REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(JUDICIAL REVIEW & CONSTITUTIONAL DIVISION)

JR MISC. APPLICATION NO. 193 OF 2014

THE LAW REFORM ACT & THE CIVIL PROCEDURE ACT

IN THE MATTER OF ORDER 53 RULES 1(1), 1(2) AND 1(4) OF THE CIVIL PROCEDURE RULES, SECTION 8 OF THE LAW REFORM ACT, CAP 26, AND THE INHERENT POWER OF THE COURT

IN THE MATTER OF APPLICATION BY PARAGON ELECTRONICS FOR LEAVE TO APPLY FOR ORDERS OF MANDAMUS, CERTIORARI AND PROHIBITION

REPUBLIC……..……..……..APPLICANT

VERSUS

KENYA REVENUE AUTHORITY…….RESPONDENT

EX PARTE: **PARAGON ELECTRONICS LIMITED**

RULING

Introduction

1. By a Notice of Motion dated 28th May, 2014, the *ex parte* applicant herein, **Paragon Electronics Limited,** sought the following orders:

1. **An order of prohibition do issue to prohibit the Respondent from acting upon its decision contained in its letter of 8th April 2014 which purports to assess the Applicant's Value Added Tax ("VAT") liability at Kshs. 104,308,782 and the Applicant's Withholding Tax liability at Kshs. 1,199,537.**
2. **An order of Certiorari do issue to remove into the High Court and quash the said decision of the Respondent of 8th April 2014.**
3. **An order of Mandamus do issue to compel the Respondent to comply with the provisions of the Value Added Tax Act and the income Tax Act in Relation to:**

    (i) the determination of taxable value for taxable supplies made under the Value Added Tax Act; and

(ii)the obligations of a taxpayer in relation to the deduction and remittance of withholding tax under the Income Tax Act;

4. **An order of prohibition do issue to prohibit the Respondent from issuing any further demands for payment of instituting recovery mechanisms for the sum of Kshs. 104,308,782 and Kshs. 1,199,537 (in total Kshs. 105,508,320) prior to complying with the provisions of the value Added Tax Act and the Income Tax Act in relation to the subject matter of the dispute; and**
5. **The costs of this application be provided for.**

Ex Parte Applicant's Case

2. After considering the application the Court found that the applicant ought to have exercised other available alternative statutory options before instituting these judicial review proceedings as prescribed under section 9 of the ***Fair Administrative Action Act, 2015***. Accordingly this Court struck out the application.
3. Immediately after the delivery of the ruling, **Mr Wairoto**, learned counsel for the Applicant applied for a stay for 30 days. Though the application was opposed by **Mr Chaballa**, learned counsel for the respondent, I directed that the *status quo* be maintained for 21 days.
4. The applicant has now moved this Court by a Motion on Notice dated 26th October, 2015, seeking that the said *status quo* order be extended pending the hearing of the Applicant's appeal against the decision of Respondent dated 8th October, 2015 confirming a claim against the Applicant for Value Added Tax in the sum of Kshs 104,308,782/=. It is important to note that that was the subject of these judicial review proceedings.
5. According to the applicant on 8th May, 2014, it filed a Notice of Appeal challenging the said confirmation. However the Local Committee was abolished on 2nd September, 2014 and replaced by the Tax Appeals Tribunal (hereinafter referred to as "the Tribunal") on 1st April, 2015. Although the Applicant has filed the requisite appeal documents before the said Tribunal, the said Tribunal is not yet operational hence the need to extend the order of the status quo granted herein in order to safeguard the interests of the Applicant. The Applicant confirmed that it was ready to abide by the same conditions that this Court gave during the pendency of these judicial review proceedings.
6. In his submissions, **Mr Wairoto** informed the Court that only last week were the Tribunal Rules gazetted and that the said Rules, unlike the provisions of section 38 of the repealed ***Value Added Tax Act***, under which the stay was automatic, does not have similar provisions though they do empower the Tribunal to grant a stay. However as the Tribunal is yet to commence its sittings, it is necessary to apply for the orders sought herein.
7. **Mr Wairoto** argued that this Court has residual jurisdiction to preserve the *status quo* in order to allow the appeal to be heard and that by doing so, the Court will not be reviving the dismissed proceedings as alleged since he applicant is not seeking any prerogative orders.
8. The application was opposed by the Respondent. According to the Respondent this Court having made final determination in these judicial review proceedings, it has no jurisdiction to hear any other applications arising subsequent to the said judgement (sic) as the suit nolonger exists. It was therefore contended that the suit having been dismissed the prayer for *status quo* cannot lie since by striking out the application the Court did not make any orders capable of being implemented.
9. It was contended in the affidavit that the appeal having been filed by the Applicant before the Tribunal, the tax in dispute is stood over by operation of the law hence this application is unmerited and is an abuse of the process of the law.
10. In his submissions, **Mr Nyagah**, learned counsel for the Applicant while conceding that there is no provision that automatically stays the collection of the tax on the filing of an appeal to the Tribunal, contended that the Respondent is still guided by the provisions of the repealed Act in such matters. It was submitted that this Court is now *functus officio* in so far as these proceedings are concerned as this matter has ceased to exist following the decision rendered herein. It was submitted that the proceedings having been struck out there are no orders capable of being executed hence no orders to stay. The grant of an order for *status quo*, it was submitted would

