



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANOUS APPLICATION NO. 34 OF 2014

IN THE MATTER OF: AN APPLICATION BY CAPITAL HILL FOREX BUREAU LTD FOR JUDICIAL REVIEW ORDERS OF MANDAMUS, PROHIBITION AND CERTIORARI

AND

IN THE MATTER OF: THE CENTRAL BANK OF KENYA ACT, CAP 491 LAWS OF KENYA,

SECTIONS 1A, 1B & 3A OF THE CIVIL PROCEDURE ACT CAP 21, LAWS OF KENYA & ARTICLE 40 OF THE CONSTITUTION

REPUBLIC..... APPLICANT

VERSUS

CENTRAL BANK OF KENYA.....RESPONDENT

AND

CAPITAL HILL FOREX BUREAU LTD.....EX PARTE APPLICANT

JUDGEMENT

1. By an amended Notice of Motion dated 17th April, 2014, the *ex parte* applicant herein, **Capital Hill Forex Bureau Ltd**, seeks the following orders:

1. That an Order of *Certiorari* be and is hereby granted to quash the Gazette Notice No. 15107 published in the Kenya Gazette on 6th December 2013.
2. That an Order of *Mandamus* do issue to compel the Respondents to reinstate the Applicant's licence.
3. That an Order of *Prohibition* do issue to prohibit the Respondents their servants and/or agents from closing down and/or in any way howsoever interfering with the Applicant's Forex Bureau business operating from the 1st Floor, NHIF Building, situated along Ngong Road, Nairobi.
4. That the costs of this Motion and these proceedings be borne by the Respondents.

Ex Parte Applicant's Case

2. The said application was based on the following grounds:
 - a. **The Applicant was incorporated on the 29th January 2004 under the auspices of the Companies Act Chapter 486 Laws of Kenya and on or about the 31st March 2004, the Applicant applied to the Respondent to be licensed to operate a Forex Bureau.**
 - b. **The Applicant started operations after having duly been licensed to operate by the Respondent.**
 - c. **There have been several inspections done on the Applicant's business operations by the Respondent and always the Respondent would find a reason to penalize the applicant allegedly for failing to comply with the regulations and provisions of the Central Bank of Kenya Act and Foreign Exchange Business/ Regulations 2007 and 2009 and also Foreign Bureau Guidelines.**
 - d. **As the Applicant started its business, it was required to maintain a minimum/statutory deposit with the Central Bank of US \$ 10,000 or its equivalent in Kenya Shillings however subsequent regulations were passed requiring the balances to be enhanced to US \$ 30,000**
 - e. **There were subsequent guidelines published via legal notice No. 82 of the Central Bank of Kenya (Foreign Exchange Bureau Penalties) Regulation 2009 which gave the Respondent discretion to levy penalties of up to Kshs. 500,000/= and or to an imprisonment term not exceeding 3 years upon conviction or to both.**
 - f. **The Respondent on 15th November 2013 revoked the Forex Bureau licence of the Applicant.**
 - g. **The revocation of the Applicant's licence was published in the Kenya Gazette of 6th December 2013.**
 - h. **The decision of the Respondent to revoke the forex bureau licence of the Applicant without following due process in its dealings with the Applicant is in itself a draconian act which has been reached at in bad faith and devoid of the doctrine of *ubrimae fidae*.**
 - i. **The Applicant's director's constitutional rights as to engagement of trade and profession stands shattered by the short sighted actions of the Respondents.**
 - j. **The Applicant therefore prays that the orders sought for be granted.**
3. The application was supported by a verifying affidavit sworn by Adrian Louis, a director of the applicant on 17th April, 2014.
4. According to the deponent, the Applicant was incorporated on the 29th January 2004 under the auspices of the **Companies Act** Chapter 486 Laws of Kenya and on or about the 31st March 2004, it applied to the Respondent to be licensed to operate a forex bureau. As the regulatory authority of forex bureau business within Kenya, the respondent carries out annual inspections on the forex bureau business of the Applicant with the first inspection having been carried out for the period ending 31st December 2006 and the report made in March 2007. The said report noted the Applicant did not have a Principal Officer and internal control weaknesses.
5. It was deposed that on 11th May 2007 the Applicant wrote to the Respondent and informed them of the appointment of a Principal Officer and the steps taken to rectify the internal controls.
6. The second inspection of the Applicant by the Respondent, according to the deponent was carried out for the period ending 31st March 2008 and the report made in April 2008 and according to the report, the Respondent noted the Applicant did not have an Assistant Principal Officer though the overall internal control were considered adequate. On 11th June 2008 the Applicant wrote to the Respondent and informed them the Assistant Principal Officer was on leave and the steps taken to improve on reconciliation schedules.
7. The third inspection of the Applicant by the Respondent, according to the deponent was carried out for the period ending 31st December 2008 and the report made in February 2009 in which it was noted that there were certain alleged violations of the Forex Bureau Guidelines by the Applicant and the respondent threatened to suspend the Applicant's forex bureau licence which threat was responded to by letters dated 9th March 2009 & 16th March 2009. On 18th March 2009 & 31st August 2009 the Respondent wrote to the Applicant and agreed to facilitate processing of

