



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISCELLANEOUS CIVIL APPLICATION 217 OF 2010**

**IN THE MATTER OF: THE INCOME TAX ACT, CAP 470 OF THE LAWS OF KENYA AND THE VALUED ADDED TAX ,CAP 476 OF THE LAWS OF KENYA.**

**IN THE MATTER OF: THE LAW REFORM ACT, CAP 26 OF THE LAWS OF KENYA.**

**IN THE MATTER OF: KENYA REVENUE AUTHORITY ACT, CAP 496 LAWS OF KENYA.**

**IN THE MATTER OF: AN APPLICATION BY FOR LEAVE OF THE COURT TO INSTITUTE JUDICIAL PROCEEDINGS AGAINST THE KENYA REVENUE AUTHORITY AND THE HONOURABLE ATTORNEY AND GENERAL OF KENYA, KENYA REVENUE AUTHORITY BY WAY OF ORDERS OF CERTIORARI AND PROHIBITION.**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**AND**

**THE HON. ATTORNEY GENERAL OF KENYA.....1<sup>ST</sup> RESPONDENT**

**KENYA REVENUE AUTHORITY .....2<sup>ND</sup> RESPONDENT**

**EX-PARTE**

**LEEBECA ENTERPRISES LIMITED**

**JUDGMENT**

On or about 17<sup>th</sup> June 2010 the applicant was granted leave to file a Judicial Review application.

Through a Notice of Motion dated 1<sup>st</sup> July 2011 brought under Order LIII Rule 1, 2 & (3) of the civil Procedure Rules, the law reform Act Cap 26 laws of Kenya and section 3A of the Civil procedure Act, Chapter 21` Laws of Kenya and all enabling provisions of the law, the applicant sought the following orders:

- 1. An order of certiorari to quash the agency notice dated 28<sup>th</sup> February 2010 and 25<sup>th</sup> March 2010.**
- 2. An order of prohibition to prohibit the 2<sup>nd</sup> respondent from collecting money before any tax due from the applicant is reckoned.**

The Applicant is seeking to quash two Agency notices dated 28th February 2010 and 25th March 2010 in which the 2<sup>nd</sup> Respondent purported to act under section 19 of the value added Tax and Section 96 of the Income Tax. The 2<sup>nd</sup> Respondent proceeded to issue agency notice and proceeded to collect money which are held by the clients customers but not due.

It is the applicant case that it filed returns for the particular years of assessment. It had a credit for Value Added Tax in the sum of Ksh 1,093,110. And that the 2<sup>nd</sup> respondent issued a certificate of Tax compliance. The 2<sup>nd</sup> respondent used a special Proviso of section 19 of the Value Added Tax and section 96 of the income Tax Act to recover taxes owed. The 2<sup>nd</sup> respondent issued the agency notices to different customers without prior notice.

The applicants submitted that provision relating to the section 19 of the Value added Tax Act and section 96 of the income Tax Act were not applicable since returns were filled. It is contended that the 2<sup>nd</sup> respondent acted in excess of its power by demanding sums due to the applicant rather the tax due and payable on the goods supplied to the customers of the companies associated with the interested party. The notices were also oppressive in that they were sent to different parties based on the same amount which is an error, in applying section 19 of the Value added Act or Section 96 of the income tax Act.

The 2<sup>nd</sup> respondent opposed the Application and relied on the Replying affidavit of Zipporah Njoki Mwathi. The deponent stated that Kenya Revenue Authority is an agency of the government for collection and receipt of all revenue. Further, under section 5 the authority is required to administer and enforce all provisions of the written laws set out in part 1 & 2 of the first schedule for the purpose of assessing, collecting and accounting for all revenues in accordance with the laws.

In execution of the mandate under the Income Tax Act and Value Added Tax Act, the 2<sup>nd</sup> Respondent is duty bound by the law to investigate all claims and information received from any source to the effect that any person or entity has evaded the lawful payment of taxes including the applicant. Pursuant to their duties the 2<sup>nd</sup> Respondent officer carried out investigations to establish the applicant tax status.

The investigation revealed that the applicant was involved in the evasion of tax, and Mr. Hu Shiwen who is the interested party was fleeing the country without paying the taxes owed by the applicant. The 2<sup>nd</sup> respondent used the mechanism provided under the Value Added Act and Income Tax Act to secure the taxes owed by the applicant. The 2<sup>nd</sup> respondent acted within section 9 of the Value added Act and section 96 of the Income tax act to issue agency notices to persons holding money on account of the applicant , in this case the customers for purposes of recovering taxes owed by the applicant.

The 2<sup>nd</sup> respondent submitted that the agency notices issued to the applicant customers were issued in accordance with section 96 of the Income Tax Act and section 19 of the value added Act for purposes of recovering the taxes owed by the applicant. It is contended that the applicant was accorded sufficient opportunity to rebut the notices.

