**Re Kenya National Federation of Co-operatives Ltd and others**

**Division:** High Court of Kenya at Nairobi

**Date of ruling:** 1 March 2005

**Case Number:** 1621/04

**Before:** Ibrahim J

**Sourced by:** N Regeru

**Summarised by:** M Kibanga

*[1] Judicial review – Application for leave to apply for judicial review – Applicant not making a full*

*disclosure of facts – Whether applicant under duty to make full material disclosure of facts to court.*

*[2] Judicial review – Application for leave to apply for judicial review – Leave and stay granted –*

*Application made to set aside the stay and for dismissal of application for leave – Affidavit supporting*

*application sworn by a director without a resolution of the board of directors – Whether affidavit*

*admissible.*

**RULING**

**IBRAHIM J:** On the 25 November 2004 the Kenya National Federation of Co-operatives Limited filed an application under *inter alia* the provisions of section 8 and 9 of the Law Reform Act

Chapter 26) Laws of Kenya and Orders LIII, rules 1, 2 and 4 of the Civil Procedure Rules and section 3A of the Civil Procedure Act for leave to be granted to it by way of judicial review for the following orders that: “1. This application be heard and disposed of *ex parte* in the first instance. 2.

*a*) A n order of *certiorari* to bring to the High Court the decision of the Communication Commission of Kenya made on 19 August 2004 granting a Global Service Mobile

GSM) licence to Econet Wireless Kenya Limited for the purposes of being quashed.

*b*) A n order of *certiorari* to bring to the High Court the licence issued to Econet Wireless Kenya Limited on the 10 November 2004 for purposes of being quashed.

*c*) A n order of *mandamus* compelling the Communication Commission of Kenya

CCK) to grant the third GSM licence to the consortium that was awarded the tender to operate a third GSM network on the 19 September 2003. 3. T hat the grant of leave herein to operate as a stay of the matter complained of herein before, that is to say, the leave do operate to stay performance or operation of the licence of the Global Service Mobile

GSM) issued to Econet Wireless Kenya Limited pending the hearing and determination of the substantive application. 4. T he application also seeks an order that the costs of these proceedings be borne by the respondent.” The application was supported by an affidavit sworn by one Mr Charles Muchiri, the Vice Chairman of the applicant company on the 25 November 2004. This application was placed before me under certificate of urgency on the next day on 26 November 2004. I certified the application as urgent and proceeded to hear it *ex parte* as contemplated by Order LIII, rule

2). Upon hearing the submissions of the applicant’s counsel Mr Kahonge and Mr *Karanja* I granted all the prayers sought except that I directed that costs would be in the main application. I further ordered that the main application be filed within 21 days and that Econet Wireless Kenya Limited be made a party to the proceedings as a second respondent or first interested party as it may deem fit. In the said application the Kenya National Federation of Co-operatives

hereinafter referred to as “KNFC”) claim that: Page 131 of [2004] 2 EA 128

HCK)

i) The Communication Commission of Kenya

hereinafter referred to as “CCK”) made a decision on 19 August 2004 granting a Global Service Mobile

GSM) licence to Econet Wireless Kenya Limited.

ii) The CCK had on 10 November 2004 issued the said licence to Econet Wireless Kenya Limited

hereinafter referred to as “EWK”). It is common ground that EWK was a constortium company consisting of four shareholders or partners which came together for the purpose of bidding for the tender and award of the Kenya GSM licence. These shareholders and/or partners were: 1. K NFC, a Kenyan company established and owned by co-operative societies and unions in Kenya

Kenya Co-operative Movement). 2. E conet Wireless International Pty Limited

hereinafter referred to as “EWI”), an international telecommunications company having its headquarters in South Africa. 3. R apsel Limited, a Kenyan company, and 4. C orporate Africa Limited, a Kenyan company. The effect of the Orders granted by this Court on 26 November 2004, *inter alia*, was to stay and prohibit the use, performance and operation of the licence for the Global Service Mobile

GSM) issued to EWK pending the hearing and determination of the substantive application to be filed by KNFC. EWK as the licensee, granted and owner of the licence was aggrieved by the said orders granted *ex parte*. As a result, EWK filed in this Court an application under a certificate of urgency on 3 December 2004 for the following orders: 1. T hat the application be certified urgent on the grounds set out in the certificate of urgency filed and listed for hearing on a priority basis on such date and at such time as the Court may direct; 2. T hat the *ex parte* leave granted to the Kenya National Federation of Co-operatives Limited on 26 November 2004 to apply for prerogative orders of *certiorari* and *mandamus* in this case as set out in the chamber summons dated 26 November 2004 be set aside and the order for stay issued on the same day be discharged; 3. T hat the chamber summons dated 26 November 2004 filed by the applicants be dismissed with cost; and 4. T hat KNFC be condemned to bear the costs of the applicant. This application by EWK was placed before me on 6 December 2004 when I certified it as urgent and fixed the *inter partes* hearing thereof on 10 December 2004. The hearing commenced in earnest on 17 December after all parties, including interested parties who appeared, had placed themselves on record and filed their respective court papers. Apart from the applicant EWK, and the respondent for purpose of the application, KNFC, the others parties who appeared and filed affidavits respectively were: 1. C CK in support of the application. 2. C orporate Africa Limited in support of the application. 3. R apsel Limited in opposition of the application. Before commencement of the hearing of the application the Court dealt with several preliminary issues, and applications in respect of which it gave its directions. Page 132 of [2004] 2 EA 128

HCK) One application which deserves mention at this stage is one by a company called Kenya Telecommunications Investment Group which sought to be joined in the proceedings as an interested party and be given leave to participate in EWK’s application. The Court declined to grant the leave and directed that they await the outcome of the application to set aside the orders of 26 November 2004. The grounds set out in EWK’s application are as follows:

*a*) That there is no, or no sufficient material placed by the applicants before this Honourable Court to show that KNFC has a *prima facie* case to apply for any of the prerogative orders.

