REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

JUDICIAL REVIEW MISC APPLICATION NO. 60 OF 2018

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW FOR ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF ARTICLES 40 & 47 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF THE INDUSTRIAL PROPERTY ACT,2001; THE TRADE MARKS ACT; THE TRADE MARKS RULES, 1956; SUBSIDIARY LEGISLATION AND AMENDMENTS THERETO

AND

IN THE MATTER OF SECTION 3(5) OF THE INTERPRETATION AND GENERAL PROVISIONS ACT AND SECTION 3(1) (A) (1) OF THE KENYA INFORMATION AND COMMUNICATIONS (POSTAL AND COURIER SERVICES) REGULATIONS, 2010

AND

IN THE MATTER OF THE DOCTRINE OF NATURAL JUSTICE, LEGITIMATE EXPECTATION AND REASONABLENESS

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

REGISTRAR OF TRADE MARKS.....1ST RESPONDENT

EXECUTIVE DIRECTOR,

ANTI-COUNTERFEIT AUTHORITY.....2ND RESPONDENT

AND

BRIGHT SKY SOLAR SOLUTIONS LIMITED.....INTERESTED PARTY

AND

UWIN INVESTMENT AFRICA

COMPANY LIMITED.....EX PARTE APPLICANT

RULING

[1] The Notice of Motion dated 13th April 2023 was filed herein by the *ex parte* applicant, **Uwin Investments Africa Company Limited (hereinafter, the applicant),** under **Sections 1A and 3A of the Civil Procedure Act** and **Order 45** of the **Civil Procedure Rules 2010.** The applicant prayed for orders that:

[a] Spent

[b] The Court be pleased to review its orders of 10th June 2019 by directing the respondents either jointly or severally to settle accrued customs warehouse rent and related charges of Kshs. 6,830,508/= as at 3rd April 2023 which accrued on account of the 2nd respondent's faulty seizure and detention of the applicant's containers numbers TTNU9962322 and DRYU4535826 from 23rd and 28th August 2018, respectively.

[c] The court be pleased to review its orders of 10th June 2019 by directing the respondents either jointly or severally to settle demurrage charges to be raised by the shipping line, **CMA CGM Kenya Limited,** upon empty return of the containers numbers TTNU9962322 and DRYU4535826, which demurrage charges have accrued on account of the 2nd respondent's faulty seizure and detention of the applicant's containers numbers TTNU9962322 and DRYU4535826 from 23rd and 28th August 2018, respectively.

[d] Any just modification of the above orders or other orders the Court deems fit to grant in the circumstances.

[e] The costs of the application be provided for.

[2] The application was premised on the grounds that, on the 10th June 2019, **Hon. Justice E.K. Ogola** delivered a ruling herein in which he found that the seizure of the applicant's containers numbers TTNU9962322 and DRYU4535826 on the 23rd and 28th August 2018, respectively, was based on faulty premises and could not stand. Accordingly, an order was made for the immediate release of the two containers. Being dissatisfied with the decision, the 1st and 2nd respondents moved to the Court of Appeal and there obtained an order of stay pending appeal.

[3] The applicant further complained that, although the appeals were ultimately dismissed on 2nd December 2022, the respondents have continued to detain the containers, thereby accruing customs warehouse rent to the tune of Kshs. 6,830,508/= which must be paid in full before the containers can be released. The applicant also averred that the containers continue to accrue demurrage charges pending their return to the shipping line, **CMA CGM Kenya Limited**. Thus, the applicant contended that it is imperative that the orders dated 10th June 2019 be reviewed to compel the respondents, either jointly or severally, to pay the accrued customs warehouse rent and the demurrage charges due to the shipping line.

[4] The application was supported by the averments set out in the Supporting Affidavit filed therewith, sworn by **Advocate Edgar Washika Ochima** on 13th April 2023. He deposed that he was given a Power of Attorney by the applicant to make the deposition and was therefore well versed with the issues raised in the suit. At paragraphs 2 to 8, **Mr. Washika** restated the background of the application and asserted that the two containers and the goods therein have continued to be detained at Kilindini Harbour even after the conclusion of the respondent's appeal.