- the licence renewal. However, on 1st February 2010 the Respondent wrote to the Applicant and informed them about the amendments made to the **Central Bank of Kenya Act** imposing penalties for offences arising from foreign exchange dealings.
8. It was deposed that the fourth inspection of the Applicant by the Respondent was carried out for the period ending 31st March 2010 and the report made in June 2010 after which vide a letter dated 10th June 2010 from **Alex M. Nandi**, Assistant Director, Bank Supervision Dept. of the Respondent the Applicant was given 30 days to fulfil certain requirements of the Forex Bureau Guidelines and address internal control weaknesses. The same date, i.e. 10th June 2010 one **F. P. K. Pere**, the Director, Bank Supervision Department of the Respondent wrote to the Applicant alleging certain violations of the Forex Bureau Guidelines by the Applicant and thereafter proceeded to inform the Applicant that they were going to penalize the Applicant for the same. On 23rd June 2010 the Applicant wrote to the Respondent and addressed the issues raised in the inspection report by the Respondent. However, on 6th August 2010 the Respondent wrote to the Applicant and insisted that they were still going to levy the penalty which they arbitrarily put at Kshs. 500,000/= which is the maximum penalty which penalty the applicant paid on 31st August 2010.
 9. The fifth inspection of the Applicant by the Respondent was carried out for the period ending 30th April on 30th May 2011 & 31st May 2011 and in the letter of 20th June 2011 the Respondent alleged certain violations of the Forex Bureau Guidelines by the Applicant and thereafter proceeded to inform the Applicant that they were going to penalize the Applicant for the same which they arbitrarily put at Kshs. 500,000/= which is the maximum penalty provided for under the law. Despite the applicant's response that the issues had been addressed, on 12th September 2011 the Respondent informed the Applicant that they had recovered the penalty of Kshs. 500,000/= from the non-interest bearing deposit held with the Respondent which was the maximum penalty which penalty the applicant disputed. However, on 13th October 2011 the Respondent wrote to the Applicant and proceeded to suspend the applicant's licence.
 10. On 21st November 2011 the Applicant moved to court under Certificate of Urgency seeking orders of prohibition and certiorari which application was dismissed on 19th April 2011 and on 13th August 2013 the Respondent wrote to the Applicant and threatened to revoke the Applicant's licence and despite the applicant raising certain legal issues with the respondent through the applicant's advocates, the respondent wrote directly to the Applicant on 15th November 2013 informing them of revocation of their licence alleging that the Applicant was in breach of the Central Bank guidelines.
 11. It was averred that on 17th January 2014 the Respondent wrote to the Applicant and informed them the Respondent had revoked the forex bureau licence of the Applicant and published the revocation in the Kenya Gazette of 6th December 2013.
 12. According to the deponent, there is arbitrariness and a lot of partiality at how the decisions have been reached and the said decisions are against the rules of natural justice where a person cannot be a judge of its own cause as it is in the current case.
 13. To the deponent, the Central Bank of Kenya is not a court of law capable of quantifying penalties but it is an enforcer of regulations and the only body that is capable of levying such penalties is a court of law which can levy the same after hearing both the accuser and the accused hence the Respondent is usurping the powers donated to it under the act that constitutes it and is acting like a court of law when it is not. It was reiterated that there has not been fair hearing accorded to the company nor has its representatives appeared before an independent and impartial body to be heard before being condemned hence the company stands to suffer great losses as the capital injected in the business has mainly been sourced from the life time savings of its agents and also from taking up of mortgages on the properties belonging to the directors.
 14. The applicant therefore contended that the revocation of the Applicant's licence should not be allowed as the same has been reached at in bad faith and devoid of the doctrine of *ubrimae fidae*. Further, the company's director's constitutional rights as to engagement of trade and profession stands shattered by the short sighted actions of the Respondents.
 15. While admitting that there was Judicial Review Application No. 293 of 2011 (hereinafter referred to as "the former suit") between the same parties herein, it was contended that whereas the earlier