*b*) That in obtaining the orders that it did, *ex parte*, on 26 November 2004 KNFC:

i) Withheld and suppressed from the attention of this Honourable Court facts relevant and material to the issues before the Court.

ii) Deliberately distorted and misrepresented the facts applicable to this matter.

iii) Deliberately misled this Honourable Court as to the true state of the dealings between the parties hereto and in particular as amongst the members of the consortium.

iv) Wilfully failed to disclose to this Honourable Court that it has consistently defaulted on its obligations in this matter and failed to discharge its obligations under the various agreements made between the parties.

v) Misrepresented, distorted and taken out of context its purported 82% interest in the consortium.

vi) Has failed to do equity even as it itself seeks equity.

vii) Has come to this Honourable Court with unclean hands.

viii) Failed to discharge that duty owed to this Honourable Court to place before the Court at the *ex parte* stage all such material as would assist the Court to do justice to all the parties concerned.

ix) Has, in the result, abused the process of this Honourable Court.

*c*) That had KNFC disclosed and availed to this Honourable Court the true and full facts it is unlikely that the ourt would have made the orders that it did on 6 November 2004.

*d*) That in all circumstances of this matter, KNFC is not entitled to the leave given or to the order for stay granted on 26 November 2004.

*e*) That consequently the chamber summons herein dated 26 November 2004 ought to be dismissed with costs. The application EWK is supported by an affidavit sworn on 3 December 2004 by one Zachary Wazara who is said to be a director of both EWK and EWI. Right at the beginning of the hearing, this affidavit had been challenged by Rapsel Limited. The said company apart from replying affidavit also filed a notice of preliminary objection on 16 December 2004 in the following terms: “1. The said application dated 3 December 2004 is incompetent in law since it is supported by an affidavit sworn by a person without authority to do so on behalf of EWK. 2. T he said affidavit sworn in support of the application dated 3 December 2004 is inadmissible on the grounds of conflicts of interest on the part of Mr Zachary Wazara, the deponent, and should be struck out.” Mr *Kibe*, counsel for Rapsel Limited proposed to argue these preliminary objections before EWK argued its application. However, since I had my reservation as to whether the said objections raised pure points of law and in order to save precious judicial time, I directed that they be raised in Rapsel’s submissions in reply. Since the said objections are claimed to be preliminary in nature, it Page 133 of [2004] 2 EA 128

HCK) would be prudent for the Court to dispose of them at the beginning of this ruling since if they are successful and are upheld, Mr Wazara’s affidavit would have to be struck out thereby disposing of the entire application on these grounds alone. Preliminary objection number 1 – Mr Zachary Wazara’s authority to swear to the affidavit on behalf of EWK. Rapsel Limited through Mr *Kibe* argued that at no time did the board of directors of EWK pass any resolution for Mr Zachary Wazara to swear to the affidavit sworn on 3 December 2004 in support of the application on behalf of EWK. He says that at the material time, there were only two directors of the board and there is no evidence that the two met as a board for this purpose and of more importance, no resolution was passed to authorise the making of the said affidavit. That a director cannot on his own make decisions on behalf of the board. Further, that the act of Mr Wazara swearing to the affidavit is not one capable of ratification. That the acts capable of ratification are those of the board of directors and not an individual director. Mr *Kibe* relied on the decision in *Bugerere Coffee Growers Ltd v Sebaduka and another* [1970] EA 147 in which High Court of Uganda

Youds J) held that when companies authorise the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or board of directors’ meeting and recorded in the minutes. The Court on this ground among others dismissed the suit holding that no such resolution had been passed authorising the proceedings. In response Mr *Regeru* for EWK submitted that EWK came to court on the basis of a court order. He submitted that it is the Court which made EWK a party and directed that it should be served. That EWK was, therefore, in the proceedings participating in compliance with an express court order which as a law abiding person, it could not disregard. Further, that Mr Zachary Wazara was indeed a director and the chairman of EWK a fact known by all parties. Mr *Regeru*, referred the Court to resolutions of the board of directors and the chairman of EWK a fact known by all parties. Mr *Regeru*, referred the Court to resolutions of the board of directors of EWK made on 9 March 2004 in which the board of directors of EWK was purportedly reconstituted. He also said that the chief executive of Rapsel Limited, Mr Manga Mugwe, in his own affidavit sworn on 16 December 2004 confirmed that Mr Wazara was a director of EWK. EWK argued that since Mr Wazara was a director of EWK, it is presumed that he has the authority of the company to swear to the affidavit on its behalf unless it can be shown otherwise. That a director of a company is an agent of the company and has authority to act on the company’s behalf in certain matters. That the swearing to an affidavit or making of an application as the one before the Court does not amount to institution of proceedings which requires the boards resolution. Further, that the action taken by Mr Wazara in trying to protect the assets of EWK is *intra vires* the powers of the board of directors and is capable of ratification. I have considered the submissions on both sides and I am of the view that: 1. F irstly, whether the point of law regarding Mr Wazara’s authority is as envisaged by the principles laid down in line with *Mukisa Biscuits v West End Distributors Limited* [1969] EA 700. Page 134 of [2004] 2 EA 128

