



Republic v Kenya Revenue Authority; Khamis & another (Exparte Applicants) (Judicial Review Application 39 of 2017) [2023] KEHC 21876 (KLR) (24 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21876 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

JUDICIAL REVIEW APPLICATION 39 OF 2017

OA SEWE, J

AUGUST 24, 2023

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE LAW REFORM ACT, CHAPTER 26 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE FAIR ADMINSTRATIVE ACTION ACT NO. 4 OF 2015

AND IN THE MATTER OF THE TAX PROCEDURES ACT, NO. 29 OF 2015

AND

IN THE MATTER OF AN APPLICATION

FOR JUDICIAL REVIEW ORDERS OF PROHIBITION AND MANDAMUS

BETWEEN

REPUBLIC APPLICANT

AND

KENYA REVENUE AUTHORITY RESPONDENT

AND

HUSSEIN HAMID KHAMIS EXPARTE APPLICANT

ABUBAKAR ALI JOHO EXPARTE APPLICANT

JUDGMENT

1. Upon being granted leave on 17th July 2017 to file their substantive Judicial Review application, the ex-parte applicants (hereinafter, “the applicants”) filed the Notice of Motion dated 19th July 2017 pursuant to Article 47 of the Constitution of Kenya, Section 3(1) of the Fair Administrative Action



Act, No. 4 of 2015 and Sections 8, 9, 12 and 28 of the Tax Procedures Act, 2015. They prayed for the following orders:

- (a) That an order of Prohibition be granted to prohibit the respondent, its employees, servants and or agents, or any other person acting under their authority, from blocking the applicants' access to their Personal Identification numbers (PIN) online, being No. A003 153 949Z for Hussein Hamid Khamis and No. A001 242 148F for Abubakar Ali Joho, and consequently designating the said identification numbers with the "Status: Stopped" being a decision taken and implemented by the respondent on dates unknown to the applicants in the months of either May or June 2017.
 - (b) That an order of Mandamus be granted, to compel the respondent, its employees, servants and or agents or any other persons acting pursuant to its authority or under any of them, to activate the applicants' Personal Identification Numbers (PIN) No. A003 153 949Z and No. A001 242 148F for Hussein Hamid Khamis and Abubakar Ali Joho, respectively, and bring the same to "Active Status" so as to enable the applicants to file their annual self-assessment returns for the 2016 year of income.
 - (c) That the costs of the application be provided for.
2. The application was premised on the grounds that, in compliance with Sections 8 and 12 of the Tax Procedures Act, the Commissioner of the Respondent issued the applicants with Personal Identification Numbers (PIN); and that the applicants are therefore allowed by law, and in particular Section 12(2) of the aforesaid Act to use their PINs in connection with and in fulfilling all purposes in relation to the requirements of all tax laws affecting either of them. It was further their contention that they have never notified the respondent that either or any of them intends to be deregistered under any tax law relevant to them under Section 10 of the Act; and no such deregistration has been done by the respondent.
 3. The applicants further averred that, contrary to all the provisions of laws relating to tax, the respondent proceeded to block, shut down and top accessibility by the applicants to their respective Personal Identification Numbers in its online accounts and designated them as "Status: Stopped". They further asserted that the respondent did not notify any of them of the dates or time when it designated the PINS to the "Status: Stopped"; and added that no reason was ever given to them for this highhanded action. They therefore averred that the respondent's actions are not only unlawful but also ultra vires its lawful mandate.
 4. The applicants also pointed out that, by their letters dated 23rd June 2017 to the respondent, they sought to be furnished with reasons for immobilizing their access to their own PINs. They also required the respondent to activate their PINS to "Active Status" and notified the respondent that its conduct was discriminatory; but that the respondent has remained mute and has refused to even acknowledge receipt of the said correspondence. They complained that the respondent's conduct makes them susceptible to punitive penalties under the applicable tax laws for late filing of returns.
 5. The applicants also relied on the Statutory Statement dated 14th July 2017 and the Verifying Affidavit sworn by Hussein Hamid Khamis on 14th July 2017 to which they attached the letter dated 23rd June 2017 by the applicant's lawyers to the respondent on the de-activation of the applicants' PINS as well as PIN Checkers for the applicants confirming their "Stopped" status as at Friday 9th June 2017. Thus, the applicants prayed for the judicial review orders of Prohibition and Mandamus.
 6. In response to the application, a Replying Affidavit was filed on behalf of the respondent on 21st August 2017, sworn by Justus Kiuvu who described himself as an authorized officer appointed under and in accordance with Section 13 of the Kenya Revenue Authority Act, Chapter 469 of the Laws of Kenya.



