REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

JUDICIAL REVIEW NO.51 OF 2011

DHOKIA TRANSPORTERS.....APPLICANT

VERSUS

KENYA REVENUE AUTHORITY.....RESPONDENT

J U D G M E N T

The *ex- parte'* applicant, Dhokia Transporters Limited filed a Judicial Review application seeking the following orders against Kenya Revenue Authority :

1. **Certiorari removing and bring(sic) into the High Court the decision of Kenya Revenue Authority dated 19th October 2011directing among others, Bank of Baroda Kisumu Branch, Steel Center Limited Kisumu, Kibos Sugar and Allied industries Limited Kisumu, Kapa Oil Refineries Limited Nairobi and Keysian(Kyasian) Auctioneers Nairobi or any other agent or whomsoever to be its agent for purposes of collecting Kshs. 40,613,991/- or any lesser sum or at all for purposes of being quashed.**
2. **Prohibition to made prohibiting Kenya Revenue Authority from pursuing the said decision or action or recommendation dated 19th October 2011 against the applicant directing the aforesaid entities or any other person or legal entity or whomsoever to be its agents for purposes of collecting Kshs. 40, 613,991/-or any lesser sum or at all.**

EX-PARTE APPLICANTS' CASE

The Motion is premised on the grounds set out in the statutory statement filed herein on 31st October 2011 and amended on 29th March 2012 verifying affidavit sworn by Jitendra A. Dhokia on 31st October 2011 and the further affidavit of Jitendra Dhokia sworn on 29th March 2012. The deponent is one of the directors of the ex- parte applicant herein. According to him, the ex-parte applicant is a duly registered tax payer Pin No. P00062702N. That on the 31st October 2011 the applicant received various letters dated 19th October 2011 from the Respondent(hereinafter KRA) addressed to Bank of Baroda Kisumu Branch, Steel Center Limited Kisumu, Kibos Sugar and Allied industries Limited Kisumu, Kapa Oil Refineries Limited Nairobi and Keysian(Kyasian) Auctioneers Nairobi and copied to the applicant, appointing the above mentioned as its agents for purposes of collecting and remitting the sum of Kshs. 40, 613,991/- allegedly being taxes owing and due to it. That 28th of October, 2011, in compliance with the said letters, Kyasian Auctioneers went ahead to proclaim and distrain the applicant's entire fleet of 36 motor vehicles and other goods thus bringing the applicant's operations to a halt. That the applicant was not allowed a chance to be heard before the decision was reached and actualised.

Mr. Dhokia deponed that on 1st October 2010, he received a notice of intention to audit for assessment. He noticed that the audit was intended even for the year 2006 which period had already been covered by a previous audit. He enquired from KRA why the year 2006 was included in the intended audit. That

thereafter they held a series of meetings with KRA as a result of which KRA agreed to have a fresh examination of the applicant's financial records. On 23rd June 2011, KRA issued a fresh computation of taxes due in the sum of Kshs. 42,989,931.00/- and a notification of formal assessments of tax in respect of the sum computed would be issued within seven days. After the passing of the seven days, the deponent wrote to KRA on 5th July 2011 and raised questions as to why items conclusively dealt with in the earlier audit were being raised and called upon KRA to address the issues.

According to Mr. Dhokia, the applicant did not receive a reply to his letter of 5th July 2011 and that he was only surprised to receive an urgent telephone call from the applicant's banker informing him of the agency notice issued by KRA for collection of taxes. That later, he was able to retrieve from the offices of the applicant's accountants, M/S V.P Patel &Co , a copy of a notice of assessment dated the 9th September, 2011 which was never served to the applicant as is required under Section 78 as read together with section 128(2) of the Income Tax Act cap 470. That as a result of the failure and neglect by KRA to serve the notice upon the applicant as is required by the law, the applicant was denied its statutory right to respond to the notice. It is the applicant's case that KRA which is a public body has acted improperly, without regard to the rules of natural justice and in violation of specific sections of the Income Tax Law.

The applicant also filed written submissions highlighted by its Counsel Mr. Mwasigwa where it reiterated the contents of the further affidavit sworn by Mr. Dhokia and the amended statement. It argued that the consequence of the non delivery of the notice of assessment to the applicant is that there could not have been attachment of liability for the tax charged in the said notice under section 92(2)(b)(ii) of the Income Tax Act which stipulates that liability would attach within thirty days from the date of service of the notice of assessment.

KRA'S CASE

The case for the respondent is set out in the affidavit of Peter Macharia Mwangi sworn on 22nd November 2011 in reply and opposition to the application, and written submissions. Mr. Mwangi deponed that the applicant was first served with a Notice of Intention to audit under Section 56 of the Income Tax Act and section 30 of the Value Added Tax Act on 1st October 2010. That the applicant was supposed to avail its financial record so as to enable KRA come up with a computation of the taxes due but the applicant failed to provide the same. Mr. Mwangi stated further that due to the applicant's failure to provide the necessary records, KRA assessed the taxed payable based on the records previously availed. KRA's findings were served on the applicant vide its letter dated 23rd June 2011 and later its tax audit findings and tax demand was served on 9th September 2011.

It was deponed further that the applicants right to object to the findings were highlighted to him under heading No. 6 of the letter as "***Your rights under the law"*** in which the applicant was invited to file a notice of objection to the finding. That it is therefore not true that the applicant was not allowed a chance to be heard as alleged.

In its written submissions, KRA submitted that Section 128 of the Income Tax Act has a clear stipulation to shed light on how notices are to be served and that KRA has already shown that it indeed served the notice upon the applicant. That the applicant had appointed the firm of V.P Patel &Co. as its agent under Part VIII Returns and Notices of Income Tax and it is through its agent that it was served.

KRA argued further that the applicant's application did not meet the tenets of judicial review whose jurisdiction is limited to procedure followed as opposed to determination on disputed issues of fact. KRA pointed the court to the case of **REPUBLIC VS.- CABINET SECRETARY, MINISTRY OF INTERIOR & CO-ORDINATION OF NATIONAL GOVERNMENT & 2 OTHERS EX-PARTE KISIMANI HOLDINGS LTD[2015]eKLR.** It urged the court to dismiss the application with costs.

ANALYSIS AND DETERMINATION

The application herein raises two major issues for determination as follows:

a. **Whether the applicants were denied a chance to be heard, and consequently**
b. **Whether the applicants have established a case for Judicial Review orders.**

It would appear that the main contention in this matter is the issue of service of the notice of assessment and audit dated 9th March 2011. It is the determination whether the applicant was served that would establish whether the applicant was allowed to be heard or not. This is because the notice contained clause No. 6 which invited the applicant to file an objection if need be in exercise of its statutory right.

It is the case for the applicant that the notice was not served upon him and instead it was served upon its accountant the firm of M/S V.P Patel. The applicant argued that under section 78 and 128 of the Income Tax Act, KRA is obliged to serve the notice on the applicant in person. That service upon the accountant was negligent and also a way of denying it its right to object. On the other hand KRA argued that the firm of Accountants was the applicant's agent through which previous correspondences had passed and that the applicant had not discharged them as their accountant. As such, it was their argument the service was good for all purposes.

Section 78 of the Income Tax Act provides as follows:

> **Service of notice of assessment, etc.**
>
> **The Commissioner shall cause a notice of an assessment or provisional assessment, instalment assessment to be served on each person assessed, and such notice shall state the amount of income assessed and the amount of tax payable and shall inform the person assessed of his rights under section 84 of this Act:**
>
> **Provided that no notice need be served in the case of a person deemed to have been assessed under section 74(2) or 74A(2).**

Similarly Section 128 of the Act provides:

Service of notices, etc.

1 Where under this Act any notice or other document is required or authorized to be served on or given to the Commissioner, then that notice or other document may be so served or given—

(a) by delivering it personally to an officer; or

(b) by leaving it at the office of an officer; or

(c) by sending it by post addressed to an officer in his official capacity.

2 Where under this Act any notice or other document is required or authorized to be served on or given to any person by the Commissioner, then such notice or other document may be so served or given by addressing it to that person, or, where such person is a company, to the principal officer or secretary of such company, and—

a delivering it personally to him; or

b leaving it at his usual or last known place of address or the address shown on the latest return of income furnished by him or on his behalf to the Commissioner; or

c sending it by post addressed to his usual or last known place of address or to a post office box

rented in the name of such person or of his employer or to the address shown on the latest return of income furnished by him or on his behalf to the Commissioner;

d by public notice through print media of national circulation.