suit was seeking the suspension of the applicant's operations for 90 days, this cause seeks to quash Gazette Notice No. 15107 published on 6th December, 2013.

The Respondent's Case

16. On behalf of the respondent, the application was opposed vide a replying affidavit sworn by **Sylvester Cheruiyot Sawe**, its Manager in charge of Forex Bureau Surveillance on 30th May, 2014.
17. According to the deponent, the matters presented before this Court were the subject of Judicial Review Application 293 of 2011 which was fully and finally determined by this Honourable's Judgment delivered on 19th April 2013 hence the issues before the Honourable Court are *res judicata* and should not be entertained.
18. The Respondent further reiterated the contents of its affidavit filed in Nairobi Misc. H.C. Misc. Application (JR) No. 293 of 2011 filed before this Honourable Court and contended that the leave being sought to file a Judicial Review application following the *ex-parte* Applicant's contempt of this Honourable Court's decision is an abuse of process and should be dismissed with costs.
19. It was deposed that since the institution of Nairobi Misc. H.C. Misc. Application (JR) No. 293 of 2011 to date, the *ex-parte* Applicant has continued to operate, not because it has complied with the law, or even attempted to do so, but purely on the basis of the Stay Orders that were obtained pending determination of JR No. 293 of 2011. On being dismissed, the *ex-parte* Applicant continued with its gross violations, and when requested to comply with the law, filed the present application for the same purpose.
20. It was deposed that the *ex-parte* Applicant has completely disregarded the regulatory framework regarding forex bureaus which, if permitted to persist on this scale, will irreversibly affect Kenya's ability to deal with rampant crime.
21. It was averred that the Central Bank of Kenya is established by Section 3 (1) of the **Central Bank of Kenya Act** (Chapter 491 of the Laws of Kenya) and is empowered by this Act, to make rules and guidelines, and to regulate the operations of Forex Bureaus in Kenya.
22. The *ex-parte*, it was deposed, submitted an application for a foreign exchange licence to the Respondent in February 2004 and was granted the licence in August 2005 and therefore falls under the regulation and supervision of the Respondent. According to the deponent, the Respondent, in discharging its legal mandate and obligation, conducts regular inspections of all Forex bureaus in Kenya, to ensure that they comply with the laid down Guidelines and Regulations. Pursuant thereto, on various dated the respondents carried out inspection of the applicant's premises and found that the applicant had failed to comply with various Forex Bureau Guidelines and Central Bank of Kenya (Foreign Exchange Business) Regulations some of which the applicant admitted and agreed to rectify and in instances paid the penalties levied by the respondent.
23. These inspections and breaches rested with the inspection of 30th April 2011, which revealed further violation of section 4.1, 4.10(5), 4.8(2), 4.1(3)(c), 4.8(1), 4.9(5) 4.3(1), 4.10(3) and 4.3(12) the Forex Bureau Guidelines and as a consequence of this non compliance, a notice of intention to levy penalty on the Bureau was issued on 20th June 2011 to which the applicant responded on July 4th 2011 disputing and admitting some of the violations that had been revealed by the inspection. On 12th July 2011, the Respondent, upon review of the representations from the *ex-parte* Applicant and discussions with its management levied the penalty of Ksh.500, 000 in accordance with Regulation 6(2) of the **Central Bank of Kenya Act (Foreign Exchange Bureau (Penalties) Regulations 2009** which was payable subject to the condition that failure to pay up within 30 days would result to the amount being recovered from the *ex-parte* Applicant's non-interest bearing deposit and a suspension of their licence in 90 days. This action was disputed by the applicant and as a consequence of failing to raise the amount as required, the Respondent suspended the *ex-parte* Applicant's licence for 90 days with effect from 13th October, 2011. In addition, the Bureau was directed by the bank not to transact any business during this suspension period. However, on 10th and 17th November 2011, when the Respondent sent its officials to confirm whether the *ex-parte* Applicant had closed operation as directed, the officers found that the *ex-parte* Applicant was still in operation and as a consequence of violation of the suspension order, a notice of