Mr. Kiuvu conceded that the applicants are registered tax payers under the aforementioned PINs; and that while exercising its mandate, the respondent received information from its Business Intelligence Unit that the applicants were involved in tax evasion schemes. Mr. Kiuvu further deposed that, acting on the intelligence, the respondent requested for bank statements of the applicants for purposes of investigations under Section 59(2) of the *Tax Procedures Act* which empowers the Commissioner to call for records for purposes of obtaining full information in respect of tax liability of any person or class of persons for the purposes of ascertaining correct declaration of taxes and confirming compliance with the tax laws.

7. At paragraphs 11, 12, 13, 14 and 15 of the Replying Affidavit, Mr. Kiuvu deposed that the investigation revealed that the applicants had filed nil returns yet their bank statements painted a different picture in terms of annual income. Accordingly, the respondent concluded that the applicants were involved in tax evasion schemes and accordingly blocked their PINs as an administrative action to pave way of in-depth investigation without any interference. Thus, Mr. Kiuvu averred that the orders sought, if granted as prayed, will interfere with the ongoing investigations into the tax affairs of the applicants; and that it is therefore only fair and just that the respondent be allowed to undertake its statutory duties unhindered, to safeguard the much needed government revenue and the integrity of its systems.
8. In response to the assertions made in the respondent's Replying Affidavit, the applicants filed a Further Affidavit, sworn on 1st October 2019 by the 1st applicant. He denied that the respondent has ever requested for any documents from him, and therefore that the bank statements allegedly scrutinized by the respondent were not supplied by him. The 1st applicant reiterated that his complaint is about their PINs being blocked; and pointed out that, two years down the line, the respondent had not reversed the impugned action. Thus, the 1st applicant reiterated their prayer that the respondent be ordered to respect the law.
9. The application was urged by way of written submissions which were highlighted on 31st May 2023. In his written submissions filed on 21st July 2020, Mr. Buti reiterated the factual basis of the application; and in support of the application he relied on various provisions of the *Tax Procedures Act* and pointed out that, in obedience to the provisions of Sections 8 and 11 of the *Act*, the applicants applied for and were issued with PINs as follows:
 - (a) Hussein Hamid Khamis, the 1st applicant – No. A003xxxxx9Z
 - (b) Abubakar Ali Joho, the 2nd applicant – No. A00xxxxx8F
10. He further submitted that, after the two applicants were blocked from making their returns, they wrote to the respondent, seeking to know why that action had been taken and asking that they be given access to the respondent's system to enable them submit their returns but their letter remained unanswered up to the time of filing this suit. Counsel submitted that the respondent has no power to either deactivate or stop any person's PIN; and that the only time a PIN can be stopped is if the individual PIN holder applies to the Commissioner for deregistration under Section 10 of the *Act*. Accordingly, Mr. Buti submitted that the respondent's action is ultra vires, having been done without jurisdiction; and is therefore null and void ab initio.
11. The second limb of Mr. Buti's submissions was that, in taking the impugned action, the respondent violated the provisions of Article 47 of the *Constitution* and Section 4 of the *Fair Administrative Action Act*, in that no written reasons were given to the applicants for the action. In addition, counsel pointed out that the respondent relied on documents that were never obtained from the applicants. He accordingly urged the Court to find that the respondent deviated from the correct decision making process in arriving at the impugned decision. Reliance was placed by counsel in this regard