3 Where a notice or other document is served or given by post, service shall, in the absence of proof to the contrary be deemed to have been effected—

a where it is sent to any address in Kenya, ten days after the date of posting;

b where it is sent to any address outside Kenya, at the time at which the notice would be delivered in the ordinary course of post,

and in proving service it shall be sufficient to prove that the envelope containing the notice or other document was properly addressed and was posted:

Provided that where the person to whom a notice or other document has been sent by registered post is informed of the fact that there is a registered letter awaiting him at a post office, and such person refuses or neglects to take delivery of such letter, and the letter consists of a notice or other document, then service of such notice or other document shall be deemed to have been effected.

(4) Where the income of any person is assessable and chargeable in the name of any other person, then if any notice or document which is required or authorized to be served on or given to such first mentioned person is served on or given to the other person such notice or document shall be deemed also to have been served on or given to the first mentioned person

From the foregoing sections it is crystal clear that any notice or document from the commissioner ought to be served on the individual and in case of a company the notice ought to be served on the principal of the company or the secretary. In our present case, the applicant argues that the notice was served on its accountant and it only got to know of it when KRA appointed agents for purposes of collection of the taxes. KRA has not disputed this fact; it is its case that the firm of V.P Patel & Co. was the applicant's agent appointed under Part VIII- Returns and Notices of Income Tax. through which previous correspondences had been made.

A look at the notice in question reveals that the same was addressed to the Managing Director of the applicant and copied to V.P Patel &Co. It however does not contain a receiving stamp to show whether the same was received by the applicant or its accountant. However, it is clear that although other correspondences could have been through the firm of accountants, Section 128(2) is very clear that in case of notices from the commissioner the same ought to have been served on the applicant's principal or secretary. Other correspondences may have been through the accountant but the notice ought to have been done as provided by the law. That way the applicant would not have heard a leeway to state that it was condemned unheard.

G.V ODUNGA J in **REPUBLIC V KENYA MEDICAL PRACTITIONERS AND DENTISTS BOARD & 2 OTHERS [2013] eKLR** WHILE QUOTING FROM **THE SUPREME COURT PRACTICE 1997 VOL 53/1-14/6:** stated in that regard as follows:

> **“the remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself. "It is important to remember in every 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 has been subjected and that it is no part of that purpose to substitute by law the decision in the matter in question....The Court will not.....on a judicial review application act as a Court**

of Appeal from the body concerned, nor <u>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 was not within that body's jurisdiction."</u>

In a similar vein, in the case of **<u>KAMANI VS. KENYA ANTI-CORRUPTION COMMISSION [2007] 1 EA 112:</u>** The court expressed itself on issue of the scope of Judicial Review as follows:

> **"The remedy of judicial review is concerned with the reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision making process. It is important to remember in every 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 has been subjected and that it is not part of that purpose to substitute the opinion of the Judiciary or individual Judges for that of the authority constituted by law to decide the matters in question...."**

The Court concluded thus:

> **The mandate of the Court is to ascertain if the implied duty to act fairly has not been discharged and if the implied duty to act fairly has not been discharged the court would have the power to quash the decision so that [the authority] can make it again in accordance with the law. The Court cannot, however substitute its own decision and impose its own conditions, as this would be a usurpation by the Court of the power clearly vested in [the authority]. Similarly, [the authority's] decision and conditions can be attacked on being unreasonable or that irrelevant considerations taken into account or relevant considerations having been ignored."**

Guided by the foregoing laid out principles, I find that though it is not the place of this court to interfere with the exercise of discretion conferred on KRA, it is obvious that in this case the discretion was exercised unfairly in that the notice was not served on the applicant but an agent a fact it has admitted. It is therefore my conclusion that its decision ought to be quashed so that the right procedure can be followed by issuing the notice through the right channel and in accordance with the law and allowing the applicant a chance to raise its objection.

For the foregoing reasons the application is allowed with costs to the applicants.

Dated, signed and delivered this 26th day of April, 2016.

H. K. CHEMITEI

<u>J U D G E</u>