Consequently, a sum of Kshs. 6,830,508/= was due by way of customs warehouse rent as at April 2023 when the instant application was filed.

[5] **Mr. Wachika** further deposed that, in addition to the warehousing rent, the applicant will be compelled to pay demurrage charges to the shipping line unless the orders sought by it are granted by the Court. He added that the exact amount of demurrage charges can only be determined upon return of the empty containers to the shipping line. He relied on several documents in support of his averments, such as:

[a] A letter from KRA dated 3rd April 2023 addressed to the applicant notifying it of the customs warehousing rent of Kshs. 6,830,508.

[b] Bill of Lading and Delivery Order from CMA CGM Kenya Limited setting out the conditions for tabulation of demurrage charges, cleaning and repair charges.

[c] A registered Power of Attorney.

[6] The applicant filed a Further Affidavit sworn on 2nd May 2023 reiterating that the application dated 13th April 2023 seeks a determination from this Court as to who bears the payment of accrued customs warehouse rent and related charges due to Kenya Revenue Authority of Kshs. 6,830,508/= and demurrage charges to be raised by

the shipping line (CMA CGM Kenya Limited) upon return of the empty containers. **Mr. Washika** explained, at paragraph 4 of the Further Affidavit that, at the time of filing the instant application, the shipping line was yet to provide its estimated demurrage charges; and that he only managed to get a copy of the invoice dated 17th April 2023 for USD 183,896 on 19th April 2023.

[7] Hence, the applicant's contention is that the charging of customs warehouse rent in the sum of Kshs. 6,830,508/= and demurrage charges estimated at Kshs. USD 183,896 comprise new and important matters of evidence which were not available to the applicant at the time the ruling of 10th June 2019 was made. Reference was made to the Consent Order made by the parties recorded on 28th October 2019 by which the 2nd respondent was obliged to keep the goods in merchantable condition pending the hearing and determination of the suit. Thus, the applicant postulated that, on that account, the responsibility of settling the warehouse rent and demurrage charges is that of the 2nd respondent.

[8] In response to the application, the 2nd respondent filed Grounds of Opposition dated 12th May 2023, contending that:

[a] The application is fatally defective and incurably incompetent.

[b] The application is premised on contested matters of fact that fall outside the scope of judicial review.

[c] For all intents and purposes, the application is a claim for special damages that must be specifically pleaded and proved; and therefore falls outside the scope of judicial review.

[d] The application is a gross and acute abuse of the due process of this court.

[e] The Court is *functus officio*, upon the grant of the judicial review orders in its ruling dated 10th June 2019.

[f] The application seeks new or a variant of the old orders for which leave has not been sought and obtained, and in any event, cannot be granted by this Court.

[g] The application is a fishing expedition premised on documents of dubious character that cannot found a cause of action.

[h] The Court lacks the requisite jurisdiction to entertain, hear and determine the application, as its jurisdiction has been wrongly and illegally invoked.

[i] The application seeks orders that are purely contractual in nature between the applicant and the shipping line, a contract to which the 2nd respondent is a stranger.

[j] The application seeks orders that had been prayed for and denied by the Court.

[k] The application has been made late in time and is an inexcusable afterthought.

[l] The application is frivolous and vexatious and only intended to annoy and disparage the 2nd respondent.

[m] The application is not founded on any known or available provision of the law.

[n] The application seeks the sympathy of the Court and not the resolution of any dispute that falls within the Court's jurisdiction.

[o] The application is basically a desperate attempt at a second bite at the cherry by the applicant.

[9] In addition, the 2nd respondent filed a Notice of Preliminary Objection dated 26th April 2023 notifying the parties hereto that it would raise a preliminary objection *in limine* prior to the hearing of the

application dated 13th April 2023 on the ground that the Court lacks the requisite jurisdiction to entertain, hear and determine the said application.

[10] The application was canvassed by way of written submissions, pursuant to the directions given herein on 15th May 2023. Accordingly, the applicant filed written submissions dated 5th June 2023 and reiterated the factual basis of the application and proposed the following issues for determination:

> **[a]** Whether the Court has the requisite jurisdiction to hear and determine the application dated 13th April 2023 as the application allegedly falls outside the scope of judicial review and lacks merit.
>
> **[b]** If the Court has jurisdiction, whether the prayers sought in the application dated 13th April 2023 are merited.