HCK) The submissions made by counsel demonstrate that Rapsel Limited is of the view that at the time the affidavit was sworn the company had two directors only namely, Mr Eliphason Mwaura and Mr Peter Kibiriti. Rapsel relied on a letter dated 11 November 2004 from the Registrar of companies. On the other hand, Mr *Regeru* referred to a purported resolution of the board of directors of EWK made on 9 March 2004 in which a new board of directors were purportedly appointed to include additional directors as follows: Apollo Kariuki representing KNFC, Nguru Wachira representing KNFC, Kairu Mbuthia representing KNFC, Manga Mugwe representing Rapsel Limited, Zachary Wazara representing EWI, Rugare Chidembo representing EWI and Chris Wadman representing EWI. The initial directors, Mr Kibiriti represented Corporate Africa while Mr Mwaura Njiri represented EWI. The said resolutions which were shown to the Court were signed by four directors including Mr Manga Mugwe. The Court also confirmed that in paragraph 3 of his aforesaid affidavit, Mr Mugwe the chief executive of Rapsel Limited depones that both himself and Mr Wazara were directors of EWK. The Court deems that such directorships could only have arisen from the said resolution. The Court had sight of the notification of change of particulars of directors and secretaries

Form 203 A) dated 9 March 2004 and the receipt dated 6 May 2004 issued by the Registrar General allegedly in respect of the filling of these returns. As each side disputes the position of the other side in respect of the directorship, I do hereby hold the first preliminary objection by Rapsel Limited is based on a contentious factual issue and which requires evidence to be produced and determined by the Court. It is not a pure point of law and the same is therefore dismissed. In the event I am wrong. I would have held that Rapsel Limited is the one which has raised the preliminary objection, it must be deemed that it accepts the facts in EWK’s application to be correct for purposes of objection. In the case of *Nitin Properties Limited v Kalsi and another* [1989] LLR 289 CAK, the Court of Appeal said: “It must be born in mind that for a preliminary point to succeed the facts as alleged in the plaint are deemed to be correct”. In the present application, when considering the preliminary objection raised the Court must deem that the facts in Mr Zachary Wazara’s affidavit are correct. If this be the case then the Court would accept that Mr Wazara is a director of EWK and the interim chairman of the boards of directors. The Court would also accept that on 9 March 2004 a new board of directors was constituted increasing the number of directors from two to nine. The grant of the *ex parte* orders herein had the effect of prohibiting the use, performance and operation of the licence for the GSM issued to EWK. EWK could not commence any operations or transact any business in this connection. EWK was paralysed so to speak. EWK being aggrieved was entitled to come to court to protect its valuable asset as there can be no dispute that the licence is indeed a very valuable and important asset and the owner is EWK. The issue is whether the action of Mr Zachary Wazara to file the application and to swear to the affidavit in support thereof was authorised by a resolution of the board of directors. Mr Wazara, when faced with the preliminary objection did not produce any resolution or evidence that indeed the board of directors authorised him to not only file the application but to swear to the affidavit Page 135 of [2004] 2 EA 128

HCK) herein. Mr *Regeru* as indicated earlier argued that the said actions of Mr Wazara were *intra vires* the company’s articles of association and therefore capable of ratification by the board. In *Halsbury’s Laws of England*

4 ed) Volume 7 at paragraphs 504

at 292) it is stated as follows: “Acts *ultra vires* ... Any act of the directors which is not *ultra vires* the company, may be ratified by the company in general meeting, or at an informal meeting of all the shareholders, or by the acquiescence of all shareholders without a meeting”. In the English case of *Bamford v Bamford* [1969] All ER 969, the Court of Appeal in England held that that issue of shares by the directors of a company, which is *intra vires* the company and directors but voidable because the directors were actuated by improper motives and so guilty of misfeasance, can be ratified after full and frank disclosure by the directors to the shareholders by an ordinary resolution of the shareholders in general meeting. Lord Harman LJ put this principle very succinctly when he observed

at 972): “it is *trite* law, I had thought, that if directors do acts, as they do everyday, especially in private companies, which, perhaps because there is no quorum, or because their appointment was defective, or because sometimes there are no directors properly appointed at all, or because they are actuated by improper motives, they go on doing for years, carrying on the business of the company in the way in which, if properly constituted, they should carry it on, and then they find that everything has been, so to speak, wrongly done because it was not done by a proper board, such directors can, by making a full and frank disclosure and calling together the general body of the shareholders, obtain absolution and forgiveness of their sins; and provided the acts are not *ultra vires* the company as a whole everything will go on as if it had been done all right from the beginning. I cannot believe that it is not a common place of company law. It is done everyday. Of course, if the majority of the general meeting will not forgive and approve, then the directors must pay for it”. In the light of the aforesaid sound principles of law I am persuaded by, I ask myself firstly: Are the actions of Mr Wazara in instructing counsel to file this application and in swearing to the affidavit in support capable of ratification by the board of directors or general meeting of the company? I am of the view rightly or wrongly, the action of EWK through Mr Wazara’s decision is one for the protection of the company’s asset or at least one for which it has parted with at least $15 million to CCK to secure the licence. There are claims albeit contested that it has incurred much more than this. Ordinarily, such a decision would be taken by the board of directors through a resolution. It would be a routine matter as it would be their duty to do so. So far, there is no suggestion by any party that such a decision would not be *intra vires* the company’s articles or that the board properly constituted could not be able to decide upon it. It is my view that the action of Mr Wazara was taken to protect the company’s asset, the licence is *bona fide* in the interest of the company and it is a duty laid on the board of directors by their office as directors to act in all matters committed to them *bona fide* in the interest of the company. I hold that the said action is capable of ratification not only by the general meeting but by the board of directors, if they are committed to the welfare, benefit and interest of the company. It follows, therefore, that this Court cannot interfere with such a decision or action by Mr Wazara. If Mr Wazara lacked any authority to make the affidavit, Page 136 of [2004] 2 EA 128

