



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
PETITION NO 86 OF 2012

NAVCOM LTDPETITIONER

VERSUS

THE KENYA REVENUE AUTHORITY RESPONDENT

NIC BANK LTD JUNCTION BRANCH1ST INTERESTED PARTY

**STANDARD CHARTERED BANK LTD
YAYA CENTRE BRANCH2ND INTERESTED PARTY**

JUDGMENT

Introduction

1. The petitioner approached this court by way of this petition and an application dated 19th March 2012 seeking orders to restrain the respondent from taking money held in the petitioner's accounts in branches of the Interested Parties. The money sought to be recovered was based on a disputed assessment of tax. Interim orders were granted on 20th February 2012 and on 21st May 2012, the parties agreed to extend the orders till the hearing and determination of this petition.

2. When the matter came up for hearing on 6th February 2013, Counsel for the 1st Interested Party argued that it should not have been joined to the proceedings as no prayers had been sought against it, and it asked for the costs of the proceedings. The petitioner and the respondents agreed that the court should render its decision on the basis of their respective written submissions as they did not wish to highlight the submissions.

The Petition

3. In the petition dated 19th March 2012, the petitioner seeks the following orders:

1. ***An order quashing the notices of the respondent dated 9th March 2012 issued to the Interested parties appointing them to be applicant's agents and requiring payment to the respondent of some monies***

2. ***An Order of permanent injunction do issue restraining the respondent from recovering any monies as tax arrears from the applicant and or applicant's monies held by the Interested Parties pending the exhaustion of the tax dispute resolution procedure provided in part X of the Income Tax Act, chapter 470 Laws of Kenya and part X of the Value Added Tax, chapter 476 Laws of Kenya.***

4. The petition is supported by the affidavit of **Susan Wangui Kariuki** sworn on 19th March 2012 and a further affidavit also sworn by Ms. Kariuki on 30th August 2012. The case petitioner has also filed written submissions dated 29th September 2012.

The Petitioner's Case

5. The petitioner is a limited liability company incorporated under the provisions of the Companies Act, Cap 486 laws of Kenya. It carries on the business of sale and maintenance of communications equipment. It alleges that it has been paying all taxes due since its incorporation in 1981 and has a current tax compliance certificate issued by the respondent.

6. The petitioner alleges that in the month of October 2011, without notice, the respondent's employees raided its offices with the intention of commencing an in-depth analysis of the petitioner's books of account which the respondent's officers took away. Thereafter, the petitioner received a demand note dated 1st November 2011 for payment of taxes totalling Ksh79,905,561. The petitioner alleges that the tax assessment was not fair as it was not in a position to respond comprehensively as its books were still in the custody of the respondent. It alleges that it requested for more time to respond to the assessment to which the respondent acquiesced.

7. The petitioner, however, alleges that on 13th January 2012, the respondent sent another demand for payment of taxes amounting to Ksh80,268,855, an enhancement of the amount earlier demanded. The petitioner objected to this demand by its letter dated 13th January 2012, and appointed a firm of auditors to deal with the assessment and the said auditors responded to the issues raised by the respondent.

8. According to the petitioner, the respondent then issued the Agency Notices dated 9th March 2012 to the Interested Parties requiring them to remit tax arrears amounting to Ksh 79,905,561.00. The petitioner argues that the issuance of the Agency Notices was in breach of the principles of natural justice and contrary to the law as the petitioner's books of account were still in its possession; that the petitioner could not therefore respond or object to the assessment; that this was tantamount to denying the petitioner a right to a hearing and a right to mount a defence and was therefore in breach of the petitioner's rights to fair administrative action under Article 47; that the notices are tainted with illegality as they do not conform to the requirements set out in section 78 of the Income Tax Act that the petitioner be informed of its rights under section 84 of the Income Tax Act; and that the raiding of the petitioner's premises and taking away of its books of account without notice violated the petitioner's right to privacy under the Constitution.