[11] On jurisdiction, the applicant relied on **Section 1A** of the **Civil Procedure Act** and submitted that the application gives the Court the opportunity to resolve the dispute between the parties in a just, expeditious, proportionate and affordable manner. Reliance was also placed on **Section 3A** of the **Civil Procedure Act** which stipulates that nothing in the Act shall limit or otherwise affect the inherent power of the

Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. The cases of **Republic v National Transport Services Authority, Ex Parte Extra Solutions Ltd** [2017] eKLR and **Kenya Bus Services Ltd & Others v Attorney General & Others** [2005] 1 EA 111; [2005] 1 KLR 743 were cited to buttress the argument.

[12] Accordingly, the applicant posed the following questions for determination within the context of the dispute between the parties:

[a] How will the ends of justice be met in this case?

[b] How can this Court prevent abuse and obstruction of its process, do justice between the parties and secure a fair trial between them?

[c] How can this Court uphold, protect and fulfill its constitutional judicial function of administering justice in a regular, orderly and effective manner?

[13] The Court was thus urged to find that sufficient cause has been made by the applicant to warrant the invocation of its inherent jurisdiction in this matter. In addition, counsel for the applicant relied on **Section 80** of the

Civil Procedure Act and **Order 45 Rule 1** of the **Civil Procedure Rules** and submitted that the circumstances evinced by the applicant's evidence warrant a review of the ruling and order dated 10th June 2019 in that there is new and important evidence that only became apparent when the applicant sought to enforce the Court's final orders.

[14] Counsel added, on the authority of **Nakumatt Holdings Limited v Commissioner of Value Added Tax** [2011] eKLR, that it is permissible to review orders made by the Court in its judicial review jurisdiction; especially in situations in which the object is the implementation of the orders of the Court and the attainment of the ends of justice. The applicant pointed out that the precedent has been followed in several other decisions, such as **Republic v Kenya Revenue Authority, Ex Parte Paragon Electronics Limited** [2015] eKLR, and **Victrociset S.P.A Kenya v Commissioner of Domestic Taxes** [2018] eKLR among others.

[15] The 2nd respondent's written submissions were made in accordance with the 15 points raised in its Grounds of Opposition dated 12th May 2023. The Agency posited that judicial review, being *sui generis* proceedings, is not governed by the **Civil Procedure Act**, save for **Order 53** thereof. It relied on **Kisumu Civil Appeal No. 41 of 2013: Republic v The**

Chairman Amagoro Land Disputes Tribunal; Jacinta Papa (interested Party) ex parte to buttress the argument. The 2nd respondent further argued that the judicial review is inappropriate in situations that call for consideration of the factual basis of the suit; yet the instant application is replete with contested facts.

[16] The 2nd respondent also took issue with the fact that the application seeks to introduce a special damage component; which ought to have been claimed by way of a Plaint and not judicial review. In this regard, the 2nd respondent relied on **Mombasa Civil Appeal No. 252 of 2015: Funzi Island Development Limited & 2 Others v County Council of Kwale & 2 Others** to assert that judicial review is essentially concerned with the process as opposed to the merits of a matter. The 2nd respondent was equally concerned that the sum claimed is, by the applicant's own admission a moving target that is premised on conditions that are entirely unknown to the 2nd respondent. In its view therefore, by resorting to a strange procedure to obtain summary determination based on a contractual issue with third parties, the applicant is out to abuse the process of the Court.

[17] On the merits, the 2nd respondent submitted that the application is based solely on the Bill of Lading; which is a contract between it and the shipping line. It further argued that all the conditions in the said contract were well known to the applicant before it came to Court in 2018; and therefore do not amount to new or important matters of evidence. Consequently, the 2nd respondent contended that the Court is *functus officio* in connection with its decision dated 10th June 2019. Reliance was placed, in this regard on **Civil Appeal No. 186 of 2004: Biren Amritlal Shah & Another v Republic & 3 Others** to advance this argument.

