



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 170 OF 2010

**IN THE MATTER OF AN APPLICATION FOR ORDERS OF PROHIBITION, CERTIORARI
AND MANDAMUS PURSUANT TO LEAVE GRANTED THEREFOR BY THE HON. LADY
JUSTICE WENDOH ON 4TH MAY 2010**

AND

**IN THE MATTER OF THE LAW REFORM ACT, ORDER LIII OF THE CIVIL PROCEDURE
RULES**

AND

THE EAST AFRICA CUSTOMS MANAGEMENT, ACT OF 2004

BETWEEN

REPUBLIC.....APPLICANT

-VERSUS-

THE COMMISSIONER GENERAL, KENYA REVENUE AUTHORITY....RESPONDENT

***EX PARTE* MOUNT KENYA BOTTLERS LTD**

AND

GAMMA VILLA LIMITED.....INTERESTED PARTY

RULING

1. On 23rd May, 2016 I delivered a judgement in this matter in which I dismissed with costs the Notice of Motion dated 7th May, 2010. By the said Motion, the ex parte applicant herein was seeking the following orders:

1) An order of certiorari to remove into this High Court for the purpose of being quashed, the decision(s) of the Respondent, his officers and/or agents made on dates unknown to the Applicant but embodied in letters under the hand of two delegates of the Respondent's in (a) an agent appointment notice dated 7th April, 2010 under the hand of one P. N. Iraki and expressed to have been issued on behalf of the "Commissioner of Investigation and

Enforcement” for the recovery of a sum of Kshs. 63,789,724.00 from the Applicant’s bankers Messer’s Kenya Commercial Bank Limited, Nyeri Branch and (b) a second agent appointment notice dated 22nd April 2010 under the hand of one Mrs. M.W. Njuguna expressed to have been issued for the “Commissioner, Customs Services Department” for the recovery of a sum of Kshs. 69,048,048.00 from the Applicant’s bankers Messer’s Kenya Commercial Bank Limited, Nyeri Branch.

2) An order of prohibition directed to the Respondent, prohibiting the Respondent whether directly or through its officers and /or agents restraining the Respondent from enforcing any recovery measures referred to and embodied in the two letters dated 7th April 2010 and 22nd April 2010 to the Applicant’s bankers Messer’s Kenya Commercial Bank Limited, Nyeri Branch or at all, or seeking to recover the sums of Kshs. 63,789,724.00 and/or Kshs. 69,048,048.00 and/or any other communication sum by/or on behalf of the Respondent in the same regard.

3) An order of mandamus directed to the Respondent to produce the customs files, custom release orders, sign on release orders, airway bills, forms C 17 B, payment receipts, computer print outs and certificate(s) in relation to all consignments related to the Respondent’s demand and threats mentioned in the foregoing paragraphs, for purposes of review by an independent auditor appointed by this Honourable Court for the ascertainment whether any amounts are owing from the Applicant to the Respondent.

4) Costs of this application be provided for.

2. Aggrieved by the said decision, the ex parte applicant intends to appeal to the Court of Appeal against the said decision. In the meantime by a Notice of Motion expressed to be brought under Article 22(3) of the Constitution, section 11 of the *Fair Administrative Action Act*, Order 40 rule 2, Order 51, rule 1 and 2 of the *Civil Procedure Rules*, Section 1A, 1B and 63(e) of the *Civil Procedure Act*, the inherent powers of the court and all enabling provisions of the law, the ex parte applicant seeks the following orders:

1. This application be certified urgent and be heard ex parte in the first instance.

2. The court do issue a conservatory order [by way of injunction or otherwise] pending the hearing and determination of this application restraining the respondent from implementing and/or giving effect to the agency notices issued on 7/4/2010 and 22/4/201 and in or any other manner howsoever commencing and/or executing recovery proceedings against the applicant with respect to the post-clearance audit on customs duty for the period 1/2/2009 to 14/10/2009

3. In the alternative the conservatory order issued by the Hon. Mr. Justice Odunga on 23/5/2016 be extended/preserved pending the hearing and determination of this application inter-partes and subsequently, pending the hearing and determination of the application pending for hearing in the Court of Appeal [Being Civil Application No. 139 of 2016]

4. The court do issue a conservatory order [by way of injunction or otherwise] pending the hearing and determination of the application pending in the Court of Appeal [being Civil Application No. NAI. 139 of 2016] restraining the 1st respondent from implementing and/or giving effect to the agency notices issued on 7/4/2010 and 22/4/2010 and or in any other manner howsoever commencing and/or executing recovery proceedings against the applicant with respect to the post-clearance audit on customs duty for the period 1/1/2009 to 14/10/2009.

5. The court do issue a conservatory order [by way of injunction or otherwise] pending the hearing and determination of the intended appeal restraining the 1st respondent from implementing and/or giving effect to the agency notices issued on 7/4/2010 and 22/4/2010 and or in any other manner howsoever commencing and/or executing recovery proceedings

against the applicant with respect to the post-clearance audit for the period 1/1/2009 to 14/10/2009.

6. Any other or further orders that this court may deem fit and just to grant

7. Costs of this application be in the cause.

Applicant's Case

3. According to the ex parte applicant, this court on 23rd May, 2016 dismissed the applicant's motion which sought to quash by way of judicial review, two separate agency notices that had been issued by the respondent to the applicant's bankers following a post-clearance audit regarding alleged customs duty payable for the period 1st January, 2009 to 14th October, 2009. It was contended that as a direct result and consequence of the dismissal order, the respondent is at liberty to enforce the agency notices and/or institute other enforcement and recovery measures as against the applicant to recover the assessed [though disputed] tax and unless this application is heard as a matter of urgency and orders granted as sought, the applicant's intended appeal will be rendered nugatory as the respondent will have recovered the disputed tax from the applicant and/or its bankers/third parties.

4. It was averred that it is a well-known fact, of which the Court ought to take judicial notice that the respondent, Kenya Revenue Authority, is notoriously slow at effecting any tax refunds to tax payers. As a result, any payments made to the respondent may be impossible, or difficult to recover, in the event the intended appeal is successful.

5. It was disclosed that the applicant had indeed lodged and served its notice of appeal and had similarly requested the deputy registrar of the court to furnish it with certified proceedings, judgment and order for purposes of assembling the record of appeal for filing at the Court of Appeal and the letter addressed to the deputy registrar of the court. Further, the applicant had since moved the court of appeal under the provisions of the *Appellate Jurisdiction Act* [rule 5(2)b] seeking interim relief pending the hearing and determination of the intended appeal. However, due to administrative delays, the application was not likely to be heard before the 6th June, 2016 thus necessitating the present application so as to obtain some measure of protection from the courts. The application before the Court of Appeal was yet to be heard and determined.

6. It was averred that the applicant's primary allegation herein was that the respondents actions were tainted with illegality were irrational and unreasonable and fettered the applicants legitimate expectation and dissatisfied with the said decision, the applicant company has expressed its intention to file an appeal against the said decision by complying with the relevant provisions of the law.

7. In the applicant's view, it has a strong, arguable appeal as is demonstrated in the memorandum of appeal a copy of which it exhibited. It was however apprehensive that should the respondent proceed to effect the agency notices and/or commence recovery proceedings, it would suffer grave and irreparable and substantial loss in that the respondent will recover the disputed tax and the intended appeal would be rendered a mere academic exercise hence the applicant should be given an opportunity to ventilate its appeal on merit. It however was ready and willing to furnish security in the form of an insurance bond [for a reasonable sum] or in any other manner/form that this court may direct.

8. The applicant disclosed that it is a large tax payer that routinely fulfils its civil obligations by paying its taxes and when they fall due and exhibited copies of its annual tax compliance certificates issued to the applicant by the respondent and work sheets demonstrating the amount of taxes the applicant has remitted to the respondent over the years.

Respondent's Case

9. On its part the Respondent confirmed that the court delivered judgment in Misc. Civil Application No. JR 170 of 2010 Republic vs. Commissioner General, KRA ex parte Mount Kenya Bottlers Limited in

which the court dismissed the applicants notice of motion application which sought to quash by way of judicial review 1st Respondent Agency notices. Following the said judgment, the applicants were granted 14 days conservatory orders which orders lapsed on 6th June 2016.

10. The Respondent also confirmed that it was aware that the applicant filed a notice of appeal on 26th May, 2016 and subsequently filed an application for conservatory orders and injunction pending the hearing and determination of the intended appeal from the said decision which application being Nairobi Court of Appeal Civil application No. 139 of 2016 - Mount Kenya Bottlers Limited versus the commissioner General, Kenya Revenue Authority was pending before the Court of Appeal and which application was yet to be heard and determined.

11. The Respondent asserted that when the court dismissed the judicial review application and granted the applicant temporary relief pending filing of a formal appeal, the applicants' recourse lies in an appeal before the Court of Appeal. To the Respondent, the effect of the court decision as above outlined is that the court determined the issues before it in essence upholding the respondent's decisions hence this suit is spent and therefore the present application is "*res judicata*".

12. It was the Respondent's position that the instant application as filed is based fundamental misapprehension of the law, is frivolous and an abuse of the court process for the following reasons;

- a. That judgment having been delivered, and the court having pronounced itself on the issues before it, the orders sought in the instant application cannot issue as the court has since become "*functus officio*".
- b. That the instant application amounts to the court seeking to sit on an appeal of its own decision.
- c. That the present application brought under Order 40 Rule 2 seeking injunctive reliefs against the respondent cannot issue in the realm of the law under which the main suit was premised.
- d. The applicants herein had not during the pendency of the judicial review application sought any such orders of injunction and the same cannot therefore be available to them now after the judicial review application has been determined.
- e. That it is in the interest of the greater public that the applicant pays the taxes as found due than for it to delay in paying thus the balance of probability tilts in favour of the respondent.

