REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Misc Civ Appli 664 of 2004

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW

IN THE MATTER OF: CUSTOMS AND EXCISE ACT CAP. 472 LAWS OF KENYA

IN THE MATTER OF: AIR PASSENGER SERVICE CHARGE ACT CAP. 475 LAWS OF KENYA

IN THE MATTER OF: ORDER LIII OF THE CIVIL PROCEDURE RULES AND SECTION 3A OF THE CIVIL PROCEDURE ACT CAP.21 LAWS OF KENYA

THE REPUBLIC …….....……..APPLICANT

VERSUS

THE COMMISSIONER OF CUSTOMS & EXCISE.....RESPONDENT

EX-PARTE ETHIOPIAN AIRLINES

R U LING

In the application dated the 31st May 2004 brought by way of Chamber Summons under Order 53 of the Civil Procedure Rules, the Applicant/Respondent sought, *ex - parte*, and obtained on the 2nd June 2004 leave **"to apply for the Orders of Mandamus , I certiorari and Prohibition"** in terms of prayer b) thereof. The application did not seek that the leave, if granted, do operate a stay and no stay was therefore considered or granted.

The Respondent/Applicant, being dissatisfied with that order, filed the Notice of Motion dated the 27th July 2004 (the subject of this ruling) seeking to set aside the *ex - parte* leave. The Motion is premised upon the five grounds set out therein and supported by the affidavit of Moses Giteru Mararo made on the 27th July 2004 annexed thereto.

In opposition to the application, the Applicant/Respondent filed the Replying Affidavit of its learned

counsels Mak'Ogonya T.T. Tiego, made on the 9th August 2004.

In her submissions and in support of grounds 1 to 4 inclusive of the application Mrs. J.W. Kamande, learned counsel for the Respondent/Applicant, contended that the court ought not to have entertained the application dated the 31st May 2004 because. on the 2nd June 2004 when the same was heard ex – parte, and in contravention of section 6 of the Civil Procedure Act, there was already another suit still pending before the court, being Nairobi HC Misc. Civil Application N0.256 of 2004 between the Applicant/Respondent as the Respondent/Applicant in which the matters in issue were also directly and substantially the same.

Further, learned counsel submitted that notwithstanding that the Applicant/Respondent in its Notice dated the 31st May 2004 purported to discontinue the proceedings in Misc. Civil Application N0.256 of 2004 aforesaid with effect from the 31st May 2004, such notice did not infact become effective until the 10th June 2004 when the Notice was filed. Accordingly, and the Applicant/Respondent having failed to disclose these material facts to the court was not entitled to a grant of the leave sought as in any event, the application of the 31st May 2004 was incompetent by virtue of section 6 of the Act aforesaid. In further support of her argument, Mrs. Kamande feared me to the unreported judgment of Nyamu, J. dated the 9th November 2004 in **The Republic v. Kenya Revenue Authority and Others** (Nairobi HC Misc. Civil Application N0.946 of 2004).

Finally, and on ground 5 of the Motion, learned counsel urged that the *ex - parte* leave to apply for an order of certiorari was irregularly and improperly granted as the application for such leave was made after the six months period prescribed by section 9(3) of the Law Reform Act [Cap. 26]and under Order 53 rule 2 of the Rules aforesaid. Learned counsel further contended that inasmuch as the Applicant/Respondent in prayer a) of the substantive Notice of Motion dated the 8th June 2004 and filed on the 9th June 2004 pursuant to the *ex - parte* leave seeks an order of certiorari to quash the Respondent/Applicant s letter dated the 3rd December 2003, and given the Respondent's/Applicant's argument that the effective date of the discontinuance of the proceedings in HC Misc. Civil Application No.256 of 2004 was the 10th June 2004 when the Notice was filed and not the 31st May 2004 as stated in the Notice, the Applicant/Respondent was already statute barred under section 9(3) of the Law Reform Act aforesaid and cannot seek to circumvent this statutory provision by backdating the effective date of the said Notice. Counsel also contended that the said letter of the 3rd December 2003 on which the Applicant/Respondent relies does not constitute a Notice of Assessment under the Air Passenger Service charge Act [cap. 475] as it was merely a response to an earlier request made by the Applicant/Respondent to waive accrued penalties on the actual Notices of Assessment respectively dated the 15th May 2002 and the 17th July 2002 which the Applicant/Respondent did not bring to the attention of the court when seeking the *ex - parte* leave.

On these grounds and reasons, Mrs. Kamande urged that the ' Motion be allowed.

In response to these arguments, Mr. Tiego for the Applicant/Respondent opposed the Motion on the basis of his said affidavit made on the 9th August 2004. He submitted that at the hearing of the *ex-parte* application for leave dated the 31st May 2004; all material facts were, in fact, disclosed to the court. Learned counsel contended that section 6 of the Civil Procedure cannot and does not apply to the Motion because at the time the application dated the 31st May 2004 was filed on the 2nd June 2004, there no other suit pending before the court as Nairobi HC Misc. Civil Application N0.256 of 2004 had already been withdrawn on the 31st May 2004 and that it is irrelevant that the Notice of discontinuance thereof was not filed until the 10th June 2004. Mr. Tiego further submitted that in any event, there is no law barring the Applicant/Respondent from neither filing more than one application nor barring the court from granting orders with retrospective effect. Mr.Tiego submitted, therefore that even if the court were to find that the Notice to Discontinue Proceedings dated the 31st May 2004 was defective, the court should nonetheless also find the application of even date therewith competent and not time barred as the Respondent/Applicant contends. Finally, Mr. Tiego submitted that the grounds and reasons advanced by

the Respondent/Applicant ought, in any event, to be raised at the hearing of the substantive Notice of Motion herein dated the 8th June 2004. For these reasons, Mr. Tiego urged that the application be dismissed with costs.

