



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**JUDICIAL REVIEW DIVISION**  
**JR CASE NO. 28 OF 2015**  
**REPUBLIC.....APPLICANT**  
**VERSUS**  
**CENTRAL BANK OF KENYA.....RESPONDENT**  
**EX-PARTE**  
**MIDDLETOWN FOREX BUREAU LTD**  
**JUDGEMENT**

1. These judicial review proceedings were triggered by the letter of the Respondent, Central Bank of Kenya addressed to the ex-parte Applicant, Middletown Forex Bureau Ltd on 19<sup>th</sup> January, 2015. The said letter stated as follows:

**“LEVYING OF PENALTY**

**We write further to our notice of December 16, 2014 in which we signified the intention of the Central Bank of Kenya to levy penalty against Middletown Forex Bureau Limited for non-compliance with the Central Bank of Kenya Act and Forex Bureau Guidelines.**

**We note that as at October 31, 2014 when the Central Bank of Kenya undertook an inspection of Middle Town Forex Bureau Ltd, the bureau was found to be in breach of the Forex Bureau Guidelines and directions given by the Central Bank as more particularly set out in our letter of December 16, 2014 and as outlined below:**

- **Section 4.2(3) – Deliberate splitting of transactions to amounts below US\$ 10,000 to avoid reporting to the Central Bank of Kenya. Some of these transactions were noted to have occurred at the same time an indication that the splitting was deliberate. Further, forex bureaus are required to report all foreign exchange transactions amounting to US\$10,000 or more including for customers who transact repeat transactions in a day amounting to US\$10,000 or more.**
- **Section 4.9(1)(a), (b) and (c) – Failure to submit daily and weekly returns to the Central Bank on various dates. In addition, the bureau failed to report various foreign currency transactions that amounted to US\$10,000 or more to the Central Bank as**

required.

The Central Bank has considered the representations made during the meeting held at the Central Bank of Kenya and in your letter dated 24<sup>th</sup> December, 2014 in which you confirmed the violations of the Forex Bureau Guidelines but explained that they were not deliberate. However, our observations as discussed with the bureau's directors at the Central Bank of Kenya on December 4, 2014 were as illustrated above.

On account of the foregoing and in accordance with Section 33L of the Central Bank of Kenya Act and Regulations 5 and 6 of the Central Bank of Kenya (Foreign Exchange Bureau) (Penalties) Regulations, 2009 issued under Legal Notice No. 82 of 2009, the Central Bank of Kenya hereby notifies the directors that a penalty of Kshs.500,000 has been assessed against Middletown Forex Bureau Limited. The penalty is to be paid to the Central Bank of Kenya by bankers' cheque within fourteen (14) days from the date of this letter.

Please note that if the penalty is not paid within fourteen (14) days, the Central Bank will recover the amount from the bureau's non-interest bearing deposit held with us as provided under Regulation 6(2) of the Central Bank of Kenya (Foreign Exchange Bureau) (Penalties) Regulations.”

2. On 13<sup>th</sup> May, 2016 the Applicant moved this Court and obtained leave to commence these judicial review proceedings. Consequently the Applicant filed the Notice of Motion application dated 2<sup>nd</sup> February, 2015, seeking orders as follows:

“a) **THAT** an order of certiorari be and is hereby issued to bring up and quash the Respondent's, its servants, agents, employees or anybody else whatsoever acting on its behalf decision of 19<sup>th</sup> January, 2015 levying a penalty of the sum of Kshs.500,000.00.

b) **THAT** an order of prohibition be and is hereby issued to prohibit the Respondent, its servants, agents, employees or anybody else whatsoever acting on its behalf from cancelling the Applicant's trading license or implementing its decision of 19<sup>th</sup> January, 2015 levying a penalty of the sum of Kshs.500,000.00 and recovering the same from the Applicant's non-interest bearing deposit held with the respondent or recovering it any other way thereof.

c) **THAT** the costs of all the applications herein be paid by the Respondent herein.”

