Republic v Commissioner of Domestic & Border Control Services Kenya Revenue Authority & another; Digital Cargo Forwarders Limited (Exparte) (Judicial Review Application E004 of 2022) [2022] KEHC 14333 (KLR) (27 October 2022) (Judgment)

Neutral citation: [2022] KEHC 14333 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

JUDICIAL REVIEW APPLICATION E004 OF 2022

JM MATIVO, J

OCTOBER 27, 2022

BETWEEN

REPUBLIC ..... APPLICANT

AND

KENYA REVENUE AUTHORITY ..... 1ST RESPONDENT

COMMISSIONER OF DOMESTIC & BORDER CONTROL SERVICES KENYA REVENUE AUTHORITY ..... 2ND RESPONDENT

AND

DIGITAL CARGO FORWARDERS LIMITED ..... EXPARTE

JUDGMENT

1. By an application dated March 3, 2022, the *ex parte* applicant prays for certiorari to quash the Respondents' decision issued on October 3, 2018 suspending its tradex password for customs operation *vide* its licence ref number CUS/018886/18/PIN P0511465XXX.It also prays for a writ of *mandamus* to compel the Respondents to lift the said suspension. Further, it prays for any other consequential and or incidental reliefs to meet the ends of justice. Lastly, it prays for costs of the application to be provided for.

2. The application is premised of the following grounds: - (i) that its password was suspended following irregular activities by unauthorized persons; (ii) the said persons were charged in Mombasa Criminal Case No. 315 of 2019 with the offence of fraudulent evasion of duty; (iii) the said persons were discharged by the court on October 9, 2019 for want of evidence; (iv) the applicant was not an accused in the said case; (v) that it was not accorded a hearing prior to the said decision; (v) that the applicant had suffered loss of business; (vi) the Respondents' actions are in total breach of Article 47 of *the*

Constitution for want of an explanation; and (vii) the impugned decision offends the principles of natural justice.

3. In opposition to the application, the Respondents filed the Replying affidavit of Joab Omole dated April 25, 2022, an officer appointed under section 13 of the *Kenya Revenue Authority Act*.[1] The salient points are that :- (a) it was noted that the applicant had cleared several units of vehicles and a mis-declaration of the state of the motor vehicles was noted and no taxes was paid for the vehicles which was an illegal entry aimed at evading payment of taxes or reduction of the amount of taxes due and payable; (b) all the suspected transactions bore the applicant's PIN and details; (c) in exercise of its powers under section 145 (3) of the *East African and Customs Act*, (EACCMA), the Respondent suspended the applicants password to curb continued illegality; (d) the applicant admitted the said illegalities in its supporting affidavit; (e) the password is private and only shared among the applicant's employees and that the applicant has full control of the password which was misused; (f) before the acquittal of the accused in the criminal case, the applicant has not sufficiently demonstrated to the Commissioner that the same was not shared with unauthorized persons; (g) the Commissioner has the prerogative not to issue, revoke or suspend any licenses under section 145 (1) of *ECCMA* and that the Commissioner exercised his discretion in suspending the password; (h) that the applicant instituted this suit 4 years after the suspension on the license; (i) that the orders sought if granted will interfere with the Commissioner's discretion; (j) that the orders sought are misplaced.

4. In his submissions, the applicant's counsel replicated the grounds in support of the application. He cited *Senior Assistant Commissioner (Enforcement Port Operations) & 3 others*[2] in support of the holding that if discretion is used arbitrarily or unreasonably, the court may step in to remedy the situation. He cited section 145 of *EACCMA* and argued that the Respondent could only suspend the license only if the applicant had been found guilty of an offence or for other reason ejusdem generis. He relied on *Republic v Kenya Revenue Authority ex parte United Millers Limited*[3] which faulted the Respondents' decision to block the applicant from accessing the Simba system without providing reasons describing it as unreasonable.

5. The Respondents' counsel submitted that the applicant has not demonstrated any grounds for the court to grant the discretionary orders sought; that the applicant has not demonstrated that the Respondent acted ultra vires its powers and cited *Kenya National Examination Council v Republic ex parte Geoffrey Gathenji & 9 others*.[4] Counsel also submitted that judicial review does not deal with merits of a decision but the decision making process and cited *Biren Armitlal Shsh & another v Republic & 3 others*.[5] Lastly, counsel submitted that the application was brought long after the lapse of 6 months contrary to Order 53 (2) of the *Civil Procedure Rules*, 2010 and sections 8 and 9 of the *Law Reform Act*. To fortify his argument, he cited *Republic v Chief Magistrate, Busia Law Courts & another ex parte Albert Gerald Lusima Rague; Wafula Ogema Odunga & another (Interested Parties)*.[6] Lastly, counsel submitted that the applicant does not deserve the orders sought.