HCK) the Court will not intervene at this stage as it is an act capable of ratification by the board or the general meeting. I would therefore have dismissed the first preliminary objection on this ground. Preliminary objection number two: Whether the affidavit by Mr Zachary Wazara is inadmissible on the grounds of conflict of interests on his part? Rapsel Limited contends that the affidavit sworn in support of the application dated 3 December 2004 is inadmissible on the grounds of conflict of interests on the part of Mr Zachary Wazara. Mr *Kibe* in his submissions says that Mr Wazara in the said affidavit is advancing the cause and interest of EWI in the name and guise of a directorship of EWK. That the other consortium members save EWI did not consent or give him authority to do so. That Mr Wazara, as a director of EWK, owes a duty of care to Rapsel Limited which is supposed to be a shareholder of EWK and entitled to sit on the board. That Mr Wazara, as a director of EWK, is in a fiduciary position and cannot in law take a position adverse to the interests of the shareholders, in this case Rapsel Limited. That Mr Wazara made the affidavit well knowing that the directors representing members of the consortium are involved in an adversarial litigation or disputes. That the interest of EWI and Rapsel are not the same and are in conflict, at the material times, a fact known by Mr Wazara who wears two hats, namely, a director in both EWK and EWI. Rapsel Limited prays that the said affidavit be declared inadmissible by this Court and the same struck out. I have considered this preliminary point of law and the various submissions of counsel. First and foremost, the contention as to whether there is a conflict of interest between Mr Wazara’s position as a deponent in these proceedings and his position as a director of EWK considering the interest and position of consortium members is a matter of fact and evidence. For Mr *Kibe* to attempt to persuade the Court on this point, he was compelled to refer to the correspondence, agreements and other documents annexed to various affidavits. This alone demonstrates and confirms the Court’s view that the second preliminary objection is not a pure point of law. For the Court to determine the existence of the conflict its has to refer to evidence. Counsel himself could not desist from doing this in advancing the said argument. Be that as it may, it is a fact that from the positions taken in this matter, the affidavits and other documents there are serious differences and disputes between the consortium members and partners/shareholders in EWK. It has been revealed and came to the fore that in these proceedings EWI and Corporate Africa are on one side while KNFC and Rapsel Limited are on the other side. Mr Wazara is a director and representative of the interests of EWI in EWK. It may appear and may even be proved later that indeed when Mr Wazara speaks for EWK, he is also advancing the interests of EWI and if there is an internal conflict, he will not remain independent and impartial. The likelihood is that he will always take a position in favour of EWI. I would say the same would apply to Mr Manga Mugwe the Chief Executive of Rapsel Limited. He is director of EWI and also Rapsel Limited as a consortium member. If there is a board room dispute, surely, it would be natural for Mr Mugweto to take a position to protect the interests of Rapsel Limited. It follows that the aforesaid so-called conflict of interest would cut across the board of all directors of the respective consortium members. Page 137 of [2004] 2 EA 128

HCK) However, the Court would wish that the parties redirect themselves and focus to the real questions for the Court’s determination in this matter. The application filed by KNFC is for judicial review orders namely, order of *certiorari* and *mandamus* in respect of decisions of CCK. It does not require any persuasion, therefore, that the said application and what is before the Court is not and I emphasis not, a shareholders’ dispute or proceedings to determine any questions of differences or disputes between KNFC, EWI, Rapsel Limited and Corporate Africa. The Court has no mandate or jurisdiction under Order LIII, to hear or resolve disputes between shareholders in a company whether private or public. That’s for the civil and/or commercial courts. What is before this Court are matters pertaining to the discharge of statutory duties of CCK and its conduct and decisions thereof. As a result, any matters of conflict of interest between EWI and Rapsel Limited or the conduct of Mr Wazara in these proceeding in this regard are irrelevant. Let Rapsel Limited be assured that this Court will not take into account any part of Mr Wazara’s affidavit that purports to discuss the rights, interests and conduct of Rapsel Limited and in particular in so far as it relates to shareholding or equity, capital contributions, agreements between shareholders, alleged breaches thereof etcetera. These are not for this Court to decide not only in the present application but also in the substantive application filed by KNFC. Any reference to the above issues could only be in connection with the award of the tender to EWK, the grant of the licence and the compliance with the terms and conditions thereof and the provisions of the Kenya Communications Act. I therefore do hereby dismiss the second preliminary objection for the aforesaid reasons. Before the Court delves into the main grounds on which EWK’s application is grounded, namely, the question of non-disclosure and suppression of material facts, information and documents, it must in essence deal with the question of jurisdiction raised by Rapsel Limited which really ought to have been one of EWK’s *locus standi*, rather than jurisdiction of the Court. Rapsel Limited contends that the orders sought by KNFC in its application for leave and stay and the substantive orders sought in the main application are by way of judicial review under Order LIII of the Civil Procedure Rules. That the orders granted by the Court on 26 November 2004 were made against CCK which is the true respondent in this matter. That EWK strictly is an interested party and as such does not have the *locus standi* to apply to set aside or discharge the *ex parte* orders granted. That the said orders cannot in law be available to EWK. That the appropriate time for EWK to respond or say its piece is at the hearing of the substantive application. Finally, that for EWK to be allowed to prosecute its application and if it is successful, would deny Rapsel Limited its right to canvas its interest and participate in the judicial review application. It is the Court’s views that although CCK is the principal respondent and that it is its decision and conduct which are under attack in the main application, the licence granted belongs to and is the property and asset of EWK. Although it could be said to be a secondary respondent or even an interested party and not the main respondent, it is the one that has been most affected by the grant of the *ex parte* orders. The licence is EWK’s property and there can be no dispute that it is a valuable asset. Its operation and implementation has been Page 138 of [2004] 2 EA 128

