



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
JR MISC. CIVIL APPLICATION NO. 250 OF 2013

REPUBLIC.....APPLICANT

VERSUS

KENYA REVENUE AUTHORITY1ST RESPONDENT

COMMISSIONER OF DOMESTIC TAXES.....2ND RESPONDENT

EX-PARTE

MARSHALLS (EAST AFRICA) LIMITED

JUDGEMENT

The genesis of these proceedings are two agency notices dated 28th June, 2013 addressed to ECO Bank Kenya Limited and Kenya Commercial Bank Limited by one Mrs. E Meyo, Acting Senior Deputy Commissioner, Large Taxpayer's Office. Through the said agency notices the Kenya Revenue Authority (the 1st Respondent) and the Commissioner of Domestic Taxes (the 2nd Respondent) appointed the two banks' managers, under Section 96 of the Income Tax Act, Cap 470, as agents of the ex-parte Applicant ("the Applicant) Marshalls (East Africa) Limited in respect of the sum Kshs.12,110,036/= being tax due by the Applicant.

Upon learning of the said agency notices, the Applicant on 12th July, 2013 moved to this Court and obtained leave to commence judicial review proceedings. By way of a notice of motion dated 25th July, 2013 the Applicant therefore seeks orders as follows:

1. **AN ORDER OF CERTIORARI** to remove into this Honourable Court and quash the decision and directions given to Ecobank Kenya Limited and Kenya Commercial Bank Limited contained in the 1st and 2nd Respondents' agency notice dated 28th June 2013 addressed to Ecobank Kenya Limited and Kenya Commercial Bank Limited.
2. **AN ORDER OF MANDAMUS** do issue against 1st and 2nd Respondents directing the 1st and 2nd Respondents to withdraw with immediate effect the agency notices dated 28th June 2013 addressed from Ecobank Kenya Limited and Kenya Commercial Bank Limited in so far as they relate to the Applicant.
3. **AN ORDER OF PROHIBITION** do issue against 1st and 2nd Respondents restraining the Respondents whether by themselves, their servants, agents or howsoever otherwise from in any manner whatsoever acting or continuing to act upon or enforcing or continuing to

enforce the directives contained in the 1st and 2nd Respondents' agency notices dated 28th June 2013 addressed to Ecobank Kenya Limited and Kenya Commercial Bank Limited respectively in so far as they relate to the Applicant's Account No 0110025010123701 held at Ecobank Kenya Limited and Kenya Commercial Bank Limited or any other Bank whatsoever.

- 4. AN ORDER OF PROHIBITION do issue against 1st and 2nd Respondents restraining the Respondents whether by themselves, their servants, agents or howsoever otherwise from in any manner whatsoever making any claims against the Applicant or issuing any directives of whatever nature to Ecobank Kenya Limited and Kenya Commercial Bank Limited or any other bank in which the Applicant holds accounts directing the Ecobank Kenya Limited and Kenya Commercial Bank Limited or any Bank to make any payments whatsoever to any person, body or authority on the instructions of the 1st and 2nd Respondents.**
- 5. AN ORDER OF PROHIBITION do issue against 1st and 2nd Respondents restraining the Respondents whether by themselves, their servants, agents or howsoever otherwise from in any manner whatsoever interfering with the business operations of the Applicant.**
- 6. The costs of and incidental to this application be provided for in any event.**
- 7. Such further or other relief as this Honourable Court may deem fit, just and expedient to grant.**

The application is supported by the chamber summons application for leave, the statutory statement and the verifying affidavit of Abhimanyu Garhwal all dated 11th July, 2013 and a supplementary affidavit sworn by the said Abhimanyu Garhwal on 31st January, 2014.

The Applicant's narrative is that by a letter dated 13th June, 2013 the respondents wrote to the Applicant claiming tax amounting to Kshs.17,975,465/= made up of alleged principal, penalty and interest. The contents of the said letter were repeated by the respondents' letter dated 24th June, 2013.

By a letter dated 26th June, 2013 the Applicant's Financial Controller wrote to the respondents confirming that full payment of the claimed principal sum had been made in 2011. Notwithstanding the said payment and by way of caution the Applicant requested to know the years for which the said respondents were claiming payment and a break-down of the amounts alleged to be due and owing.

However, there was neither an acknowledgement nor any response whatsoever to the Applicant's said letter. Instead, unlawfully and without any legitimate justification or cause whatsoever and completely out of the blue and to the Applicant's great shock and dismay, the respondents sped to issue agency notices dated 28th June, 2013 to the Applicant's bankers namely Ecobank Kenya Limited and Kenya Commercial Bank Limited pursuant to Section 96 of the Income Tax Act requiring the immediate payment of Kshs.12,110,036/= out of the Applicant's accounts with the banks to the respondents.

Further that on 10th July, 2013 Ecobank Kenya Limited, Industrial Area Branch without informing the Applicant went ahead and debited the Applicants Account Nos. 011002501023701 and 0110025010123702 with a total of Kshs.2,927,000/= in favour of the respondents thus leaving a balance of Kshs.9,183,036/= in respect of the claimed amount. It is the Applicant's case that this debit without informing the Applicant was in an affront to the rules of natural justice as the debit was done contrary to all known banking rules and runs counter to the spirit of the Constitution of Kenya.

The Applicant asserts that its payments of PAYE are up to date and the respondents have failed to justify and give particulars of the alleged debt despite the Applicant's request contained in its letter dated 26th June, 2013.

The Applicant contends that the decisions and directions contained in the respondents' notices to the Applicant's bankers were taken and issued without any opportunity being given to the Applicant to be heard on the issue or any information given to the Applicant contrary to Article 35 of the Constitution before the administrative action was unlawfully taken by the said respondents.

The Applicant stated that it had become aware that its accounts held at Ecobank Kenya Limited and Kenya Commercial Bank Limited had been frozen in purported compliance with the respondents' notices dated 28th June, 2013 thereby seriously impacting upon its business operations as a public company to the detriment, loss and damage to the Applicant as well as putting in imminent risk the jobs of 300 employees and their livelihoods and those of their families.

It is the Applicant's case that by taking the decisions and issuing the directives contained in their said notices without providing any information whatsoever to the Applicant as requested in the letter dated 26th June, 2013 or giving any opportunity to the Applicant to be heard the respondents failed to take into account the fact that the Applicant was up to date with its PAYE payments.

The Applicant also contends that in taking the said action the respondents failed to take into account the fact that the Applicant which is a long established company and a flagship in the motor trade sector is a public company whose business operations will be crippled by their conduct.

The Applicant contended that no prejudice could have been caused to the respondents if they gave the information requested by the Applicant to facilitate a just conclusion to the respondents' demands and consideration of the Applicant's valid explanations.

It is the Applicant's case that the respondents' action was made in bad faith and amounted to abuse of office and power. The Applicant submits that the respondents' decision was unfair, arbitrary, inconsistent and capricious. In support of this argument, the Applicant argues that the respondents' decision is a blatant and unlawful interference with the property of the Applicant and its business. The Applicant submits that by totally ignoring the contents of the Applicant's letter dated 26th June, 2013 requesting information, the respondents failed to have any regard whatsoever to the full meaning of the purport of the said letter. The Applicant asserts that the respondents acted in bad faith since they knew that the claimed tax was not owed at all. The Applicant contends that it was not given an opportunity to be heard before the action was taken by the Applicant. The Applicant's case is that the respondents abused the discretion given to them by statute by failing to take into account the contents of its letter dated 26th June, 2013.

It is further the Applicant's case that the respondents' decision violated the principle of legitimate expectation. The Applicant contends by acting as they did, the respondents violated its legitimate expectation that they would perform their duties lawfully, fairly, justly, rationally and in conformity with statute and the Constitution.

The Applicant submits that the respondents' actions violated the Articles 21(1), 31(1)(b), 35(1)(a) and (b), and 47(1) and (2) of the Constitution. In support of this contention, the Applicant asserts that the respondents' decision amounted to a breach of the cited constitutional provisions for the following reasons:

- (a) Failure to give the Applicant the information which is held by the State and which the Applicant requested in its letter dated 26th June, 2013;
- (b) Failure to address or give due consideration and weight to the contents of the Applicant's letter dated 26th June, 2013;
- (c) Failure to afford the Applicant the right to respond to the claim prior to the respondents taking their decision; and
- (d) Failure to give any explanation to the Applicant following its letter dated 26th June, 2013 and failing to give written reasons for the respondents' decision.

The application was opposed through a detailed replying affidavit sworn by Newton Kingara Magu of the respondents' Large Taxpayers Office within the Domestic Taxes Department.

The facts of the matter as narrated by the said Newton King'ara Magu are different from what the Applicant told the Court. Mr. Magu averred that he was involved in the assessment, collection and enforcement actions giving rise to these proceedings. He averred that acting on the powers granted by Section 56(1) of the Income Tax Act the respondents issued a notice dated 8th February, 2011 to carry out compliance check on the Applicant's tax records for the period December, 2009-January 2011. Upon completion of the exercise, it emerged that the Applicant had not fully complied with the tax regulations with regard to PAYE tax. There were irregularities in PAYE returns, late filing of returns, unpaid taxes on directors' bonuses and late remittance of employees' final benefits.

