



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CONSTITUTIONAL PETITION NO. 3 OF 2020

IN THE MATTER OF ARTICLES 40, 47, 48, 165 AND 209 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTION 3, 7, 10 OF THE KENYA REVENUE AUTHORITY

(TAX AGENTS) REGULATIONS, 2012

AND

IN THE MATTER OF SECTIONS 24, 24A (2) OF THE KENYA REVENUE AUTHORITY ACT

(CAP 469 LAWS OF KENYA)

AND

IN THE MATTER OF SECTION 52 OF THE BANKING ACT CAP 488 LAWS OF KENYA

BACHULAL NARBHERAM VYAS.....PETITIONER

VERSUS

KENYA REVENUE AUTHORITY.....1STRESPONDENT

NATIONAL BANK OF KENYA LIMITED.....2ND RESPONDENT

JUDGMENT

The Petitioner (**BACHULAL NARBHERAM VYAS**) filed this Petition alleging that his constitutional rights under **Articles 40, 47, 48, 165 and 209** of the Constitution of Kenya 2010 have been and are still being violated by the 1st Respondent (**KENYA REVENUE AUTHORITY**) and he seeks the following orders against the 1st Respondent and the 2nd respondent (**NATIONAL BANK OF KENYA LIMITED**) and for:

A declaration that:

- a) the Petitioner duly paid the 1st Respondent; income tax principal amount totalling KShs. 7,656,578/= through the 2nd Respondent as an agent of the 1st Respondent
- b) the Petitioner duly paid the 1st Respondent; VAT/PAYE principal amount totalling KShs. 1,431,493.05 through **BANK OF BARODA KENYA LIMITED**
- c) the sum of KShs. 2,598,359.95 which is largely interest/penalties is the difference between the sum claimed by the 1st Respondent of KShs. 11,686,431/= and what had been paid totalling to KShs. 9,088,071.05 which should not be levied as payment was made on time.
- d) An order directing the 2nd Respondent to pay and/or remit and/or provide proof of remittance of the sum of **KShs. 7,656,578/-** to

the 1st Respondent which sum was paid by the Petitioner on account of tax and received by the 2nd Respondent as agent of the 1st Respondent.

- e) A declaration that the Petitioner does not owe the 1st Respondent any income tax, PAYE tax, VAT or any interest and/or penalties for and arising from the years 2015 to 2018.
- f) An order of certiorari to remove into this Honourable Court and quash agency notices and freezing of the Petitioner's bank account issued by the 1st Respondent to the Petitioner's bankers, tenants and/or debtors.
- g) An order lifting the agency notices issued by the 1st Respondent to the Petitioner's tenants and bankers.
- h) An order of prohibition be issued against the 1st Respondent, its agent and/or servants from levying, demanding from the Petitioner, issuing Petitioner's tenants, bankers and debtors agency notices on account of the demand tax of KShs. 11,680,431/- and/or any other amount thereof.
- i) Costs of the Petition and interest

The said Petition is supported by the affidavit sworn by **Bachulal Narbheram Vyas**, in which he states that the 2nd respondent has at all material times been receiving and/or collecting taxes payable to the 1st respondent for and on its behalf. The Petitioner maintains that he has been paying taxes to the 1st respondent through the 2nd respondent and also through Bank of Baroda Kenya Limited (who were the appointed agents of the 1st respondent)

He explains that the procedure was that upon receipt of the monies for tax payment from him, the 2nd respondent would issue a duplicate of payment slip together with customer transaction receipt to him as evidence of payment and/or receipt of the monies paid to it by the petitioner on account of the 1st respondent.

That on diverse dates between the years 2015 and 2018, the petitioner paid income tax totalling to Kshs 7,656,578/- to the 1st respondent through the 2nd respondent. However, by a letter dated 1st November 2017, the 1st respondent demanded from the Petitioner payment of Kshs 1,347,390/- as outstanding tax dues plus penalty interest.

In response, the petitioner provided proof of payment made on numerous occasions through the 2nd respondent, and by a letter dated 9th November 2017, the 1st respondent informed the petitioner that it was in the process of carrying out a massive reconciliation with relevant institutions as to the payments of the demanded tax through its agent, namely the 2nd respondent, and that once it was through with the exercise, it would get back to the petitioner. The 1st respondent requested the petitioner to be patient, but advised him to continue remitting the required statutory payments

On 12th November, the Petitioner complained to the 1st respondent that none of his 2018 advance tax payments were appearing on his iTax ledger despite payment of the same. The petitioner laments that all advance income tax payments from the years 2015 up to and including March 2019 made to the 1st respondent to the 2nd respondent acting as its agent are not reflected.

