REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 28 OF 2018

IN THE MATTER OF AN APPLICATION BY THE APPLICANT

FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY WAY OF

AN ORDER OF CERTIORARI, PROHIBITION AND DECLARATION

PURSUANT TO ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010.

IN THE MATTER OF TAX APPEAL TRIBUNAL ACT

IN THE MATTER OF TAX PROCEDURES ACT

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

BETWEEN

VICTROCISET S.P.A. KENYA.....APPLICANT

VERSUS

THE COMMISSIONER OF DOMESTIC TAXES...RESPONDENT

RULING ON REVIEW

1. On 7th February 2018 this court delivered a ruling granting the exparte applicant herein Vitrociset S.P.A leave to apply for Judicial Review orders against the respondent Commissioner of Domestic Taxes.

2. The court also ordered that the leave so granted do operate as stay of implementation of the decision by the respondent whereupon the latter issued Agency notices to the exparte applicant's Bankers on 15th January 2018 and effectively froze the bank accounts held by the applicant at the Diamond Trust Bank Limited.

3. The applicant dutifully filed and served the notice of motion as directed by the court. However, on 21st February 2018 the applicant's counsel Mr Kashindi brought to the attention of the court that his client was experiencing challenges implementing the conditional stay orders of this court which provided that the stay was conditional upon the applicant providing a bank guarantee of shs 50 million within 14 days.

4. The court after giving directions on compliance with the processes of filing of document to ready the hearing of the main application, did direct the applicant to make an appropriate application regarding implementation of the order of 7th February 2018.

5. On 22nd February 2018 the applicant lodged an application dated the same day seeking for variation of the order of 7th February 2018 requiring the applicant to provide a security of a bank guarantee of 50,000,000 as a condition for granting a stay.

6. Secondly, that the court does direct that the Security of shs 7,905497 and advance taxes amounting kshs 6,381,929 which was already deposited with the respondent be the basis of conditional stay. Finally, costs be borne by the respondent.

7. The grounds upon which the application is predicated are inter alia, that the applicant is unable to execute the bank guarantee in

question as ordered by the court because the bank requires deposit of similar amount in the applicant's account which the applicant cannot raise at once as it is in the service industry and most of its finances are operational and held up with its customers who cannot deposit in the bank as a result of the freezing order.

8. Further, that the applicant has a history of fulfilling its tax obligations, that it is not a flight risk and that even while the tax dispute was pending before the tribunal, it paid over 300,000,000 in taxes.

9. It was averred that unless the orders sought are granted, the orders of 7th February 2018 will not be implemented as a result of which the applicant is threatened with ceasing its operations as it cannot receive or access funds from the bank to pay its suppliers, staff salaries etc which then necessitates review of the conditions given by this court for stay.

10. It was further averred that this court should exercise is inherent power to reconsider the mater in order to meet the ends of justice and to prevent hardship and irreparable harm and prejudice and continued breach of fundamental rights of the applicant.

11. In opposing the motion for review of the orders of 7th February 2018, the respondent filed grounds of opposition on 28th February 2018 contending that the motion is resjudicata, that it offends Order 45 (1) of the Civil Procedure Rules on review of orders in that the threshold for review has not been met; that the application for review is an attack on the discretion of the court; that all evidence set out in the motion were within the applicant's possession and knowledge as at the time when the order which is sought to be reviewed was made; that there are no new matters disclosed in the motion which could not have been obtained with due diligence; that there is no error or mistake apparent on the face of the record; That the application is a gross abuse of court process; that the applicant has an appeal pending from the Tax Appeals Tribunal case No. 21/2017, being HCCA No 1/2018: that the applicant's accounts are not frozen but open to receiving monies and that the applicant's banks are obligated to release to it monies; that this court should not go into the merits but concern itself with the procedure of the respondent in issuing Agency Notices pursuant to a valid judgment of the Tax Appeals Tribunal; that therefore the applicant's application dated 22nd February 2018 must be dismissed as the court cannot grant futuristic orders as there is no proper order by the court to review hence the application is frivolous and vexatious and an abuse of the court process only meant to delay and halt the collection of the taxes found to be due and payable.