3. In brief, the Applicant's case is that it is a company incorporated in Kenya whose main business activities include buying and selling foreign currencies and transfer of funds. Between 19<sup>th</sup> November, 2014 and 14<sup>th</sup> November, 2014 the Respondent being the regulator of the sector in which the Applicant operates carried out inspection of the Applicant's operations in accordance with Section 33(F) of the Central Bank of Kenya Act. The inspection resulted in the issuance by the Respondent of the impugned decision contained in the letter dated 19<sup>th</sup> January, 2015.

4. According to the Applicant, through the said letter, the Respondent purported to levy a penalty of Kshs.500,000/= in utter disregard of the rules of natural justice.

5. It is the Applicant's case that it was never given reasonable notice to appear and challenge the allegations, that it was not given reasonable time to prepare its response or defence; that it was denied an opportunity to call its witnesses; and that the Respondent's staff were biased and acted unlawfully against it.

6. It is thus the Applicant's case that the actions by the Respondent are unreasonable, irrational, biased, in bad faith, capricious, oppressive, unfair and against the rules of natural justice.

7. The Respondent opposed the application through a replying affidavit sworn on 20<sup>th</sup> March, 2015 by

Sylvester Cheruiyot Sawe, its manager in charge of Forex Bureau Surveillance Section.

8. The Respondent commenced its case by asserting that the order granting leave to commence these proceedings was obtained on the foot of the Applicant's deliberate suppression and/or concealment of material facts especially regarding its numerous admitted violations of the provisions of the Forex Bureau Guidelines.

9. It is the Respondent's case that the Applicant has since the year 2000 been found upon inspection, to have violated the provisions of Forex Bureau Guidelines. Some of the violations included failure to maintain the requisite minimum capital and failure to hold the minimum required amount in its foreign exchange account. It is the Respondent's case that the Applicant has always admitted the various breaches of the Forex Bureau Guidelines and had been fined accordingly.

10. The Respondent asserts that following the inspection report as at 31<sup>st</sup> October, 2014, it was found that the Applicant had violated Section 4.2(3) of the Forex Bureau Guidelines by deliberate splitting of transactions to amounts below US\$ 10,000 to avoid reporting to the Respondent. Also breached was Section 4.9(1) (a), (b) and (c) as the Applicant had failed to submit daily and weekly returns to the Respondent on various occasions.

11. The Respondent states that due to the gravity of the allegations, coupled with the numerous repeated violations over the years together with unfulfilled promises by the Applicant not to repeat the violations, it held a meeting with a director and an official of the Applicant on 4<sup>th</sup> December, 2014. In that meeting the two officials (Mr. Anthony Mbaabu and Ms. Annastacia Kamanthe) were taken through the violations and advised on the seriousness of the violations and the intention of the Respondent to levy penalty on the Applicant.

12. Subsequently a notice of intention to levy penalty on the Applicant was issued on 16<sup>th</sup> December, 2014. It is the Respondent's case that the Applicant responded to the penalty notice by a letter dated 24<sup>th</sup> December, 2014 owning up to the violations and explained that some of its cashiers had been duped into splitting transactions.

13. The Respondent asserts that after considering the Applicant's representations following the meeting with it on 4<sup>th</sup> December, 2014 and taking into account the Applicant's history of numerous violations of the Forex Bureau Guidelines, it carefully and in accordance with the law exercised its discretion and levied a penalty of Kshs.500, 000/=.

14. It is the Respondent's view that the assertion by the Applicant that it had been conducting its business in accordance with the law is factually incorrect considering its repeated history of violation.

15. In summary, the Respondent asserts that the Applicant's application is aimed at reviewing the merits of its decision and not the decision-making process as is the norm in judicial review applications.

16. Through a further affidavit sworn on 6<sup>th</sup> July, 2015, the Applicant introduced a new issue. It is the Applicant's case that subsequent to the filing of these proceedings, it applied for renewal of its annual licence and for permission to open a new branch. It received a reply from the Respondent's counsel through a letter dated 19<sup>th</sup> March, 2015 informing it that the two applications had been put in abeyance pending the hearing and determination of these proceedings. It is the Applicant's averment that the Respondent's conduct is contemptuous of this court's orders.