HCK) stopped through the Court orders herein. EWK cannot mobilise or roll-out its project as intended. EWK is naturally aggrieved and it is not a surprise that it has moved this Court in the manner it has. I do hold that EWK has more than sufficient right and interest in these proceedings. It has the *locus standi* to bring the application just as CCK which also filed a similar application subsequently has. The novelty of the application cannot deprive EWK of its right to participate in these proceedings including challenging the *ex parte* orders granted. I therefore, hold this Court has the jurisdiction to entertain the present application. Another point of law that Rapsel Limited raised which ought to be considered by the Court at this stage is that the standard the Court is to apply when considering the question of alleged non-disclosure of material facts at the time an applicant applies for leave *ex parte* in judicial review applicants ought to be lower than in cases of *ex parte* applications for injunctions. Mr *Kibe* argued that most of the authorities or cases regarding principles applicable to non-disclosure of material facts related to *ex parte* applications for injunctions. He submitted that in an application for injunction the applicant does not require leave for the Court to commence the proceedings. That in injunction applications what is sought is a remedy or relief pending the hearing of the application *inter partes* in the main suit. That an *ex parte* injunction will be set down for hearing *inter partes* and the parties have the opportunity to argue the matter before the Court on its full merits. That a party in an injunction application must demonstrate that the orders were obtained properly and the Court is required to record its reasons for the grant of *ex parte* orders. That if an applicant is not successful in his *ex parte* application for injunction, the remedy is still available at the *inter partes* stage. Mr *Kibe* further contended that it is different when it comes to applications for leave to file judicial review applications. That in an application for leave to stay, if the Court does not grant these at the threshold, then that is the end of the matter as far as those prayers are concerned. That judicial review applications are not to give remedies to private parties but to ensure the performance of statutory duties by public bodies. That if the threshold for obtaining leave was made so high, then the supervisory jurisdiction of the Court would be rendered meaningless and many would be denied access to judicial review. That in applications for leave the Court is not required to go into the matters in depth and all the applicant has to show is that he has an arguable case. Finally, that the stay orders if granted are only provisional and can be set aside. That also in private disputes the litigant does not need the permission of the Court to institute proceedings while under Order LIII, it is mandatory to obtain leave of the Court before commencing judicial review proceedings and, therefore, the standards cannot be the same and the Court must be more liberal in the latter cases. In response to the aforesaid arguments, EWK and CCK referred to the case of *R v Metropolitan Police Force Disciplinary Tribunal ex parte Lawrence* [1999] EWHC Admin 588 in which the High Court of England observed: “It is essential that parties whose seek leave to move for judicial review should appreciate that they have a duty to make full disclosure of all potentially material matters to the Court”. This statement seems to counter the arguments by Mr *Kibe* who did not cite any authority to support his aforesaid submission on this point. Mr *Amoko* for Page 139 of [2004] 2 EA 128

HCK) CCK availed to the Court extracts from the “*Judicial Review Handbook*”

3 ed) by Michael Fordham which is an essential and must have handbook on judicial review. At page 352, the author says that a claimant for permission is under a duty to make full and frank disclosures to the Court of all material facts and matters. He says: “21.5 Claimant’s duty of Candour A claimant for permission is under an important duty to make full and frank disclosure to the Court of all material facts and matters. It is especially important to draw attention to matters which are adverse to the claim, in particular:

1) any statutory restriction on the availability of judicial review;

2) any alternative remedy;

3) any delay/lack of promptness and so need for an extension of time. In facing up to adverse points, the claimant will have an early opportunity to explain why those points are not fatal and why the case should be permitted to proceed

that is ‘confess and avoid’). The duty of ‘full and frank disclosure’ harks back to the time when permission for judicial review was ‘*ex parte*’

without notice to the defendant/interested parties). That has changed”. In Kenya, the position has not changed and Order LIII actually contemplates that applications for leave be heard *ex parte*. The said Handbook cites the case of *R v Leeds City Council, ex parte Hendry* [1994] Admn LR 444D in which Latham J observed: “It is of fundamental importance that applications for judicial review should be made with full disclosure of all material available to the claimant this is a case which I can properly use in order to send a message to those who are making applications to this Court reminding them of their duty to make full disclosure; failure to do so will result in appropriate cases in the discretion of the Court, being exercised against

a claimant) in relation to the grant of

a remedy)”. The aforesaid statement in the handbook and observations in the above case demonstrate that indeed the requirement of full and rank disclosures by applicants in judicial review is the same as in injunction applications. There is no criteria for lowering of standards in the said statements. If anyone had any doubts then reference to the *cause celeb’re* regarding the principles of full and frank disclosures and the consequences of non-disclosure of material facts would put the matter to rest. This is the oft-cited case of *King v General Commissioners for the Purposes of the Income Tax Acts for the District of Kensington* ex parte *Princess Edmond De Polignac* [1917] 1 KB 487 which was in respect of a judicial review application and which has been approved and applied by our own Court of Appeal in a string of appeal cases and the principles therein are now part of our law. I, therefore, find that there is no distinction when applying the said principles to cases of judicial review. It does not matter the type of case or matter, once a matter is before the Court in the absence of another or other parties

*ex parte*) the duty of full and frank disclosures are imposed on applicants and the standard must always be fairly high considering the authorities. This brings me to the main questions in these application by EWK which is supported by CCK and Corporate Africa. In its affidavit in support of the application for leave sworn by Mr Charles Muchiri the vice chairman of KNFC, the applicant, *inter alia*, stated as follows: “12. That on 19 March 2004 the first respondent, Communications Commission of Kenya, placed, a *Gazette* notice number 2113 that it intended to grant a GSM licence to a company going by the name Econet Wireless Kenya Limited of Page 140 of [2004] 2 EA 128

HCK) post office number 79630, Nairobi

annexed hereto and marked CM5 is a copy of the *Gazette* notice). 13. T hat on the 19 August 2004, the first respondent, officially and publicly made and announced a decision to proceed and grant the GSM licence to Econet Wireless Kenya Limited. It never officially communicated this decision to the applicant who only learnt of the event in the press and from the first respondent commission’s official website.

annexed hereto and marked CM6 is a print out from the commissions website which speaks for itself). 14. T hat on the 23 August 2004, the applicant officially complained to the first respondent of the impropriety of its action in granting the licence and also highlighted the massive flaws and fraud in awarding that licence to Econet Wireless Kenya Limited

annexed hereto and marked CM7 is a copy of the said letter). 15. T hat on 10 November 2004 despite protestations by the applicant; the first respondent issued the third GSM licence to Econet Wireless Kenya Limited. This was done without any communication or invitation of the applicant to the occasion. The applicant learnt about the grant of the licence in the press and from the first respondent’s official website.

annexed hereto and marked CM8 is a copy of a print out from the said commissions website evidencing the matters herein bespoken). 16. T hat Econet Wireless Kenya Limited did not exist at the time the provisions of the third GSM licence was subjected to tender. Econet Wireless Kenya Limited did not participate or qualify for the tender to operate the third GSM system in Kenya. The successful bidder was the Econet Wireless Consortium. 17. T hat indeed Econet Wireless Kenya Limited was registered on 27 November 2003 over two

2) months after qualification of the Econet Wireless consortium.

