



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
JUDICIAL REVIEW DIVISION
MISC. CIVIL SUIT NO. 461 OF 2004

BETWEEN

REPUBLIC

VERSUS

COMMISSIONER OF INCOME TAX RESPONDENT

EXPARTE

CHARTERHOUSE BANK LIMITEDAPPLICANT

JUDGMENT

The Application

1. The *ex-parte* applicant, Charterhouse Bank Limited was at the time material to this application, licensed to carry out the business of banking under the ***Banking Act (Cap 488 of the Laws of Kenya)***. It is now under statutory management and it brings these proceedings against the Commissioner of the Income Tax.

2. By a Notice of Motion dated 21st April 2004 filed pursuant to leave granted on 8th April 2004 and brought under **Order 53 rule 3** and 7 of the ***Civil Procedure Rules***, the *ex-parte* applicant seeks the following orders of judicial review;-

- (a) *An order of certiorari to quash the agency notice issued by the respondent on 1st March 2004.*
- (b) *An order of prohibition to prevent the respondent from issuing any or further agency notice(s) pursuant to the assessment notice dated 24th February 2004 unless the respondent has first complied with the procedure laid down in sections 84-86 of the Income Tax Act (Chapter 470 of the Laws of Kenya).*
- (c) *Costs of and incidental to this application be provided for.*

3. The Motion is supported by the statutory statement dated 8th April 2004 and the verifying affidavit of Peter James Mwangi sworn on 8th April 2004 and a further affidavit sworn on 10th August 2004.

Ex-parte Applicants' Case

4. The *ex-parte* applicant's grievance arises from the agency notice dated 1st March 2004 ("the notice") appointing Central Bank of Kenya ("the Central Bank") as its agent for the purpose of collecting additional tax assessed and contained in a letter dated 24th February 2004. The letter claimed Corporation Tax, Withholding Tax for the years 1999 to 2003 and PAYE for the years 1999 – 2003.
5. The notice issued to Central Bank required the sum of Ksh.59,653,896 to be paid within a period of twelve months.
6. The *ex-parte* applicant contends that the assessment was received on 27th February 2004 at 3.00 pm and the agency notice issued on 1st March 2004 thereby denying it an opportunity to react or respond to the purported additional assessment.
7. The *ex-parte* applicant avers that it lodged an objection against the assessment of tax by a letter dated 8th March 2004 and despite this objection, the respondent has declined to withdraw the notice.
8. The bank also argues that the funds held at the Central Bank and which are the subject of the agency notice are deposited in accordance with statutory requirements and are not available to satisfy the agency notice and will result in non-compliance with statutory requirements.
9. The *ex-parte* applicant avers that the agency notice was issued in disregard of the rules of natural justice, it was arbitrary and without foundation and was intended to embarrass the bank.

Respondent's case

10. The respondent denies the allegations levelled against it based on the replying affidavit sworn by Justus Musau Kiuvu on 12th July 2004. He confirms that the bank's tax affairs were the subject of an audit and that he met with the bank's officials on several occasions to discuss the audit and to examine additional records of the bank's corporation tax, PAYE and withholding taxes. This interaction was the subject of correspondence between the parties.
11. As a result of the failure of the bank to respond to various queries, the respondent decided to issue an agency notice to the Central Bank pursuant to the provisions of **section 96** of the ***Income Tax Act (Chapter 470 of the Laws of Kenya)***. Subsequent to the agency notice, the bank lodged a notice of objection dated 8th March 2004 but it was not admitted as it was not accompanied by supporting documents as required by the rules.

Proceedings

12. This matter was filed in the year 2004. It was adjourned from time to time and was adjourned generally on 6th June 2006. As no step had been taken by the *ex-parte* applicant, the court issued a notice to dismiss the matter for want of prosecution. The *ex-parte* applicant opposed the notice by affidavit and on 24th February 2012, I allowed it a chance to prosecute the suit. On 27th March 2012, I fixed the hearing of the motion for 18th April 2012 and directed parties to file written submissions.
13. When the matter came up for hearing on 18th April 2012, counsel for the *ex-parte* applicant sought an adjournment to prosecute an application for the firm to cease acting on behalf of the *ex-parte* applicant. I rejected the application for adjournment and ordered the matter to proceed for hearing.
14. Counsel for the *ex-parte* applicant informed the court that she did not have instructions and did not make any submissions. Counsel for the respondent relied on the written submissions filed on 1st April 2012. I have nevertheless considered all the material placed on record by the *ex-parte* applicant.

