



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**JUDICIAL REVIEW DIVISION**  
**MISC. APPL. JR.NO 186 OF 2013**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**THE KENYA REVENUE AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**DIRECTOR C.I.D ..... 2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

***EXPARTE***

**SUNDIP J. PATEL**

**JUDGMENT**

**Introduction and Background**

1. The *ex-parte* applicant (“Patel”) is aggrieved by the respondents’ actions of what he terms as harassment by their officers over payment of the company’s debts. He brings the Notice of Motion dated 24<sup>th</sup> June 2013 in which he seeks the following Orders;
1. *An Order of Certiorari directed at the 1<sup>st</sup> respondent to quash the decision they made to charge the ex parte applicant with a criminal offence predicated upon the dishonour of some of the cheques issued to the said 1<sup>st</sup> respondent by KAPU (K) LTD .....*
2. *An order of Prohibition directed at all the Respondents prohibiting them by themselves, their agents, and/or their servants or otherwise howsoever from harassing and coercing the applicant to pay the taxes due from the company, it being a limited liability company, distinct from its members.*
3. *An order of prohibition directed at the 1<sup>st</sup> and 2<sup>nd</sup> Respondents restraining them from harassing and coercing the applicant to pay the taxes due from the company, it being a limited liability company, distinct from its members.*
4. *An Order of prohibition directed at the 1<sup>st</sup> and 2<sup>nd</sup> Respondents restraining them by themselves,*

*their agents, and/or their servants or otherwise howsoever from harassing and embarrassing the applicant by causing the 2<sup>nd</sup> respondent to pursue him with the intention of arresting and charging him for the actions and inactions of the company and its tax advisers.*

2. Patel is the managing director of KAPU (K) Ltd (“KAPU”). The facts of the case are that sometime in November 2008, the Kenya Revenue Authority (“KRA”) commenced investigations into the affairs of KAPU. Following investigations, KRA discovered that it owed income tax and Value Added Tax (VAT) which it demanded by a letter dated 11<sup>th</sup> February 2009. KAPU objected to the demand and proposed to pay part of the amount demanded in settlement of its liabilities.
3. By a letter dated 1<sup>st</sup> February 2010, KRA issued a notice of ‘*Investigation and Enforcement*’ in relation to the corporation tax assessments for the income year 2004-2008 addressed to KAPU. KAPU appealed to the Local Committee against the said assessment. By its decision dated 22<sup>nd</sup> August 2011, the Local Committee disallowed the appeal.
4. Thereafter KRA and KAPU entered into arrangements for settlement of the amount owing to KRA through cheques. Patel claims that KRA failed to abide by the terms upon which the cheques were issued, in particular the dates for presentation and as a result some cheques were dishonoured.
5. On 6<sup>th</sup> June 2012, KRA addressed to the Directors of KAPU a letter titled, ‘*VARIOUS DISHONoured CHEQUES*’. In that letter, KRA made a schedule of the various cheques that had been dishonoured, the amounts and the date. The letter went to state that, “*Take note that issuing bouncing cheques is an offence under the (Finance Act No. 4 of 2004) and that the Authority intends to enforce the Law regarding issuance of bouncing cheques by your firm. Vide this letter make immediate payment to Commissioner of Domestic Taxes of Kshs. 12,400,000/= through RTGS to Income Tax Main Collection Account...immediately failure of which enforcement measures shall be instituted without reference to you.*”
6. KAPU responded to the threat of enforcement stating that the scheduled post-dated cheques were issued based on an agreed amount deemed to be the total and final liability due to KRA.

### **Applicant’s Case**

7. The applicant contended that the intention by KRA to prefer charges against him for an offence in relation to the company issuing dishonoured cheques is unfair and in bad faith. He argued that KRA is keen on using the criminal justice system to harass him as the cheques were dishonoured, not due to the fault of the company but out of the failure by KRA to present them for payment on their due dates as agreed.
8. The applicant claimed that no offence was disclosed as against him because the cheques were issued to KRA by the company’s tax advisers and not the applicant. He relied on the doctrine of corporate personality to the effect that a company is a legal entity distinct from its directors hence he could not be charged for any offence committed by the company. His counsel cited the well-known case of ***Salomon v Salomon (1897) AC 22***.
9. The applicant submitted that KRA had during the settlement negotiations agreed to settle an amount in full and final settlement of the KAPU’s tax liabilities in consideration of the company issuing post-dated cheques for the said amount. He accused KRA of renegeing on the agreement by contending that the amount agreed was only for the undisputed amounts.
10. The applicant’s case is that the respondents acted unreasonably and that their conduct was unjust and oppressive.

### **Respondents’ case**

11. The KRA opposes the application on the basis of a Replying affidavit sworn by Sylvester Okello Ogello, a senior Assistant Commissioner with the KRA on 26<sup>th</sup> June 2013. In a nut shell, KRA's case is that it is within its mandate under the law to investigate all claims and information received from any source relating to any unlawful tax evasion by any party.
12. KRA's position was that an in depth audit of the affairs of KAPU revealed that it had evaded payment of taxes. That despite being accorded all the support to resolve the matter amicably, it has resorted to delaying tactics to frustrate any recovery efforts including issuing of bad cheques which is a criminal offence which ought to be investigated and action taken if there is evidence to support the charge.
13. KRA denied that it was harassing the *ex-parte* applicant.

