



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: VISRAM, MWERA & M'INOTI, J.J.A.

CIVIL APPEAL (APPLICATION) NO. 9 OF 2012

BETWEEN

ETHICS & ANTI-CORRUPTION COMMISSION.....APPLICANT

AND

NATIONAL CEREALS & PRODUCE BOARD.....1ST RESPONDENT

ERAD SUPPLIES & GENERAL CONTRACTORS LTD.....2ND RESPONDENT

(An application for orders that the Ethics & Anti-Corruption be made a party and that additional evidence be taken in the appeal from the Judgment of the High Court of Kenya (Njagi, J) dated 28th June 2011 in MISC C. APP. NO 639 OF 2009)

RULING OF THE COURT

On 6th November 2014, the applicant, the *Ethics & Anti-Corruption Commission (EACC)*, took out a Motion on Notice under *section 3A of the Appellate Jurisdiction Act*, and *rules 29, 31 and 42 of the Court of Appeal Rules*, seeking two substantive orders as follows:

- i. *That the EACC be joined in this appeal as an interested party or in any other capacity that the Court may deem fit; and*
- ii. *That the Court be pleased to take additional evidence by way of affidavit.*

On 10th November 2014 when the application was scheduled to be heard, learned counsel for the parties, namely *Mr. Ben Murei* for EACC, *Mr. Mohammed Nyaoga* appearing with *Mr.*

Katwa Kigen, Joshua Nyawara and Paul Gicheru for the *National Cereals & Produce Board (the 1st Respondent)* and *Mr. Ahmednassir Abdullahi, Senior Counsel*, leading *Mr. Protas Saenda* for *Erad*

Supplies & General Contractors Ltd (the 2nd respondent) agreed that this Court should first determine whether the EACC should be allowed to join this appeal. Accordingly we heard submissions from learned counsel on the issue and this ruling is therefore restricted to that one question.

Before we address the issue placed before us by the parties, we consider it necessary to give the relevant background to the appeal in which this application is made, so that the proper context and significance of the application can be appreciated.

The 1st respondent is a State Corporation established under the **National Cereals & Produce Board Act, Cap 338**. By **section 4** of that Act, the 1st respondent is responsible for regulating and controlling the marketing and processing of maize, wheat and other scheduled agricultural produce and is empowered, among other things, to buy, store, sell, import, export or otherwise acquire and dispose of those commodities so as to meet the needs and requirements of producers and consumers in Kenya. The 2nd respondent is a limited liability company incorporated in Kenya.

Following acute shortage of maize in the country which saw the national grain reserve virtually depleted, the 1st respondent, in July 2004, advertised a tender for the supply of 180,000 metric tonnes of white maize to ameliorate the resulting hunger. In response, the 2nd respondent submitted a bid to supply 85,000 metric tonnes of white maize. By a letter dated 12th August 2004 the 1st respondent awarded the 2nd respondent tender to supply 40,000 metric tonnes of white maize at the agreed price of US\$ 229 per metric tonne. The parties entered into a formal contract on 26th August 2004 by which, among other terms, the 2nd respondent was obliged to ship the maize to the port of Mombasa within four weeks from the date of signing of the contract.

Soon thereafter a dispute arose between the parties and ultimately no maize was delivered to the 1st respondent as agreed or at all. Pursuant to clause 12 of the contract, the 2nd respondent referred the dispute to a single arbitrator, **Mr. E. T. Gaturu, Advocate**. The 2nd respondent's claim was that in its endeavour to perform the contract, it had obtained a performance bond in the sum of **US\$ 932,000** as required under the contract but the 1st respondent had, in breach of the contract, failed to issue an operative letter of credit in favour of the 2nd respondent prior to the shipment of the maize.

Accordingly the 2nd respondent claimed against the 1st respondent **US\$ 1,960,000** as loss of profit @ US\$ 49 per tonne; **US\$ 1,838,000** as storage costs; interest at commercial rates from 27th October 2004 until payment in full; general damages for breach of contract and costs of the proceedings.

The 1st respondent filed a defence and counterclaim. In the defence it denied that it had breached the contract and instead blamed the 2nd respondent for the breach. The 1st respondent further contended that it was not obliged to open the letter of credit before shipment of the maize and that the letter of credit was a mere mode of payment dependent on the 2nd respondent first shipping the maize. In the counterclaim it claimed from the 2nd respondent a total of **Kshs 70,090,54.62** being insurance cost and lost agency commissions from the Government of Kenya and **US\$ 916,000** as the value of a performance bond.

By an award published on 7th July 2009 the arbitrator allowed the 2nd respondent's claim and dismissed the 1st respondent's counterclaim. He awarded the 2nd respondent **US\$ 1,960,000** as loss of profit of US\$ 49 per metric tonne; **US\$ 1,146,000** as storage costs due to suppliers; interest at 12% p. a. from 27th October 2004 until payment in full and costs and interest thereon at 12% from the date of the award.

