



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
MISCELLANEOUS CIVIL APPLICATION 417 OF 2008

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS
OF CERTIORARI AND PROHIBITION**

AND

IN THE MATTER OF: THE VALUE ADDED TAX ACT (CAP.476)

AND

**IN THE MATTER OF: THE PROCEEDINGS BEFORE THE VALUE ADDED TAX
TRIBUNAL IN APPEAL NO.5 OF 2004 AND THE RULING DELIVERED ON 15TH APRIL 2008**

BETWEEN

REPUBLIC.....APPLICANT

-VERSUS-

THE VALUE ADDED TAX TRIBUNALRESPONDENT

AND

THE COMMISSIONER VALUE ADDED TAX.....INTERESTED PARTY

**EX-PARTE
GENERAL PLASTICS LIMITED**

J U D G M E N T

What falls for determination by this Court is the Notice of Motion dated 24th July 2008 filed on 28th July 2008 in which the Exparte Applicant General Plastics Ltd seeks the following orders:

- 1) THAT this Honourable Court be pleased to grant an order of Certiorari to bring into the High Court and quash all previous proceedings before the Respondent in Tribunal Appeal No.5 of 2004;
- 2) THAT this Honourable Court be pleased to grant an order of Certiorari to bring into the High Court and quash the decision of the Respondent contained in the ruling delivered on 15th April 2008.;
- 3) THAT this Honourable Court be pleased to grant an Order of Prohibition to restrain the Respondent as presently constituted from hearing or continuing to hear or determine all facets and aspects of Tribunal Appeal No.5 of 2004; and,
- 4) THAT the costs of this application be provided for.

The application was filed pursuant to leave granted by Nyamu, J on 23rd July 2008. It is supported by the statement of facts dated 10th July 2008 and the verifying affidavit sworn by Rashik Punjab Shah, a director of the applicant on 11th July 2008 and annexures thereto.

The background against which the application was filed as can be discerned from the pleadings filed by the parties particularly the verifying affidavit sworn by the *ex parte* applicant (***hereinafter simply referred to as the applicant***) is that by letter dated 16th June 2004, the interested party herein the Commissioner of Value Added Tax issued to the applicant a VAT assessment for the Year 1998 in the sum of **Kshs.55,319,109**. The applicant objected to the said assessment but the interested party stood his ground in letter dated 19th July 2004 and demanded payment of tax as assessed within 14 days from date of the said letter. The applicant then lodged an appeal before the respondent against the interested party's decision in Tribunal Appeal No.5 of 2004 which is pending hearing to date in view of stay orders granted in this matter prohibiting further proceedings in the aforesaid appeal till hearing and determination of the current judicial review proceedings. Before the said appeal could proceed for hearing, advocates representing the applicant and the interested party sought to compromise the appeal by executing a purported consent dated 24th August 2005 which if adopted as an order of the tribunal would have had the effect of having the interested party's assessment of VAT for 1998 with respect to the applicant withdrawn and the applicant's appeal allowed leaving only the issue of costs for determination by the respondent.

It is evident from the record of the proceedings before the tribunal (***see annexure SOK4 to the Respondent's replying affidavit sworn by Mr. Sankole Ole Kentai***) that on 4th March 2008, counsel for the applicant Mr. Monyu made a formal application before the respondent urging the respondent to adopt the terms of the agreement between the parties in the letter dated 24th August 2005 titled "consent" as an order of the respondent and thereby terminate the proceedings before it save for the issue of costs.

In the course of hearing that application, it emerged that one Mr. Gaulke M. Obbayi, a member of the tribunal who sat in the proceedings of 4th March 2008 and 25th March 2008 had written to the respondent a letter dated 29th September 2005 disputing validity of the purported consent compromising the appeal on grounds that Mr. Mohamed M. Kullow, an advocate who had signed the said consent on behalf of the interested party had in fact no instructions or authority from the interested party to enter into such a consent.

The respondent proceeded to hear both parties to the appeal on the issue of whether the alleged consent should be admitted or adopted as an order of the tribunal before it delivered its Ruling on the matter on 15th April 2008. In that ruling, the respondent found as a fact that Mr. Mohammed N. Kullow had signed the purported consent on behalf of the interested party without any instructions or authority from the interested party or other senior officers in the management of the interested party with the aim of defrauding the interested party. This decision by the Respondent is what provoked or triggered the current judicial review proceedings.

