REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Misc Appli 944 of 2006

IN THE MATTER OF: AN APPLICATION BY AWAL LIMITED,

PLANET INTERNATIONAL LTD,

UNLITE CABLES AND RETREADING LTD. AND

FURNITURELAND LIMITED

FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

A N D

IN THE MATTER OF: KENYA REVENUE AUTHORITY

A N D

IN THE MATTER OF: THE INCOME TAX CAP 470, LAWS OF KENYA

A N D

IN THE MATTER OF: THE VALUE ADDED TAX CAP 476 LAWS OF KENYA

B E T W E E N

AWAL LIMITED …….. 1ST APPLICANT

PLANET INTERNATIONAL LIMITED …… 2ND APPLICANT

UNLITE CABLES AND RETREADING LTD. …….. 3RD APPLICANT

FURNITURELAND LIMITED …… 4TH APPLICANT

- Versus -

KENYA REVENUE AUTHORITY …….. RESPONDENT

Coram: Before Hon. Justice L. Njagi

Court clerk – Kinyua

Mr. Mabeya for the Applicants

Mr. Gatonye for the Respondents

R U L I N G

By a notice of motion dated 6th October, 2006, the Respondent in the main application seeks to move the court to make certain orders under sections 8 and 9 of the Law Reform Act; Order LIII rules 1, 2, 3, 4, 6 and 7; Order L rules 2 and 17 of the Civil Procedure Rules; the inherent jurisdiction of this court, and all other enabling provisions of the law. In order to appreciate the matter fully, I find it prudent to set it out briefly within its historical context.

On 28th September, 2006, the ex-parte applicants, hereinafter referred to as the applicants, filed an application by a chamber summons of the same date. The chamber summons were taken out under Order LIII rule 1(2) (3) and (4) of the Civil Procedure Rules; sections 8 and 9 of the Law Reform Act, Cap. 26 of the Laws of Kenya; and section 3A of the Civil Procedure Act, Cap 21 of the Laws of Kenya; and all other enabling provisions of the law. The applicants sought orders, inter alia, that leave be granted to them to apply for:-

1. …

2. …

3. (a) An order of certiorari to remove to this Honourable Court for purposes of quashing the decision of the Respondent, its officers and agents, contained in three (3) unreferenced letters dated 26th September, 2006, addressed to the 1st, 2nd and 3rd Applicants requiring the removal of certain documents to Customs House, 1st floor, Mombasa, without any notice or reasonable notice and/or giving opportunity to the Applicants to make copies and/or make and keep records thereof.

(b) An order of certiorari to remove to this Honourable Court for purposes of quashing the decision of the Respondent, its officers and agents, of entering upon the premises of the Applicants and arbitrarily, capriciously and forcibly removing therefrom documents, equipment, motor vehicles and other chattels.

(c) An order of prohibition prohibiting the Respondent from exercising its powers under the Income Tax Act, Cap 470, and the Value Added Tax Act, Cap 476, in an arbitrary manner.

(d) An order of mandamus directing the Respondent to carry out its obligations under the Income Tax Act, Cap 470, in a judicious manner.

(e) **Costs of this application.**

The fourth prayer was for an order that the grant of leave herein do operate as a stay. It is reproduced verbatim hereinafter.

The application was filed under a certificate of urgency and it came for hearing before this court on 28th September, 2006. After hearing counsel for the applicant, the court was of the opinion that the allegations against the respondent were sufficiently serious to warrant the grant of leave to file an application for judicial review. However, given the standing of the respondents, who are expected to know the parameters within which to conduct their operations, the court took the view that they probably had some good reasons for doing what they did, and therefore should be given a chance to explain

themselves before the court could determine whether the grant of leave should operate a stay of the proceedings in question. This led to the making of a split order per incuriam, whereby the court granted leave to apply for judicial review, and in the same breath ordered that the application be served for hearing inter partes to enable the court to decide whether the grant of leave should operate as a stay.