[18] It was further the submission of the 2nd respondent that what the applicant seeks are final orders in respect of which no leave was obtained for purposes of **Order 53 Rule 1** of the **Civil Procedure Rules**. Hence, the 2nd respondent posited that the application is merely intended to evoke sympathy from the Court and not the resolution of any dispute that falls within the special jurisdiction of the Court.

[19] The foregoing submissions were reiterated in the 2nd respondent's written submissions made in respect of its Notice of Preliminary Objection dated 26th April 2023. Hence, directions having been given on 15th May 2023 that the 2nd respondent's Preliminary Objection be canvassed

alongside the application, it imperative that the issue of jurisdiction be considered upfront by the Court, before engaging in a merit consideration of the application dated 13th April 2023.

[20] Needless to say that jurisdiction is primordial; and that it is a proper ground for a preliminary objection, seeing as it is not an issue dependent on proof, but can be easily ascertained from the pleadings. In **Mukisa Biscuit Company v West End Distributors Limited (supra)**, it was held that a preliminary objection consists of:

> **"...a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion..."**

[21] Similarly, in the case of **Oraro v Mbaja** [2005] 1 KLR 141 **Ojwang, J.** (as he was then) reiterated that:

> **"...The principle is abundantly clear. A "preliminary objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual**

aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence..."

[22] Thus, **Hon. Nyarangi, JA** pointed out in **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (supra) that:**

> **"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it."**

[23] The centrality of the issue of jurisdiction was aptly articulated in **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (supra)** thus:

> **"...Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given..."**

[24] Similarly, in **Kalpana H Rawal & 2 Others v Judicial Service Commission & 2 Others (supra)** the Supreme Court quoted with approval the decision of the Supreme Court of Nigeria in **Case No. 11 of**

2012: Ocheja Emmanuel Dangana v Hon. Atai Aidoko Aliusman & 4 Others thus:

> **"...It is settled that jurisdiction is the lifeblood of any adjudication because a court or tribunal without jurisdiction is like an animal without blood, which means it is dead. A decision by a court or tribunal without requisite jurisdiction is a nullity – dead – and of no legal effect whatsoever, that is why an issue of jurisdiction is crucial and fundamental in adjudication and has to be dealt with first and foremost..."**

[25] That jurisdiction is conferred either by the Constitution or a statute was explicated by the Supreme Court in **Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others** [2012] eKLR, thus:

> **"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred by law. We agree with counsel for the first and second Respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings...Where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution confers power on Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to**

prescribe the jurisdiction of such a court or tribunal by statute law."

[26] By way of background, this is a judicial review matter. The substantive application dated 17th September 2018 was filed under **Sections 8** and **9 of the Law Reform Act,** upon leave being granted by the court on the 12th September 2018. The applicant asked for the following orders:

[a] An Order of Certiorari to bring into this Court for quashing the decision of the Registrar of Trade Marks of the 3rd September 2018 which rectified the Register of Trade Marks by expunging the applicant's Trade Mark TMA No. 88989 "GDLITE" from the Register of Trade Marks.

[b] An Order of Mandamus directed at the 1st respondent either by themselves or their servants, employees and/or agents, compelling them to remit the matter for reconsideration and hearing before the Tribunal established under the **Trade Marks Act.**

[c] An Order of Prohibition against the 1st respondent restraining the 1st respondent either by themselves, their servants, employees and/or agents, from publishing in the Kenya Gazette or the Kenya

Industrial Property Institute's Industrial Property Journal the impugned expungement of Trade Mark TMA No. 88989 "GDLITE"; or in any way further advancing the expungement proceedings of Trade Mark TMA No. 88989 "GDLITE"

[d] An Order of Prohibition against the 1st respondent restraining the 1st respondent either by themselves, their servants, employees and/or agents from assigning to the 3rd parties the Trade Mark "GDLITE" in class 9 of the Nice Classification of Goods and Services.

[e] An Order of Prohibition against the 1st and 2nd respondents restraining them jointly and/or severally either by themselves, their servants, agents and/or on behalf of the Government of the Republic of Kenya from commencing and/or instituting criminal proceedings against the applicant, its servants, employees, and/or agents for unlawfully possession, control, importing into, transiting through trans-shipping within Kenya, goods in Class 9 of the Nice Classification bearing the applicant's expunged Trade Mark TMA No. 88989 "GDLITE" pending hearing and determination of this application and further orders from this Court.