Analysis and Disposition

15. As these are judicial review proceedings, I am not concerned about the merits of the decision to assess tax due from the *ex-parte* applicant. The scope of judicial review is now settled. ***“The Court will not, however, on a judicial review act as a “court of appeal” from the body concerned, nor will the Court interfere in any way with the exercise of any power or discretion which has been conferred on that body unless it has been exercised in a way which is not within that body’s jurisdiction, or the decision is Wednesdaybury unreasonable. The function of the court is to see that lawful authority is not abused by unfair treatment. If the court were to attempt itself the task entrusted to that authority by law the Court would, under the guise of preventing the abuse power be guilty of usurping the power”*** (See *Chief Constable of North Wales Police v Evans [1982] 1 WLR 1155 p.1173* adopted in *R v Judicial Service Commission ex-parte Pareno [2004] 1 KLR 203*).

16. The order of certiorari sought seeks to quash the agency notice issued to the Central Bank. The assessment of taxes due is not contested in these proceedings and therefore the only question is whether the respondent was entitled to issue the agency notice.

17. The respondent is empowered to issue an agency notice under the provisions of **section 96** of the **Income Tax Act** and I am satisfied that in the circumstances of this case there was tax due from the bank and the respondent was entitled to exercise its powers to collect tax.

18. The issue of the tax due from the bank had been the subject of meetings, correspondence between the parties I am unable to conclude that the issue of the Agency Notice was issued in bad faith or arbitrarily or was without foundation.

19. The *ex-parte* applicant argues that the Central Bank of Kenya could not be an agent for purpose of **section 96** of the **Income Tax Act** and therefore the agency notice is *ultra vires*. This argument lacks merit for several reasons. First, there is nothing in the **Income Tax Act** that exempts the Central Bank of Kenya from the provisions of **section 96** of the **Income Tax Act**. Secondly, there is nothing in the **Central Bank of Kenya Act (Cap 491 of the Laws of Kenya)** or the **Banking Act** that grants immunity to the Central Bank from the provisions of **sections 96** of the **Income Tax Act**.

20. Thirdly, if the Central Bank was aggrieved it would have raised an objection to the agency notice. In fact, by a letter dated 5th March 2004, the Central Bank wrote to the bank seeking to know its position in the matter. The *ex-parte* applicant was informed by the Central Bank that, *“we intend to implement the notice without delay.”* To date no objection or intervention has been lodged by the Central Bank.

21. The conclusions I have arrived at are fortified by the decision of the Court of Appeal in the case of ***Pili Management Consultants Ltd v Commissioner of Income Tax & Another Mombasa Civil Appeal No. 154 of 2007 (Unreported)*** where the court in considering a case where an agency notice was challenged observed that, ***“either tax was or was not payable on the money in the bank and whether the Commissioner’s assessment or assessments are correct will, we hope, be determined in the objection proceedings lodged by Pili. On the question of whether the agency notice was validly issued, we are satisfied that in the particular circumstances of this case, the notice was validly issued and we confirm the learned judge’s decision on that point.”***

22. I am also satisfied that the agency notice was validly issued and having been issued an order of certiorari does not lie. It also follows that the order of prohibition cannot issue as the respondent has not acted unreasonably, without or in excess of its jurisdiction in demanding outstanding taxes.

23. In the circumstances, the Notice of Motion dated 21st April 2004 is hereby dismissed with costs to the respondent.

DATED and DELIVERED at NAIROBI this 30th April 2012.

D.S. MAJANJA

JUDGE

Ms S. Simiyu instructed by Iseme Kamau and Maema Advocates for the *ex-parte* applicant.

Mr B. Mwamuye instructed by the Commissioner of Income Tax.