REPUBLIC OF KENYA

HIGH COURT OF KENYA

AT MOMBASA

JUDICIAL REVIEW APPLICATION NO. 57 OF 2010

REPUBLIC..... APPLICANT

VERSUS

KENYA REVENUE AUTHORITY..... RESPONDENT

EX PARTE:

1. ABDALLA BREK SAID T/A AL AMRY DISTRIBUTORS

2. FAUD ABDALLA BREK SAID

3. FAHMY ABDALLA BREK SAID

4. FARID ABDALLA BREK SAID

5. FAHID ABDALLA BREK SAID

RULING

Introduction

1. For determination is the Notice of Motion dated 25th November, 2014 and filed on 26th November, 2014 in which the Ex- Parte Applicants sought the following orders -

> **(a) An order of certiorari do issue to remove into this Honourable Court for the purpose of being quashed the decision contained in the Respondent's Additional Assessments computations all dated 11th September, 2014 and Demand Notices all dated 31st October, 2014 demanding alleged unpaid tax amounting to Kshs. 601,120,545/- from the 1st Applicant; Kshs. 62,142,545.49 from the 2nd Applicant; Kshs. 466,177,136.72 from the 3rd Applicant; Kshs. 14,591,595.97 from the 4th Applicant and Kshs. 16,196,764.00 from the 5th Applicant.**
>
> **(b) An order of prohibition do issue to prohibit Kenya Revenue Athority from acting upon, implementing and/or issuing any collecting Agency Notices in respect thereof for the collection or payment to the Respondent of the sum of:-**

Kshs. 601,120,545.00 from the 1st Applicant or such other sum;

Kshs. 62,142,545.49 from the 2nd Applicant or such other sum;

Kshs. 466,177,136.72 from the 3rd Applicant or such other sum;

Kshs. 14,491,595.97 from the 4th Applicant or such other sum; and

Kshs. 16,196,794.00 from the 5th Applicant or such other sum; and from continuing to wrongfully, unlawfully and unprocedurally demand from the Applicants any monies on account of alleged tax due from the Applicants for the tax years as specified in the Additional Assessments dated 11th September, 2014 and Demand Notices dated 31st October, 2014.

(c) Any other further Orders/directions as may be deemed just to be granted.

(d) Costs of the application be provided for.

2. The Application is supported by the Statutory Statement dated 11th November, 2014 and a Verifying Affidavit sworn by ABDALLA BREK SAID on 11th November, 2014 and a Further Affidavit sworn by the same deponent on 16th February, 2014.

3. The Application is opposed by the Respondents through the Replying Affidavit sworn by EDWARD KARANJA on 16th December, 2014.

The Ex-Parte Applicants' Case

4. The Ex-Parte Applicants' case is that the Respondent computed and generated additional tax assessments for the years 2008 and 2013 in respect of income tax ledger account of the 1st Applicant and those of the other Applicants dated 11th September, 2014. However, in the notices dated 31st October, 2014 addressed to the Ex-Parte Applicants, the amount of additional tax is not disclosed.

5. It was the Ex-Parte Applicants' contention that the Respondent did not afford them an opportunity to be heard before issuing the additional assessments in breach of the rules of natural justice and mandatory provisions of the Income Tax Act and Value Added Tax. The Ex Parte Applicants contended that they were not served with the Respondent's letters dated between 21st and 23rd July, 2014 in which the Respondent had raised questions over the Ex-Parte Applicants' income declaration. The Ex Parte Applicants further denied that they received the Respondent's letters of demand of additional tax dated 31st October, 2014.

6. The Ex Parte Applicants contended that the Respondent's decision to demand additional tax is an abuse of statutory power, is unreasonable and irrational. Further, that the decision was made in bad faith, in error of fact and in breach of the rules of natural justice. The Ex Parte Applicants further contend that the Respondent's decision is an abuse of statutory discretion, is an infringement of the Ex Parte Applicant's constitutional rights, is biased, oppressive, malicious, vexatious, arbitrary and *ultra vires* the provisions of the Income Tax and Value Added Tax.

The Respondent's Case

7. The Respondent stated that it carried out preliminary investigations which revealed tax discrepancies and that the Ex Parte Applicants were invited to give clarification on the discrepancies. Each of the Ex Parte Applicants was served with the initial investigation findings and given 30 days to respond to the queries raised. Upon expiry of the 30 day window period, and in the absence of a response from the Ex Parte Applicants, the Respondent proceeded to raise and formally issue the Additional Assessments to the Ex Parte Applicant.

8. The Respondent contended that its letters dated between 21st and 23rd July, 2014 in which it had raised tax questions were served on the Ex Parte Applicants through their advocates, and that the demand notices dated 31st October, 2014 were served upon the Ex Parte Applicants via registered post in accordance with **section 128** of the Income Tax Act.

9. It is the Respondent's case that under **section 84** of the Income Tax Act (Cap. 470 Laws of Kenya), the Ex Parte Applicants ought to have raised their objection to the tax assessment within 30 days of service by the Commissioner. The Ex Parte Applicants did not raise any objection as provided for in the said section hence the Respondent sent to the Ex Parte Applicants demand notices for taxes.