amount to the revival of these proceedings.

11. I have considered the application herein. It was contended that this Court is *functus officio* and cannot consider the prayers sought herein. That submission is too broad and is not entirely true. The Court of Appeal in **Biren Amritlal Shah & Another vs. Republic & 3 Others [2013] eKLR** expressed itself on section 8(5) of the ***Law Reform Act*** as follows:

"It is therefore quite clear that appeals in respect of orders made under judicial review lie with the Court of Appeal. Therefore, in answering the question whether the High Court had jurisdiction to entertain a review application, we agree with the learned judge of the High Court that, in exercising its special jurisdiction under the *Law Reform Act,* the High Court had no jurisdiction to review its previous order."

12. Whereas the same Court however held in **Nakumatt Holdings Limited vs. Commissioner of Value Added Tax [2011] eKLR** that the superior court in the matter before the court has the residual power to correct its own mistake, in my view to the extent that the Court has no powers under Order 45 of the ***Civil Procedure Rules*** to review its orders made on judicial review, I agree that the Court of Appeal's decision in **Biren Amritlal Shah & Another vs. Republic** (supra) cannot be faulted. However, as the Court of Appeal appreciated in **Nakumatt Holdings Limited vs. Commissioner of Value Added Tax [2011] eKLR**, the superior court in the matter before the court has the residual power to correct its own mistake. Accordingly, where a mistake is shown to have been committed which is remediable by the Court the same ought to be corrected by the Court in the exercise of its inherent jurisdiction. In my view where a mistake has been brought to the attention of the Court which is capable of being remedied, be it by review or otherwise, I do not see any bar to the Court invoking its inherent powers to do so, the nature of the proceedings in question notwithstanding.

13. However, whether the Court will exercise such powers in judicial review proceedings depends on the nature of the prayer sought and their impact on the said proceedings. Where judicial review proceedings have been determined and the applicant does not set out to set aside the order determining the same, but seeks orders which are totally unrelated to the matter which was placed before the Court for determination, it is my view that the provisions of section 8(2) and (3) of the ***Law Reform Act***, become relevant. Those provisions state:

(2) In in any case in which the High Court in England is, by virtue of the provisions of section 7 of the Administration of Justice Act empowered to make an order of mandamus, prohibition or certiorari, the High Court shall have power to make a like order.

(3) No return shall be made to any such order, and no pleadings in prohibition shall be allowed, but the order shall be final, subject to the right of appeal therefrom conferred by subsection (5) of this section.

14. In my view what this section means is that once a determination is made, the Court ought not to revisit the proceedings already determined save for the limited purpose of either implementing its orders or where the Court is moved to set aside its decision.

15. In this case the Applicant is neither seeking to set aside this Court's orders nor to implement the same. What the applicant is seeking is to perpetuate the orders of stay granted herein. That would be the effect of extending the order for status quo. However the same was, as is stated in Order 53 rule 1(4) of the ***Civil Procedure Rules,*** pegged on the existence of leave save for the limited and exceptional circumstances when the Court may invoke its inherent powers. Even so, the stay can only apply to the *proceedings in question*. In this case the proceedings in question were those related to the decision contained in the Respondent's letter of 8th April 2014 assessing the Applicant's Value Added Tax ("VAT") liability at Kshs. 104,308,782 and the Applicant's Withholding Tax liability at Kshs. 1,199,537.00. In the instant application however what the applicant seeks are preservatory orders pending the Appeal before the Tribunal. In other words no decision is under challenge in these proceedings. To grant the orders sought herein whose effect would be to stay the decision of the Respondent would fall outside the ambit of the aforesaid provisions and would be without jurisdiction.

16. The applicant contends that though the law empowers the Tribunal to grant stay, the said Tribunal is not fully operational hence it is unable to consider the applicant's plea for stay. In my view, where a remedy provided under the Act is made illusory with the result that it is practically a mirage, the Court will not shirk from its Constitutional mandate to ensure that the provisions of Article 50(1) are attained with respect to ensuring that a person's right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body is achieved. Apart from that Article 48 of the Constitution provides:

The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.

