



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**JUDICIAL REVIEW APPLICATION NO. 53 OF 2012**

**IN THE MATTER OF: AN APPLICATION BY MOSES THUO GAKURU FOR LEAVE TO  
APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF: THE INCOME TAX ACT (CAP 470) LAWS OF KENYA**

**BETWEEN**

**REPUBLIC..... APPLICANT**

**AND**

**KENYA REVENUE AUTHORITY ..... RESPONDENT**

**AND**

**THE COMMISSIONER OF INCOME TAX.....INTERESTED PARTY**

**AND**

**MOSES THUO GAKURU ..... EX PARTE APPLICANT**

**RULING**

**THE APPLICATION**

1.The ex parte Applicant seeks an order of Certiorari to bring to this court for the purposes of being quashed the decision of the Respondent made on 15<sup>th</sup> May, 2012 in exercises of its public duty under the Income Tax Act, Cap 470 demanding payment from the ex parte Applicant of arrears of income tax in the total sum of Kshs.3, 400,313/=. He also seeks an order of prohibition to restrain the Respondent from enforcing the said decision or demanding the said payment from the ex parte Applicant.

2.The grounds for the application are set out on the face of the Notice of Motion dated 26<sup>th</sup> June, 2012, the Statement and the Affidavit Verifying the Facts sworn by Moses Thuo Gakuru, who is the ex parte Applicant. They are, in summary, that the basis for the Respondent's demand for payment of the arrears and penalties does not display a reasonable accusation against the ex parte Applicant. The ex parte Applicant maintains that he has at all material times been paying his taxes and submitting his income tax

return reports as required of him by law. The ex parte Applicant further states that his several requests to the Respondent to have the issue of his returns clarified has never attracted any response from the Respondent.

### **THE ORIGIN OF THE DISPUTE**

3. The genesis of this Notice of Motion is the Respondent's claim for disputed tax arrears from the ex parte Applicant. The respondents on 15<sup>th</sup> May, 2012 issued a notice ("MTG – 10") to the ex parte Applicant demanding tax arrears of Kshs.3,400,313/= for various 11 years between 1996-2010 and threatened execution to recover the same. Previously, the Respondents had by a letter to the ex parte Applicant dated 24<sup>th</sup> April, 2007 demanded taxes in arrears to the tune of Kshs.1, 696,945/= for the period between 1996–2003. An audit commissioned by the ex parte Applicant for that period indicated that he was indebted to the Respondent in tax arrears for Kshs.688, 526/= for the year ending 2003. His auditors M/s Njoya & Associates were in communication with the Respondent on his behalf in an attempt to sort out the said tax issues. By the auditor's calculation, the ex parte Applicant had acquired tax credits of Kshs.950,932/=. It would appear that the parties have not been able to reach any agreement on these issues. It is the ex parte Applicant's case that the Respondent's decision contained in the notice of 15<sup>th</sup> May, 2012 amounts to an abuse and/or excess of power and it has been made *mala fide* with a view to oppress, vex, embarrass and harass the ex parte Applicant. The decision was said to offend the rules of natural justice and was demonstrably unreasonable as to constitute irrationality.

### **THE RESPONDENT'S CASE**

4.The Respondent and Interested Party entered appearance on 26<sup>th</sup> June, 2012 through Twahir Alwi Mohamed, Advocate, opposing the application. F. S. E. Olwala, Senior Assistant Commissioner under the Interested Party of the Respondent swore affidavits dated 18<sup>th</sup> July, 2012 and 5<sup>th</sup> May, 2015 explaining that the ex parte Applicant submitted some of the self assessment returns (returns) for the period in question late, thus attracting a penalty. The ex parte Applicant also failed to pay the taxes in full despite filing returns which attracted further penalties and interest. These accumulated to Kshs.3, 400,313/= for which a Demand Notice was issued on 15<sup>th</sup> May, 2012 in order to recover the amount aforesaid.

5.The Respondent's F. S. E. Olwala in the affidavit of 5<sup>th</sup> May, 2015 at paragraphs 8 – 20, added that the Respondent and Interested Party are allowed to demand for unpaid and due taxes. He stated that the Judicial Review remedies sought herein were unavailable to the ex parte Applicant since the Respondent and Interested Party had exercised their decision in accordance with the Act. He further stated that the Income Tax Act provides for a mechanism for objection if a party is aggrieved by the decision taken by the Respondent or Interested Party, and the ex parte Applicant ought to have initiated his complaint in that manner per the Act.

### **THE SUBMISSIONS**

6.The ex parte Applicant's submissions were filed on 11<sup>th</sup> March, 2014 before the Respondent and Interested Party had filed their response. It was submitted for the ex parte Applicant that the decision to issue the notice was ultra vires the powers of the Respondent and Interested Party as set out in the Act, and that the decision did not afford the ex parte Applicant an opportunity to be heard. The Respondent and Interested Party's submission was a rehash of the facts set out in the affidavit of F. S. E. Olwala.

### **DETERMINATION**

7. It is trite law that Judicial Review is concerned not with the merits of a decision but rather the decision making process. In this instance, it would be concerned primarily with whether in reaching the decision to issue the demand notice dated 15<sup>th</sup> May, 2012 the Respondent acted ultra vires, illegally, irrationally, with any procedural impropriety or breach of natural justice and particularly whether the ex parte Applicant was condemned unheard.

8. Where statute has provided for an alternative remedy, such remedy ought to be pursued first, save where the said remedy would be inadequate in the circumstances of the case. (See **Speaker of National Assembly vs. Njenga Karume [2008] 1 KLR 425** and **Republic vs. National Environment Management Authority [2011] eKLR**). Section 84 – 91A of the *Income Tax Act*, CAP 470 of the Laws of Kenya provides for a dispute resolution mechanism for persons disputing an assessment under the Act which includes an avenue for appeal to the Court. The alternative remedy is however never a bar to judicial review.

9. Going by the evidence on record, the ex parte Applicant has been in communication with the respondent and interested party over the alleged tax arrears. Various letters from the ex parte Applicant's auditors refer to meetings with the respondent. The first notice was in fact received in 2007 when the respondent assessed the tax arrears at Kshs.1, 696,945/= at the time. The ex parte Applicant cannot be said to have been denied a chance to defend himself. It is not in doubt that the Respondent and interested party are entitled and duly authorized to collect taxes from the ex parte Applicant as part of their mandate. The ex parte Applicant has not demonstrated in what way the Respondent or the Interested Party has acted ultra vires their respective mandates. Their decision has not been proved to have been irrational or plagued with procedural impropriety for that matter.

10. The main issue of contention therefore is what amount of tax arrears are due from the ex parte Applicant. The most appropriate remedy for the ex parte Applicant would have been to have the decision examined on the merits. As far as Judicial Review is concerned, the remedies sought are not available to the ex parte Applicant. As a result, the application herein for Prohibition and Certiorari are hereby dismissed with costs.

11. It is so ordered.

**Dated, Signed and Delivered in Mombasa this 21<sup>st</sup> day of July, 2015.**

**M. J. ANYARA EMUKULE**

**JUDGE**

In the presence of:

Mr. Wameyo holding brief Maundu for Applicant

Mr. Kirugi holding brief Twahir for Respondent

Mr. Kaunda Court Assistant