



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW NO. 60 OF 2019

ABDI GEDI AMIN *Alias* ABDI IBRAHIM AHMED.....APPLICANT

VERSUS

- 1. THE KENYA REVENUE AUTHORITY**
- 2. THE DIRECTOR OF PUBLIC PROSECUTIONS**
- 3. THE CHIEF MAGISTRATE MOMBASA LAW COURTS**
- 4. THE HON. ATTORNEY GENERAL.....RESPONDENTS**

RULING

1. At the center of the Notice of Motion herein dated 10/12/2019 is whether or not the prosecution of the Applicant in **Mombasa Criminal Case No. 1554 of 2019 (Republic vs. Abdi Ged Amin alias Abdi Ibrahim Ahmed)** should be quashed for reasons given in the application.

2. The Ex parte Applicant has been charged before the Chief Magistrates Court at Mombasa in Criminal Case Number MCCR 1554 of 2019. The charges relate to allegations of failure to pay tax by due date, and making incorrect statement affecting tax liability contrary to various Sections of the Tax Procedures Act. The Ex parte Applicant alleges that the Respondents in preferring the aforesaid charges have failed to observe procedures under the law. The Ex parte Applicant avers that the said Criminal proceedings were commenced without issuance of a Tax Demand or Notice under Section 29 of the Tax Procedures Act. It is the Applicant's assertion that he was not granted an opportunity of being heard by the 1st and 2nd Respondents, and that failure amounts to contravention of the Applicant's rights to a fair hearing under the constitution and the Fair Administrative Actions Act. The Applicant avers that the decision of the 1st and 2nd Respondents and the commencement of the criminal proceedings, was irrational, absurd and unreasonable and violate statutory obligations under the Tax Procedures Act, 2015, leading to the loss of the Applicant's legitimate expectation of a fair process.

3. The Ex parte Applicant states that he cannot be charged for failure to pay tax on due date when there was no tax assessment done pursuant to Section 29 of the Tax Procedures Act to enable the Applicant to exercise his rights under Section 51 of the same Act to move to the Tax Appeals Tribunal to conduct assessment. In that regard it was averred that the Applicant's right to an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair was breached. The Ex parte Applicant asserts that since the due process was never followed, this Court has the duty to stop the prosecution of the Applicant so that the proper procedure in demand for tax may be followed.

4. The Applicant therefore prays for the following orders:

i. An order of certiorari to the Respondents by themselves, their servants or any other officer acting under their authority to bring to the court for the purposes of being quashed the charge sheets and all incidental and consequential proceedings related to the prosecution of the Applicant in Criminal Case Number MCCR 1554 OF 2019 (Republic-Vs- Abdi Ibrahim Ahmed alias Abdi Ibrahim Ahmed)

ii. An order of prohibition do issue directed to the Respondents herein prohibiting them, their agents, employees and servants from proceeding with the Prosecution of the Applicant in Criminal Case Number MCCR 1554 of 2019 (Republic-Vs- Abdi Ibrahim Ahmed alias Abdi Ibrahim Ahmed)

iii. The Honourable Court be pleased to issue an order of prohibition directed against the 3rd Respondent by himself, his

agents and/or any other Judicial officer for the time being seized of hearing or conduct of Cr Case No. 1554 of 2019 from trying and/or carrying any further proceedings on the matter pending the hearing and determination of the application or further orders of the court.

iv. The leave so granted does operate as stay of the proceedings related to the prosecution of the Applicant in Criminal Case Number MCCR 1554 OF 2019 (Republic vs. Abdi Ibrahim Ahmed alias Abdi Ibrahim Ahmed)

v. Costs of this application be awarded to the Applicant.

5. The application is supported by the Verifying Affidavit sworn by Abdi Ibrahim Ahmed on 4/12/2019 in support of the Chamber Summons of the same date.

6. On 30/01/2020 this Court delivered a Ruling staying the prosecution and proceedings in MCC No. 1554 pending this Ruling.

Response

7. The motion is opposed by the 1st Respondent through a Replying Affidavit sworn by Godfrey June on 23/1/2020. The 1st Respondent's case is that their investigations established from a tip off that the Ex parte Applicant has engaged in fraud relating to remission of taxes for the period between 2013 to 2018 amounting to Kshs. 512,919,520/70. The 1st Respondent avers that the Ex parte Applicant was informed of the charges against him and was taken through the lawful process and he recorded a statement pertaining to the Tax inquiry. A decision was then made to charge the Applicant with various offences in relation to tax found to be due. The 1st Respondent states that Section 29 of the Tax Procedures Act allows the Commissioner to follow a civil process to recover taxes owed but does not impose a mandatory condition on the commissioner to issue tax demands and/or assessments in relation to taxes. According to the 1st Respondent, the Applicant was assessed under Section 31 of the Tax Procedures Act and not 29 as averred by the Applicant. The 1st Respondent avers that it expressed good faith by serving the Applicant with a Tax decision pursuant to provisions of the Tax Procedures Act, and the Applicant responded with notice of objection. The Applicant was granted 60 days to pay the tax due. The Applicant was never deprived of the right to prefer an appeal under Section 51 of the Tax Procedures Act.

8. The 2nd Respondent opposed the application on the basis of the grounds of opposition dated 16/01/2020. The grounds are as hereunder:

a. That the orders sought by the Applicant are an abuse of the court process and frowns on the Constitutional mandate of the 2nd Respondent.

b. That the 2nd Respondent exercise its powers under Article 157 of the Constitution, that it reviewed the evidence presented by the 1st Respondent which it found credible and charged the Applicant.

c. That the Applicant has not placed any material documents to warrant the orders being sought.

d. That the Applicant has not demonstrated that he will suffer prejudice or damages if the criminal case is allowed to proceed.

e. That Article 50(2) (e) states that an accused person has the right to have a trial being and concluded without unreasonable delay for the interest of Justice and public interest.

f. That the orders sought if granted will ground prosecution of a matter of great public interest

g. That any action so far taken by any of the Respondents does not contravene the Constitution or any other law and therefore the Application is brought without merit, is calculated to interfere with enforcement of criminal Justice System and protection of the collective right of the complainant and the People of Kenya.

h. That the orders sought have far reaching consequences on the powers of the 1st and 2nd Respondents under the Constitution.

9. In opposition of the Application the 3rd & 4th Respondents filed their grounds of opposition which are as hereunder:

a. That the application is misconceived, frivolous, vexatious and abuse of the process of the court as the 3rd Respondent is doing his/her mandated duties.

b. The orders sought are untenable and a nullity

c. Application is guilty of laches

d. That the Applicant is the author of his own misfortunes. The cause of action and/or omissions of the stated Tax

Procedures Act 2015 have not been denied by the Applicants as brought herein.

Submissions

10. With the leave of court parties filed submissions to the application. However, the 2nd, 3rd and 4th Respondents did not file submissions and relied on their pleadings and on submissions by the 1st Respondent.

11. **Mr. Anyoka**, learned Counsel for the Ex parte Applicant submitted that Kenya Revenue Authority, the 1st Respondent herein, is an administrative body enjoined by Article 147 (1) & (2) of the Constitution of Kenya, as read with the Fair Administrative Act, 2015 to carry out its functions in an expeditious, efficient, lawful, reasonable and in a procedurally fair manner. Counsel submitted that every person has a right to an administrative action that is lawful, reasonable and procedurally fair. Counsel submitted that under the said Article, if the right or fundamental freedom is likely to be affected by administrative action then the person has the right to be given the reasons for the administrative action.

12. Counsel submitted that the Applicant herein has been charged with various offences under the Tax Procedures Act Sections 94 (1) and Section 104. They are also charged under Section 95 and 97 as read with Section 104 of the same Act. Counsel submitted that if one is convicted of an offence under Section 97 of the aforesaid Act, then that person shall be liable to fine not exceeding Kshs. 10,000,000/= or double the tax evaded or an imprisonment not exceeding ten years or both. Mr. Anyoka submitted that the charge sheet claims Kshs. 512,919,520/= and that Section 61 of the Tax Proceedings Act gives the commissioner a right to have a person who has evaded tax appear before him. That Sections 51, 52, 53 and 55 of Tax Procedures Act provide what the Commissioner can do concerning assessing and objection on tax issues. Counsel submitted that Section 74 of Tax Procedures Act provides guidelines on how the Petitioner is to serve the tax notice. It is averred that in this matter no tax notice of the intention to audit was given. The Applicant was not investigated or requested to avail any documents to KRA. It was submitted that the Applicant has a right to be treated fairly before a decision to charge is made.

13. **Mr. Mwenda**, learned counsel for the 1st Respondent submitted that Section 28 of the Tax Procedures Act provides for self-assessment of tax, and filing of returns and that the Commissioner only steps in where that assessment has not taken place. Counsel submitted that the Commissioner has two options; the first, giving agency notice and secondly, where there is fraud in evading tax then there is prosecution. Counsel submitted that in this matter the Applicant was summoned by KRA and his statement was taken and he was informed of his rights. The decision to charge was reached after full investigations and upon compiling of the data. Counsel submitted that the 1st Respondent will suffer prejudice if the intended prosecution is stopped by this Court since it will not be able to collect tax. Counsel submitted that the Applicant was availed a chance to appeal the tax assessment, which he did vide Appeal No. 509 of 2019 but withdrew the appeal. On that basis Mr. Mwenda submitted that the criminal matter should be allowed to proceed.

14. The 2nd Respondent supported the 1st Respondent's submissions and further relied on their grounds of opposition filed on 16/01/2020. The 2nd Respondent's case is that investigations were carried out by the 1st Respondent and when the file was forwarded to the ODPP a decision to charge was made, and so the criminal trial is constitutionally and procedurally lawful and fair.

Determination

15. I have carefully considered the application and submissions by all parties in this matter. The only issue for determination is whether the proceedings in MCCR 1554 of 2019 should be quashed.

16. The starting point is a consideration of the principles and objectives of judicial review. In that regard **Lord Diplock in Civil Servants Union vs. The Minister for Civil Service [1985] AC** had this to say:

“Judicial review has, I think developed to a stage today when one can conveniently classify into 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”. 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.... By “irrationality” I mean what can now be succinctly referred to as “Wednesbury unreasonableness”. It applies to a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. I have described the third as “procedural impropriety”, rather than failure to observe rules of natural justice or failure to act with procedural fairness towards the person affected by the decision.”

The Court of Appeal in **Republic vs. Kenya Revenue Authority, Ex parte Yaya Towers Limited [2008] eKLR** stated as follows:

“... the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision-making process itself. It is important to remember in such case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he/she has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or that of individual judges for that of the authority constituted by law to decide the matter in question.”

17. In **Republic vs. Anti-counterfeit Agency & 2 Others Ex parte Surgipharm Limited [2011] eKLR** referring to Halsbury's Laws of England, 4th Edition Vol. III paragraph 12 at page 270, the Court said:

“The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus) ... are all discretionary. The court has a wide

discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief.”

18. The Ex parte Applicant’s complaint here is basically that the decision of the 1st and 2nd Respondents to charge him without the adherence to procedures under the law was procedurally wrong and an infringement of his constitutional right to fair trial. The 1st Respondent asserts that the Applicant was never deprived of the right to prefer an objection and indeed the Applicant exercised this right in filing an objection before Tax Appeals Tribunal on 27/11/2019. The Ex parte Applicant on the other hand submitted that by the time they filed the said appeal the decision to charge him had already been reached and the charge sheet drawn. I have referred to the annexed charge sheet. It was signed and stamped on 6/9/2019, a date well before the Ex parte Applicant filed their appeal before the Tax Appeals Tribunal.

19. Section 51 of the Tax Procedures Act No. 29 of 2015 provides an elaborate process to be followed when a tax payer objects to tax decisions made against him. The outcome of such a decision escalates to an appeal to the Tax Appeals Tribunal established under the Tax Appeals Tribunal Act No. 40 of 2013. A decision of the Tribunal can be subject to an appeal to the High Court (Section 53). An appeal to the Court of Appeal can follow (Section 54). The next issue for determination therefore should be whether the principles of natural justice were violated.

20. The record shows that the process of investigations started on 10/9/2019 as per paragraph 7 of the 1st Respondent’s Replying Affidavit. As noted above the charge sheet were drawn and stamped on 6/9/2019. The demand notice was issued to the Ex parte Applicant on 30/10/2019. The Ex parte Applicant then appealed to the Tax Appeals Tribunal on 27/11/2019 through his Notice of Objection dated 27/11/2019. However, this appeal was subsequently withdrawn when the 1st Respondent decided to charge the Ex parte Applicant with the tax fraud offence. So it is evident that the investigations started on 10/9/2019. The demand for tax was made on 30/10/2019, while the charges were prepared and stamped on 6/9/2019. **It is clear that the decision to charge was made 24 days before a demand for tax was made.** In other words, the 1st Respondent had made the decision to charge even before a demand for tax was made. When the demand was made 24 days later, the Applicant filed a notice of appeal and later withdrew the same when he realized that a decision to charge was already made. In other words, the Applicant saw the futility of the process. He then came to court for these judicial review orders.

