REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW DIVISION

JR. APPLICATION NO.349 OF 2008

REPUBLIC.....APPLICANT

-VERSUS-

THE PERMANENT SECRETARY, MINISTRY OF

LIVESTOCK DEVELOPMENT.....RESPONDENT

EX PARTE: HALAL MEAT PRODUCTS LIMITED.....EX PARTE APPLICANT

ENG.JOHN.M. LITONDO..1ST INTENDED INTERESTED PARTY/APPLICANT

ESTATE OF THE LATE

ROBERTSON-DUNN.....2ND INTENDED INTERESTED PARTY/APPLICANT

RULING

Before court are two notices of motion respectively dated 16 November 2020 and 18 January 2021; they have been filed by the 1st and 2nd Intended Interested Parties respectively. Both the applications have been filed under Order 1 Rule 10 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, cap. 21. The prayers in the first motion have been framed as follows:

i) THAT this Application be certified urgent and due to the urgency thereof service in the first instance be dispensed with.

ii) THAT this Honourable Court be pleased to enjoin the Intended Interested Party as an Interested Party in this matter.

iii) THAT upon inter partes hearing of this Application, the Honourable Court be pleased to grant the Interested party leave to file pleadings as pertains this matter.

iv) THAT upon interpartes hearing and determination of this application, the Honourable Court do issue an order directing that the share payments to be paid to the interested party on account of award/decree appertaining to the Judgement in favour of the ex parte Applicant herein in HCCC 1655 of 1986-Halal Meat Products vs. AG herein as confirmed by the Court of Appeal be made directly to the Interested Party through their Advocates on record.

v) THAT upon interpartes hearing and determination of this application, the Defendant and Plaintiff be ordered to disclose the

agreement/discussions or consents they have made in relation to the payment of the decretal award and the costs thereof.

vi) THAT the costs of this Application be in the cause."

The 2nd application seeks, more or less, similar prayers; they are couched as follows: "

i) THAT this Application be certified urgent and due to the urgency thereof service in the first instance be dispensed with.

ii) THAT this Honourable Court be pleased to enjoin the Intended 2nd Interested Party as a 2nd Interested Party in this matter.

iii) THAT upon inter partes hearing of this Application, the Honourable Court be pleased to grant the Interested party leave to file pleadings as pertains this matter.

iv) THAT upon interpartes hearing and determination of this application, the Honourable Court do issue an order directing that the share payments to be paid to the interested party on account of award/decree appertaining to the Judgement in favour of the ex parte Applicant herein in HCCC 1655 of 1986-Halal Meat Products vs. AG herein as confirmed by the Court of Appeal be made directly to the Interested Party through their Advocates on record.

v) THAT upon interpartes hearing and determination of this application, the Defendant and Plaintiff be ordered to disclose the agreement/discussions or consents they have made in relation to the payment of the decretal award and the costs thereof.

vi) THAT the costs of this Application be in the cause."

The motions are based on similar grounds on the face of the motions and are supported by the affidavits of Eng. John M. Litondo and Diana Morris respectively.

In his affidavit, the 1st interested party has deposed that following this Honourable Court's directions in **Civil Case No**. **1655 of 1986** to the effect that the loss suffered by the plaintiff in that case be assessed to enable the court make an informed decision, the 1st Intended Interested Party together with the Late Robertson Dunn were engaged by the applicant for their professional services to undertake the assessment exercise. The two completed the task for which they were engaged and submitted a report which was adopted by the court as evidence in the proceedings that ended in the *ex parte* applicant's favour.

Upon the conclusion of the suit, judgment was entered in favour of the Plaintiff on 7 October,2005 by the Honourable Lady Justice Gacheche (as she then was) in the following terms:

i)* THAT *judgement be and is hereby entered against the Government in the sum of Kshs. 1,807,772,000/= as per plaint;

ii)* THAT*, the awards herein shall earn interest at court rates till payment in full;

iii)* THAT*, professional fees for the Plaintiff's Surveyors, Engineers and Contractors are hereby granted at 7.5% of the above award."

The Respondent appealed against the decision but the appeal was dismissed on 29 July 2016.

It has been deposed that the Intended Interested Parties are owed by the applicant but that the Respondent has blatantly refused or neglected to honour the said Decree. Instead, it has been engaged in secret negotiations with the Applicant as a result of which an agreement has been reached that payments in satisfaction of the decree be made to the applicant by the Respondent. But there is no information on when the amounts owed to the professionals, in particular, the Intended Interested Parties, will be settled. It is for these reasons that the Intended Interested parties seek to be included in these proceedings.

Mohamed Ali Motha, the Director of the Applicant swore and filed a replying Affidavit opposing the applications.

The affidavit, by and large, reproduces what transpired in the in **Civil Case No**. **1655 of 1986** reiterating that the proceedings which the Intended Interested Parties seek to be incorporated in arise out of the judgment that was obtained in that civil suit.

There is not much of a dispute on facts that I consider material to the interested parties' applications. It is apparent from the record itself that as early as 1986, the *ex parte* applicant filed a civil against the Attorney General who was obviously sued on behalf of the Government. The civil suit was concluded in favour of the *ex parte* applicant in October 2005. In 2008, the applicant sought to enforce the judgment and decree and, in that regard, filed a judicial review application seeking in the main, an order for mandamus to compel the Permanent Secretary, Ministry of Livestock Development to settle to the money decree. The application was granted and the order for mandamus duly issued in November 2008.

It would appear that despite the issuance of the order of mandamus, the decretal sum was not settled as a result of which the applicant filed an application to commit the Permanent Secretary in the parent ministry and who is named as the respondent in these proceedings, to civil jail. The application is dated 20 June 2019 and was filed in court on 21 June 2019. As far as I can gather from the record, this is the application in which the Intended Interested Parties seek to be joined as interested parties and, it would appear, prior to the Intended Interested Parties' applications, it was the only application pending for determination.

The judgment out of which the applicant obtained the order for mandamus was in favour of the applicant alone; it is obvious that the Intended Interested Parties were not part of that suit hence their present applications. It is not in doubt that part of the award made to the applicant in the civil claim was to cater for the fees for the professionals that the applicant engaged in prosecution of his suit and that these professionals may have included the Intended Interested Parties.

But the fact remains that the suit was exclusively the applicant's and whatever was awarded as the amount due to the Intended Interested Parties was part of the award that was made to the applicant. In these circumstances, I doubt that the Intended Interested Parties can proceed as if they obtained judgment and eventually a decree which they can execute against the applicant in these proceedings. The execution proceedings which the Intended Interested Parties are bidding to join were specific and restricted to the applicant as the decree-holder and against the state, the judgment debtor.

In any event, it is worth noting that the judgment did not specifically single out the Intended Interested Parties as the "*Plaintiff's Surveyors, Engineers and Contractors*" who were entitled to the 7.5% of the award made. Granted, it is possible that the Intended Interested Parties could be the only persons or entities that the Court may have been referring to but whether they were or not is a question that, in my humble view, would be determined in separate and distinct proceedings between the Intended Interested Parties and the applicant. I suppose it is in such proceedings that the Intended Interested Parties could have obtained a judgment and a decree of their own which they could properly execute against the applicant.

Considering that the court in **Civil Case No**. **1655 of 1986** was particular in its judgment that 7.5% of the total award made to the applicant was to cater for fees for the surveyors, engineers and contractors which the applicant contracted, the judgment and decree which the Intended Interested Parties could have possibly obtained against applicant would have been of particular interest to this Honourable Court while considering the order of mandamus in execution of the decree obtained in **Civil Case No**. **1655 of 1986**.

But as it stands now, the order of mandamus has already been made. The proceedings which the Intended Interested Parties could have joined as interested parties, assuming they had obtained the money decree against the applicant, were concluded culminating in that particular order. As has been noted, the order of mandamus was granted in November, 2008 about fourteen years ago.

I note that the Intended Interested Parties invoked Order 1 Rule 10 of the Civil Procedure Rules in their applications. To be precise, it is Order 1 Rule 10(2) of these rules that caters of situations when the court may order joinder of parties; that rule reads as follows:

Order 1 Rule 10 (2)

The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added. (Emphasis added).

The Intended Interested Parties seek to join the proceedings neither as 'plaintiffs' nor as 'defendants'. Assuming these rule is applicable to judicial review proceedings, they would be in the category of persons or parties '*whose presence before court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit'*.

But the suit in which the Intended Interested Parties may have argued that their presence was necessary for the effectual and complete determination of the questions involved has, as noted, already been determined. If they had sought to join the judicial review proceedings for the order of mandamus to pay the decretal sum awarded in **Civil Case No**. **1655 of 1986**, the question of their entitlement to part of that sum would have been a pertinent question that the court was bound to consider and, for that reason, to include the Intended Interested Parties in the suit in order to adjudicate upon and settle all questions involved in the suit.

Though it may not make any difference to the fate of the Intended Interested Parties' course, a more pertinent rule would have been Order 53 Rule 3(4) of the Civil Procedure Rules. It is under this rule that this Honourable Court has the leeway to include any other party in judicial review proceedings if in the opinion of the court such a party, though not named, ought to have been served with motion. I dare say that, of the several reasons that may inform the discretion of the court to include any other party to the proceedings besides those named, the need to effectually and completely adjudicate upon and settle all questions involved in the suit as contemplated under Order 1 Rule 10 (2) is certainly one of these reasons. That rule reads as follows:

If on the hearing of the motion the High Court is of the opinion that any person who ought to have been served therewith has not been served, whether or not he is a person who ought to have been served under the foregoing provisions of this rule, the High Court may adjourn the hearing, in order that the notice may be served on that person, upon such terms (if any) as the court may direct.

Considering the Intended Interested Parties' stake in the judgment in **Civil Case No**. **1655 of 1986,** it is quite likely that the court would have ordered that the substantive motion seeking the order of mandamus be served upon them so that the question of the manner of payment of their share of the award would have been adjudicated upon and resolved; this is on the assumption that the extent of their claim was not in dispute or, perhaps, they had obtained a decree of their own against the applicant considering that the judgment in the **Civil Case No**. **1655 of 1986 d**id not provide in specific terms who the **"**Surveyors, Engineers and Contractors" that the applicant had contracted were.

And even if the court had not invited the Intended Interested Parties *suo motu,* nothing would have stopped them from moving the court for appropriate orders to be joined to the judicial review proceedings for the mandamus order under the same rubric of Order 53. Rule 3 (4) of the Civil Procedure Rules.

Be that as it may, from whichever angle one looks at the Intended Interested Parties' applications, whether it is from the perspective of Order 53. Rule 3 (4) or Order 1 Rule 10(2) of the Civil Procedure Rules, one thing is certain; that the circumstances under which the Intended Interested Parties would have joined the proceedings in which the applicant sought to enforce payment of the decretal sum no longer subsist.

As earlier noted, the application for mandamus was filed way back in 2008 and the order for mandamus for payment of the decretal sum was issued on 21 November 2008. The window for the Intended Interested Parties to join the judicial review proceedings in the manner they have sought in their present applications was shut the moment those proceeding were concluded.

The Supreme Court set out the parameters for including a party in any proceedings as an interested party in **Francis Karioki Muruatetu & another v Republic & 5 others [2016] eKLR** where it held as follows:

"From the foregoing legal provisions, and from the case law, the following elements emerge as applicable where a party seeks to be enjoined in proceedings as an interested party:

One must move the Court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:

i. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.

ii. The prejudice to be suffered by the intended interested party in case of non-joinder must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.

iii. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.''

These prescriptions are what one may consider as prerequisites that an intended interested party must meet before being added to any court proceedings as an interested party; but they can only be considered if there exist proceedings in which questions that the intended interested party proposes to bring to the fore can be adjudicated upon and determined. If the proceedings have been concluded, as it is the case here, the question whether the intended interested party meets the criteria for joinder is of no consequence.

The Intended Interested Parties' position is compounded even further by a ruling of this Court in **Civil Case No. 1655 of 1986** in which they filed similar applications for joinder. This fact is captured at the beginning of the ruling delivered on 8 December 2020 by Mbogholi, J (as he then was); in the first paragraph, the ruling states as follows:

"By an application dated 4th August, 2020 the intended interested parties herein sought orders that they be enjoined in this matter as interested parties and that the defendant be restrained from making any payments to the plaintiff. As set out in the decree confirmed by the Court of Appeal."

The intended interested parties referred to in this paragraph are the same Intended Interested Parties in the instant applications. Their application was eventually dismissed. In dismissing the application, the learned judge noted as follows:

"If I were to allow to allow this application then issues for determination would have to be drawn and heard by the court and a decision made thereon. It is not hard to observe that in such a situation, the current status of this matter is likely to be reversed to detriment of the decree holder, in this case the plaintiff. Prejudice will be visited upon a party who has a decree in possession and where execution is in fact in progress. I am not persuaded that this is the right step to take at this stage of this case which has been pending in our records from 1986."

So, the Intended Interested Parties could not join the suit out of which the judgment sought to be executed in the present suit was obtained. It is a bit perplexing that they could, in these circumstances, be seeking to join proceedings that have literally been concluded to enforce a judgment that, as noted, arose from proceedings which they were barred from joining.

For our purposes, the interested parties' applications are bad in law, misconceived and an abuse of the due process of this Honorable Court. The two applications are dismissed. Parties will bear their respective costs.

It is so ordered.

Signed, dated and delivered on 21st January 2022

Ngaah Jairus

JUDGE