



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 1 OF 2013

IN THE MATTER OF AN APPLICATION BY FREDRICK TSOFA MWENI FOR LEAVE TO APPLY FOR JUDICIAL REVIEW.

AND

IN THE MATTER OF DISQUALIFICATION OF THE APPLICANT FROM BEING THE MANAGING DIRECTOR OF TSAVO SECURITIES LIMITED FROM APPOINTMENT AND SERVICE AS A DIRECTOR OF ANY LISTED COMPANY OR LICENSED OR APPROVED PERSON IN THE CAPITAL MARKETS IN KENYA.

AND

IN THE MATTER OF CAPITAL MARKETS ACT CAP 485 LAWS OF KENYA

REPUBLIC.....APPLICANT

VERSUS

CAPITAL MARKETS AUTHORITY.....1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

AND

CENTRAL BANK OF KENYAINTERESTED PARTY

FREDRICK TSOFA MWENI.....EX-PARTE

RULING

1. On 1st July 2016, Honourable Justice W.Korir delivered judgment in this matter and concluded as follows:

“45.Considering what I have stated above, it follows that the applicant’s case should fail save for the reason that the decision of the respondent on the length of his suspensions did not comply with Section 26(2) of the Capital Markets Act Cap 485 A. For that reason alone the applicant’s disqualification is quashed. The matter is remitted to the respondent to impose a disqualification that meets the requirements of the law.”

2. On 16th August, 2016, the 1st respondent filed a notice of motion dated 15th August 2016 under the provisions of Section 80 of the Civil Procedure Act, Order 45 Rule 1 of the Civil Procedure Rules and the inherent power of the court seeking that:

1. The portion of the judgment dated 1st July 2016 by which the court held that the length of the suspension of the ex parte applicant did not comply with Section 26(2) of the Capital Markets Act be reviewed and set aside.

2. The costs of this application are provided for.

3. This application is predicated on the grounds on the face of the application and supported by an affidavit sworn by **Timothy Githendu** wherein it is largely deposed that there is an apparent error on the face of the judgment of 1st July 2016 in that the court incorrectly used the terms “suspension of the applicant” as opposed to his disqualification under Section 25A (1)(c) (i) which empowers the first respondent to disqualify an employee of a person licensed under the Act.

4. That in view of the error above, the order that the matter be remitted to the 1st respondent to impose a disqualification that meet the requirements of the law cannot be complied with.

5. That the judgment should be corrected to read “the ex parte applicant was disqualified under Section 25 A(1) (c) (1) of the Act and not suspended under Section 26 of the Act.

6. The application for review was opposed by the ex parte applicant who filed grounds of opposition contending that the application is defective; has no merits and is based on the misconception of the law; vexatious and an abuse of the court process; that the matter offends the provisions of Order 53 of the Civil Procedure Rules and Section 7 and 9 of the Law Reform Act as they are the only provisions that apply to Judicial Review; that the application is not within the purview of Judicial Review Court neither does it meet the basic tenets of Judicial Review application.

7. It was further contended by the ex parte applicant that the 1st Respondent’s application for review seeks a substantive review of the court’s judgment which is not possible within these Judicial Review proceedings; and that this court has no power to review its decision in a Judicial Review application under Order 53 of the Civil Procedure Rules.

8. Further, it was contended that the provisions of Section 80 of the Civil Procedure Rules invoked and Order 45 Rule 1 of the Civil Procedure Rules do not confer jurisdiction on the court to grant the said orders neither do they apply to Judicial Review.

9. That to grant the order for review would fundamentally and radically change the decision to be reviewed and would open a new front of litigation thus amounting to an abuse of court process; and that the application for review is entirely without merit by virtue of the matters on record, or not at all and ought to be dismissed with costs.

10. Parties’ advocates filed authorities which they relied on and argued the application orally on 6th March 2017 before me, Honourable Korir J having left the Nairobi station on transfer to Busia and now he is the Resident/Presiding Judge of Malindi High Court.

11. Mr Ochieng counsel for the applicant/1st respondent argued that in the judgment, the learned judge held that the length of suspension was not in accordance with the Act yet there was no suspension and that instead, the ex parte applicant was disqualified from holding office but the court erroneously stated that he was suspended hence the need to correct the terminology to allow implementation of the judgment.

12. It was argued that the review will not change the outcome of the judgment but to set the record straight and clarify the judgment.

13. On the contention by the *exparte* applicant that this court has no jurisdiction to review the judgment, the 1st respondent's counsel relied on the case of **Nakumatt Holdings Ltd V Commissioner of VAT[2011]eKLR** where the Court of Appeal held that the court has residual power to correct its own mistakes and therefore to review its own decision.

14. It was also submitted that this court has inherent power to review its own orders where there is no specific provision in the Law Reform Act providing for review.