The applicant prays for orders of **Certiorari** to quash the proceedings before the respondent and its

decision of 15th April 2008 on grounds that it was apprehensive that the participation of a member of the respondent Mr. Gaulke Micah Obbayi in part of the proceedings who had previously worked for the Kenya Revenue Authority and had handled matters relating to Appeal No.5/04 had influenced the manner in which the proceedings had been carried out and the eventual decision of the respondent. This is notwithstanding the fact that the said Mr. Gaulke M. Obbayi sat only in the first two sittings of the respondent and thereafter excused himself from further participating in the appeal by letter dated 25th March 2008.

It is the applicant's contention that the participation of the said member gave rise to the perception that he was biased against the applicant and amounted to a breach of one of the cardinal principles of natural justice that no man should be a judge in his own cause.

The applicant also claimed that the said participation of Mr. Obbayi in the proceedings amounted to a breach of his constitutional right to a fair hearing before an independent and impartial tribunal and that since it had lost faith in the respondent as previously or presently constituted, this court should issue orders of prohibition prohibiting the respondent from hearing Appeal No.5 of 2008.

Lastly, the applicant claimed that the respondent acted irrationally by considering extraneous matters in its ruling of 15th April 2008 with the result that the said ruling was unjust, unfair and illegal.

The application is opposed by both the respondent and the interested party. Mr. Sankale Ole Kantai swore a replying affidavit on behalf of the respondent on 12th November 2008 which was filed in court on the same day.

The interested party opposed the motion through a replying affidavit sworn by Fred Mwangi Gakobo, a Deputy Commissioner with Kenya Revenue Authority on 14th November 2008.

In opposing the motion, the respondent averred that the motion had no merit and that it should be dismissed. The respondent denied that it was biased against the applicant in its proceedings and in the decision sought to be impugned in this case. It was the respondent's view that the respondent acted in accordance with the law on the basis of the facts and submissions placed before it and that since the respondent was properly constituted even in the absence of Mr. Obbayi, the court should disallow the application and direct that the appeal lodged before the respondent should proceed to hearing.

The interested party on its part advanced the view that the Notice of Motion was defective and incompetent as the applicant failed to attach the proceedings before the tribunal which it wanted quashed by orders of Certiorari thus failed to satisfy the requirements of Order 53 Rule 7(1) of the Civil Procedure Rules.

It is the interested party's case that failure to attach the said proceedings at the leave stage was deliberate aimed at concealing material facts which if disclosed would have persuaded the court not to grant leave.

The interested party also contended that the applicant should have utilized the alternative remedy of appeal provided by Section 33 of the VAT Act which was most efficacious in the circumstances of this case as opposed to judicial review and that in any case, the judicial review remedies sought in this case were not available to the applicant since the respondent had and still has jurisdiction to hear the appeal and that in conducting the proceedings and reaching the decision sought to be impugned, it observed the rules of natural justice.

On the participation of Mr. Obbayi in the proceedings, it was the interested party's case that the applicant knew about Mr. Obbayi's role in disputing the legality of the purported consent subject of the proceedings before the respondent. That it was the respondent who made an application on 4th March 2008 for Mr. Obbayi to recuse himself from the proceedings but the applicant opposed the said application and insisted that he should continue sitting as a member of the respondent. According to the

interested party, the applicant was in the circumstances estopped from asserting that Mr. Obbayi's participation in the proceedings led to a breach of the rules of natural justice having acquiesced to his participation in the proceedings. It was also the interested party's case that the decision reached by the respondent refusing to adopt the present consent as an order of the tribunal was reached on the basis of evidence and submissions made by both parties to the appeal and was not in any way influenced by Mr. Obbayi.

To further advance their respective positions, advocates representing each of the parties herein filed written submissions which they highlighted before me on 10th February 2012.