Annexed hereto and marked CM9 is a copy of the certificate of incorporation of Econet Wireless Kenya Limited). 18. T hat Econet Wireless Limited was incorporated with a share capital of KShs one hundred thousand and only two shareholders and directors were stated as:

*a*) E lizaphason Mwaura Njiri – 1 share

*b*) P eter Kibiriti –1 share Annexed hereto and marked CM10 is a copy of the memorandum and articles of incorporation of Econet Wireless Kenya Limited. 19. T hat indeed by a letter dated 11 November the Registrar of companies confirmed the position in numbers 17 and 18 above.

annexed hereto and marked CM 11 is a copy of the letter from the Registrar of companies). 20. T hat in making the application for the licence the first respondent clearly and with an ulterior motive represented to the Communication Commission of Kenya that it was indeed a representative of the consortium that won the tender. I state further that the second respondent, Econet Wireless Kenya Limited masqueraded as constituting all partners of the consortium which won the tender, this was untrue as Econet Wireless Kenya Limited is owned and directed by only two individuals; Elizaphason Mwaura Njiri and Peter Kibiriti who had nothing to do with the tendering process

see attachment CM5). 21. T hat the first respondent by grossly abdicating its statutory duty to ensure strict compliance with legal tender requirements and its own terms and conditions clearly abetted this anomaly and stubbornly refused to correct the situation when the fraudulent act was brought to its attention by the applicant’s official. 22. T hat the first respondent, Communication Commission of Kenya had a duty to satisfy itself that the shareholding and composition of Econet Wireless Kenya included and reflected all the parties that constituted the consortium that won the tender as per its own requirement that the application included a confirmation of the shareholding by the Registrar of companies. Page 141 of [2004] 2 EA 128

HCK) 23. T hat at no time after the tender was won was the character and shareholding of the winning consortium changed. I state further that it is now manifest that none of the partners that won the tender benefited from the process clearly defeating the entire procurement process. 24. T hat given the prevailing public interest in the process the first respondent acted beyond its powers and flagrantly abused the legal provisions and its own regulations in awarding the licence to a company that was not a participant in the tender process. I state further that as presently constituted, the operation of the third GSM licence will now benefit two private individuals’ shareholders namely:

*a*) E lizaphason Mwaura Njiri – 1 share

*b*) P eter Kibiriti –1 share This is contrary to public policy and cannot have been the intention of the government in deciding to grant a third GSM licence to Econet Wireless Consortium which included the applicant. ...” I have set out the aforesaid paragraphs in their entity as these are the facts which KNFC relied on heavily in the *ex parte* application for leave to stay and referred to by its counsel achieving the impact and results desired. The Court relied on these factual statements in reaching its decision to grant leave to stay. The Court made its decision on two major grounds: 1. T hat KNFC’s protestations and objections contained in its letter of 23 August 2004 were brushed aside and CCK did not at all respond to the said letter and serious issues and allegations made therein. 2. T hat in breach of legal provisions and its own regulations and the terms and conditions of the tender, CCK had awarded the licence to EWK yet the said company did not constitute all the 4 shareholders or consortium partners thereby changing the character and shareholding composition of the winning consortium in breach of section 4.5 of the tender rules and conditions. And also in breach of section 3 of the tender document which made it mandatory that Kenyan investment in the consortium was to be retained at a level not less than 30% of the entire investment. In the application to set aside the order of stay and dismissal on the ground of non-disclosure, suppression and concealment of material facts EWK and CCK in their respective affidavits have annexed massive documents and correspondence which they allege were withheld and suppressed from the Court’s attention. EWK and CCK also alleged that KNFC deliberately distorted and misrepresented the facts applicable to the matter. It is not practical for the Court to set out all the aforesaid documents and correspondence produced by EWK and CCK and their contents. They are just too many. However, I have gone through all of them and have understood their contents. This being a court of record, the said documents and correspondence are deemed to be part of the proceedings and evidence before the Court. CCK in an affidavit sworn by Mr Sammy Kirui the director general of CCK produced a letter dated 31 August 2004 which it says was its response in detail to the allegations made by KNFC in its letter of 23 August 2004. It is a four page letter which is in detail and blow for blow responds to the allegations made by KNFC. Upon consideration of the contents, one gets a different picture of the allegations made by KNFC and the position of CCK. Whether the answers are wholly sufficient and sound or correct is not the issue. The crucial point is that CCK did respond to the protestations and objections by KNFC in Page 142 of [2004] 2 EA 128