17. In a further affidavit sworn by Sylvester Cheruiyot Sawe on 20<sup>th</sup> July, 2015, the Respondent contends that it was carrying out its regulatory work by denying the Applicant the licences. Further, that the issue of a licence for a new outlet can only be addressed through fresh judicial review proceedings.

18. A review of the pleadings and submissions made by the parties in this matter shows that the only question for consideration in these proceedings is whether the Respondent complied with the rules of

natural justice when dealing with the Applicant. It is the Applicant's case that the Respondent breached the rules of natural justice. The Respondent asserts that it heard the Applicant before making its decision.

19. The importance of compliance with the rules of natural justice in the conduct of public affairs is a matter that no longer needs winded arguments in its support. Those who are subjected to proceedings before public bodies are, almost in all cases, entitled to a fair hearing.

20. In **Judicial Service Commission v Mbalu Mutava & another [2015] eKLR** Githinji, JA reiterated the contents and the importance of the principle of natural justice as follows:

**“In exercise of its powers under the Constitution or under legislation, public officers, state organs and independent bodies or tribunals may make decisions which may be characterised as judicial, quasi-judicial or administrative depending on the empowering provision of the Constitution or the law. The landmark decision of the House of Lords in Ridge v Baldwin [1964] AC 40 clarified the law, that the rules of natural justice, in particular right to fair hearing, (*audi alteram partem* rule) applied not only to bodies having a duty to act judicially but also to the bodies exercising administrative duties. In that case, Lord Hodson at page 132 identified three features of natural justice as:**

- 1. the right to be heard by an unbiased tribunal.**
- 2. the right to have notice of charges of misconduct.**
- 3. the right to be heard in answer to those charges.”**

21. Applying those principles to the case at hand, I conclude as follows. The allegations against the Applicant were made after inspection by the Respondent's officers. Through the letter dated 16<sup>th</sup> December, 2014 the Respondent informed the Applicant as follows:

**“NOTICE OF INTENTION TO LEVY PENALTY DUE TO NON – COMPLIANCE WITH THE FOREX BUREAU GUIDELINES**

**During the course of the recent inspection conducted in respect to your bureau's financial condition as at 31<sup>st</sup> October 2014 (Inspection report attached), it was observed that the bureau failed to comply with the following sections of the Forex Bureau Guidelines:**

- 1. Section 4.2(3) – Deliberate splitting of transactions amounting to US\$10,000 or more to avoid reporting to the Central Bank of Kenya.**
- 2. Section 4.9(1) (a), (b) and (c) – Failure to submit daily and weekly returns to the Central Bank on various dates. In addition, the bureau failed to report various foreign currency transactions that amounted to US\$10,000 or more to the Central Bank as required.**

**In accordance with the provisions of Section 6.1 of the Forex Bureau Guidelines, the Central Bank of Kenya has determined the existence of the violations of the Guidelines and therefore notifies Middle Town Forex Bureau Limited, in writing, of the inspection findings and the intention to assess penalties. Legal Notice No. 82 of the Central Bank of Kenya (Foreign Exchange Bureau) (Penalties) Regulations, 2009 provides that failure to comply with the Central Bank of Kenya Act, Regulations and the Forex Bureau Guidelines may result in penalties of up to Ksh.500,000.**

**The purpose of this letter therefore is to give Middle Town Forex Bureau Limited fourteen (14) days' notice from the date of this letter of our intention to levy penalty of Ksh.500,000 due to non-compliance with the Forex Bureau Guidelines. Please note that any subsequent violations may result in revocation of the bureau's licence.**

**As evidence that each director has reviewed and understood the contents of the report, we have attached a certificate of Directors' Awareness for their signatures, a copy of which should be returned to this Department for record purposes."**

22. It is the Respondent's case that the said notice followed a meeting held between a director and an officer of the Applicant on 4<sup>th</sup> December, 2014. The Applicant did not deny the fact that the meeting took place.

