



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Judicial Review 19 of 2012

**IN THE MATTER OF: AN APPLICATION BY IRON ART LIMITED FOR LEAVE TO
COMMENCE JUDICIAL REVIEW PROCEEDINGS AGAINST THE DECISIONS OF THE
COMMISSIONER OF VALUE ADDED TAX AS SET OUT VIDE TAX ASSESSMENT
REFERENCE NO.P051111309B**

AND

**IN THE MATTER OF: THE INCOME TAX ACT CHAPTER 470 OF THE LAWS OF
KENYA**

AND

**IN THE MATTER OF: THE LAW REFORM ACT CHAPTER 26 OF THE LAWS OF
KENYA**

BETWEEN

REPUBLICAPPLICANT

AND

**THE COMMISSIONER OF VALUE ADDED
TAX.....RESPONDENT**

EX-PARTE

IRON ART LIMITED

RULING

The application before me is the one dated 8th February 2010 and filed on 10th February 2012 in which the Exparte Applicant “Iron Art Ltd” (*hereinafter referred to as the Applicant*) seeks the following orders:

- (1) THAT leave be granted to the Applicant for extension of time by one (1) day within which to file and serve the Notice of Motion as per the Order of the court (Mr. Hon. Justice Warsame).**
- (2) THAT the Notice of Motion herein which was filed and served on the 1st February 2012 be deemed as having been filed and served within time.**

(3) THAT the Applicant be granted leave to amend the Notice of Motion application in terms shown by the annexed draft amended Notice of Motion in order to correct an error in the names of the Respondent and the deponent thereof.

(4) THAT the orders of stay granted herein on the 20th January 2012 be extended until the date of the hearing of the substantive application.

(5) THAT the costs of this application be in the cause.

The application is expressed to be brought under Section 3A and Section 95 of the Civil Procedure Act and Order 8 Rule 3 of the Civil Procedure Rules.

It is premised on the grounds stated on its face and is supported by an affidavit sworn by the Applicant's counsel, Mr. Jotham Okome Arwa on 8th February 2012.

In support of the application, Mr. Arwa, learned counsel for the Applicant deposed that after the Applicant obtained leave to commence judicial review proceedings against the Commissioner of Income Tax on 20th January 2012, the court directed that the substantive motion be filed and served within 10 days.

Counsel averred that there was two weekends within which the 10 days leave was supposed to remain in force meaning that the Applicant had practically 6 days within which to file and serve the Notice of Motion.

Mr. Arwa also deposed that Mr. Murlidhar Shetty the Managing Director of the Applicant was away till 31st January 2012 when he was available to sign the affidavit prepared in support of the Notice of Motion with the result that the Notice of Motion was filed and served on the Respondent on 1st February 2012 a day after the 10 days leave granted for the filing of the substantive Notice of Motion expired.

It is the Applicant's case that as the notice of motion was being processed in a hurry, the name of the Respondent was by error indicated as the Commissioner of Value Added Tax instead of the Commissioner of Income Tax and the deponent to the supporting affidavit was wrongly described as Hitesubhai Bhikhabhai Patel instead of Murlidhar Shetty.

The Applicant therefore urged the court to allow extension of time for one day so that the Notice of Motion filed and served on 1st February 2012 would be deemed as properly filed and served, it be granted leave to amend the Notice of Motion in terms shown on the draft amended Notice of Motion annexed to the Applicant's supporting affidavit in order to correct an error in the description of the Respondent and the deponent in the affidavit supporting the motion

The application is opposed by the Respondent through grounds of opposition filed on 23rd February 2012. The grounds of objection taken by the Respondent are that;

1. The Application is incompetent, fatally defective in substance and form and an abuse of the process of the Court.

2. Order 53 of the Civil Procedure rules does not allow the amendment of the Notice of Motion. Order 53 Rule 4 only allows the Applicant to seek leave to amend the statement of facts and file further affidavit in support of the motion. The proposed amendment is incompetent and cannot cure the defective Notice of Motion dated 31st January, 2012.

3. Judicial Review proceedings are special proceedings and the provisions of the Civil Procedure Act Cap.21 and Order 8 Rule 3 Civil Procedure Rules do not apply.

