REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

(Coram: Ojwang, J.)

MISC. CIVIL APPLICATION NO. 82 OF 2010

IN THE MATTER OF: AN APPLICATION FOR AN ORDER OF MANDAMUS PURSUANT TO ORDER LIII OF THE CIVIL PROCEDURE RULES

-AND-

IN THE MATTER OF: THE VALUE ADDED TAX ACT (CAP. 469, LAWS OF KENYA)

-AND-

IN THE MATTER OF: THE KENYA REVENUE AUTHORITY ACT (CAP. 469, LAWS OF KENYA)

-BETWEEN-

REPUBLIC……APPLICANT

-AND-

KENYA REVENUE AUTHORITY…….....…….RESPONDENT

ex parte

L.A.B. INTERNATIONAL KENYA LIMITED

JUDGMENT

Pursuant to leave granted by ***Mr. Justice Ibrahim*** on ***30th July, 2010*** the ***ex parte*** applicant moved the Court, by Notice of Motion dated ***17th August, 2010***, brought under ss. 8 and 9 of the Law Reform Act (Cap. 26, Laws of Kenya), the Value Added Tax Act (Cap. 476, Laws of Kenya), and Order **LIII** of the Civil Procedure Rules. The application carried one main prayer:

"THAT this Court be pleased to issue an order of *mandamus* ***to compel the respondent to pay to the applicant a Value Added Tax (VAT) refund of Kshs. 35, 187, 432/82."***

The application is supported by the Statement of Facts dated ***15th July, 2010***. The Statement sets out the grounds upon which the application rests:

(i) that, the applicant had made an application to the respondent, for the refund of VAT in the sum of Kshs. 59,261,780/02 for the period ***1st September, 1998*** *to* ***30th April, 1999***, ***November*** *and* ***December, 2007***, ***January*** *to* ***December, 2008***, *and* ***January*** *to* ***September, 2009****;*

(ii) that, the respondent has remitted the sum of Kshs. 49,754,680/00 to the applicant, but unreasonably failed and/or refused to remit the balance of Kshs. 9,507,100/02;

(iii) that, of the said outstanding balance, the respondent has admitted owing Kshs. 4,653,282/00 for the period ***August – September, 1999****, but alleged that the Kshs. 4,653,282/00 claimed for the period* ***September, 1998*** *to* ***April, 1999*** *is not due since the applicant lodged its application for refund out of time;*

(iv) that, despite the evidence of the Commissioner of VAT allowing the applicant's claim to be lodged out of time, the respondent has refused to make payment;

(v) that, whereas the amount in dispute is only Kshs. 4,653,282/00, the actual amount payable is Kshs. 4,853,818/02;

(vi) that, the respondent has also refused and/or failed to pay to the applicant the sum of Kshs. 25,680,332/80 in respect of the claim for VAT refund for the period ***October, 2009*** *to* ***April, 2010****;*

(vii) that, the effect is that the respondent owes the applicant the sum of Kshs.35,187,432/82 in unpaid VAT refund;

(viii) that, the failure and/or refusal by the respondent to remit the VAT refund to the applicant is high-handed, in bad faith, and is actuated by ulterior and/or improper motives;

(ix) that, the failure and/or refusal by the respondent to remit the VAT refund to the applicant amounts to an abuse of the respondent's authority and discretion;

(x) that, the failure and/or refusal by the respondent to remit the VAT refund to the applicant is ***ultra vires*** *the respondent's authority and is grossly unfair;*

(xi) that, the failure and/or refusal by the respondent to remit the VAT refund to the applicant is a contravention of the applicant's legitimate expectation;

(xii) that, the decision by the respondent to withhold remittance of the confirmed VAT refund to the applicant is in breach of the spirit and letter of the law;

(xiii) that, the issues raised by the applicant are weighty and go to the very root of the exercise of power by the Government's revenue collection agent;

(xiv) that, the conduct of the respondent as shown in this matter, is unreasonable within the applicable rules of administrative law;

(xv) that, the persistent refusal by the respondent to remit the VAT refund has occasioned the applicant irreparable loss and damage;

(xvi) that, the respondent has no good cause for refusing to pay the tax refunds, and its conduct, therefore, amounts to failure to discharge a statutory duty.

Apart from the foregoing statements of pleadings, the applicant, through its Managing Director, ***Eliza Kooyman***, has annexed a 38-paragraph affidavit, sworn on ***15th July, 2010*** providing the supporting evidence, as well as a 27-paragraph further affidavit of ***13th September, 2010*** which also carries annexures to validate the unfulfilled expectations.

The Principal Revenue Officer responsible for Domestic Taxes, with the respondent, ***Violet Sabwa***, swore a replying affidavit on ***1st September, 2010***. The deponent acknowledges the tax-refund claim made by the ***ex parte*** applicant, but avers that:

"The respondent while processing the applicant's VAT refund-claim of Kshs. 59,259,406/60 disallowed the following sums:

(a) Kshs. 10,869/00 as auditor's adjustments;

(b) Kshs. 4,653,282/00 f0r the period September 1998 to April 1999 as a time-barred claim under section II of the Value Added Tax Act (Cap.476, Laws of Kenya)."

The deponent (para. 7 of the replying affidavit) admits a significant averment by the *ex parte* applicant:

"The respondent subsequently refunded the applicant a sum of Kshs. 49,746,069/00 for the periods outlined [in] paragraph 4 above, remaining with a balance of Kshs. 4, 842,055/00 *which was not refunded* ***due to non-availability of funds from the Ministry of Finance to effect such refunds".***

On the question of a VAT refund out-of-time in the sum of Kshs. 4,653,282/00, the deponent makes a denial, and blames a certain former employee for having sworn an affidavit (***Philip Odeny's*** affidavit of ***23rd March, 2010***) deposing that he had, while performing the duties of the Commissioner of VAT, allowed a VAT refund for that amount to the *ex parte* applicant.

It is not clear how this deponent was advised to respond on evidentiary matters calling for candour, merely by denouncing the relevant affidavit as "mischievous and made in bad faith"; this would be an untenable claim, as the respondent could have had the said ***Philip Odeny*** called for cross-examination on his affidavit. As ***Mr. Odeny's*** affidavit has not been contested according to law, this Court does not attach much weight to ***Violet Sabwa's*** averment (para. 8 (e) of the replying affidavit) that "***Mr. Philip Odeny's*** affidavit should be ignored".

The deponent (***Violet Sabwa***) offers an explanation of the non-payment of refunds due to the *ex parte* applicant (para. 12 of the replying affidavit):

"……under the Government Financial Management Act (Cap. 5, Laws of Kenya), the respondent does not have access to [the] Consolidated Fund and the Exchequer Account and can only rely on the parent Ministry, the Ministry of Finance, for allocations of funds to make such refunds."

The deponent avers that even now, when it is known that the respondent should have made the refunds to the *ex parte* applicant, an order of mandamus "cannot issue"; and why not? The deponent still relies on the respondent's denial of ***Philip Odeny's*** sworn statement, to aver:

"The sum of Kshs. 4,653,282/00 for the period *September 1998* ***to*** *April, 1999* ***is not due for refund, the same having been submitted out of the recommended time under Section II of the VAT Act, and there having been no approval to submit the refund claim out of time".***

And the deponent states as a reason for continued delay in refunding to the *ex parte* applicant even an amount acknowledged to be due to that applicant; in the deponent's words:

"The sum of Kshs. 4,842,055/00 has been confirmed as refundable to the applicant and the respondent is waiting for allocation of funds from the Ministry of Finance so as to effect the refund. As such the respondent has not declined and/or refused to make the refund. The same goes for the refund claim for Kshs. 10,379,976/00 as outlined in paragraph 9(b) of this affidavit."

As regards another claimed refund of Kshs. 15,050,024/00 the deponent deposes that this "is pending verification by the respondent and if found payable the refund will be made to the applicant subject to availability of funds from the Ministry of Finance".

Mr. Kamau Karori, learned counsel for the *ex parte* applicant, made submissions under four heads:

(i) whether the applicant is entitled to VAT refunds;

(ii) whether the respondent acted unreasonably and/or delayed in paying the VAT refunds;

(iii) what is the total amount due to the applicant in VAT refunds;

(iv) whether the applicant has established a case for the grant of an order of mandamus.

Is the applicant entitled to VAT refunds?

