



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA.**

**JUDICIAL REVIEW CASE NO. 2 OF 2017**

**ALLAN WAIHUMBU NJUGUNA.....APPLICANT**

**VERSUS.**

**KENYA REVENUE AUTHORITY.....1<sup>ST</sup> RESPONDENT**

**HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT.**

The Exparte Applicant, Allan Waihumbu Njuguna filed this Notice of Motion dated 30<sup>th</sup> March 2017 brought (Pursuant to Order 53 rules 3(1) of the Civil Procedure Rules, Sections 8 and 9 of Law Reform Act CAP 26 of Laws of Kenya, ARTICLE 47 of The Constitution and the Fair Administrative Actions Act) seeking orders;

**1. THAT an order of certiorari be used to remove into this honourable court and quash the Agency Notice issued by the 1<sup>st</sup> Respondent dated 9<sup>th</sup> February 2017.**

**2. THAT an order of prohibition be issued restraining the 1<sup>st</sup> Respondent from issuing any further Agency Notice4s to its clients and or bankers.**

**3. THAT costs be in the cause.**

The grounds upon which the application is premised are that;

- a. The 1<sup>st</sup> Respondent has demanded payment of tax without noting that the exparte applicant has already cleared and any subsequent demands for payment shall be double payment.
- b. The 1<sup>st</sup> Respondent has proceeded to enforce the collection thereby depriving the exparte applicant the right to pursue its statutory guarantees within the procedures set out in the Tax Procedures Act.
- c. The Agency Notice issued on 9/2/2017 was issued in bad faith and or ulterior and improper motives.
- d. The premature issuance of the Agency notice amounts to an abuse of the 1<sup>st</sup> Respondent's authority.
- e. The Agency Notice is ultra vires the 1<sup>st</sup> Respondent's authority and is extremely unreasonable.
- f. The Agency Notice contravenes the exparte applicant's legitimate expectation.
- g. The Agency Notice contravenes the exparte applicant's proprietary rights under Article 40 of the Constitution.
- h. The Agency notice is inconsistent with the law.

The application is supported by the supporting affidavit of the exparte applicant who reiterates the grounds of the application. The applicant further depones that he is a businessman trading in the name and style of Mwireri Mbao Stores. The Respondent Kenya Revenue Authority made demands that the Applicant file Income Tax Returns which he did for the years 2015, 2016, 2009, 2011, 2013, which taxes were all paid and acknowledged. The 1<sup>st</sup> Respondent then despite the tax payments issued a demand for Kshs.731,673 which the applicant contends had been paid and then went a head and issued agency Notice to Managing Director KCB to pay the money held by them in accordance with the Section 42 of the Tax Procedures Act. The applicant depones that any payment for the demanded amount will mean double payment and therefore prejudicial to the applicant.

The 1<sup>st</sup> Respondent filed a Replying Affidavit sworn by Asha K. Salim a Manager at the Respondents Taxes Department in the opposing application. She deponed that there are established Mechanism within the Tax Procedures Act 2015 to address the applicants grievances and in particular Section 51 of the Tax Procedure Act which provides;

1. A taxpayer who wishes to dispute a tax decision shall first lodge an objection against the tax decision under this Section before

proceeding under any other written law.

2. A taxpayer who disputes a tax decision may lodge 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 taxpayer 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 under the assessment that is not in dispute.
4. Where the Commissioner has determined that a notice of objection lodged by a taxpayer has not been validly lodged, the Commissioner shall immediately notify the taxpayer in writing that the objection has not been validly lodged.
5. Where the tax decision to which a notice of objection relates is an amended assessment, the taxpayer may only object to the alterations and additions made to the original assessment.
6. A taxpayer may apply in writing to the commissioner for an extension of time to lodge a notice of objection.
7. The commissioner may allow an application for the extension of time to file a notice of objection if – (a) the taxpayer was prevented from lodging the notice of objection within the period specified in subsection (2) because of an absence from Kenya, sickness or other reasonable cause; and (b) the taxpayer did not unreasonably delay in lodging the notice of objection.
8. Where a notice of objection has been validly lodged within time, the Commissioner shall consider the objection and decide either to allow the objection in whole or in part, or disallow it, and Commissioner’s decision shall be referred to as an “objection decision.”
9. The Commissioner shall notify in writing the taxpayer of the objection decision and shall take all necessary steps to give effect to the decision, including, in the case of an objection to an assessment, making an amended assessment.
10. An objection decision shall include a statement of findings on the material facts and the reasons for the decision.
11. Where the Commissioner has not made an objection decision within sixty days from the date that the taxpayer lodged a notice of the objection, the objection shall be allowed.

Further she deponed that by letter dated 20<sup>th</sup> September 2016 the 1<sup>st</sup> Respondent informed the applicant of the outstanding tax; he did not object as per the requirements of Section 51(1) and that the amount demanded and details are as per paragraph 10 of the further affidavit being Tax unpaid since 2001 made up of as hereunder;

**INCOME TAX:**

YEAR OF INCOME	TAX LIABILITY	REMARKS
2001	1,200	Late filing penalty
2008	43	Return Balance
2009	444,571	Return Balance
2011	1,200	Late filing penalty
2012	120	Return Balance
2013	1,000	Late filing penalty
2014	1,000	Late filing penalty
2015	87,478	Return Balance
TOTAL	537,692	

