



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Miscellaneous Civil Application 376 of 2009

IN THE MATTER OF AN APPLICATION BY LARSEN & TOUBRO LIMITED FOR ORDERS OF CERTIORARI AND MANDAMUS

AND

IN THE MATTER OF AN AGENCY NOTICE DATED 17TH FEBRUARY 2009 AND DECISION DATED 8TH JUNE 2009 BY THE

COMMISSIONER OF DOMESTIC TAXES

BETWEEN

LARSEN & TOUBRO

LIMITED.....APPLICANT

T

AND

COMMISSIONER OF DOMESTIC

TAXES.....RESPONDENT

R U L I N G

1. On 16th November 2009 the court herein (Lenaola, J) granted the *Ex Parte* Applicant leave to apply for judicial review. The orders to be sought were -

(i) **Certiorari** to quash an agency notice issued by the Respondent, Commissioner of Domestic Taxes, dated 17th February 2009, and also the decision of the Respondent dated 8th June 2009 to charge the *Ex Parte* Applicant withholding tax of KShs 97,870,369/00 and PAYE tax of KShs 16,994,453/00.

(ii) **Prohibition** to prohibit the Respondent from claiming the said sums pursuant to his said decision of 8th June 2009.

2. The court also directed that the leave so granted do operate as a stay of the agency notice dated 17th February 2009 and the decision of 8th June 2009 pending determination of substantive application, or until the further order of the court.

3. The substantive application was filed on 3rd December 2009 by notice of motion of the same date. On 7th May 2010 the Respondent filed a replying affidavit (sworn by one VERONICA N. MBURU, then a

principal revenue officer of the Respondent) in opposition to the application.

4. The Respondent also filed **notice of motion dated 6th May 2010** seeking the main orders-

(i) That the leave granted on 16th November 2009 be set aside, “particularly the part thereof that directed that such leave do operate as a stay of the agency notice ... and the decision of 8th June 2009...”

(ii) That the court be pleased to impose such terms as to giving of security and to order the *Ex Parte* Applicant to deposit the sum of KShs 1,485,000,000/00 in a joint interest-earning account at **National Bank of Kenya Ltd (Harambee Avenue Branch)** or as the court may otherwise direct.

(iii) That in the alternative and without prejudice the court be pleased to order that the *Ex Parte* Applicant do furnish to the Respondent adequate security in the form of a bank guarantee to cover the said sum of KShs 1,485,000,000/00, the same being the taxes in dispute.

5. In response to this application the *Ex Parte* Applicant filed a **notice of preliminary objection dated 18th June 2010**. That preliminary objection is the subject of this ruling.

The points of law taken in the preliminary objection are -

(i) That leave having been granted, there is no residual jurisdiction to vary the terms upon which such leave was granted.

(ii) That there is no jurisdiction for the High Court to sit on appeal upon its own decision.

(iii) That the High Court may not exercise civil jurisdiction in the issuance of prerogative writs of **mandamus, certiorari** and **prohibition**.

6. I have considered the submissions of the learned counsels appearing, including the cases cited.

7. In so far as the application seeks an order to set aside the leave granted to apply for judicial review, it is incompetent. The leave granted can only be challenged at the hearing of the substantive application, which application, as already noted, has already been filed. The jurisdiction to refuse or grant leave is exercisable *ex parte*, not *inter partes*. See **Order LIII, rule 1(2)** of the then **Civil Procedure Rules (the Rules)**. Once that *ex parte* jurisdiction has been exercised, it cannot be challenged except at the hearing of the substantive application.

8. What about the order directing that the leave granted do operate as a stay? Is it amendable to review? I cannot see why not. The order of stay is entirely discretionary and is made to meet the ends of justice pending hearing of the substantive application. It is usually made upon a scenario presented and canvassed *ex parte*. Is it to be said that once made the hands of the court are tied and the issue cannot be revisited *inter partes*?

9. All that is being asked by the Respondent is that it be allowed to canvass additional circumstances as far as the order of stay is concerned to see if it will be in the interests of justice to impose conditionalities for the stay.

10. The argument that the exercise of such review jurisdiction is a civil jurisdiction and hence not available in judicial review is an unacceptable technicality. The jurisdiction may neither be civil nor criminal, but non-the-less it is a jurisdiction that the court has, or should have, howsoever called! If the court has jurisdiction to direct that leave to apply for judicial review do operate as a stay of the decision or order challenged, why should not the court have jurisdiction to vary the direction as it may deem fit in the interests of justice?

11. In this context, the term “court” surely cannot be limited to the very same judge who granted the

leave? A succeeding judge ought to exercise the same jurisdiction of review that the judge who granted leave would exercise. It is unduly restrictive, and certainly not acceptable, that once the judge who granted leave leaves the station, or is otherwise not available (for instance due to death), that a succeeding judge cannot review in the interests of justice the direction that the leave do operate as a stay. This would be another unacceptable technicality!

12. Our new **Constitution** will not brook technicalities of procedure at the expense of justice. **Article 159 (2) (d)** specifically states that in exercising judicial authority, the courts and tribunals shall be guided by, *inter alia*, the principle that justice shall be administered without undue regard to procedural technicalities.

13. I therefore do not find merit in the preliminary objection and the same is overruled with costs in the cause. The notice of motion dated 6th may 2010 shall proceed to hearing of the prayers for variation of the direction that the leave granted do operate as a stay. It is so ordered.

14. The delay in preparation of this ruling is deeply regretted. It was caused by my poor state of health the last few years. But thank God I have now regained my full health.

DATED AT NAIROBI THIS 6TH DAY OF SEPTEMBER 2012

H. P. G. WAWERU
JUDGE

COUNTERSIGNED AND DELIVERED AT MACHAKOS THIS 28TH DAY OF SEPTEMBER 2012

ASIKE-MAKHANDIA
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JUDGE