



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 370 of 2012

KAPA OIL REFINERIES LTD.....PETITIONER

AND

KENYA REVENUE AUTHORITY.....1ST RESPONDENT

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

THE ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

Introduction

1. The petitioner (“KAPA”) is a locally owned limited liability company that refines and produces edible and cooking oil for local and regional markets. Kenya Revenue Authority (“KRA”) is incorporated under the provisions of **section 3** of the *Kenya Revenue Authority Act (Chapter 469 of the Laws of Kenya)* and is responsible for the collection of taxes in the country. The Commissioner of Domestic Taxes (“the Commissioner”), who is sued as the 2nd respondent, is an officer of KRA and acts on its behalf pursuant to the *Income Tax Act (Chapter 470 of the Laws of Kenya)* and the *Value Added Tax Act (Chapter 476 of the Laws of Kenya)*.

2. The facts giving rise to the petition are not in dispute and can be gathered from the affidavits filed on behalf of the parties. The genesis of petitioner’s case against the respondents can be traced back to an audit completed in 2008 by the respondents for the period 2005 to 2007. The Commissioner disallowed certain expenses relating to payments made by KAPA to Kinsum Industries Limited of Malaysia (“Kinsum”). The Commissioner then assessed and demanded income tax on the additional revenue. After an objection was lodged against this decision, the Commissioner conceded that payments to Kinsum were an allowable expense for corporate tax purposes and vacated the demand. The Commissioner however contended that these payments were agency fees/discounts to Kinsum for which withholding tax was payable. He therefore amended the initial assessment and demanded from KAPA an additional amount based on agency fees/commissions paid to Kinsum for marketing and promotional services. KAPA lodged an objection against the amended assessment. The Commissioner considered the objection and disallowed it thereby confirming the assessment.

The Judicial Review Proceedings and the Judgment

3. It is this assessment that precipitated judicial review proceedings in *Nairobi High Court JR Misc. Application No. 283 of 2009 Republic v Kenya Revenue Authority and others ex-parte Kapa Oil Refineries Limited*. In relation to the payments made to Kinsum and which were the subject of the

decision of the Commissioner, KAPA, in the Notice of Motion filed sought, inter alia, the following orders;

[1] *Judicial Review orders of certiorari do issue to remove into the High court and quash the decision of the Respondents and or the 4th respondent converting the discounts granted to Gourock Ropes and Canvas (Z) Limited and terming it as a Commission or agency fees paid to Kinsum Industries Limited and thereby subject to Income Tax, withholding tax and VAT.*

[4] *Judicial Review orders of prohibition do issue directed to each and all the respondents prohibiting each and all of them from classifying the Applicant's payment of discounts to Gourock Ropes and Canvas (Z) Limited as Commission or agency fees to Kinsum Industries Limited.*

4. Justice Wendoh heard the matter and delivered a judgment on 2nd September 2011 (“the Judgment”) dismissing the notice of motion. The petitioner being dissatisfied with certain parts of the appeal preferred an appeal to the Court of Appeal, being ***Nairobi Civil Appeal No. 309 of 2012***. The appeal is still pending determination in that Court.

5. The Judgment dealt with several issues arising from the audit but the matters germane to the petition concerns the treatment of payments made to Kinsum. KAPA entered into a Sales and Distribution Agreement with Gourock Ropes and Canvas (Z) Limited (“Gourock”) for the sale of its products in Zambia. In the agreement KAPA gave Gourock a 6% discount where purchases exceeded USD 200,000/00 in any month and the whole discount was payable after Gourock made full payment for the purchases. Gourock then directed KAPA to pay Kinsum all volume discounts arising out of the value of goods sold to Gourock.

6. KRA contended that the payments were for marketing and promotional services rendered by Kinsum to KAPA and were paid as agency fees or commission thus attracting withholding tax and reverse VAT. KAPA on the other hand contended that the payments to Kinsum were in respect of discounts due and payable to Gourock which had directed that the discounts be remitted to Kinsum as such there was no tax liability on its part.

7. In answer to the question framed, that is, whether the money paid to Kinsum was liable to withholding tax and VAT, Justice Wendoh found as a fact that there was no evidence that Kinsum did business with KAPA during the material time upon which taxes could be attributed hence the KRA's claim for taxes could not be supported. It is in light of this finding that KAPA now contends that the Judgment conclusively annulled the respondent's assessments which were wholly based on the provision of the marketing and promotional services by Kinsum.

8. The petitioner contends that the learned Judge proceeded to make findings not contemplated in the dispute that is the liability of KAPA in respect of services rendered by Gourock. The judge observed that, “[KAPA] received the taxable service on the payments made to Kinsum for services rendered by Gourock and was liable to pay VAT.”

9. The learned Judge declined to intervene in the assessment on the ground that judicial review was concerned with the process and that there existed a procedure under the ***Income Tax Act*** to appeal the assessment to the Local Committee and that the Commissioner had issued proper notices which were amenable to the statutory procedures.

