applicant's postal/courier operator licence.**
2. **The costs of this Application be borne by the Respondent.**

**EX PARTE APPLICANT'S CASE**

2. The application is based on the Statement of Facts filed on 7<sup>th</sup> March 2012 and a verifying affidavit sworn on 6<sup>th</sup> March 2012 by **Gibson Ombonya Shiraku**, who erroneously described himself as the *ex parte* applicant herein. In the said affidavit which is very thin on the facts, the deponent purports to reiterate the contents of the statement of facts as being part of his affidavit.
3. With due respect this is a very unusual way of seeking orders of judicial review. In **Commissioner General, Kenya Revenue Authority Through Republic vs. Silvano Anema Owaki T/A Marenge Filing Station Civil Appeal No. 45 of 2000**, the Court of Appeal held:

**“We are certain that the issue of the procedure used does not arise inasmuch as the applicant has not ruled out the possibility of the bulk of the products containing the**

chemical used only in the products meant for export. That much is clear from some of the matters in the Statement accompanying the application for leave, which the Judge in his ruling, despite the statements purportedly of facts being worthless, appear to put a lot of faith in. The learned Judge decided the application for judicial review on the basis of inadmissible matters. We would observe that it is the verifying affidavit not the Statement to be verified, which is of evidential value in an application for judicial review. That appears to be the meaning of rule 1(2) of Order LIII. This position is confirmed by the following passage from the *Supreme Court Practice 1976 Vol. 1 at paragraph 53/1/7*: “The application for leave “By a statement” – The facts relied on should be stated in the affidavit (see *R v. Wandsworth JJ. ex p. Read [1942] 1 KB 281*). “The statement” should contain nothing more than the name and the description of the applicant, the relief sought, and the grounds on which it is sought. It is not correct to lodge a statement of all the facts, verified by an affidavit.’ At page 283 of the report of the case of *R v. Wandsworth Justices*, Viscount Caldecote CJ said: ‘The Court has listened to argument on the proper procedure or remedy in the case of the exercise by an inferior court of a jurisdiction which it does not possess. It is, however, not necessary here to consider whether or not there has been a usurpation of jurisdiction, because there has been a denial of justice, and the only way in which that denial of justice can be brought to the knowledge of this court is by way of affidavit. For that reason the court is entitled, indeed, it is bound, if justice is to be done, to look at the affidavit just as it would in an ordinary case of excess of jurisdiction.’ ”

4. In the interest of justice I will, nevertheless consider the statement of facts though I will revisit this issue later in this judgement.
5. According to the statement, upon payment of Kshs 10,000/= the ex parte applicant was granted postal courier operator licence by the Respondent on 28<sup>th</sup> January 2003 for a period of 15 years. Vide Kenya Gazette Notice No. 9824 dated 12<sup>th</sup> August 2011 the respondent however purported to revoke the said licence and the decision was communicated to the applicant vide a letter dated 22<sup>nd</sup> September 2011 and the reasons for the said revocation were that the applicant company was under receivership and/or failed to comply with the licence conditions. According to the ex parte applicant the said reasons are false as the ex parte applicant has never been in receivership and is unaware of any licence conditions that the applicant had not complied with since the same were never brought to its attention. On demanding for the revocation of the said decision the respondent contended that the applicant had defaulted in remitting annual fees and foiling annual compliant returns which contention the applicant disputes. The applicant contends that the said decision was contrary to the basic tenements of natural justice in that the applicant was not notified and allowed to defend its position before the decision to revoke the licence was reached. In any case, it is the applicant’s position that the reasons placed in the Kenya Gazette and the reasons being advanced are irreconcilable and the respondent’s decision affects the livelihood of persons employed by the applicant.

#### **RESPONDENT’S CASE**

6. In opposition to the application, the Respondent on 10<sup>th</sup> May 2012 filed a replying affidavit sworn by **Martin S. Ngesa**, the respondent’s Manager – Postal Licensing and Compliance the same day.
7. According to the said deponent, the applicant herein (hereinafter referred to as Chapex) applied to the respondent (hereinafter referred to as CCK) through a written application dated 30<sup>th</sup> April 2002 seeking to be licensed as a postal service provider, expressly specifying that what it sought was an intra-city licence to serve Industrial Area only, and CCK duly processed an Intra-City Postal Courier Operator Licence which was issued on Chapex on 28<sup>th</sup> January, 2003 together with detailed terms and conditions that the said Licence was subject to. According to the deponent the Terms and conditions of the Licence issued to Chapex required the Licensee to pay annual operation fees to CCK over the duration of the licence, and to furnish CCK with its detailed schedule of tariffs for the services provided and any changes effected thereon from time to time, amongst other requirements. Other conditions were as provided in the relevant legal provisions and regulations under which the Licence was issued, particularly Sections 51 and 52 of the Kenya