- on *Mombasa Municipal Council v Umoja Consultants* [2002] eKLR to buttress his arguments. He consequently urged that the application be allowed.
12. On behalf of the respondent, written submissions were filed herein by Ms. Chelang'at on 31st March 2023. She similarly reiterated the factual basis of the respondent's case as set out in the Replying Affidavit sworn by Mr. Kiuvu and pointed out that the preliminary investigations carried out by the respondent revealed discrepancies indicative of tax evasion. She further asserted that the respondent resorted to blocking the applicants' PINs to protect the integrity of its system from further abuse and to enable it conduct further investigation without any interference from the applicants. Thus, counsel proposed one issue for determination, namely, whether the respondent acted within its statutory mandate in blocking the applicants' PINs.
 13. Ms. Chelang'at submitted that it is the statutory mandate of the respondent, under Sections 5(1) and (2) of the *Kenya Revenue Authority Act*, to enforce collection of revenue and ensure compliance with the revenue laws. She further submitted that, pursuant to that mandate, the respondent initiated investigations into the tax affairs of the applicants; which investigations included a consideration of the self-assessment tax returns submitted by them as well as bank statements obtained from the two applicants pursuant to Section 24(2), 58 and 59(1)(a) of the *Tax Procedures Act*.
 14. Counsel referred the Court to the South African case of *Metcash Trading Limited v Commissioner for the South African Revenue Service & Another* [2000] ZACC 21 as to the powers of a tax authority such as the respondent, to request for the production of records and additional information. She also relied on *Tumaini Distributors Company (K) Limited v Commissioner of Domestic Taxes* [2020] eKLR to underscore her submission that it was the duty of the applicants to provide all the documents needed by the Commissioner for purposes of the investigations.
 15. Thus, Ms. Chelang'at submitted that the applicants are not entitled to the orders sought granted that tax evasion is a criminal offence under Section 97(a) as read with Section 104(3) of the *Tax Procedures Act*. She urged the Court to find that the respondent acted within its mandate in blocking the applicants' PINs and to dismiss the applicants' Notice of Motion dated 19th July 2019 with costs to the respondent.
 16. In the light of the foregoing summary of the averments and submissions made herein by the parties, there is no dispute as to the mandate of the respondent. Indeed, that mandate is explicitly set out in Section 5 of the *Kenya Revenue Authority Act*; and it includes collection and receipt of all revenue on behalf of the Government. In the discharge of its mandate, the respondent has the powers to administer and enforce all provisions of the written laws set out in Part I and Part II of the First Schedule and for that purpose, to assess, collect and account for all revenues in accordance with those laws.
 17. Section 8 of the *Tax Procedures Act*, mandates the respondent, through its Commissioner, to register all persons who are eligible to pay income tax for purposes of the *Income Tax Act* as soon as such liability accrues. Hence, Section 11 of the *Act* stipulates that:

“The Commissioner shall issue a number, to be known as a Personal Identification Number (“PIN”) to a person registered for purposes of a tax law and that person shall use the PIN as may be required under this Act.”
 18. Thus, the parties are in agreement that the two applicants duly applied to the respondent's Commissioner for registration and had been issued with their respective PINs, being No. A00xxxxx9Z for Hussein Hamid Khamis and No. A00xxxxx8F for Abubakar Ali Joho. It is also common ground that the applicants' respective PINs were deactivated by the respondent and that they were consequently unable to make returns for the year ending December 2016. The applicants exhibited



screenshots of the respondent's Pin Checker for Friday 9th June 2017 to confirm that the status of the PINs in the respondent's system as "Stopped".

19. The applicants availed credible proof that, on the 23rd June 2017, they wrote to the respondent's Commissioner, Domestic Taxes Department, complaining about the deactivation of their PINs; and indicated that they were unable to access their KRA online accounts and file 2016 tax returns in spite of several complaints to the respondent's Commissioner.
20. Needless to say that judicial review is concerned, not with the merit of an impugned decision, but the process leading up to the decision. Thus, in *Municipal Council of Mombasa v Republic & Umoja Consultants Limited* [2002] eKLR the Court of Appeal held that:

“The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review.”
21. Accordingly, the two issues emerging for determination in this suit are:
 - (a) whether the decision to deactivate the applicants' PINs is ultra vires; in other words, whether the respondent acted within its statutory mandate in making the impugned decision; and,
 - (b) Whether the impugned action is an infringement of Article 47 of the *Constitution* and Section 4 of the *Fair Administrative Action Act*.

