



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
JUDICIAL REVIEW CONSTITUTIONAL DIVISION

MISC. APP. NO. 57 OF 2014

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

0. By Chamber Summons dated 12th November 2014, the Applicants who are father and his four sons operating a family business under the business name Al Amry Distributors sought leave of court to file judicial review proceedings for certiorari and prohibition with regard a decision of the Respondent in its Additional Assessments computations dated 11th September 2014 and Demand Notices dated 31st October 2014 for alleged unpaid income tax amounting to a total Ksh.1,160,228,587.18 from the applicants, and for an order that leave granted do operate as a stay of the implementation of the decision to demand payment and or collection of the additional assessed tax dues form the applicants.
0. Pursuant to Order 53 Rule (1) (4) of the Civil Procedure Rules, set out below, the Court on 12th November 2014 made an order that the application be served for hearing *inter partes* on the question of leave and whether leave shall operate as a stay on the 20th November 2014 .
0. Order 53 Rule (1) of the Civil Procedure Rules provides as follows:

“1. (1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.

(2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.

(3) The judge may, in granting leave, impose such terms as to costs and as to giving

security as he thinks fit including cash deposit, bank guarantee or insurance bond from a reputable institution.

(4) The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise:

Provided that where the circumstances so require, the judge may direct that the application be served for hearing inter partes before grant of leave. Provided further that where the circumstances so require the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days.”

0. On 20th November 2014, by consent of the parties, leave to file judicial review proceedings was granted as sought in the Chamber Summons. Upon opposition to an order that leave grant do operate as a stay, the court directed that the question of leave granted operating as a stay be heard separately on the 28th November 2014, when on an application for adjournment by the applicant to consider grounds of opposition dated 28th November filed by the Respondent, the application was scheduled for the 9th December 2014.
0. The application eventually came up for hearing on 9/12/14 when counsel for the parties - Mr. Asige for the Applicants and Mr. Kirugi for the Respondent - made oral submissions and ruling was reserved.
0. I agree with counsel for the Respondent that the court may make an order under Order 53 rule (1) (3) of the Civil Procedure Rules, set out above, for a bank guarantee or other security a condition for the grant of leave to file judicial review proceedings and for the subsequent order for leave granted to operate as a stay. I do not accept as urged by counsel for the Applicants that the power to impose terms on the grant of leave can only be exercise once at the grant of leave and not at the stage of consideration of the question whether the grant of leave should operate as a stay, where separate hearing for the question of leave and leave operating as a stay is ordered. The general rule is for consideration of the two questions of leave and stay together. The Rules, however, permit separate consideration of the questions, where the circumstances so require.
0. In my view, the grant of leave to file judicial review proceedings, the grant of an order that leave operates as a stay, and the imposition of terms for the grant of leave are all part of the same consideration of the question whether leave should be granted and, if so, upon what terms, which consideration is predicated upon the court’s decision on proof of an arguable case. The discretion to order security is, therefore, not lost upon the grant of leave separately and prior to the consideration of the question of leave operating as a stay.
0. The issue for determination in this ruling is therefore whether the leave already granted shall operate as a stay of the decision of the Respondent in assessing and demanding payment of the additional tax dues from the applicants, pending the hearing and determination of the substantive Notice of Motion, which has already been filed and is scheduled for hearing on 17th February 2015.
0. As I understand the legal position with regard to leave to file judicial review proceedings, the grant of leave is an exercise of discretion to filter frivolous proceedings which is made upon demonstration by the applicant of **an arguable case**, as distinguished from ‘*prima facie* case’ for the grant of the judicial relief sought (see *Meixner v. R* (2005) 2 KLR 189). Having granted the application for leave to file judicial review application, the court should see that the substantive Notice of Motion, if successful, is not rendered nugatory by action taken by the Respondent in the meantime. Hence the power to make an order that grant of leave shall operate a stay of the decision challenged by the judicial review proceedings.
0. In exercising the court’s discretion to direct that the leave granted do operate as a stay and upon what terms, I consider that regard must be had to the balance of convenience in the circumstances of the case. The Respondent has Statutory obligation under section 24 of the Kenya Revenue Authority Act and section 105 (1) of the Income Tax Act, respectively to collect taxes and to refund any excess tax paid to the Authority, but the exercise of such power should not be

- exercised in an oppressive manner so as to drive the subjects of taxation out of business.
0. Although, as observed by the counsel for the respondent, the Applicants have not filed their balance sheets to show their inability to pay the tax demanded, I would agree with the counsel for the Applicants that the payment of the huge amount of tax allegedly due from the applicants, or even 50% of the sum at about Kshs.560 Million would adversely affect any business, if not altogether 'close the applicant' as contended by the counsel for the applicants.
 0. The public interest in the collection or recovery of taxes due pursuant to section 24 of the Kenya Revenue Authority Act is well taken care of by the provision for accrual of penalty and interest under section 24 (2) of the Act and section 96A of the Income Tax Act, as pointed out by the counsel for the Respondent in the Grounds of Opposition. Should the Applicants be unsuccessful in their judicial review proceedings, the Respondent will be able to recover the taxes with penalty and accrued interest. However, if the Applicants succeed in their cause, they will have been saved from the certainly debilitating effect of a huge tax assessment burden.
 0. In these circumstances, the balance of convenience lies with the continued operation of Applicants' business sheltered from adverse effects of immediate recovery of the additional tax assessment dues pending the hearing and determination of the judicial review proceedings herein. In the interests of expedited resolution of the dispute, the court will direct that the case proceeds to hearing as scheduled on priority basis.
 0. The court avails itself of this opportunity to call for the establishment of a specialised Tax Division of the High Court which may give expeditious hearing of tax disputes in the interests, on the one hand, of a quick determination of the tax liability for the tax payers' benefit and, on the other hand, in the interests of the Public at large who eventually benefit for the proceeds of taxation.
 0. Accordingly, it is ordered that the leave granted to commence judicial review proceedings shall operate as a stay as prayed in Prayer No. 4 of the Chamber Summons dated 11th November 2014, and the matter to proceed to hearing on priority basis as scheduled on the 17th February 2015.

DATED SIGNED AND DELIVERED THIS 16TH DAY OF JANUARY 2015.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Asige for the Applicants

Mr. Kirugi for the Respondent

Mr. Mbiu Court Assistant.