9. The petitioner concedes that the respondent has the mandate to collect tax, but that such mandate is subject to adherence to the Constitution and to rules of natural justice. It also accepts that the respondent did return its books but alleges that the said books were returned at intervals and in some cases, after the deadline of 30 days given had passed. It alleges further that the respondent's letter dated 1st March 2012 does not entitle one to lodge an appeal as it does not conform to the legal format for a "Notice to Confirm Assessment"; that it can only be taken as part of the normal exchange of correspondence as a Notice to Confirm assessment clearly indicates the law and the rights of a party to lodge an appeal to the Local Committee. The petitioner also alleges that the Agency Notices were issued without prior notice and abruptly while the negotiations were still on-going.

10. The petitioner has relied on the decision of Majanja J in **Samura Engineering Ltd & Others Vs Kenya Revenue Authority Nairobi High Court Petition No 54 of 2011** to support its contention that it is entitled to come to seek relief in the circumstances of this case where the respondent has raided its premises and taken away its documents without a warrant.

The Respondent's Case

11. The respondent's case is that its actions with respect to the petitioner's tax assessment were in

accordance with the law and its mandate under the law, that there was no breach of the rules of natural justice nor a violation of the petitioner's constitutional rights under Articles 31, 40 and 47 of the Constitution as the petitioner alleges. It has set out its case in some detail in two affidavits sworn by **Mr. Erick Mwaniki Mwangi**, a senior revenue officer in the respondent's Domestic Taxes Department, and written submissions dated 25th October 2012.

12. According to the respondent, an initial audit interview was conducted at the petitioner's premises on 28th September 2011 upon which the petitioner's books of accounts were availed by the petitioner as requested in the Notice of Intention to Audit dated 1st September 2011. Following this audit, the respondent, by its letter dated 31st October 2011, wrote to the petitioner explaining and tabulating the audit findings which led to a demand of a total tax liability of Ksh79,905,561.00. It states that it also enclosed the formal assessment for PAYE, Withholding Tax and VAT. Copies of the demand letter dated 1st November 2011, the tax assessments and basis for the tax computation are annexed to the respondent's replying affidavit.

13. In the affidavit sworn by Mr. Mwangi, the respondent has also set out in detail the basis of its demand to the petitioner together with a tabulation of the tax demand with regard to the treatment of bad debts by the petitioner and the failure to charge VAT on taxable products, namely sale of communication equipment, on the basis that they were meant for export but which were sold to locally registered tax payers. The respondent submits that the petitioner admitted in the letter from its auditor dated 30th January 2012 (annexure "**EMM8**") that it failed to charge VAT.

14. The respondent asserts that in its demand dated 1st November 2011 it clearly explained that the petitioner had a right to object within 30 days of the date of service of the assessment notice. It also contends that several documents were returned to the petitioner through a letter dated 7th November 2011 and receipt was acknowledged by the petitioner's auditors. It also maintains that the rest of the petitioner's documents were returned to the petitioner under cover of a handwritten letter dated 14th December 2011 and were received by their agent, Mr. Mathenge, of Muiro Kandia & Co, Certified Public Accountants. It submits therefore that by the time the petitioner objected to the assessment in the letters dated 13th January, 2012 and 30th January 2012, it had all its documents to enable it object to the respondent's audit findings. The respondent assert therefore that the petitioner was accorded a chance to object under section 84 of the Income Tax Act and section 32 of the VAT Act, and as its documents had been returned and receipt acknowledged by its auditors, it could not allege that it was prevented from adequately objecting to the audit findings and tax assessments.

15. The respondent avers that the petitioner has failed to exhaust the internal mechanism of resolving a tax dispute by appealing to the Local Committee under section 86 of the Income Tax Act and has instead filed this petition which is intended to frustrate the respondent's statutory mandate; that the petitioner has had sufficient time to pay the taxes or appeal to the Local Committee and the VAT Tribunal; and that the respondent is empowered to issue agency notices under section 96 of the Income Tax Act and section 19 of the Value Added Tax Act to the petitioner's bankers in order to recover the taxes owed by the petitioner.

16. With regard to the petitioner's contention that it has a tax compliance certificate, the respondent avers that the issuance of such a certificate does not prohibit the respondent from carrying out audits on the tax affairs of a company and raising any taxes that are proved to be unpaid. It asserts that the certificate is issued to confirm that the tax payer is up to date in filing the self-assessment forms; that the certificate is subject to the caveat that the respondent may withdraw the certificate ***'if new evidence materially alters the tax compliance status of the recipient.'***

17. With regard to the petitioner's allegation that the notice to confirm assessment did not conform with the statutory form, the respondent submits that there is no legal format for a notice to confirm assessments under the Income Tax Act 470 and that the document annexed to the petitioner's further affidavit was no longer in use.

The 1st Interested Party's Case

18. The 1st Interested Party filed grounds of opposition dated 18th July 2012 in which it contended that there is no claim by the petitioner against it; that if there is, such claim is incompetent, bad in law, fundamentally defective and ought to be dismissed with costs at the earliest opportunity; that its joinder to these proceedings was premature and an embarrassment to the 1st Interested Party, and the judicial process. The Interested Party also applied for its name to be removed from the proceedings on the basis of its grounds of opposition, an application that was resisted by the petitioner until the hearing of the petition when it conceded that the Interested Party could be excused but without an order for costs.

19. The 2nd Interested Party did not participate in the proceedings.

Determination

20. The petitioner has proposed three issues for determination by the court, namely whether the petitioner owes the respondent any taxes, whether the respondent was justified in issuing the agency notices, and whether the petitioner was justified in seeking relief from the High Court. With regard to the last issue, it is my view that where a party alleges violation of its constitutional rights, it is entitled to present its claim to court for relief. See in this regard the decision of Majanja J in **Samura Engineering Ltd & Others –vs- Kenya Revenue Authority Nairobi HC Petition No 54 of 2011** where he stated as follows:

“the right of access provided under article 22 and 23 is independent and constitutionally guaranteed and cannot be made subservient to an alternative remedy. The constitution is the supreme law of the land and the provisions of article 22 and 23 are not subject to any other alternative remedies existing in law. Once the court comes to the conclusion that there has been an infringement of the fundamental right and freedoms, it is by virtue of article 23 entitled to frame any remedy that will ameliorate the wrong done to the petitioner.”

21. The main issue for determination in this petition in my view is whether, in taking any of the actions that it took in relation to the petitioner, and in particular in issuing the Agency Notices, the respondent has violated any of the petitioner's rights under Articles 31, 40 and 47 of the Constitution as alleged by the petitioner.

22. In dealing with this issue, the court shall enquire into whether or not the respondent was entitled to issue the Agency Notices. It cannot, however, properly enter into an inquiry into the petitioner's tax status, that is whether or not the petitioner owes any taxes. That is within the mandate of the respondent and the other mechanisms such as the Local Committee set up under the relevant tax legislation. The court is thus not the proper forum for determination of the first issue proposed by the petitioner.

23. The petitioner has alleged that by its actions, the respondent has breached the rules of natural justice and the petitioner's constitutional rights under Articles 31, 40 and 47. It has an obligation therefore to demonstrate the manner in which these provisions have been violated with regard to it. See **Anarita Karimi Njeru (1976-80) 1 KLR 1272** and **Trusted Society of Human Rights Alliance-v- Attorney General & Others High Court Petition No. 229 of 2012**.

24. There is, I believe, no dispute that the respondent has the mandate, under section 5(1) of the Kenya Revenue Authority Act, to act as the government agency in the collection and receipt of all revenue; nor that it has the mandate to do so under the provisions of the Income Tax Act Cap 470 and the Value Added Tax (VAT) Act Cap 476. I have also not heard the petitioner to dispute the power of the respondent under sections 56 of the Income Tax Act and Section 30 of the VAT Act to require, for its examination, the production by any tax payer of any records, books of accounts, statements of assets or other documents. In the exercise of its mandate, however, the respondent must act in accordance with the law and the Constitution. The question then is whether the acts of the respondent impugned in this petition have breached either its statutory duty or the petitioner's constitutional rights.

25. From the depositions of the parties, the following facts relevant to determination of the matters before me emerge:

i. The respondent served the petitioner with a Notice of Intention to Audit dated 12th September 2011. The Notice was issued in accordance with the provisions of section 56 of the Income Tax Act and section 30 of the VAT Act. I note from the document, which was annexed to the respondent's replying affidavit as '**EMM1**', that the notice was received on 13th September 2011 by one Rosemary Wainaina and is duly stamped with the petitioner's stamp. The petitioner does not dispute that it received this notice.

ii. An audit of the petitioner was carried out, according to the respondent, on 28th September 2011 at the petitioner's premises. The respondent also carried away the petitioner's documents and records.

iii. The respondent then sent its letter dated 1st November 2011 which is expressed to be a **Tax Audit Report of Findings and Demand Note** in which it set out its findings following the audit of the petitioner's documents and made a demand for tax arrears of Kshs 79,905,561. Attached to this letter are several documents setting out the basis of the tax assessment.

iv. On November 7 2011, the respondent returned some of the records that it had collected from the petitioner following the Notice of Intention to Audit dated 12th September 2011. These included cheque stubs, VAT and Paying in Slips booklets. This letter is annexed to the respondent's replying affidavit as '**EMM3**'.

v. On November 30 2011, the petitioner wrote to the respondent requesting for an extension of time to enable it complete the reconciliation of its accounts, indicating that it had not been able to do so to meet the 30 day deadline set by the respondent in its letter of 1st November 2011 as its books of account were still being held by the respondent.

vi. A hand written letter dated 14th December sets out certain documents and records which the respondent states are the rest of the petitioner's records that it had taken at the time of the audit. The letter, annexure '**EMM4**' to the respondent's replying affidavit, indicates that the documents were received by one Mathenge.

vii. On 13th January 2012, the respondent wrote to the petitioner demanding payment of Kshs 80, 268, 855.00. This demand was objected to by the petitioner in its letter also dated 13th January 2011 and received by the respondent, according to the date stamp, on 16th January 2011.

viii. In its letter dated 19th January 2012, the respondent pointed out that the petitioner had appointed its auditor as its tax agents; that its books of account had been collected by the auditor, and it demanded that the tax amount of Kshs79,905,561 be paid to avoid enforcement action.

ix. By a letter dated 30th January 2012 from its auditors, Muiro Kandia & Co., the petitioner acknowledged that it had received the rest of its documents sometime in December and made certain clarifications with regard to the issues raised by the respondent in its audit.

x. On 1st March 2012, the respondent wrote to the petitioner declining to accept its objection and demanding that it pays the amount of tax earlier demanded.

xi. The respondent therefore sent the Agency Notices dated 9th March 2012 to the Interested Parties.

26. From the above facts which are culled from the documents annexed, in some cases, to the affidavits sworn in support of both parties' cases but mostly to the replying affidavit of Erick Mwaniki

Mwangi sworn on 11th July 2012, it is evident that the petitioner was somewhat economical with the truth when it approached this court alleging violation of its rights under Article 31, 47 and 40, and a breach of the rules of natural justice.

27. The petitioner alleges that the respondent raided its premises and took away its books without notice, yet the respondent's letter dated 12th September 2011, received by the petitioner the following day, is a clear notification of the intention to audit the petitioner and a request for production of its documents and records. The audit took place on 28th September 2011, which means that the petitioner had more than two weeks' notice before the respondent visited its premises for the audit.

28. There is also nothing before me that indicates that the respondent took away the petitioner's documents without the petitioner's consent. In the letters dated 7th November 2011 and 14th December 2011, the respondent returned the petitioner's documents, and nothing in the letter from the petitioner dated 30th November 2011 supports its allegation that the documents were carried away following a 'raid' as it alleges. In addition, from the letter of Muiru Kandia, the petitioner's auditors, to the respondent dated 30th January 2012, it is clear that the petitioner had all its documents by December, 2011.

29. From the material before me, it is evident that there was a notice in very explicit terms served on the petitioner and duly received; the petitioner was accorded every opportunity to present its case to the respondent, and to object to the assessment made. While it is true that its documents were in the possession of the respondent at some point during the audit, at the time the petitioner was lodging its objection to the assessment in January 2012, the documents had been returned to its auditor at least a month before. While the petitioner is indeed entitled to seek relief from this court if a violation of its rights has occurred, the facts of this case differ considerably from the facts in the case of **Samura Engineering Ltd –vs- Kenya Revenue Authority (supra)** relied on by the petitioner, in which the court found that no notice whatsoever had been issued to the petitioners before the respondent moved in and took away their documents, including medical records. In the circumstances, I can find no basis for allegation of breach of the rules of natural justice, invasion of privacy or breach of the petitioner's rights under Articles 31 and 47 of the Constitution.

30. The petitioner alleges that it is unreasonable for the respondent to demand tax arrears while it has issued the petitioner with a Tax Compliance Certificate. This certificate, annexure 'SW2' in the affidavit sworn by Ms. Susan Kariuki in support of the petition, is dated 9th December 2011 and is thus issued during the same period as the respondent and the petitioner were engaged in the process of audit and objections on the petitioner's tax affairs. The Certificate carries at its foot the caveat that the respondent reserves the right to withdraw the certificate ***'if new evidence materially alters the tax compliance status of the recipient.'*** I am unable to accept the contention by the petitioner that the issuance of the Tax Compliance Certificate was 'unqualified' and that therefore the demand for arrears was unreasonable. The explanation by the respondent that the issue of the certificate was an acknowledgement that the petitioner had complied with the requirement to file its tax returns as part of the country's self- assessment system and that the self-assessment is subject to further audit is, in my view, more credible.

31. The petitioner has taken issue with the Agency Notices issued on 9th March 2012. It contends that the respondent was wrong to serve the notices without serving notice of confirmation of assessment which would have enabled the petitioner to appeal, and that the notice of compliance was not in the form prescribed. The petitioner also contends that it was given a very short period of only seven days for appealing before enforcement was commenced.

32. The respondent has countered that there is no legal format for notice of confirmation of assessment, and that the form annexed to the petitioner's further affidavit is an administrative form that was previously in use. I have looked at the provisions of Section 85 of the Income Tax Act. Section 85(3) (b) provides that where, after an objection, the Commissioner ***'refuses to amend the assessment, he shall cause a notice confirming the assessment to be served on that person.'***

33. I have also considered the contents of the letter dated 1st March 2011 from the respondent to the petitioner indicating that it has rejected the petitioner's objection. It appears to me that this letter is in very explicit terms, and there can be no room for misunderstanding by the petitioner with regard to the position of the respondent on the demand for tax. It also sets out the reasons for the refusal to accept the objection and demands payment of the tax arrears. The question, then, is whether the respondent was required to give a particular period of time from the date of notice of confirmation before issuing agency notices, and whether the issuance of the notices amounts to arbitrary taking of property contrary to Article 40 of the Constitution.

34. The respondent has contended that its acts in issuing the Agency Notices was in accordance with the law as provided in Section 96 of the Income Tax Act and Section 19 of the Value Added Tax Act. It has relied on the decision of the Court of Appeal in **Pili Management Consultants Limited-vs-Commissioner of Income Tax Kenya Revenue Authority Court of Appeal Civil Appeal No. 154 of 2007 (Mombasa)**. In that case, the appellant had challenged the issuance of an agency notice on the basis that it was not liable to pay tax for the period in question. In dismissing its appeal against the decision of the High Court declining to issue orders of certiorari against the respondent, the court of Appeal observed as follows with regard to the agency notices:

