



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 293 OF 2011

REPUBLICAPPLICANT

VERSUS

THE GOVERNOR CENTRAL BANK OF KENYA.....1ST RESPONDENT

THE ATTORNEY GENERAL2ND RESPONDENT

EX-PARTE

CAPITAL HILL FOREX BUREAU LIMITED

JUDGMENT

Through a notice of motion dated 6th December, 2011 the ex-parte applicant Capital Hill Forex Bureau Limited, a limited liability company incorporated under the Companies Act, Cap. 486 of the Laws of Kenya and licensed to carry out forex bureau business in Kenya prays for orders as follows:-

- 1. This honourable court do hereby grant orders of prohibition to the ex-parte Applicant against the Respondents essentially prohibiting them from arbitrarily suspending and or closing down the ex-parte Applicant's Forex Bureau business as operating from the 1st Floor NHIF Building, Ngong Road, Nairobi.**
- 2. An order of certiorari do issue to remove into the High Court and quash the decision of the 1st Respondent dated 13th October, 2011 to suspend the operations of the ex-parte Applicant for 90 days.**
- 3. Costs of this application be borne by the Respondents.**

The application is grounded upon a statutory statement dated 21st November, 2011 and a verifying affidavit sworn on the same date by Adrian Louis, a director of the applicant.

For purposes of record, it is noted that the applicant had initially brought these proceedings against the Governor of the Central Bank of Kenya as the 1st respondent and the Attorney General of the Republic of Kenya as the 2nd respondent. On 10th December, 2012 the applicant and the Governor Central Bank of Kenya entered a consent in which the Attorney General was removed from these proceedings. As such the Governor Central Bank of Kenya is the only respondent in this matter.

The applicant's case is that on 31st March, 2004 it was granted a licence to operate a business dealing in exchange of foreign currencies. Thereafter the applicant's licence was renewed annually without any hindrance. It is the applicant's case that its problems commenced in 2010 when the respondent's officers carried out inspection on its business and concluded that it had breached the Central Bank of Kenya Act, Cap. 491 and various regulations made under the Act.

A penalty of Kshs.500,000/= was subsequently imposed and the applicant paid the same. However, its tribulations did not end there. On 30th May, 2011 the applicant was informed of an impromptu inspection to take place on the same date. The applicant co-operated with the respondent's officers. After the inspection, the applicant was notified through a letter dated 20th June, 2011 that it had failed to comply with various sections of the Forex Bureau Guidelines. It was through the same letter notified of the respondent's intention to impose a penalty of Kshs.500,000/= for non-compliance with the guidelines. The applicant wrote a letter dated 4th July, 2011 to the respondent indicating the steps it had taken to rectify the shortcomings pointed out in the inspection report. The applicant at the same time appealed against the proposal to impose a penalty of kshs.500,000/=. The respondent nonetheless through a letter dated 12th July, 2011 went ahead and assessed a penalty of Kshs.500,000/= against the applicant to be paid within 14 days from the date of the letter. Through the same letter the applicant was notified thus:-

“Please note that in the event that you do not pay as stipulated, the amount will be recovered from your non-interest bearing deposit and this will result in breach of the guidelines by the bureau. The bureau will then be required to raise the amount in the non interest bearing deposit to the level of US \$ 30,000 as provided under Regulation 6(3) within thirty (30) days failure to which the licence will be suspended.”

It is presumed that the respondent was referring to Regulation 6(3) of the Central Bank of Kenya (Foreign Exchange Bureau) (Penalties) Regulations 2009 since the said letter accused the applicant of having breached the said regulations. Subsequently, through another letter dated 12th September, 2011, in which the letter dated 12th July, 2011 is referred to, the applicant is informed that the penalty sum of kshs.500,000 had been recovered from its non-interest bearing deposit held with the respondent. The applicant was then given directives as follows:-

“The directors of Capital Hill Forex Bureau Ltd are therefore required to raise the non-interest bearing deposit to the level of USD 30,000 as provided under Regulation 6(3) within thirty (30) days from the date of this letter

Kindly note that failure to remit the amount to the Central Bank of Kenya will lead to suspension of the bureau's licence for ninety (90) days. In addition, the directors are required to note that any subsequent violations will result in revocation of the bureau's licence.”