That infact on 14th December 2019, the petitioner pointed out to the 1st respondent that out of the Kshs 11,680,431/- demanded

- i. Income principal tax amounting to a total of Ksh 7,656,578 was paid through the 2nd respondent**
- ii. VAT/PAYE totalling to Kshs. 1,431,493/05 was paid through Bank of Baroda Kenya Limited, and after the said bank provided proof on 27th January 2020, the 1st respondent credited the petitioner's account**
- iii. The difference between the sum claimed by the 1st respondent, and what has been paid is interest/penalties which should not be levied as payment was made within time**

The petitioner states that the 2nd respondent together with the 1st respondent have obtained and/or collected the sum of Ksh 7,656,578/- on account of tax from him, but have fraudulently failed to credit his account, and continue demanding for the same in an attempt to extort money from him. The particulars of fraud are pleaded as:

- Fraudulently misrepresenting that the money received from the petitioner by the 2nd respondent will be remitted to the 1st respondent, who would credit and update its system
- Refusing to credit the payments made from the 2nd respondent and Bank of Baroda Kenya Ltd
- Fraudulently demanding the sum of KShs. 11,680,431/-. Knowing too well that the same has been paid
- Refusing to return the petitioner's original payment slips and customer transaction receipts

This Petition was occasioned by the 1st Respondent's actions who has now put in motion a recovery process, by freezing the petitioner's

bank account, and arbitrarily issuing the Petitioner's tenants, bankers and/or debtors agency notices requiring them to pay and/or remit to the 1st Respondent any amounts due and/or owed to the Petitioner to the 1st Respondent on account of alleged tax arrears of KShs. 11,680,431/-.

The Petition is opposed by the 1st Respondent vide a replying affidavit sworn by **ANDREW MPUNGU (Chief Manager within the Domestic Taxes Department) of the Kenya Revenue Authority** who confirms that the petitioner's case was forwarded from the **CTAMD-North Rift** for enforcement as there were tax arrears whose breakdown he has given. He was personally involved in review of the petitioner's tax affairs and after the petitioner filed self-assessments there was tax liability. He confirmed that the tax arrears were initially shown as Kshs. 11,680,431/- made up of the principal amount, penalty and interest for Income Tax, VAT AND PAYE. The 1st Respondent position is that:

- a) The onus of proving tax payment is upon the tax payer and not the tax man;
- b) That the tax arrears in dispute herein spans over a period of Three (3) years and if the Petitioner had been diligent, he would have noted that there was a problem within the first few months and have taken deliberate steps to correct such anomalies.
- c) That the obligation to pay tax by a tax payer does not in any way violate the tax payer's right to property as is enshrined in Article 40 of the Constitution of Kenya

It is confirmed that the petitioner brought documents claiming that payments had been made as relates to the assessments made, and indeed the 1st respondent's **Eldoret Tax Station Office** informed the petitioner that the amount would be reconciled, and the 1st respondent would revert to him. Subsequently the petitioner sent to the 1st respondent copies of all payments made through the 2nd respondent and Bank of Baroda Kenya, and it was eventually noted that the payments made through the Bank of Baroda were reflecting in the 1st respondent's i-Tax system, whereas the ones made through the 2nd respondent were not reflected. So the petitioner was profiled as a top debtor and a demand was issued, and he was also notified to contact his bank details as the payments could not be traced.

The 1st respondent also sent an official request to the 2nd respondent to authenticate the purported un-reflected payments and by a letter dated 6th November 2019, the 2nd respondent stated that the transactional receipts were not genuine and did not originate from the bank, so the process of recovery of tax due and enforcement within the 1st respondent's mandate begun. As far as the 1st respondent understood, the petitioner only asked for confirmation of payments, and they had no issues with the payments made through Bank of Baroda, but the ones made through the 2nd respondent. It is pointed out that by his letter dated 14/12/2019, although the petitioner did not admit liability, he sought that the 1st respondent waives interest on the **Income Tax debt** and agreed to pay the balance of the Principal tax being **Kshs 7,656,578/-** in relation to Income Tax, and also sought a payment plan

That the petitioner had proposed a payment mode, and even started making payments amounting to **Kshs 621,743/** in a month on the VAT debt, and the 1st respondent defends its action saying the petitioner has not met his tax obligations, so the notices were not issued arbitrarily, and execution must follow. Further, that the onus of proving tax payment rests on the tax payer, and the 1st respondent has a statutory duty to demand for and make sure taxes are paid, as tax payment is a mandatory obligation

The 2nd Respondent in its Replying Affidavit states that at all material times to the Petition, the Petitioner did not have and still does not have an account with the 2nd Respondent, and the funds in question herein were allegedly deposited into a collection account operated by the 1st Respondent and all tax payers are allowed to remit their taxes into the aforementioned account. It is argued that the 1st Respondent is at liberty to furnish statements of account to ascertain whether the Petitioner actually deposited funds into the aforesaid account. Further, that the Court can also direct the inspection of the account should it deem the same necessary.

The 2nd respondent argues that after conducting a reconciliation of accounts exercise, it was not able to trace the alleged payments alluded to by the petitioner and it is evident that he failed to deposit the funds. It is emphasized that, the Petitioner did not have and still does not have an account with the 2nd Respondent, and his interactions with the 2nd Respondent were limited to the deposits that he purportedly made into the 1st Respondent's collection account held by the 2nd Respondent.

The 1st respondent points out that when the amount that was allegedly deposited by the Petitioner into the collection account held by the 2nd Respondent could not be traced following the completion of the reconciliation of accounts process, it wrote a letter dated 6th November, 2019 seeking to confirm the authenticity of the receipts that the Petitioner had provided to it as evidence that he had honoured his tax obligations in full. The 2nd Respondent contends that upon examination of the deposit slips request by the 1st Respondent, the following anomalies were noted:

- The serial numbers on the deposit slips were not consistent with the standard system generated serial numbers on the 2nd Respondent's deposit slips;
- The stamp affixed on the deposit slips was at variance with the 2nd Respondent's official stamp;
- The dates and the amounts indicated on the deposit slips aforesaid did not correspond with the amounts that were reflected in the 1st Respondent's collection account.

It is also pointed out that the 2nd Respondent vide a letter dated 26th November, 2019 stated that after conducting a verification process it established that the purported deposit slips were not genuine and did not originate from the bank. The 2nd Respondent contends that the 1st Respondent is the only entity in a position to verify whether the Petitioner actually made deposits into its collection account held by the

2nd Respondent.

In his submissions, the petitioner points out that the 1st Respondent vide its letter dated **10th December, 2019** appointed the Bank of Baroda (K) Limited as the Petitioner's agent requiring the Bank of Baroda (K) Limited to pay the 1st Respondent a sum of **KShs. 11,680,431/-** being alleged tax owed by the Petitioner which states as follows;

“Payment should be made by you immediately to the following account at Central Bank of Kenya quoting Tax Payer's name and PIN;

Tax Head	Account Name	Account No.	Amount (Kshs.)
VAT	VAT Main Collection account	1000007354	1,398,231
Income Tax	Income Tax Main Collection account	1000007338	9,317,417
PAYE	Income Tax – PAYE account	1000009877	320,983

.... note that in case of partial payment, this notice shall remain in force until the amount specified herein is fully recovered.”

The petitioner denies the assertion that the 1st Respondent did not have an issue with taxes paid through the Bank of Baroda but to the contrary the Petitioner sought clarification on PAYE and VAT paid through the Bank of Baroda that were not reflecting on his i-tax ledger which the bank clarified through its letter dated 27th January, 2020 (annexture marked “BNV 13”)

It is also pointed out by the petitioner that, the 1st Respondent in its replying affidavit replicates its letter dated 27th November, 2019 and still insists that the tax arrears demanded from the Petitioner is KShs. 11,680,431/= made up as follows;

1. Income Tax KShs. 7,656,578/= penalty thereon KShs.0, interest thereon KShs. 1,660,839 totalling to KShs. 9,317,417, (which principal amount was paid through the 2nd Respondent),
2. PAYE KShs. 217,470/= penalty thereof KShs.0, Interest thereon KShs. 103,313/= totalling to KShs. 320,783/=,
3. VAT KShs. 990,807/= penalty thereon KShs. 25,367/=, interest thereon KShs. 382,057/= totalling to KShs. 1,398,231/=.

This court is urged to note that whereas both **PAYE** and **VAT** were paid through the Bank of Baroda the 1st Respondent in its replying affidavit alleges that it did not have an issue with tax paid through the Bank of Baroda yet at in the same replying affidavit it still maintains that **PAYE** and **VAT** tax is owing when the same was paid through the Bank of Baroda. That despite the clarification by the Bank of Baroda, and the fact that the 1st Respondent being on record as not having issues with payment made by the Bank of Baroda, it has not rectified its demand which still includes **PAYE and VAT**.

As regards **INCOME TAX**, it is the Petitioner's contention that he paid for the same through the 2nd Respondent. However, the 1st Respondent disputes this. On this limb, the petitioner submits that the procedure was, and remains to date that upon receipt of monies for tax payment from the Petitioner and/or tax payer, the 2nd Respondent would issue a duplicate of payment slips together with customer transaction receipts to the Petitioner as evidence of payment and/or receipt of the monies paid on account of the 1st Respondent. That on diverse dates between the years 2015 and 2018, the Petitioner paid income tax amounting to KShs. 7,656,578/= to the 1st Respondent through its appointed agent, the 2nd Respondent.

It is argued that upon receipt of the demand from the Petitioner for payment of KShs. 1,347,390/- allegedly being the outstanding tax dues plus penalty and interest, the petitioner provided evidence of payments by availing to the 1st Respondent original payment receipts and customer transaction receipts as proof of payment of all the tax paid to the 1st Respondent.

The petitioner contends that on 28th November, 2019 his representative (**Mr. Rajesh Vyas**) visited the 1st Respondent's offices and held a meeting with the 1st Respondent's officer namely, **Fred Nyongesa and Ivy Moturi** where he explained to them that the tax arrears claimed was paid through the 2nd Respondent and the Bank of Baroda. The Petitioner vide his letter dated 14th December, 2019 informed the 1st Respondent that the Income Tax Principal amount totalling to KShs. 7,656,578/= was in fact paid through the 2nd Respondent. (See annexture marked “BNV10” at page 108 of the Petition).

It is as a result of the foregoing that the Petitioner maintains he does not owe the 1st Respondent any amount as tax arrears, as he has provided the payment slips and customer transaction receipts. The Petitioner argue that in any event, the Respondents have the capacity to involve the law enforcement agencies and cause thorough investigations into this matter which the 1st Respondent acknowledges that has affected most of its clients, and he should not be penalised for omission or commission of the Respondents.

In support of this submission, the petitioner cites the case of **Semura Engineering Limited and others vs. Kenya Revenue Authority – HC Petition No.54 of 2011 (2012) eKLR**. Where Majanja J. emphasized that;

“Kenya Revenue Authority as the state agency charged with collection of taxes is bound by the provisions of the Bill of Rights to the fullest extent in the manner in which it administered the law concerning the collection of taxes. The values contained in

Article 10 must all times permeate its functions and activities which it is mandated to carry out of by statute.”

It is further submitted that the 1st Respondent’s action is in contravention of his right to own property under Articles 40, right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair as provided under Article 47 and 50 of the Constitution of Kenya 2010.

Emphasis is made on the right to fair administrative action by citing the decision in **Judicial Service Commission vs. Mbalu Mutave (2015) eKLR**, where Githinji, JA held that;

“Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in Article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officer, state organs and other administrative bodies are now subjected by Article 47(1) to the Principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under common law was developed.”

Also in **Kenya Bankers Association vs. Kenya Revenue Authority (2018) eKLR**. Odunga (J) held that;

“In this case, the implementation of the impugned administrative decision amounts to imposition of tax upon the applicant's members in situations where they may well not be obliged to pay the same. That is clearly unlawful. The said decision is further being without the applicants' members being afforded an opportunity of being heard as to whether in the exercise of their statutory power of sale they in fact made capital gains. That is clearly procedurally unfair.”

ISSUES FOR DETERMINATION:

- I. Whether the Petition meets the threshold for a constitutional petition;
- ii. Whether the Petitioner’s reliance on the alleged forged deposit slips is calculated so as to avoid his tax obligations or had he actually made the payments.
- iii. What is the appropriate order as to costs?

WHETHER THE PETITION MEETS THE THRESHOLD FOR CONSTITUTIONAL PETITION

It is the 1st respondent’s contention that the decision to issue demand notices to the petitioner for failing to pay taxes is within its mandate and cannot amount to an unfair administrative action and reference is made to the enabling constitutional and statutory provisions to argue that the 1st respondent has the power to collect revenue from every tax payer, and where there is failure to pay taxes, then it is mandated to enforce collection measures. To bolster this position, the 1st respondent relies on the case of **REPUBLIC VERSUS KENYA REVENUE AUTHORITY EX PARTE BATA SHOE COMPANY (KENYA) LIMITED [2014] EKLR**, and that on the strength of this, the court cannot interfere with that mandate

It is argued that if the petitioner made payments to the 2nd respondent, and the same were not remitted to the 1st respondent, then the petitioner ought to file a suit for recovery of the money from the 2nd respondent, and not through a constitutional petition. It is thus submitted, that this suit is frivolous and vexatious, as the petitioner seeks to invoke a constitutional remedy on a matter where on constitutional issues are raised or proved. The 1st respondent’s counsel urges this court to rely on the case of which held that the invocation of provisions of the Constitution to allege breach of constitutional rights in addition or as an alternative to laid down procedure of seeking a particular remedy is an abuse of court process

The 2nd respondent submits that the Petition herein falls short of the threshold for a constitutional Petition as it lacks precision and particularity, and the Petitioner has merely cited omnibus provisions of the Constitution in the title of the Petition without going on to state with reasonable precision the exact provision of the Constitution that has been purportedly infringed and the manner of the infringement. Further, that **Articles 40, 47 and 48** contain numerous distinct provisions and the Petitioner ought to have made a meticulous precision as to what sub-article was infringed and by which of the Respondents. In support of this submission, the 2nd respondent draws from the case of **ANARITA KARIMI NJERU VS THE ATTORNEY GENERAL [1979] eKLR** which established the threshold for a constitutional petition, the court held as follows:

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed”.

It is contended that the petition fails to define the issues that the 2nd Respondent needs to respond to in its defence and reference is made to **H.C.C. PETITION NO. 22 OF 2014 MOMBASA, MANASE GUYO & 260 OTHERS VS. KENYA FOREST SERVICES & ANOTHER**, where the court stated:

“To succeed in their Petition, the Petitioners are required to state in a clear, concise and precise manner the correlation between

the alleged infringement and the action of the Respondent. It was not sufficient to merely cite provisions of the Constitution they believe to have been infringed but to also state the manner in which the provisions were infringed. This is because as it was held in LYOMOKI AND OTHERS VS. ATTORNEY—GENERAL [2005] E.A. 127, the onus, in constitutional Petitions, as in other ordinary civil actions, is upon the Petitioner or the Plaintiff to establish a prima facie case, and thereafter the burden shifts to the Respondents to justify the limitation to those rights”.

This court is thus urged to find that the petition is fatally defective and be guided by the case of **MUMO MATEMU V TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE & 5 OTHERS [2013] eKLR** where the court dismissed a Petition which failed to plead the alleged violation of constitutionally enshrined rights with particularity and precision.

That in any event, the petitioner has not demonstrated how the 2nd Respondent has violated his rights as is provided for in **Article 47 (Fair administrative action) and Article 48 (Access to justice) of the Constitution**.

Under the **Kenya Revenue Authority Act**, the 1st respondent is responsible for the assessment, collection, receipt and accounting for all government revenue Under section 5 (2) (a) (I) of the Act the functions of the 1st respondent are set out as follows:

2) **In the performance of its functions under subsection (1), the Authority shall— (a) administer and enforce—**

(I) all provisions of the written laws set out in Part I of the First Schedule and for that purpose, to assess, collect and account for all revenues in accordance with those laws;

(ii) the provisions of the written laws set out in Part II of the First Schedule relating to revenue and for that purpose to assess, collect and account for all revenues in accordance with those laws;

(b) to advise the Government on all matters relating to the administration of, and the collection of revenue under the written laws or the specified provisions of the written laws set out in the First Schedule;

Article 209 of the Constitution of Kenya provides that Power to impose taxes and charges

(1) Only the national government may impose—

(a) income tax;

(b) value-added tax;

(c) customs duties and other duties on import and export goods; and

(d) excise tax.

Under Part I of the Kenya Revenue Authority Act, the 1st respondent administers inter alia the Income Tax Act and the Value Added Tax Act (VAT Act).

In step with its mandate the 1st respondent vide its letter dated 27th November, 2019 demanded for payment of **PAYE, VAT and INCOME TAX** (See annexure “BNV 9b”), the Petitioner then sought clarification from the Bank of Baroda (as shown by annexure marked “BNV11”), Bank of Baroda then wrote to the 1st Respondent vide letters dated 27th January, 2020 confirming the payment of **VAT and PAYE** and attaching the system generated slips (annexures marked “BNV13”). Would this then mean that in equal measure, the petitioner had actually made payments to National Bank of Kenya (the 2nd respondent)?

The 1st Respondent vide its letter dated 9th November, 2017 while making reference to its letter dated 1st November, 2017 informed the Petitioner that it was in the process of massive reconciliation with the relevant institutions and that once they are through with the exercise, it will revert back to the Petitioner. The 1st Respondent thus requested the Petitioner to be patient and to continue remitting the required statutory payments.

Indeed, the Petitioner complained to the 1st Respondent that all advance income tax payment for the year 2015 up to and including March, 2019 made through the 2nd Respondent (National Bank of Kenya Limited) were not reflecting on his i-Tax ledger but the payments made through Bank of Baroda Kenya Limited were reflecting.

The 1st Respondent vide its letter dated 9th July, 2019 responded to the Petitioner's letter dated 16th May, 2019 stating that:

“We refer to the above and hereby inform you that we are in receipt of the same and the relevant documents provided for our perusal. We also note with concern the un-reflected instalments paid for the mention periods i.e. 2015, 2016, 2017 and 2018. Kindly note that this is something that has affected most of our clients and we are reconciling from the previous years to date.

In the meantime, we are in the process of reconciling your records provided to us by National Bank of Kenya Limited. Kindly bear with us and will revert to you once we are through with the exercise.”

According to the respondents, the receipts /paying slips purported to have been issued by the 2nd respondent were, upon scrutiny found to be fake. Of course there would be the question as to whether they have been subjected to expert scrutiny by a document examiner. There is also the apt observation made by the 1st respondent, that if indeed the petitioner had made payments to the 2nd petitioner, and that these were not remitted, then it has an avenue of redress to seek recovery from the 2nd respondent by filing a civil suit. I do not think that would be a reason to tell the 1st respondent to stop carrying out its statutory duty of demanding for unpaid taxes.

Whereas Article 47 of the Constitution of Kenya provides that:

47. Fair administrative action

(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.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration.

The petitioner has not demonstrated how the decision to issue a demand and enforce recovery amounts to an unfair administrative action made ultra vires the powers donated to the 1st respondent or fails to implement public policy, or are out rightly illegal

Secondly as regards the transactions between the petitioner and the 2nd respondent, there exists a different avenue of redress through which the petitioner can pursue his grievance and not a constitutional petition. Indeed, the complaint has all the features of a debt recovery litigation I find legal rational in the words of Lord Diplock in **HARRIKSON VS ATTORNEY GENERAL OF TRINIDAD AND TOBAGO (1980) AC 265** to the effect that

“... the mere allegation that a human right or a fundamental freedom of the applicant has been or is likely to be contravened is not itself sufficient to invoke the jurisdiction of the court ... if it is apparent that the allegation is frivolous or vexatious, or an abuse of court process as being more solely for the purpose of avoiding the necessity of applying in the normal way for appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom”

I hold that this petition does not meet the threshold to entitle i to be a constitutional petition and there is an alternative remedy other than a Constitutional Petition.

WHETHER THE PETITIONER CAN PLACE RELIANCE ON PURPORED FORGED DEPOSIT SLIPS TO AVOID HIS TAX OBLIGATIONS

The Petitioner insists that he deposited a sum of Kshs. 7,656,578.00 into the 1st Respondent’s collection account held by the 2nd Respondent, whilst the 1st Respondent maintains that the alleged payment does not reflect in their accounts, and the 2nd Respondent contends that the deposit slips that the Petitioner wishes to rely on are not genuine and do not originate from them. The 2nd respondent refers to **section 112 of the Evidence Act** which provides that in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him. On this basis, this court is urged to cause the 1st Respondent’s collection account to be inspected in light of the provision of **section 140(2) of the Evidence Act**.

Is there a basis for this court to declare that declaration that the Petitioner duly paid the 1st Respondent; income tax principal amount totalling KShs. 7,656,578/= through the 2nd Respondent as an agent of the 1st Respondent; and that the Petitioner duly paid the 1st Respondent; VAT/PAYE principal amount totalling KShs. 1,431,493.05 through **BANK OF BARODA KENYA LIMITED**. Is there justification in (b) An order directing the 2nd Respondent to pay and/or remit and/or provide proof of remittance of the sum of KShs. 7,656,578/- to the 1st Respondent which sum was paid by the Petitioner on account of tax and received by the 2nd Respondent as agent of the 1st Respondent.

It is argued that it is not uncommon for tax payers to attempt to place reliance on deposit slips in attempts to avoid meeting their tax obligations, and that this court ought to take note that in the instant case the deposit slips relied upon by the Petitioner are forged as there is no corresponding amount credited into the 1st Respondent’s account. That there is a possibility that the Petitioner was defrauded of his funds by his representatives who were entrusted to make deposits into the 1st Respondent’s account held by the 2nd Respondent as was the case in **MULTI CHOICE KENYA LIMITED V MAINKAM LIMITED & ANOTHER [2019] eKLR**

Surely there would be no justification for such pronouncements, as the veracity of the documents sought to be relied on is in issue. The issue of forgery/fraud and remittance of the sums still remains moot. It would defeat logic and end up muzzling the 1st respondent’s statutory duty for this court to deign to declare that notices should not issue nor order that the 1st respondent should not effect any enforcement measures including freezing of accounts. How can notices be lifted without proof of full payment of the taxes due? An order of certiorari to remove into this Honourable Court and quash agency notices and freezing of the Petitioner's bank account issued by the 1st Respondent to the

Petitioner's bankers, tenants and/or debtors would have no leg on which to stand and remains rather wobbly!

Interest/Penalties: As regards levying of interest/penalties, it is submitted by the petitioner that the sum of KShs. 2,598,359.95 is largely interest/penalties and the difference between the sum claimed by the 1st Respondent of KShs. 11,686,431/= and what had been paid totalling to KShs. 9,088,071.05 which should not be levied as payment was made on time. Is this a constitutional issue really? That the court ought to make a declaration that the Petitioner does not owe the 1st Respondent any income tax, PAYE tax, **Section 24 (2) of the KRA Act** provides:

If any person fails to remit any revenue in accordance with subsection (1) on or before the due date, a penalty of twenty percent of the amount due shall become due and payable, and thereafter an interest of two percent per month or part thereof until the amounts are remitted in full. The issue regarding full payment still remains an unsettled one, and it would be premature to make such declaration.

The only prayer that succeeds, and really I do not know why it even needs to be formally made (since the 1st respondents concedes) is that the Petitioner duly paid the 1st Respondent; **VAT/PAYE** principal amount totalling **KShs. 1,431,493.05** through **BANK OF BARODA KENYA LIMITED** ...but I must point out that even this is NOT a constitutional issue

ORDER AS TO COSTS

Generally costs follow the event, and the 2nd respondent cites the case of **MORGAN AIR CARGO LIMITED V EVREST ENTERPRISES LIMITED [2014] eK** which discussed the meaning of the word "event" to mean the result of all the proceedings to the litigation, and that the expression "the costs shall follow the event" means that the party who on the whole succeeds in the action gets the general costs of the action, and the costs of any particular issue go to the party who succeeds upon it. It is submitted that since the Petition herein lacks merit and ought to be dismissed, the costs should be awarded to the 2nd Respondent, who in any event has not violated the Petitioner's constitutional rights. In the present instance, the event is that the respondents have successfully resisted the petition which is hereby dismissed for lack of merit, and costs are awarded to the two respondents.

Virtually Delivered and dated this 22nd day of July 2020 at Eldoret

H.A. OMONDI

JUDGE

Miss Odwa for Petitioner

Miss Chelangat for 1st respondent

Miss Khadambi for 2nd Respondent