



Republic v Director of Public Prosecutions & 2 others; Ngirici (Exparte) (Miscellaneous Civil Application 167 of 2017) [2022] KEHC 18104 (KLR) (Judicial Review) (29 July 2022) (Judgment)

Neutral citation: [2022] KEHC 18104 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
MISCELLANEOUS CIVIL APPLICATION 167 OF 2017**

J NGAAH, J

JULY 29, 2022

BETWEEN

REPUBLIC APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

THE CHIEF MAGISTRATES COURT AT MAKADARA 2ND RESPONDENT

KENYA REVENUE AUTHORITY 3RD RESPONDENT

AND

ANDREW PETER NGIRICI EXPARTE

JUDGMENT

1. The application before court is the applicant’s motion dated 25 April 2017 filed under section 8 of the [Law Reform Act](#), cap. 26 and Order 53 Rule 3 of the Civil Procedure Rules. The application seeks the judicial review orders of certiorari, mandamus and prohibition. The prayers for these orders have been captured in the motion as follows:
 1. That an Order of Certiorari do issue to bring into this Honourable Court for the purpose of being quashed the 1st Respondent’s decision made on or about the 3rd April 2017 to institute criminal proceedings against the Applicant in Makadara Chief Magistrate’s Criminal Court PCR No.1843 of 2017 before the 2nd Respondent.
 2. That an Order of Certiorari do issue to bring into this Honourable Court for the purpose of being quashed the proceedings in Makadara Chief Magistrate’s Criminal Court PCR No.1843 of 2017.



3. Thatan Order of Prohibition do issue to prohibit the 2nd Respondent from hearing, sustaining or in any manner dealing with the charges laid or proceedings in Makadara Chief Magistrate's Criminal Court PCR No.1843 of 2017 until the 3rd Respondent complies with the provisions of the Constitution of Kenya, 2010, the Fair Administrative Action Act and the Tax Procedures Act,2015.
4. Thatan Order of Prohibition do issue to prohibit the 1st Respondent from preferring criminal charges against the Applicant relating to the allegations made in Makadara Chief Magistrate's Criminal Court PCR No.1843 of 2017 or in any other court prior to the provisions of the Constitution of Kenya, 2010, the Fair Administrative Action Act and the Tax Procedures Act,2015 having been complied with.
5. Thatan Order of Certiorari do issue to bring into this Honourable Court for the purpose of being quashed the decision by the 3rd Respondent directing the blocking or causing the blocking of the Applicant's underlisted bank accounts;
 - NIC Account No.10XXXXX-Mombasa
 - Co-operative Bank Account 011XXXXX-Kerugoya.
 - Co-operative Bank Account 011XXXXX-Mombasa
 - Stanchart Bank Account 100XXXXX-Mombasa
 - Diamond Trust Bank Account 002XXXXX- Mombasa
 - Diamond Trust Bank Account 71XXXXX-Mombasa
6. Thatan Order of Mandamus do issue to compel the 3rd Respondent to cause the underlisted Applicant's bank accounts which have been blocked at the instructions of the 3rd Respondent be unblocked;
 - NIC Account No.10XXXXX-Mombasa
 - Co-operative Bank Account 011XXXXX-Kerugoya.
 - Co-operative Bank Account 011XXXXX-Mombasa
 - Stanchart Bank Account 10XXXXX-Mombasa
 - Diamond Trust Bank Account 00XXXXX- Mombasa
 - Diamond Trust Bank Account 71XXXXX-Mombasa
7. Thatan Order of Prohibition do issue to prohibit the 3rd Respondent from causing the Applicant's underlisted bank accounts to be blocked prior to the provisions of the Constitution of Kenya,2010, the Fair Administrative Action Act and the Tax Procedures Act,2015 having been complied with;
 - a) NIC Account No.10XXXXX-Mombasa
 - b) Co-operative Bank Account 01XXXXX-Kerugoya.
 - c) Co-operative Bank Account 011XXXXX-Mombasa
 - d) Stanchart Bank Account 10XXXXX-Mombasa
 - e) Diamond Trust Bank Account 00XXXXX- Mombasa



- f) Diamond Trust Bank Account 71XXXX-Mombasa.
8. That an Order of Prohibition do issue to prohibit the 3rd Respondent from dealing with the Applicant's taxation matters without adhering to the provisions of *the Constitution* of Kenya, 2010, the *Fair Administrative Action Act* and the *Tax Procedures Act*, 2015.
9. That costs of this application be provided for."
10. The application is based on a statutory statement dated 6 April 2017 and a verification affidavit sworn by the applicant on even date.
11. As the prayers in the motion suggest, the application stems from criminal proceedings instituted against the applicant in the magistrates' court at Makadara. The case in which the applicant has been charged is Criminal Case No. 1843 of 2017. The offences for which the applicant has been charged are tax related and according to the applicant, they are based on a tax assessment by the 3rd respondent; an exercise that the applicant alleges was undertaken without his knowledge or participation.
12. The applicant deposed that considering the circumstances under which he was charged, his prosecution is for purposes other than upholding criminal justice or a legitimate cause. He also claims that his right to privacy was infringed upon when the 3rd Respondent obtained details of his bank accounts without his knowledge or consent.
13. The applicant only discovered that his bank accounts had been blocked when he sought to make withdrawals from the account. It is then that his bankers informed him that the accounts had been blocked at the instance of the 3rd respondent on allegations that the applicant had defaulted in payment of his taxes.
14. The 3rd respondent's action, the applicant has urged, is contrary to section 29 (2) of the *Tax Procedures Act*, 2015 according to which the applicant ought to have been notified of the 3rd respondent's intention to investigate the applicant's bank accounts before they were blocked. It is the applicant's position that had he been notified and issued with the requisite tax assessment notice, he would have invoked section 51 of the *Tax Procedures Act* to dispute the assessment.
15. It is urged that the respondents' decision to charge the applicant was unreasonable, irrational and made in bad faith. In addition, it also constituted an abuse of power and is in breach of the rules of natural justice and the applicant's legitimate expectation.
16. Again, the 3rd Respondent's decision to lodge a complaint with the police before issuing the applicant with a tax assessment notice and giving him the opportunity to object was illegal and constitutes usurpation of power.
17. No response was filed by the 1st or 2nd respondents but in its response, the 3rd respondent filed a replying affidavit sworn by Mr. Justus Kiuvu, an officer of the 3rd respondent.
18. According to Mr. Kiuvu, the investigations into the tax affairs of the applicant were prompted by a request from the Financial Reporting Centre pursuant to section 24(b) of the Proceeds of Crime and Anti Money Laundering Act, 2009.
19. It had emerged that the applicant and his wife Purity Wangui Kuria had opened a repository account at Diamond Trust Bank under the name of their son Dean Kuria who was a minor at the material time. It was suspected that the applicant was using the said account to conceal the source of their funds which may well have been criminal activities and tax evasion. Pursuant to section 59(2) of the *Tax*



- Procedures Act, 2015, the 3rd respondent requested for the applicant's bank statements, in the course of its investigations.
20. The investigations revealed that the applicant had not been filing tax returns for years between 1995 and 1999 and that he had filed nil returns between the year 2001 to 2012. This was contrary to section 52B (1)(a) of the Income Tax Act. Further, the applicant had not registered for Value Added Tax despite having met the threshold for such registration. Failure to register is an offence under section 37 (a) of the VAT Act, 2013.
 21. It was thus deposed that, as a result of the investigations, it was apparent that the applicant had willingly withheld other sources of income in a bid to avoid payment of taxes. The applicant was subsequently charged in Makadara Criminal Case No. 1843 of 2017 for the offence of failure to submit a tax return contrary to section 104 (1) and section 113 of the Tax Procedures Act and failure to register for VAT contrary to section 37(a) of the VAT Act.
 22. The application was opposed for reasons, *inter alia*, that the granting of the orders would amount to stopping the criminal proceedings before court and, further, that an order of prohibition cannot issue against the 3rd Respondent as the court cannot prohibit what has been sanctioned by statute.
 23. Following this Honourable Court's directions, parties filed written submissions in support of or in opposition to the positions they adopted with respect to the application before court.
 24. In his submissions, the learned counsel for the applicant contended that the 3rd respondent acted illegally by declining to issue a tax assessment notice prior to lodging a complaint with the police. In support of this argument counsel cited the cases of Republic v Institute of Certified Public Accountants of Kenya Ex parte Joy Vipichandra Bhatt T/A Jv Bhat & Company [2008] Eklr; Geothermal Development Company Limited v. Attorney General & 3 Others [2013] eKLR where it was held that a notice is a key component of due process.
 25. On the allegation that the 3rd respondent failed to give the applicant an opportunity to be heard and explain his position regarding the balances in his bank accounts, the learned counsel cited the case of Geothermal Development Company Limited v Attorney General & 3 Others (*supra*) and Silver Chain limited v Commissioner Income Tax & 3 Others [2016] Eklr.
 26. It was submitted that the 1st respondent's decision to prosecute the applicant is unreasonable and irrational and for this argument, counsel cited the case of Associated Provincial Picture Houses v Wednesbury Corporation [1948] 1KB 223 and the case of Kevin K. Mwiti & Others v Council of Legal Education & Others JR No. 395 of 2015 consolidated with JR No. 295 of 2015.
 27. It is the applicant's position that the institution of the criminal proceedings was not done in good faith and that his right to a fair administrative process under Article 47 of the Constitution was violated. Counsel cited the case of Republic v Commissioner for Co-operative Ex parte Kirinyaga Tea Growers Co-operatives Savings and Credit Society Ltd [199] I E.A. 254 cited with approval in Republic v Institute of Certified Public Accountants of Kenya Ex parte Joy Vipichandra Bhatt T/A Jv Bhat & Company *supra*. In conclusion, it was submitted that the applicant's right to justice was denied and therefore this court should allow the notice of motion as prayed.
 28. In rebuttal, the 3rd respondent urged that it is duty bound, by law, to investigate all claims and information of evasion of lawful payment of taxes. Further, that the Financial Reporting Centre is obligated to send reports received under the Act to the appropriate law enforcement authorities, any intelligence agency, or any other appropriate supervisory body, including the 3rd respondent, for further action if the director of the Centre has reasonable grounds to suspect that the transaction is suspicious.



29. It was submitted that the tax collection regime is a self-assessment regime that largely relies on full disclosure or goodwill of the tax payers and while a majority of the taxpayers comply and make such disclosure, there are those who are not willing to meet their tax obligations. On the abuse of self-assessment tax regime, counsel cited the case of Pili Management Consultants Ltd vs Commissioner of Income Tax and Kenya Revenue Authority, Civil Appeal No.154 of 2007 where the court questioned why a tax defaulter had failed to declare the funds in his account and then explain why the tax was not payable on them.
30. On probable cause for the 3rd Respondent's actions, learned counsel cited the case of Hicks v. Fawkers [1878] 8 Q.B.D. It was further submitted that in the interest of the public, tax offenders ought to be brought to book. The case of Republic v Commissioner of Police & Another Ex parte Michael Monari & Another [2012] eKLR was cited in this regard. It is the 3rd Respondent's case that no evidence has been tendered by the applicant to prove this assertion. Learned counsel cited the case of Paul Ng'ang'a & 2 Others v. AG & 3 Others; Petition No.518 of 2012.
31. On the question of public interest, counsel cited the case of Hussein Khalid & 16 Others v Attorney General & 2 Others [2014] eKLR. The case of Thuita Mwangi & 3 Others [2013] eKLR was also cited in regard to the institution of criminal proceedings being perpetuated by malice or being influenced by external forces.
32. Learned counsel further submitted that section 108 of the Tax Procedures Act, 2015 provides a distinction between prosecution and tax payable and as such issuance of assessment or lack of it does not bar prosecution if an offence under the Act is established. It was the 3rd respondent's case that most of the issues raised before this court are matters for determination by the Tax Appeals Tribunal particularly the issue of taxes payable. But that in itself does not exempt the applicant from prosecution if an offence or offences have been committed.
33. The 3rd Respondent contended that the applicant had not adduced any evidence to show that there is a likelihood that he will not get a fair trial as provided under Article 50 of the Constitution. In support of this argument, the learned counsel for the 3rd respondent relied on the case of Ronald Leposo Musengi v Director of Public Prosecutions & 3 Others [2015] eKLR.
34. Learned counsel further submitted that the criminal court is the best placed forum to adjudicate the issue of the applicant's innocence. The case of Francis Mbugua v Commissioner of Police & 2 Others; Petition No. 79 of 2012 was cited in this regard.
35. It was also urged on behalf of the 3rd respondent that since he had cheated on his taxes, the applicant had approached this honourable court with unclean hands and, as such, this court cannot come to his aid. To buttress this argument counsel cited the case of Kuria & 3 Others v. Attorney General [2002] 2 KLR 69.
36. While citing Republic v National Transport & Safety Authority & 10 Others Ex parte James Maina Mugo [2015] eKLR it was submitted on behalf of the 3rd respondent that this honourable court lacks jurisdiction to grant the orders sought because if it was to do so, it would be delving into the merits of the decision to charge the applicant.
37. Having read the pleadings, the affidavits of both the applicant and the respondents and having had occasion to read the submissions filed by both parties, I am persuaded that prayers 5, 6 and 7 in the motion were compromised by the consent order entered on 31 May 2017. In that order, the notices issued to the applicant by the 3rd respondent were declared to have expired and the applicant was given unconditional access to his bank accounts.



38. Save for the 8th prayer in the motion, the rest of the prayers revolve around criminal case No. 1843 of 2017. The success of prayer 8 largely depends on the success of the rest of the prayers and, in particular whether the decision to charge the applicant is tainted on any of the grounds of judicial review.

39. My assessment of the applicant's case leads me to the conclusion that the applicant's primary concern is pegged on what he believes to be the 3rd respondent's breach of section 29 of the *Tax Procedures Act*. This section reads as follows:

29. Default assessment

- (1) Where a taxpayer has failed to submit a tax return for a reporting period in accordance with the provisions of a tax law, the Commissioner may, based on such information as may be available and to the best of his or her judgement, make an assessment (referred to as a "default assessment") of—
 - (a) the amount of the deficit in the case of a deficit carried forward under the *Income Tax Act* (Cap. 470) for the period;
 - (b) the amount of the excess in the case of an excess of input tax carried forward under the *Value Added Tax Act*, 2013 (No. 35 of 2013), for the period; or
 - (c) the tax (including a nil amount) payable by the taxpayer for the period in any other case.
- (2) The Commissioner shall notify in writing a taxpayer assessed under subsection (1) of the assessment and the Commissioner shall specify—
 - (a) the amount assessed as tax or the amount of a deficit or excess of input tax carried forward, as the case may be;
 - (b) the amount assessed as late submission penalty and any late payment penalty payable in respect of the tax, deficit or excess input tax assessed;
 - (c) the amount of any late payment interest payable in respect of the tax assessed;
 - (d) the reporting period to which the assessment relates;
 - (e) the due date for payment of the tax, penalty, and interest being a date that is not less than 30 days from the date of service of the notice; and
 - (f) the manner of objecting to the assessment.
- (3) A written notification by the Commissioner of an assessment under this section shall not alter the due date (referred to as the "original due date") for payment of the tax payable under the assessment as determined under the tax law imposing the tax, and any late payment penalty or late payment interest shall remain payable based on the original due date.
- (4) This section shall not apply for the purposes of a tax that is not collected by assessment.
- (5) Subject to subsection (6), an assessment under subsection (1) shall not be made after five years immediately following the last date of the reporting period to which the assessment relates.
- (6) Subsection (5) shall not apply in the case of gross or wilful neglect, evasion or fraud by a taxpayer.



40. According to the applicant, he ought to have been notified of the assessment as required in section 29(2) and if he had been notified as required, he would have invoked section 51 of the [Tax Procedures Act](#) and contested it by way of an objection. Subsection (1) and (2) of this section read as follows:

51. Objection to tax decision

(1) A taxpayer who wishes to dispute a tax decision shall first lodge an objection against that tax decision under this section before proceeding under any other written law.

(2) A taxpayer who disputes a tax decision may lodge a notice of objection to the decision, in writing, with the Commissioner within thirty days of being notified of the decision.

41. Under section 3 of the [Tax Procedures Act](#), a tax decision includes an assessment which the Commissioner is tasked to make under section 29(1) of the [Tax Procedures Act](#). As I understand the applicant, the 3rd respondent ought not to have initiated the prosecution of the applicant before exhausting the procedure for assessment of the taxation due and the objection which tax payer would be entitled to take under section 51 of the Act. Paragraph 2 of the grounds upon which the application is based summarise this as the applicant's case; it states as follows:

“The decision by the 3rd respondent to lodge a complaint with the police regarding the tax status of the applicant before a notice was issued by the 3rd respondent notifying the applicant of the default assessment and granting the applicant an opportunity to object to the assessment is illegal and constitutes usurpation of power by the 3rd respondent. In particular, section 29 (2) of the [Tax Procedures Act](#), 2015 stipulates that where the 3rd respondent makes a default assessment in respect to a taxpayer, the 3rd respondent shall notify the taxpayer in writing of the assessment and specifically the taxpayer shall be informed of the amount assessed as tax, the due date for payment of the tax, the penalty and interest as well as the manner of objecting to the assessment.”

42. Accordingly, the applicant urges that the decision to charge him was contrary to section 4 of the [Fair Administrative Action Act](#), 2015 which is to the effect that where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator is required to give the person affected by the decision a prior and adequate notice of the nature and the reasons for the proposed administrative action and also an opportunity to be heard and to make representations as the case may require.

43. But my reading of the charges preferred against the applicant in the criminal court is that they had nothing to do with the assessment of the tax that may be due from the applicant. The charges against the applicant relate to his alleged failure to submit tax returns for the years 2011 to 2016. They are based, not on section 29 or 51 of the Tax Procedure Act but on section 94 of the Act as read with section 104(1) and section 113 of the same Act.

44. The charge with respect to the 2011 tax returns, for instance, reads as follows:

“Failure to submit a tax return by due date contrary to section 94 as read with section 104(1) and section 113 of the [Tax Procedures Act](#), 2015.”

45. The particulars of the charge read as follows:

“1. Andrew Peter Ngerici:- On diverse dates between January 2011 and December 2011 within the Republic of Kenya, being a person chargeable to income tax and liable to file a



return of income to the commissioner for the year 2011, failed to submit a tax return by the 30th day of June 2012.”

46. Except for the last count, each of the other five counts are in similar terms save for the year for which the applicant is said to have defaulted in the filing of the returns. The last count has to do with failure by the applicant to register for value added tax contrary to section 37(a) of the VAT Act, 2013. Again, this provision has nothing to do with tax assessment.
47. The point is, the offences for which the applicant has been charged are independent of the tax assessment by the commissioner and the appurtenant procedures for assessment and objection as prescribed under sections 29 and 51 of the *Tax Procedures Act*. In other words, to be liable for an offence under section 94 as read with section 104(1) and section 133 of the Act, it is not necessary that the Commissioner must have initiated a tax assessment under section 29 of the Act and the taxpayer exercised his right to object to the assessment under section 51 of the Act. Neither is the assessment and the objection a condition precedent for preferring any charges under section 37(a) of the VAT Act.
48. It follows that whether or not the 3rd respondent complied with the provisions of section 29 and 51 of the Tax Procedure Act with respect to any taxes that may be due from the applicant and the applicant’s right to object to the tax assessment, the charges preferred against the applicant in the criminal court would still be viable. I have not heard the applicant suggest that contrary to the 3rd respondent’s complaint, he has filed the returns for the years in question or that he has complied with the requirement of VAT registration. Nevertheless, that is a question whose answer in which this Honourable Court would be least interested. The appropriate forum to interrogate it would, in my humble view, be the trial court. It is in that forum that the state will work towards proving its case against the applicant, on the one hand, and the applicant challenge the accusations levelled against him, on the other hand.
49. For purposes of judicial review, I come to the conclusion that there is no proof that the prosecution of the applicant is tainted with illegality, irrationality or procedural impropriety. These grounds, commonly referred to as the traditional grounds for judicial review were enunciated in the English case of *Council of Civil Service Unions v Minister for the Civil Service* [1985] A.C. 374,410 in which Lord Diplock explained them as follows:

“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.

By “irrationality” I mean what can by now be succinctly referred to as “Wednesbury unreasonableness” (*Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court’s exercise of this role, resort I think is today no longer needed to Viscount Radcliffe’s ingenious explanation in *Edwards v. Bairstow* [1956] A.C. 14 of irrationality as a ground for a court’s reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. “Irrationality” by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.



I have described the third head as “procedural impropriety” rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all.”

50. Looking at the applicant’s application from this perspective, there is no proof that by lodging a complaint to the police as a result of which the applicant has been charged, the 3rd respondent did not understand correctly the law that regulating its decision-making power or that it failed to give effect to it.
51. Under section 5(12) of the *Kenya Revenue Authority Act*, the 3rd respondent is established to, among other things, collect and receive taxes of Government revenue and enforce revenue laws as well. It has not been disputed that the exercise of its mandate under its mother Act, the 3rd respondent is enjoined to investigate claims and information on evasion of taxes or otherwise or any offences committed under the Act or any other law.
52. Section 52B of the *Income Tax Act*, for instance, makes it mandatory for every chargeable person to file a return of income in any particular year. As noted earlier in this judgment, where such a return is not filed, an offence is committed under section 94 (a) of the *Tax Procedures Act*. Against this background, it cannot be said, that the prosecution of the applicant arose from misapprehension, by the 3rd respondent, of the law that regulates its decision making power. If anything, the prosecution of the applicant was meant to give effect to specific provisions of the law.
53. And if that be the case, it cannot also be argued that the decision to lodge a complaint against the applicant and subsequently prosecute him was, as it were, “so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.”
54. It has not been suggested that the 3rd respondent acted outside the Tax Procedure Act in complaining against the applicant. Neither has it been demonstrated that any procedural requirement was not complied with in charging the applicant. In other words, the prosecution of the applicant was not a culmination of procedural unfairness or impropriety on the part of the 3rd respondent or any other respondent for that matter.
55. In the ultimate I do not find any entry point upon which this Honourable Court can interfere with the 3rd respondent’s decision and generally the prosecution of the applicant in the magistrates’ court. To this end I find the words of De Smith, Woolf and Jowell in their book, *Judicial Review of Administrative Action* 5th Edition, at page 3 quite befitting; the learned authors said of judicial review of administrative action as follows:

“Judicial review provides just one of a number of legal controls of administrative action and its role is inevitably sporadic and peripheral. The administrative process is not, and cannot be, a succession of justiciable controversies. Public authorities are set up to govern and administer, and if their every act or decision were to be reviewable on unrestricted grounds by an independent judicial body, the business of administration could be brought to a standstill. The prospect of judicial relief cannot be held out to every person whose interests may be adversely affected by administrative action.”



56. And with that I come to the conclusion that there is no merit in the applicant's application. It is hereby dismissed but I make no orders as to costs. It is so ordered.

Signed, dated and delivered on 29 July 2022

Ngaah Jairus

JUDGE