**VAT:**

<b>MONTH</b>	<b>PRINCIPAL TAX</b>	<b>INTEREST</b>	<b>TOTAL TAX</b>
2015 JUNE	62,074	11,785	73,859
2015 AUGUST	71,200	10,166	81,366
2016 APRIL	38,756		38,756
<b>TOTAL</b>	<b>172,030</b>	<b>21,951</b>	<b>193,981</b>

After reconciliation of the payments made by the applicant the 1<sup>st</sup> Respondent has established;

**1. THAT the amount due and payable is Kshs.605, 439.00 which is broken down as follows:-**

**VAT - Kshs.155,225/= and;**

**Income Tax - Kshs.450,214/=.**

By consent of the Counsel for the parties this application was canvassed by way of written Submission. Mr. Oyano for the exparte applicant submitted that this application is premised on the action of the 1<sup>st</sup> Respondent in issuing Agency Notices to KCB for collection of Kshs.731.673 tax arrears which act was illegal, unreasonable and malicious. This is more so given that the exparte applicant tendered to the 1<sup>st</sup> Respondents Manager in Bungoma all evidence to show that he did not have tax arrears but the said Manager ignored the same. He submits that evidence of this is that although in the Agency Notice, the 1<sup>st</sup> Respondent stated that exparte applicant owed Kshs.731,673/= in the sworn affidavit filed in court they amount is now Kshs.605,439/=.

Mr. Twahir for the 1<sup>st</sup> Respondent submitted that the act of the exparte applicant to file this application was pre-mature as he had not submitted himself to the process and remedies available to him under the Tax Procedures Act. Counsel further submitted that having not exhausted all the Internal mechanism for appeal or review under written law, this court has no jurisdiction to issue the orders sought. He referred this court to the decision in;

**i) Nairobi Constitutional & Human Rights Division Petition No. 4 of 2017: Gibb Africa Limited Vs. Kenya Revenue Authority [2017] eKLR**

**ii) Mombasa Constitutional & Judicial Review Division Judicial Review No. 2 of 2017: Port Freight Terminals Limited Vs. Kenya Revenue Authority [2018] eKLR**

From the application, Responses and submissions by Counsels I find that the following are not disputed.

1. That the exparte applicant is a taxpayer.
2. That the 1<sup>st</sup> Respondent is the body mandated to collect taxes under the VAT and Income Tax Law.
3. That the 1<sup>st</sup> Respondent in its duty assessed an demanded tax arrears from the exparte applicant.
4. That the exparte applicant disputed both the assessment and demand.
5. That the 1<sup>st</sup> Respondent then issued an agency notice to KCB the exparte applicant's bank for recovery of the sum of Kshs.731,673/=.

From the foregoing the issues for determination by this court are;

- 1). Whether this court has Jurisdiction to hear and determine this application and;
- 2). Whether the court should grant the prayers sought by the exparte applicant.

Mr. Onyando for the exparte applicant submits that; this court has Jurisdiction to hear and determine this application because the Respondent issued agency Notices in respect of the Exparte applicant without affording a hearing which goes against the rules and principles of natural justice. He submitted that although the exparte applicant was served with a demand letter, he responded and later served with the Agency order. He urges this court to be guided by the decision in Rep Vs. Commissioner – General KRA Exparte Martin M. Magi 218

eKLR. Mr. Twahir for the Respondent submits that this application is before court pre-maturely because set mechanisms from resolution of the dispute have not been complied with.

This is a Judicial review application. The prayers under Judicial review are available to the exparte applicant where it is shown, that a decision was made by a body without jurisdiction or exceeded its jurisdiction, or the process leading to the decision making was unfair; or that the decision made is unreasonable. The Judicial review court will not usually concern itself with the merits of the decision by the body. The purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected, and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. As was held in **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited, (2008) eKLR**, 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.

Therefore, it follows that in its determination of the instant application, this Court is not concerned with the issue whether the Applicant was liable to pay the taxes demanded or not. That is an issue which goes to the merit rather than the process, as was held in **Pili Management Consultants Ltd vs. Commissioner of Income Tax, Kenya Revenue Authority Civil Appeal No. 154 of 2007.**

In this application the exparte application is challenging the agency notice issued on the basis that he has demonstrated that the tax demanded is not due from him. He has done that by the explanation by auditors but the Respondent went ahead to issue agency notice. What is being challenged is the sum demanded from the exparte applicant; Basically the issue is on tax assessment. This being so Section 51 of the Tax Procedure Act provides;

1. A taxpayer who wishes to dispute a tax decision shall first lodge an objection against the tax decision under this Section before proceeding under any other written law.
2. A taxpayer who disputes a tax decision may lodge notice of objection to the decision, in writing, with the Commissioner within thirty days of being notified of the decision.

Where a clear mechanism and procedure has been set up by law to resolve disputes, the High Court should restrain itself in interfering with that process unless it has been demonstrated that the body is unwilling to resolve the dispute, frustrating the applicant or acting with unreasonableness which will attract the intervention of the court.

In this application the applicant has not availed himself to the dispute resolution mechanism availed under the Tax Procedure Act. Having not shown to have exhausted the internal mechanism provided, I am unable to grant the orders sought and direct the Exparte applicant to submit himself to the procedures provided for. To enable him do so I grant stay of execution of the agency orders for 60 days to enable the exparte applicant avail himself to the Mechanism under Section 51 of Tax Procedure Act and decision made thereon.

**Dated and Delivered at Bungoma this 28<sup>th</sup> day of May 2019.**

**S.N. RIECHI**

**JUDGE**