- intention to revoke the *ex-parte* Applicant's licence was issued on November 17, 2011 giving the directors 14 days to show cause why the licence should not be revoked for failure to comply with the Bank's directive.
24. This, it was deposed provoked the applicant into filing Judicial Review Miscellaneous Application No.293 of 2011 in which it obtained an *ex-parte* Court Order prohibiting the Respondent from enforcing its directive of suspending the licence of the *ex-parte* Applicant for the period of 90 days. On 19th April 2013 the Judgment on the judicial review application was delivered wherein the application was dismissed with costs and the Respondent's mandate to regulate and supervise the affairs of the *ex-parte* Applicant was affirmed and restored.
 25. On 13th August 2013, the Respondent wrote a letter to draw the attention of the *ex-parte* Applicant's directors to the judgment and to remind them of their obligations under the **Central Bank of Kenya Act** giving them a 14 days notice period within which to submit their compliance status on the aforementioned issues failure to which the Respondent would proceed to revoke their licence to transact in foreign exchange business as per section 6.2(2) of the Forex Bureau Guidelines and section 33D of the **Central Bank of Kenya Act**. Instead of complying with the law, on 26th August 2013, the Bureau through its present advocates, Mungai Kalande & Company Advocates, responded to the notice to revoke by alleging that they had not been given an opportunity to be heard which allegation is false as illustrated by all the correspondence ongoing between the parties and as affirmed by the Honourable Court's Judgment which remains in force as there been no appeal preferred.
 26. Accordingly, on the 15th of November 2013, the Respondent revoked the *ex-parte* Applicant's licence due to non-compliance with the Regulations aforementioned which revocation was published in the Kenya gazette Notice No.15107 of 6th December 2013 and is still in force.
 27. It was this action that provoked the applicant into instituting the current proceedings in which the applicant seeks to quash the gazette notice No. 15107, to compel reinstatement of their licence and prohibit the Respondent, its servants or agents from closing down or in any way interfere with its Forex bureau business.
 28. According to the respondent the applicant continues to be in violation of the provisions of the said Act and Regulations.

Determinations

29. I have considered the foregoing including the submissions filed on behalf of the parties herein and the authorities relied upon.
30. The first issue for determination is whether the instant applicant is caught up by the doctrine of *res judicata*.
31. It is not in doubt that the applicant had instituted Judicial Review Miscellaneous Application No.293 of 2011 in which it sought orders prohibiting the Respondent from enforcing its directive of suspending the licence of the *ex-parte* Applicant for the period of 90 days. Following the dismissal of the said case, the respondent proceeded to implement its decision and published the same in the impugned Gazette Notice.
32. As the applicant contends that the two causes of action are not the same, it is important to revisit the legal principles guiding the applicability of the doctrine of *res judicata*.
33. In the case of **Lotta vs. Tanaki [2003] 2 EA 556** it was held as follows:

“The doctrine of *res judicata* is provided for in Order 9 of the Civil Procedure Code of 1966 and its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgement between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit. The scheme of section 9 therefore contemplates five conditions which, when co-existent, will bar a subsequent suit. The Conditions are: (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit; (ii) the former suit must have been between the same parties or privies claiming under them; (iii) the parties must have litigated under the same title in the former suit; (iv) the court which decided the former suit must have been competent to try the subsequent suit; and (v) the matter in issue

must have been heard and finally decided in the former suit”.

34. In the case of Gurbachan Singh Kalsi vs. Yowani Ekori Civil Appeal No. 62 of 1958 the former East African Court of Appeal stated as follows:

“Where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time...No more actions than one can be brought for the same cause of action and the principle is that where there is but one cause of action, damages must be assessed once and for all...A cause of action is every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.”

35. In the case of Apondi vs. Canuald Metal Packaging [2005] 1 EA 12 Waki, JA stated as follows:

“A party is at liberty to choose a forum which has the jurisdiction to adjudicate his claim, or choose to forego part of his claim and he cannot be heard to complain about that choice after the event and it would be otherwise oppressive and prejudicial to other parties and an abuse of the Court process to allow litigation by instalments”.