1 Cap 469, Laws of Kenya.

2 [2018] e KLR.

3 [2015] e KLR.

4 Nairobi Civil Appeal No. 266 of 1996.

5 [2013} e KLR.

6 [2021] e KLR.

6. First, I will address the Respondents' submission that these proceedings are statute barred. Even though this is a highly dispositive issue, the applicant's counsel gave it a wide berth. Undeniably, the decision sought to be reviewed was made on October 3, 2018. The applicant approached this court on February 24, 2022, after a period of over three years. The Respondents' objection as I understand it is premised on the provisions of section 9 (3) of the *Law Reform Act*[7] and Order 53 Rule 2 of the *Civil Procedure Rules*, 2010. Section 9(3) of the *Law Reform Act* provides as follows:-

> (3) In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

7. Order 53 Rule 2 of the *Civil Procedure Rules*, 2010 provides as follows:-

> Time for applying for certiorari in certain cases [Order 53, rule 2.]
>
> Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

8. The Court of Appeal in *Ako v Special District Commissioner Kisumu & another* [1989] e KLR found that leave shall not be granted unless application for leave is made inside six months after the date of the judgment or decision sought to be challenged. Leave having been granted, the question is whether it was properly granted and or whether it can be recalled. That this Court has jurisdiction to set aside leave granted in judicial review proceedings is not in doubt. The foregoing position was affirmed by the Court of Appeal affirmed this in *R v Communications Commission of Kenya & 2 Others ex Parte East Africa Televisions Network Ltd*.[8] In See also *Njuguna v Minister for Agriculture*,[9] it was held that where leave is granted improperly at the expert stage, it can be challenged even by way of a Replying affidavit.

9. The applicant moved this court *ex parte* knowing that the period provided by the law had lapsed. The applicant never sought extension of time nor did it disclose to the court the fact that the period provided by the law had lapsed. At the ex parte stage, the application is not subjected to a heightened degree of scrutiny and some details may escape the court's attention. A person who makes an ex parte application to court is an under obligation to candidly, fairly, frankly and faithfully make the fullest possible disclosure of all material facts within his knowledge. An applicant who fails to discharge this duty of good faith cannot obtain an advantage from the proceedings and must be deprived of any advantage gained from such conduct.

[7] Cap 26, Laws of Kenya.

[8] Civil Appeal No. 175 of 2000 [2001] KLR 82; [2001] 1 EA 199.

[9] Civil Appeal No. 144 of 2000 [2000] 1 EA 184.

10. The applicant did not invoke the provisions of *the Constitution*. The applicant elected to approach the provisions of sections 8 & 9 of the *Law Reform Act* and Order 53 of the *Civil Procedure Rules*, 2010. It follows that the timelines set out by the said provisions do apply.

11. The statutes of limitations are enacted as a matter of public policy to fix a limit within which an action must be brought, or the obligation is presumed to have been paid, and is intended to run against those who are neglectful of their rights, and who fail to use reasonable and proper diligence in the enforcement thereof. These statutes are declared to be 'among the most beneficial to be found in our books. They rest upon sound policy, and tend to the peace and welfare of society. The underlying purpose of statutes of limitation is to prevent the unexpected enforcement of stale claims concerning which persons interested have been thrown off their guard by want of prosecution.[10]

12. Statutes of limitation are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, witnesses have disappeared or parties holding decrees assume that no appeals have been preferred. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and the right to be free of stale claims in time comes to prevail over the right to prosecute them.[11] The fundamental purpose of the statute of limitations is to give defendants reasonable repose, that is, to protect parties from defending stale claims. A second policy underlying the statute is to require plaintiffs to diligently pursue their claims.[12]

13. I note that the applicant also invoked sections 1A, 1B and 3A of the *Civil Procedure Act*.[13] Simply put, the applicant invited this court to exercise its inherent powers and grant the orders sought. Decidedly, courts derive their power from *the Constitution* and the statutes that regulate them. The jurisdiction of each hierarchy of the courts is limited within the boundaries of the written law apart from the High Court which is sometimes said to have inherent jurisdiction to do things not specifically provided for. Historically, the high court, in addition to the powers it enjoyed in terms of statute, has always had additional powers to regulate its own process in the interests of justice. This was described as an exercise of its inherent jurisdiction. Freedman C J M, citing I H Jacob Current Legal Problems, adopted the following definition of 'inherent jurisdiction'[14]

> ". . . the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of the law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them..."

10 *Pashley v Pacific Elec. Co*., 25 Cal. 2d 226, 228-29. 153 P.2d 325, 326 (1944) (quoting 1 HORACE G. WOOD. A TREATISE ON LIMITATION OF ACTIONS 8-9 (4th ed. 1916»; accord *Neff v New York Life Ins. Co* . 30 Cal. 2d 165, 169. 180 P.2d 900. 903 (1947).