Due to the central role it has taken in the application before us, it is important to point out that the claim for storage costs was based on an invoice for US\$ 1,146,000 from **CHELSEA**

FREIGHT of 14th Floor, John Ross House, Suite 406/407, Jonsson Lane, Durban, 4001, South Africa. It was the 2nd respondent's case that Chelsea Freight had stored the maize from 21st September

2004 to 22nd January 2005 and was therefore owed by the 2nd respondent US\$ 1,146,000 as storage charges.

Aggrieved by the award, the 1st respondent, on 6th October 2009 applied to the High Court under **section 35 of the Arbitration Act** seeking to set aside the award on the grounds that the arbitrator had dealt with a dispute not contemplated by the parties; that the award was against public policy and that the arbitrator had exceeded his jurisdiction. **Njagi, J.** heard the application and dismissed the same in a ruling dated 28th June 2011. The only part of the award that was varied was the arbitrator's taxation of 2st respondent's costs, which action the court found to have been in excess of jurisdiction.

Further aggrieved by the ruling of the High Court, the 2nd respondent filed a notice of appeal on 4th July 2011 and ultimately this appeal. At the hearing of the application before us, we were informed by counsel for the parties that there has since been a multiplicity of applications before the High Court, this Court and even the Supreme Court.

Regarding the application to join the applicant as a party in this appeal, Mr. Murei urged that the applicant had placed before us sufficient material to justify the order sought. While conceding that the applicant had not participated in the arbitral proceedings or in the application to set aside the award in the High Court, Mr. Murei submitted that the applicant has a statutory mandate under the Ethics & Anti-Corruption Act to combat corruption in Kenya. In discharge of its duties and relying on Mutual Legal Assistance, counsel submitted, the applicant had on **29th October, 2014** obtained from the Republic of South Africa evidence confirming that the documents upon which the 2nd respondent's claim for storage charges of **US\$ 1,146,000** was based were forgeries and did not emanate from South Africa as claimed by the 2nd respondent. Accordingly the applicant sought to be joined in the appeal as a first step before applying to be allowed to adduce that additional evidence obtained from the Republic of South Africa.

Mr. Murei also submitted that granted its statutory mandate, the applicant was a person directly affected by the appeal within the meaning of **rule 77 of the Court of Appeal Rules** and on that basis ought to be enjoined in the appeal. Invoking **Article 159 (1) (d) of the Constitution**, learned counsel urged us not to pay undue regard to technicalities but instead uphold the clear anti-corruption purpose and principle of the Constitution.

Mr. Nyaoga for the 1st respondent did not oppose the applicant's plea to be allowed to join the appeal. In learned counsel's view, it was necessary to join the applicant in the appeal so that all relevant issues could be ventilated once and for all.

Mr. Abdullahi, SC for the 2nd respondent vigorously opposed the application. In Senior Counsel's view the applicant did not have any *locus standi* to join the appeal or to adduce any evidence. It was submitted that the applicant was not a party directly affected by the appeal within the meaning of rule 77 of the Court of Appeal Rules because it was not a party to the arbitral proceedings. Allowing the the applicant to join the appeal so late in the day, it was submitted, would be prejudicial to the 1st and 2nd respondents, the parties who had real interest in the appeal.

Senior Counsel further submitted that the application by the applicant to join the appeal had ulterior motives because the 1st respondent had made an application to adduce further evidence in the appeal, which was similar to the application that the applicant wishes to make once made a party to the appeal. It was submitted that in that first application the evidence sought to be adduced was similar to what the applicant now seeks to adduce, and that the arbitrator had duly considered the issues that the applicant seeks to address. We were informed that the 1st applicant's application to adduce additional evidence was dismissed by this Court on 11th July 2014 and we were accordingly asked to find the application now before us is an abuse of the process of Court.

We have anxiously considered the application before us. As we indicated earlier, by agreement of the parties, the only issue before us is whether the applicant has sufficient interest to be allowed to join in this

appeal. The question whether the evidence the applicant seeks to adduce will be admitted is entirely a different matter.

The applicant is established by the ***Ethics & Anti-Corruption Commission Act, No 22 of 2011***. Act No 22 of 2011 itself is enacted pursuant to the express provisions of ***Article 79 of the Constitution*** which requires Parliament to enact legislation to establish an independent ethics and anti-corruption commission with the status of a constitutional commission and with the mandate of ensuring compliance with and enforcement of chapter six of the Constitution on leadership and integrity. By virtue of the provisions of its constituting Act the applicant is empowered among other things to conduct investigations pertaining to alleged corruption on its own initiative or on a complaint made by any person; to monitor the practices and procedures of public bodies to detect corrupt practices; to institute and conduct proceedings in court for purposes of recovery or protection of public property, or for the freezing or confiscation of proceeds of corruption or proceeds related to corruption; to undertake preventive measures against unethical and corrupt practices; and to request and obtain professional assistance or advice from such persons or organizations as it considers appropriate.

