



**BETWEEN**

**REPUBLIC**

**VERSUS**

**KENYA REVENUE AUTHORITY.....RESPONDENT**

***EX-PARTE***

**SANJAY SHAH ..... 1<sup>ST</sup> APPLICANT**

**MANOJ R. SHAH ..... 2<sup>ND</sup> APPLICANT**

**NITIN M. SHAH ..... 3<sup>RD</sup> APPLICANT**

**KINGSWAY TYRES AND**

**AUTOMART LIMITED.....4<sup>TH</sup> APPLICANT**

## **JUDGMENT**

### **Introduction**

1. It is unfortunate and regrettable that this matter has taken 13 years to be heard and determined and that is why I declined to entertain the applicants' advocate's request for an adjournment when the matter came up for hearing.
2. These judicial review matters are consolidated as they deal with the interpretation of **section 123** of the ***Income Tax Act (Chapter 470 of the Laws of Kenya)*** ("the Act") and ***Gazette Notice No. 2895*** dated 11<sup>th</sup> June 1998 ("***the Direction***") issued by the Minister for Finance ("the Minister") in exercise of the powers conferred on him by **section 123(2)(a)** of the Act. Similar provisions are contained in the ***Value Added Tax Act (Chapter 476 of the Laws of Kenya)*** and ***Gazette Notice No. 2894*** was also issued by the Minister in respect of Value Added Tax.
3. These provisions entitled the Commissioner of Income Tax ("the Commissioner") and the Minister to declare a tax amnesty. This decision deals with the nature and extent of that amnesty declared by the Minister and contained in the Direction issued by him.

### **Section 123 of the Income Tax Act and the Gazette Notice No. 2895**

4. For the proper appreciation the legal provisions in contention I shall set them out in full.

***Section 123 of Income Tax Act provides that:-***

***(1) Notwithstanding the provisions of this Act, in any case where he is of the opinion that he should refrain from assessing tax, or recovering tax from a person by reason of:-***

- (a) *Uncertainty as to any question of law or fact; or*
- (b) *Consideration of hardship or equity; or*
- (c) *Impossibility, or undue difficulty or expense of recovery of tax*

*The Commissioner may elect to refrain from assessing or recovering the tax in question and thereupon liability to the tax shall be deemed to be extinguished or the tax shall be abandoned or remitted as the case may be and the provisions of this Act other than this section shall no longer apply thereto.*

(2) *In any case which has been referred to him and when he considers it appropriate, the Minister may in writing direct the Commissioner:-*

- (a) *To take such action under this Section as the Minister may deem fit; or*
- (b) *To obtain the direction of the Court upon the case.*

(3) *Where the Commissioner has elected to refrain from assessing or recovering tax under the provisions of subsection 91, he shall report that election in writing to the Minister as soon as may be after the 30<sup>th</sup> June next following his election.*

Gazette Notice No. 2895

## **INCOME TAX ACT**

**(Cap 470)**

### **DIRECTION**

*It is notified for the information of the general public that in exercise of powers conferred by section 123 of the Income Tax Act the Minister for Finance has directed the Commissioner of Income Tax to refrain from assessing or recovering tax, interest and penalty from any person on income chargeable to tax under section 3 of the Act in respect of the years of income prior to the 1<sup>st</sup> January 1998, not disclosed to the commissioner in any return made prior to the 11<sup>th</sup> June 1998;*

*Provided that:-*

- (i) *The direction shall only apply and be limited to the amount of undisclosed income applied to the purchase by that person of registered government bonds of a duration of at least two years and*
- (ii) *The person shall submit all appropriate returns or amended returns containing a full disclosure of the previously undisclosed income including all registered government bonds purchased under paragraph (i) to the Commissioner of Income Tax and*
- (iii) *The purchase of bonds under paragraph (i) and the disclosure under paragraph (ii) are effected not later than 31<sup>st</sup> December 1998.*

*Dated the 14<sup>th</sup> June 1998.*

**SIMEON NYACHAE**

*Minister for Finance*

## **The 1<sup>st</sup> Application (Misc. 845 of 1999)**

5. The *ex-parte* applicants (“applicants”), Sanjay Shah (“Sanjay”), Manoj R. Shah (“Manoj”), Nitin M. Shah (“Nitin”) and Kingsway Tyres and Automart Limited (“Kingsway”) moved the court by a Notice of Motion dated 27<sup>th</sup> July 1999 and applied for the following orders of judicial review;

- (a) *The applicant be granted leave to amend the statutory statement as per the draft annexed herein.*
- (b) *An order of Certiorari to quash the Agency Notices served upon the applicants’ bankers demanding Income Tax assessed, computed or allegedly payable for the period to prior to 1<sup>st</sup> January 1998.*
- (c) *An order of Mandamus to direct the respondent its servants and or agents to abide by the provisions of the Income Tax Act and Gazette Notice No. 2895 of 11<sup>th</sup> June 1998 and refrain from computation, collection, or recovery of tax due prior to 1<sup>st</sup> January 1998.*
- (d) *A declaration that the respondent’s acts are ultra-vires provisions of Income Tax Act Cap 470 Laws of Kenya more particularly section 123.*
- (e) *A declaration that it is discriminatory and an abuse of office and in excess of power for the respondent to deprive the applicant it’s tax amnesty conferred by section 123 of the Income Tax Act.*
- (f) *A declaration that no Tax liability is due prior to 1<sup>st</sup> January 1999.*
- (g) *Costs of and incidental to this suit.*

6. The motion was supported by a verifying affidavit sworn on 14<sup>th</sup> July 1999 by Sanjay, a director of Kingsway and statutory statement dated 14<sup>th</sup> July 1999. Manoj and Nitin have also sworn verifying affidavits sworn on 14<sup>th</sup> July 1999. There is an amended statement filed on 29<sup>th</sup> July 1999 which has amended the relief sought but it is not clear whether it was amended with leave.

7. According to Sanjay, after ***the Direction*** was issued, he complied with it by purchasing government bonds for two years and was allocated CDS Account No. 07-00-411509. Both Manoj and Nitin aver that they purchased government securities and were allocated account numbers 07-00-411401 and 07-00-411456 respectively. The applicants contend that they met the conditions of the tax amnesty extended by ***the Direction*** and thus no computation or collection of tax prior to 1<sup>st</sup> January 1998 could be made by the Commissioner.

8. The applicants were therefore shocked when the respondent issued agency notices to his bankers purporting to collect income tax arrears from them. It is this action that precipitated these proceedings.

9. The application is opposed by the replying affidavit sworn on 15<sup>th</sup> February 2001 by Jairus Saulo Mukabane who was, at the material time, a revenue officer attached to the Pay As You Earn (PAYE) section of the Income Tax Department.

10. Mr Mukabane depones that on 13<sup>th</sup> January 1999 he was asked to commence a PAYE audit of Kingsway employees and its directors and in that respect he issued a notice to produce records under **section 56** of the Act and **Rule 14** of the **PAYE Rules**. The notice requested records for the period from January 1996 to December 1998 to be produced for inspection.

11. Mr Mukabane visited the premises of Kingsway and examined records including the payroll of 1996 – 1998, personnel files, directors’ ledger, general ledger, cash books, cheque counterfoils, payments vouchers, lease agreements, balance sheets and pay-in slips. On completion of the audit on the 2<sup>nd</sup> of February 1999, he was established that certain benefits like car, water, telephone, electricity and loan benefits were not charged correctly.

12. He thereafter adjusted the taxes in respect of the benefits to directors as required by **sections 3 and 5** of the Act. The amount adjusted was Kshs.7,152,024/= which was notified to Kingsway by a letter dated 2<sup>nd</sup> March 1999 and a reminder duly sent on 19<sup>th</sup> March 1999.

13. Since there was no response to the notices issued, KRA decided to invoke recovery measures under **section 96** of the Act. The notices were issued on 19<sup>th</sup> May 1999.

14. Mr Mukabane states that earlier on, the advocates for the applicants had written a letter dated 9<sup>th</sup> May 1999 stating that the computation of taxes prior to January 1998 was prohibited in law under **section 123** of the Act and *the Direction*. Enclosed with the letter were cheques for two employees not covered by the tax amnesty.

### **The 2<sup>nd</sup> Application (Misc. 873 of 1999)**

15. The *ex-parte* applicant, Kingsway, by the Notice of Motion dated 27<sup>th</sup> July 1999 applied for the following orders of Judicial review;

(a) *An order of certiorari to quash the Agency Notices served upon the applicants bankers Standard Chartered Bank Limited Industrial Area and Kimathi Street Branches or any other bank demanding income tax assessed computed or allegedly payable for the period prior to 1<sup>st</sup> January 1998.*

(b) *An order of mandamus to direct the respondent it's servants and or agents to abide by the provisions of the Income Tax Act and gazette Notice No. 2895 of 11<sup>th</sup> June 1998 and refrain from computation collection or recovery of tax due prior to 1<sup>st</sup> January 1998.*

(c) *A declaration that the respondent's acts are ultra-vires provisions of Income Tax Act Cap 470 Laws of Kenya more particularly section 123.*

(d) *A declaration that it is discriminatory and an abuse of office and in excess of power for the respondent to deprive the applicant it's tax amnesty conferred by section 123 of the Income Tax Act.*

(e) *A declaration that no Tax liability is due prior to 1<sup>st</sup> January 1999.*

(f) *Costs of and incidental to this suit.*

16. The motion is supported by a verifying affidavit sworn by Sanjay Shah on 20<sup>th</sup> July 1999 and the statement dated 21<sup>st</sup> July 1999. Sanjay depones that pursuant to *the Direction*, Kingsway purchased government bonds for a period of two years and was allocated CDS Account No. 09-39-157707. In the circumstances, he believed that having met the terms of the amnesty, there would be no computation or collection of income tax prior to 1<sup>st</sup> January 1998.

17. It was therefore surprising that the respondent issued agency notices dated 8<sup>th</sup> June 1999 to the applicants' bankers in respect of assessment prior to 1<sup>st</sup> January 1998. Despite demand by the applicants advocate to withdraw the agency notices, the respondent declined to do so precipitating these proceedings.

18. The applicant's application has been opposed by the replying affidavit sworn on 15<sup>th</sup> February 2009 by Justus Musau Kiuvu, a revenue officer attached to the Large Tax Payers office at the material time.

19. Mr Kiuvu depones that in 1998, Kingsway was selected for examination of records under **section 56(2)** of the Act and to this end a meeting was arranged between its officers and tax agents. It was agreed that the applicant would within a reasonable time prepare its books and records for examination. Despite several calls and requests, Kingsway did not make the books available causing a formal notice to be

issued on 29<sup>th</sup> January 1999 under **section 56(1)** of the Act.

20. According to Mr Kiuvu, several calls were made to Kingsway's Financial Controller and the tax agent but no books or records were forthcoming. In the absence of records, KRA estimated additional assessment for 1995 and 1996 and issued them in accordance with **section 73(2)** of the Act. An estimated assessment for 1997 was issued on the same day under **section 73(1)** of the Act.

21. On 17<sup>th</sup> March 1999 the respondent dispatched the assessments. As there was no response, on 8<sup>th</sup> June 1999 and 20<sup>th</sup> July 1998 the respondent issued agency notices to the applicant's bankers in accordance with **section 96** of the Act. Collection of taxes was put on hold by court orders staying the collection of taxes.

### **The Submissions**

22. Mr Nderitu, counsel for the applicants adopted the written skeleton arguments dated 11<sup>th</sup> July 2007. According to Mr. Nderitu, the High Court (Osiemo J), provided an interpretation of **section 123** of the Act and *the Direction* in the case of *Music Mines Limited v Matimu Kinyua Nairobi HCC No. 2480 of 1998 (Unreported)*. In that case the learned judge stated, "*The correct interpretation of section 123 of Cap 470 and section 14 of Cap 476 is that once the Minister for Finance has invoked his powers under the Act all other provisions of those Acts are rendered inoperative for the period indicated.*"

23. It is the applicants' submissions that applicants, their agents, servants or any other person or authority are prohibited from taking any other thing or acts except as provided under **section 123** of the Act. Therefore, the respondents could neither make assessments or demands of tax or issue notices as they purported to do. The applicants contend that they have complied with the terms of amnesty by purchasing bonds therefore the issuing of the agency notices was contrary to **section 123** of the Act.

24. It was therefore, the applicants' case, that the respondent's actions were *ultra vires*, illegal, irrational and procedurally untenable. In the circumstances, the applicants submit that they are entitled to the relief in the respective applications.

25. The respondent's case was argued by Mr Ontweka on the basis of skeleton arguments dated 25<sup>th</sup> January 2007 and further submissions dated 10<sup>th</sup> May 2012.

26. The central contention by the respondent is that the applicants have not complied with the provisions of *the Direction*. Firstly, the applicants did not show or file returns for previous undisclosed income by the time the agency notices were issued in accordance with *the Direction*.

27. Secondly, the audits and assessments were properly done and if there was any objection to the assessment then the applicants should invoke the procedures set out in **sections 84 to 91A** of the Act to lodge its objections. Since no objections were lodged, then the assessments must stand and the court should not intervene by granting orders of judicial review.

28. On the whole, Mr Onkweka contends, that no case has been made for the grant of the relief sought.

### **Determination**

29. The central issue for determination in this matter is the interpretation of **section 123** of the Act and *the Direction* issued by the Minister and whether the actions by the Commissioner of assessing, demanding and collecting taxes from the applicants were *ultra vires*, illegal, irrational and procedurally untenable

30. In the case of *Music Mines Limited v Maturu Kinyua (Supra)* the Court had the opportunity to consider the interpretation of **section 123** by way of case stated under **section 123(2) (b)**. In that case, the court stated as follows, "*The correct interpretation of Sections 123 of Cap 470 and section 14 of Cap*

*476 is that once the Minister for Finance has invoked his powers under the Acts, all the other provisions of those Acts are rendered inoperative for the period indicated. By the Legal Notice mentioned above the Minister directed the Commissioner of Income Tax to refrain from assessing or recovering tax prior to 1<sup>st</sup> January 1998. Tax recoverable prior to 1<sup>st</sup> January 1998 is deemed to be extinguished or abandoned or remitted..... The provisions of section 123 of the same are very explicit. Once the provisions of section 123 have been invoked the other provisions of the Act Cap 470 other than the provisions section 123 SHALL no longer apply thereto. The Legislature used the word SHALL which means it is mandatory that all the provisions of the Act be suspended during the period of the Amnesty and as far as it relates to undisclosed tax liability prior to 1<sup>st</sup> January 1998..... The defendant, his agent/servants or any other person or authority is prohibited from making any returns or to undertake any other thing or acts except what is provided for under section 123 of Cap 470 and section 14 of Cap 476..... In view of section 123 of Cap 470 and section 14 of Cap 476 the defendant, his agents or any other person or authority are in regard to Gazette Notices No. 2894 and 2895 refrained from assessing or recovering taxes prior to 1<sup>st</sup> January 1998 and such taxes are deemed to have been extinguished or abandoned or remitted.”*

31. The decision of High Court is not binding on this court. While I would ordinarily be persuaded to follow it for the sake of consistency, I am entitled to exercise my judgment and in doing so I must be satisfied that the decision is properly founded on legal principle and statute.

32. **Section 123(1)** of the Act which I quoted at the introductory part of this judgment is in two parts. The first part deals with the Commissioner’s discretion to abandon or remit tax when he is satisfied that the reasons in subsection **(a), (b) or (c)** exist. Once he is so satisfied and he elects to refrain from assessing or recovering tax then the liability is extinguished and the provisions of the Act other than the section shall no longer apply.

33. It is to be noted that there are no terms or other conditions imposed on the Commissioner’s exercise of discretion once he is satisfied that the reasons prescribed under this provision exist.

34. **Section 123(2)** of the Act on the other hand is the specific power granted to the Minister to exercise on any case referred to him and where he considers appropriate, the minister may direct the Commissioner under the **section 123(1)** as the Minister deems fit. The Minister is therefore entitled to direct Commissioner in any manner to exercise his powers.

35. It is in this light that the Minister’s power under **section 123(2)** of the Act that *the Direction* must be seen. It is not an independent exercise of the Commissioner’s power under **subsection (1)** but a direction of the Minister as he may deem fit to the Commissioner to exercise his power and the Minister in giving such a directive under the section may impose any terms and conditions. In other words, if the Commissioner is directed by the Minister to exercise his discretion under **section 123(1)**, he must do so in accordance with the terms set by the Minister.

36. *The Direction* contained in **Gazette Notice No. 2895** is not unconditional, it prescribes conditions that must be met before the Commissioner can abandon or remit taxes in accordance with **section 123(1)** of the Act. The minister directed the Commissioner of Income Tax to refrain from assessing or recovering tax, interests and penalty on income changeable to tax under **section 3** in respect of years of income prior to 1<sup>st</sup> January 1998 not disclosed in any return of income made prior to 11<sup>th</sup> June 1998. The condition to be met was time limited and in respect of income not disclosed prior to the deadline stipulated.

37. *The Direction* imposed further terms that undisclosed income had to be applied to purchase by that person of registered government bonds for duration of at least two years. Furthermore, the person taking advantage of this provision had to submit appropriate returns or amended returns containing full disclosure of previously undisclosed income including all registered government bonds purchased in accordance with the direction.

38. It was therefore incumbent on the applicants to comply with the conditions which are part of *the Direction* in order to take advantage of the amnesty declared by the Minister under **Section 123(2)** of the

Act.

39. My view that **section 123** contains two separate provisions is further fortified by **section 123(3)** which requires that when the Commissioner exercises his power under **section 123(1)**, he must report to the Minister at the end of the financial year. The Commissioner's power under **section 123(1)** is not subject to the Minister's direction

40. My conclusion is that under **section 123(2)(a)** of the Act, the Minister is entitled to direct the Commissioner to take action as the Minister may deem fit. In doing so, the Minister may impose such terms and conditions he considers appropriate and he did so in **the Direction** published in **Gazette Notice No. 2985**.

41. I am therefore constrained to disagree with the decision of Justice Osiemo in the case of **Music Mines Limited v Matimu Kinyua (Supra)** as it is inconsistent with the plain and obvious reading of the provisions of the statute. The findings in that case would only apply to the exercise by the Commissioner of his power under **section 123(1)** of the Act.

### **Disposition**

42. In order to comply with the terms of **the Direction**, the applicants were required to, "*submit all appropriate returns or amended returns containing a full disclosure of the full undisclosed income .....*" I have considered the affidavits of Sanjay Shah in both matters and they do not show that, "*all appropriate returns or amended returns .....*" were ever submitted. This fact was denied by the respondent and nothing would have been easier than for the applicants to attach the amended returns submitted in compliance with **the Direction**, if any, to their depositions.

43. Furthermore the requirement of the Direction is that the, "*undisclosed income*" must be applied to the purchase of the registered government bonds. What the applicants have attached to their depositions are account opening forms. There is no disclosure of the "*undisclosed income.*" I also do not see any evidence of the purchase of bonds for the "*undisclosed income.*" So that even if I were to follow decision in **Music Mines Limited v Matimu Kinyua (Supra)**, material before me does not meet the requirement of **the Direction**.

44. I therefore conclude that the purchase of the Government Bond, if any, was gratuitous and was not in compliance with the terms of the amnesty. In any case, the Commissioner did not at any time signify compliance with the terms of the amnesty once the letters forwarding evidence of purchase of the bonds were sent to him.

45. Failure to meet the terms of the amnesty entitled the respondent to exercise its statutory power to collect, assess determine and collect taxes in accordance with the Act. Furthermore, the failure to comply with terms of **the Direction** was an implicit admission that there was indeed undeclared tax due from the applicants for the previous years which the respondent was entitled to collect.

46. The net result of my finding is that the applicants' Notice of Motion dated 27<sup>th</sup> July 1999 in **HC Misc. 845 of 1991** and the Notice of Motion dated 27<sup>th</sup> July 1999 in **HC Misc. 873 of 1991** are dismissed with costs to the respondent.

**DATED and DELIVERED at NAIROBI** this 30<sup>th</sup> day of May 2012.

**D.S. MAJANJA**

**JUDGE**

Mr Nderitu instructed by Kariuki Muigua and Company Advocates for the *ex-parte* applicants.

Mr Ontweka instructed by the respondent.