Petitioner's Case

10. Although the motion was dismissed, the KAPA complains that despite the findings of the learned judge, the Commissioner proceeded to issue agency notices to collect the taxes. KAPA paid the sum of Kshs.70,940,176/00 being the principal tax. It appealed to the Minister for a waiver of the interest and penalty amounting to Kshs. 70,146,744.00 but the application was rejected.

11. Simply stated, the KAPA impugns the petitioner's move to collect taxes on the ground that even

though the motion was dismissed, the learned Judge found in favour of KAPA that there was no relationship between Kinsum and KAPA and therefore collection of taxes could not proceed on the basis of the earlier assessment in view of the clear findings by the learned Judge without due process and in disregard of proper procedures. Mr Mogeni, learned counsel for the petitioner, argued that in view of the specific findings by the learned Judge, it was incumbent upon the Commissioner to raise fresh assessments based on facts set out in the Judgment and support those facts with evidence. He further submitted that this would enable the petitioner take advantage of the statutory appeal process.

12. The petitioner contends that the action by the respondents to demand taxes based on assessments whose basis was essentially annulled by the Judgment by raising fresh assessments is manifestly unjust, unprocedural and in violation of the petitioner's right to fair administrative action protected under **Article 47(1)** and amounts to deprivation of property contrary to **Article 40**. The petitioner relied on several decisions including ***Kenafric Industries Limited v Kenya Revenue Authority and Others Nairobi Petition No. 99 of 2011 [2012]eKLR*** and ***Electoral Commission of Kenya v Attorney General and Others Nairobi Misc. App. 415 of 2007 [2007] eKLR*** to emphasise the right to fair administrative action.

13. In its petition dated 27th August 2012, the petitioner seeks the following orders;

- (i) *A declaration do issue that the judgment of the Lady Justice Wendoh delivered on 2nd September 2011 in Misc. Application No. 283 of 2009 had the effect of annulling the respondents assessments/demands for extra revenue from the petitioner dated 26th January 2009, 23rd February 2009 and 5th May 2009.*
- (ii) *A declaration do issue that in light of the judgment of the Honourable Court in Misc. Application No. 283 of 2009, the respondents could not pursue extra taxes, penalties and interest demanded vide their letters dated 26th January 2009, 23rd February 2009 and 5th May 2009.*
- (iii) *A declaration do issue that the respondent's conduct or intention to issue agency notices, levy distress or otherwise collect taxes interest or penalty or other action against the petitioner's property based on their assessment letters dated 26th January 2009, 23rd February 2009 and 5th May 2009 notwithstanding the findings of the Judgment of Lady Justice Wendoh dated 2nd September 2011 and in the circumstances hereof is illegal, unconstitutional, null and void and a violation of the petitioner's right to fair; unlawful and procedural administrative action under Article 47.*
- (iv) *A declaration do issue that the demand by the respondents of tax arrears together with interest and penalty amounting to Kshs. 141, 086,920 vide their letter dated 26th September 2011 notwithstanding the observations of Lady Justice Wendoh in Misc. Application No. 283 of 2009 is illegal, unconstitutional, null and void and a violation of the petitioner's right to fair administrative action under Article 47 of the Constitution.*
- (v) *A declaration do issue that the issuance of agency notices dated 4th October 2011 by the respondents to the petitioner's banks is illegal unconstitutional and a violation of the petitioner's right to fair administrative action under Article 47 of the Constitution and deprivation of the petitioner's right to property under article 40 of the Constitution.*
- (vi) *A declaration do issue that the demand for penalties and interest amounting to Kshs. 70,147,044/= by the respondents by their letter dated 9th July 2012 is illegal, unconstitutional, null and void and in violation of the petitioner's right to property under Article 40 of the Constitution.*
- (vii) *A declaration be issued that the intended issuance of agency notices or levying of distress in the circumstances herein is contrary to the law, null and void and it constitutes arbitrary deprivation of property and inconsistent with the right to protection of property guaranteed under Article 40 of the Constitution.*

(viii) A declaration do issue that the payment of Ksh.70,940,176/= made to the respondents pursuant to their demand letter dated 26th September 2011 was made in error as it was not due and petitioner is entitled to a full refund with interest thereon from the date of payment at Court rates.

(ix) An order be issued prohibiting the respondent or any other Government officers or authorities from acting on the Commissioners' tax assessments dated 26th January 2009, 23rd February 2009 and 5th May 2009 and demands dated 26th September 2011 and 9th July 2012 pending the hearing and determination of this petition.

(x) The Honourable Court be pleased to issue such other or further orders, directions and writs as may be necessary to safeguard and prevent the violation of the petitioner's fundamental rights and Freedom and the Constitution.