Information and communication Act, Cap 411A of the Laws of Kenya. Despite CCK issuing reminder letter to Chapex seeking its compliance with the licensing conditions, Chapex persisted in its defaults on making the required annual payments and submitting the required returns to CCK and was notified of the same. When Chapex wrote to CCK in December 2009 complaining that it had been left out of the then published list of compliant postal courier licensees, CCK clearly responded to Chapex through its letter of 4<sup>th</sup> January, 2010 setting out the full details of Chapex's non-compliance with payment of the required annual operating fees for the period 2004 and 2009 and failure to submit the required returns over the same period i.e. 2004 to 2009 and attached the relevant invoices and returns forms requesting Chapex once again to comply with the licensing conditions. By the year 2011, Chapex had accumulated unpaid arrears on its Annual Operating Licence (AOL) Courier Fees to the tune of Kshs. 310,160.90. Owing to the continued and persistent failure by Chapex to comply with the Licence conditions, Chapex was properly included as one of the listed firms in the "Notice to Revoke Licences" which was published by CCK as Gazette Notice No. 9823 dated 8<sup>th</sup> August, 2011 and published on 12<sup>th</sup> August, 2011. The notice included many other listed firms such as telecoms firms, and the reasons relevant to the various firms were varied, the one relevant to Chapex being "failure to comply with the licence conditions." Following the Gazettement of the Notification to Revoke Licence, Chapex was duly informed by CCK through a letter dated 22<sup>nd</sup> September, 2011 that its licence had been revoked and asked to return the same to CCK within 14 days (which it failed to do), and was further cautioned on the consequences of the revocation. The revocation of Chapex's Licence, it is submitted, was clearly effected after its persistent failure to comply with the conditions subject to which the said Licence was issued, and the said revocation was preceded by numerous demands, reminders and notices from CCK to Chapex seeking compliance, and consequently the revocation was effected properly and in accordance with the relevant legal provisions.

8. In the deponent's view the Notice of Motion dated 27<sup>th</sup> March, 2012 lacks any merit at all, and the same ought to be dismissed with costs.

#### **APPLICANT'S SUBMISSIONS**

9. On behalf of the *ex parte* applicant it was submitted that the Respondent's action of informing the applicant of the revocation of the licence long after the same had been revoked can only point to malice and unreasonableness and that the same was reckless. It is submitted that under regulation 75 of the Kenya Communications Regulations, the CCK has to give a licensee 60 days written notice of its intention to cancel a licence which notice must specify reasons for the intended cancellation. Upon receipt of the said notice the licensee has a right to make representations thereto after which the licensee may be required to remedy the act or pay a penalty. It is submitted that it is only in default of the foregoing that CCK may revoke the licence. According to the applicant CCK failed to comply with the regulation and the procedure despite the complaints by the applicant hence CCK's decision is tainted by procedural impropriety. It is therefore submitted that the impugned decision was against the due process of the law and the rules of natural justice hence null and void.
10. Citing **Kenya Hotels and Allied Workers Union vs. The Registrar of Trade Unions eKLR**, it is submitted that the remedy of judicial review is concerned with reviewing not the merits of the decision in which the application for judicial review is made, but the decision making process itself. The purpose being to ensure that the individual is given fair treatment by the authority to which he has been subjected. By revoking the applicant's licence without following the laid down legal procedure, it is submitted the respondent exceeded its powers and exercised powers that it did not have hence the application ought to be allowed.

#### **RESPONDENT'S SUBMISSIONS**

11. On behalf of the respondent, it is submitted that the Gazette Notice through which the communication or publication of the revocation of the Applicant's licence was made was Gazette Notice No. 9823 dated 8<sup>th</sup> August 2011 and published in Kenya Gazette issue of 12<sup>th</sup> August 2011 and not Gazette Notice No., 9824 as alleged. It is submitted that the respondent was justified in

taking the action it took since the applicant persisted in breach of the terms of the licence despite reminders and an opportunity being afforded to the applicant to remedy the breaches. Relying on David Mulei Mbuvi & 13 Others vs. Registrar General & 2 Others [2012] KLR, Michael Ochieng' Odera vs. Attorney General [2012] eKLR, Joseph C. Mumo vs. Attorney General and Another [2008] eKLR and Republic vs. Teachers Service Commission and Another ex parte John Mongare Nyakundi [2012] eKLR, it is submitted that there was no breach of any law or procedure by the Respondent in the circumstances of this matter and thus its decision cannot be impugned or reversed *moreso* since the revocations took effect and have not been interfered with since 2011 to date.