15. Further reliance was placed **HC JR 11/2012 Republic vs Anti counterfeit Agency & 2 Others *exparte* Surgipharm Limited [2014]e KLR** and **HC JR 7/2008 Republic vs Chairman Provincial Land Disputes Appeal Tribunal Rift Valley Province & 2 Others *exparte* Christopher Chebii and Bernard Osewe Odongo(F/P)** wherein the court held that the court has jurisdiction to review or set aside its orders made in Judicial Review proceedings hence the mere fact that the instant application is expressed to be brought under Order 45 of the Civil procedure Rules does not render the application fatally defective or incompetent.

16. The 1st respondent's counsel also relied on Article 159 of the Constitution which mandates the court to conduct its business in the interest of justice and that the court cannot fold its hands where it is called upon to foster the interests of justice. Mr Ochieng urged the court to exercise its inherent power and review the decision of Korir J.

17. In opposition to the motion for review, Mr Musiega Counsel for the *exparte* applicant reiterated the grounds of opposition as filed and maintained that review does not fall within the purview of Judicial Review and that Section 80 of the Civil procedure Act and Order 45 Rule 1 of the Civil Procedure Rules are inapplicable in the circumstances. Mr Musiega relied on **B.A. Shah & Another V Republic [2013] e KLR** where the Court of Appeal held that there is no provision for review by the superior court of its own decisions in Judicial Review, once rendered and that under Section 8(5) of the Law Reform Act, any person aggrieved by an order made in the exercise of the Judicial Review may appeal to the Court of Appeal. That decision was made on 20th September 2013. Mr Musiega also submitted that the decision in **Nakumatt Holdings** (*supra*) case is different from the instant case, but left it to court to distinguish.

18. In a rejoinder, Mr Ochieng counsel for the 1st respondent/applicant submitted that bringing the application under the provisions of Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules does not bind the court as the court has residual power. Further, that the **B.A. Shah & Another** (*supra*) case relied on by the *exparte* applicant is different in that the grounds for review sought therein were to introduce new evidence which was not in their possession before, which if allowed would change the scope of the case and reopen the matter; unlike in this case where the applicant complains of an error on the face of the record to clarify the judgment and not reopening of the case.

19. Mr Ochieng maintained that the court can review its own decision to correct mistakes made by the court, in the interest of justice and to avoid hardship to the parties, which matter the **Biren Amrital Shah** case(*supra*) did not consider.

DETERMINATION.

20. I have considered the foregoing in line with the established statutory and case law.

21. In my view, the main issues for determination are whether this court has jurisdiction to review the judgment delivered on 1st July 2017 by Honourable W. Korir J and if so, whether the 1st respondent has made out a case for review of the said judgment in the manner proposed and finally, what orders should this court make.

22. As earlier indicated, the Honourable Justice W. Korir did deliver his judgment in this matter on

1st July 2016 to the effect that the ex parte applicant's substantive motion fails save for the reason that the decision of the respondent on the length of the ex parte applicant's suspension did not comply with Section 26(2) of the Capital Markets Act, Cap 485A. The learned judge further directed that the ex parte applicant's disqualification is quashed on that account and the matter was remitted to the respondent to impose a disqualification that meets the requirements of the law.

23. According to the 1st respondent Capital Markets Authority, it is not possible to implement the judgment of Hon Korir J because it talks of suspension of the ex parte applicant, which suspension does not exist under the law, but that a disqualification does, under Section 25A (1) (c) (1) of the Act.

24. It is worth noting that the ex parte applicant's motion dated 11th January 2013 which Hon Korir J considered and rendered a decision on its merits sought for the following orders:

- *That the applicant be granted an order of certiorari to bring the decision of the 1st respondent made on 21st December 2012 disqualifying the applicant as the Managing Director of Tsavo Securities Limited, from appointment and service as a Director of any listed company or licensed or approved person in the Capital Markets in Kenya with effect from 21st December 2012 to this Honourable court for purposes of being quashed.*

25. From the above main prayer, no doubt, the ex parte applicant did not complain about suspension but disqualification as the Managing Director of Tsavo Securities Limited, which is a listed company with Capital Markets Authority, the first respondent herein, from appointment and service as a Director of a company listed or approved in the Capital Markets Authority in Kenya.

26. The Section which provides for suspension is Section 26 of the Capital Markets Act. It allows for suspension of a license issued to the Company which is listed with the 1st respondent for a period not exceeding three months provided that the Authority may if it considers it necessary extend the suspension for a further period not exceeding three months.

27. Suspension under Section 26 of the Act relates to license of the company listed the Capital Markets Act and not its directors. Directors can only be disqualified.

28. From that part of the judgment, indeed, I find that the learned judge Korir J mixed up the terms "suspension" and "disqualification".

29. According to the ex parte applicant, this court has no jurisdiction to review the judgment in judicial review proceedings and that to review the judgment will open up a new cause of action. Reliance was placed on the **B.A. Shah** (supra) case. I have compared the two decisions of **Nakumatt Holdings Ltd** (supra) which was delivered on 8th April 2011 and the case **B.A. Shah & Another** (supra) delivered on 20th September, 2013. Whereas in the latter case which is the latter of the two decisions, the Court of Appeal held that the High Court could not review its judgment in Judicial Review proceedings, in the former case of Nakumatt Holdings Ltd, the same Court of Appeal constituted differently was emphatic that whether or not the then Order 44 of the Civil Procedure Rules applied in a matter under Judicial Review, what is important is that the superior court in the matter before the court had the residual power to correct its own mistake and that it may be that the appellant cited wrong provision of the law in its application for review which, per se would not deprive the court the power of correcting its own mistake which that court itself acknowledged it made.