A. On Ultra Vires:

22. In *Okiya Omtatah Okoiti & 3 Others v Anne Waiguru, the Cabinet Secretary, Devolution and Planning & 6 others* [2021] eKLR it was held:

“An act of ultra vires when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provisions of law or its principles renders the decision made laced with illegality.”
23. Moreover, the decision of Lord Diplock in *Council of Civil Service Unions versus Minister for the Civil Service* [1985] AC 374,410, which has been quoted with approval in numerous cases locally, was that:

“...Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call “illegality,” the second “irrationality” and the third “procedural impropriety.” That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of “proportionality” which is recognised in the administrative law of several of our fellow members of the European Economic



Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.

By “illegality” as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable. (Emphasis added).

24. Hence, the applicants took the posturing that there are no powers of any description donated to the respondent to either deactivate or stop any person’s PIN once such PIN has been issued by the respondent’s Commissioner. Indeed, a perusal of the *Tax Procedures Act* makes no provision for stoppage or deactivation of a PIN once issued. What it provides for, in Section 10 of the *Tax Procedures Act*, is deregistration at the instance of the PIN holder. The provision reads:

- “(1) A person who ceases to be required to be registered for the purposes of a tax law shall apply to the Commissioner for deregistration under that specific tax law.
- (2) A registered person shall apply for deregistration under subsection (1)—
 - (a) in the prescribed form; and
 - (b) within thirty days of ceasing to be required to be registered under that tax law.”

25. The contention of the applicants was that at no time did they apply for deregistration of their PIN; and counsel for the respondent did not point to any specific provision of the *Tax Procedures Act*, or any other statute or regulation that authorizes the deactivation of a PIN at the instance of the respondent. In the circumstances, I am satisfied that, in so far as the stoppage of the applicants’ PINs was not backed by any provision of the law, it was ultra vires of the respondent’s mandate.

B. On whether the respondent infringed Article 47 of the Constitution:

26. Articles 47 of the Constitution provides that:

- (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”

27. The above provision is reiterated in Section 4 of the *Fair Administrative Action Act* thus:

- (1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
- (2) Every person has the right to be given written reasons for any administrative action that is taken against them.

28. I note that the respondent explained at length why it deactivated the applicants’ PINs and added that it has the exclusive mandate to enforce the provisions of the tax laws. The explanation is to be found at paragraphs 8 to 17 of the Replying Affidavit; and while I have no quarrel about the reason for the deactivate, it is plain that those averments are averments touching on the merits of the decision and not the process leading to or following the decision. The applicants’ complaint was that, at no time



did the respondent notify them of the intention to deactivate their PINs. In particular, they averred, at paragraph 12 of the Supporting Affidavit, that in spite of their letter to the respondent dated 23rd June 2017, no response or communication of any kind was made by the respondent as to why or when the PINs had been deactivated. There is nothing in the Replying Affidavit to show that the applicants' letter dated 23rd June 2017 was ever responded to or to show that the justification given in the Replying Affidavit was ever communicated to the applicants. It is plain therefore that, in that regard, the respondent acted not only in breach of Article 47(2) of the Constitution but also flouted the provisions of Section 4 of the Fair Administrative Action Act.

29. As for the applicants' complaint that the respondent relied on documents, and in particular, bank statements that were never supplied by them, I am satisfied that Sections 58 and 59 of the Tax Procedures Act are wide enough to cover the recovery of bank statements from financial institutions; and therefore that the bank statements in question were properly obtained. Indeed, Section 59(2) of the Act is specific that:

“If the person required to produce documents under subsection (1)(a) is a financial institution—

- (a) the documents shall not, while they are being examined, be removed from the premises of the financial institution or other premises at which they are produced;
- (b) the Commissioner or authorised officer carrying out the examination may make copies of such documents for the purposes of any report relating to the examination; and
- (c) the confidentiality of the information obtained in the course of the examination by the Commissioner or authorised officer shall be maintained and the information shall be used solely for the purposes of the tax laws.”

