REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 845 OF 2010

INSPECTOR-GENERAL (CORPORAITONS) …….. PLAINTIFF

VERSUS

PATRICK MUTUA MBITHI ……..…… DEFENDANT

R U L I N G

1. The Defendant's Notice of Motion dated and filed 9 July 2012 is before this Court for determination. The same is brought under the provisions of **sections 1A, 1B, 3, 3A** of the *Civil Procedure Act* and under **Order 2 Rule 15 (a), (b), (c)** and **(d)** as well as **Order 45 Rule 1 (1)** and **(2)** and **Order 51 (1)** of the *Civil Procedure Rules, 2010*. The Application seeks Orders that this Court be pleased to review and/or set aside the Ruling of this court (**Musinga J**. as he then was) delivered on the 1 November 2011 and/or to strike out the Plaint/suit herein dated 6 November 2010 with costs. The Defendants sought an alternative prayer namely that this Court be pleased to strike out the Plaint/suit herein dated 6 November 2010 as the same has been overtaken by events in view of the Judgement of the Judicial Review Division of this Court delivered on 23 November 2011 and/or that the Plaint/suit no longer discloses a cause of action against the Defendant and/or there are no triable issues pending determination by this Court.
2. The Defendant's said Application was based on the following Grounds:

"1. That the Defendant had filed an application dated 2nd March 2011 seeking to strike out the suit/plaint herein but the application was dismissed vide a Ruling issued on 1st November 2011 by this honourable court.

2. That after the delivery of the said Ruling of 1st November 2011 sufficient reasons and/or new

evidence which renders the said Ruling reviewable have arisen namely:

a. **The Judicial Review court on 23rd November 2011 nullified/quashed the Certificate of Surcharge Number 141 of 2010 (The plaintiff in the suit herein is seeking to enforce the terms and conditions of the said certificate).**

b. **The nullification/quashing of the said Certificate of Surcharge number 141 of 2010 by the Judicial Review Court renders the suit herein a non-starter and/or disposes of the suit herein as there are no further triable and/or further any issues remaining for determination by this court.**

3. The full implications of nullifying/quashing the said Certificate of Surcharge Number 141 of 2010 is that the plaintiff has got no further cause of action against the defendant and the court should dismiss the suit herein with costs to the Defendant.

4. That the suit herein was filed prematurely as the Defendant filed the suit while it all material times knew Certificate of surcharge Number 288 of 2010 had been challenged by the Plaintiff in Judicial Review Case Number 288 of 2010 and even stay orders had been issued.

5. The Plaintiff should have awaited the outcome of the said Judicial Review 288 of 2010 before filing the suit herein.

6. The suit herein was ill-conceived/ misconceived and ill-timed and has subjected the Defendant to heavy unnecessary litigation costs for a fault that was wholly attributable to the Plaintiff's negligence and incompetence in performing its statutory duty and/or in abusing the Court process in filing the suit herein".

3. The Application was supported by the Affidavit of the Defendant sworn on the 9th July 2012. The deponent noted that he was surcharged by the Plaintiff vide a Certificate of Surcharge No. 141 of 2010 issued on 23 February 2010 for the amount of Shs. 1,629,166/-. Ostensibly, he had been surcharge because he had failed to submit PAYE returns to the Kenya Revenue Authority. The Defendant went on to say that he challenged the said surcharge in Judicial Review Miscellaneous Cause No. 288 of 2010 and while the proceedings were pending in that suit, the Plaintiff filed the present suit before this Court to enforce the said Certificate of Surcharge. The Defendant noted that he filed an application seeking to strike out the suit herein on the 2 March 2011 but **Musinga J.** dismissed the same on 1 November 2011. Accordingly, the Defendant asked this Court to review the Judge's Ruling and he averred that sufficient reasons and/or new evidence and/or new important matters which were not within his knowledge when a filed the said Application. Those matters included the quashing/nullifying of the said Certificate of Surcharge by the Judicial Review Court on 23 November 2011. The Defendant noted that the suit herein was meant to enforce the terms of the said Certificate of Surcharge and now, as the same had been quashed, there were no further or other triable issues pending determination by this Court. The Defendant maintained that the suit herein was filed prematurely for the reason that the Plaintiff knew that the Defendant had filed his suit for Judicial Review and it should have awaited the outcome thereof. In his opinion, the filing of this suit was an abuse of the Court's process.