30. The court Odunga J further stated in **Republic vs Anti counterfeit Agency 2 Others** (supra):

" 30 However, in the light of the provisions of Article 159(d) of the Constitution the mere fact that a party cites the wrong provisions of the law ought not to deprive the court of a jurisdiction where such jurisdiction exists. As I have demonstrated the above jurisdiction to review or set aside orders made in judicial review proceedings exist hence the mere fact that the instant application is expressed to be brought under Order 45 in

my view does not render the application fatally defective or incompetent.”

31. This court notes that the **Nakumatt Holdings (supra)** case had a different constitution of **S.E. Bosire , E.M. Githinji & Alnashir Visram JJA** whereas in the **B.A. Shah & Another** case (supra) the composition was **S. Gatembu Kairu; D.K. Maraga and Agnes (K) Murgor JJA**. However, the court notes that in the **B.A. Shah** case, the court did not refer to its earlier decision in the **Nakumatt Holdings Ltd** and moreover, the court was concerned with the prayer for review where the High Court Judge had declined to issue the orders of certiorari and prohibition as prayed and instead granted mandamus directing the 2nd and 3rd respondents to cancel the registration of the appellants as owners of the suit land and restore the 4th respondent as its owner.

32. In that **B.A. Shah** case, the appellants were dissatisfied with the above decision of the High Court and instead of filing an appeal under Section 8(5) of the Law Reform Act, filed an application for review of the judgment. The High Court judge dismissed the application for review holding that he had no jurisdiction to review his earlier decision of 7th December 2002 and cited Section 8(5) of the Law Reform Act.

33. In my humble view, and while agreeing with both the learned High Court Judge in the **B.A. Shah** case as well as the Appellate Court's decision on the jurisdiction to review own judgment, I find that the above **B.A. Shah** case can be distinguished from this case and that of **Nakumatt Holdings Ltd** in that in the **B.A. Shah** case, the appellant was seeking to upset the decision of the learned judge by way of review as opposed to filing of an appeal. He was seeking to have the court sit on its own appeal because the judge had granted orders which had not been sought or prayed for in the Notice of Motion which in my view, hinges on errors of law and or misapprehension of the law and therefore that could not in my humble view be resolved by way of a review but an appeal.

34. In the present case, however, there is a clear error apparent on the face of the record which a court looking at that error can tell without delving into the merits or demerits of the motion, that the learned Korir J used the term 'suspension' as opposed to 'disqualification' of the ex parte applicant.

35. Further, I am in agreement with the 1st respondent that the court has the residual and inherent power to correct its own mistakes which are apparent on the face of the record in order to do justice to the parties and to avoid rendering the judgment incapable of implementation. Court decisions are meant to be implemented and the court is expected to facilitate smooth implementation of its orders. It is for that reason that parties usually return to court after decisions, seeking for clarifications thereto to enable enforcement of the orders or decisions of the court and so as not to render a court decision a paper judgment

36. In this case, what the 1st respondent is seeking from the court is not a reopening of the case or new evidence but to correct a mistake where the court used the term 'suspension' instead of "disqualification" as stipulated in the law. That being the case, I have no doubt in finding that the decision in **Nakumatt Holdings Ltd** is relevant to this case and that this court has the inherent and residual power to correct its own mistakes which are apparent on the face of the record to facilitate the enforcement of its own judgment, as courts of law do not issue orders in vain.

37. In addition, it is for the benefit of both the ex parte applicant and the 1st respondent that the judgment is corrected or rectified as sought by the 1st respondent otherwise the judgment of 1st July 2016 will remain a paper judgment since the Act does not provide for suspension of the ex parte applicant but his disqualification which are two different words with different meanings.

38. The ex parte applicant will thus suffer no prejudice if the correction of the judgment in the manner proposed by the 1st respondent is done as it will clarify the judgment for implementation.

39. Accordingly, I find and hold that the application by the 1st respondent is merited and I proceed to grant it and order that the portion of the judgment of Honourable Korir J dated 1st July 2016 which

reads that “ the length of the suspension of the exparte applicant did not comply with Section 26(2) of the Capital Markets Act” is hereby reviewed and set aside and in its place, the judgment shall read that “the disqualifications of the exparte applicant did not comply with Section 25A (1) (c)(1) of the Capital Markets Act.

40. As the review was necessitated by an inadvertent error on the part of the court in pronouncing the judgment by inter changing the term disqualification with suspension, I order that the parties bear their own costs of this application for review.

Dated, signed and delivered in open court at Nairobi this 3rd day of May, 2017.

R.E.ABURILI

JUDGE

In the presence of:

Jmaes Tugei for the 1st respondent/applicant

Miss Ngonde h/b for Kithi for the exparte applicant

C.A. Mohammed.