11 *Wood v. Elling Corp*., 20 Cal. 3d 353, 362, 572 P.2d 755, 760,142 Cal. Rptr. 696, 701 (1977) (quoting Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348 (1944»; accord Lackner v. LaCroix, 25 Cal. 3d 747, 751, 602 P.2d 393,395, 159 Cal. Rptr. 693, 695 (1979).

12 *Jolly v. Eli Lilly & Co.,* 44 Cal. 3d 1103, 1112,751 P.2d 923, 928, 245 eal. Rptr. 658, 662-63 (1988) {citing *Davies v. Krasna*, 14 Cal. 3d 502, 512, 535 P.2d 1161, 1168, 121 Cal. Rptr. 705, 712 (1975).

13 Cap 21, Laws of Kenya.

14 *Montreal Trust Co v Churchill Forrest Industries (Manitoba) Ltd* 1972 21 DLR (3d) 75 at 81 quoting I H Jacob, Current Legal Problems (1970) p 51.

14. Jerold Taitz, in his book, *The Inherent Jurisdiction of the Supreme Court*[15] succinctly describes the inherent jurisdiction of the high court as follows: -

> "... This latter jurisdiction should be seen as those (unwritten) powers, ancillary to its common law and statutory powers, without which the court would be unable to act in accordance with justice and good reason. The inherent powers of the court are quite separate and distinct from its common law and its statutory powers, eg in the exercise of its inherent jurisdiction the Court may regulate its own procedure independently of the Rules of Court."

15. I.H. Jacob in "*The Inherent Jurisdiction of the Court*' [16]quoted by Jerold Taitz (*supra*) states:

> "(it) exists as a separate and independent basis of jurisdiction, apart from statute or Rules of Court ... It stands upon its own foundation, and the basis for its exercise is ... to prevent oppression or injustice in the process of litigation and to enable the court to control and regulate its own proceedings ... [it] is a necessary part of the armoury of the courts to enable them to administer justice according to law. The inherent jurisdiction of the court is a virile and viable doctrine which in the very nature of things is bound to be claimed by the superior courts of law as an indispensable adjunct to all their other powers ... it operates as a valuable weapon in the hands of the court to prevent any clogging or obstruction of the stream of justice."

16. The inherent jurisdiction of the high court has long been acknowledged and applied by courts.[17] However, a court's inherent power to regulate its own process is not unlimited. It does not extend to the assumption of jurisdiction which it does not otherwise have. In National Union of Metal Workers of South Africa & others v Fry's Metal (Pty) Ltd[18] it was held: -

> "While it is true that this Court's inherent power to protect and regulate its own process is not unlimited – it does not, for instance, "extend to the assumption of jurisdiction not conferred upon it by statute..."

17. The wisdom flowing from the above references is; what can the High Court do, in exercise of its inherent jurisdiction, to achieve the desirable justice and practicality in the prayers sought in an application which is out rightly time barred and was filed without leave of the court? The answer is simple. There is no competent application before the court. The inherent powers of the court are not an open licence for the court's exercise of unlimited discretion. This courts inherent jurisdiction is invoked to effect procedural fairness between the parties where a statute falls short of doing so or where there is a gap in the law. The inherent power claimed is not merely one derived from the need to make the court's order effective, and to control its own procedure, but also to hold the scales of justice where

15 Jerold Taitz, University of Cape Town, Juta, 1985.

16 (1970) 23 Current Legal Problems 23 at pp. 51-52.

17 *Ritchie v Andrews* (1881-1882) 2 EDL 254; *Conolly v Ferguson* 1909 TS 195.

18 2005 (5) SA 433 (SCA) para 40 citing *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) at 7 F. 6

no specific law provides directly for a given situation.[19] Order 53 Rule 2 and Sections 8 and 9 of the *Law Reform Act* provides in clear terms the time frame for instituting applications of this nature. The word shall which connotes a mandatory prescription is deployed in the said provisions. The attempt to invoke this courts inherent jurisdiction on the face of such clear provisions of the law is misguided.

18. Having found that there is no competent application before me, and having found that the application was filed in contravention of the above provisions of the law, the conclusion becomes inevitable that the application dated March 3, 2022 falls for dismissal. Having so concluded, I find and hold that it will serve no utilitarian purpose for me to address the application on merits. Accordingly, I dismiss the said application with costs to the Respondents.

DATED AND SIGNED AT MOMBASA THIS 19TH DAY OF OCTOBER 2022

JOHN M. MATIVO

JUDGE

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 27TH DAY OF OCTOBER 2022

OLGA SEWE

JUDGE

[19] *Se Ex parte Millsite Investment Co (Pty) Ltd* 1965 (2) SA 582 (T) at p 585F-G Vieyra J and *Union Government and Fisher v West* 1918 AD 556.