12. The parties' advocates urged the application orally on 28th February 2018 with Mr Kashindi advocate submitting on behalf of the exparte applicant tax payer and Miss Mburugu submitting on behalf of the respondent tax collector.

13. The submissions by both counsels substantially mirror the applicant's assertions and the contentions by the respondent. It is therefore not necessary to reproduce them here.

14. However, Miss Mburugu relied on some authorities which I shall refer to in my determination.

15. Having considered the application by the applicant, the grounds of opposition by the respondent and the respective parties' oral submissions and authorities cited, the main question to be determined in this matter is whether the application for review is merited.

16. The respondent contends that this matter is resjudicata because the court considered the matters raised herein by the applicant when dealing with the application for leave and stay and arrived at the decision which is sought to be reviewed hence it cannot review its own orders in the absence of evidence of new and important matter, error apparent on record and further, that this court cannot be asked at this stage to consider merits of the matter or to review its own orders which are discretionary orders. Reliance was placed on Order 45 Rule (1) of the Civil Procedure Rules on review whose substantive law is Section 80 of the Civil Procedure Act Cap 21 Laws of Kenya.

17. The question therefore which arises from the above submissions is whether this court is functus officio and cannot review its own orders especially where the threshold for review as stipulated in Order 45 Rule (1) of the Civil Procedure Rules was allegedly not met by the applicant in its application dated 22nd February 2018.

18. The Court of Appeal in **Biren Amritlal Shah & Another vs Republic & 3 Others [2013] e KLR** expressed itself thus, regarding whether or not the court in Judicial Review proceedings brought under Section 8(5) of the Law Reform Act could review its own orders:-

> ***" It is therefore quite clear that appeals in respect of orders made under judicial review lie with the Court of Appeal. Therefore, in answering the question whether the High Court had jurisdiction to entertain a review application. We agree with the learned judge of the High Court that, in exercising its special jurisdiction under the Law Reform Act, the High court had no jurisdiction to review its previous order."***

19. However, in its earlier decision made in 2011 which decision was not referred to in the latter [2015] decision of **Biren Amritlal** case, the same Court of Appeal held in **Nakumatt Holdings Ltd vs The Commissioner of Value Added Tax [2011] e KLR** that the Superior Court in the matter before the court ***had the residual power to correct its own mistakes, and that to the extent that the court has no powers under Order 45 of the Civil procedure Rules to review its own orders made in Judicial Review.***

20. Honourable Odunga J in **Republic vs Kenya Revenue Authority exparte Paragon Electronics Ltd[2015] e KLR** dealing with the same issue of review of the court's own orders in judicial review proceedings, and citing the above two cases of the Court of Appeal held, inter alia:

> ***"……I agree that the Court of Appeal's decision in Biren Amritlal Shah & another vs Republic (supra) cannot be faulted. However, as the Court of Appeal appreciated in Nakumatt Holdings Limited vs Commissioner of Value Added Tax [2011] e KLR, the Superior Court in the matter before the court has the residual power to correct its own mistakes. Accordingly, where a***

mistake is shown to have been committed which is remediable by the court the same ought to be corrected by the court in the exercise of its inherent jurisdiction. In my view, where a mistake has been brought to the attention of the court which is capable of being remedied, be it by review or otherwise, I do not see any bar to the court invoking its inherent powers to do so, the nature of the proceedings in question notwithstanding."

21. The court went further and stated that:

"However, whether the court will exercise such powers in Judicial Review proceedings, depends on the nature of the prayer sought and then impact on the said proceedings. Where Judicial Review proceedings have been determined and the applicant does not set out to set aside the order determining the same, but seeks orders which are totally unrelated to the matter which was placed before the court for determination. It is my view that the provisions of Section 8(2) and (3) of the Law Reform Act, become relevant .