Four days later, learned counsel for the applicants came back by way of a mention. He said that the purpose of the mention was to bring to the attention of the court the first part of the decision of the court of appeal in **REPUBLIC** v. **COMMISSIONER OF CO-OPERATIVES & ANOR**. [1997] LLR 2227 (CAK). After setting out the provisions of Order LIII rule 1 subrules (1), (2) and (4) of the Civil Procedure Rules, the learned judges of Appeal went on the state:-

"**If the application must be made ex parte, then it follows that it must be heard and granted or refused ex parte. If the application is granted, then rule 4 (sic) of Order LIII must also be dealt with because it is at the granting stage that the judge is required to deal with the issue of whether the leave granted shall act as a stay. From the provisions we have set out it is clear to us that a judge has no power to separate the granting of leave ex parte from the issue of whether or not such leave shall act as stay. The judge must decide at the stage of granting leave whether or not such a grant shall act as a stay. There is no power to make one portion of the chamber summons ex parte and the other portion of it to be heard inter partes."**

It is clear from these words that the court had no jurisdiction to hear the leave portion of the chamber summons ex parte, and then to order the portion on leave operating as a stay to be heard inter partes. Asked whether the court had jurisdiction to recall the order for interpartes hearing and determine the issue of leave operating as a stay, learned counsel for the applicants answered that the order for inter partes hearing lad neither been served nor perfected. He submitted that we were still at the expartes stage, and that the court has still the jurisdiction and discretion, under Section 3A of the Civil Procedure Act, to recall that part of the order directing service for hearing inter partes and making a conclusive and final decision on prayer 4 of the application.

In a bid to salvage what it could out of the wreck, the court sought to pre empt the inter partes hearing of the prayer for stay by recalling its previous order made on 28th September, 2006, and ordering that the leave to apply for judicial review do operate as a stay of the proceedings. This was done by granting prayer 4 of the application which was couched in the following language:-

"**The grant of leave herein do operate as a stay of the Respondents declining and/or refusal to release to the Applicants the originals or copies or records of documents taken and further operate as a stay of the continued retention by the Respondent of the Applicants items taken from the Applicants' premises, offices, showrooms, factory or warehouses."**

It was this order which most aggrieved the Respondent, thereby prompting the Respondent to file the application now before the court. The application seeks one main prayer:-

1. …

2. …

3. …

"**4. <u>THAT</u> this Honourable Court be pleased to discharge, set aside, vary and/or vacate the Order made and/or issued by the High Court of Kenya at Mombasa on 2nd October, 2006, particularly the part thereof directing that leave granted to the applicants shall operate as a stay of the respondents declining and/or refusal to release to the applicants the originals or copies or records of documents taken and further operate as stay of the continued retention by the respondent of the applicants items taken from the applicants premises offices, showroom, factory and warehouse."**

The main grounds upon which the application is based are that:-

(a) The order was granted in excess of the jurisdictions of the court under Order LIII rule 1(4) of the Civil Procedure Rules.

(b) The effect of the said order is that the Respondent has been restrained ex-parte from carrying out it statutory duties and regulatory functions under the Value Added Tax Act, Income Tax Act, and the East African Community Customs Management Act, and the subsidiary legislation thereunder, and the Applicants have been granted immunity from the investigatory and the audit powers of the Respondent.

(c) The order, in the form it was made, is not only vague but also ambiguous in terms thereby rendering the compliance thereof by the Respondent extremely uncertain.

(d) That in all the circumstances of this matter, the Applicants were not entitled to the Orders granted and it is in the wider interest of justice that the aforesaid orders be discharged and/or vacated.

There can be no doubt in anyone's mind that the orders made by this court on 28th September were contrary to the letter and spirit of the law as pronounced by the court of appeal in **REPUBLIC v. COMMSIIONER OF CO-OPERATIVES & ANOR** [1997]LLR 2227 (CAK) (supra). Similar sentiments were echoed in **SHAH** v. **RESIDENT MAGISTRATE, NAIROBI** [2000]1E.A. 208 (CAK), in which the Court of Appeal reiterated that a judge has no jurisdiction to grant leave ex-parte and order the issue of stay to be heard or determined inter-partes. Although in the present matter the court arrested the interpartes hearing of the issue of stay by recalling its previous orders and granting a stay, with hindsight, it seems to me that the process was fraught with some procedural lapses, all of which raise the question of jurisdiction. The first issue is whether the court had jurisdiction to recall the orders made on 28th September, 2006. Mr., Mabeya for the Applicants submitted that the court had jurisdiction since the said orders had neither been served nor perfected, and that the matter was therefore still at the exparte stage. Attractive as this argument sounds, I am not, on my part, certain that it provides the panacea for the original transgression. I prefer to take the position that the best practice is to adhere strictly to the guidelines given by the Court of Appeal and deal at the same time with the issue of the leave and whether such leave would operate as a stay.

Secondly, even if the court had jurisdiction to recall its previous orders, this should not have been done at a mention. It is trite law that the court has no jurisdiction to make substantive orders at a mention. The Applicants should have moved the court by a substantive application. But there was no such application. On what basis, then, were the court orders of 2nd October, 2006, predicated? What sadly transpired on that day was that the court was led into reviewing its own orders on the ground of an error apparent on the face of the record, yet there was no application for review. In the absence of a formal application, the court had no jurisdiction to grant the orders.