Having carefully considered the pleadings herein and the rival submissions made by M/s Ondari for the applicant, M/s Masaka for the respondent and Mrs. Kamande for the interested party, I find that the applicant has not challenged the jurisdiction of the respondent to hear and determine the appeal lodged before it being Appeal No.5 of 2004 and to conduct the proceedings relating to the adoption of letter of consent dated 24th August 2005 leading to the impugned decision delivered on 15th April 2008.

In my view, the main issues which emerge for determination by this court are the following:

- (1) Whether the Respondent violated or breached the rules of natural justice in its proceedings leading to its decision of 15th April 2008.
- (2) Whether the Applicant is guilty of non-disclosure of material facts and if so, what is the effect of material non-disclosure?
- (3) Whether the Respondent acted irrationally and took into account extraneous matters.
- (4) Whether the Applicant is entitled to the reliefs sought.
- (5) What orders should be made on costs.

I will now proceed to consider each of the identified issues sequentially with a view to determining whether or not the applicant has demonstrated that it is deserving of the reliefs sought herein.

Starting with the issue of natural justice, Counsel for the applicant argued that the respondent breached one of the rules of natural justice that requires that no man should be a judge in his own cause and that in the process it denied the applicant the constitutional right to be heard by an impartial and independent tribunal.

Associated with this issue is also the applicant's claim that the respondent denied it the right to be heard.

Generally, two cardinal principles constitute the rules of natural justice. The principles are that no man should be a judge in his own cause (*nemo iudex in causa sua*) and that no man shall be condemned unheard (*audi alteram partem*).

It is trite law that these two rules of natural justice must be observed by courts, tribunals and all persons or bodies who exercise judicial or quasi-judicial powers or who have a public duty to act fairly.

The first tenet of the rules of natural justice that no man shall be a judge in his own cause prohibits the participation of persons with an interest in a matter from participating in proceedings or sitting in judgement over matters in which they have pecuniary or other forms of interest to avoid the perception or likelihood of bias.

The rule against bias is captured in Halsbury's laws of England, 4th edition Vol.1(1) Para 86 in the following terms:

“It is a fundamental principle often (often expressed in the maxim *nemo iudex in causa sua*) that, in the absence of statutory authority or consensual agreement or the operation of necessity, no man may be a judge in his own cause. Hence, where persons having a direct interest in the subject matter of an inquiry before an inferior tribunal take part in adjudicating upon it, the tribunal is improperly constituted and the court will grant an order of prohibition to prevent it from adjudicating, or an order of certiorari to quash a determination arrived at by it, or such other remedy (for instance, an injunction or a declaration as may be appropriate)”.

In this case, the applicant claims that the participation of Mr. Obbayi in the proceedings that led to the decision of 15th April 2008 gave rise to the perception or real likelihood that Mr. Obbayi was biased in favour of the interested party and against the applicant as he had previously worked as a Senior Deputy Commissioner with the interested party and had actively dealt with matters relating to Appeal No.5 of 2004 including writing the letter dated 29th September 2008 questioning the legality or validity of the consent purportedly executed by both parties compromising the appeal. It is the applicant’s case that the said Mr. Obbayi influenced the respondent in the manner it conducted the proceedings and in its decision though he had recused himself after the second sitting of the respondent.

To start with, it’s clear from the proceedings before the respondent annexed to the respondent’s replying affidavit and marked SOK 4 that the applicant objected to the disqualification of Mr. Obbayi from sitting as a member of the respondent when an application was made in that regard by learned counsel for the interested party Ms. Kamande on 4th March 2008 when the tribunal started formal proceedings to determine whether or not to adopt the alleged consent as an order of the tribunal (Respondent).

Learned counsel for the applicant M/s Ondari in her submissions claimed that the reason the applicant objected to the interested party’s application was because by then there was no material before the respondent to prove what role Mr. Obbayi had played in the matter.

This claim by the applicant cannot be true because there is evidence from the material placed before this court that in fact the applicant knew the role Mr. Obbayi had played in matters related to the appeal when he was an employee of the Kenya Revenue Authority including the fact that he had been the author of the letter dated 29th September 2008 which challenged the validity of the consent subject of the proceedings.

The said letter was copied to the applicant’s advocates who confirmed having received the same and reacted to its contents in letter dated 5th October 2005 addressed to the Secretary of the respondent.

