



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Miscellaneous Civil Application 281 of 2010

IN THE MATTER OF: AN APPLICATION BY MARY W. KAMAU & RICHARD K. KINOTI T/A MARY HAPPY SCHOOL FOR ORDERS OF CERTIORARI

BETWEEN

REPUBLIC.....APPLICANT  
-VERSUS-

THE KENYA REVENUE AUTHORITY.....RESPONDENT

EXPARTE

MARY W. KAMAU

RICHARD K. KINOTI ALL T/A MARY HAPPY SCHOOL

J U D G M E N T

By a Notice of Motion dated 23<sup>rd</sup> September 2010 and filed in court on 24<sup>th</sup> September, 2010 pursuant to leave granted on 6<sup>th</sup> September 2010 to institute judicial review proceedings, the Exparte Applicants have moved this court praying that:

- 1. An Order of Certiorari be granted to remove into court and have quashed the decision of the Respondent, Kenya Revenue Authority issued on the 29<sup>th</sup> of April, 2010 and 30<sup>th</sup> of April, 2010 and communicated by letters of similar date freezing the Applicant's Bank Accounts with M/s Co-operative Bank of Kenya (Westlands & Kariobangi Branches), Barclays Bank of Kenya (Development House Branch) and Equity Bank Limited (Eastleigh Brnach) and appointing the said Banks as the Respondents tax agents with authority to pay over any monies in the ex-parte Applicant's Accounts and any monies coming through the Accounts to the Respondents to satisfy an alleged tax debt in claimed unremitted PAYE arrears of Kshs.9,979,670/- and Kshs.9,702/- in claimed withholding tax arrears.***
- 2. The Costs of this Application be granted to the Ex-parte Applicant.***

The application is supported by the statutory statement made on 20<sup>th</sup> August 2010 and a verifying

affidavit sworn by Richard Kirimi Kinoti on 20<sup>th</sup> August 2010. It is premised on the following grounds:

- (i) That the Respondent in arriving at the decisions and orders complained of breached and acted contrary to the express provisions of the law especially the Income Tax Act.*
- (ii) The Respondent in arriving at the decision and orders complained of acted unreasonably, recklessly and maliciously.*
- (iii) The Respondent in arriving at the decision and orders complained of denied the Applicants their inalienable right to be heard and to defend their position before an independent tribunal.*
- (iv) The Respondent's order and decision if implemented would cause and lead to irreparable loss and damage to the Applicant's operations.*
- (v) It is in the interest of justice that the Orders complained of be quashed.*

The Exparte Applicants Mary W. Kamau and Richard K. Kinoti are partners operating a school business known as Mary Happy School in Nairobi. In the verifying affidavit, Richard Kinoti the School's managing partner stated that on 16<sup>th</sup> February 2010 the Respondent informed the school through a letter of even date that it intended to make adjustments on the school's tax liability for PAYE and withholding tax following an audit of the school's financial records for Years 2006 – 2009.

On 30<sup>th</sup> March 2010, the Respondent again wrote to the school informing it that it owed the Respondent Kshs.9,979,670/- in unremitted PAYE and Kshs.9,702 in withholding tax which it was required to pay immediately. The two letters are exhibited and annexed to the verifying affidavit and **marked RKK2 and RKK3.**

The Applicants complain that they were not given an audit report to show how the said amounts in unremitted taxes were computed and as far as they were concerned, the school was upto date in all tax payments and nothing was owing to the Respondent.

According to the Applicants, amounts payable to Respondent as PAYE was deducted from its employees and remitted monthly to the Respondents as evidenced by sample remittances marked RKK4.

After being served with the tax demand, Richard Kinoti wrote to the Respondent objecting to the tax assessment but before his objection was considered, the Respondent issued and served on the school's bankers orders freezing its accounts and appointing the bankers as the Respondent's Agents mandating them to attach all funds in the said accounts and remitting them to the Respondent to pay off the alleged tax debt.

The Applicant's now want to have these orders in the form of Agency notices quashed by way of Certiorari since according to them, they were issued illegally and unprocedurally as the Commissioner of Income Tax never issued them with a notice confirming the assessment of taxes as required by the law and the applicants were not given an opportunity to be heard on their position by an independent tribunal before the orders freezing their bank accounts were made.

It is the applicant's contention that the decision by the Respondent to freeze their bank accounts and direction that all monies therein be remitted to it by the applicants bankers is malicious, arbitrary and unreasonable and if allowed to stand it will paralyze the school's operations.

The application is opposed through a replying affidavit sworn by Josephine Wanjiku Muraya, Revenue Officer I in the employ of the Respondent.

In the replying affidavit, the Respondent has sought to explain how the amounts demand in unremitted PAYE and withholding tax for Years 2006 – 2009 had been computed and insisted that they were justified in issuing the agency notices under the Income Tax Act as the applicants had allegedly

failed to perform their responsibility of withholding tax from audit fees and remitting the same to the Respondent together with PAYE deducted from income and taxable benefits of the school's directors and members of staff. These included cash payments, housing and school fees benefit, telephone expenses and car benefits. It is the Respondent's case that the amounts were arrived at after a comprehensive audit of financial records submitted by the Applicants. The Respondent also claim that the applicants chose to file this suit instead of lodging an appeal to the Local Committee under Section 37(1) of the Income Tax Act in order to frustrate the Respondent's efforts in collecting Revenue.

Both parties filed written submissions which Counsel for the Respondent M/s Ngugi highlighted before me on 17<sup>th</sup> January 2012. Counsel for the Exparte Applicants relied entirely on his written submissions and chose not to highlight the same.

Having carefully considered the application, the opposition thereto and the submissions made by counsel for the respective parties, I find that it is not disputed that the Kenya Revenue Authority (***the Respondent***) is statutorily mandated to collect and receive all revenue in the form of taxes on behalf of the Government of Kenya.

In the exercise of this mandate, the Respondent is empowered to enforce all tax related laws including the Income Tax Act and the Value Added Tax Act. In this case, under Section 56 of the Income Tax Act and Section 30 of the Value Added Tax Act the Respondent served on the Exparte Applicants a notice of intention to audit their school's business books of account to ascertain whether the correct amount of tax was being remitted to the Respondent. According to the Respondent, an audit of the books of accounts submitted by the Applicants revealed that for the years between 2006 – 2009 the Applicants had not remitted a total of ***Kshs.9,989,372*** in PAYE and ***Kshs.9,702/-*** withholding tax to the Respondent.

The claim by the Applicants that they did not know how the said sums were computed cannot be credible or true since there is evidence that one of the partners Mr. Richard K. Kinoti and their auditor attended a meeting described as ***"note of final interview"*** (see exhibit marked ***JWM6***) with officers of the Respondent in which an in-depth analysis of benefits subject to PAYE was done and amounts due from them identified. The Applicants were also served with a letter dated 30<sup>th</sup> March 2010 showing how the said tax had been computed. This letter in fact acted as a tax demand in which the Applicants were directed to pay the amount demanded immediately.

The tax demand prompted a notice of objection by the Applicant claiming that the sums computed were erroneous and without justification and praying that the same be reworked afresh. This objection was not heard or considered by the Respondent as the letter requesting for further documentation was received by the Applicants a day after the deadline set for submission of documents meant to form the basis of considering the said objection and soon thereafter the Agency notices were issued.

In paragraph II of the verifying affidavit, the deponent avers that he received the said letter dated 21<sup>st</sup> April 2010 by post on 29<sup>th</sup> April 2010 while the deadline for submission of further documentation was on 28<sup>th</sup> April 2010 which had already passed. It is important to note that the Agency notices addressed to various banks which the Applicants have asked this court to quash by orders of Certiorari were issued on 29<sup>th</sup> April 2011 and 30<sup>th</sup> April 2010.

In view of the foregoing, the question that then arises for determination by this court is whether the Exparte applicants are entitled to the orders sought.

At the outset, let me start by observing that judicial review is the process by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals, statutory bodies or persons who carry out judicial or quasi-judicial functions or who are charged with the performance of public duties. It is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made but with the decision making process. That is why one of the grounds on which the remedy of judicial review would issue besides illegality and irrationality is procedural impropriety. What amounts to procedural impropriety will depend on the facts of each

particular case but generally it will involve failure to follow statutory procedures for the performance of a task or duty including failure to follow the rules of natural justice.