On the date that the application was filed, that is on 8th February 2012, the Respondent also filed a notice

of Preliminary Objection dated 3rd February 2012 attacking the Applicant's Notice of Motion on grounds that it was incompetent and fatally defective for having been filed outside the time allowed by the court for filing of the substantive judicial review application and for naming an non-existent entity as the Respondent.

Looking at the notice of preliminary objection, it is clear that the points of objection taken by the Respondent encompass the issues being addressed in the Applicant's Notice of Motion. The preliminary objection and the Applicant's Notice of Motion are for that reason intertwined and a determination of the Applicant's Notice of Motion one way or the other will have the effect of disposing off the preliminary objection. By this I mean that if the Applicant's Notice of Motion is successful, the Preliminary objection will automatically fall by the way side but if the application fails, the preliminary objection will by implication be sustained bringing the judicial review proceedings instituted by the Applicant to a premature end.

For this reasons, I will treat the preliminary objection as part of the Respondent's case in opposition to the Applicant's Notice of Motion.

Both the Applicant and the Respondent filed written submissions in support of their respective positions in this matter and the same were highlighted in court on 26th October 2012 by Mr. Arwa for the Applicant and Mr. Nyagweso for the Respondent.

Having considered the application, the preliminary objection, the grounds of opposition together with the submissions made by the advocates on record, I find that the main issues for the court's determination is whether it has jurisdiction to extend the period of time granted to the Applicant to file the substantive application for judicial review and whether it has jurisdiction to allow the amendment of the Notice of Motion filed late by the Applicant to correct both the name of the Respondent and the name of the deponent to its supporting affidavit.

It is the Respondent's case that this court does not have jurisdiction to enlarge the time for filing of the substantive motion outside the period of leave granted by the court and to allow amendment of a Notice of Motion for judicial review since there is no provision in Order 53 of the Civil Procedure Rules empowering the court to do so. This submission was grounded on the fact that Judicial Review is a special jurisdiction in which the Civil Procedure Act and Rules had no application.

Mr. Arwa submitted on behalf of the Applicant that the court had inherent jurisdiction to allow the orders sought in the application as it has a constitutional obligation to shun procedural technicalities and to embrace substantive justice.

Though I am in total agreement with Mr. Nyangweso that a judicial review court exercises a special jurisdiction described by the Court of Appeal in the case of **Commissioner of Lands -Vs- Hotel Kuntse Ltd, C/A No.234 of 1995** as a jurisdiction *sui generis* in which the Civil Procedure Act and Rules do not apply, I am of the firm view that where Order 53 of the Civil Procedure Rules which regulates the procedure for the conduct of judicial review proceedings is silent, this court has power under its inherent jurisdiction to do justice to the parties before it to make orders that are fair and just depending on the circumstances of the case provided that no prejudice is caused to the opposing party.

In this case, it is common ground that the Applicant was granted leave by the court on 20th January 2012 to file and serve the substantive Notice of Motion within 10 days.

Both the Applicant and the Respondent are in agreement that the Applicant filed the Notice of Motion late by one day. Though it was within the court's power to limit the period of leave granted to ten (10) days, the law under Order 53 Rule 3 provides that once leave is granted, the substantive Notice of Motion commencing judicial review proceedings must be filed within 21 days.

It therefore follows that though the Applicant failed to comply with the time limit fixed by the court, it filed its Notice of Motion within the time allowed by the law. In the circumstances, I think that if the

application was filed without delay and good reasons were given for failure to file the substantive motion within the period of time limited by the court, the court would be entitled to exercise its discretion to enlarge the time given for filing of the substantive motion if the interests of justice requires it to do so.

In this case, it is noted that the Applicant's application for enlargement of time and amendment of Notice of Motion was made timeously. It was filed on 10th February 2012 and leave had expired on 31st January 2012. The Applicant through its counsel adequately explained in the supporting affidavit the reasons for filing the Notice of Motion outside the time allowed by the court. The court appreciates the fact that the delay complained of was only for one day. I find that the reasons given for the said delay are satisfactory.

I have perused the pleadings and has noted that the subject matter of these proceedings in disputed tax in the sum of **Kshs.7,243,818**. If the court were to decline to grant the prayer for enlargement of time by one day, the court would by that decision effectively drive the Applicant away from the seat of justice. This might occasion great prejudice to the Applicant since it would expose it to the risk of being compelled to pay the disputed tax which in its view is not owed to the Respondent without giving it an opportunity to be heard. On the other hand, if the application is allowed, the Respondent is not likely to suffer any prejudice which he/she cannot be compensated for by an award of costs.

Balancing the sides of justice, I find that they tilt more in favour of the Applicant and in the circumstances, I allow the appreciation in terms of Prayers 1 and 2.

On the Prayer for amendment of the Notice of Motion in order to properly describe the Respondent, I find that though it has not been disputed that the office of Commissioner of VAT does not exist, the Respondent has not denied the Applicant's claim that the correct Respondent in this case is the Commissioner for Domestic Taxes who was the same person named as the Respondent in the application for leave but wrongly described as the Commissioner for VAT.

This demonstrates the Applicant's claim that the amendment sought seeks to properly describe the Respondent and does not go to the substance or root of the application.

The application was made without inordinate delay and there is no evidence to suggest that any prejudice will be occasioned to the Respondent if the prayer for amendment of the Notice of Motion is allowed. In the event, Order 53 Rule 4(2) of the Civil Procedure Rules allows amendment of the statement of facts supporting a notice of motion provided that a notice of intention to amend is given to all parties and the proposed amendment is availed to the parties affected. If the rules under Order 53 Civil Procedure Rules allows for amendment of a statutory statement which in my view is a mirror of the substantive motion, I find that no injustice or prejudice would be caused to parties who have had notice of intention to amend the notice of motion and of the proposed amendment if the court exercised its discretion under its inherent powers to allow an amendment to the notice of motion. In this case, I find that the filing of the instant application and the attachment of the draft amended notice of motion as an annexure to the application constitutes notice of intention to amend and nature of the proposed amendment.

Given the circumstances of this case, I find that it would be in the interest of justice to allow the application for amendment of the notice of motion as prayed in order to allow the parties an opportunity to ventilate their respective cases and have the issues in controversy determined on merit. This is what substantive justice is all about.

In the new constitutional dispensation, courts are obligated to administer substantive justice and not to tie its hands with procedural technicalities. This is what I have endeavoured to do in this case.

For all the foregoing reasons, I am inclined to allow the prayer for amendment for the correction of the Name of the Respondent but not of the Name of the deponent in the supporting affidavit. This is because depositions in affidavits are statements given under oath which means that they amount to evidence. Affidavit evidence cannot be amended but a party who realizes a mistake in the way that such evidence had been presented can seek the court's leave to file a further affidavit to explain the mistakes or anomalies in an affidavit if the same had been filed in court and is part of the court record.

I hasten to add however that in Judicial Review proceedings, the Notice of Motion does not require to be supported by any affidavit. Order 53 Rule 3 of the Civil Procedure Rules does not require that the substantive Notice of Motion be filed together with a supporting affidavit. Order 53 Rule 4 only requires that the Notice of Motion be served together with the statutory statement and that affidavits accompanying the application for leave be supplied to the persons served upon demand. In my view, an affidavit filed in support of an application for judicial review is unnecessary and is superfluous.

Taking everything into account, I find merit in the Applicant's Notice of Motion dated 8th February 2012 and it is hereby allowed in terms of Prayer 1, 2 and 4. Prayer 3 is partially allowed to cover the correct description of the Respondent only. I direct that the amended Notice of Motion be filed and served on the Respondents within 7 days from today.

In order to move the matter forward, I also direct that this case be mention on 26th November 2012 for directions on hearing of the amended Notice of Motion. Costs of this application are awarded to the Respondent.

DATED, DELIVERED and SIGNED by me this 15th day of November 2012.

C.W. GITHUA

JUDGE

In the presence of:

Florence – Court Clerk

M/s Kerubo for Arwa for Applicant

N/A for Respondent