



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

JUDICIAL REVIEW APPLICATION NO. 26 OF 2010

**IN THE MATTER OF AN APPLICATION BY HOTEL SIRIKWA LIMITED FOR ORDERS OF
JUDICIAL REVIEW**

BY WAY OF ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE INCOME TAX ACT (CAP 470) OF THE LAWS OF KENYA

BETWEEN

REPUBLIC.....APPLICA

NT

=VERSUS=

**THE COMMISSIONER GENERAL, KENYA REVENUE AUTHORITY.....1ST
RESPONDENT**

**THE COMMISSIONER OF VALUE ADDED TAX2ND
RESPONDENT**

**THE COMMISSIONER OF INCOME TAX.....3RD
RESPONDENT**

RULING

By its Notice of Motion dated 5th October, 2010, **Hotel Sirikwa Limited**, (hereinafter “**the applicant**”) seeks the following orders:-

- (a) An Order of Certiorari to remove into this Court and quash the decision of the Commissioner General, Kenya Revenue Authority, the Commissioner of Value Added Tax and the Commissioner of Income Tax, (hereinafter “**the respondents**”) assessing the outstanding Income Tax and Value Added Tax for the applicant as contained in the letter dated 17th June, 2010.
- (b) An Order of Certiorari to remove into this court for the purpose of quashing the decision of the respondents demanding the payment of the sum of Kshs 22,637,389.00 and Kshs 30,408,344.00 allegedly on account of outstanding Income Tax and Value Added Tax respectively as contained in the letter dated 31st August, 2010.
- (c) An Order of certiorari to remove into this Court for the purpose of quashing the agency notices dated 16th September, 2010, addressed to the Manager, National Bank of Kenya and Branch Manager, Barclays Bank of Kenya dated 16th September, 2010.
- (d) An Order of prohibition directed at each and all the respondents prohibiting each and all of them from collecting or recovering by way of distress or distraint or by any other means the sum of Kshs 53,045,733.00 based on the assessments of Income Tax and Value Added Tax made against the applicant and communicated to the applicant in the letter dated 17th June, 2010, and as further demanded in the letter dated 31st August, 2010.

The Notice of Motion is expressed to be brought under the provisions of sections 8 and 9 of the Law Reform Act and order LIII rule 3 of the Civil Procedure Rules.

The motion is supported by a statutory statement and an affidavit of one **Wilson K. Kipkot**, one of the directors of the applicant.

The application is opposed and there is a replying affidavit sworn by one **Fredrick O. Osamba**, an Assistant Commissioner within the 1st Respondent’s Investigation and Enforcement Department.

On 8th February, 2011, counsel for the applicant filed a Notice of Preliminary Objection seeking to have the documents marked A58, A66, A69, A65, A71, A86, A87 and A 88 expunged from the record because they offend the provisions of the Oaths and Statutory Declarations Rules. The Preliminary Objection was then listed for hearing before me on 22nd March, 2011. Come that date, counsel agreed to file written submissions which were in place by 10th May, 2011.

The applicant’s contention is that the documents marked A58, A65, A66, A69, A71, A86, A87 and A88 and which are annexed to the replying affidavit aforesaid offend Rules 9 and 10 of the Oaths and Statutory Declarations Rules. The said Rules are in the following terms:-

“9 All exhibits to the affidavits shall be securely sealed thereto under the seal of the Commissioner and shall be marked with serial letters of identification,

10 The forms of jurat and identification of exhibits shall be those set out in the third schedule.”

To buttress its contention, the applicant invoked several decisions of the High Court one of which was rendered by myself in **Weetabix Limited –vrs- Health U Two Thousand Limited [NAI HC (Milimani Commercial Court) Case No. 283 of 2006](UR)**.

The respondents' contention on the other hand is that the said documents do not offend the said provisions. In their view, the same are either attachments to the respondents' letter dated 17th June, 2010 which is exhibited as "F002" and/or part of an identified exhibit and are accordingly properly produced and do not offend the said rules. To buttress their argument, they invoked several decisions of the High Court, among them, that of **Nairobi HC Misc. Civil Application No. 1335 of 2005: Republic -vrs- Kenya Bureau of Standards (UR)**.

I have considered the rival submissions. I have also perused the replying affidavit and the impugned documents. Finally, I have given due consideration to the authorities cited by counsel. Having done so, I take the following view of the matter. Annexures A58, A69, A65, A66 and A71 are clearly described at the end of exhibit "F002" as attachments thereto. They are therefore part of that exhibit which is clearly identified and marked in accordance with Rules 9 and 10 of the Oaths and Statutory Declarations Rules. The case of **Weetabix Limited -vrs Healthy U Two thousand Limited (Supra)** is clearly distinguishable from our case. There, some annexures were not securely sealed as envisaged by rule 9 of the Oaths and Statutory Declarations Rules. A stamp in the format recommended in rule 10 was imposed on a plain paper which was not even signed by the Notary Public before whom the affidavit was taken. The exhibits were also separate; were not part of the plain paper and did not carry the seal of the Notary Public.

The position in this case is quite different. The impugned annexures: A58, A69, A65, A66 and A71 are introduced by exhibit "F002" which does not offend the said rules. As the said annexures are part of the said exhibit, they did not require separate authentication. The objection raised against them is therefore without merit and is overruled.

With regard to annexures A86, A8 and A88, however, it is plain that they are not part of exhibit "F006" which is addressed to the Branch Manager, National Bank of Kenya, Eldoret. Annexure A86 is addressed to the Branch Manager, National Bank of Kenya- Eldoret whilst annexures A87 and A88 are addressed to the branch Manager, Barclays Bank of Kenya-Eldoret. They are all agency notices but they are separate and distinct exhibits. Counsel for the respondents has submitted that they are produced as a bundle. That may have been their original intention but they have not been exhibited as a bundle. If the deponent of the replying affidavit had in paragraph 22 of his affidavit identified the annexures specifically, they would probably pass as a bundle but he did not. That being my view of the annexures, they should therefore have been separately securely sealed under the seal of the Commissioner of Oaths who attested the affidavit and marked with serial letters of identification in accordance with Rules 9 and 10 of the Oaths and Statutory Declarations Rules. The annexures therefore offend the said Rules. In **Weetabix Limited –vrs- Healthy U Two thousand Limited (Supra)**, such contravention attracted the penalty of striking out. The fact that the present proceedings are judicial review proceedings does not affect the operation of the said rules. An affidavit remains an affidavit wherever it is applied. The rules regarding the same do not apply selectively or discriminatively otherwise absurd results would ensue.

Under Order LIII Rule 1 (2) an application for judicial review orders should be accompanied by a statutory statement and an affidavit verifying the facts relied upon. The verifying affidavit envisaged in the order is one which complies with Order XVIII of the Civil Procedure Rules and the Oaths and Statutory Declarations Act. It is not a special document for the special judicial review jurisdiction. It is simply an affidavit and for it to pass muster it must comply with the Law and rules governing affidavits. To demand compliance with the Oaths and Statutory Declarations Act and Orders XVIII of the

Civil Procedure Rules does not in any way whittle down the scope of judicial review otherwise there would be no point in having that statute and those rules in the first place. I must therefore, with much trepidation and with all due respect part ways, on the point, with **Nyamu J.** as he then was, in **Nairobi HC Misc. Civil application No. 1335 of 2005: Republic –vrs- Kenya Bureau of Standards (UR)**. I have not been persuaded that I was wrong in the Weetabix case and the Court of Appeal has not pronounced otherwise on the point since.

The result is that the objection is allowed with respect to annexures A86, A87 and A 88. The same are hereby struck out and expunged from the said affidavit.

With regard to directions on service sought in the applicant's submissions, the same are clearly outside the purview of the Preliminary Objection and submissions thereon were with respect misconceived.

With regard to costs, I think the order that commends itself to me is that the same be in the cause.

Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 21ST DAY OF JUNE, 2011.

F. AZANGALALA

JUDGE

Read in the presence of:-

Ms Odundo for the respondents.

F. AZANGALALA

JUDGE

21/6/2011