The findings were communicated to the Applicant in a letter dated 10th March, 2011 with details on the taxes due which amounted to Kshs. 17,975,464.50. The Applicant responded to the letter by indicating that it would revert to the respondents in due course. The Applicant followed this by issuing to the respondents three cheques for Kshs.700,345/= one current and two post-dated. This was followed by a meeting held on 1st April, 2011 in which the Applicant proposed to pay the principal tax of Kshs.12,110,035.74 in monthly installments of Kshs. 700,000/= until the principal tax was cleared. The Applicant also indicated that upon payment of the principal tax, it would apply for the waiver of the penalties amounting to Kshs.4,180,579.69 and the interest of Kshs.1,684,579.69. The respondents did not accede to this request and instead asked the Applicant to remit Kshs.3.5 million per month until the principal tax amount was cleared.

Despite the decline of the Applicant's proposal, the Applicant again wrote to the respondents on 18th April, 2011 proposing payment of Kshs. 700,000/= fortnightly in settlement of the principal tax due.

The Applicant, however, did not make any payments and on 6th May, 2013 the respondents wrote to the Applicant demanding payment of Kshs. 17, 975,464.50 within fourteen days, failure to which enforcement action would be instituted to recover the taxes due. The Applicant did not respond to the demand. The respondents followed their letter with a reminder dated 13th June, 2013. The Applicant responded to the letter on 19th June, 2013 indicating that the matter had been forwarded to the Board of Directors for deliberations and needful instructions and would revert at the earliest possible. The Applicant, however, never reverted back to the respondents and a final reminder was issued to Applicant on 24th June, 2013 followed by the issuance of the agency notices on 28th June, 2013.

It is the respondents' case that the Applicant has a statutory duty imposed on it by Section 37(5) of the Income Tax Act to deduct and remit taxes. Further that Paragraph 10 of the PAYE Rules provides that an employer shall before the 10th day following the end of every month or before any other day which may be notified to him by the Commissioner, pay to such person as the Commissioner shall direct, all amounts of tax which the employer has deducted under the Rules during that month. Failure by an employer to account for the deducted tax is an offence.

The respondents further asserted that Paragraph 12 of the PAYE Rules provides that for purposes of the recovery of tax which an employer would have been liable to pay under Paragraph 10, the employer shall be deemed to have been appointed an agent of the employee under Section 96 of the Act.

The respondents therefore contend that the agency notices were issued in accordance with Section 96 of the Income Tax Act in enforcement of recovery of taxes due and owing by the Applicant.

It is the respondents' case that the Applicant was provided with a breakdown and tabulations of the taxes due and the year they related to after the compliance check and in subsequent demand letters. Further that the Applicant was at all times prior to recovery action given adequate notice and every opportunity to be heard and to seek clarifications in regard to the demand notices.

It is the respondents' case that the agency notices were issued for taxes that were lawfully assessed and due from the Applicant.

The respondents contend that an order of certiorari cannot issue to quash a notice made pursuant to

statutory provisions and regulations under an Act of parliament, more specifically the Income Tax Act. They also contend that an order of mandamus cannot issue in the circumstances of this case as the Applicant has not demonstrated that the respondents have failed to discharge a statutory duty imposed on them. Further, the respondents assert that an order of prohibition cannot issue as the Court cannot prohibit what is sanctioned by statute as the respondents are empowered to issue agency notice for purposes of enforcing compliance with revenue laws and for purposes of safeguarding Government revenue.

It is the respondents' case that the Applicant's application is an attack on the merits of their decision and as such judicial review remedies, which are aimed at the decision-making process, are not available to the Applicant.

The Applicant responded to the respondents' replying affidavit through a supplementary affidavit sworn by Abhimanyu Garhwal on 31st January, 2014. In the said affidavit, the Applicant points out that although the respondents demand payment of Kshs. 17,975,464.50 it is pertinent that in their agency notices dated 28th June, 2013 they only claimed Kshs.12,110,036/=.

The Applicant asserts that the respondents' refusal to accept its proposal for payment of the principal taxes in installments is a violation of its constitutional rights to fair administrative action as the respondents **“failed to take into account or have any regard whatsoever to the financial state of the Applicant a fact of which the Respondents were well aware.”**

It is the Applicant's case that the respondents acted unreasonably, unfairly, arbitrarily, in abuse of office and contrary to its legitimate expectation that they would exercise their discretion reasonably and treat it with due consideration and fairly. It is the Applicant's contention that the respondents denied it an opportunity to reach an amicable settlement by issuing the agency notices without giving it an opportunity to be heard.

I have intentionally reproduced the affidavit evidence of the parties at length. I have also read their submissions.

It is clear that the Applicant does not dispute the legal basis of the respondents' actions. It is also clear from the Applicant's supplementary affidavit that it does not dispute the additional facts placed before the Court by the respondents.

What I get the Applicant to be saying is that due to its precarious financial and management condition, it ought to have been treated more “fairly” by the respondents. In order to see whether the Applicant was treated fairly or not, one has to look at the circumstances leading to the issuance of the agency notices.

From a perusal of the material placed before the Court by the Applicant, the application stands out for its paucity of relevant facts. Although the question about the taxes in question started in 2011, the Applicant opted to base its application on the respondents' letter dated 13th June, 2013 thereby denying the Court the opportunity of knowing what had happened prior to that. In fact the Applicant failed to disclose the letter dated 6th May, 2013 which triggered the process leading to the issuance of the agency notices. I will revert back to this issue in the course of this judgement.

The facts placed before the Court shows that through a letter dated 26th June, 2013 drawn to the attention of the Asha K. Salim of the Large Taxpayers Office, Commissioner of Domestic Taxes, the Applicant's Financial Director states:

“We refer to our letter dated 19th June, 2013 and yours dated 13th June, and 24th June, 2013. We draw your attention to the fact that the company was acquired by the current owners in late 2012 and this led to change of management and therefore a breakdown in communication.

We note that the previous management paid the full principal tax amount in 2011 to Kenya Revenue Authority and submitted returns to the Kenya Revenue Authority before we took over.

We therefore confirm to you that all principal arrears relating to the compliance check were fully paid. Be that as it may, we shall be grateful if you can avail to us the years covered by your letters and a breakdown of the alleged amounts.”

The important thing to note is that the letter is not accompanied by evidence of payment of the taxes demanded by the respondents. It is also clear from the letter that the Applicant was aware that the principal tax arrears related to the compliance check.

In the supplementary affidavit sworn by Abhimanyu Garhwal the Applicant does not disclose evidence of payment of the taxes and does not dispute the correspondences exchanged between it and the respondents.

There is no evidence that there was change of ownership of the Applicant in late 2012. Even assuming that there was indeed a change of ownership, there is evidence that the management did not change. Mr. Abhimanyu Garhwal who identified himself in the verifying affidavit sworn on 11th July, 2013 as a Director of the Applicant was present in a meeting held on 1st April, 2011 in which the Applicant's proposal to pay Kshs.700,000/= per month until the principal tax was cleared was rejected by the respondents. Those minutes were exhibited in the respondents' replying affidavit. There is a clear connection between the taxes discussed in that meeting and the taxes demanded in the letter dated 6th May, 2013 whose reminder was the one dated 13th June, 2013.

Was the Applicant treated fairly? From the correspondences exhibited through the affidavits it is clear that the respondents were very patient with the Applicant. The Applicant never disputed the assessed taxes. It plea was that it be allowed to pay the taxes in installments. In 2011 the respondents allowed the Applicant to pay the principal tax by installments of Kshs.3.5 million per month. The Applicant did not comply but insisted on paying the amount in installments of Kshs.700,000/=. The Applicant nevertheless failed to comply with its own proposal.

Through the letter dated 6th May, 2013 the respondents renewed their demand for the unpaid taxes but instead of making payment the Applicant pretended not to be aware of the taxes. The Applicant cannot be allowed to pretend not to know the particulars of the taxes demanded by the respondents. All the facts have all along been within the knowledge of the Applicant. It later approached this Court with an application that did not disclose all the facts.

Failure to disclose full facts is frowned upon by the courts. Approving this principle, the Kenyan Court of Appeal in **BAHADURALI EBRAHIM SHAMJI v. AL NOOR JAMAL & 2 OTHERS [1998] eKLR** cited the decision of Warrington L.J. in the English case of **THE KING v. THE GENERAL COMMISSIONERS FOR THE PURPOSES OF INCOME TAX ACTS FOR THE DISTRICT OF KENSINGTON: EX PARTE PRINCESS EDMOND DE POLIGNAC [1917] All E.R. 486** where at page 509 he opined that:

"It is perfectly well settled that a person who makes an ex parte application to the Court - that is to say, in the absence of the person who will be affected by that which the Court is asked to do - is under an obligation to the Court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by him. That is perfectly plain and requires no authority to justify it."

The Applicant claimed that the respondents issued agency notices for Kshs.12,110,036/= yet its claim is for kshs.17,975,465/=. It is clear that the respondents only issued agency notices for the principal tax. It did not claim the penalty and interest which they are entitled to collect.

Looking at the evidence placed before the Court, it is apparent that the respondents acted lawfully, fairly and in compliance with the principles of natural justice. The Applicant's claim for judicial review remedies is therefore unfounded and its application dated 25th July, 2013 is therefore dismissed with costs to the respondents.

Dated, signed and delivered at Nairobi this 24th day of June, 2014

W. KORIR,

JUDGE OF THE HIGH COURT