



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), WARSAME & MURGOR, J.J.A)

CIVIL APPEAL (APPLICATION) NO. 132 OF 2017

BETWEEN

ATTORNEY GENERAL.....INTERESTED PARTY/APPLICANT

AND

KENYA BUREAU OF STANDARDS.....RESPONDENT/APPELLANT

GEO-CHEM MIDDLE EAST.....RESPONDENT/ RESPONDENT

(Being an application for joinder of the Attorney General as an interested party and in the intended appeal

in

Civil Application No. 132 of 2017)

RULING OF THE COURT

At the heart of this dispute involving the Kenya Bureau of Standards (KEBS) and Geo- Chem Middle East (Geo- Chem) is an agreement dated 5th June, 2009 but which came into effect by Legal Notice No.142 of 2009. KEBS contracted Geo-Chem to inspect and test imported petroleum products for quality assurance and quantity determination. Pursuant to the agreement, the inspection commenced in August 2009 but was suspended in March 2010 through Government intervention.

The parties disagreed over Geo-Chem's fees and a reference was filed in the arbitral tribunal as provided for under the agreement. After considering the arguments presented by the parties, the arbitral tribunal delivered its final award, in which it held that KEBS was in breach of the contract between it and Geo-Chem. As a result it ordered the former to compensate the latter in the sum of US \$ 15,401,504.70, less Kshs. 87,988,213.15 which KEBS was awarded on its counter-claim.

Geo-Chem moved the High Court under **Section 36** of the Arbitration Act to adopt the award as a judgement of the court. For their part, KEBS applied for the setting aside of the award.

Ochieng, J in determining the two applications dismissed the one for setting aside and entered judgment which he directed the award be adopted as judgment of the court.

Aggrieved by the order, KEBS has filed a notice of appeal. In the meantime, it has taken out a motion for leave to appeal the decision of Ochieng, J and stay of execution.

While that application was pending, the applicant in the instant motion, the Hon. the Attorney General applied to be joined in the appeal as an interested party, arguing that having been notified on 17th July, 2017 by KEBS of this application, he decided to apply for joinder; that, though not a party to previous proceedings involving KEBS and Geo - Chem, he is, entitled as the Principal Legal Adviser to the Government, to promote and uphold the rule of law and to defend the public interest.

It was further deponed that under **Article 6(2) (a)** and **7** of the Constitution, the applicant can appear in any civil proceedings; that having reviewed the proceedings in the court below and the tribunal's arbitral award, he came to the conclusion that they raise matters of significant public interest, which he is duty bound by law to defend.

The applicant relied on the grounds that the award was illegal and contrary to public policy for the reason that it was not within the scope of the reference to arbitration since the dispute involved third parties; that the award of approximately Kshs. 1.59 Billion is public money; that Garnishee proceedings are pending in the High Court; that should the Court not admit the applicant in these proceedings the decree may be executed without the applicant ventilating the public interest aspects of the dispute; and that there is real threat of violation of the principles of public finance under **Article 201** of the Constitution and the provisions of the Public Finance and Management Act.

The application was expressed to be brought under several provisions of the Constitution, Office of the Attorney-General Act, 2012, the Appellate Jurisdiction Act and the Court of Appeal Rules, the combined effect of which is that, other than the authority under **Article 156 (5)** of the Constitution to appear, with the leave of the court as a friend of the court in any civil proceedings to which the Government is not a party, the applicant represents the national Government in all civil and constitutional matters in accordance with the Government Proceedings Act (Cap.40).

By the provisions of **section 6(2)** the applicant can;

“(a) with leave of the court or tribunal, appear at any stage of proceedings, appeal, execution or any incidental proceedings before any court or tribunal.” (Our emphasis).

In furtherance of the foregoing, he has the right of audience in proceedings of any suit or inquiry of an administrative body in which he considers to be **“of public interest or involves public property”**. But he has to **“satisfy the court, tribunal or any other administrative body of the public interest or public property involved”**. See **Section 7(1)(a)** and **7(2)(b)** of the Office of the Attorney General Act.

Rule 77 of the Court of Appeal Rules, on the other hand enjoins an intended appellant to serve copies of the notice of appeal on **“all persons directly affected by the appeal”** before or within seven days after lodging the notice of appeal.

“Provided that the Court may on application, which may be made *ex parte*, within seven days after lodging the notice of appeal, direct that service need not be effected on any person who took no part in the proceedings in the superior court”.

Although premised on the provisions of **Order 1 Rule (10) (2)** of the Civil Procedure Rules, this Court in **M K v M W M & another**, Cause No. 268 of 2013, emphasised that the Court can, at any stage of the proceedings, upon application by either party or *suo motu*, order the name of a person who ought to have been joined or whose presence before the court is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, to be added/joined as a party. The guiding principle in joinder of parties is that:

“All amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs.”

See **Central Kenya Ltd. V. Trust Bank & 4 Other**, CA NO. 222 of 1998. Having thus set out the law applicable to the circumstances of this case, we stress that power of the court to add a party to proceedings can be exercised at any stage of the proceedings including at the appellate stage. Indeed, a party can be joined even without applying. We also bear in mind the principle that no suit shall be defeated by reason only of the misjoinder or non-joinder of a party; and that the Court may proceed to determine the matter in controversy so far as the rights and interests of the parties actually before it are concerned.

In our view, the circumstances must justify the joinder, in that the claim and defence before the Court must raise a doubt as to which of the parties is liable in the final outcome of the dispute. In this regard, it is clear that KEBS knowingly and intentionally left out the applicant from the arbitral and High Court proceedings. Again, it must be demonstrated that it would be desirable to add the applicant as a new party and that his presence would enable court to resolve all the matters in the dispute.

Another important consideration is whether the joinder is intended to vex the parties or convolute the proceedings with unnecessary new matters and grounds not contemplated by the parties or envisaged in the pleadings. It cannot therefore fall from the lips of the applicant to say that it would protect and promote public interest in this dispute. The issue of interest or liability between the parties can be sufficiently and conclusively determined without any to the applicant.

Has the applicant satisfied us that public interest or public property is involved in this appeal that would warrant this Court to exercise its discretion to allow him to participate in these proceedings?

Whereas it is not in doubt that an award of US \$ 15,401,504.70, (less Kshs. 87,988,213.15) is, by any standard colossal, that alone cannot be the reason for joining the applicant in these proceedings this late. He has not convinced us that what he intends to advance will be helpful to the Court in the resolution of the main question in hand. As a matter of fact, and with respect, we do not think what the applicant wishes to bring into these proceedings is any different from those of the other parties already on record. He, similarly, has not demonstrated what prejudice he or indeed the country stands to suffer if his intervention is denied.

Being the titular head of the bar by virtue of his office, does not vest in him intellectual superiority over the rest of the advocates. As the titular head, the applicant, just like the Director of Public Prosecutions, the Solicitor-General, Senior Counsel or Queen’s Counsel takes precedence of other advocates in court in all matters whenever he appears. See **Section 20** of the Advocates Act.

In the result, we decline to exercise our discretion in favour of the applicant and accordingly dismiss the notice of motion dated 7th September, 2017. We make no orders as to costs.

Dated and delivered at Nairobi this 21st day of March, 2018.

W. OUKO, (P)

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR