



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI LAW COURTS)**

**JUDICIAL REVIEW 35 OF 2011**

**IN THE MATTER OF: AN APPLICATION BY TETEZI HOUSE LIMITED FOR  
LEAVE TO INSTITUTE JUDICIAL REVIEW ORDERS OF MANDAMUS**

**AND**

**IN THE MATTER OF: AN APPLICATION FOR REFUND OF AN AMOUNT AS STAMP DUTY**

**AND**

**IN THE MATTER OF: THE STAMP DUTY ACT (CAP 480) LAWS OF KENYA**

**AND**

**IN THE MATTER OF: ARTICLES 19, 20, 21, 22, 23 AND 40 OF THE CONSTITUTION OF  
KENYA**

**BETWEEN**

**TETEZI HOUSE LIMITED.....APPLICANT**

**-VERSUS-**

**COLLECTOR OF STAMP DUTY.....1<sup>st</sup>RESPONDENT**

**ATTORNEY GENERAL.....2<sup>nd</sup>RESPONDENT**

**J U D G M E N T**

The Exparte Applicant herein Tetesi House Ltd (*hereinafter referred to as the Applicant*) moved this Court by way of Notice of Motion dated 8<sup>th</sup> March 2011 and filed on 14<sup>th</sup> March 2011 seeking an Order of Mandamus directed at the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, the Collector of Stamp Duty and the Hon. Attorney General respectively compelling them to refund to the Applicant an amount of **Kshs.2,012,010/-** paid as stamp duty in respect of a transfer by chargee instrument executed by the Applicant and Barclays Bank of Kenya Ltd together with interest at court rates from 8<sup>th</sup> February 2010.

The Notice of Motion was filed pursuant to leave granted on 24<sup>th</sup> February 2011 under Order 53

Rule I(1) of the Civil Procedure Rules. It is supported by the statutory statement dated 21<sup>st</sup> February 2011 and the verifying affidavit sworn by John Maina Mburu a director of the Applicant.

The brief facts of this case are that the Applicant entered into an agreement for the sale of land Reference Numbers 4953/1990 and 4953/1991 (*hereinafter referred to as the properties*) with Barclays Bank of Kenya on 10<sup>th</sup> February 2009. Thereafter, a transfer by chargee instrument dated 9<sup>th</sup> June 2010 was executed by directors of the Applicant and Barclays Bank of Kenya Ltd (*the chargee*). Valuation of the properties was subsequently done and stamp duty payable for the proposed transfer by chargee to the Applicant was assessed at Kshs.2,012,010 which amount the Applicant paid on 31<sup>st</sup> July 2009. The transfer by chargee instrument duly stamped together with other completion documents were lodged for registration on 6<sup>th</sup> August 2009 but they were returned unregistered in September 2009 by the Registrar of Titles on grounds that there was a prohibitory order registered against the title of the properties prohibiting dealings related to the said titles.

The Applicant on conducting due diligence discovered that the High Court of Kenya had in HCC 246/09 issued the said prohibitory order which had been registered on 5<sup>th</sup> August 2009 a day before the Applicant had lodged completion documents to effect transfer of title to the properties to its name.

According to the Applicant, after realizing that the proposed transfer of the properties to the Applicant's name had been frustrated by the pendency of the case filed at the High Court and the existence of the prohibitory order, Barclays Bank of Kenya the vendor and the Applicant decided to rescind their agreement for sale of the properties in question and the instrument of transfer by chargee.

On 8<sup>th</sup> February 2010 and 22<sup>nd</sup> February 2010, the Applicant applied to the 1<sup>st</sup> Respondent for a refund of the stamp duty paid on the failed transaction. According to the two letters exhibited as annexures **marked JMM 7("a")** and **JMM 7("b")**, the letter dated 8<sup>th</sup> February 2010 sought transfer of Kshs.2,012,010/- paid as stamp duty on LR.Nos.4953/1990 and 4953/1991 Account of Tetesi House Ltd to LR. Nos.21251 and others Account of Kitengela Water Ltd while letter dated 22<sup>nd</sup> February 2010 sought a refund of the stamp duty paid to the Applicant.

In the replying affidavit sworn on 31<sup>st</sup> October 2011 by Nyandoro David Nyambaso who functions as the 1<sup>st</sup> Respondent, he stated that he responded to the two requests by the Applicant by explaining that stamp duty was not transferable from one account to another and that the application for refund to the Applicant had been made out of time in view of the provisions of Section 102(c) of the Stamp Duty Act as amended in 1994 - (*hereinafter referred to as the Act*) and that as he had no mandate to extend the time limit within which applications for refund should be made, he was unable to refund the monies paid as stamp duty by the Applicant.

It was however the Applicant's case that the 1<sup>st</sup> Respondent was required by law to make refunds of stamp duty erroneously paid under Section 24 of the Act provided that the request for refund was made within one year.

The Applicant contended that it had made a claim for a refund of the stamp duty paid on 31<sup>st</sup> September 2009 within six months and that therefore it was entitled to a refund as a matter of right and that the 1<sup>st</sup> Respondent had a duty under Section 24 of the Act to make the said refund and that as he had failed/and or refused to do so, he should be compelled by an Order of Mandamus to refund the said money to the Applicant.

To buttress their respective positions, the parties herein filed written submissions which Mr. Munyororo for the Applicant and M/s Gitahi for the Respondents briefly highlighted before me on 31<sup>st</sup> January 2012.

Having considered the Applicant's motion and the submissions made by the parties, I find that the only issue for determination by the Court in this case is whether or not the Applicant is entitled to the

order of mandamus as sought since it is not disputed that the 1<sup>st</sup> Respondent is an office in the public service which is amenable to judicial review.

In order to resolve the issue of whether or not the remedy of mandamus is available to the Applicant, I think it is important to understand the nature and scope of the said remedy and when it should issue.

In Halsbury's Laws of England, 4<sup>th</sup> Edition at paragraph 128, the learned author had the following to say about the order of mandamus

“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty”.

At paragraph 129 headed the ‘mandate’ it is stated:

“The order must command no more than to do that which the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way”.

The Court of Appeal in Kenya National Examination Council Vs R ex parte Geoffrey Gathenji Njoroge & 9 Others, C/A No.266 of 1996 after quoting with approval the above passage in Halsbury's Laws of England concerning the nature and scope of the remedy of mandamus proceeded to explain that an order of mandamus can only be issued against public officers or public bodies who have failed to perform a public duty imposed by statute. The Court of Appeal expressed itself in the following terms:

***“What do these principles mean?”***

They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.....”

In view of the foregoing, I fully concur with M/s Gitahi's submission that this court can only issue orders of mandamus to compel the 1<sup>st</sup> Respondent to refund the stamp duty paid by the Applicant if the Court was satisfied that the 1<sup>st</sup> Respondent had a statutory duty to make such a refund which duty he had failed or refused to perform to the detriment of the Applicant.

The Applicant has maintained that the 1<sup>st</sup> Respondent was statutorily required under Section 24 of the Act to refund the stamp duty it had paid on 31<sup>st</sup> July 2009 since having rescinded the contract of sale of the properties in question and in view of the existence of the prohibitory orders issued in HCC 246/2009, the transfer for which the stamp duty had been paid could not be effected and the application for refund had been made within the time limited by the law.

Section 24 of the Act states as follows:

“If a Senior Collector of Stamp Duties is satisfied that an instrument has been erroneously assessed with duty or penalty, he may, if application for a refund is made at any time within one year after date of the payment of that duty or penalty, refund the amount thereof to the person by whom it was paid”

In my view, Section 24 of the Act imposes a duty on the 1<sup>st</sup> Respondent to refund stamp duty or penalties which had been paid based on erroneous assessment of duty or penalty payable and where the application for refund had been made within one year.

What then constitutes **“erroneous assessment?”**

According to Black’s Law Dictionary, 8<sup>th</sup> Edition an erroneous assessment is:

**“An assessment that deviates from the law and creates a jurisdictional defect and that is therefore invalid”**

In my considered view, an erroneous assessment would refer to a situation where the person charged with the responsibility of assessing duty or penalties payable applies the wrong principles or formulae contrary to those allowed by the law in calculating the amount of duty/penalty payable with the result that he arrives at the wrong figures not representative of the amount of duty required by law to be paid for the transaction in question. This in my view includes a situation where duty assessed is either higher or lower than the amount required for a certain transaction and based on this erroneous assessment the wrong amount of duty is paid. When this happens and the person who paid the erroneously assessed duty makes a claim for a refund of the duty paid within one year, then the 1<sup>st</sup> Respondent is required by Section 24 to refund the same and not in any other situation. This in my view is the plain and ordinary meaning of the words used in Section 24 of the Act and I find no need to adopt any other interpretation that would unduly stretch its language to include other situations obviously not contemplated by the said legislation as suggested by the Applicant herein.

If it was parliament’s intention that stamp duty correctly assessed and paid could be refunded if the purpose for which it had been paid was thereafter defeated by parties rescinding their sale of land contracts or by frustration caused by occurrence of hitherto unforeseen events nothing would have been easier than for Parliament to provide for refunds of stamp duty paid in such situations either under Section 24 in addition to duty paid on the basis of erroneous assessments or in any other provision of the Act. Parliament did not do so and this Court can only conclude that Parliament did not intend for refunds to be made under Section 24 of the Act other than for stamp duty paid on the basis of erroneous assessment.

In this case, it is clear from the Applicant’s pleadings and submissions that it was not claiming a refund of the stamp duty paid because it had been wrongly assessed. It is not disputed that in this case stamp duty was properly assessed and paid. The Applicant’s claim is based on the fact that the transfer for which duty had been paid was no longer tenable as it had been frustrated by registration of prohibitory orders against titles which were the subject of the proposed transfer by chargee.

In the circumstances, even though the claim for a refund had been made within time, I find that Section 24 of the Act was inapplicable in this case and since parliament in its wisdom did not provide for refunds of stamp duty in situations where the claim for refund was based on frustration of purpose for which duty had been paid, it is my considered view that the 1<sup>st</sup> Respondent did not have a statutory duty to refund the stamp duty paid by the Applicant in this case either under Section 24 of the Act or in any other provision of the Act except perhaps under Section 102 thereof where conditions therein had been satisfied.

In my opinion, such a refund would only have been possible under Section 102 of the Act if the Applicant’s application for refund of the stamp duty had been made within 180 days of the date stamp duty was paid. I have deliberately indicated that the application for refund ought to have been made within 180 days not 90 days as submitted by the Respondent because Section 102(c) has since been amended to extend the time from 90 days to 180 days and the Court is supposed to apply the law as it is currently not as it was previously even though the Applicant’s claim for refund had been made before the law was amended.

The question then to resolve at this juncture is whether the Applicant had made his claim for refund within 180 days of payment of duty in order to become entitled to a refund under Section 102 of the Act.

It is not disputed that the Applicant paid for the said stamp duty on 31<sup>st</sup> July 2009. From 31<sup>st</sup> July 2009 a period of 180 days equivalent to six months expired in January 2010. The Applicant however

applied for the said refund on 22<sup>nd</sup> February 2010 about a month or so after time limited by Section 102(c) of the Act had expired.

The Applicant's application for a refund of the stamp duty paid on 31<sup>st</sup> July 2009 was therefore statutorily time barred. I have painstakingly gone through the Stamp Duty Act and I did not come across a provision giving the 1<sup>st</sup> Respondent discretion or authority to either extend time allowed under Section 102(c) to make applications for refund of stamp duty or to refund stamp duty paid without regard to any timelines where the purposes for which duty had been paid had been frustrated by other intervening factors as happened in the Applicant's case.

In the absence of legislation imposing a duty on the 1<sup>st</sup> Respondent to refund stamp duty paid by Applicants irrespective of time the application for refund is made to the 1<sup>st</sup> Respondent, I find that since the Applicant had failed to bring itself within the parameters provided by Section 102 particularly Section 102(c) of the Stamp Duty Act in order to become entitled to the refund sought in letter dated 22<sup>nd</sup> February 2010, the 1<sup>st</sup> Respondent did not have any statutory duty to refund the monies paid as stamp duty by the Applicant or any interest thereof.

From the foregoing, it is evident that the 1<sup>st</sup> Respondent had no legal obligation to refund the monies paid to his office by the Applicant as requested having received its application for refund outside the time specified by Section 102(c) of the Act.

With much respect to Mr. Munyororo for the Applicant, it is my considered view that in refusing to make the refund sought by the Applicant, the 1<sup>st</sup> Respondent was just complying with the law and he cannot be faulted for obeying the law in the performance of his duties.

Though failure to refund the said monies would obviously be detrimental to the Applicant's interest, whether or not the same would have the effect of violating the Applicant's right to property and protection of the law under Article 40 of the Constitution of Kenya 2010 is not an issue for determination by this Court. This is an issue that should be raised and ventilated in other appropriate forums where if it is found that the Applicant's right to property had been violated as alleged, appropriate remedy would be made available to the Applicant. In this case, only the courts judicial review jurisdiction has been invoked to grant the orders of mandamus and this is the only remedy that the court is able to grant if the Applicant is able to demonstrate that it is deserving of the orders sought. This court is only concerned with the issue of whether in failing and/or refusing to refund the monies sought by the Applicant, the 1<sup>st</sup> Respondent was refusing or failing to perform a public duty imposed on him by statute.

As demonstrated earlier, the 1<sup>st</sup> Respondent only had a public duty imposed under the Stamp Duty Act to make refunds of stamp duty paid on the basis of erroneous assessments under Section 24 of the Act or where an application for such refunds had been made within the time specified in Section 102(c) of the Act and not in any other situation.

In the circumstances, having received the Applicant's application for a refund outside the time limited by Section 102(c) of the Act, the 1<sup>st</sup> Respondent did not have any statutory duty to make the refund sought by the Applicant herein. Consequently, this court cannot issue orders of mandamus to compel the 1<sup>st</sup> Respondent to perform a duty he is not obligated by law to perform or to do that which he is prohibited to do by the law.

Though the Court sympathizes with the position the Applicant finds itself in, I wish to observe that the Applicant is the author of its own misfortune for having lodged its application for refund of stamp duty late. Had it lodged its application within the time allowed by the law, the 1<sup>st</sup> Respondent would have been under a legal duty to make the said refund and in the event that he failed to perform his duty under the Act, this court would not have had any hesitation in issuing orders of mandamus to compel him to perform his aforesaid statutory duty. The Applicant appears to have slept on its right to a refund under the law and only woke up when it was too late to enforce that right. It is in a way an exemplification of the

legal maxim that Equity aids the vigilant not the indolent.

In the circumstances of this case, I am satisfied that the Applicant has failed to demonstrate that it is deserving of the orders of mandamus sought in these proceedings.

I accordingly find no merit in the Notice of Motion dated 8<sup>th</sup> March 2011 and it is hereby dismissed with no orders as to costs.

**Dated, Signed and Delivered** by me at Nairobi this 30<sup>th</sup> day of March, 2012.

**C. W. GITHUA**

**JUDGE**

***In the presence of:***

Florence – Court Clerk

Mr. Munyororo for Applicant

M/s Gitahi for Respondent