



## JUDICIAL REVIEW

### Meaning of:-

- Fairness
- Unreasonableness - defined
- Wednesbury unreasonableness
- Irrelevant and relevant considerations
- Illegality and Public Policy – “maxim – Exturpi causa non action” applied concerning consequences of alleged illegality

**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
MISC CIV APPLI 807 OF 2004**

**IN THE MATTER OF AN APPLICATION BY SOMKEN PETROLEUM  
COMPANY LIMITED FOR ORDERS OF CERTIORARI AND MANDAMUS  
AGAINST THE COMMISSIONER OF LANDS TO REMOVE AND QUASH THE  
DECISION OF THE COMMISSIONER OF LANDS FOR REFUSING TO  
REGISTER THE TRANSFERS IN RESPECT OF L.R. NO. 3777/279/65, L.R.  
NO. 2116/238 & L.R. NO. 6938/28**

REPUBLIC ..... APPLICANT

VERSUS

THE COMMISSIONER OF LANDS ..... RESPONDENT

EX-

PARTE:-

SOMKEN PETROLEUM COMPANY LIMITED ..... RESPONDENT

### JUDGMENT

The application before the court is dated 14th September, 2004 brought by way of a Notice of Motion.

The orders sought include an order of certiorari to bring into the High Court and quash the decision of the Commissioner of Lands refusing to register the transfers in favour of the applicant over properties LR No 3777/279/65, LR 2116/238 – LR 2116/239 and LR 6938/25 and an order of mandamus to compel the Commissioner of Lands to register the aforesaid transfers.

Since the facts are not in dispute except the issue of payment and its effect in law I shall avoid setting them out in extenso but give a brief outline.

The applicant, Somken Petroleum Ltd a private limited Company offered to purchase the properties described above from Kenya Shell Ltd and BP Kenya Ltd. M/S.N.A Okello & Company advocates who represented the vendors instructed their clerk to have the transfers assessed for stamp duty. The Stamp duty was assessed at Kshs 1,717/240 and M/s NA Okello purchased from Barclays Bank of Kenya Limited a Bankers cheque number 439446 payable to the Collector of Stamp Duty for the sum of the assessed stamp duty. M/s N. A. Okello advocate endorsed on the reverse side of the Bankers cheque described the four properties which were the subject matter of the transfers as is the practice. The bankers cheque for the assessed Stamp Duty was presented for payment at the Lands office alongside with application for registrations of the Transfers after the transfers were stamped. The stamps on the face of the transfer documents indicate that they were assessed and were after inspection embossed and signed against the embossment. The transfer were stamped as certified by the collector of Stamp Duty on 18th December, 2003.

An application for registration in the formal manner prescribed by law under the Registration of Titles Act (RTA) and the applications were duly received in the Department of lands. The transfers were lodged two times that is on 30th September, and on 30.10.2003 following the cancellation of the original stamping. Upon presentation to the Registrar of Titles for registration the registrar did not sign the Transfers.

The applicant contends that the cheque was later found banked with the Central Bank of Kenya Eldoret Branch and stamped on the reverse as received on 15th August 2003. The stamping indicates that the payee account had been credited and the moneys transferred to the Land Registrar Account. The applicant claims that the bankers cheque was in fact processed and was indeed received by the bank and the cheque credited to the payee account. It is further claimed that the Commissioner of Lands contention that the cheque was not presented for payment is erroneous.

A delay in registration of the transfers arose and the firm of Muthoga Advocates who are now acting for the applicant were instructed to follow up and ascertain the reasons for non registration.

By a letter dated 7th April 2004 the Commissioner of Lands gave the reasons for this as under:-

- 1. "The requisite stamp duty was not paid by the Collector of Stamp Duties**
- 2. Your clerk did not present the cheque to the Lands Office and the fact that no official receipt was issued by the Ministry in respect of the cheque in question attests to this**
- 3. If documents were stamped then the said stamping was done fraudulently and I would not consider the documents to have been duly stamped as provided for in the Stamp Duty Act Cap 480." Sg J.M. OKUNGU COMMISSIONER OF LANDS**

These proceedings are predicated on the letter dated 7th April 2004.