I now consider the application in light of these submissions of both learned counsel and of the evidence before me and the law. Ground v) of the grounds set forth in the Chamber summons application dated the 31st May 2004 reads as follows:-

"**v) After due consideration the Applicants have now opted to abandon the said application and start afresh as the limitation is due to set out in by 2nd June 2004 and further grounds."**

What the Applicant/Respondent failed to disclose to the court is that though it had opted to abandon Nairobi HC Misc. Civil Application N0.256 of 2004, the Applicant/Respondent had not, in fact, withdrawn the same. As of the 2nd June 2004 when the application for leave was granted, no notice to withdraw the proceedings aforesaid was on record. It was not until the 10th June 2004 that such notice was filed purporting to withdraw the proceedings with effect from the 31st May 2004. In my judgment, the Applicant/Respondent failed to disclose this material fact to the court and ought not, on the authority of the unreported Court of Appeal decision in **Uhuru Highway Development Ltd v. Central Bank of Kenya and Two Others** (Civil Appeal No.126 of 1993) following the principle settled in **R. v. Kensington Income Tax Commissioner *Ex- parte* Princess Edmond de Polignac** [1917] 1KB 486, to have been granted the leave sought.

This brings me to the second question for consideration in this ruling, namely: when did the Notice dated the 31st May 2004 to discontinue the proceedings in Nairobi HC Misc. Application N0.256 of 2004 aforesaid take effect? It is logical, if not obvious, that such Notice could only take effect from the 10th June 2004 when it was filed and the Applicant/Respondent is not in a position, at law, to deem that the same took effect from the 31st May 2004 as stated therein. To find and hold otherwise would lead to the absurd situation where a plaintiff, on realizing that his claim was statute barred, purported the circumvent the statutory limitation merely by pleading in his plaint that the effective date thereof was not the date of filing but rather a specified date well chosen to fall prior to the date on which the cause of action, in fad, became statute barred. I find and hold that as at the 2nd June 2004 when the application for leave dated the 31st May 2004 was filed, Nairobi HC Misc. Application N0.256 of 2004 aforesaid was still very much alive. Accordingly, the Applicant/Respondent contravened the provisions of section 6 of the Civil Procedure Act in seeking leave when other proceedings were still pending in this court. Consequently, and as the leave sought and obtained is to apply for orders, *inter alia*:

"**of certiorari directed to the Respondent to bring to this court demand letter (Notice of Assessment) dated 3rd December 2003 for a sum of Ksh.7,867,713/= for purposes of being quashed**
"

As stated in prayer a) of the Notice Of Motion dated the 8th June 2004, the application dated the 31st May 2004 is incurably defective, and therefore incompetent, under and by virtue of Section 9(3) of the Law Reform Act and Order 53 rule 2 of the Civil Procedure Rules respectively.

There is one final issue with which I must deal though it was not raised by the Respondent/Applicant and that is whether or not the said affidavit of Mr. Tiego sworn on the 9th August 2004 is competent and properly before the court. Reading what is deponed to in paragraphs 9 and 10 thereof in particular, I cannot help but wonder what Mr. Tiego would have to say if cross - examined thereon under Order 18 rule 2(1) of the Civil Procedure Rules. With profound respect, learned counsel would appear to have abdicated his role as an Advocate and usurped that of his client. In this regard and having had the benefit of reading the unreported ruling dated the 15th July 1996 of Ringera, J (as His Lordship then was) in **Kisya investments Ltd. & Another v. Kenya Finance Corporation Ltd. & Others** (Nairobi HCCC No. 3504 of 1993), I would respectfully agree with the principle adopted therein. I am fortified by the decision in **Yusuf Abdul Gani v. Fazal Garage** (1955) 28 KLR 17, affirmed by the Court of Appeal in

David Kinyanjui & Others v. Mechack Omari Munyoro (Civil Appeal No.121 of 1993) (unreported), which held that:- "**while order 18, rule 3(1) in ,. Interlocutory applications relaxed the best evidence rule and the rule , excluding hearsay by admitting statements on belief the use made of the rule must be strictly scrutinized lest there be risk of rendering nugatory the salutary proviso that the grounds for belief must be stated. When a client was himself available to depone either to his own knowledge or to his own belief and so state his own grounds it was preferable that he, rather than his advocate on his behalf swore the affidavit lest unacceptable grounds were obliterated or some undue advantage obtained to the defeat of the rule."**

By reason thereof, Mr. Tiego's said affidavit is defective and incompetent and l hereby struck it out.

In the result, and for the foregoing reasons, 1 would and do allow the application made by Notice of Motion dated and filed on the 27th July 2004 and order that the *ex-parte* order of leave granted on the 2nd June 2004 pursuant to the chamber summons application dated the 31st May 2004 be as is hereby set aside and vacated. It is further ordered that each party shall bear its own costs of the application.

Dated and delivered at Nairobi this 17th day of December2004.

P. Kihara Kariuki

Ag. Judge