REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI CITY

COURT NAME: MILIMANI LAW COURTS

CASE NUMBER: HCCOMMITA/E084/2020

CITATION: COMMISSIONER OF DOMESTIC TAXES VS W.E.C LINES KENYA

RULING

1. This matter relates to a Judgment delivered in this court on 31st January 2022. The Judgment was based on an appeal by the Appellant ("the Commissioner") against a decision of the Tax Appeals Tribunal (''the Tribunal''). The Court affirmed the decision of the Tribunal that the Respondent, having made zero-rated supplies, is entitled to VAT refunds due to it and that the VAT Regulations, 2017 ceased to have any effect immediately on the 8th day after the said Regulations were not tabled before the National Assembly. The court therefore dismissed the Commissioner's appeal with costs to the Respondent.

2. The Commissioner being aggrieved by the decision filed a Notice of Appeal dated 4th February 2022. It later filed the application dated 24th February 2022 seeking to review the judgment of the court under section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. The application seeks the following orders:
1. Spent.
2. THAT this Honourable Court be pleased to review its judgement delivered on the 31st January 2022, holding that the VAT Regulations, 2017 ceased to have any effect immediately on the 8th day after the said Regulations were not tabled before the National Assembly. The Commissioner could not apply them to the Respondent's case as they were at the time null and void.
3. THAT this Honourable Court be pleased to further review its orders that the Respondent having made zero-rated supplies, is entitled to VAT Refunds due to it.
4. THAT the costs of this application be provided for.

3. The Application is supported by affidavit of Pius Nyaga sworn on 24th February 2022. It is opposed through Grounds of Opposition and Replying Affidavit of Roger Dainty, the Respondent's General Manager, both dated 7th April 2022. The Application was canvassed by written submissions which the court takes due consideration of.

4. The Applicant seeks to review the judgment that this court delivered its Judgment on 31st January 2022. The Commissioner argues that its Counsel handling the appeal inadvertently misrepresented the court that the VAT Regulations, 2017 were never tabled before parliament.

5. The Commissioner outlined the procedure followed for the regulations to be tabled before

Parliament including the press release, letters issued and their publication in the Kenya Gazette. The Commissioner therefore confirmed that the VAT Regulations, 2017 were indeed tabled before the National Assembly on 10th May 2017 as is required and under the provisions of Statutory Instruments Act, 2013.

6. The Commissioner submits that owing to the inadvertent submission of the it's counsel during the hearing of the appeal, this court arrived at an erroneous conclusion that the VAT Regulations, 2017 were never tabled before the National Assembly and as a result the Court dismissed the Appellant's appeal, inter alia, on the ground that they ceased to have any effect immediately on the 8th day when they were not tabled before the National Assembly.

7. The Commissioner states that decision was as a result of its counsel's mistake. It urges the court to review the judgment which if allowed to stand, would not only be contra statute for being factually wrong, but occasion colossal loss of revenue in the form of tax refunds that are likely to be requested by taxpayers since it has an effect in rem. The Commissioner maintains that the application has been instituted without undue delay and now seeks orders for review and re-hearing of the appeal.

8. The Respondent opposes the application and argues that the Appellant has not met the grounds required for review. It submits that the information upon which the application is based was known to the Appellant throughout the pendency of this dispute. It states that from the affidavit of Pius Nyaga, the information that is the subject of this application was available to the Appellant as early as March 2017 and is therefore not new information.

9. The Respondent cites Rule 15 of the Tax Appeals Tribunal Act (Appeals to the High Court) Rules, 2015 which requires an appellant to produce evidence in its possession before or during the hearing of the appeal and submits that the application is an attempt to not only introduce evidence on appeal but after the appeal has been determined. It therefore argues that the application will not serve any purpose as the evidence sought to be introduced will not change the outcome of the case the appellant having abandoned Prayer 3 which touches on the main issue in this appeal namely the VAT treatment of the Respondent's services.

10. The Respondent points out that the Tribunal found that even if the VAT Regulations, 2017 were valid they could not take precedence over the VAT Act, 2013 and that the court could only decide the dispute based on the evidence on record. It maintains that the Appellant is not deserving of the exercise of the court's inherent power to correct its own errors as the Appellant admits that it is its advocate and not the court that made an error. It urges that therefore the application is an abuse of the court process and should be dismissed.