### **Determination**

14. It is the statutory mandate of the KRA to collect taxes and it is in public interest that it does so and the defaulters dealt with in accordance with the law. In discharging its mandate, the KRA is bound to act fairly. The question is whether in the circumstances of this case, KRA conducted its mandate in a fair manner towards Patel, or in an unreasonable oppressive manner as to warrant this court's interference.
15. The 2<sup>nd</sup> respondent, the Director of the Criminal Investigations Department derives his authority from the Inspector General of Police. The Director of Public Prosecutions has the authority to prosecute criminal offences. Both offices are independent offices under the Constitution. In ***Kenya Commercial Bank Ltd and 2 others v Commissioner of Police and another, Nairobi Petition No. 218 of 2011*** (Unreported) the court observed as follows, “[25] The Office of the director of Public Prosecutions and Inspector General of the National Police Service are independent and this court would not ordinarily interfere in the running of their offices and exercise of their discretion within the limits provided for by the law. But these offices are subject to the Constitution and the Bill of Rights contained therein and in every case, the High Court as the custodian of the Bill of Rights is entitled to intervene where the facts disclose a violation of the rights and fundamental freedoms guaranteed under the Constitution.” [Emphasis added]
16. The underlying facts and controversy relates to whether the amount offered by KAPU and secured by the post-dated cheques was in full and final settlement of all the taxes owing or whether it was only for payment of the undisputed amount in taxes which is the KRA's contention. I shall not delve into resolution of this issue for three reasons; KRA's decision as to the amount of tax owing is within its mandate, its decision is not under challenge in these proceedings and KAPU is not a party to these proceedings.
17. I will now deal with the issues in this case in light of the prayers sought in the motion.

### ***Whether the proposed charges should be quashed***

18. The order of certiorari sought is grounded on the fact that a decision has been made to charge him with a criminal offence related to the dishonour of some cheques issued to KRA by KAPU. Patel does not deny that cheques were issued and dishonoured upon presentation.
19. This is *prima facie* a violation of **section 316A** of the ***Penal Code (Chapter 63 of the Laws of Kenya)*** which provides as follows;

**316A.** (1) Any person who draws or issues a cheque on an account is guilty of a misdemeanour if the person -

(a) knows that the account has insufficient funds;

(b) *knows that the account has been closed; or*

(c) *has previously instructed the bank or other institution at which the account is held not to honour the cheque.*

(2) *Subsection (1)(a) does not apply with respect to a post-dated cheque.*

(3) *Any person who, by deceit or any other fraudulent means, assists a person to obtain anything on the basis of a cheque drawn or issued in the circumstances described in subsection (1) is guilty of a misdemeanour.*

(4) *A person who is guilty of a misdemeanour under this section is liable to a fine not exceeding fifty thousand shillings, or to imprisonment for term not exceeding one year, or to both.*

20. This offence has to be read with **section 23** of the **Penal Code** dealing with liability of officer of corporations for offences committed by the corporation. It provides as follows; “*Where an offence is committed by any company or other body corporate, or by any society, association or body of persons, every person charged with, or concerned or acting in, the control or management of the affairs or activities of such company, body corporate, society, association or body of persons shall be guilty of that offence and liable to be punished accordingly, unless it is proved by such person that, through no act or omission on his part, he was not aware that the offence was being or was intended or about to be committed, or that he took all reasonable steps to prevent its commission.*”

21. The applicant has pleaded the doctrine of corporate personality to assert that criminal charges cannot be taken out against him personally regarding the alleged offence as the cheques were drawn on behalf of the company by its tax assessors. This is an attractive and well founded argument urged by counsel for the *ex-parte* applicant but I think it is made in the wrong forum. Whether and to what extent **sections 23** and **316A** of the **Penal Code** encompass liability of directors of a company is not for this court to pronounce in this case at this stage. Likewise, whether or not the acts complained of fall within the provisions of the law cited is not the concern of the court at this stage.

22. In my view, the court should not pronounce on criminal liability *a priori* or speculate and make a decision on the charges that have not been preferred against the *ex-parte* applicant. To do so would encroach on the responsibility of the Inspector General of the Police Service and the Director of Public Prosecutions. If and in the event a decision is made to charge the applicant with an offence and whether the charge can be sustained as a matter of law and fact is for the trial court to decide.

23. Since the an offence has been alleged, and I find that there is sufficient basis for this allegation based on the issuing of dishonoured cheques by KAPU, it follows that the 2<sup>nd</sup> respondent is entitled to investigate the allegation and take appropriate action if necessary. It is not for this court to make such a determination or intervene except for the circumstances I have set out elsewhere in the judgment.

24. I decline to enter into a dissertation on the issue of criminal liability for corporations and their directors for a dishonoured cheque and as such I decline to grant prayer 1 of the Motion.

#### ***Whether an order of prohibition should be issued***

25. The prayer on prohibition is predicated on the alleged attempt by the respondents to harass the applicant on account of taxes due from KAPU and the attendant dishonoured cheques issued. I have dealt with the issue of criminal liability above and in view of what I have held in respect of prayer 1 of the Motion, I do not think there is any ground to stop the respondents from proceeding with their legal mandate.

26.I therefore decline to grant prayer 2 and 3 of the Motion.

**Conclusion and Disposition**

27.In light of the reasons I have given above, the Notice of Motion dated 24<sup>th</sup> June 2013 is dismissed with no order as to costs.

**DATED** and **DELIVERED** at **NAIROBI** this 30<sup>th</sup> day of August 2013.

**D.S. MAJANJA**

**JUDGE**

Mr Arwa instructed by Rachier & Amollo Advocates for the *ex-parte* applicant.

Ms Odindo, Advocate instructed by the Kenya Revenue Authority.