(xi) The costs be provided for. [Emphasis mine]

Respondents' Case

14. The 1st and 2nd respondents opposed the petition primarily on the ground that matters which the petitioner raises were heard and determined and a judgment delivered on the merits of the case in **Nairobi JR Misc. Application No. 283 of 2009 Republic v Kenya Revenue Authority and others ex-parte Kapa Oil Refineries Limited**.

15. Apart from the fact that the petitioner's case was dismissed, Mr Matuku, learned counsel for the 1st and 2nd respondents, submitted that KAPA preferred an appeal to the Court of Appeal and execution has been stayed pending hearing and determination of the appeal. He submitted that the court should not entertain the petition as the matter is now *res judicata* since the issue of taxes was dealt with in the judicial review application and the matter must now await appeal. Counsel referred to several authorities including **Fleur Investment Limited v Permanent Secretary, Roads and Another Nairobi Petition No. 173 of 2011 [2012]eKLR**, **John Githongo and Others v Harun Mwau and Others Nairobi Petition No. 44 of 2012 [2012]eKLR** to support the proposition that this case is an abuse of the court process as the petitioner seeks, in effect, to review the judgment of the High Court.

16. Ms Makori, learned counsel for the Attorney General, submitted that that there was no case for breach of fundamental rights and freedoms pleaded or alleged against it and no relief was sought against it. In the circumstance counsel urged the court to strike out the case against the 3rd respondent.

Determination

17. The central issue for determination is whether there is a violation of the petitioner's fundamental rights and freedoms by the enforcement of taxes as a result of the Judgment.

18. I agree with the submission by Mr Matuku that once the application for judicial review was dismissed, the applicant's position was that existing prior to the filing of the motion. Since the tax assessment and demands existing prior to the case has not been set aside, the effect of dismissal of the judgment was to entitle KRA to proceed with enforcement. KRA was therefore entitled to enforce taxes through the issuance of agency notices.

19. What the petitioner requires this court to do is to interpret the Judgment in order to stop KRA's enforcement action. The findings contained in the Judgment are now subject of appeal and the appellate court of will now have an opportunity to address all matters arising from the decision. The specific findings made in the judgment cannot be divorced from the judgment itself or the ultimate decision dismissing the motion. The appellate court may well come to a conclusion that may reverse the learned judge or uphold the dismissal.

20. The effect of the petition is to call upon this court to adjudicate on or express a view on matters that

have been the subject of a decision which is pending appeal. If any evidence were required, it is in the prayers which I have set out in paragraph 13 above. To proceed on the course suggested by the petitioner is not permitted and it is an abuse of the court process as the direct result of such an inquiry would be to ignore the fact that Justice Wendoh dismissed the petitioner's case.

21. Furthermore, I do not think that effecting the decision of a court, of itself, constitutes a violation of any fundamental right or freedom. After the motion was dismissed, KRA was entitled to proceed with enforcement. The petitioner's remedy, on the other hand, if it is dissatisfied with part or whole of the decision is to prefer an appeal. In the case of **Methodist Church of Kenya, Registered Trustees & Another v Rev. Jeremiah Muku and Another; CA Civil Appeal No. 233 of 2008 (Unreported)** the Court of Appeal addressed this issue. It observed, "[I]t is only in rare cases that an error in the judgment or order of a court can constitute a breach of human right or fundamental freedoms. It is also clear from the quotation that ordinary errors made in the course of adjudication by courts of law should be cured by invoking the mechanism and procedures prescribed by the ordinary law for correction of errors such as appeal or review." The quotation the Court of Appeal referred to was in the case of **Maharaj v Attorney General of Trinidad and Tobago (No. 2) [1979] AC 385, 399** where the Privy Council held that, "In the first place, no human right or fundamental freedom recognized by Chapter I of the Constitution is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person's serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. Where there is no higher court to appeal to then none can say that there was an error. The fundamental human right is not to a legal system that is infallible but to one that is fair. It is only errors in procedure that are capable of constituting infringements of the rights protected by section 1(a); and no irregularity in procedure is enough, even though, it goes to jurisdiction; the error must amount to a failure to observe one of the fundamental rules of natural justice. Their Lordships do not believe that this can be anything but a very rare event..."

22. Likewise, the respondents cannot be faulted for proceeding with enforcement after the court dismissed the challenge to the assessments. The petitioner has lodged an appeal and it is in the Court of Appeal that its relief must lie. I was informed that there is a stay of execution pending appeal hence the petitioner is properly secured against any adverse action by KRA.

Disposition

23. It must now be abundantly clear that the petition is an abuse of the court process. It must be dismissed and it is hereby dismissed with costs to the 1st and 2nd respondents.

DATED and DELIVERED at NAIROBI this 17th day of May 2013

D. S. MAJANJA

JUDGE

Mr Mogeni instructed by Kelvin Mogeni Advocates for the petitioner.

Mr Matuku, Advocate instructed by the Kenya Revenue Authority for the 1st and 2nd respondent.

Ms Makori, State Counsel, instructed by the State Law Office for the 3rd respondent.