The provisions state:

(2) In any case in which the High Court in England is, by virtue of the provisions of Section 7 of the Administration of Justice Act empowered to make an order of mandamus , prohibition or certiorari, the High Court shall have power to make a like order.

(3) No return shall be made to any such order, and no pleadings in prohibition shall be allowed, but the order shall be final, subject to the right to appeal there from conferred by Subsection (5) of this Section.

In my view what this Section means is that once a determination is made, he court ought not to revisit the proceedings already determined save for the limited purpose of either implementing its orders or where the court is moved to set aside its decision(emphasis added)."

22. In the instant case, the court made an order staying the decision made by the respondent on 15th January 2018 vide letters to the applicant's bankers appointing them as agents for tax collection from the applicant's accounts and effectively, allegedly, freezing the applicant's operational accounts thereby paralyzing its operations.

23. The court in granting the applicant leave to apply for judicial review orders also ordered that the leave so granted shall operate as stay of the agency notices and of the freezing of the applicant's bank account conditional upon the applicant securing a bank guarantee of shs 50 million within 14 days of 7th February 2018.

24. The applicant returned to court through an application dated 22nd February, 2018 subject of this ruling complaining that it is unable to implement the court's order of conditional stay because its funds are all tied up by the freezing orders of the respondent and that it cannot raise the sh 50 million to deposit in a bank as demanded to issue a bank guarantee.

25. Further, that it is in the service industry and its operations and services have been paralyzed due to the freezing order. The applicant has also given a history of its tax disputes with the respondent and demonstrated how it has been diligently settling taxes due despite the dispute, and which matters are not controverted by the respondent tax collector by way of an affidavit.

26. Although the respondent claims that the applicant is a flight risk because its contract with the Kenyan Government lapsed and that it is a subsidiary of an Italian Company, the court did pronounce itself on this matter in its ruling dated 7th February 2018 hence it cannot revert to that issue.

27. Further, albeit the respondent heavily relied on the threshold for review set out in Order 45(1) of the Civil Procedure Rules, it is now clear that those provisions are inapplicable to proceedings for Judicial Review.

28. In Judicial Review, the power of the court to review or vary its own orders is limited to for purposes of either implementing its orders or where the court is moved to set aside its decision.

29. It therefore follows that the decisions relied on by the respondent's counsel namely, **Abdullahi, Mohamud vs Mohamud Kahiye [2015] e KLR and Francis Origo & Another Kimali Mungals (CA 149/2001 and Stephen Gathua Kimani vs Nancy Wanjira Wauingi t/a Providence Auctioneers [2010] e KLR** are inapplicable to the circumstances of this case, as they all relate to review in purely civil cases.

30. This court's jurisdiction to review or vary its orders can thus be exercised only in exceptional circumstances when the court is called upon to invoke its inherent powers to ensure that its orders are enforced. This is so because courts of law do not make orders in vain and therefore it would make no judicial sense to make or issue orders which are incapable of implementation, which would in essence defeat the purpose for which the orders were sought and granted.

31. This is a court of law and a court of justice which exists and exercises judicial authority derived from the people and in doing do so it must ensure that justice is administered without due regard to procedural technicalities and that the purposes and principles of the Constitution shall be protected and promoted as espoused in Article 159 of the Constitution. It follows that where a court of law gives a remedies which in this case is a conditional stay which has turned out to be an illusory with a result that it is practically a mirage, the court will not shirk from its constitutional mandate to ensure that a person's right to a fair hearing as stipulated in Article 50(1) of the Constitution and Article 48 on access to justice for all persons and that if any fee is required, it shall be reasonable and shall not impede access to justice,, and the right to fair Administrative Justice as stipulated in Article 47 of the Constitution are actualized.

32. It would, in my view, be a denial of the very remedy of stay that the court gave on 7/2/2018 if the court makes an order which the beneficially thereof finds it impossible to enjoy. Where the party returns to the temple of justice and sufficiently explains the difficulties encountered in implementing the order, it is upon the court to consider whether such complaint is made in good faith.

33. It has not been shown that the application by the applicant is made in bad faith or that it is an abuse of the court process.

34. In **Chege Kimotho & Others vs Vesters & Another [1988] KLR 45,** citing with approval **Midland Bank Trust Company vs Green [1982] 2 WLR 130,** it was held:

> ***"The law is a living thing. It adapts and develops to fulfill the needs of living people whom it both govern and serves. Like clothes it should be made to fit people. It must never be strangled by the dead hands of long discarded custom, belief, doctrine or principle."***

35. As was eloquently put by Odunga J in **Republic vs Kenya Revenue Authority Exparte Paragon Electronics Ltd[2015] e KLR** and which authority I adopt, the principles espoused therein albeit the circumstances are slightly different from this case:

> ***"The Law must, of necessity, adapt itself; it cannot lay still. It must adapt to the changing social condition. The court in the modern society in which we live cannot deny a deserving litigant a remedy . The courts have recognized that unlawful interference with a citizens rights gives rise to a right to claim redress and if the exparte applicant has a right he must of necessity have the means to vindicate it and a remedy if they are injured in the enjoyment or exercise of it; and indeed, it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocate whether or not they will be able to prove that their rights have been contravened or infringed is another matter all together (See Rookes vs Bernard [1964] AC 1129; Ashby vs While [1703] 2 Ld Raym, 938; 92 ER 126."***

36. In the **Republic vs Returning Officer of Kamukunji Constituency & The Electoral Commission of Kenya HC MCA 13/2008** the court held, inter alia, that:

> ***"Just as nature abhors a vacuum, even the enforcement of the rule of law abhors a vacuum or a gap, in its enforcement. The court proceeded to uphold the jurisprudence that helps to illuminate the dark spots and shadows in all circumstances, so that justice as a beacon of light and democratic ideals are practiced and hailed all the times over the hills, valleys, towns and homes. In this beautiful land of Kenya. The mantle of justice the and rule of law must cover all corners of Kenya in all stations. Courts have a continuing obligation to be the foremost protectors of the rule of law."***

37. The applicant has returned to this court seeking to have the orders of 7th February 2018 implemented without difficulties. This court must be willing to be facilitative of the execution of its orders so as to make the rule of law a reality, not to strangle the rule of law.

38. It is for that reason that I must invoke the inherent powers and jurisdiction of the court to facilitate or inject life in the rule of law implementation process. This court believes in and has not once but severally made it clear that investors must be facilitated to do business, provide employment opportunities for the young people of Kenya and pay taxes from which the Governments at both National and County levels can render efficient services to its citizens..

39. An Investor is like a cow which gives us milk. We must not slaughter it. If we do, we only get meat from it. The milk stops flowing. Meat is short term whereas milk is long term. We must therefore endeavour to nurture the cow so that it continues to give us milk. That should the attitude of Kenya Revenue Authority our National Tax Collector. It must not strangle tax payers. It must be facilitative of tax payers. It must be incentive-based not execution- based. The tax collector should not endeavour to strangle investors and taxpayers or treat them with disdain.

40. For all the above reasons, I find that the motion for review is merited. It is hereby granted. The earlier order of 7th February 2018 on stay is hereby reviewed and varied and substituted with an order of unconditional stay of enforcement of the respondent's letters of 15th January 2018 until these Judicial Review proceedings are heard and determined on merits.

41. The court declines to make any orders on the security deposited with the respondent by the applicant during the pendency of the Tax Appeals Tribunal's dispute as that is a matter which is outside the armbit of this matter since the specific dispute is subject of the appeal proceedings pending in the Civil(Tax and Commercial Division) of the High Court.

42. Each party shall bear their own costs of this application for review.

Dated, signed and delivered in open court at Nairobi this 2nd day of March, 2018.

R.E. ABURILI

JUDGE

In the presence of:

Miss Musau for the exparte applicant

Mr Koima h/b for Carole Mburugu for the Respondent

CA: Kombo

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