11. Before considering the merits of the application it is important to outline the legal framework for applications for review under section 80 of Civil Procedure Act and Order 45 of the Civil Procedure Rules. They state as follows:
80. Any person who considers himself aggrieved-
(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
(b) by a decree or order from which no appeal is allowed by this Act,
may apply for a review of judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

Order 45 Rule 1 of the Civil Procedure Rules provides as follows: -
45 Application for review of decree or order

(1) Any person considering himself aggrieved-
(a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
(b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay.

12. On the plain reading of these provisions of law, it is clear that a party can only apply for review where no appeal has been preferred. In this case, the Appellant has lodged a notice of appeal evincing its intention to appeal to the Court of Appeal and also filed an application for review. The Court of Appeal in Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Limited & 2 Others NRB CA Civil Appeal No. 368 of 2014 [2020] eKLR addressing itself on these provisions observed that:
It has to be stressed that the legal policy of Order 45 is to prevent a party, against whom judgment has been passed, from availing himself of two remedies at one and the same time; to apply for a review in the court below while his appeal (not notice of appeal) is pending in the Court of Appeal. It is now an accepted view that both the Civil Procedure Rules and the Court of Appeal Rules did not contemplate the simultaneous proceedings of review and appeal before two different courts at the same time. Where a party has filed an appeal but subsequently wishes to apply to the court from which the appeal came to review the decision impugned, that party must, in the first place withdraw the appeal. [Emphasis mine]

13. Following the aforesaid decision, I hold that since the Commissioner has only filed a Notice of Appeal and not the Appeal itself, this court has jurisdiction to hear the application for review. Had the record of appeal been filed then the same ought to have been withdrawn first so that the court cannot proceed with the application for review. I now turn to the merits of the application.

14. The principles governing the exercise of discretion to review a decree or order are now commonplace and the parties have cited several decisions to support their respective positions. An applicant is required to show either that there was an error apparent on the face of record or that there has been discovery of new and important matter or for any other sufficient reason for the court to review (see National Bank of Kenya Limited v Ndungu Njau [1996] KLR 469). Although the Order 45 of the Civil Procedure Rules sets out the conditions which an application for review may be granted, section 80 of the Civil Procedure Act does not prescribe the conditions upon which an application for review may be granted. The Act provides that the court may make such an order as it thinks fit while the Rules enumerate specific grounds for review and includes, ‘’or any other sufficient reason.’’ In Official Receiver and Liquidator v Freight Forwarders Kenya Limited NRB CA Civil Appeal No. 235 of 1997 [2000] eKLR, the Court of Appeal held that section 80 of the Act enables a court to make such orders on review application which it thinks just so that the words, “or any sufficient reason” as used in Order 45 rule 1 of the Civil Procedure Rules are not ejusdem generis with the words “discovery of new and important matter” and “some mistake or error apparent on the face of the record” and that those words extend the scope of the review hence the court may consider the circumstances of the case which may not be analogous with the other grounds specified in the Order (see also Wangechi Kimita and Another v Mutahi Wakabiru [1980 -88] 1 KAR 977).

15. Before I consider the grounds proffered by the Appellant in light of the principles I have outlined, I think it is important to set out the context of the application and in particular what the court stated in the judgment in relation to the TAT Regulations, 2017. The material part of the