10. The Respondent contended that the application is premature and ill-advised as the Ex Parte Applicants are yet to exhaust available administrative remedies.

Issue for Determination

11. The issue for determination by this court is whether the Ex-Parte Applicants are entitled to the judicial review remedies sought.

Analysis

12. To start with, I wish to state that the purpose of a judicial review court is not to look at the merits of the decision being challenged but at the process through which the decision was made. I rely on the following paragraph from the case of **REPUBLIC VS. SECRETARY COUNTY PUBLIC BOARD & ANOTHER EX PARTE HULBAI GEDI ABDILLE [2015] eKLR**:

> "At this stage it is important to revisit the parameters of judicial review jurisdiction. The said parameters were set out by the Court of Appeal in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd (Civil Appeal No. 185 of 2001)** in which it was held that:
>
> > **"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters…The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision."**

13. In **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR** it was held that 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**.

14. This court will therefore not look at whether the amounts indicated as owing from the Ex arte Applicants were the right amounts of tax arrears. Put differently, it is not the duty of this court to delve into the question of how much income the Ex Parte Applicants earned and how much tax they were supposed to pay. The court's mandate is to answer the question of whether the Respondent had the power to raise those figures and whether in arriving at the figures, the Respondent followed the due process.

15. **Section 73 (1)** of the Income Tax Act, (Cap. 470 Laws of Kenya) provides that:

> **"73(1) Save as otherwise provided, the Commissioner shall assess every person who has income chargeable to tax as expeditiously as possible after the expiry of the time allowed to that person under this Act for the delivery of a return of income."**

16. **Section 73 (2) (b)** of the Income Tax Act provides as follows:

"73(2) Where a person has delivered a return of income, the Commissioner may –

(a) i…..

ii…….

(b) if he has reasonable cause to believe that the return is not true and correct, determine, according to the best of his judgment, the amount of income of that person and assess him accordingly."

17. **Section 77** of the Income Tax Act provides that:

"77. Where the Commissioner considers that a person has been assessed at a less amount, either in relation to the income assessed or to the amount of tax payable than that at which he ought to be assessed, the Commissioner may, by an additional assessment, assess that person at such additional amount as, according to the best of his judgment, that person ought to be assessed."

18. The above provisions give the Commissioner of Income Tax powers to assess an additional amount of tax if the Commissioner considers that a person's income tax has been assessed at a lesser amount than what it ought to be assessed at. The Ex-Parte Applicants' contention that the Respondent acted without legal authority is therefore baseless.

19. On the question of notice, **Section 78** of the Income Tax Act provides that:

"78. The Commissioner shall cause a notice of an assessment, provisional assessment or installment assessment to be served on the person assessed, and the 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; but no notice need be served in the case of a person deemed to have been assessed under section 74(2) or 74A(2)."

20. The documents filed in court show that the Respondent raised questions regarding the Ex Parte Applicant's tax declarations through the various letters dated between 21st and 23rd July, 2014. The Ex Parte Applicants denied that they received those letters. There is however, on record a letter dated 20th August, 2014 written to the Respondent by the Ex Parte Applicants' Advocates, M/s Asige Kaverenge & Anyanzwa Advocates which is a direct response to the letters dated between 21st and 23rd July, 2014. Thus, the said letters were either received by the Ex Parte Applicants or their advocates on their behalf. The instructions to respond thereto was presumably given to the Advocates by the Ex Parte Applicants hence the conclusion that they received the letters.

21. The said letter by M/S Asige Kaverenge & Anyanzwa Advocates dated 20th August, 2014 read in part as follows:

"1. We act for our above named clients and refer to your letters dated between 21st and 23rd July 2014 in regard to the above captioned matter.

2. Your letters request and invite our clients to respond to queries raised therein.

3. We write to notify you that our clients have now engaged professional services and advice from M/s AAC Kenya (Mr. Aboo – Managing Partner) of Post Office Box Number 83313-80100 Mombasa (Tele: 0722205993) to deal with the queries in conjunction with ourselves and to contact you with a view of settling the queries raised.

4. By a copy of this letter to M/s AAC Kenya Certified Public Accountants, we are advising them to liaise with you and deal with you and deal with the queries raised to conclusion.

Yours faithfully,

ASIGE KEVERENGE & ANYANZWA

J.S ASIGE"

22. The record shows that, the Respondent did not receive any communication from either the Ex Parte Applicants, their Advocates or M/s AAC Kenya. This prompted the Respondent to serve the Ex Parte Applicants with Additional Assessments of Income contained in the Respondents letters all dated 11th September, 2014. The Ex Parte Applicants denied that they received those letters. The Respondent explained that both the Ex Parte Applicants and their Advocates declined to receive the letters dated 11th September, 2014 prompting the Respondent to serve the same via registered post pursuant to section **128** of the Income Tax Act. **Section 128 (2)** of the Income Tax Act provides as follows:

> **"128(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 that notice or other document may be so served or given by addressing it to that person, or, where that person is a company, to the principal officer or secretary of the 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 by post addressed to his usual or last known place of address or to a post 1office box rented in the name of that 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."**

23. The Respondent's decision to serve the Ex Parte Applicants with the Additional Assessments through registered post to the last known address in the Respondent's system was therefore proper and cannot be faulted for the same was in compliance with **Section 128 (2) (c)** of the Income Tax Act.

24. The Respondent's letters dated 11th September, 2014 clearly indicated the amounts of taxes due from the Ex Parte Applicants. Their contention that the letters dated 31st October, 2014 did not specify the amount of tax due is, in my view, without legal basis. I say so because the letters dated 31st October, 2014 were mere demand letters but the notice of assessment provided for under **Section 78** of the Income Tax Act was already served in the form of the letters dated 11th September, 2014. The process cannot therefore be faulted on the basis that the letters dated 31st October, 2014 did not specify the figures.

25. The Ex Parte Applicants were afforded an opportunity to respond to the issues and even appointed an Advocate and a tax expert. Neither the Ex Parte Applicants nor any of the appointed professionals responded to the questions raised by the Respondent. The Ex Parte Applicants cannot therefore complain that their right to a fair hearing as guaranteed under the rules of natural justice was infringed.

26. I therefore find no reason at all to fault the Assessment of Additional Taxes done by the Respondent. The same was done procedurally and in accordance with the laid down legal procedure. The Application by the Ex Parte Applicants should accordingly fail.

27. However, even assuming that the Respondent did not comply with the legal procedure in assessing the additional taxes, **Section 84** of the Income Tax Act provides for the procedure a person aggrieved by the Commissioner's assessment of additional tax should follow to lodge an appeal against such assessment. The section provides as follows:

> **"84(1) A person who disputes an assessment made upon him under this Act may, by notice in writing to the Commissioner, object to the assessment.**

(2) A notice given under subsection (1) shall not be a valid notice of Objection unless it states precisely the grounds of objection to the assessment and is received by the Commissioner within sixty days after the date of service of the notice of assessment; but if the Commissioner is satisfied that owing to the absence from Kenya, sickness or other reasonable cause, the person objecting to the assessment was prevented from giving the notice within that period and there has been no unreasonable delay on his part, the Commissioner may, upon application by the person objecting, and after deposit by him with the Commissioner of so much of the tax as is due under the assessment under section 92, or such part thereof as the Commissioner may require, and the payment of any interest due under section 94, admit the notice after the expiry of that period and the admitted notice shall be a valid notice of objection:

Provided that the objection made within the sixty days shall not be valid unless it is accompanied by a return of income together with all the supporting documents, where applicable."

28. What the Ex Parte Applicant should have done if they were aggrieved with the assessment contained in the Respondent's letters of 11th September, 2014 was to lodge an objection in writing with the Commissioner. The Ex Parte Applicants did not do so and therefore did not follow the appellate procedure provided for in **Section 84** of the Income Tax Act. Judicial review remedies are discretionary on the court and in my view the court should be reluctant to grant the remedies to a party who has deliberately and without just cause ignored the clearly outlined dispute resolution channel. The court stated in the case of **REPUBLIC VS. SECRETARY COUNTY PUBLIC BOARD & ANOTHER EX PARTE HULBAI GEDI ABDILLE (supra)** that:

"It is now trite law that where a statute provides a remedy to a party, the Court must exercise restraint and first give an opportunity to the relevant bodies or State organs to deal with the dispute as provided in the relevant statute. This principle was well articulated by the Court of Appeal in Speaker of National Assembly vs. Njenga Karume [2008] 1 KLR 425, where it held that;

"In our view there is considerable merit...that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed."

See also Kipkalya Kones vs. Republic & Another ex-parte Kimani Wanyoike & 4 Others [2008] 3 KLR (EP) 291 and Francis GitauParsimei& 2 Others vs. National Alliance Party & 4 Others Petition (No.356 and 359 of 2012).

I agree that where there exist an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first."

29. In the case of the High Court quoted with approval the decision of the Court of Appeal in **Republic vs. National Environment Management Authority Court of Appeal No.84/2010 (unreported)** as follows:

"The Court of Appeal had opportunity to pronounce the law on this point in the case of Republic vs. National Environment Management Authority (Court of Appeal No.84/2010) when it was considering an appeal lodged against the decision made by Wendoh, J in Republic vs. National Environment Management Authority Exparte Sound Equipment Limited (Misc. Civil Application No. 7 of 2009). The court expressed itself in the following terms:

"The principle running through these cases is that where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in

determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to determine and whether the statutory appeal procedure was suitable to determine it."

30. In my humble view, and in light of my finding that the Respondent complied with the legal procedure, I do not see any exceptional circumstances that warrant the court to grant the judicial review remedies to the Ex Parte Applicants who have ignored to follow the objection procedure provided for in the Income Tax Act. The application is therefore dismissed with costs to the Respondent.

Dated, Signed and Delivered in Mombasa this 19th day of May, 2016.

M. J. ANYARA EMUKULE, MBS

JUDGE

In the presence of:

Mr. Asige for Applicants

Mr. Josiah Nyangweso holding brief for Kirugi for Respondent

Mr. S. Kaunda Court Assistant