HCK) an elaborate letter to it. KNFC did not disclose this fact to the Court. To the contrary KNFC expressly in its affidavit and through counsel’s submission at the *ex parte* hearing asserted that CCK never responded to its letter of 23 August 2004. KNFC did not file any affidavit to deny that it had not received the said letter. During its submissions its counsel admitted the existence of the said letter and argued that it did not “address” the issues raised in KNFC’s letter. As stated above herein, one of the reasons the Court granted the *ex parte* orders of leave to stay was that the Court was made to believe that CCK never responded to the letter of protestations and objections which to me was a very serious issue. It comes to light now that not only did CCK respond but it has in writing and the letter detailed. KNFC received the letter as it was addressed to it and had possession of it at the time of making the *ex parte* application. When faced with the allegations of suppression and concealment, it had no answer and did not attempt to explain why it misled the Court that there was no reply from CCK. In the affidavit of Mr Zachary Wazara for EWK, the applicant produced various agreements between the consortium members. One of them was titled heads of agreement. Clause 2.2 of the agreement KNFC and EW1 stipulates as follows: “The parties agree that, if the consortium is declared by the Communications Commission of Kenya to be the successful bidding entity for the project; they will form a single purpose entity

“the project company”) with the name Econet Wireless Kenya Limited to engage in the operation, financing; expansion and development of the project”. EWK also produced a letter dated 24 February 2004

correct date said to be 12 March 2004). It was addressed to KNFC and dealt with *inter alia*, the incorporation of EWK. In the said letter EWI explained that the shareholders of the company would be: KNFC – 82%, EWI – 10%, Rapsel – 4%, Corporate Africa – 4%. EWK through the said affidavit also produced resolutions of the interim board of EWK passed in a meeting dated 9 March 2004. This resolution has been referred to earlier in this ruling. The existing directors then were: Mr Kibiriti, representing Corporate Africa Limited and Mr Mwaura Njiri, representing EWI. The board resolved to appoint additional directors as follows: Apollo Kariuki representing KNFC, Nguru Wachira representing KNFC, Kariri Mbuthia representing KNFC, Manga Mugwe representing Rapsel Limited, Zachary Wazara representing EWI and Rugare Chdembo representing EWI. There were also resolutions relating to shareholdings. All the four consortium members’ interests appeared to be catered for. The resolution was signed by Mr Apollo Kariuki for KNFC. The heads of agreements were executed by KNFC and were quite detailed and elaborate. They dealt with the agreements *inter alia* relating to shareholding. The said agreements and resolutions were not produced by KNFC in its application for leave and stay. In its response, KNFC questioned the material relevance and validity of the said documents. It did not deny that it was aware of their existence, was party to them and they were in its possession at the time of the *ex parte* application. It is not necessary for the Court to reproduce each and every document or letter tendered by EWK and CCK in this application many of which have been Page 143 of [2004] 2 EA 128

HCK) confirmed to have been within the knowledge of KNFC and of which it had possession. In the case of the *King v The General Commissioners for Purposes of the Income Tax Acts for the District of Kensington*

citation above); the Court of Appeal held:

1) That the rule of the Court requiring *ubberima fides* on the part of an applicant for an *ex parte* injunction applied equally to the case of an application for a rule *nisi* for a writ of prohibition.

2) That there having been suppression of material facts by the applicant in her affidavit, the Court would refuse a writ of prohibition without going into the merits of the case. Lord Cozens – Hardy MR in this landmark case said:

at 504) “It is a case in which it seems to me there was plainly a suppression of what was material, and we cannot be too strict in regard to that which to the best of my belief has been a long established rule of the Court in applications of this nature and has been recognised as the rule. The authorities in the books are so strong and so numerous that I only propose to mention one which has been referred to here, a case of high authority, *Dalglish v Jarvie*

1), which was decided by Lord Langdale and Rolfe B. The head-note, which I think states the rule quite accurately is this: “it is the duty of a party asking for an injunction to bring under the notice of the Court all facts material to the determination of his right to that injunction; and it is no excuse for him to say that he was not aware of the importance of any facts which he has omitted to bring forward. Then there is an observation in the course of the argument by Lord Langdale. It is quite clear that every fact must be stated, or even if there is evidence enough to sustain the injunction, it will be dissolved.” That is to say he would not decide upon the merits, but said that if an applicant does not act with *uberrimae fides* and put every material fact before the Court it will not grant him an injunction, even though there might be facts upon which the injunction might be granted, but that he must come again on a fresh application”. I have been asked to invoke the said principles in respect of the non-disclosures on the part of KNFC. After a careful consideration of the letters and agreements and facts referred to above and considering several other letters and documents which were left out by KNFC, I am of the view that the said letters and documents were material facts which if availed to the Court at the *ex parte* stage could have affected the decision of the Court. It is for the Court to decide on the ultimate materiality and extent of relevance. It is not for the applicants or his counsel to decide on this aspect. Considering the contents of the letter from CCK, the heads of agreement and the resolutions, I hold that they were very material and relevant to the application and I may possibly have reached a different decision with regard to the order of stay. Since the said documents and correspondence were in the possession and/or within the knowledge of the KNFC, I find that there was a deliberate concealment and suppression of extremely crucial relevant and material facts. In *Uhuru Highway Development Limited v Central Bank of Kenya and others* [1995] LLR 389

CAK), the Court of Appeal applied the principles of non-disclosure which were enunciated in the case of *Brink’s Mat Ltd v Elcombe* [1988] All ER

CA) 188

at 193-194). Ralph Gibson LJ dealt with the question of materiality when he said: “Whether the facts not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the Judge on the Page 144 of [2004] 2 EA 128

