IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: BOSIRE, GITHINJI & VISRAM JJ.A)

CIVIL APPEAL NO. 200 OF 2003

BETWEEN

NAKUMATT HOLDINGS LIMITED.....APPELLANT

AND

THE COMMISSIONER OF VALUE ADDED TAX.....RESPONDENT

(Appeal from the Ruling/Order of the High Court of Kenya at Narobi (Rimita J.) given on 27th day of June, 2003

in

H.C.C. MISC. APPLICATION NO. 508 OF 2003)
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JUDGMENT OF THE COURT

This is an appeal from the decision of the superior court given on 27th June 2003, in which Rimita J. declined to review his earlier decision given on 6th June, 2003 declining to grant leave to apply for an order of judicial review. In his decision of 6th June 2003, the learned Judge cited **section 33** of the Value Added Tax Cap 476 (the Act), as denying the High Court jurisdiction to review decisions by the Commissioner of Value Added Tax by way of judicial review or otherwise. It later transpired that **section 33**, aforesaid, had, by the date of that decision, been repealed and replaced.

In the second decision, given on 27th June, 2003, the learned Judge was ruling on an application by **Nakumatt Holdings Limited** (*the appellant*), in which the appellant sought an order of review of the order of 6th June 2003. That application was expressed to be brought under **Order XLIV** of the Civil Procedure Rules. The only ground which was given for seeking review is that **section 33** aforesaid had been repealed by the Finance Act of 1998 and replaced by a provision which, unlike the repealed section, did not oust the jurisdiction of the court. The learned Judge also expressed the view that the only option open to the appellant was an appeal as in his view in absence of a clear provision in the Law Reform Act Cap 26 providing for review the Court had no jurisdiction of reviewing its own decision even when it is shown to be clearly wrong as was the case in the matter before him.

In the appeal before us the main, if not the only issue is whether or not the superior court had jurisdiction to review its own decision given on 6th June 2003, given that Rimita J. conceded that he wrongly invoked section 33 of the Value Added Tax Act to decline jurisdiction to grant leave to apply for an order of

judicial review.

We consider it important to put the issue in a proper factual context. On 20th May 2003, the appellant filed in the superior court a chamber summons seeking leave of that court to take out a motion for orders of judicial review pursuant to the provisions of **order 53 rule 1** of the Civil Procedure Rules. That order was promulgated pursuant to the provisions of the Law Reform Act, Cap 26 of the Laws of Kenya, which among other things, provides for power to move the court for orders of judicial review. In that application the appellant was complaining that the Commissioner of Value Added Tax had on 13th March 2003, taken a decision in which he refused to allow a deduction of input tax of Kshs. 163,650, 415/= by the appellant allegedly on certain non-designated supplies. The appellant was desirous of having the decision quashed by an order of judicial review and hence the application for leave.

Under the provisions of **order 53**, aforesaid, an application for leave is normally made ***ex parte*** to a Judge in Chambers. The application was placed before Rimita J. No submissions were made to him on the merits or otherwise of the application. In the review application, however, Rimita, J. was addressed on the issue of the jurisdiction of the court to review an order made under **order 53**, aforesaid. We too were addressed at reasonable length by counsel for the parties on the same issue.

It was common ground that the decision of the superior court given on 6th June 2003, was erroneous to the extent that the superior court acted on the mistaken belief that **section 33** of the Value Added Tax had not been amended. It is also common ground that the Law Reform Act does not have provisions for review. The point of departure is whether **order 44** of the Civil Procedure Rules under which the review application was made, applies to **order 53** of the same Rules.

In the case of **Aga Khan Education Service Kenya v. Republic Through Ali Seif Benson Nairagu, Joseph Ngethe Gitau and The Attorney General, Civil Appeal No. 257 of 2003,** this Court, differently constituted when handling a matter more or less similar to this one, rendered itself thus:

"We would, however, caution practitioners that even though leave granted *ex parte* can be set aside on an application, that is a very limited jurisdiction and will obviously be exercised very sparingly and on very clear cut cases unless it be contended that judges of the superior court grant leave as a matter of course. We do not think that is correct. Unless the case is an obvious one, such as where an order of certiorari is being sought and it is clear to the court that the decision sought to be quashed was made more than six months prior to the applicant coming to court and there is, therefore, no prospects at all of success, we would ourselves discourage practitioners from routinely following the grant of leave with application to set aside. Fortunately such applications are rare and like the Judges in the United Kingdom, we would also point out that the mere fact that an applicant may in the end have great difficulties in proving his case is no basis for setting aside leave already granted."