[f] A Declaration that the 2nd respondent's actions on the 23rd and 28th of August 2018 of seizing and detaining container numbers

TINU9962322 and DRYU4535826, respectively, containing the applicant's goods bearing the applicant's Trade Mark TMA No. 88989 "GDLITE" is unlawful, unfair and breach of the applicants right to a fair hearing and fair administrative action.

[g] An Order of Mandamus upon the 2nd Respondent to release the container numbers TINU9962322 and DRYU4535826 seized and detained on the 23rd and 28th August 2018 respectively containing the applicant's goods bearing Trade Mark TMA No. 88989 "GDLITE".

[h] In the alternative to prayer 8 above, An Order of Mandamus upon the 2nd Respondent to remove from the G-Section verification area of Kenya Ports Authority in Kilindini Habour, Mombasa County, containers number TINU9962322 and DRYU4535826 seized and detained on the 23rd and 28th August 2018 to the 2nd Respondent own warehouse.

[i] A Declaration that the applicant is entitled to compensation to be assessed by the Court against the 1st Respondent for the arbitrary deprivation of the applicant's intellectual property being Trade Mark TMA No. 88989 "GDLITE" by expunging the applicant's

Trade Mark TMA No. 88989 "GDLITE" from the Register of Trade Marks.

[j] THAT the Costs of this application be provided for.

[27] The court record shows that the judicial review application was duly heard and a final decision made, dated 10th June 2019. The Court allowed the application and granted the following final orders:

[a] An order of Certiorari is hereby issued removing into this Court for purposes of quashing the 1st Respondent's decision made on the 3rd September 2018 which rectified the Register of Trade Marks by expunging the Applicant's Trade Mark TMA No. 88989 "GDLITE" from the Register of Trade Marks.

[b] An order of Mandamus is hereby issued removing into this Court for purposes of compelling the 1st Respondent either by themselves, or their servants, employees and/or agents compelling them to remit the matter for reconsideration and hearing before the Tribunal established under the **Trade Mark Act**.

[c] A declaration that the 2nd Respondent's actions on the 23rd and 28th of August 2018 of seizing and detaining container numbers TINU9962322 and DRYU4535826 respectively containing the applicant's goods bearing the applicants Trade Mark TMA No.

88989 "GDLITE" is unlawful, unfair and in breach of the applicant's right to a fair hearing and fair administrative action.

[d] An order of Prohibition against the 1st Respondent restraining the 1st Respondent either by themselves, their servants, employees and/or agents from assigning to the 3rd parties the Trade Mark "GDLITE" in Class 9 of the Nine Classification of Goods and Services until the matter is reconsidered under Order No. (b) above.

[e] An order of Mandamus upon the 2nd Respondent to release the container numbers TINU9962322 and DRYU4535826 seized and detained on the 23rd and 28th August 2018 respectively containing the Applicants goods bearing Trade Mark TMA No. 88989 "GDLITE"

[f] A declaration that any criminal proceedings initiated by the 2nd Respondent relating to the matters raised herein are premature, illegal and unfounded and for that reason the said Criminal Case No. 1585 of 2018 ACA is hereby forthwith terminated.

[28] Having carefully considered the Grounds of Opposition raised alongside the issue of jurisdiction, the points that stand out are that the application is *res judicata*; that the court is barred by the doctrine estoppel; that the application invokes Civil Procedure Rules yet judicial review is *sui generis*; that the application seeks determination of private

contractual rights; that the court is *functus officio*; that the court lacks jurisdiction to issue a public law remedy in the circumstances; and that the remedy sought is special damage and does not fall within the purview of judicial review jurisdiction of the court.