13. The Respondent averred that whereas the applicants are willing to furnish security by way of an insurance bond or otherwise, the applicants' had throughout the pendency of the judicial review enjoyed conservatory orders against the respondent pending the hearing and determination of the judicial review application, the said having been determined, all the orders therein are spent and the applicants cannot seek to reintroduce such conservatory orders after the said judicial review application has been dismissed. To the Respondent, as long as the demanded tax remains unpaid it continues to accrue interest and penalties and therefore it is in the interest of the applicant to settle the same.

14. It was the Respondent's case that the allegation that the respondent is notoriously slow at effecting tax refunds is untrue, misleading and in any case unsupported and averred that the respondent has a tax refund mechanism should the applicants succeed in their intended appeal. In addition, the applicant has a right apply for a set off of any refunds due for any taxes that may be owing to the respondent.

Determination

15. I have considered the foregoing.

16. The instant application was filed on 6th June, 2016. From the supporting affidavit, it is clear that by

the time the affidavit was being sworn, the applicant had filed an application before the Court of Appeal being Civil Application No. 139 of 2016 which application was, by the time of the making of the instant application pending before the Court of Appeal. What informed the filing of this application, from the ex parte applicant's own deposition, were administrative delays in the Court of Appeal.

17. In my view the effect of the determination by this Court may have two consequences. If the application is dismissed, the applicant will be at liberty to proceed with the application before the Court of Appeal. On the other hand, the conditional grant of the orders sought herein would mean that the applicant would similarly be at liberty to try its luck before the Court of Appeal. One shudders to think of what would happen if the Court of Appeal was to dismiss the application for want of merit. The applicant would have in effect through the backdoor gotten orders from this Court which the Court of Appeal, a Court superior to this one, would have dismissed.

18. In my view, parties must choose the forum at which they want to seek their relief and once they do so, they cannot be permitted to ignore that process midstream and open another legal battlefield seeking the same reliefs. That in my view amounts to a gross abuse of the Court process. It is upon the parties to convince the Court of Appeal that there is an urgency in their case and if they fail to do so, they cannot be permitted to run back to the High Court and obtain the same orders during the pendency of their application before the Court of Appeal. In fact I daresay that a party who has invoked the jurisdiction of the Court of Appeal in order to obtain stay orders ought not to return to the High Court for the same. This was the position adopted by the Court of Appeal in **Nyokabi Karanja & 3 Others vs. Kamuingi Housing Co. Limited Civil Application No. Nai. 61 of 2005** when it held that it is an abuse of the process of the Court to maintain two parallel and identical applications on the same matter.

19. In **Kutima Investment Limited vs. Kihara and Another [2007] 1 EA 162** an application for stay was made to the High Court after a similar one had been made before the Court of Appeal and the High Court proceeded to issue orders thereon. When the matter before the Court of Appeal came up, the Court expressed itself as hereunder:

“The applicant having obtained an order of injunction in the Superior Court, its rights were thus safeguarded. Those orders are still in place and those rights are safeguarded whether or not the Court of Appeal adds further orders for the same purpose. The general principle of law is that courts should not act in futility. An order of the Court of Appeal in favour of the applicant will not add anything and whether or not the order of the High Court will be set aside is not for the Court of Appeal to say at the moment. What the Court is competent to say is that as the position is at the moment, the Superior Court has exercised the jurisdiction, which it was perfectly entitled to exercise, of granting the applicant an order... Although ordinarily, the motion having been filed after this one, should have been stayed to await a decision in this one, the decision is not rendered invalid for that reason alone, considering that the Superior Court had the jurisdiction to make the order... It will be an abuse of the process of the Court to insist on proceeding with this application. The court must protect its process from abuse. It has the jurisdiction to do so. The object underlying the principle of concurrent proceedings is to avoid recording or issuing conflicting decisions or findings on the same issues. There is no guarantee that this Court will come to the same conclusion as the Superior Court did in the application before it.”

20. In my view, these were the kind of proceedings that Kimaru, J had in mind in **Stephen Somek Takwenyi & Another vs. David Mbutia Githare & 2 Others Nairobi (Milimani) HCCC No. 363 of 2009** in which he expressed himself as follows:

“This is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived. The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilised legal process it is the machinery used in the courts of law to vindicate a man's rights or to enforce his duties. It can be used properly but can also be used improperly,

and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract *res judicata* rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it”.

21. The same Judge in Rev. Madara Evans Okanga Dondo vs. Housing Finance Company of Kenya Nakuru HCCC No. 262 of 2005 similarly held that:

“The court will always invoke its inherent jurisdiction to prevent the abuse of the due process of the court. The jurisdiction of the court, which is comprised within the term “inherent”, is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of the substantive law; it is exercisable by summary process, without plenary trial, it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of the court. The inherent jurisdiction of the court enables the court to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process. In sum, it may be said that the inherent jurisdiction of the court is virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.”

22. In the circumstances, I hereby draw on the powers of this Court reserved under its inherent jurisdiction and strike out the instant application with costs to the Respondent.

23. It is so ordered.

Dated at Nairobi this 22nd day of February, 2017

G V ODUNGA

JUDGE

Delivered in the presence of: