



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

JUDICIAL REVIEW NO. 27 OF 2019

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF: ARTICLES 2,3,22,23,33,40,47 & 50 OF THE

CONSTITUTION

AND

IN THE MATTER OF: SECTIONS 4, 6, 7 & 11 OF THE FAIR ADMINISTRATIVE ACTION ACT 2015, SECTION 131 OF THE EAST AFRICAN COMMUNITY CUSTOMS MANAGEMENT ACT AND THE LAW REFORMS ACT

AND

IN THE MATTER OF: THE CIVIL PROCEDURE ACT AND THE CIVIL PROCEDURE RULES 2010

BIPICHANDRA NARANDAS RAIHOD and

BHUPENDRA NARENDAS RAIHOD

T/A PENNYWAYS.....EX PARTE APPLICANT

VERSUS

KENYA REVENUE AUTHORITY.....RESPONDENT

I & M HOLDING LIMITED.....INTERESTED PARTY

RULING

Preliminary Objection

1. By a Notice of Preliminary Objection filed herein on 25.7.19 the Respondent herein Kenya Revenue Authority seeks to strike out the Notice of Motion dated 6.6.2019 on grounds that:

- a) The Application and the entire suit as filed offends Section 52(1) and (2) of the Tax Procedure Act 2015
- b) The Application and the entire suit as filed offends Section 9 of the Fair Administrative Act 2015.
- c) The Applicant has failed to exhaust the remedies provided by law first before invoking the powers of this Honourable Court.
- d) The Application has no merit, is misconceived, bad in law, fatally defective and ought to be struck out.
- e) The Application raises no reasonable cause of action against the Respondent.

f) **The Application has been brought to Court prematurely based on the Applicant's misapprehension of facts.**

2. The origin of the Preliminary Objection is that on 6.6.19 the Ex parte Applicant herein sought for orders of certiorari and prohibition to stop the Interested Party and Respondent from collecting taxes alleged to be due amounting to **Kshs. 10, 013797/=** demand for which was issued vide an Agency Notice dated 20.5.19 The Ex parte Applicant objected to the said Agency Notice on grounds:

i. That the Respondent by issuing an Agency Notice is in violation of the Applicant's right to own property enshrined under Article 40 of the Constitution

ii. That the Respondent's decision is in contravention of Article 47(2) of the Constitution for failing to give reasons whatsoever for its decision communicated vide letter dated 20.5.2019.

iii. That the Respondent's decision was made in bad faith was unreasonable as it did not take into consideration such active criminal proceedings in Court over the subject properties and without involving parties to the proceedings in Court.

iv. That the ex-parte Applicant stands to suffer irreparable loss if the Respondent's illegal, unreasonable and unlawful decision communicated vide letter dated 20.5.2019 is not quashed.

3. Before the Ex-parte Applicant's application could be heard, the Respondent filed the current Preliminary Objection stating that the Applicant has failed to exhaust the remedies available to it as provided by law before invoking the powers of this Court.

4. The Preliminary Objection was heard on the 24.9.2019. Both the Ex-parte Applicant and the Respondent's submissions are dated 19.9.2019.

Submissions

5. **M/s. Onyango** Learned Counsel for the Respondent submitted that the Ex-parte Applicant had not exhausted all the available avenues for dispute resolution before instituting the current suit as the Agency Notice dated 20.5.2019 is an appealable decision pursuant to Section 3 and 52 of the Tax Procedure Act. Reliance was placed on the decision in **Republic v Kenya Revenue Authority, Commissioner for Investigation and Enforcement Department Ex parte Centrica Investments [2019] eKLR** where it was held that the *ex parte* applicant ought to have exhausted the available mechanism before approaching the Court.

6. **M/s. Onyango** further submitted that purported assessment of tax was done on the 20.11.2006 and all along the ex-parte Applicant has had the right of Appeal under the Customs Exercise Act.

7. **Mr. Wafula** Learned Counsel for the Ex-parte Applicant submitted that the doctrine of exhaustion did not apply to the present case as the tax assessment was done on the 20.7.2006 which was before the enactment of the Tax Procedure Act and as such an assessment done in 2006 cannot be brought within the Tax Procedure Act as the law does not operate retrogressively.

8. **Mr. Wafula** further submitted that the assessment made in 2006 was never served upon the ex-parte Applicant and therefore an Appeal was not possible as they were not aware of the agency notice. Also, Counsel submitted that an agency notice is not an appealable decision because it is an execution of a final Judgment and the said recovery should be conducted pursuant to Section 39 of the Tax Procedure Act.

The Determination

9. I have considered the submissions of the parties on the matters in dispute. With regard to the preliminary Objection, the parties were united with the submission that the ex-parte Applicant sought Judicial Review of the Respondent's action without pursuing any of the available remedies before the agency itself. The Court of Appeal in the case of **Kakuta Maimai Hamisi -vs- Peris Pesi Tobiko & 2 Others [2013] eKLR** had the following to say on the centrality of the issue of jurisdiction:-

"So central and determinative is the jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings in concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cui-de-sac. Courts, like nature, must not sit in vain."

Whether the present dispute properly before this Court?

10. The Ex-parte Applicant has argued that the law does not operate retrogressively as the tax assessment was done in the year 2006 which is ten (10) years before the enactment of the Tax procedure Act and therefore it is not subject to the procedures under the Tax Procedure Act. In the case of **Municipality of Mombasa vs Nyalil Limited [1963] EA 37**, Newbold, J.A, stated as follows:

"Whether or not legislation operates retrospectively depends on the intention of the enacting body as manifested by the legislation. In seeking to ascertain the intention behind the legislation, the courts are guided by certain rules of construction.

One of these rules is that if the legislation affects substantive rights, it will not be construed to have retrospective effect unless a clear intention to that effect is manifested. Whereas, if it affects procedure only, prima facie, it operates retrospectively unless there is good reason to the contrary. But in the last resort it is the intention behind the legislation which has to be ascertained

and rule of construction is only one of the factors to which regard must be had in order to ascertain that intention”.

11. More recently, the Supreme Court clarified the law on retroactivity and retrospectivity of legislation in the case of **Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 Others [2012] eKLR**, stating: -

“As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature. (Halsbury’s Laws of England, 4th Edition Vol. 44 at p.570). A retroactive law is not unconstitutional unless it:

- i. is in the nature of a bill of attainder;*
- ii. impairs the obligation under contracts;*
- iii. divests vested rights; or*
- iv. is constitutionally forbidden.”*

12. On a careful analysis of the dispute at hand I take note that, under the Tax Procedure Act on transition and saving, Section 113 of the Procedure Act. provides as follows:

(1) Subject to this section, this Act shall apply to any act or omission that occurred or is occurring for which no prosecution has been commenced, or any assessment made against which no appeal has been made, before the commencement date.

(2) Any appeal or prosecution commenced before the commencement date may be continued and disposed of as if this Act had not come into force.

(3) If the period for any application, appeal or prosecution had expired before the commencement date, nothing in this Act shall be treated as having enabled the application, appeal, or prosecution to be made under this Act by reason only that a longer period is specified in this Act.

(4) Any tax liability that arose before the commencement date may be recovered under this Act despite any action already taken for the recovery of the tax.

13. From the foregoing, it is clear that the Tax Procedure Act can be applied retrospectively as a clear intention for it to apply to tax assessment made before its commencement has been specifically stated. Consequently, the Ex-parte Applicant ought to exhaust the statutory process as envisaged under the Tax Procedure Act, unless there are exceptional circumstances to warrant the filing of a Judicial Review Application as was held by the Court of Appeal in **Republic vs National Environmental Management Authority [2011] eKLR** where it was stated:

“The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal process, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the Court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it....”

14. On the issue of the Ex-parte Applicant not being notified of the Tax Assessment, the Respondent in its Application dated 19.6.2019 exhibited copies of a demand query and a tax arrears reminder which on the face are addressed to the Ex-parte Applicant and its Managing director. There is no evidence that the same were ever dispatched to Ex-parte Applicant or its Managing director as no certificate of postage has been annexed to prove the mode of service.

15. Accordingly, this Court cannot state with certainty that the ex-parte Applicant had been notified of the tax arrears. Consequently, I find that the Respondent failed to discharge its burden of proof and that notices had been served upon the Ex-parte Applicant, and as a result, the Ex-Parte Applicant could not have been expected to pursue an Appeal against the decision it had not been notified about. In the case of **Nyagilo Ochieng & Another vs. Phanuel B. Ochieng & 2 Others [1996] eKLR**, the Court of Appeal pronounced itself on this point thus:

“Unless the receipt of statutory notice is admitted, posting thereof must be proved and upon production of such proof the burden of proving non-receipt of such notice or notices shifts to the addressee as is contemplated by section 3(5) of the Interpretation and General Provisions Act, Cap 2, Laws of Kenya.

[18] Section 3(5) of the Interpretation and General Provisions Act, provides that:

“Where any written law authorizes or requires a document to be served by post, whether the expression “serve” or “give” or “send” or any other expression is used, then, unless a contrary intention appears, the service shall be deemed to be effected by properly addressing to the last known postal address of the person to be served, prepaying and posting, by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would have been delivered in the ordinary course of the post.”

16. Though the Respondent has a statutory and legal duty to collect tax as provided for under the relevant law, the exercise of that authority must be done within precincts of the law for it to pass the test provided for under Article 47 of the Constitution. If indeed the Respondent intends to proceed with the recovery of the tax arrears against the Ex-parte Applicant, then it has to serve it with the relevant notices as required under the law in order for the Ex-parte Applicant to be given an opportunity to respond to the demand query and if dissatisfied pursue an Appeal under the Tax Procedure Act.

17. In the case of **Silver Chain Limited vs. Commissioner Income Tax & 3 others [2016] eKLR**, it was held as follows:

“My view is that disputes involving tax assessment should be dealt with under the legal procedures set up by the law. The respondents are expected to discuss their assessment with a tax payer. If the tax payer is not satisfied with the assessment, an objection form which could be standardized should readily be available to the tax payer to lodge his objection to the assessment. The commissioner of that particular tax stream should make his/her decision within the permitted period. Appeals to the Tax Appeals Tribunal should be allowed and if any party is dissatisfied by the decision of the Tax Appeals Tribunal, the matter can be brought to the courts. The courts are ill-equipped to know whether the tax assessment is proper or not.”

18. In the premises, I find that the Respondent Preliminary Objection is partly successful. However, a Preliminary Objection cannot be half successful and half unsuccessful. It is certain to say that the Preliminary Objection has failed. However, there is nothing stopping the Respondent from serving afresh the tax demand notice.

19. Parties shall bear own costs of the Preliminary Objection.

Dated, Signed and Delivered at Mombasa this 23rd day of January 2020.

E. K. OGOLA

JUDGE

In the presence of:

Mr. Ng'ang'a for Respondent

Mr. Wafula for Ex parte Applicant

Mr. Kaunda Court Assistant