[29] Accordingly, the overarching question to pose is whether the Court has the jurisdiction to entertain the application for review brought under **Section 80** of the **Civil Procedure Act** and **Order 45** of the **Civil Procedure Rules,** considering that the decision sought to be reviewed was made in a *sui generis* type of proceedings under **Sections 8 and 9** of the **Law Reform Act**. The simple and straightforward answer to this question is to be found in **Subsection (5) of Section 8** of the **Law Reform Act,** which is explicit that:

> **"Any person aggrieved by an order made in the exercise of the civil jurisdiction of the High Court under this section may appeal therefrom to the Court of Appeal."**

[30] The above provision has been considered and interpreted in various cases to the effect that a final decision made in judicial review proceedings can only be appealed and therefore are not amenable to review. For instance, in **Biren Amritlal Shah & Another v Republic & 3 Others** [2013] eKLR, the Court of Appeal held that:

"...In determining whether the High Court had jurisdiction to hear the review, the question that arises is whether the CPA and the Rules can be applied in judicial review proceedings?

Section 80 of the CPA is clear. It stipulates that a review is allowed from an order or a decree from which an appeal is allowed or not allowed by the Act. It therefore follows that the High Court can review its own orders or decrees in suits where the Court is exercising its ordinary jurisdiction.

With respect to judicial review the Court is exercising powers under Order 53 of the Rules wherein the procedure of judicial review are set out. It is noteworthy that there is no provision for review by the Superior Court of its own decisions in judicial review once rendered...It is therefore quite clear that appeals in respect of orders made under judicial review lie with the Court of Appeal. Therefore, in answering the question whether the High Court has jurisdiction to entertain a review application, we agree with the learned judge of the High Court that, in exercising its special jurisdiction under the Law Reform Act, the High Court had no jurisdiction to review its previous order..."

[31] Although the applicant urged the Court to invoke its inherent jurisdiction in the interest of justice, I note that it relied on persuasive decisions of the High Court, such as **Republic v National Transport Services Authority, Ex Parte Extra Solutions Ltd** (supra) and **Kenya Bus Services Ltd & 2 Others v Attorney General & 2 Others** (supra), which was, in any case grounded on **Section 84(1) and (2)** of the retired Constitution. It is also noteworthy that the facts of **Republic v National Transport Services Authority** are markedly different from the facts hereof. For one, the review application was intended to correct an error

apparent on the face of the record in respect of an order made *ex parte* at the leave state. The trial judge noted therefore that no final decision had been made and on that account distinguished the case of **Biren Amritlal Shah & Another v Republic & 3 Others.** In addition, the application was not brought under **Order 45** of the **Civil Procedure Rules**, as has been done herein. Thirdly, the trial judge acknowledged that there were conflicting decisions of the Court of Appeal and therefore consciously elected to follow **Nakumatt Holdings Limited v Commissioner of Value Added Tax** [2011] eKLR in which the Court of Appeal held that the Court had residual power to correct its own mistakes.

[32] In the instant matter, the applicant seeks to introduce new evidence in a summary manner in respect of a suit in which a final decision has been given. I therefore have no hesitation in holding that the Court has no jurisdiction, not even under its inherent jurisdiction, to entertain the application dated 13th April 2023. I find succor for this posturing in the decision of the Court of Appeal in **Civil Appeal No. 216 of 2009: Ransa Company Limited v Manca Francesco & 2 Others,** in which it was held:

> **"...Jurisdiction in Judicial Review matters is like a straight jacket. It has very limited scope and application. It is not amenable to expansion. It is a sui generis jurisdiction, which, unlike civil or even criminal jurisdiction, does not accord a**

Judge discretion to invoke inherent jurisdiction...The appellant had an opportunity to appeal the Ruling adopting the impugned consent order. He chose not to do so. He also chose to ignore the magnanimous advice of the Court.

Section 8(3) and (5) of the Law Reform Act is clear and bears no repeating. I hold firstly, that a court sitting on Judicial Review is dispossessed of inherent jurisdiction and must operate within the confines of Sections 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules." (Per Hon. Karanja, JA)

[33] In the premises, I find merit in the 2nd respondent's Preliminary Objection. The same is hereby upheld and orders made as hereunder:

[a] That the *ex parte* applicant's application dated 13th April 2023 is incompetent and is hereby struck out.

[b] Each party to bear own costs thereof, granted the nature of the dispute.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA

THIS 24TH DAY OF JANUARY, 2024

OLGA SEWE

JUDGE