I have gone through the application, the statement of facts, all the affidavits and annexures thereto; the written submissions and the authorities relied upon by the parties. Having done so, I have come to the conclusion that the key issues for determination are as follows:-

1. Whether the agency notice issued on 28<sup>th</sup> February 2010 and 25<sup>th</sup> March 2010 were according to the relevant law and the power was exercised by a valid authority.
2. Whether the money stated in the two agency notices are legally owing and due .
3. Whether the Applicant was given an opportunity to contest or rebut the notice.
4. Whether the decision of 2<sup>nd</sup> Respondent acted unreasonably, unlawfully, illegally and in violation of the principle of natural justice.

5. Whether the applicant is entitled to the relief's sought.

On whether the two Agency letters were sent according to the relevant laws, the 2nd Respondent submitted that its action was within the provision of section 96 of the Income Tax Act and section 19 of the value added Act.

Section 96 of the income Tax Act states as follows:

**96.(1) In this section -**

**"agent" means a person appointed as such under sub-section (2);**

**"appointment notice" means a notice issued by the Commissioner under that subsection appointing an agent;**

**"moneys" include salary, wages and pension payments and any other remuneration whatever;**

**"principal" means the person in respect of whom an agent is appointed.**

**(2) The Commissioner may by written notice addressed to any person -**

**(a) appoint him to be the agent of another person for the purposes of the collection and recovery of tax due from that other person, and**

**(b) Specify the amount of tax to be collected and recovered.**

**(3) An agent shall pay the tax specified in his appointment notice out of any moneys which may, at any time during the twelve months following the date of the notice, be held by him for, or due from him to, his principal**

**(4) Where an agent claims to be, or to have become, unable to comply with subsection (3) by reason of the lack of moneys held by, or due from him, he shall, within seven working days, notify the Commissioner accordingly in writing setting out fully the reasons for his inability so to comply, and the Commissioner may -**

**(a) Accept the notification and cancel or amend the appointment notice accordingly; or**

**(b) if he is not satisfied with those reasons, reject the notification in writing.**

**(5) Unless and until a notification is by given an agent under**

**subsection (4) -**

**(a) sufficient moneys for the payment of tax specified in his appointment notice shall be presumed to be held by him for, or due from him to, his principal; and**

**(b) in any proceedings for the collection or recovery of that tax shall be stopped from asserting the lack of those moneys.**

**(6) For the purposes of this section, the Commissioner may, by notice in writing, at any time require any person to furnish him within a reasonable time, not being less than thirty days from the date of service of the notice, with a return showing any moneys which may be held by that person for, or due by him to, another person from whom tax is due.**

**(7) Where an agent fails to pay an amount of tax specified in his appointment notice within thirty days -**

**(a) of the date of service of the notice on him; or**

**(b) of the date on which any moneys come into his hands for, or become due by him to, his principal.**

**whichever is later, and -**

**(I) he has not given a notification under subsection (4); or**

**(ii) he has given a notification which has been rejected by the Commissioner, the provisions of this Act relating to the collection and recovery of tax shall apply to the collection and recovery of that amount as if it were tax due and payable by the agent, the due date for the payment of which was the date upon which that amount should have been paid to the Commissioner under this subsection.**

#### **Preservation of funds**

**(8) An agent who has made a payment of tax under this section shall for all purposes be deemed to have acted therein with the authority of his principal and of all other persons concerned, and shall be indemnified in respect of that payment against all proceedings, civil or criminal, and all process, judicial or extrajudicial, notwithstanding any provisions to the contrary in any written law, contract or agreement.**

**(9) A person who, in giving a notification under subsection (4), willfully makes any false or misleading statement, or willfully conceals any material fact, shall be guilty of an offence.**

**(10) For the purposes of this section, cases where moneys are held by an agent for, or due by him to, his principal, shall include case where the agent -**

**(a) owes or is about to pay money to the principal; or**

**(b) holds money for or on account of the principal; or**

**(c) holds money on account of some other person for payment to the principal; or**

**(d) has authority from some other person to pay money to the principal.**

Section 19 of the Value Added Act provides that

**19. (1) where any sum by way of tax is due and payable by a taxable person, the Commissioner may, by notice in writing, require -**

**(a) any person from whom any money is due or accruing or may become due to the taxable person; or**

**(b) any person who holds or may subsequently hold money for or on account of the taxable person; or**

**(c) any person who holds or may subsequently hold money on account of some other person for payment to the taxable person; or**

**(d) any person having authority from some other person to pay money to the taxable person, to pay to the Commissioner that money or so much thereof as is sufficient to pay the tax so due and payable,**

**(2) Where a person required under subsection (1) to pay money to the Commissioner claims to be or to have become unable to do so by reason of lack of moneys held by, or due from him, he shall**

**within seven days notify the Commissioner accordingly in writing stating the reasons for his inability to do so.**

**(3) Unless the Commissioner is satisfied with the reasons given by such person under subsection (2)-**

**(a) sufficient moneys for the payment of the tax specified in the notice shall be presumed to be held by such person for, or due from him to, the taxable person in respect of whom the notice is given under subsection(1); and**

**(b) in any proceedings for the collection or recovery of that tax person shall be stopped from asserting the lack of those moneys.**

**(4) The Commissioner may, by notice in writing, at any time require any person to furnish him within a reasonable time, not being less than thirty days from the date of service of the notice, with a return showing any moneys which may be held by that person for, or due to him to, the taxable person from whom tax is due.**

