REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION NUMBER 243 OF 2012

ANDERS BRUEL T/A QUEENCROSSS AVIATION..........PETITIONER/APPLICANT

VERSUS

KENYA CIVIL AVIATION AUTHORITY......................................1ST RESPONDENT

THE HON. ATTORNEY GENERAL...2ND RESPONDENT

RULING

Introduction

1. On 12th October 2012, I delivered judgment in this petition in which I dismissed the petition and found that the petitioner had failed to demonstrate that there had been a violation of his rights under Articles 27, 40 and 47 in respect of aircrafts numbers 5Y-EKO and 5Y-BMA.

2. The petitioner has now filed this application by way of Notice of Motion dated 2nd November, 2012 in which he seeks, among others, the following orders:

a) …..
b) ….

c) The Judgment/Decree of 12th October, 2012 be reviewed and set aside and the petition be allowed as prayed.

d) The 1st Respondent do issue the Petitioner with Certificates of Registration pursuant to Rule 4(4) of the Civil Aviation (Aircraft Registration and Marking) Regulation, 2007 in respect of the aircrafts 5Y-EKO and 5Y-BMA.

e) The court be pleased to grant any other orders in the interests of justice.

f) Costs be in the cause.

3. The application is supported by an affidavit sworn in Copenhagen, Denmark on 30th October, 2012 by the petitioner/applicant, Anders Bruel, and another sworn by Ulrik Holsted-Sandgreen on 26th of October, 2012.

4. The 1st respondent opposes the application and has filed grounds of opposition dated 5th November, 2012. The 2nd respondent has not filed a reply to the application. Both the petitioner and 1st respondent have filed written submissions, dated 3rd December and 20th December, 2012 respectively which they requested the court to rely on in making its determination of this application.

5. The application seeks a review of the judgment on several grounds which are set out in his application. The first is that there was an error apparent on the face of the record with regard to his legal capacity. He alleges that the name 'Queenscross Aviation' is a business name and not a limited liability company, and that he had used this business in his trading capacity. He therefore charged that the court erred in finding that he had no *locus standi* in the Petition.

6. The second ground relied on in the application is that the 1st respondent purported to act on a non-existent court order in **Moses Wachira vs. Niels Bruel HCCC No. 16 of 2006** which barred transfer of ownership in the two aircrafts. He contends that these orders had lapsed on 30th of March, 2011 and had not been extended, and that upon an application to extend the orders, Lady Justice Okwengu declined to do so and ordered that the Plaintiff in **Moses Wachira vs. Niels Bruel HCCC No. 16 of 2006** make a formal application for extension of the orders.

7. The applicant also contends that there was an error on the face of the record with regard to the interpretation of Rule 4 of the Civil Aviation (Aircraft Registration and Marking) Regulations 2007. The applicant contends that the 1st respondent did not bring it to the attention of the court that registration of an aircraft by a foreigner is permissible under this regulation so long as the aircraft is leased to a qualified person in Kenya. The applicant therefore contends that his lack of residency status should not have been an impediment to registration. He submits that Danish Law did not require the petitioner to register his sole proprietorship, Queenscross Aviation.

8. The petitioner also alleges that there was discovery of new material in respect of proceedings before Justice Okwengu **Moses Wachira vs. Niels Bruel HCCC No. 16 of 2006** and asserts that this court could have also called for these proceedings on its own motion as they were in the public domain.

9. The applicant submits in respect of prayer number 4 in his application that he should be allowed to effect the change in the ownership of the two aircrafts to reflect his name and business name, a prayer that was not in the petition the subject of the judgment of 12th October 2012. He argues that the effect of the judgment is to deprive him of his property and enable the 1st respondent and or other persons to seize his property.

10. In response to the petitioner's application and submissions, the 1st respondent argues that the entire application before me is an abuse of the court process; that the court rendered its decision in the matter on 12th October, 2012 and is thus *functus officio;* that asking this court to review its decision is tantamount to asking the court to sit on appeal on its own decision.

11. The respondent also submits that if there was an error on the face of the record, it should be apparent, not the subject of arguments. By contending that the court did not appreciate Danish law, the applicant is raising an issue for appeal, not review

12. The 1st respondent submits further that the applicant has already lodged a Notice of Appeal against the judgment of this court and cannot purport to bring an application for review of the same decision; that the applicant has not demonstrated an error apparent on the face of the record; and that the provisions of the Constitution invoked by the applicant do not donate any power to this court to review its decision.

Determination

13. Two issues arise for determination in this matter. The first is whether this court has power to review its decision. If the answer is in the affirmative, whether the grounds on which a court can review a matter

have been established by the applicant in this matter.

14. The application is expressed to be brought under the provisions of Articles 22, 23, 40, 48, 159, and 165 of the Constitution, and rules 8, 9, and 20 of the Civil Aviation Rules. None of these provisions provide for review of decisions made on the hearing of a petition alleging violation of constitutional rights. Even the rules of court that govern the procedure for hearing of constitutional petitions, the **Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of The Individual) High Court Practice and Procedure Rules, 2006** are silent in this regard. However, the standard with regard to hearing of matters alleging violation of fundamental rights has, in my view, been set by the Constitution, albeit indirectly. Article 22 of the Constitution requires that the Chief Justice shall makes rules which require, among other things, that the court shall not be unduly restricted by procedural technicalities. Article 159(2)(d), which vests judicial authority on the courts, also contains a similar provision. My understanding of these provisions is that even if there is no specific provision in the Rules allowing the court to review its decision, should the court find that a case has been made out for review of its decision, then it would be duty bound to review its decision.

15. Before addressing my mind to the application for review in this matter, it is important to consider the circumstances established in the law and judicial precedents under which the court can exercise its powers to review its decision. In this regard, the provisions of the Civil Procedure Rules with regard to review provide some guidance. Order 45 Rule 1 of the Civil Procedure Rules 2010 allows a party who considers himself aggrieved by an order or decree from which an appeal is allowed, '**but from which no appeal has been preferred'** to file an application for review if there are new and important matters which have been discovered at the time of the hearing, or because of an error apparent on the face of the record.

16. The respondent submits that the applicant has lodged a Notice of Appeal against the decision made by this court on 12th October 2012, and is therefore not entitled to a review. However, I agree with the applicant that, on the authority of the constitution and the decision in Gucokaniriria Kihato Traders & Farmers Co. Ltd -v- The Attorney General Nairobi High Court Misc Civil Appl No 1251 of 2002, a Notice of Appeal simply shows an intention to appeal and is not an appeal. I therefore hold that the application for review is properly before me.

17. To succeed in his application, the petitioner needs to show the discovery of new material or evidence that was not available, with the exercise of due diligence, at the time of the hearing, demonstrate there is an error apparent on the face of the record. First, this application is premised on the grounds that the court made an error apparent on the face of the record with regard to the ownership of the aircrafts the subject matter of the petition. Black's Law Dictionary defines **apparent** as, *"That which is obvious, evident or manifest."*

18. In the case of Nyamongo & Nyamongo Advocates -v- Kogo CA No 322 of 2000, the Court of Appeal observed as follows with regard to review:

"There is a real distinction between mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error on the face of the record…. A mere error or wrong view is certainly no ground for a review although it may be for an appeal."

19. The petitioner has relied on the affidavit of Ulrik Holsted-Sandgreen, described as a qualified lawyer based in Denmark, in his affidavit sworn on 26th October 2012 in support of the application for review, in which he makes certain averments with regard to Danish Law, in particular that according to Danish Law, it is not a pre-requisite for a sole proprietorship to be registered with the Danish Business Authority or any other Governmental Agency to give effect to the sole proprietorship as long as the undertaking is not liable to pay Value Added Tax. It is not clear what this affidavit is intended to achieve. The matters that are deponed to in the affidavit were not before the court at the time this petition was heard. They were not in the pleadings by the petition, nor were they brought before the court as judicial authorities. To consider

them in an application for review would, in my view, amount to a re-opening of the petitioner's case and admitting evidence that was not before the court at the hearing of the petition. At any rate, these matters do not constitute an error ***'apparent on the face of the record.'*** To take them into account would amount to permitting these matters to be adduced as additional evidence and a re-consideration of the facts presented before the court. What the court is being asked to do is not to review its decision because there are errors apparent on the face of the record, but to allow the introduction of new matters by the petitioner.

20. The petitioner also raises the issue of the proceedings before Okwengu, J in HCCC No 16 of 2006 and asserts that they constitute material that the court should have called for on its own motion. He also asserts that the 1st respondent had not drawn to the attention of the court the provisions of Rule 4(4) of the Civil Aviation Rules with regard to registration of an aircraft to a foreigner.

21. In determining this petition, the court was concerned with allegations by the petitioner that there had been violation of his constitutional rights by the respondents. The burden lay on the petitioner to place before the court all such material as he deemed necessary to demonstrate which of his constitutional rights had been violated. I am yet to see a rule or precedent that places a burden on the court to call for files in other matters to assist a party establish his claim. Nor can the petitioner properly complain that the 1st respondent failed to draw attention to any of the Civil Aviation Rules. The responsibility lies squarely with the petitioner and his Counsel to bring all such information and draw attention to all the rules that would assist the petitioner in establishing his claim, and it is strange that he now wishes to lay responsibility for his omissions on the court and the 1st respondent.

22. At any rate, all the matters that the petitioner raises in his application do not meet the standard for review. They call for argument and examination of the material that was before the court, and for an analysis of whether or not the court failed to appreciate the material before it, or to capture the intricacies of the law, including Danish Law that was not before the court but is now being adduced before the court by way of affidavit. Such arguments are properly within the jurisdiction of an appellate court and cannot form the basis for review.

23. In the circumstances, I find that this application is an abuse of the court process and it is hereby dismissed with costs to the respondents.

Dated Delivered and Signed at Nairobi this 14th day of March, 2013.

Mumbi Ngugi
Judge