36. However, I must say here that the mere addition of parties in a subsequent suit does not necessarily render the doctrine of *res judicata* inapplicable since a party cannot escape the said doctrine by simply undertaking a cosmetic surgery to his pleadings. If the added parties peg their claim under the same title as the parties in the earlier suit, the doctrine will still be invoked since the addition of the party would in that case be for the sole purpose of decoration and dressing and nothing else. Under explanation 6 to section 7 of the *Civil Procedure Act*, where persons litigate *bona fide* in respect of a public right claimed in common by themselves and others, all persons interested in such right shall, for the purposes of the section, be deemed to claim under the persons so litigating.

37. In the cases of Mburu Kinyua vs. Gachini Tuti [1978] KLR 69; [1976-80] 1 KLR 790 and Churanji Lal & Co vs. Bhaijee (1932) 14 KLR 28 it was held that:

“

However, caution must be taken to distinguish between discovery of new facts and fresh happenings. The former may not necessarily escape the application of the doctrine since parties cannot by face-lifting the pleadings evade the said doctrine. In the case of *Siri Ram Kaura vs. M J E Morgan Civil Application No. 71 of 1960 [1961] EA 462* the then East African Court of Appeal stated as follows:

‘The general principle is that a party cannot in a subsequent proceeding raise a ground of claim or defence which has been decided or which, upon the pleadings or the form of issue, was open to him in a former proceeding between the same parties. The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceedings is no answer to a defence of *res judicata*...The law with regard to *res judicata* is that it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in a litigation can be allowed to re-open that

litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up to the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show you that this is a fact which entirely changes the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have been ascertained by me before...The point is not whether the respondent was badly advised in bringing the first application prematurely; but whether he has since discovered a fact which entirely changes the aspect of the case and which could not have been discovered with reasonable diligence when he made his first application.”.

38. It is therefore clear that parties are not to evade the application of *res judicata* by simply conjuring up parties or issues with a view to giving the case a different complexion from the one that was given to the former suit.
39. In the former case the applicants were alleging that the respondent had no powers to levy the penalty it had imposed on the applicant. The Court however overruled this contention in its decision and that decision still stands. Accordingly, the applicant is precluded from raising the same issue in these proceedings since the process which gave rise to the earlier suit is substantially the same process which gave rise to these proceedings.
40. In these proceedings, it is alleged that the applicant was never afforded an opportunity of being heard. First it is clear that the decision made by the respondent which gave rise to the impugned Gazette Notice was not pegged on fresh facts but was pegged on facts that existed at the time the earlier proceedings were instituted. Accordingly, the issue of violation of the rules of natural justice could have been raised in the earlier proceedings. If the applicant, as a result of negligence, inadvertence, or even accident, omitted part of its case, in this case alleged violation of the rules of natural justice, it cannot be permitted to raise the same issue in these proceedings.
41. From the replying affidavit it is clear that the applicant was afforded an opportunity of being heard before the impugned gazette notice was issued. As was held in **Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998:**

“Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it.”

15. Although the applicant is challenging the decision contained in the Gazette Notice, it is clear from the material before the Court that the Gazette Notice was not the decision but just a transmission of the decision. The effect and import of a Gazette Notice was determined in **Catholic Diocese of Moshi vs. Attorney General [2000] 1 EA 25 (CAT)**, where it was held that the whole objective behind such publication is to bring the purport of the order concerned to the notice of the public or persons likely to be affected by it, thereby making the legal maxim “ignorance of the law does not excuse” more rational, in view of the growing stream of delegated legislation. Therefore, it is my view and I so hold that unless the instrument in question expressly provides that the decision in question is to be by way of gazette, the gazette is merely an instrument of information and is not to be construed as the decision itself. As was held in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001:**

“Where a decision is made and its making has been made known to the Respondents who did not challenge the same within 6 months of its being made by way of *certiorari* to have it moved into the High Court and be quashed, it is not open for them to seek to have the Appellant prohibited from implementing the decision...”

Order

42. Consequently, I find no merit in the Notice of Motion dated 17th April, 2014 and the order which commends itself to me and which I hereby grant is that the said Motion be and is hereby dismissed with costs.

Dated at Nairobi this 20th day of February, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ouma for the Respondent

Cc Simiyu