***In what circumstances does the order of Certiorari issue?***

According to Halsbury Laws of England 4<sup>th</sup> edition Vol.1 at paragraph 111, Certiorari will issue to quash a determination for excess or lack of jurisdiction, error of law on the face of the record, breach of the rules of natural justice or where the determination was procured by fraud, collusion or perjury.

In the instant case, while it is admitted that the Respondent was acting in accordance with the law (***The Income Tax Act and Value Added Act***) in demanding the payment of taxes from the Applicants and was empowered by Section 96(i) of the Income Tax Act to issue agency notices to banks as agents for purposes of tax collection, it is my view that such agency notices ought to have been issued when all the objection and appeal processes provided for under Section 82 – 87 of the Income Tax Act (***hereinafter referred to as the Act***) had been exhausted and a final assessment issued under Section 88 of the Act.

In this case, though the Applicants chose not to utilize the process of appeal to the Local Committee which was within their rights, they disputed the assessment and made a notice of objection to the Commissioner under Section 84(1) of the Act. This is admitted by the Respondent.

There is no claim by the Respondent that the said notice of objection was invalid. Infact the letter dated 21<sup>st</sup> April 2010 requiring the Applicants to submit further documentation to enable the Respondent deal with the objection is proof that the Applicants objection was admitted as valid. Under Section 85 of the Act, the Commissioner was required to consider the objection and decide whether to amend the tax assessment in line with the objection or using his best judgment or reject the objection altogether.

As noted earlier, it is apparent from the facts of the instant case that the Applicants were not heard on their objection before the tax assessed earlier was considered as a final assessment and Agency notices were issued to enforce its recovery. This in my view denied the applicants the opportunity to be heard on their position that the tax as assessed by the Respondent was erroneous as it was allegedly not in conformity with financial records held by them. The Respondent did not also consider the objection as it had not received the documents it required for that purpose from the applicants before it issued the Agency notices on 29<sup>th</sup> April 2011 and 30<sup>th</sup> April 2011.

Failure to consider the said objection irrespective of whatever decision the Respondent would have come out with amounted to failure by the Respondent to perform its statutory duty under Section 85 of the Act. Given the substantial amounts involved in the tax assessment, I find that failure to consider the applicants objection to the tax assessment before issuing the Agency notices which had the effect of freezing the applicants bank accounts without notice was not only a procedural lapse in the processing of tax demands by the Respondent but was a procedural impropriety which exposed the applicants to unfair treatment. It also amounted to a breach of the rules of natural justice which require that no person should be condemned unheard.

In the case of Chief Constable of Northwales Police –vs- Evans [1982] All ER 142 at page 143, Lord Halsham L.G. stated:

*“It is important to remember in every case that the purpose of (the remedy of judicial review) is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question”.*

In this case the court is not questioning the validity or otherwise of the tax assessment served on the Applicant. It is also not questioning the decision of the Respondent to issue agency notices as this was part of its statutory duties. The court is not saying that the Respondents acted illegally or in excess of its jurisdiction but the court is however concerned with the procedural impropriety committed by the Respondent in the process of making the said decision since it exposed the Applicants to unfair

treatment. The respondent being a statutory body with quasi judicial powers had a duty to act fairly and judiciously.

Under Article 47(1) of the Constitution of Kenya 2010, the applicants have a right to fair administrative action which this court is duty bound to protect.

For all the foregoing reasons, I find that the Exparte Applicants have proved that they are deserving of Orders of Certiorari sought in the Notice of Motion dated 23<sup>rd</sup> September 2010. The application is therefore allowed in terms of Prayer I.

The Respondents should now proceed to consider the Exparte Applicant's objection to the tax assessment contained in letter dated 30<sup>th</sup> March 2010 and make its determination one way or the other before a final tax assessment is issued and served on the Exparte Applicants.

Each party will bear its own costs.

**Dated, Signed and Delivered** by me at Nairobi this 14<sup>th</sup> day of February, 2012.

C. W. GITHUA  
**JUDGE**

*In the presence of:*

Florence – Court Clerk  
Mr. Omogo for Applicants  
M/s Ngugi for Respondent