'Before we deal with other matters, let us first dispose of the question that the agency notice was illegal because it demanded payment "immediately" while section 96 of the Act allowed a grace period of thirty days. That contention, with respect to Mr. Asige, is clearly based on a misreading of section 96(7) of the act. The section requires the agent to pay to the Commissioner the money specified in the notice within thirty days. We do not understand that provision to mean that if an agent has in his custody the money demanded in the notice, he is not allowed to remit the same to the Commissioner until thirty days are over. The agent can remit the money to the Commissioner within two, ten, fifteen or even twenty-nine days after the receipt of the notice. What the agent is not permitted to do is to go beyond thirty days before remitting the money which he has in his possession. If the agent fails to remit the money within thirty days then under the same section the agent becomes personally liable to the Commissioner; the Commissioner, however, can demand immediate payment as was done in this case, but before the thirty days are over, the Commissioner cannot take any action against the agent. We are satisfied this submission on behalf of Pili, i.e the contention that payment was demanded immediately, was erroneous and we reject it. The notice was not illegal on the basis that it demanded immediate payment. There was no evidence to show that the Commissioner sought to enforce the notice before the thirty days were over. In any case, if there was to be any enforcement by the Commissioner with regard to the thirty days, the enforcement would be against the agent, in this case the Bank, not against the principal, i.e. Pili.

35. As I understand it, the agency notice does not require payment of the amounts due immediately. The notices give a period of 30 days within which payment must be made, which is sufficient time for the tax payer to deal with the issue of tax due. The notices cannot be enforced before thirty days are over, and they cannot, cannot, therefore, be deemed a violation of the petitioner's right to fair administrative action or right to property as they offer room for the petitioner to sort out its tax obligations before the agent to whom the notice is addressed is required to effect payment in terms of the notice.

36. The petitioner has also argued that the period between the confirmation of the assessment and the issue of agency notices was too short, and did not allow it a time to appeal. I cannot find anything in the law that requires that a party appeals against a tax assessment before becoming liable to pay tax. I believe that the respondent is correct when it submits that the principle with regard to taxation is, as observed by the Supreme Court of Uganda in **Uganda Projects Implementation Authority –vs Uganda Revenue Authority (2010) 2 EA 462**, that a tax payer should meet his obligation to pay his tax in accordance with the law and argue later. In the present case, the petitioner, which states that it has been in operation since 1981, is aware of its rights and obligations with regard to tax. It had received notice of the intended audit, had filed an objection through its agent, and had received a clear notification of the refusal by the Commissioner to accept its objection to the assessment. In the circumstances, I can find nothing that would prevent the issuance of the agency notices, or that requires that the petitioner appeals first before the respondent seeks to enforce the recovery of the tax arrears.

37. To hold otherwise would result in a scenario where government business and provision of services to citizens, which are dependent on payment of tax, would be totally frustrated as parties in the position of the petitioner would cite pending appeals, whether merited or not, as a basis for not paying tax. While there is a duty on the respondent to be fair and reasonable in executing its mandate of tax collection, where no unreasonableness or violation has been demonstrated its mandate ought not to be frustrated by a party, which has had every opportunity to deal with its tax issues seeks to hide behind an intended appeal to the Local Committee.

38. In the circumstances, I find no merit in this petition, and it is hereby dismissed with costs to the respondent. The 1st Interested Party, which had applied to be excused from the proceedings as no orders were sought against it shall have one quarter of the costs of the petition.

Dated Delivered and Signed at Nairobi this 24th day of May 2013

**MUMBI NGUGI
JUDDGE**

Mr. Kangata instructed by the firm of Muchoki Kangata & Co. Advocates for the Petitioner

Ms. Odundo instructed by the firm of Beatrice Odundo & Co. Advocates for the Respondent

Mr. Abidha instructed by the firm of Ochieng, Onyango Kibet & Ohaga & Co. Advocates for the 1st Interested Party

No appearance for the 2nd Interested Party