There cannot therefore be any doubt that the applicant knew exactly what role Mr. Obbayi had previously played in the matters in issue before the respondent prior to 4th March 2008 and that in objecting to his disqualification, the applicant acquiesced to the said member participating in the proceedings.

It is also noted that though the applicant belatedly made an application for disqualification of Mr. Obbayi from further participating in the proceedings on 25th March 2008 which application was rejected by the respondent, Mr. Obbayi voluntarily recused himself from the proceedings on the same day – (**see letter marked ‘SOK 2’**) and thereafter the applicant voluntarily continued to participate in the proceedings till the end without complaining that the initial participation of Mr. Obbayi may influence the outcome of the proceedings.

It is my considered view that the applicant having voluntarily participated in the said proceedings to the end cannot now turn around and claim that Mr. Obbayi’s initial participation raised a reasonable apprehension of bias and that he may have influenced the outcome of the proceedings. It is important to note that this complaint by the applicant was made only after the respondent made its decision which did not favour the applicant. This gives rise to the impression that the applicant only complained about perceived bias because it lost its fight of having the purported consent compromising the appeal adopted as an order of the tribunal.

It is my finding that the conduct of the applicant as described hereinabove amounted to approbating

and reprobating. The law is that parties to litigation should not be allowed to approbate and reprobate as this denotes dishonesty and lack of good faith. This is the position that was taken by the Court of Appeal in the Case of Air Alfaraj Limited –Vs- R aytheon Aircraft Credit Corporation & Another, Civil Appeal (Application) No.29 of 1999 and in Behan & Okero Advocates –Vs- National Bank of Kenya [2007] eKLR.

In any event, it is difficult to understand how the respondent could have breached the rule that no man should be a judge in his own cause when it is not disputed that Mr. Obbayi voluntarily disqualified himself from the proceedings on the 2nd day and did not take part in the rest of the proceedings and in the decision making that followed.

The tribunal's proceedings clearly show that the respondent constituted by the Chairman and two members excluding Mr. Obbayi

heard submissions from both the applicant and the interested party before reaching its decision on the admissibility of the purported consent executed by the parties. There is no scintilla of evidence availed by the applicant to show that the respondent was influenced in any way by Mr. Obbayi in reaching its decision. The question that now comes to mind at this juncture is – ***How could Mr. Obbayi influence the decision of the Respondent if he was not involved in making the decision itself?*** This is a question that was not answered by the applicant. Having gone through the ruling delivered by the respondent containing the decision sought to be impugned in this case, I have come to the firm conclusion that the said decision was made on the basis of the evidence presented to the respondent, the submissions by both learned counsels and the law applicable on the subject under consideration by the respondent.

Considering the manner in which the respondent conducted the proceedings in question as can be seen from annexure marked SOK 4 and given that Mr. Obbayi who was the only member of the respondent who could be said to have had an interest in the outcome of the appeal had disqualified himself early in the proceedings and was not involved in making the impugned decision, I find that any reasonable person given these circumstances can only come to the conclusion that there was no possibility or likelihood that the respondent could have been biased or influenced by Mr. Obbayi in making the impugned decision.

On the claim that the applicant was not given an opportunity to be heard, I find no basis for this complaint since from the proceedings before the respondent, it is clear that both the applicant and the interested party were fully heard through their respective counsel before the respondent reached its decision. As the applicant did not allege that any of the other members of the respondent had any interest in the matter that would have given rise to a possibility of them being biased against it, I find no substance in the applicant's submission that it was not given a fair hearing before an independent and impartial tribunal. I find no evidence to suggest that the respondent as constituted by the time of making its decision was not independent and impartial.

The upshot of the foregoing is that I am satisfied that the respondent in conducting the interlocutory proceedings before it in Appeal No.5 of 2004 and reaching its decision of 15th April 2008 did not violate or breach the rules of natural justice as alleged by the Applicant.

Coming now to the issue of non-disclosure of material facts, I agree with the interested party's submission that the applicant is guilty of non-disclosure of material facts which if disclosed would have assisted the court reach an informed decision on whether to grant leave to commence judicial review proceedings or not or whether if granted, the said leave would operate as stay.