30. Thus, while I find no merit in the applicants' contention that the bank statements were irregularly obtained, it is my finding that the applicant has proved that the impugned decision was made without jurisdiction and is therefore an illegal decision; and that the same was made in contravention of the provisions of Article 47(2) of the Constitution and Section 4 of the Fair Administrative Action Act. Indeed, in Republic v Kombo & 3 Others, Ex parte Waweru [2008] 3 KLR (EP) 478 it was held that:

“The rule of law has a number of different meanings and corollaries. Its primary meaning is that everything must be done according to the law. Applied to the powers of government, this requires that every government authority which does some act which would otherwise be wrong... or which infringes a man's liberty... must be able to justify its action as authorized by law – and nearly in every case this will mean authorized directly or indirectly by Act of Parliament. Every act of government power that is to say, every act which affects the legal rights, duties or liberties of any person, must be shown to have a strictly legal pedigree. The affected person may always resort to the Courts of law, and if the legal pedigree is not found to be perfectly in order the Court will invalidate the act, which he can safely disregard.”



31. And where an infringement of the right is proved, Article 23 is explicit that the High Court may then grant appropriate relief including an order of judicial review. In *Kenya National Examinations Council v Republic, Ex-Parte Geoffrey Gathenji Njoroge & Others* [1977] eKLR the Court of Appeal held that:

“The remedies of certiorari and prohibition are tools that this court uses to supervise public bodies and inferior tribunals to ensure that they do not make decisions or undertake activities which are ultra vires their statutory mandate or which are irrational or otherwise illegal. They are meant to keep public authorities in check to prevent them from abusing their statutory powers or subjecting citizens to unfair treatment. The nature and scope of certiorari was discussed in the case of Captain *Geoffrey Kujoga Murungi v Attorney General* Misc Civil Application No. 293 of 1993 where it was stated; “Certiorari deals with decisions already made Such an order can only be issued where the court considers that the decision under attack was reached without or in excess of jurisdiction or in breach of the rules of natural justice...”

32. The Court then proceeded to state thus:

“What does an Order Of Prohibition do and when will it issue” It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See *Halsbury’s Law Of England*, 4th Edition, Vol.1 at pg.37 paragraph 128...The point we are making is that an order of prohibition is powerless against a decision which has already been made before such an order is issued. Such an order can only prevent the making of a decision. That, in our understanding, is the efficacy and scope of an order of prohibition...”

33. As for the order of Mandamus, the Court of Appeal had the following to say:

“What is the scope and efficacy of an Order Of Mandamus? Once again we turn to *Halsbury’s Law Of England*, 4th Edition Volume 1 at page 111 From Paragraph 89. That learned treatise says:-

“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”

34. In the light of my findings herein above, I am satisfied that the ex-parte applicants’ application dated 19th July 2017 is meritorious. The same is hereby allowed and orders granted as hereunder:

- (a) That an order of Prohibition be and is hereby granted to prohibit the respondent, its employees, servants and or agents, or any other person acting under their authority, from blocking the applicants’ access to their Personal Identification numbers (PIN) online, being



No. A00xxxx9Z for Hussein Hamid Khamis and No. A001 242 148F for Abubakar Ali Joho, and consequently designating the said identification numbers with the “Status: Stopped”.

- (b) That an order of Mandamus be and is hereby granted, to compel the respondents, its employees, servants and or agents or any other persons acting pursuant to its authority or under any of them, to activate the applicants’ Personal Identification Numbers (PIN) No. A00xxxx9Z and No. A00xxxx8F for Hussein Hamid Khamis and Abubakar Ali Joho, respectively, and bring the same to “Active Status” so as to enable the applicants file their annual self-assessment returns as by law required.
- (c) That each party shall bear own costs of the application.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 24TH DAY OF AUGUST 2023

OLGA SEWE

JUDGE