## **DETERMINATION**

12. I have considered the foregoing. Article 47 of the Constitution provides:

**(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**

**(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.**

13. The purview of judicial review was clearly set by Lord Diplock in the case of Council for Civil Service Unions vs. Minister for Civil Service [1985] A.C. 374, at 401D when he stated that:-

**“Judicial review has I think developed to a stage today when.....one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call ‘illegality’, the second ‘irrationality’ and the third ‘procedural impropriety’.....By ‘illegality’ as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it .....By ‘irrationality’ I mean what can now be succinctly referred to as “Wednesbury unreasonableness’.....it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it .....I have described the third head as ‘procedural impropriety’ rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision.”**

14. This position was reaffirmed in the Uganda case of Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300 in which it was held:

**“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety....Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission.....Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.....Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to**

**adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”**

15. Regulation 75 of the *Kenya Communications Regulations, 2001* provides:

**(1) Every postal licence shall contain provisions for the suspension or revocation of the licence.**

**(2) Notwithstanding the provisions of paragraph (1), the Commission may suspend or revoke a licence on grounds of—**

**(a) serious and repeated breach of the licence conditions;**

**(b) discovery of any fraud or intentional misrepresentation by a licensee at the time of applying for the licence;**

**(c) engagement in or support of unlawful activities by the licensee; or**

**(d) cessation of the licensee to be a person who is eligible to hold such licence; or**

**(e) failure to pay the prescribed fees.**

**(3) Unless provided otherwise in the licence, the Commission shall give a licensee sixty (60) days written notice of its intention to suspend or cancel a licence and shall specify in such notice the reasons for the intended suspension or cancellation of the licence.**

**(4) The licensee or any interested party may make representations against such suspension or cancellation to the Commission.**

**(5) After due consideration of such representations, the Commission may—**

**(a) prescribe the time during which the licensee may remedy the offending act or conduct; or**

**(b) require the payment of a penalty or fee as specified in the Act or these Regulations.**

**(6) Where a licensee has not complied with the conditions set by the Commission in paragraph (5) of this regulation, it may—**

**(a) suspend the licence for a specified period of time; or**

**(b) revoke the licence.**

**(7) Any person aggrieved by the decision of the Commission, under this regulation may within fifteen (15) days from the date on which the decision is made appeal to the Tribunal.**

16. I have perused the conditions annexed to the subject licence and contrary to the provisions of Regulation 75(3) above there was no provision for a period other than the 60 days stated in the said regulation. To the contrary the said terms and conditions expressly provided that “the terms and conditions of this licence may be modified in accordance with the provisions the Act”.

17. I have perused the documents annexed to the replying affidavit. Whereas there are correspondences emanating from the respondent to the applicant which required the applicant to submit returns and other licence conditions, in none of the said documents is there a sixty (60) days written notice given by the Respondent Commission intimating its intention to suspend or cancel the applicant’s licence and specifying in the reasons for the intended action.

18. To make matters worse, the Gazette Notice which was a seven (7) days notification gave as its reason for revocation of the applicant’s licence that the applicant had been put under receivership, failure to comply with the licence conditions and ceasing to engage in the business for which the

licence was granted. Whereas it may be argued that the failing to comply with the licence conditions was the reason applicable to the applicant such omnibus notice was in my view not the kind of notification contemplated under the aforesaid provision.

19. It is therefore my view and I so hold that the respondent's action was tainted with illegality, irrationality and procedural impropriety and cannot stand. The mere fact that the revocation was done in 2011 is in the circumstances of this case immaterial since it is not alleged that the applicant is guilty of the delay in challenging the said decision. As was held in **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43**, like the Biblical mustard seed which a man took and sowed in his field and which is the smallest of all seeds but when it grew up it became the biggest shrub of all and became a tree so that the birds of the air came and sheltered in its branches, judicial review stems from the doctrine of ultra vires and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three "I's") and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. It has been said that the growth of judicial review can only be compared to the never-ending categories of negligence after the celebrated case of **Donoghue vs. Stephenson** in the last century.

### **ORDER**

20. It follows that the Notice of Motion dated 27<sup>th</sup> March, 2012 is merited and succeeds with the result that an order of certiorari is hereby issued removing into this Court the decision of the Respondent, Communications Commission of Kenya dated 8<sup>th</sup> August 2011 published in the Kenya Gazette Notice No. 9824 of 12<sup>th</sup> of August, 2011 and communicated by letter dated 22<sup>nd</sup> September, 2011 revoking the ex-parte Applicant's postal/courier operator licence and the same is hereby quashed. However as the applicant's verifying affidavit did not comply with the law with respect to the facts of the case, there will be no order as to costs.

**Dated at Nairobi this 5<sup>th</sup> day of July 2013**

**G V ODUNGA**

**JUDGE**

***Delivered in the presence of Mr Mwiti for the Respondent and Ms Omondi for Mr Namada for the applicant.***