In the case cited, above, leave was granted to apply for an order of judicial review. An application was made by a party affected to have the order granting leave reviewed and set aside. The superior court declined the request. An appeal against the refusal was dismissed on the ground that there was no basis for interfering with that decision.

An application for an order of judicial review is intended to be a quick and inexpensive procedure to aid a party who, in a way, is in distress. That is why, for instance, in the case of certiorari, there is a time limit within which such an application has to be made. The proceedings for an order of judicial review are commenced by a chamber summons for leave to bring, such an application, which is normally made *ex parte*. That is the procedure the appellant adopted, and because its intended application for which leave was sought, was for an order of *certiorari*, time was of the essence. An application for an order of *certiorari* has, by dint of the provisions of **section 9 (3)** of the Law Reform Act as also **order 53 rule 2** of the Civil Procedure Rules, to be brought within six months of the decision sought to be quashed. The decision which the appellants want quashed was made on 13th March 2006. So the appellant had up to early September 2006 to bring an application for judicial review. As stated earlier the application for leave was made on 20th May 2003, which was timeous. Leave was refused on 6th June 2003 and an

application for review of that order was dismissed on 27th June 2003. A record of appeal in this matter was filed on 27th August 2003, before the limitation period for bringing an application for an order of certiorari expired. As at the hearing of this appeal on 9th March 2011, that period had long expired.

Mr. Ontweka, for the respondents in his submissions to us, seemed to suggest that where a law is silent on whether review is permissible, then courts must decline jurisdiction where a review is sought. While we agree with him that judicial review is a special jurisdiction, we do not agree that in clear cases, courts should nonetheless fold their arms and decline jurisdiction. The process of review is intended to obviate hardship and injustice to a party who is, otherwise, not to blame for the circumstances he finds himself in. This Court in the case we earlier cited of **Aga Khan Education Services Kenya v. R.** (supra) expressed the view, that review jurisdiction in cases as the present one, should be exercised sparingly and in very clear-cut cases.

In the matter before us it was the superior court which put the appellant in the predicament it finds itself in. It was mistaken on the applicable law. The appellant acted promptly and sought an order reviewing the erroneous order. The court declined jurisdiction with the result that the limitation period expired. If that decision is not reviewed it would not have any remedy. It is hardship of that nature which the review jurisdiction should be exercised to obviate, more so if it is shown that the applicant did not contribute to that state of affairs.

The decision of this Court in the case of **Judicial Commission of Inquiry into the Goldenberg Affair & 3 Others v. Kilach** [2003] KLR 249, which Mr. Ontweka cited, does not, with due respect to learned counsel, hold that review is not available under **order 53** of the Civil Procedure Rules. It would be oppressive and an affront to common sense in a case like the one before us where the court precipitated a situation for the same court to turn around and say it lacks jurisdiction to correct what is obviously a wrong decision, more so where, as here, the court was not addressed on the merits or otherwise of the application for leave. The court, ***suo motu***, raised the jurisdictional issue without asking the applicant's counsel to address it on the matter.

There has been debate as to whether or not **order 44** of the Civil Procedure Rules applies to proceedings under **order 53**. Whether or not **order 44**, above, applies is a matter which should await another occasion. What is important is that the superior court in the matter before us had the residual power to correct its own mistake. It may be that the appellant cited a wrong provision of the law in its application for review. That ***per se*** would not deprive the court the power of correcting its own mistake which that court itself acknowledged it made.

Mr. Mogeni invited us to spell out the correct procedure for approaching the court in a case as this one where the court is the one which erred at leave stage. In the **Aga Khan Education Services** case (supra) this court cautioned practitioners to exercise caution in seeking orders of review under **order 53**. We cannot spell out a procedure, because in that case the court appreciated that it is a practice which should not be encouraged, and that it should be resorted to only in the clearest of cases. We rather not spell out the procedure as the court was not addressed fully on the issue.

In the result we allow the appeal, set aside the order of the superior court dated 27th June 2003, and in place thereof substitute an order allowing the application dated 10th June 2003, set aside the dismissal order and grant the appellant leave to bring an application for orders of certiorari and mandamus as prayed in the chamber summons dated 14th May 2003. The application to be filed within 21 days from the date of this judgment. The costs of this appeal, and the thrown away costs of proceedings before the superior court, to abide the outcome of the yet to be filed motion. In the event that the motion is not filed, the order on costs shall be that each party bear its own costs.

Dated and delivered at Nairobi this **8th** day of **April 2011**.

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.M. GITHINJI
.....
JUDGE OF APPEAL

ALNASHIR VISRAM
.....
JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR