



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 11 OF 2010

IN THE MATTER OF ARTICLE 165(3) OF THE CONSTITUTION

**IN THE MATTER OF ALLEGED AND/OR THREATENED CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND**

FREEDOMS UNDER ARTICLES 27, 40, 47, 48 AND 50

BETWEEN

LAB INTERNATIONAL (KENYA) LIMITEDPETITIONER

VERSUS

KENYA REVENUE AUHORITY.....RESPONDENT

R U L I N G

This petition under the provisions of inter alia, Article 165 of the Constitution and Articles 27, 40, 57, 48, and 50 of the Constitution was fixed for hearing on 9th December , 2010 upon directions being given.

On 16th February, 2011, these dates were reconfirmed after reconstruction of the court file. Later the original court file was traced. The parties took 2 days for the hearing of the petition, namely 9th and 10th march 2011. The parties have gotten up for the trial and the Petitioner is ready to proceed. The Petitioner has 2 witnesses from the United Kingdom. The Respondent has been aware that these witnesses would be called.

At the hearing the Respondent has applied that this Court under the provisions of Article 165(4) do certify the Petition as raising a substantial question of law under clause 3(b) and (d) and the matter be referred to the Chief Justice to empanel a court of uneven number of judges, being not less than three.

The effect of granting such an order would mean the automatic adjournment of the hearing of the Petition. The application is strongly opposed by the Petitioner through the counsel for obvious reasons, namely,

1)The dates were taken as early as 9th December, 2010 and confirmed on 16th February, 2011.

2)The directions were taken by consent.

3)The Petitioner has prepared for the trial and has prepared for the trial and has witnesses from the U.K.

I think that it is prudent first and foremost to decide whether indeed the Petition raises any substantial question of law that makes it prudent and necessary for the court to refer to the Chief Justice for empanelling a wider Constitutional Court other than the one presided over by a single judge.

In my view, a substantial question of law must be one which raises in a serious question of law

Ø One that touches on statutory provisions and interpretation thereof.

Ø One that can involve a declaration that a particular statutory or other law in is inconsistent or in contravention of the Constitution thereby nullifying the said law.

Ø Any act or decision is inconsistent with the Constitution and which decisions are normally made in respect of other members of the public, industry or section of the society.

Ø Any matter that can lead to a decision that will bind or affect the government, a public body, state corporation in the way that it deals with similar matters.

Ø Any matter that touches on public policy or any matter that may affect government expenditure and impose liability to the tax payers.

Ø Any matter which otherwise is of great public interest.

The Petitioner has placed, inter alia, that;-

Ø The Respondent the Kenya Revenue Authority has infringed and has threatened to further infringe or continue infringing the Petitioner's fundamental rights and freedoms as enshrined in article 27,40,47,48 and 50 of the Constitution.

Ø That in September 2005 the Respondent carried out an in- depth tax audit and that in breach of the Petitioner's right to a fair and expeditious administration as enshrined in Article 47 of the Constitution did not communicate the results of the audit until 15 months later when by letter dated 23rd January, 2007 the Respondent sought payment of the sum of ksh.323,121,502 from the Petitioner being the tax allegedly due to it on account of undeclared income earnings by LAB- UK a company registered in Britain for the years 2002 – 2004.

Ø That while it agreed to pay tax demanded by the Respondent on account of withholding tax in the sum of shs.302,869/-, it objected to the demand. For LAB UK Income tax alleged owed to the Respondent on the basis among others that LAB- UK did not earn income in Kenya.

Ø That the Petitioner objected to the claim by the Respondent.

Ø That the Respondent sought further information which was provided in full.

Ø That the Respondent then changed its tact and verbally sought payment of the demanded tax on grounds that the Petitioner was a permanent establishment of LAB – UK.

Ø That the Petitioner demonstrated that it was not a permanent establishment of LAB –UK.

Ø That for the third time, the Respondent changed its approach and issued a letter dated 18.02.2009 informing the Petitioner of intention to raise an assessment under section 23 of the ITA

Ø The petitioner says that it immediately objected to the new basis of alleged outstanding tax.

Ø That despite protests by the Petitioner the Respondent proceeded to raise additional assessment notice numbers:-

- 0305200200304/4

- 030520030054/4 and

- 0305200400073/4

Against the Petitioner and sought payment of the sum of ksh.532,798,716/= in principal tax, penalties and interest under section 23 of the ITA.

Ø The Petitioner is aggrieved by the said assessment and demands which it says is high handed, unreasonable and in breach of duty to act in a manner that is reasonable and procedurally fair.

Ø That decision by the Respondent to impose a business model on the Petitioner is clearly unreasonable and procedurally unfair. That the decision by the respondent to impose a business model on the Petitioner is clearly unreasonable and unfair. That these constitute unreasonable and procedurally unfair administrative actions in terms of Article 47 of the Constitution.

Ø The Petitioner then gives the particulars of the business and how it has so far performed paying in excess of sksh188, 406,359.80 in tax.

Ø At 2010 it has spent ksh.203, 312,459 discharging its other statutory obligations or payments which in effect are beneficial to the Government of Kenya.

Ø The assessment under section 23 of ITA presupposes that the business model adopted by the Petitioner has resulted in a reduction in or avoidance of tax which is not the case.

Ø The Petitioner has already objected to the additional assessment within the period stipulated by law.

Ø The Respondent's conduct has denied the Petitioner the right to quiet enjoyment of its money.

Ø That by refusing to render its decision within a reasonable period of time, the Respondent has shirked and/or abdicated its responsibility as a public body and thereby breached the Petitioner's right to a hearing and determination of its objection within a reasonable time as provided for in Article 47 of the Constitution.

Ø That the Petitioner has had to come to this court as the Minister of Finance has failed to establish the Income Tax Tribunal which is required under the ITA to resolve disputes arising from Section 23 of the ITA.

Ø That the Respondent's conduct also contravenes the Petitioner's legitimate expectations and denies it the right to the protection of the law guaranteed under Article 22(1), 25(c) (4) and 50(1) of the Constitution.

The foregoing demonstrates the grievances of the petitioner and *inter alia*, seeks the following orders:-

- a) An order to quash the additional assessment notices raised on the Petitioner directing it to pay shs.532,798.716.
- b) A declaration that the said additional assessments have infringed the Petitioner's right to property as enshrined in Article 40 of the Constitution.
- c) An order prohibiting the Respondent from seeking to enforce the purported additional assessment by way of issuing agency notice to the Petitioner, its bankers and/or debtors or otherwise at all.
- d) A declaration that the refusal by the Respondent to consider the petitioner's objection and render a decision amounts to a deprivation of the Petitioner's right to a quiet enjoyment of its property.
- e) A declaration that the Petitioner's business model is not a transaction designed to avoid tax liability as envisaged by section 23 of the Income tax Act.

I have carefully considered the foregoing issues and I do find that this is substantially a dispute on the interpretation of section 23 of the Income Tax Act and other related provisions to the business of the Petitioner.

It is a dispute on the procedure for carrying out an in-depth audit and the right to notice and information.

- It is a dispute between the Income revenue collecting Agency KRA and a tax Payer.

- It is a commercial dispute between a service provider and a customer albeit under the aegis of a statute.

- It is a dispute between a public and statutory body and a private company in the exercise of its discretion in imposing or assessing additional tax.

With respect to the Respondent, the case does not and cannot raise any question for the determination of the Case which can be deemed to be a substantial question of law.

There is no allegation that any provision of law is inconsistent with or *ultra vires* the Income Tax Act. None of the orders will lead to challenge of the law and legislation. None of the issues even will raise any fundamental matter of public policy.

Infact I am inclined even to question the Petitioner as to whether the matter raised herein are truly of such nature and importance as tolerate or be considered a Constitutional dispute under the Bill of Rights.

I wonder if the true forum for this case was not a Judicial Review Court dealing with matters of administrative action i.e. through invocation of order 53 dealing with judicial review orders of mandamus, prohibition and certiorari. It's through such proceedings that usually the unreasonable exercise of descretion and authority in administrative matters are dealt with, unfairness, wrong procedure, high handedness arbitrariness, violation of the principles of natural justice etc. I am, therefore puzzled why the Petitioner had elected to bring this matter to the Constitutional Court.

Be that as it may, I do appreciate the following:-

- That this Court under Article 22 and 23 can grant orders of judicial review,

- The exercise of other civil remedies and procedures is not a bar to invoking the provisions of the Constitution.

It is appreciated that the new Constitution has opened up the horizons and landscapes of fundamental and basic rights that almost any violation and infringement can be interpreted as one touching on the Bill of Rights.

However, with the fullness of time and as the institutions and Kenyans generally appreciate and learn the full meaning of the Constitution and as wanton and unnecessary violations are stopped or end gradually the courts will give directions and roadmaps as to the matters that should be filed under the provisions of Article 22 and 23 of the Constitution and which are truly and germanely Constitutional matters. The court will have to give definitions and directions so that Defamation cases do not become claims of violations of Human dignity, or traffic cases do not become ones seeking protection and security of the person against any form of violence and physical torture etc! There may appear extremes and graphic but a time will come when the constitutional courts will have to set some reasonable criteria to define or rate

as to what is a truly constitutional matter under Article 22 and 23 of Constitution.

In view of the foregoing, I decline to certify this petition as raising any substantial Constitutional or question of law in the context of Article 165(4) of the Constitution.

The hearing shall proceed subject to the convenience of the Court, the parties and taking into account all matters pertaining to the witness expenses.

Dated and delivered this 9th March 2011

M. K. IBRAHIM

JUDGE