Counsel submitted on the basis of the affidavit evidence, that the applicant is a tea trading company and is duly registered under the provisions of the Value Added Tax Act (Cap. 476, Laws of Kenya); the applicant deals in tea purchased from Mombasa tea auctions, and exports to foreign markets; since the business falls under the Fifth Schedule to the said Act, the exportation of its goods or taxable services are zero-rated, and so the applicant charges 0% VAT on the goods it supplies. By s. 11(2) (a) of the said Act, it is provided that where, by reason of making zero-rated supplies, there is no output tax to accord the supplier a set-off, the Commissioner of VAT shall refund to the affected supplier the input tax incurred by such a supplier.

Learned counsel submitted that, in the instant case, the applicant incurs input tax on purchases, but it is unable to benefit from a set-off since it is not allowed to collect output tax; and thus, the applicant is entitled to a refund of the excess input tax under s. 11(2) (a) of the Act; and this entitlement to VAT refund is not in dispute.

Did the respondent act unreasonably? Did the respondent delay in making VAT refund to the applicant?

By s. 11(2) (a) of the Value Added Tax Act, a claim is to be lodged within 12 months, where excess input tax is repayable. The Act vests discretion in the Commissioner of VAT, to allow claims to be lodged out of time, as long as the request is made within 24 months from when the tax becomes payable. The applicant had submitted VAT returns to the respondent on a monthly basis, and claimed all the input tax incurred for the following periods: ***1st September, 1998 – 30th April, 1999; November, 2007 – December, 2007; January, 2008 – December, 2008;*** and ***January, 2009 – September, 2009***.

Mr. Karori submitted that the applicant had expected to be paid the VAT refunds within a reasonable period of time, from the date the claims were made; but the respondent did not make the refunds, and, as at ***1st November, 2009*** there was an unpaid refund of Kshs. 59,261,780/02; and it was not until ***January, 2010*** that he respondent paid to the applicant Kshs.49,754,680/=, leaving an outstanding balance of ***Kshs. 9,507,100/02***.

From these facts, counsel submitted that the respondent's refusal to pay the tax refund is to be typified as unfair administrative action, contrary to the terms of Article 47 of the ***Constitution of Kenya, 2010***. That Article thus provides:

"(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."

Counsel submitted that the respondent had failed to deal with the applicant's claim in an expeditious or reasonable manner, or to adopt a system that was procedurally fair.

Counsel submitted that the respondent, by withholding VAT refunds due to the applicant, had contravened Article 40 as read with Article 260 of the Constitution – Article 40 being devoted to the protection of the right to property. Counsel urged:

"*As a tax-payer, the applicant was…..entitled to the use and enjoyment of its property, in this case, its money*"; and "*the withholding of the VAT refunds due to the applicant amounts to a deprivation of the said …..constitutional right*".

A distinctly similar case, ***Intersplav v. Ukraine***, Application No. 803/02 had come up before the European Court of Human Rights [Ruling delivered at Strasbourg on ***9th January, 2007***], and it was thus held (p.6):

"The Court observes that, having met the criteria and requirements established by the domestic legislation, the applicant could reasonably expect the refund of the VAT it had paid in the course of its business activities, as well as compensation for any delay."

Mr. Karori also raised the issue of equity regarding the balance of benefits, for any two parties having an interest in an asset: "the failure by the respondent to pay the VAT refunds ……had the effect of conferring an undue benefit upon the respondent, to the detriment of the applicant, and amounts to unjust enrichment." Counsel urged it to be of relevance, in this regard, that by s. 24 of the Kenya Revenue Authority Act (Cap. 469), any delay in making tax remittances to the respondent herein, attracts stringent penalties and significant interests, whereas the respondent for its part, pays no penalties or interests on delayed refunds: "in consequence, by delay in remitting the refunds, the respondent conferred upon itself the benefit of using and enjoying the applicant's funds without any obligation to compensate the applicant for being deprived of the use and enjoyment of the….funds".

Counsel contested the respondent's averment that, in respect of some of the VAT refund claim, an audit was still being conducted, and so a refund could not be made. Counsel urged: "by purporting to withhold payment of the refunds due to the applicant when no claim for tax had been made on account of the said audit, the respondent acted ***ultra vires*** its authority, since the [VAT] Act does not provide [for a] right to set off [VAT] refunds against unproven income tax".

Learned counsel submitted that the applicant's failure to pay the VAT refunds was based on ***irrelevant considerations***, and merely signified high-handedness.

Protection against discrimination – Article 27 of the Constitution of Kenya, 2010

Article 27 (1) and (2) of the Constitution thus provides:

"(1) ***Every person is equal before the law and has the right to equal protection and equal benefit of the law.***

"(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms."

Counsel submitted that the respondent, by failing to pay the VAT refund in question, had shown discrimination as between the applicant, and ***another category*** of tax-payers. By the operation of s.11 of the VAT Act, those tax-payers who provide services other than zero-rated services, are assured of recovering their money immediately, whereas the suppliers of zero-rated services were placed at a disadvantage, such as afflicts the applicant in the instant case.

Is there a case for issuance of an order or mandamus

Counsel urged that there was a clear case for issuance of an order of mandamus. ***Mr. Karori*** supported his client's case with a statement of principle in the English House of Lords decision in ***Commissioners of Inland Revenue v. National Federation of Self-Employed and Small Businesses Limited*** [1982]A.C. 617:

"It must follow from these cases and from principle that a taxpayer would not be excluded from seeking judicial review if he could show that the Revenue [Department] had either failed in its statutory duty toward him or had been guilty of some action which was an abuse of their powers or outside their powers altogether."

Counsel urged that "*the respondent has irregularly used its powers to deny the applicant its entitlement*", and that "*such conduct amounts to an abuse of the respondent's powers, a direct violation of Article 47 of the Constitution…….*" Counsel relied on a passage, on this point, from the English House of Lords case, ***Preston v. Inland Revenue Commissioners*** [1985]2All ER328 [quoting ***Lord Scarman*** in [1982]AC617 at p.650]:

"I am persuaded that the modern case law recognizes a legal duty owed by the Revenue [Department] to the general body of taxpayers to treat taxpayers fairly, and to use their discretionary powers so that, subject to the requirements of good management, discrimination between one group of taxpayers and another does not arise, to ensure that there are no favourites and no sacrificial victims" [p.338].

Learned counsel, ***Mr. Matuku***, for the respondent, focused his submission on the evidentiary aspect of this case which, as already noted, is not the subject of significant difference between the parties.

Counsel made an issue of one element in the VAT refund claimed by the applicant: the sum of Kshs. 4,653,282/00 which a deponent said to have been claimed out of time. In the words of counsel: "It is the contention of the respondent that, that particular refund was never allowed out of time….." Just like the deponent of the replying affidavit, learned counsel has not endeavoured to prove the respondent's claim in a regular manner, and all he does is to disown a sworn statement; counsel states: *"…..it is our argument that* ***Mr. Philip Odeny's*** *affidavit is mischievous and made in bad faith*". I reject this contention, as its validity is not urged according to law.

Counsel, with respect, opts for hypothetical and general assertions and banalities, to meet statements of fact set out by the applicant, such as this: *"….we are dealing with public funds in the form of VAT refund……[The] respondent …..is not a private enterprise, it is a public institution which can only rely on records for its memory*."

The last defence of the respondent is a plea of the *inadequacies of its operational procedures*, in its interplay with other Government entities which, by their mode of work, generally cause delays, and consequent prejudice to those entitled to refund; it tends to deflect the charge of administrative impropriety to *someone else*. This is an example:

"….I would like to submit on the issue of……[the respondent relying] on the Ministry of Finance for funds to effect VAT refunds. This has to do with Section 15 of the Kenya Revenue Authority Act and Sections 13-15 of the Government Financial Management Act (Act No. 5 of 2004)."

Counsel goes on to argue:

"…….it is evident that the respondent …..pays all, to the last cent, into the Consolidated Fund, a fund which is not operated by the respondent ……The respondent does not have authority to access the taxes paid into the Consolidated Fund".

Counsel goes on to urge: *"….the respondent herein does not have withdrawal powers on the revenue it collects and [pays] into the Consolidated Fund and the Exchequer"*. He submits as well that: "*the operators of the respondent are tied to the directions of the Minister for Finance*".

The respondent's operational linkages to the Minister for Finance and to other Government bodies have, in my opinion, been invoked in vain: for, firstly, by Article 47 of the ***Constitution of Kenya, 2010*** persons such as the applicant have a *right* to fair administrative action, which must not be denied whether by the *respondent*, or by the *other Government agencies* and mechanisms to which the respondent may happen to be operationally attached; the whole set of those agencies, which are statutory and public bodies, are subject to *Article 10 of the Constitution* which, under the head, "*national values and principles of governance*", requires "good governance, integrity, transparency and accountability" [Article 10 (2) (c)]. If those agencies to which the respondent is operationally related are baldly invoked as governing premise, to justify the respondent's non-delivery, the effect would be to nullify vital private rights safeguarded under the Constitution: that cannot be permitted by this Court, which is under obligation, by *Article 159 (2) (e) of the Constitution*, to protect and promote "*the purpose and principles of this Constitution*".

In practical terms, Government has a *public duty to effect change* to any unprogressive bureaucratic arrangements, such as those that may characterize the operational linkage of the respondent to slothful structures, so as to render the respondent, as well as such structures, capable of responding to the overriding demands of the Constitution; and in this regard, ordinary statutory arrangements cannot qualify the constitutional provisions. On this account, the respondent has no justification for failing to make VAT refunds timeously.

The framework for resolving the vital questions in this application has, I believe, already crystallized; but I will finish it off by restating the governing principles in a judicial review matter such as this; and for this purpose it is meet to revert to the landmark English Court of Appeal Judgment in ***Associated Provincial Picture Houses, Ltd. v. Wednesbury Corporation*** [1947] 2AII E.R. 680 (at pp. 682-683, *per* ***Lord Greene, MR***):

"It must always be remembered that the Court is not a court of appeal. The law recognizes certain principles on which the discretion must be exercised, but within the four corners of those principles the discretion [of the decision-making public body] is an absolute one and cannot be questioned in any court of law.

"What, then, are those principles? They are perfectly well understood. The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found, expressly or by implication, matters to which the authority exercising the discretion ought to have regard, then, in exercising the discretion, they must have regard to those matters. Conversely, if the nature of the subject-matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, they must disregard those matters. Expressions have been used in cases where the powers of local authorities came to be considered relating to the sort of thing that may give rise to interference by the Court. Bad faith, dishonesty…., unreasonableness, attention given to extraneous circumstances, disregard those matters. Expressions have been used in cases where the powers of local authorities came to be considered relating to the sort of thing that may give rise to interference by the Court. Bad faith, dishonesty…., unreasonableness, attention given to extraneous circumstances, disregard of public policy……have all been referred to as matters which are relevant for consideration. In the present case we have heard a great deal about the meaning of the word 'unreasonable'. It is true the discretion must be exercised reasonably. What does that mean?.....It [the word 'unreasonable'] is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey those rules, he may truly be said…..to be acting 'unreasonably'. Similarly you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority."

The common law, in its evolution, has defined the rules of conduct for a public authority taking a public decision, entrusting the overall control-jurisdiction in the hands of the Courts of law; but for Kenya, such a general competence of the Courts is now no longer confined to the terms of statute law and subsidiary legislation, but has a fresh underwriting in the ***Constitution of Kenya, 2010***, Article 47, which imposes a ***duty of fair administrative action***, and [Art. 10(2) (c)] demands "*good governance, integrity, transparency and accountability*".

From the facts of the instant case, it is clear to this Court that the respondent failed to deal with the applicant's claim of VAT refund in the context of fairness, transparency, accountability or good governance. Besides, I agree with learned counsel for the applicant that the applicant had been subjected to discrimination, in the terms signalled by Article 27 (1) and (2) of the Constitution.

Given the safeguards of the Constitution which clearly apply to the applicant herein, the Court does not accept the respondent's plea that it is subject to certain structural inefficiencies which are traceable to other organs of Government, or to the provisions of ordinary statute law.

This line of reasoning, in my opinion, finds support in the practice of international human rights law, as is shown by the European Court of Human Rights decision in ***Intersplav v. Ukraine*** (*supra)*.

I hereby issue an Order of ***mandamus*** to compel the respondent to pay the applicant a Value Added Tax refund of Kshs. 35,187,432/82.

The respondent shall bear the costs of these proceedings.

DATED and **DELIVERED** at **MOMBASA** this ***6th*** day of ***May, 2011***.

……..

J. B. OJWANG

JUDGE

Coram: ***Ojwang, J.***

Court Clerk: ***Ibrahim***

For the ex parte Applicant: ***Mr. Karori***

For the Respondent: ***Mr. Matuku***