In our view, the applicant has a fundamental mandate to fight and combat corruption. That mandate is not merely statutory: it is traceable directly to the Constitution. In this appeal one of the parties is a state corporation that is funded almost exclusively or primarily by public funds. We must bear in mind that ***Article 201 of the Constitution*** demands, among other things, that public money must be used in a prudent and responsible manner.

In the exercise of its statutory power to request and obtain assistance from relevant organizations and institutions, and relying on mutual legal assistance, the applicant claims to have obtained evidence from the Republic of South Africa which indicates that a substantial part of the 2nd respondent's claim before the arbitrator, upon which he was awarded substantial moneys from public coffers, was based on forged documents and that the company which had purportedly stored maize for the 2nd respondent did not in fact store such maize. **Mr. THILOGAN PILLAY** and **Mr. FREDDY CHETTY**, two directors of ***CHELSEA FREIGHT***, in separate affidavits sworn on 29th October 2014, disowned the invoice purportedly from Chelsea Freight and asserted that it did not emanate from their offices. They also deponed that they had no knowledge of ***ROPAK CC INTERNATIONAL of P.O. Box 472 Edenville 1610, South Africa***, which had purportedly supplied the maize that they had allegedly stored; that they never owned any storage facilities or warehouse and that at no time had they stored any maize.

In the circumstances of this appeal and granted the unequivocal and consistent anti-corruption theme that runs through our entire Constitution, we are satisfied that the applicant has sufficient interest to be joined in this appeal for purposes of agitating its mandate. In other words, out of diffidence to the applicant's constitutionally underpinned anti-corruption mandate, we are of the view that the applicant deserves a hearing in this appeal.

Article 10 of the Constitution reminds us that whenever we interpret or apply the Constitution we are bound by the national values and principles set out in the Constitution, among them good governance, integrity, transparency and accountability. In addition ***Article 259 of the Constitution*** demands of us, whenever we interpret the Constitution, to adopt the approach that among other things, promotes its purposes, values and principles and contributes to good governance. In our view, at this stage of this appeal, the approach that would best give effect to the clear integrity and anti-corruption values of the Constitution is one which affords the applicant an opportunity to be heard on matters pertinent to its mandate and utilization of public funds. Whether or not the applicant will be allowed to adduce the additional evidence it wishes to place on record is an entirely different issue.

The applicant has also invoked rule 77(1) of the Court of Appeal Rules as the basis for the submission that it is a person directly affected by the appeal and therefore one who deserves to be afforded an opportunity to be heard. Rule 77(1) provides for service of the notice of appeal on all persons directly affected by the appeal. In the present case, it is understandable that the 1st respondent did not serve the notice of appeal on the applicant, who did not take part in the proceedings before the arbitrator or in the

High Court. But for the information that the applicant claims to have received from South Africa on 29th October 2014, we have no doubt that the applicant could not have been described as a party directly affected by the appeal at the time the notice of appeal was filed.

Upon receipt of the information from South Africa which *prima facie* appears to raise, in relation to this appeal, issues that are central to the applicant's mandate, we are of the view that the appellant can now be properly described as a party directly affected by the appeal. In **ONJULA ENTERPRISES LTD V. SUMMARIA [1986] KLR 655, Nyarangi, JA** expressed himself as follows regarding rule 76(1), now rule 77(1):

“The words ‘all persons directly affected by the appeal’ properly understood would include more persons than if the words were, ‘the persons directly affected by the appeal’. The persons directly affected by an appeal need not be only those who were parties to the proceedings.”

And in **AHN V. OPENDA (1982) KLR 87**, this Court held that a party who had taken no part in the proceedings before the High Court was nevertheless a directly affected person in so far as his actions or his property would be affected by any order made by this Court. In this case the property in issue is not the applicant's, but public property, which the applicant is obliged under the law to protect.

Further, in **RUITHIBO V. NYINGI (1984) KLR 505** this Court stated that in exercise of its inherent power under ***rule 1(3) of the Court of Appeal Rules***, it could allow an interested party who became aware of the appeal otherwise than by service on him of a notice of appeal, an opportunity to be heard, including an opportunity to apply to strike out the appeal.

In these circumstances, we are satisfied that the applicant is a person who is directly affected by the appeal by virtual of its mandate, and having moved this court to be joined in the appeal, it should be afforded an opportunity to be heard, whatever it is worth.

Accordingly, we allow the applicant's Notice of Motion dated 5th November 2014, to the extent that the applicant is allowed to join Civil Appeal No. 9 of 2012. Costs of the application shall be in the appeal.

Dated at Nairobi this 18th day of December 2014.

ALNASHIR VISRAM

JUDGE OF APPEAL

J. W. MWERA

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

I certify that this is a true Copy of the original.

DEPUTY REGISTRAR