HCK) application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being present”. It is my view that the two grounds the basis upon which I granted the *ex parte* application were quite important, namely, whether CCK had refused to consider and respond to the applicant’s objections and whether or not KNFC had CCK permitted changing of the character and shareholding of the winning consortium by granting the licence without ensuring that KNFC was still a shareholder and its interest protected while sustaining the minimum 30% local ownership of the consortium company, EWK. In the light of what I have found above, the non-disclosure was not innocent as KNFC had in its possession most of the documents and letters which were produced by EWK and CCK in this application and in particular the ones that I have specifically mentioned. The KNFC when faced with the allegations of non-disclosure did not attempt to explain why it left out the said documents, correspondence and information but instead played down the materiality of the said matters. KNFC argued that the Court could still maintain the *ex parte* orders granted if it found that despite the non-disclosures, the leave and stay could still be properly granted had they been disclosed or availed to the Court. This aspect was considered in the *Brink Mat*’s case. It was held

at 194). “

vii) finally ‘it is not for every omission that the injunction will be automatically discharged. A *locus poenitentiae* sometimes be afforded’ See *Bank Mellat v Nikpour* [1985] FSR 87 at 90 per Lord Denning MR. The Court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the *ex parte* order nevertheless to continue the order to make a new order on terms: when the whole of the facts; including that of the original non-disclosure, are before it,

the Court) may well grant such a second injunction if the original non-disclosure was innocent and if the injunction could properly be grant*e*d had the facts been disclosed.’

see *Lloyds Bowmaker Ltd v Britannia Arrow Holdings plce*

*Lavens, third party)* 3 All ER 178 at 183 per Glidewell LJ).” In this application, I have already held that the non-disclosure was deliberate and calculated and that had the said letters documents and facts been disclosed to me I would not possibly have granted the orders of stay. Robert Walker LJ in the case of *Memory Corporation PLC v Sidhu*

number 200) 1 WLR 1443 cites an unreported case –

*March Rich and Company Holding v Krasner*, 1988) in which Carnwath J said: “Full disclosure must be linked with fair presentation. The Judge must be able to have complete confidence in the thoroughness and objectivity of those presenting the case for the applicant. Once that confidence is undermined he is lost”. That’s the way I feel now, lost. The Court must insist on strict compliance with the rules pertaining to non-disclosure in order to afford protection to the absent parties at the *ex parte* stage. Finally, I come to the question of alternative remedy. EWK and CCK have strongly submitted that there was an alternative remedy available to KNFC under the provisions of the Kenya Communications Act yet KNFC did not disclose this important fact and as such the *ex parte* orders ought to be discharged. Section 102

1) of the Kenya Communications Act, number 2 of 1998 provides: Page 145 of [2004] 2 EA 128

HCK) “102

1) T here shall be established an Appeal Tribunal for the purpose of arbitrating in cases where disputes arise between the parties under this Act”. Ransley J in the case of *Kenya Telecommunications Investment Group Limited v Elecommunication 7 Commission of Kenya* miscellaneous application number 1267 of 2003 had the occasion to interpret this provision and also dealt with the question of alternative remedy. He said as follows: “This alternative remedy is to be found in section 102

1) of the Kenya Communications Act which established an Appeal Tribunal for the purpose of arbitrating in cases where disputes arise between the parties under this Act. The word “dispute” is not defined in the Act but I take it that it would include a refusal to grant a licence to anyone under section 25 of the Act . I am of the view that there is an alternative remedy in this case. Is this one of those exceptional cases where judicial review proceedings should be invoked? Nothing has been shown to me that is exceptional in this case. It might I suppose be considered to be a speedier procedure however that in itself would not be sufficient. Parliament has under the Act provided a tribunal, which can deal with the question of the refusal of a licence. That tribunal has special expertise in dealing with such matters. It is only if this tribunal itself fails in some ways to dispense with justice that a case for judicial review could be preferred against is decision”. I am inclined to adopt the views of my brother in these proceedings. The KNFC and Rapsel limited here argued that section 102

1) is not available to KNFC since it is not a “party” as contemplated by the said provisions. That being only a consortium member and not one of the bidders as EWK etc, then it could not invoke the said provision. With respect, this is not a sound argument. The tender recognised the participation of consortiums or partners in the bidding process, both local and international. It was the duty of CCK to maintain a certain ratio in the equity participation and as such had direct dealings with the consortium members. Indeed the correspondence and documents shown to the Court demonstrate that CCK throughout dealt with the consortium members before and after the award of the tender and did so individually and collectively. I therefore hold that KNFC was a “party” contemplated by section 102

1) of the Kenya Communications Act and could refer grievances to the tribunal. Was KNFC guilty of non-disclosure of the existence of an alternative remedy and if the Court found that the non-disclosure was deliberate, should it set aside or discharge the *ex parte* orders of stay on this ground? It is true that an applicant and its counsel are requited to carry out a diligent inquiry on all facts including the applicable law before making an *ex parte* application. It is a duty of an applicant to inquire as to whether there exists an alternative remedy. In this case, KNFC and its counsel must have studied the provisions of the Kenya Communications Act or at least the Court will assume so because the application was brought also under the provisions of the said act. So they knew of the existence of the alternative remedy. However, in view of Mr Kahonge’s submissions it would appear that the failure to point out or refer to section 102

1) of the Act was not to conceal or suppress this fact but was due to a misapprehension of the law. I hold that KNFC’s counsel sincerely believed that his client was not entitled to invoke the provisions of section 102

1). As a result, I will not make any orders on this ground. In conclusion, on the basis of the reasons set out above I hold that the applicant EWK has proved that KNFC withheld and suppressed from the attention of this Court facts relevant and material to the issues before it during the Page 146 of [2004] 2 EA 128

HCK) *ex parte* hearing of the application for leave. As a result I do hereby set aside and discharge the orders of leave and stay granted on 26 November 2004 in terms of prayer two of the notice of motion dated 3 December 2004. In order to demonstrate the seriousness with which the Court takes the issue of none disclosure in *ex parte* applications, the Court hereby dismisses KNFC’s application for leave for judicial review orders in terms of prayer 3. KNFC shall pay EWK’s, CCK’s and Corporate Africa’s costs of this application orders accordingly.

For the applicant:

*N Regeru* instructed by *Njoroge Regeru & Co*

For the first respondent:

*Karanj*

For second respondent:

*JRA Wananda* instructed by *Shapley Barret & Co*

For third respondent:

*AOW Amoko* instructed by *Inamdar & Inamdar Adv*