I have gone through the applicant's application for leave and in the statutory statement of facts or the verifying affidavit sworn on behalf of the applicant, I did not come across any disclosure that the interested party had on 4th March 2008 made an application for disqualification of Mr. Obbayi from the proceedings which application was disallowed following an objection by the applicant. The interested party has submitted and I cannot say that I disagree with that submission that the reason why the applicant failed to attach a copy of the proceedings before the respondent to its application for leave was because it

wanted to conceal this vital information from the court at that stage. I also find that the applicant failed to disclose to the court that it had an alternative remedy of an appeal under Section 33 of the VAT Act and why it preferred the remedy of judicial review to the alternative remedy provided by statute.

Though it is settled law that the existence of an alternative remedy is no bar to commencement of judicial review proceedings or to granting of judicial review orders, the Court of Appeal in the case of Republic –Vs- National Environment Management Authority C/Appeal No.84 of 2010 quoted with approval the decision by Wendoh, J in Republic –Vs- NEMA Exparte SoundEquipment HC Misc. Civil Appn. ELC.7 of 2009 held that failure by an applicant to disclose the existence of an alternative remedy (an appeal) and failure to demonstrate at permission stage why judicial review remedy was more convenient or effective compared to the alternative remedy disentitles an applicant to the exercise of the court's discretion to grant judicial review orders.

The applicant in this case deliberately failed to make the aforesaid material disclosures at permission stage. I say the non disclosures were of material facts because the existence or otherwise of an alternative remedy and its efficacy or the information that the applicant had objected to the disqualification of Mr. Obbayi whose brief participation in the proceedings were the basis for the claim that the respondent may have been biased in its decision against the applicant were important considerations which would have weighed on the courts mind had they been disclosed in deciding whether or not to grant leave or whether if granted leave would operate as stay.

All these were facts which were relevant to the application for leave and which were within the applicant's knowledge. The applicant was therefore duty bound to disclose the same when it approached the court for leave ex parte.

The applicant however chose to deliberately conceal these material facts from the court which had they been disclosed may have led the court to reach a different conclusion/decision at the permission stage of the proceedings.

It is now settled law that a party who approaches the court ex parte has a heavy burden and duty of making a full and frank disclosure of all material facts to the matter in question whether or not they favour his case. It is also trite that any orders obtained as a consequence of non-disclosure of material facts are liable to be set aside as happened in the case of Total Kenya Ltd –Vs- The Permanent Secretary, Ministry of Energy & Others [supra] and Re Kenya National Federation of Co-Operatives Ltd & Others [2004] EA 128 or may form the basis of a court's refusal to exercise its discretion in favour of the offending party.

It was also part of the applicant's case that the respondent acted irrationally and took into account extraneous evidence. This allegation has been denied by the respondent and the interested party. The applicant on its part did not specifically point out any matter which the respondent considered in its ruling which was not properly before it in the form of affidavit evidence.

Having gone through the proceedings before the respondent and its ruling delivered on 15th April 2008, I am not persuaded to find that the respondent's decision was either irrational or unreasonable within the meaning of *Wednesbury's* unreasonableness (*see Associated Provincial Picture Houses Ltd –Vs- Wednesbury Corporation [1947] EWCA Civ 1*) or that it considered in its decision extraneous matters which were not properly before it. I find that the respondent's decision was both rational and reasonable and that it was based on the evidence placed before it by the parties to the appeal and the applicable law.

Given the foregoing, ***is the applicant then entitled to the reliefs sought?***

In Prayer I, the applicant seeks an order of Certiorari to bring into the High Court and quash all previous proceedings before the respondent in Tribunal Appeal No.5 of 2004.

In Prayer No.2, the applicant seeks an order of Certiorari to quash the decision of the respondent contained in the ruling delivered on 15th April 2008.

In Halisbury's Laws of England, 4th Edition Vol.1 page 202 Para 109, it is stated that:

“Certiorari will issue to quash a determination for excess or lack of jurisdiction, error of law on the face of the record, breach of the rules of natural justice or where the determination was procured by fraud, collusion or perjury....”

In this case, the applicant besides not satisfying the requirements of Order 53 Rule 7(1) of the Civil Procedure Rules in respect of Prayer I as the proceedings sought to be quashed by orders of certiorari were not attached to the application for leave and were not availed to the court thereafter without any reason being given for that failure, the applicant has also failed to prove that any of the circumstances that warrants the issuance of the order of certiorari as stated herein above existed in this case. It is admitted that the respondent had jurisdiction to conduct the proceedings in question and to make the impugned decision. The applicant has not demonstrated that there was any flaw in the procedure adopted by the respondent in the said proceedings or that it committed an error of law that is apparent on its record or that it breached the rules of natural justice. Judicial review is concerned with the decision making process not with the merits of a decision. Since the applicant has not proved that the respondent's decision making process was flawed or that the impugned decision was illegal, irrational or unreasonable, this court is satisfied that the applicant has not demonstrated that it is entitled to the order of certiorari as sought in Prayer 1 & 2.

However, even if the applicant had demonstrated that it was deserving of the order of certiorari as prayed, as held by Nyamu, J in Republic –Vs- Judicial Service Commission ex parte Pareno [2004] I KLR 203 Judicial Review remedies are discretionary and even where they are deserved, the court may decline to issue them in the exercise of its discretion given the particular circumstances of the case. In this case, even if the said orders had been deserved, I would have been hesitant to exercise my discretion in favour of the applicant by granting the orders sought. I would have found that the applicant's conduct in approbating and reprobating and in failing to make a full and frank disclosure of all material facts relevant to the granting of leave at the permission stage of the proceedings disentitled it to the exercise of the court's discretion in its favour. I would have declined to grant the said orders.

Lastly, in the prayer for **Prohibition**, the applicant seeks orders of prohibition to restrain the respondent as currently constituted from hearing or continuing to hear or determine Tribunal Appeal No.5 of 2004.

In order to determine whether this court can issue an order of prohibition as sought by the applicant herein, it is important to understand in what circumstances a court can issue the orders of prohibition.

The Court of Appeal had occasion to make a pronouncement in this regard in the case of Kenya National Examination Council Vs- R ex parte Geoffrey Gathenji & 9 Others, C/Appeal No.266 of 1996 at page 10 when it stated:

“What does an ORDER OF PROHIBITION do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice.”

From the foregoing, it is clear that an order of prohibition can only be issued if a tribunal or body threatens to act without or in excess of its jurisdiction or contrary to the law. The law is that the court cannot prohibit a statutory body from executing its statutory mandate in accordance with the law.

The respondent herein is a tribunal established by the Minister of Finance under Section 32 of the VAT Act, Cap.476 Laws of Kenya for purposes of adjudicating over disputes involving assessment of VAT by the Commissioner of VAT. The respondent is therefore a statutory tribunal with jurisdiction to hear and determine Appeal No.5 of 2004. There is no evidence to show that the respondent has either acted or has threatened to act contrary to the law or to violate the rules of natural justice in the hearing of the said appeal in order to warrant the issuance of an order of prohibition as prayed.

The member of the respondent who was privy to issues related to the appeal and whose participation in the appeal may have led to perceptions of bias against the applicant has already recused himself from hearing the said appeal. There is therefore no basis for the applicant's prayer that the respondent be prohibited from hearing its appeal for fear of a biased outcome against it.

Having carefully considered the application and the elaborate submissions made by counsel for the parties for which the court is thankful, I find no basis for issuing the order of prohibition sought in Prayer 3 and I decline to grant the same. I instead direct that the respondent as currently constituted excluding Mr. Obbayi do proceed to hear and determine Appeal No.5 of 2004 expeditiously. For the avoidance of doubt in the event that Mr. Obbayi is currently still a member of the respondent, he should not participate in the hearing and determination of the said appeal.

In conclusion, the upshot of this judgment is that the applicant has not demonstrated that it is deserving of any of the reliefs sought in this case.

I consequently find that the Notice of Motion dated 24th July 2008 lacks merit and it is hereby dismissed with costs to the respondent and the Interested Party.

Dated, Signed and Delivered by me at Nairobi this 30th day of May, 2012.

C. W. GITHUA
JUDGE

In the presence of:

Florence – Court Clerk
Mr. Nganga holding brief for Mrs. Kamande for Applicant
N/A for Respondents

N/A for Interested Party