The respondent's replying affidavit was sworn on 29th June 2005 by Elizabeth Gicheha who is a Senior Registrar of Titles in charge of Stamp Duty collection section depones interalia:-

- a) no payment cheque in respect thereof was ever received into the collectors account
- b) that the cheque allegedly issued for payment of Stamp Duty was apparently diverted by the applicants previous advocates employees in complicity with other parties who purported to effect the said irregular embossment and for which acts they were charged and prosted
- c) that the employees described in (b) above were on a frolic of their own in perpetrating their criminal acts and were not for this purpose agents of the Commissioner of Lands or the Collector of Stamp Duty
- d) it is because no payment was received by the collector that the transfers were not registered

e) that the applicant has admitted in para 5 of the further affidavit by N A Okello Advocate that though a cheque numbered similar to the one the applicants allege was theirs was received by the collector, the same was as shown for the registration of transfer instruments involving properties/land other than the applicants and the receipt in respect cheque No 439446 of the said cheque was issued in the name of another firm of Advocates, namely M/s Raffman Danji Advocates for the amount of Kshs 1,190,010 and not Kshs 1,717,240 being the value of the Barclays Bank Cheque No 439446.

The applicant has strongly urged the court to note that the definition of the Collector of Stamp Duty under S 2 of Stamp Duty Act is the Kenya Revenue Authority established under the Kenya Revenue Authority Act. It has also been stressed to the court that S 7 of the Stamp Duty Act does provide that payment of duty is to be denoted upon instruments by means of stamps. In addition Regulation 2 made under section 119 of the Act provides that the stamp duty with which instruments are chargeable shall be paid and denoted by an embossed stamp which shall be embossed on the instrument under the direction of a collector ...

The applicants contend specifically:-

a) that the payment having been presented to the Lands office who had authority to receive the same and who are in possession of the embossing machine the applicant had no control whatsoever of the decision to determine into which account the bankers cheque would be deposited

b) that the Commissioner is in the circumstances unreasonable unfair in refusing to register the transfers and has in fact taken extraneous matters in arriving at the decision to refuse to register

c) it is unfair and unreasonable for the Commissioner to punish the applicant for fraud perpetrated internally by or with the connection of the officers employed by the Commissioner of Lands and that the applicant had no control over the alleged fraud d) the suspect or accused clerks and the Kenya Revenue Authority are agents of the Commissioner of Lands with regard to collection of stamp duty or that they are his agents by holding out as such

e) the applicant was innocent purchaser for value and had nothing to do with the fraud and should not support it and it is wrong for the Commissioner to have been influenced by the perceived opinion by the Commissioner that the applicant had a role which is not correct and also in making the decision relied on wrong facts and also failed to consider material facts and therefore misdirected himself since the cheque was presented in the Land Registrar's Account at the Central Bank of Kenya Eldoret Branch. The Commissioner was thus asking the applicant to be in charge of the internal affairs of the Lands officers whereas the applicant's only duty was to present the documents and to pay duty and therefore the Commissioner did take into account extraneous matters

f) the Commissioner failed to apply the law properly and proceeded to make a decision based on an error of law - She took the fact that there was no receipt as prima facie evidence that Stamp Duty was not paid without considering that the Embossing is as per S 7 of the Stamp Duty Act which is prima facie evidence of payment. She also failed to address statutory considerations and applied extraneous non-statutory considerations.

g) the Commissioner of Lands owed the applicant a duty of fairness in considering the applications for registration

h) the practice at the material time was to have the receipt issued after the processing of the cheque.

The applicant has relied on three grounds namely lack of fairness, unreasonableness and irrationality, and failing to take into account relevant considerations or taking into account irrelevant considerations and finally illegality.

Ordinarily there are two aspects as regards the rules of natural justice:

- a) The Nemo Judex rule which means that no man should be a judge in his own cause
- b) the Audi Alteram Partem rule which means the right to a fair hearing

In the circumstances of this case the Commissioner vide the letter of 4th July 2004 has given her reasons for declining to register the transfer as set out above. For this reason an oral hearing would not be necessary. The first aspect above does not apply.

I cannot therefore find any irrationality.

On this ground the Commissioner is said to have acted irrationally because the applicant had no control of the internal arrangement after presenting the application for registration of transfer and the transfer duly embossed. However the Commissioner denies that the cheque was ever receipted or the payment collected by the Commissioner. Without proof of payment she says she cannot register the transfer. The question is, is the stand taken by the Commissioner irrational? The test is that of a reasonable man. Would a reasonable man arrive at a similar decision in the circumstances. The answer to me is a clear yes. In support of this finding I wish to adopt and apply Lord Diplock observations in the leading case *CIVIL SERVANTS UNION (CCU) v MINISTER FOR CIVIL SERVICE* [1985] A C 374 (HL) where he held that irrationality as a ground in Judicial review:-

**“applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who applied his mind to the question to be decided could have arrived at it.”**

I did apply the same principle in HC Misc 1025/2003 R v JUDICIAL SERVICE COMMISSION Ex-parte PARENO.

It is quite apparent that the Commissioner’s decision cannot by any stretch of meaning be any where near the above definition or standard. I would apply the same test to the applicants contention on the other grounds of unreasonableness and irrelevant considerations. The issue of whether or not payment was received is a matter of evidence and the two parties have taken diametrically opposed positions with the claimant contending that the proceeds of the cheque were credited into the lands office account but in these proceedings no conclusive evidence of this has been adduced nor the payment linked to the properties which the applicant was purchasing. On this there is evidence of the same cheque number being used in respect of other transactions involving another firm and the receipt being issued in favour of the other firm. There is also a claim that the amounts in respect of the same cheque number were different from the total stamp duty assessed in respect of the transactions giving rise to this litigation. These are all highly contentious matters which are better tested in a full trial in an ordinary suit.

In respect of the ground of unreasonableness the learned counsel for the applicant has cited the leading case on this ground that is, *ASSOCIATED PROVINCIAL PICTURE HOUSE LTD v WEDNESBURY CORPORATION (CA) 1947 2ALL 680*.

Unreasonableness as explained in this case does in my view cover the meaning as per Lord Diplocks quote (above) in the CCU case.. It also has a second meaning of manifest unreasonableness which is a decision or exercise of power which is so unreasonable that no reasonable person would agree with it. Using the two meanings again the Commissioner’s decision does easily pass the test of reasonableness. Sir Thomas Bingham Master of Rolls in the England Court of Appeal in R v MINISTER OF DEFENCE ex parte SMITH [1996] 2 WLR 305 made a finding as follows:-

**“The court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision maker.”**

### **Irrelevant considerations.**

Again on this the WEDNESBURY decision is authority for the proposition that if a statutory authority takes an irrelevant consideration into account or ignores a relevant consideration the decision reached can be challenged .

Again in the PADFIELD v MINISTER OF AGRICULTURE AND FISHERIES [1968] AC 997 (HL) which is a House of Lords decision, Lord Upjohn summarised unlawful behaviour as:-

- i. an outright refusal to consider the relevant matter**
- ii. a misdirection on a point of law**
- iii. taking into account some wholly irrelevant or extraneous consideration**
- iv. completely omitting to take into account a relevant consideration.**

It is clear to this court that the overriding concern of a judicial review court in applying the above tests is in the court's concern whether the decision making body has addressed itself on all relevant factors. With this in view the court finds that the Commissioner's decision as communicated by letter did substantially address all the relevant factors including the relevant provisions of the Stamp Duty Act. In a situation where those involved in perpetrating the embossment of the transfer and the handling of the cheque have been arrested and the prosecutions are being undertaken the court finds that it would be improper for the applicant to insist on benefiting from a fraud in a situation where it has an alternative remedy in private law.

### **Illegality**

It has been contended for the applicant that the Commissioner of Lands did not act in accordance with the relevant law and in particular S 7 and the regulations made under S 119 of the Stamp Duty Act but the embossment of the assessed Stamp Duty only constitutes prima facie evidence of payment. This presumption can be rebutted by evidence proving that there was no payment in fact. The replying affidavit does point to a fairly contentious position concerning payment or non payment of the Stamp Duty.

The affidavit casts a long shadow concerning the alleged payment.

All that Commissioner of Lands has said in the challenged decision in the form of a letter dated 7th April 2004 is that she is not satisfied that payment was ever effected in respect of the transactions in question. Her taking this position in my view shifts the evidential burden to the applicants to prove payment and I find no misdirection on the part of the Commissioner or that he has not properly addressed the relevant law as cited or any applicable law. On this point again I wish to borrow from that great authority on judicial review, Lord Diplock. In the case of CCU cited above on the meaning of illegality as a ground in judicial review proceedings, he put it these illustrative words:-

**“By illegality as a ground for judicial review I mean that the decision maker must understand correctly the law that regulates his decision making power and must give effect to it.”**

In a recent case *R v UNION OF KENYA CIVIL SERVANTS Misc 894/2005 Kenya Union of Civil Servants v The Industrial Court* where the Government planned to terminate the employment of 116 000 workers with a stroke of a pen and the award of the Industrial Court was challenged in this court on the ground that the Judge hearing the matter was appointed for only one year as opposed to the period five years stipulated in the Trade Disputes Act, I gave leave and stay against the decision to terminate the employment of the workers because the Judge had exercised power at a time when he did not have the prescribed qualifications obviously intended to give him security of tenure of office as required in the Act

granting the power. And at the leave stage I considered that the exercise of the power by the Judge was illegal. Happily immediately after the *ex parte* order for leave and stay the parties recorded a settlement order in my chambers immediately thereafter. This case did not see the light of day because the matter did not go to the next stage in the judicial review process but it demonstrated on the ground a very serious commitment by the Government to the principle of the rule of law. It was a real triumph for the rule of law and the independence of the Judiciary because after the settlement the Industrial Court Judge was reappointed for a period of 5 years as stipulated in the Trade Disputes Act. The case is an illustration of the effect of illegality in judicial review.

### **Public Policy**

The circumstances of the stamping of the documents are such both the employees of the Commissioner of Lands and an employee on two of the advocate presenting the documents and by extension the applicants were *prima facie* involved in a fraudulent transaction – to defraud the Collector of Stamp duty revenue. In short it is a fraud upon revenue. I hold that it would be contrary to the doctrine of public policy for the applicant to seek a Judicial review remedy in a transaction so tainted with fraud on revenue.

Moreover the stamping of the documents upon which the applicant relies in seeking relief is contaminated by “*turpis causa*” and the rule has long been established that “*ex turpi causa oritur non action*”. This maxim means that no person can claim any right or remedy whatsoever under an illegal transaction in which he has participated – see ..... *GORDON v METROPOLITAN* [1910] 2 K.B 1080 at pg 1098. In *SCOTT v BROWM* [1892] 2 Q.B. 724 at pg 1128. Lindley L.J. held as follows:

**“No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or *transaction* which is illegal if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality.”**

Even in Judicial review I find that a transaction tainted with fraud or illegality cannot be enforced and the damage if any must lie where it fell unless it can be recovered without pleading illegality or fraud, when the party purporting to enforce took part.

In the face of the above reasons which I consider to be weighty on all the grounds directed at the Commissioner’s decision, the application is accordingly dismissed forthwith. However as regards costs I decline to order that they follow the event in view of the untried allegations that some employees of the Commissioner of Lands and one or two from the vendors advocates offices were involved in the alleged fraud and I make no order as to costs.

DATED and delivered at Nairobi this 28th day of October, 2005.

**J G NYAMU**

**JUDGE**

### **Advocates**

Mutungi

Muthoga & Associates

Advocates

Mr Bosire

State Counsel