23. The Applicant responded to the Respondent's notice through its letter dated 24<sup>th</sup> December, 2014. In that letter, the Applicant stated as follows:

**"RE: LETTER OF INTENTION TO LEVY PENALTY**

**We refer to your letter of 16<sup>th</sup> December on the above subject and wish to state below:**

**a. That there wasn't a deliberate effort to split transaction of \$10,000 or more as stated in your letter. What may have happened is that on several occasions our new cashiers were duped into selling \$10,000 dollars or more to one customer on different hours of the day, without realizing that this act amounted to splitting. The omission has been noted and the same thing is regretted and any future transactions of this nature will be reported.**

**b. That on few occasions in the year, we were unable to submit daily and weekly reports due to breakdown of internet system. Please note that in case of such breakdown in future, manual returns will be submitted.**

**Finally may we appeal to the bank not to impose any penalties on us in the light of the above and the fact that the forex industry as a whole is undergoing a very trying economic time, owing to the failure of economic sectors that generated foreign exchange in the industry. A fine of Kes500,000/=, which is equivalent to our month's gross exchange earning, will definitely cripple our operations and create extra strain on our ailing business, which has an accumulated losses of kes 3,000,000/= in the past two years. Any added loss will result in our directors/investors exiting the sector and/or selling the business as most of the indigenous Kenyan investors in the sector have done in the recent past."**

24. Despite the Applicant's letter of mitigation, the Respondent subsequently levied a penalty of Kshs.500,000/= through the letter dated 19<sup>th</sup> January, 2014.

25. It is clear from the exchange of correspondences that, not only was the Applicant given an opportunity to be heard, but it was indeed heard.

26. The right to a hearing does not necessarily entail an oral hearing. Exchange of letters, as was done in this case, is adequate compliance with the right to a fair hearing. In **Kenya Revenue Authority v Menginya Salim Murgani [2010] eKLR** the Court of Appeal observed that:

**"The thrust of Dr. Kuria's submissions was that the internal disciplinary procedures of the appellant should have involved an oral hearing of the respondent either by the Staff Committee or the Board being the appellate body or both.**

**However, in our view, the fairness of a hearing is not determined solely by its oral nature. It may be conducted through an exchange of letters as happened in the matter before us and we are satisfied that it was a fair hearing.**

**In the case of LOCAL GOVERNMENT BOARD vs ALRIDGE [1915] A.C. 120,132-133, SELVARAJAN vs RACE RELATIONS BOARD [1975] I WLR 1686, 1694 and in R vs IMMIGRATION APPEAL TRIBUNAL ex-parte JONES [1988] I WLR 477, 481 it was held:-**

**“the hearing does not necessarily have to be an oral hearing in all cases. There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedure. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed and there is no rule that fairness always requires an oral hearing....**

**Whether an oral hearing is necessary will depend upon the subject matter and circumstances of the particular case and upon the nature of the decision to be made....”**

**According to the evidence adduced, it cannot be said that the respondent did not receive adequate notice of the charges levelled against him and allowed to present his case in writing.”**

27. The Applicant herein cannot be heard to say that it was not aware of the charges against it or that it was not given adequate opportunity to respond to the same. The essential elements of the right to a hearing were adequately taken care of by the Respondent.

28. There is no argument that the Respondent had no jurisdiction to levy penalties or that the penalty levied was in excess of its jurisdiction. The Respondent therefore acted within the law in its dealings with the Applicant.

29. Judicial review checks irrationality, illegality or procedural impropriety in the actions of public bodies – see **Council of Civil Service Union v Minister for the Civil Service [1985] AC 2**. Where an applicant has failed to demonstrate that a public body has acted illegally and/or irrationally and/or in breach of the rules of natural justice, a judicial review court will down its tools for it has no mandate to review the merits of the decision.

30. In the circumstances of this case, I find that the Applicant has not demonstrated that judicial review orders can issue. The Applicant’s case is therefore dismissed but with no order as to costs.

Dated, signed and delivered at Nairobi this 12<sup>th</sup> day of May, 2016

**W. KORIR,**

**JUDGE OF THE HIGH COURT**