21. In the case of **Stephen Oyugi Okero vs. Chief Magistrate’s court at Milimani Law Courts (Criminal) & another [2018] eKLR**, the court observed that:

“The power to stay or stop a prosecution should only be exercised if exceptional circumstances exist which would result in prejudice to the accused which cannot be remedied in other ways. The enquiry is whether there has been an irregularity or an illegality, that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted. A criminal trial premised on unfair and questionable partisan investigations or a decision to charge arrived at unfairly and without any reasonable basis would in my view open the door to an unfair trial.”

22. The court further stated that:

“The provisions of the Constitution conferring powers upon the High Court to grant such remedies as certiorari, prohibition, Judicial review, mandamus or permanent stay of proceedings are a device to advance justice and not to frustrate it. In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the Court or that the ends of justice require that the proceeding ought to be quashed.”

23. It is patently clear that in the matter before the Court, the 1st Respondent did not provide the Ex parte Applicant with any procedural fairness.

24. Section 61 of Tax Procedures Act, 2015 states as follows:

Notice to appear before the Commission

“where the Commissioner is satisfied that the person has committed an offence under a tax law, the Commissioner may, by notice in writing, require the person to appear before him.”

25. Although there is no obligation on the Commissioner to require the defaulter to appear before him, such requirement is necessary in a matter like this one where no notice either under Section 29 or 31 was given to the Ex parte Applicant. Further, the Ex parte Applicant was denied a chance to appeal the assessed tax under Section 51 of Tax Procedures Act. The Ex parte Applicant was charged 24 days before a demand for tax was made. There is no doubt in my mind that the Ex parte Applicant’s right to fair administrative action was breached. He was not given any reasons for the proposed charges as envisaged in Article 47 (1) (2) as follows:

“(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.”

26. Further, the essence of the Tax Appeals Tribunal Act No. 40 of 2013 is to enable parties exhaust internal machinery for dispute resolutions. It is intended that a person who disputes any applicability of tax is given a chance to prove his case. It is therefore contrary to the said Tax Procedures Act that the 1st Respondent would rush to charge a tax objector in a criminal court without affording the objector arbitral remedies provided in the law. The rush to court was in complete abrogation of any known fair processes leading to prosecution.

27. In the upshot, the merit of the application before the Court has been proved, and the motion dated 10/12/2019 is allowed as prayed.

28. Costs shall be for the Ex parte Applicant and shall be paid by the 1st Respondent.

29. This Ruling applies *mutatis mutandis* to the following related matters, the same having been heard together:

(i) JR No. 57 of 2019

Abdi Ibrahim Ahmed, Mumina Ali Hussein and Royal Star Energy Limited – Ex parte Applicants

Republic & KRA & 3 others

(ii) JR No. 58 of 2019

Dubow Suga, Highstar Food Industries Limited – Ex parte Applicants

Republic & KRA & 3 others

(iii) JR No. 59 of 2019

Abdi Ibrahim Ahmed, Rukia Ali Barsok, Coast Terminal East Africa Limited – Ex parte Applicants

Republic & KRA & 3 others

(iv) JR No. 61 of 2019

Mayow Abdi Osman Desert Star Transports Limited – Ex parte Applicants

Republic & KRA & 3 others

(v) JR No. 62 of 2019

Ahmed Mohamed Abdow, Rukia Ali Barsok, Abdi Ibrahim Ahmed, Gulf Skytop Limited – Ex parte Applicants

Republic & KRA & 3 others

(vi) JR No. 67 of 2019

Adan Ibrahim Ahmed, Fatuma Ibrahim Ahmed, Skylink Oil Limited – Ex parte Applicants

Republic & KRA & 3 others

It is so ordered.

Dated, Signed and Delivered at Mombasa this 16th day of June, 2020.

E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Mr. Anyoka for Ex parte Applicant

Mr. Mwenda for 1st Respondent

Mr. Mwenda holding brief Fedha for DPP

Ms. Wasua for 3rd and 4th Respondents

Mr. Kaunda Court Assitant