REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

JUDICIAL REVIEW NO.2 OF 2019

KISA JAFFAR TENGE.....APPLICANT

-VERSUS-

KENYA REVENUE AUTHORITY.....RESPONDENT

- AND –

COOPERATIVE BANK OF KENYA.....INTERESTED PARTY

JUDGMENT

The Exparte applicant, Kisa Jaffar Tenge filed the Notice of Motion dated 24/3/2018 seeking the following Judicial Review Orders:

a. Certiorari to bring into the High Court for purposes of quashing the notice dated 16/5/2018 addressed to the Interested Party seeking to seize and forfeit the sum of Kshs.2,308,150= from the applicant's account No.01103501511600 at Cooperative Bank, Nyahururu Branch;

b. Prohibition to stop or prohibit the respondent from requesting the Interested Party and or the Cooperative Bank (K) Ltd, from selling, attaching and forfeiting the sum of Kshs.2,308,150/= from the applicant's Account No.01103501511600 at Cooperative Bank, Nyahururu Branch;

c. Any other order that the court may deem fit to grant.

The application is expressed to be brought pursuant to Article 165(1) and (7) of the Constitution, Order 53 Rule 3(1) of the Civil Procedure Rules and Sections 8 and 9 of the Law Reform Act. It is supported by a statement of facts and verifying affidavit of the applicant dated 3/8/2018 and a supplementary affidavit dated 28/11/2018.

The applicant's counsel, Mr. Lawrence Mwangi also filed submissions on 19/2/2019.

The application was opposed by the respondent through an affidavit sworn by John Njoroge Mburu an officer from Kenya Revenue Authority appointed under Section 13 of the KRA Act. The respondent was represented by Marion Gitau Advocate.

The applicant describes himself as a small business trader in Maralal Town and seeks to challenge a notice dated 16/5/2018 directed to the Cooperative Bank (K) Ltd to seize Kshs.2,308,150/= which was an investment on his Life Insurance Policy Cover from Britam Insurance. He deponed that he received a letter dated 21/11/2017 from the respondent claiming that he had issues with tax returns, and he owed a total of Kshs.3,246,912/= (KJT.11); that he responded to the letter through his advocate (KJT.IV) clarifying that he had fully paid his tax; that on or about that time, a sum of Kshs.2,308,10/= was deposited in his account in Cooperative Bank from his Insurance Policy (KJT.V) and he realized that the respondent had issued a notice to the said bank directing it to seize and surrender it to the respondent as unpaid tax.

In his supplementary affidavit, the applicant contends that one John Njoroge who claims to be averse to the tax issues is a stranger as he had only dealt with one Rangange, the Manager of Maralal Area; that the respondent has to exercise its powers without caprice or unfairness; that the applicant's rental business is not as described by the respondent as it is situated in the remote, sparsely populated town of Maralal and the business is not viable; that the bar business is performing poorly; that he only owns a 40ft x 20 ft property with a semi-permanent structure and the earnings from there in are minimal after deducting the expenses; that the respondent has not availed any evidence to prove its assertions yet it has all the machinery at its disposal through investigations and private enterprises to gather evidence; that though the applicant has provided a lot of documentary evidence in support of the application, the respondent has failed to controvert them and did not avail any evidence or criteria for assessing the tax due from the applicant.

In opposing, the application, Mr. Njuguna deposed that though the applicant filed his tax returns from the year 2013 – 2016, it was discovered he under-declared his income for the said years which was discovered after investigations; that the applicant failed to file returns on rental income from 2013 – 2016 and business income for 2013 to 2016 which accrued penalties; that upon demand, the applicant claimed to have paid tax of Kshs.45,495/= (CRA.2) and a demand was made for additional documents from the applicant by the letter dated 1/12/2017 (KRA 3, 4 & 5).

On 1/12/2017, the respondent issued an assessment for additional rental income tax and the applicant requested for 30 days to provide them on 10/12/2017 (KRA.3). In the letter, the respondent had requested for purchase agreements or allotment letters of the applicant's property in Maralal including the wife's Bank Statements from 2013 to date and give information on fee of Kshs.3,333,333/= withholding certificate, (KRA.3, 4 & 5); that the respondent issued assessment on additional rental income of Kshs.766,266; 674,870/85; 488,366, Kshs.378,645 for the year 2013 to 2016 (KRA.6); that the assessments were in tandem with Section 29(1) of the Tax Procedures Act, 2015; that the applicant failed to avail the documents requested for and the respondent therefore issued a demand letter dated 24/1/2018 but the applicant did not pay the tax arrears following which the respondent issued an agency notice to the applicant's bank to pay the said sum in terms of Section 42 of the Tax Procedures Act, 2015; it was also deponed that the orders sought cannot issue as they seek to oust the respondent's mandate; that if aggrieved, the applicant should have first lodged an appeal with the Tax Tribunal. It is urged that this application is an abuse of the court process.

The parties filed written submissions which were highlighted in court. Mr. Mwangi submitted that KRA whimsically dealt with the appellant without any facts and that the process was flawed; that the evidence before the court is mere speculation and argumentative; that though the respondent alleged that the applicant owns property, the numbers were not disclosed. The applicant therefore alleges that the notices were issued unfairly, arbitrarily, maliciously and in bad faith.

The applicant relied on the following decisions:

1. NRB.H.C.469/2013 and *471/2013 Pankaj Vrajidal Somaia v KRA*;

2. NRB Pet.418/2018 Prof. Tom Ojienda v KRA & Another;

3. NRB HC.Pet.412/2016 Dr. Robert Ayisi v KRA.

On the respondent's part, Ms. Gitau submitted that after the applicant was notified of the outstanding tax, he did not raise any objection under Section 51 of the Tax Procedures Act nor did he request for extension of time to raise objection; that a demand letter was made on 24/1/2018, 60 days after the assessment; that the matter was then referred to Enforcement Department to collect the tax Under Section 42 of the Act; that after agency notice was issued, the applicant did not challenge it in the Tax Tribunal. Counsel urged that this court does not have jurisdiction to determine the matter.

Counsel further argued that this court cannot determine the merits of the assessment or notice but only the process through which it was issued. Counsel urged that the agency notice was issued procedurally and the court should decline to grant the orders.

The respondent relied on the decision of:

1. Gibbs Africa Ltd v KRA (2017) eKLR;

2. Pili Management Consultants v Commissioner of Income Tax & KRA (2010) eKLR;

3. Republic v KRA ex-parte Yaya Towers Ltd (2008) eKLR.

Having considered the application, submissions of counsel and the authorities relied upon, I think that the issues that need consideration are:

1. Whether the agency notice dated 16/5/2018 and issued on 8/5/2018 were lawful and justified;

2. Whether Judicial Review Orders of Certiorari and Prohibition should issue;

3. Who bears the costs.

The applicant described himself as a small income owner and operates businesses in Maralal Town.

The respondent, KRA is a statutory body established under the KRA Act, Chapter 469, LoK, as the sole agent of the Government, charged with the collection and receipt of all Government Revenue under Section 5(1) of the Act. Under Section 5(2) the Authority is mandated to administer and enforce all provisions of the written laws as set out in part I & II of the First Schedule of the Act for purposes of assessing, collecting and accounting for all revenues in accordance with the Laws of Kenya.

The applicant describes himself as a small income earning person and that he files his tax returns as is required of him. He therefore admits that he is a tax payer. A tax payer is described under Section 2 of the Tax Procedures Act as a person liable for tax under a tax law whether or not they have accrued any tax liability in a tax period. It may be under the Income Tax Act, VAT Act or Exercise Duty Act.

Section 28 of the Tax Procedures Act allows a party to do self-assessment return of his income. This is what the applicant did. He filed tax returns after a self-assessment but the respondent's view is that the applicant under-declared his income for the year 2013 – 2017.

Section 29 of the Tax Procedure Act provides for a situation where a taxpayer fails to submit a tax return in accordance with the provision of the tax law and the commissioner steps in to make an assessment based on the information within his knowledge.

The section reads as follows:

> 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 judgment, 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.

It is the respondent's contention that when it raised the assessments on 21/11/2017 notifying the applicant of its findings and requiring the applicant to pay Kshs.3,246,192/= being additional tax on income earned between 2013 – 2017 as opposed to the applicant's contention that he was only entitled to pay Kshs.45,495/= vide the letter dated 22/11/2017.

The applicant admits that he owns some business and some rental premises as evidenced by his tax assessment. It is the applicant who knows exactly what he owns. Under Section 23 of the Act, a tax payer is required to keep records. In accordance with that Section, it should be in the official language, be ascertainable. This is necessary so that in the event there is need for the tax officer to look at the books they are ascertainable and understandable. Under Section 24, a tax return has to be submitted in an approved form and prescribed form. Under Section 24(2) the Commissioner is not bound by a tax return or information provided by or on behalf of the tax payer and so the Commissioner has the discretion to assess the tax himself using information available to him.

The respondent's action to demand more tax is backed by Section 24. The onus shifts to the taxpayer to prove that the self-assessment was proper and genuine.

Section 24A of the Act requires a tax payer to furnish the Commissioner with information as may be prescribed. When the respondent denied owing the taxes assessed by the respondent, by the letter dated 1/12/2017 (KRA.3) the respondent requested the applicant to furnish purchase agreements/allotment letters for all the properties he owns in Maralal including the ones for the wife; Bank Statements for the period from 2013 to date; give information on contractual fee that was held in the bank, file all income tax return from 2010 – 2015 and submit a copy of accounts for 2016. All the above information was not supplied to the respondent as required by the Section 24A of the Act. Instead, the applicant is turning the tables on the respondent, asking the respondent to provide the evidence that it was the sums claimed, which is actually the applicant's duty to prove.

A demand notice was addressed to the applicant on 24/1/2018 (KRA.7) for payment of the additional tax that was assessed at Kshs.2,308,147/=. Section 32 of the Act provides that a tax due from a person is a debt to the Government and is payable to the Commissioner. If a party is not satisfied with the tax decision, he has the option of lodging an objection under Section 51 of the Act. The section reads:

> "51(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 tax payer 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
>
> 3. A notice of objection shall be treated as validly lodged by a tax payer under subsection (2) if:-

a. The notice of objection states precisely the grounds of objection, the amendments required to be made to correct the decision, and the reasons for the amendments; and

b. In relation to an objection to an assessment, the taxpayer has paid the entire amount of tax due under the assessment that is not in dispute.

From 24/1/2018, the applicant had 30 days to lodge an objection under Section 51(2).

There is no evidence at all that the applicant complied with that provision. The act provides for redress within the Act and so far, no reason has been given by the applicant as to why that mode of redress was not adopted by the applicant.

From 24/1/2018, when the demand was made, no action was taken by the respondent till the agency notice was issued on 16/5/2018. That was over 4 months period.

When the applicant did not pay the assessed tax or file objection to the demand, the respondent is empowered under Section 42 of the Act to issue agency notice in order to collect taxes. The respondent cannot be faulted for acting within its powers under Section 42 of the Act which provides for the power to collect tax from a tax payer who has failed to pay. The agency notice was justified.

Whether Judicial Review orders of certiorari and prohibition can issue?

The scope of Judicial Review orders was defined in *Judicial Review Handbook 6th Edition by Michael Fordham at page 5*:

> "Judicial Review is a central control mechanism of administrative law (Public Law), by which the Judiciary discharges the Constitutional responsibility of protecting against abuses of power by public authorities. It constitutes a safeguard which is essential to the rule of law promoting the public interest; policing parameters and duties imposed by parliament, guiding public authorities and ensuring that they act lawfully; ensuring that they are accountable to law and not above it; and protecting the rights and interests of those affected by the exercise of public authority or power."

See Keroche Breweries Ltd & others VAG [2016] eKLR.

In Chief Constable of North Wales v Evans [1982] WLR 115 page 117 3 Lord Brightman said:

> "The court will not, however, on a Judicial Review application, act as a Court of Appeal from the body concerned, nor will the court interfere in any way with the exercise of any power or discretion which has been conferred on that body, unless it has been exercised in a way which is not within the body's function; or the decision was malicious, unreasonable. The function of this court is to see that the lawful authority is not abused by unfair treatment."

See Republic v KRA Ex-parte Yaya Towers Ltd [2008] eKLR.

A summary of the above decision is that Judicial Review will not deal with the merits of the decision made by an administrative body but will only look at the process by which the decision was arrived at, whether was the decision fair, unreasonable or made out of caprice or was made without jurisdiction, e.t.c.

The applicant has not attempted to demonstrate that the decision of the respondent is unfair, unreasonable or prompted by malice. As observed earlier in this judgment, the respondent strictly followed the provisions of the law under the Tax Procedure Act. What the applicants seems to be challenging is the merits of the decision and tending to shift the burden of proof on the respondent; e.g. paragraph 13 and 14, of the applicant's affidavit dated 28/11/2019, the applicant contends that the respondent has not provided any evidence to prove the assessment. It was the duty of the respondent to prove that it does not owe the assessed additional tax by providing the documents he was asked for but failed to provide.

An order of certiorari lies to quash a decision that has been made in excess of jurisdiction, in breach of rules of natural justice, or an illegality. It is not a restraining order. *(See Capt. Geoffrey Kujoga Murungi v A.G. Misc.App.293/1993* and Examination Council v Exparte Geoffrey Githinji & others [1997] e KLR.

In addition, I note that certiorari was not one of the prayers that the applicant pleaded in the statement of facts. The applicant only brought order of prohibition. Prayer of certiorari was irregularly added to the notice of motion which the respondent had no notice of in the statement of facts.

When will an order of prohibition be issued?

In the celebrated case of Kenya Examination Council v Republic ex-parte Geoffrey Githinji Njoroge & others [1997] e KLR, the Court of Appeal said:

> "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 in excess of its jurisdiction or in contravention of the laws of the land. It has 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 owing decision on the merits of the proceedings"

see Halburys Laws of England 4th Edition and *Vol.1 at page 37 paragraph 126*).

At no time did the applicant justify the grant of the said order. The respondent did not issue the agency notice outside its jurisdiction nor was it in contravention of the law, nor did it depart from Rules of Natural Justice. The respondent notified the applicant of the payment of additional tax, asked for more documents but the applicant failed to produce them to prove otherwise. In addition, the agency notice has already been issued and prohibition on its own would not lie.

I must point out here that the applicant ignored to exhaust the dispute resolution process under the Act. A person who is dissatisfied with an applicable decision, may appeal to the Tribunal in accordance with Tax Procedures Act, 2015. Under Section 53, an appeal from the Tribunal lies to the High Court. Again, the applicant decided to ignore the Dispute Resolution Mechanism provided under the Act and instead, came to this court. It is trite law and the courts have repeatedly held that when the law provides for a dispute resolution mechanism, the affected party must first exhaust the other processes availed by other statutory dispute resolution organs which are by law established before moving to the High Court for Judicial Review or by Petition under the Constitution. In speaker of *National Assembly v Njenga Karume [2008] I KLR 425*, the court said:

> "Where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed."

This is a tax matter, a matter of public interest. Every Kenyan who earns a salary or does business is required to pay taxes. The respondent in carrying out its mandate to flash out tax defaulters of tax cannot be stopped unless it is shown that the respondent acted in breach of the rules of natural justice, lacked jurisdiction, acted capriciously or unreasonably. Otherwise, the court would be reluctant to interfere in such exercise of jurisdiction unless the above grounds are demonstrated. I would quote Dickson CJ in *Republic v Oakes [1986] 1 SCR.103 (69-70)* when he said:

> "Courts will be required to balance the interests of society with those of individuals and groups. It is my view that it is in the public interest that taxes must be paid…"

In conclusion, I find that the Judicial Review orders sought are not merited. I hereby dismiss the application with the applicant bearing the costs.

Dated, Signed and delivered at Nyahururu this 10th day of *March,* 2020.

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R.V.P Wendoh

JUDGE

PRESENT:

Eric – Court Assistant

Ms. Gitau for the respondent