17. To provide for a remedy in Legislation and then fail to facilitate the realisation of the said remedy by putting into place the machinery through which the same may be realised amounts in my view to a denial of this right. As was rightly stated in **Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya HCMCA No. 13 of 2008** it is the responsibility of the Court to ensure that executive action is exercised; that Parliament intended and that the High Court has the responsibility for the maintenance of the rule of law; that there cannot be a gap in the application of the rule of law; that the Court must at all times embrace a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law. Therefore where there is a lacuna with respect to enforcement of remedies provided under the Constitution or an Act of Parliament, or if, through the procedure provided under an Act of Parliament, an aggrieved party is left with no alternative but to invoke the jurisdiction of the Court and the Court is perfectly within its rights to investigate the allegations. To fail to do so would be to engender and abet an injustice and as has been held before, a court of justice has no jurisdiction to do injustice. See **M Mwenesi vs. Shirley Luckhurst & Another Civil Application No. Nai. 170 of 2000** and **Kenya Industrial Estates Ltd vs. Transland Shoe Manufacturers Ltd. & 2 Others Civil Application No. Nai. 364 of 1999.**
18. The law being a living thing, a court would be shirking its responsibility were it to say, assuming that there be no existing recognised remedy covering the facts of a particular case, "Why then, this must be an end to it". The law may be thought to have failed if it can offer no remedy for the deliberate acts of one person which injures another. See **Bollinger vs. Costa Brava Wine Co. Ltd [1960] 1 Ch. 262 at 238.**
19. As was held in **Chege Kimotho & Others vs. Vesters & Another [1988] KLR 48; VOL. 1 KAR 1192; [1986-1989] EA 57** citing **Midland Bank Trust Co. vs. Green [1982] 2 WLR 130:**

"The law is a living thing: it adopts and develops to fulfil the needs of living people whom it both governs and serves. Like clothes it should be made to fit people. It must never be strangled by the dead hands of long discarded custom, belief, doctrine or principle."

20. The law must, of necessity, adapt itself; it cannot lay still.It must adapt to the changing social conditions. The court in the modern society in which we live cannot deny a deserving litigant a remedy. The courts have recognised that unlawful interference with a citizen's rights give rise to a right to claim redress and if the *ex parte* applicant has a right he must of necessity have the means to vindicate it and a remedy if they are injured in the enjoyment or exercise of it: and indeed, it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal. Whether or not they will be able to prove that their rights have been contravened or infringed is another matter altogether. See **Rookes vs. Barnard [1964] AC 1129** and **Ashby vs. White [1703] 2 Ld Raym.938; 92 ER 126.**
21. In **Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya** (supra) it was held that just as nature abhors a vacuum, even the enforcement of the rule of law abhors a vacuum or a gap in its enforcement and proceeded to uphold the jurisprudence that helps to "illuminate the dark spots and shadows in all circumstances, so that justice as a beacon of light and democratic ideals are practiced and hailed at all times over the hills, valleys, towns and homes in this beautiful land of Kenya. The mantle of justice and the rule of law must cover all

corners of Kenya in all stations. Courts have a continuing obligation to be the foremost protectors of the rule of law".

22. What then is a person in the circumstances of the applicant herein ought to do? It is my view that the Applicant cannot return to these proceedings for the purposes of seeking conservatory or preservatory orders pending the hearing and determination of its appeal to the Tribunal. Similar circumstances arose in **Kite Sacco Society Ltd vs. Simon Peter Otieno Kisumu HCCA No. 114 of 2001** where the Court appreciated that although the dispute between the Respondent and the Co-operative society fell under section 76 of the ***Co-operative Societies Act***, and ordinary courts are precluded from entertaining such disputes, the Court may entertain proceedings for preservative interlocutory orders where the justice of the case demands pending the determination of the dispute before the appropriate Tribunal. Such jurisdiction is however donated to the normal civil courts rather than judicial review courts. Accordingly, even if the Tribunal herein is not operational, the High Court is not precluded when properly moved from granting preservatory orders.
23. It is however my view that this is not the right forum where such orders ought to be sought.
24. In the premises, the Motion on Notice dated 26th October, 2015 is incompetent and is hereby struck out but with no order as to costs in light of the contention by the Respondent that notwithstanding the fact that there is no automatic stay on the filing of an appeal, the former legal position that an appeal having been filed by the Applicant before the Tribunal, the tax in dispute is stood over still remains the practice.

Dated at Nairobi this 13th day of November, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Munara for Mr Wairoto for the Applicant

Mr Kiragu for Miss Mwaniki for the Respondent

Cc Patricia