**(5) All payments made in accordance with a notice under this section shall be deemed to be made on behalf of the taxable person and of all other persons concerned, and shall constitute a good and sufficient discharge of the liability of such person to the taxable person, or any other person.**

**(6) Any person who, without lawful authority or excuse-**

**(a) Fails to comply with the requirement of any notice given to him under subsection (1) or (4); or**

**(b) Discharges any liability to a taxable person in disregard of such notice; shall be guilty of an offence and liable to a fine not exceeding fifteen thousand shillings or to imprisonment be guilty of an offence.**

The Applicant submitted that the 2<sup>nd</sup> Respondent proceeded to issue agency notice and collected monies held by the clients/customers which were not due. The 2<sup>nd</sup> respondent did not issue any notices to the applicant before releasing the Agency notices to the customers and requiring them to comply.

It is not disputed that the 2<sup>nd</sup> respondent has the mandate to collect and receive revenue but in this case it did not act within the purview of section 96 of the income Tax Act and Section 19 of the Value Added Tax. The conditions under section 19 of the value added tax were not followed as required by the law. The money which the 2<sup>nd</sup> respondent collected is that which is due to the client and not the money which is described under section 96 (1) of the Income Tax Act, consequently the notices were issued without any legal basis or authority.

On whether the amounts in the two agency notice are legally owing and due. It is the applicant case that it filed returns for the particular years of assessment. They had credit Tax in the sum of Ksh. 1,093,110 and the 2<sup>nd</sup> respondent issued a certificate of Tax compliance.

It is stated in the further affidavit sworn by Hu Shiwen on 20<sup>th</sup> February 2012 that two agency notices were issued to different customers with different sums being tax due by the applicant. The respondent in the affidavit of Zipporah Njoki Mwathi stated a different amount of money. Looking at the two notices, it is not clear the amount of money that the applicant legally owes and is due to the 2<sup>nd</sup> respondent. I am of the opinion that the amount indicated on the agency notices is an estimate not taxes due. In any case there is a remarkable departure from the correct position obtaining factually and legally.

As to Whether the Applicant was given an opportunity to contest or rebut the notices. The applicant submitted that the notices were issued to different customers without any hearing. No previous demands for any taxes were made directly or indirectly. The interested party was also arrested and charged for failure to submit returns and documents taken including bank documents. The 2<sup>nd</sup> respondent stated that

the applicant was issued with demand letter for taxes owed and the value added tax. There is no explanation why the demands were sent directly to customers of the applicant. There is no explanation why the demands were not sent or made to the applicant and Interested Parties. By sending notices to clients of the applicant, the 2<sup>nd</sup> respondent acted in bad faith in view of the credit taxes and tax compliance certificate issued to the applicant. Payment of tax is a legal and social obligation which must be administered in a friendly and civilized manner. As much as possible the business and reputation of the tax payer must not be destroyed but protected, if not enhanced. I therefore find that the actions of the 2<sup>nd</sup> respondent amounted to destroying the business of the applicant and that proper procedure was not followed.

As to whether the decision of 2nd Respondent was unreasonable, unlawful, illegal and in violation of the principle of natural justices. The 2<sup>nd</sup> respondent submitted that since the applicant failed to pay the taxes outstanding and the interested party was about to flee from the country, it was left with no option but to issue the agency notice. The applicant submitted that the 2<sup>nd</sup> respondent did not rely on the applicable law by issuing agency notice to the customers and by also arresting the interested party, and that the decision was malicious and unfair.

The applicant and interested party were treated in a manner to suggest that due consideration was not given to the protection and preservation of their business. The applicant was exposed to an illegal, unfair and unreasonable treatment. A prudent and a reasonable tribunal directing its mind to the issues and facts in dispute would conclude that the 2<sup>nd</sup> respondent exceeded its mandate in issuing the two agency notices to clients and customers of the applicant. Such action was unjustified if not unreasonable.

In the case of **Republic Vs Judicial Service Commission ex-parte Pareno,[2004] KLR 203 AT P.204**

**“Under the Wednesbury principle decisions of person or bodies which perform public duties or functions will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the court concluded that the decision is such that no such person or body properly directing itself on the relevant law and acting reasonably could have reached the decision.”**

The 2<sup>nd</sup> respondent submitted that the remedy of judicial review is not available to the Applicant because it acted, reasonably, without or in excess of its jurisdiction. By issuing the agency notices, when the applicant had a tax credit was manifestly unfair and unlawful.

Let me conclude by saying that the purpose of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected. It is not disputed that the Applicant had at all material times a tax credit and given certificate of tax compliance. This is an indication, the Applicant intended to comply/complied with the law and fulfilled its obligation to pay its taxes. This is a manifestation of good faith on the part of the Applicant.

From the foregoing, it is clear that the respondent exceeded its powers as provided by law, I therefore allow the Notice of Motion dated 1<sup>st</sup> July 2010, with no orders as to costs.

**Dated, signed and delivered on 20<sup>th</sup> July 2012**

**M. WARSAME  
JUDGE**