



Haret v Commissioner Of Domestic Taxes & another (Judicial Review Application 4 of 2021) [2022] KEHC 556 (KLR) (28 April 2022) (Ruling)

Neutral citation: [2022] KEHC 556 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
JUDICIAL REVIEW APPLICATION 4 OF 2021
FN MUCHEMI, J
APRIL 28, 2022
IN THE MATTER OF: AN APPLICATION FOR AN
ORDER OF CERTIORARI AND PROHIBITION
AND
IN THE MATTER OF: ORDER 53 RULES 1 & 2 OF THE CIVIL
PROCEDURE RULES AND SECTION 8 AND 9 OF THE LAW REFORM ACT (CAP 26)
AND
IN THE MATTER OF: THE KENYA REVENUE AUTHORITY
ACT AND THE TAX PROCEDURE ACT (NO. 29 OF 2015)
AND
IN THE MATTER OF: THE CONSTITUTION OF KENYA,
ARTICLES 22, 23, 25(A) (C), 28, 47, 50(1)(2), 165(6), (7)
AND
IN THE MATTER OF: MOHAMMED ISMAIL HARET
AND
IN THE MATTER OF: REPUBLIC VS MOHAMMED
ISMAIL HARET MCCR NO. E667 OF 2021
AND
IN THE MATTER OF: TAX APPEALS TRIBUNAL CASE
TAT NO. 224 OF 2021 BARE MOHAMUD MOHAMED ABD MOHAMED
ISMAIL HARET VS COMMISSIONER INVESTIGATIONS AND ENFORCEMENT
BETWEEN

BETWEEN



MOHAMED ISMAIL HARET APPLICANT

AND

COMMISSIONER OF DOMESTIC TAXES 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION 2ND RESPONDENT

RULING

1. The applicant commenced this Judicial Review proceedings by an ex parte Chamber Summons dated 27th August 2021 where he sought leave to apply for an order of certiorari to remove into the High Court for purposes of being quashed all decisions, orders and proceedings in Criminal Case Nyeri MCCR No. 667 of 2021 pending in the Chief Magistrates Court against the applicant. The applicant sought for orders of prohibition to prohibit the respondents from proceeding with the prosecution of Criminal Case No. MCCR No. 667 of 2021 and demanding the tax penalties and interest claimed in the said charges amounting to Kshs. 1,037,658,299/- which is currently subject to active consideration of the Tax Appeal Tribunal Case No. 224 of 2021 Bare Mohamud Mohamed and Mohamed Ismail Haret vs Commissioner Investigations and Enforcement, pending the determination of the Tax Appeal Case by the Tax Appeals Tribunal.
2. Further, the applicant sought leave be granted to operate as stay of proceedings of the Criminal Case No. 667 of 2021.
3. On 22/9/2021, this file was placed before the judge with the application for leave, who perused the application and granted leave to operate as stay of proceedings of the Criminal Case No. 667 of 2021 and granted 21 days leave for the applicant to file the substantive Notice of Motion.
4. On 22nd March 2022, the matter came up for directions on the substantive motion dated 27th August 2021. The respondent's Counsel submitted that the orders of the court dated 22/9/2021 were not complied with in that the substantive motion was filed together with the application for leave on 14th September 2021 and therefore, the application was filed without the applicant obtaining the leave of the court first. In that regard, counsel submitted that there was no valid leave nor stay and as such, the proceedings in Criminal Case No. 667 of 2021 ought to proceed.
5. Counsel for the applicant admitted filing the two applications at the same time and prayed that the court deem the substantive notice of motion as properly filed. He asked the court to ignore the technicality and allow the motion to stand.
6. Having listened to both counsels oral submissions, the only issue for determination is whether the substantive motion is properly before the court.

The Law

7. Judicial review proceedings are founded under Order 53 Rule 1 of the *Civil Procedure Rules* which provides:-
No application for an order of mandamus, prohibition or certiorari shall be made unless leave thereof has been granted in accordance with this rule.



8. This rule leaves no doubt that grant of leave is a precondition of filing the substantive motion for the prerogative orders of mandamus, prohibition or certiorari, and without such leave the substantive application cannot be entertained.
9. Order 53 Rule 3 of the Civil Procedure Rules provides:-
When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty one days by Notice of Motion and there shall, unless the Judge granting leave has otherwise directed, be at least eight clear days between the service of the Notice of Motion and the day named therein for hearing.
10. It then follows that the application for leave is not a mere procedural technicality that can be dispensed with at the whims of either the court or the applicant. It is a material stage in the application for judicial review orders at which the discretion of the court is called into question and which, for this very reason, cannot be taken away without an express provision of the law in that regard.
11. Keeping that in mind, am inclined to look at the competing interests of the parties and the administration of justice to both parties. I am guided by the case of Equity Bank Limited v West Link MBO Ltd Civil Application (Appeal) No 78 of 2011, where it was held:
Courts of law exist to administer justice and in doing so, they must of necessity balance the competing interests of different parties but within the confines of law, to ensure the ends of justice are met. Inherent power is the authority possessed by a court implicitly without it being derived from the constitution or statute.
12. Article 159(2)(d) of the Constitution provides:-
(2) In exercise of Judicial authority, the courts and tribunals shall be guided by the following principles:-
(a)
(b)
(c)
(d) Justice shall be administered without undue regard to procedural technicalities; and
13. In the matter before me, the only anomaly is that the applicant filed the motion seeking leave to operate as stay together with the substantive motion that seeks for judicial review orders. The procedure is that a party intending to file judicial review proceedings should first file the application for leave. The court upon hearing the leave application may grant leave to operate as stay of the decision or act complained of. The applicant on grant of leave will be given twenty one (21) days to file the substantive motion.
14. The court record shows that the court registry printed the application seeking for leave and forwarded it to the judge who gave the necessary orders. At that time the substantive motion had been filed but was not yet printed and filed by the registry due to an oversight that was to be explained later.
15. Having given the background facts, I hereby proceed to determine the issue at hand. It is important to bear in mind that the court had already granted leave to operate stay in the initial application on 22/09/2021. Relying on the provisions of Article 159 (2)(d), I am of the considered view that the applicant who had valid orders for leave ought to be given a chance to have his substantive motion admitted for hearing as opposed to taking the drastic action of dismissing the motion.



16. The forgoing analysis of the facts and taking into consideration the provisions of Constitution already cited, I hereby deem the substantive motion dated 27/08/2021 as properly filed.
17. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 28TH DAY OF APRIL, 2022.

F. MUCHEMI

JUDGE

Ruling delivered through videolink this day of 28th April, 2022