If I am wrong in holding the view that the court had no jurisdiction, we still have to contend with the import of prayer 4 as granted. This is the nerve centre of the present application inasmuch as the Respondent would certainly not have come to court if that order had not been granted, the procedural irregularities notwithstanding. Mr. Gatonye for the Respondent argued that this order was, in essence, a mandatory injunction under the guise of an order of stay, and that the court lacked jurisdiction to grant injunctions under Order LIII of the Civil Procedure Rules. On his part, Mr. Mabeya for the Applicants submitted that the order made was not an injunction but a plain order of stay. Counsel invited the court to look at the order and note that whereas a mandatory injunction compels a party to do a positive act, in this instance the court only stayed the Respondent's refusal to give copies of the relevant documents.

In order to appreciate the full import of the order in issue, it is necessary to revisit what had taken place before the Applicants moved to court on 28th September, 2006. In a nutshell, the Respondent was alleged to have invaded the Applicants' business premises in cowboy style, impounded and removed therefrom documents, equipment, motor vehicles and other chattels. Although the Applicants requested the Respondent to allow them to take copies of the documents at their own expense, the Respondent declined and/or refused to release to the Applicants the originals or copies or records of the documents

taken. Against that background, the Applicants seek not only leave to apply for, inter alia, orders of certiorari to remove to this Honourable Court for purposes of quashing the decision of the Respondent, its officers and agents, of entering upon the Applicants premises and forcibly removing therefrom the materials aforesaid, but also for that leave to operate as a stay. The stay which is sought is that "… **of the Respondents declining and/or refusal to release to the Applicants the originals or copies or records of documents taken …"** In my humble view, unless these words are to have no meaning at all, they mean only one thing – i.e. that the Respondents should desist from declining and/or refusing to release to the Applicants the originals or copies or records of documents taken. That can only be effected by actively releasing to the Applicants the originals or copies or records of the documents taken.

The second limb of the prayer is even more telling. It seeks that the leave do operate as a stay of the continued retention by the Respondent of the Applicants' items taken from the latter's premises, offices, showroom, factory and warehouses. Again, in my view, "a stay of the continued retention" of the said items can mean only that the same be returned to the applicants. That being the case, I agree with Mr. Gatonye that in essence, the order of stay sought in this matter is indeed a mandatory injunction cleverly couched in negative terms. Fortunately or unfortunately, depending on who is looking at it, this court lacks jurisdiction to grant injunctions in applications under Order LIII. And if the court had jurisdiction to grant such an injunction, it would have to bear in mind that mandatory injunctions are sparingly granted, and only in the clearest of cases. And, because of the very nature of such an injunction, the court would have to be overly cautious before granting it, if at all, ex parte. In **REPUBLIC** v**. THE MINISTER FOR INFORMATION AND COMMUNICATIONS & 5 ORS. EX-PARTE ECONET WIRELESS,** (NAIROBI HC MISC. CIV APPL NO. 1640 OF 2004), [2006] e KLR, Ibrahim J. said of injunctive orders under Order LIII –

"**This court has no jurisdiction to grant such an order in judicial review proceedings and if it had, it has been granted improperly and in breach of the principles of natural justice as there is no returnable date for an inter partes hearing between the parties. It is a permanent injunctive order which was given in violation of all cardinal principles of natural justice … This court can correct its errors or wrongs and hence the reason, inter alia, the legislature conferred on it, its inherent jurisdiction in section 3A of the Civil Procedure Act and in the Constitution. It is also implied in any situation where it had jurisdiction to deal with any proceedings or matter. This court is willing to do that with all humility."**

What the court did with humility in the above matter is replicated with equal, if not more, humility in this matter. Even though counsel submitted on many other issues, upon consideration, I think that all such other submissions are best reserved for the substantive application for judicial review. In the circumstances, the order made and issued by this court on 2nd October, 2006, particularly the part thereof directing that the leave granted to the applicants shall operate as a stay of the respondents declining and/or refusal to release to the Applicants the originals or copies or records of documents taken and further operate as a stay of the continued retention by the respondent of the applicants' items taken from the Applicants premises, offices, showroom, factory and warehouse is hereby discharged, set aside and vacated.

It is so ordered.

Dated and delivered at Mombasa this 2nd day of February, 2006

L. NJAGI

JUDGE