The applicant responded through a letter dated 26th September, 2011. I need not go into the details of the said response save to point out that the applicant indicated that it had been treated unfairly by the respondent. The respondent was however not done with the applicant and through a letter dated 13th October, 2011 the applicant's licence was suspended. The said letter stated in part:-

“In this regard, we note that the notice period of 30 days given to Capital Hill Forex Bureau Ltd to restore the non-interest bearing deposit to the statutory level of USD 30,000 expired on 12th October, 2011 and the bureau has not restored the non-interest bearing deposit to the statutory level as required. On account of the foregoing and in accordance with Section 33D of Central Bank of Kenya Act (Cap 491) Central Bank of Kenya hereby notifies Capital Hill Forex Bureau Limited that the bureau's licence has been suspended for ninety (90) days with effect from 13th October, 2011.

The directors of the bureau should ensure that the bureau does not transact any business during

this period. Further, please be advised that if the bureau will not have raised the non-interest bearing deposit upon the expiry of the suspension period, the bureau's licence will be revoked."

The letter dated 13th October, 2011 is what has brought the applicant to this court. The operation of the said letter was suspended since the leave granted to commence these proceedings was to operate as stay.

Looking at the pleadings filed in court by the applicant, I conclude that the applicant is complaining that the respondent's action of imposing the maximum penalty (Kshs.500,000/=) is arbitrary and an abuse of discretion. The applicant contends that the respondent in imposing the said penalty has usurped the powers of the courts. The applicant also contends that since it was licensed to conduct business in 2005, then the regulations passed in 2007 and 2009 cannot retrospectively apply to it. It is the applicant's case that the actions of the respondent are not done in good faith since the applicant is being punished for refusing to give kickbacks and favours to the respondent's officers.

The respondent opposed the application through an affidavit sworn on 31st January, 2012 by its manager in charge of Forex Bureau Surveillance Section, Mr. Sylvester Cheruiyot Sawe. The respondent's case is that in discharging its mandate, it regularly conducts inspections of all forex bureaus in Kenya from time to time so as to ensure compliance with Forex Bureau Guidelines. Through the replying affidavit, the respondent informed the court that on 20th and 21st February, 2007 it conducted an inspection of the applicant's operations which revealed irregularities including failure to appoint and present a principal officer for vetting by the respondent, several internal control weaknesses, lack of a clear policy on staff training and development, and lack of adequate insurance cover for the daily cash holdings. The applicant was through a letter dated 14th March, 2007 notified of the results of the inspection and directed to ensure compliance with the Forex Bureau Guidelines. The applicant responded vide a letter dated 11th May, 2007 explaining the steps it had taken to remedy the violations.

Again on 5th February, 2009 the respondent conducted another inspection which found the applicant guilty of various violations of the respondent's guidelines. The applicant was once again informed of these violations.

A third inspection was conducted on 6th May, 2010 and the applicant was once again found to have breached the guidelines. This time round a penalty of Kshs. 500,000/= was imposed on the applicant. The applicant paid the penalty imposed by the respondent.

The fourth inspection is the subject of these judicial review proceedings. It was carried out in May, 2011 and led to the issuance of the letter dated 13th October, 2011. The respondent contends that even after receiving the letter dated 13th October, 2011 suspending its operations, the applicant continued with its business and on 10th and 17th November, 2011 the respondent's officers managed to transact business at the applicant's offices. On 17th November, 2011 the respondent gave the applicant notice that it would revoke its licence within 14 days. It is the respondent's case that the applicant never disclosed this information to the court. The respondent argues that the applicant was in breach of guidelines and regulations and this application is meant to impede it from carrying out its statutory mandate. It is the respondent's case that the applicant had been treated fairly at all material times.

Looking at the material placed before the court, I find that the only issue for the determination of this court is whether the respondent exceeded its powers or acted in an arbitrary manner.

Section 57 of the Central Bank of Kenya Act, Cap. 491 gives power to the respondent to make regulations as follows:-

"57. (1) The Bank may make regulations for the purpose of giving effect to the provisions of this Act and generally for the better carrying out of the objects of the Bank under this Act.

(2) Without prejudice to the generality of subsection (1), the Bank may, in regulations, prescribe

penalties to be paid by authorised dealers who fail or refuse to comply with any guidelines or directions of the Central Bank under this Act, which penalties shall not exceed five hundred thousand shillings in the case of an authorised dealer, or two hundred thousand shillings in the case of a natural person and may prescribe additional penalties, not exceeding ten thousand shillings in each case for each day or part thereof during which such failure or refusal continues.”