judgment states as follows:
Applicability of the VAT Regulations
[12] As stated in the introductory part, the Commissioner's decision to reject the Respondent's VAT refund claims was partly grounded by the Commissioner's citation of Regulation 13 of the VAT Regulations, 2017. It is common ground and the Commissioner admitted that these Regulations were never tabled before the National Assembly as is required by section 11(1) of the Statutory Instruments Act, 2013 which provides that "Every Cabinet Secretary responsible for a regulation-making authority shall within seven (7) sitting days after the publication of a statutory instrument, ensure that a copy of the statutory instrument is transmitted to the responsible Clerk for tabling before parliament."
[13] The Commissioner argued that while the Regulations were not tabled before the National Assembly, they have not been found to be unprocedural and/or illegal and are therefore operational. The Respondent on the other hand submitted that the same were void by operation of law pursuant to section 11(4) of the Statutory Instruments Act, 2013 which provides that "If a copy of a statutory instrument that is required to be laid before parliament is not so laid in accordance with this section, the statutory instrument shall cease to have effect immediately after the last day for it to be so laid but without prejudice to any act done under the statutory instrument before it became void"
[14] The aforesaid provisions are mandatory and the consequence of failure to comply with the procedure renders the regulations void (see Otieno and Another v Council of Legal Education Civil Appeal38 of 2018 [2021] KECA 349 (KLR) (17 December 2021), Keroche Breweries Limited and 6 Others v Attorney General and 10 Others [2016]eKLR, Tax Justice Network Africa v Cabinet Secretary for National Treasury and 2 Others [2019] eKLR). This requirement is not idle as it is a manifestation of the legislative authority vested in Parliament under Article 94 of the Constitution. More particularly, Article 94(5) which provides that, ''No person or body, other than Parliament has the power to make provision having the force of law in Kenya except under the authority conferred by this Constitution or legislation.''
[15] Even if the VAT Regulations, 2017 had not been declared invalid, it is the affirmative duty of this court to give effect not only the Constitution but clear provisions of statute. I therefore hold that the VAT Regulations, 2017 ceased to have any effect immediately on the 8th day after the said Regulations were not tabled before the National Assembly. The Commissioner could not apply them to the Respondent's case as they were at the time null and void. [Emphasis mine}

16. It is clear from the judgment that the fact that the VAT Regulations, 2017 had not been laid before and approved by the National Assembly was in fact common ground by the parties both before the Tribunal and before this court. Hence any error by the court can only be laid at the feet of the Commissioner's counsel, who failed to inform the court of the fact that the impugned regulations were in fact tabled and approved in accordance with the law.

17. Applying the grounds set out in Order 45 of the Civil Procedure Rules, I would dismiss the application as the facts relating to the VAT Regulations, 2017 were known to the Commissioner or had the Commissioner exercised due diligence, the facts would have been evident. However, as to whether there is sufficient cause, I am of the view that the legality of otherwise of the VAT Regulations, 2017 is a matter that transcends the rights and interests of the parties to this dispute. The validity of regulations is a matter that affects the public at large and in this particular case governs the administration of the VAT Act. Further, from the evidence produced by the Commissioner, the VAT Regulations, 2017 were indeed tabled before the National Assembly on 10th May 2017. They are therefore valid and there is no basis to hold that the Statutory Instruments Act, 2013 was not complied with. Although the court is entitled to take judicial notice of all written laws under section 60(1) of the Evidence Act (Chapter 80 of the Laws of Kenya), this is a case where Commissioner, who is directly involved in administration of the VAT Act and regulations made thereunder, accepted that that the VAT Regulations, 2017 had not been laid before the National

Assembly. Had a contrary position been presented to the Tribunal and this Court, the Court would not have made the declaration.

18. From its submissions, the Commissioner does not intend to pursue the issue whether the court should review its orders that the Respondent having made zero-rated supplies, is entitled to VAT refunds due to it. I therefore consider Prayer No. 3 of the application abandoned.

19. In conclusion, I allow the application 24th April 2022 on terms that that the judgment dated 22nd January 2022 to the extent that decision that the holding that the VAT Regulations, 2017 ceased to have any effect immediately on the 8th day after the said Regulations were not tabled before the National Assembly be and is hereby set aside. For the avoidance of doubt, the VAT Regulations, 2017 are valid and have the force of law.

20. Finally, this decision does not affect the fact the appeal was dismissed and decision of the Tribunal affirmed.

21. The Appellant shall bear the costs of the application.

DATED and DELIVERED at NAIROBI this 14th day of JULY 2022.

D. S. MAJANJA
JUDGE

SIGNED BY: HON. MR. JUSTICE D. S. MAJANJA

THE JUDICIARY OF KENYA.
MILIMANI HIGH COURT
HIGH COURT COMMERCIAL AND TAX
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