4. The Inspector-General (Corporations) one **Peter B. Ondieki** swore a Replying Affidavit on 30 July 2012. He noted and had been advised by the Plaintiff's advocates on record that the Defendant's Application herein, sought to review the Order made on 1 November 2011 dismissing the Defendant's Chamber Summons dated 2 March 2011. The deponent maintained that it was not correct nor were there sufficient reasons and/or new evidence that had emerged which rendered under the said Order reviewable. He further noted that the Judgement handed down by the Judicial Review Court on 23 November 2011 did not reverse or in any way declare that the Plaintiff had no *locus standi* to institute recovery proceedings against the Defendant. Significantly, Mr. Ondieki noted that the Judgement in the Judicial Review case was not based on whether or not the Defendant was liable or otherwise for the loss of Kenyan shillings 1,629,166/-by the Kenya Maritime Authority (of which he was its Finance and Administration manager) but whether the decision-making process that led to the Defendant being held liable for the loss was proper or not. The deponent maintained that the said Judgement did not absolve or extricate the Defendant from the Plaintiff's claim for Shs. 1,629,166/-. Thereafter, the deponent denied the other averments made by the Defendant in his said Affidavit in support of his Application. He concluded his Replying Affidavit by stating that the Plaintiff's claim in this suit was for the sum of Shs. 1,629,166/- the same being the surcharged amount against the Defendant for the net amount of loss incurred by the said Kenya Maritime Authority due to the Defendant's misconduct in failing to submit payments and financial returns to the Kenya Revenue Authority, as required by the regulations. The Deponent annexed to his Replying Affidavit copies of those documents which the Plaintiff intended to rely upon in regard to its case stressing that the Plaintiff was not relying solely upon the said Certificate of Surcharge dated 23 February 2010.
5. The Defendant's written submissions were filed herein on 12 February 2013. They commenced by setting out the Orders sought in the Application as well as the sufficient reasons and/or new evidence which rendered the Ruling of 1 November 2011 reviewable. This was as per the Supporting Affidavit of the Defendant. He noted that in the Plaint dated 6 November 2010, the Plaintiff averred at paragraph 5 thereof that it had issued the said Certificate of Surcharge:

"informing the Defendant of the decision to surcharge him for a sum of KShs. 1,629,166….."

The Defendant submitted that it was the said Certificate of Surcharge which the Plaintiff was seeking to enforce by this suit. After reciting the Prayers in the Plaint, the Defendant submitted as a result of the nullifying/quashing of the said Certificate of Surcharge, the basis on which the Plaintiff was seeking to recover the aforesaid sum did not exist. As a result, the Plaintiff had no cause of action against the Defendant and this Court should dismiss the suit with costs to him. The Defendant also submitted that he should be entitled to the costs of this suit.

6. The Plaintiff filed its submissions herein on 20 February 2013. It set out the Orders sought by the Defendant in his Application and referred to the grounds as set out in the pleadings as supported by the Affidavit sworn on 9 July 2012. Thereafter, the Plaintiff set out the documents which it felt formed the pleadings before outlining its case. It noted that it had the statutory authority and power to surcharge the amount of any loss or deficiency incurred by a state Corporation upon any person who is negligent or whose misconduct caused the said loss. The Defendant, as the one time Finance and Administration Manager of the said Kenya Maritime Authority, had caused or occasioned the loss of Shs. 1,629,166/-through his negligence or misconduct. This caused the Plaintiff, after investigation, to issue the Certificate of Surcharge No. 141. The Defendant, in his Defence, had denied the authority of the Plaintiff and also denied that any investigation as to his

conduct was carried out. He also had pleaded that he had not occasioned and was not the cause of the loss of the said sum. The Plaintiff then attacked the pleadings in the Notice of Motion dated 9 July 2012. It maintained that they were fatally defective and an abuse of the court process. It relied upon the technicality that the pleading as filed did not show or indicate as to who the Applicant was or who was the applicant's representative or agent. The same had not been signed by an advocate which rendered the Application fatally defective. In this regard, the Plaintiff referred to **Order 9 Rule 16,** *Civil Procedure Rules* as well as the case of **HCCC No. 1994 of 2000 (Milimani)** being **Reginah K. Mutuku & Ors v. United Insurance Company Ltd (unreported)** and has adopted in **HCCC No. 91 of 1998 – Fidelity Commercial Bank Ltd v Worldin Tours& Travel Ltd & Anor. (unreported)** wherein **Ibrahim J.** (as he then was) stated:

"I agree with his decision that an unsigned pleading cannot in law be valid in law."

7. The Plaintiff continued with its submissions by stating that the Application as before Court, had not raised sufficient reasons and/or new evidence that would warrant the review of the Ruling delivered on 1 November 2011. It noted that the same relied solely upon the Judgement in the High Court Judicial Review case No. 288 of 2010. It commented that the said Judgement was not based on the facts touching on whether the Defendant's negligence or misconduct had occasioned the said loss to the Kenya Maritime Authority. The suit brought by the Plaintiff sought to recover that loss and the Certificate of Surcharge was only one of the grounds in support of the Plaintiff's cause of action. The Plaintiff maintained that the Ruling dealt with the substantive issue of the decision-making process and not the decision itself. The Court had not made any finding on whether or not the Defendant's misconduct occasioned the loss or deficiency to the said State Corporation and whether he should be held liable for the same.
8. I have reviewed the Defendant's Notice of Motion dated 2nd March 2011, which sought to strike out the Plaintiff's Plaint herein. There was an alternative prayer for the Court to order that the suit herein should be stayed pending the hearing and determination of the *Judicial Review Miscellaneous Cause No. 288 of 2010*. I also perused the said Ruling delivered on 1 November 2011. It is apparent that the point the Defendant was making in that Application was whether the Plaintiff had *locus standi* to institute recovery proceedings against the Defendant. It was the Defendant's view that it was only the Kenya Maritime Authority which had the power to Institute recovery proceedings for the amount of surcharge by the Plaintiff. The learned Judge found that **section 24 (1)** of the *State Corporations Act* details that in recovery proceedings the sum due is payable to the State Corporation, in this case the Kenya Maritime Authority, but only after the outstanding sum has been duly certified by way of Certificate of Surcharge by the Plaintiff herein. He noted that the Legislature intended that such proceedings be determined in a summary manner and found that the Plaintiff herein had the *locus standi* to institute these recovery proceedings. As a result, the learned Judge dismissed the Defendant's Application to strike out the Plaint herein. Fortunately or not for the Plaintiff, the Judge made no finding as regards the stay of proceedings herein pending the hearing and determination of the Judicial Review matter.
9. Quite obviously, the Defendant is relying upon the findings and the Judgement of the Judicial Review Court to support its view that the same amounts to sufficient reason and/or new evidence and/or new important matter sufficient to justify this court reviewing the said Ruling of 1st November 2011. The Plaintiff maintains that the said Ruling changes nothing so far as its case is concerned against the Defendant. The Judgement of Justice Korir in the Judicial Review Application was exhibited as "PMM 6" to the Affidavit in support of this Application. The Defendant had sought for an Order of Certiorari to move this Court and quash the *Certificate of Surcharge No. 141 of 2010* issued against him by the Plaintiff herein. He sought a further Order

of Certiorari to quash the said *Certificate of Surcharge No. 141 of 2010* issued by the Chairman of the State Corporations Appeals Tribunal against him on 23rd March 2010. The learned Judge set out the grounds upon which the Defendant had come before the Judicial Review Court as follows:

"1. The surcharge issued by the I.G. was malicious, baseless and based on falsehoods.

2. The Applicant was never given a hearing by the I.G.

3. The I.G. discriminated against the Applicant in issuing the certificate of surcharge.

4. The I.G. abused his power by surcharging the applicant without investigating the allegations against him.

5. The constitutional rights to a fair hearing, protection by the law and non discrimination were violated by the I.G.

6. The Inspector General's actions were against the rule of law, natural justice and totally arbitrary and unreasonable".

At pages 11 and 12 of the said Judgement, the learned Judge found as follows in relation to the matter before him:

"I have looked at the replying affidavit sworn on 18th January, 2011 by Peter B Ondieki the Inspector General (Corporations). At paragraph 6-8 he avers that he considered the letter dated 20th August, 2009 written to him by the Applicant's lawyer and concluded that the Applicant was solely responsible for the loss suffered by K.M.A. Looking at the said replying affidavit one can easily say that the Applicant was indeed given a hearing. The only disturbing thing about the said replying affidavit is that there is no mention about the allegation by the Applicant's counsel that one Mureithi and two other persons working for the 1st Respondent informed the Applicant's counsel that the Applicant's letter was not considered when the decision to surcharge him was reached. There is even no mention about Mr. Mureithi in the said affidavit. That means whatever the Applicant's counsel is saying to court may be true. If the Applicant's letter was not considered, then it means the decision reached by the 1st Respondent was reached without taking into account the Applicant's defence. As such, he was never accorded a hearing. For this reason alone the Applicant's case should succeed. His application is allowed in terms of prayer No. (a)".