In exercise of those powers the respondent made the Central Bank of Kenya (Foreign Exchange Business) Regulations, 2007 vide Legal Notice No. 62 of 2007, the Central Bank of Kenya (Foreign Exchange Bureau) (Penalties) Regulations, 2009 vide Legal Notice No. 82 of 2009 and Forex Bureau Guidelines 2011. Under Paragraph 3 of Legal Notice No. 62 of 2007 the minimum core capital is provided in the following words:-

“3. Minimum core capital

(1) A company applying for a foreign exchange bureau licence shall not be issued with a licence unless it has a minimum core capital of thirty thousand United States Dollars or its equivalent in Kenya Shillings.

(2) The minimum core capital prescribed under subregulation (1) shall be maintained from the date of commencement of operations and at all times during the course of any business operations of a licensed foreign exchange bureau.”

What appears to be a proviso to the said paragraph is found in Paragraph 4(3) of the said regulations as follows:-

“Every foreign exchange bureau licensed prior to the commencement of these Regulations and which paid a non-interest bearing deposit of five thousand United States Dollars shall be required to increase the deposit paid to ten thousand United States Dollars within one year of the commencement of these Regulations.”

In my view therefore it is only businesses, that came into existence after the said regulations were made, that were expected to have a minimum core capital of USD 30,000. Forex bureaus, like the applicant, which were in operation before the 2007 regulations came into force were expected to increase their minimum core capital from USD 5,000 to USD10,000. This position could only prevail so long as a forex bureau was on the correct side of the law. Paragraph 6(3) of the regulations gives the respondent authority to increase the non-interest bearing deposit once it finds a forex bureau guilty of breaching the respondent’s regulations/guidelines.

Legal Notice No. 82 of 2009 through Paragraph 2 creates violations as follows:-

“2. The following shall constitute violations by a foreign exchange bureau or a person of guidelines or directions of the Bank under the Act which shall be subject to assessment of monetary penalties.

**(a) failure by a foreign exchange bureau to –
(i) submit annual audited accounts and a copy of the auditor’s report in the prescribed form to the Bank, within three months after the end of its financial year;**

(ii) furnish, at such time and in such manner as the Bank may direct, any information in an accurate and complete manner as the Bank may require to properly discharge its functions under the Act;

(iii) comply with the Act, the Forex Bureau Guidelines or such other guidelines or directions as the Bank may issue from time to time;

(iv) submit accurate periodic reports and returns to the Bank;

(v) maintain a minimum balance of two thousand United States Dollars or such other amount as may be prescribed by the Bank with the authorized banks;

(vi) maintain the minimum capital requirements prescribed by the Bank;

(vii) maintain a proper information management system to facilitate information dissemination;

(viii) accurately record all transactions relating to the purchase and sale of foreign currency;
(b) conducting business in a manner, which is in the opinion of the Bank unsafe or unsound;
(c) conducting foreign exchange business through a proxy or nominee;
(d) transferring shareholding or changing directorship in a foreign exchange bureau without obtaining the prior written approval of the Bank;
(e) engaging a foreign exchange officer who has not been vetted, approved and registered by the Bank;
(f) maintaining foreign currency accounts with more than the prescribed number of authorized banks.”

In the letter dated 20th June, 2011 the applicant is informed of specific violations of the Forex Bureau Guidelines (2011). Nine violations are documented. Paragraph 6.0 of the Forex Bureau Guidelines 2011 provides for remedial measures. Paragraph 6.1 specifically refers to penalties. Under Paragraph 6.1(a) it is provided that:-

“Where any foreign exchange bureau contravenes any of the provisions of these guidelines, penalties shall be levied in accordance with the provisions of the Central Bank of Kenya Act (Cap 491) and the Central Bank of Kenya (Foreign Exchange Bureau) (Penalties) Regulations, 2009.”

Looking at the Central Bank of Kenya Act, Legal Notice No. 62 of 2007, Legal Notice No. 82 of 2009 and the Forex Bureau Guidelines of 2011 it becomes clear that the respondent is indeed mandated by the law to make regulations prescribing penalties for dealers who fail to comply with any guidelines, regulations or directions of the respondent. The communication from the respondent to the applicant clearly shows that the applicant was in breach of the respondent’s guidelines and directions. The respondent was therefore authorized to impose penalties on the applicant. The applicant cannot be heard to say that since the regulations and guidelines came into force post its incorporation then the same cannot apply to it. The regulations and guidelines became applicable to all forex dealers from the date they were promulgated. The applicant has no alternative but to comply with the regulations so long as it wants to remain in business. There is no evidence that the applicant has in any way been treated unfairly by the respondent.

In the circumstances of this case the applicant’s application fails and the same is dismissed with costs to the respondent.

Dated, signed and delivered at Nairobi this 19th day of April , 2013

**W. K. KORIR,
JUDGE**