10. From the above, it seems as if the Plaintiff's submissions as to the finding of the Judicial Review Court are incorrect. The Judge did not just find that the Defendant had been given no hearing before he was surcharged but he allowed the Defendant's application in terms of prayer No. (a), which means that he quashed the *Certificate of Surcharge number 141 of 2010* issued against the Defendant by the Plaintiff dated 23 February 2010, in which he was surcharged in the sum of Kshs 1,629,166/-. It is to be noted that the said Judgement of the Judicial Review Court was delivered on 23 November 2011 while the Ruling of Musinga J. in this Division was delivered prior to that on 1st November 2011. Consequently, Musinga J. did not have before him that finding of the Judicial Review Court.
11. The provisions of the law which the Plaintiff brings his application being **Order 45** for Review, sets out the grounds upon which such an application should be predicated. **Rule 1(1)** of the said Order reads:

"(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 a review of judgment to the court which passed the decree or made the order without unreasonable delay". (Underlining mine).

12. For an application for review, as set out above, the Applicant who seeks for an Order or Decree to be reviewed has to establish firstly that there was discovery of new and important matters not before Court at the time its Ruling under review was delivered. Secondly, that there was some mistake or error apparent on the face of the record and thirdly, for any other sufficient reason. Of these three principles set out in the said Order, the Defendant in his submissions seemed to rely upon all three! However, I find that the Judgement of the Judicial Review Court is a new and important matter that was not before this Court on or before 1 November 2011. **Section 24** of the *State Corporations Act* is very clear:

"24. (1) Every sum certified by the Inspector to be due by a person shall be paid by that person to the state corporation within thirty days after it has been so certified or, if an appeal with respect to the sum has been made, within fourteen days after the appeal has been disallowed, abandoned or has failed by reason of the non- prosecution thereof.

(2) The Inspector shall take all necessary steps in any competent court to recover from the persons surcharged any sum which is not paid in accordance with subsection (1).

(3) In any proceedings for the recovery of any sum which is not paid in accordance with subsection (1) the Inspector's certificate shall be conclusive evidence that the sum is due and payable by the person surcharged.

(4) On the production of the inspector's certificate the court shall give a decree for the sum sued for and the decree shall have the effect of a decree under the Civil Procedure Act and any rules made thereunder".

The problem that the Plaintiff now faces is that its certification of the sum due to the Kenya Maritime Authority has been quashed. I agree with the Defendant when he says that the quashing of the Certificate of Surcharge basically puts an end to the Plaintiff's case. I do not accept the Plaintiff's submissions as regards the other documentary evidence that he would intend to place before this Court at the hearing in due course, so as to show that the Defendant was negligent and that his misconduct caused loss to the said Kenya Maritime Authority. To my mind and with reference to **section 24 (3)** and **(4)** of the said Act, the quashing of the Certificate puts an end to these proceedings as against the Defendant. The other point raised by the Plaintiff in his submissions was that the Defendant's Application was fatally defective as the same was not signed and did not show or indicate who drafted

and/or filed the Application together with the Supporting Affidavit. I have examined the Court's copy of the Defendant's Application before this Court dated 9 July 2012. The same is definitely signed up on behalf of Nyamai & Co., Advocates and there is indication at the bottom of the Court's copy of the said Notice of Motion in pen that it is drawn and filed by the said firm of advocates. Similarly, the Affidavit in Support of the Application also has detailed upon it, that it was drawn and filed by the said advocates and has been signed for and on their behalf. Consequently, I find that the Application was properly before this Court and did not amount to an abuse of the Court process.

13. As a consequence of all the above, I allow the Defendant's Notice of Motion dated 9th July 2012 and set aside this Court's Ruling delivered on 1st November 2011. Further, I strike out the Plaint herein dated 6 November 2010 with costs to the Defendant.

DATED and delivered at Nairobi this 19th day of June, 2013.

J. B. HAVELOCK

JUDGE