



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Misc Civil Appli 295 of 2009

IN THE MATTER OF AN APPLICATION BY KAMLESH MANSUKHLAL DAMJI PATTNI FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE INCOME TAX, CAP. 470 LAWS OF KENYA

AND

IN THE MATTER OF THE DECISION OF THE INCOME TAX-LOCAL COMMITTEE NAIROBI AREA DELIVERED ON 20TH NOVEMBER, 2008 AND COMMUNICATED ON 26TH NOVEMBER 2008 AND THE KENYA REVENUE AUTHORITY’S DEMAND DATED 16TH DECEMBER 2008.

AND

IN THE MATTER OF THE INCOME TAX ASSESSMENTS FOR THE YEAR/S 1990, 1991, 1992 AND THE AMENDED INCOME TAX ASSESSMENTS DATED 26TH JULY 2007 RAISED AGAINST KAMELSH MNSUKHLAL DAMJI PATTNI

KAMLESH MANSUKHLAL DAMJI PATTNI.....APPLICANT

-V E R S U S-

THE COMMISSIONER FOR INCOME TAX 1ST RESPONDENT

THE KENYA REVENUE AUTHORITY2ND RESPONDENT

LOCAL COMMITTEE-NAIROBI AREA 3RD RESPONDENT

R U L I N G

Before me is a Chamber Summons dated 20th May, 2009 filed on the same date by S. Musalia Mwenesi, advocates for the applicant **KAMLESH MANSUKHLAL DAMJI PATTNI**. The respondents are named as **THE COMMISSIONER FOR INCOME TAX (1st respondent)** **THE KENYA REVENUE AUTHORITY (2nd respondent)**, and **THE INCOME TAX LOCAL**

COMMITTEE – NAIROBI AREA (3rd respondent). The application was purported to be brought under Order 53 rule 1 of the Civil Procedure Rules, section 3A of the Civil Procedure Act (**Cap. 21**) and section 8 of the Law Reform Act (**Cap. 26**).

The orders sought are as follows-

1. ***THAT this application be certified as urgent and heard ex-parte in the first instance.***
2. ***THAT the applicant be granted leave to apply for an order of Certiorari to remove into this Honourable Court and quash the 3rd Respondent's decision delivered on 20th November, 2008 and communicated on 26th November, 2008 dismissing the Applicant's appeals lodged thereat arising from the 1st Respondent's Income Tax assessments for the year 1990, 1991, and 1992 and the amended assessments dated 26th July, 2007 raised against the Applicant.***
3. ***THAT the Applicant be granted leave to apply for an order of Certiorari to remove into this Honourable Court and quash the 2nd respondent's decision contained in its letter dated 16th December, 2008 demanding Kshs.161,025,496/= as income tax for the years 1990, 1991 and 1992 from the Applicant.***
4. ***THAT the Applicant be granted leave to apply for an order of Prohibition to prohibit the 1st and 2nd Respondents in any manner whatsoever or otherwise acting upon the decision of the 3rd Respondent delivered on 20th November, 2008 and communicated on 26th November, 2008.***
5. ***THAT the Applicant be granted leave to apply for an order of Prohibition to prohibit the 1st and 2nd Respondents from in any manner enforcing or attempting to enforce the demand contained in the 2nd Respondent's letter of 16th November, 2008 or any other demand of income tax for the years 1990, 1991 and 1992 against the Applicant.***
6. ***THAT the Applicant be granted leave to apply for an Order of Prohibition to prohibit the 1st and or 2nd Respondent from issuing any other or any further income tax assessments for the years 1990, 1991 and 1992 against the Applicant and/or attempting to enforce the same against the Applicant.***
7. ***THAT the Applicant be granted leave to apply for Judicial Review and for an order of prohibition to prohibit the 1st and/or 2nd Respondent from issuing any other or any further assessments for the years 1990, 1991, and 1992 against the applicant.***
8. ***THAT the grant of leave to the Applicant to apply for the aforesaid Judicial Review Orders of Certiorari and Prohibition do operate as a stay of any demand and/or enforcement by the 1st and/or 2nd Respondents of any assessment of income tax for the years 1990, 1991 and 1992 against the Applicant and do also operate as a stay of the 3rd Respondent's decision delivered or made on 20th November, 2008 and communicated on 26th November, 2008 and the 2nd Respondent's decision contained in its letter dated 16th December, 2008 demanding Kshs.161,025,496 from the Applicant as income tax due and payable.***
9. ***THAT the costs of this application be costs in the cause.***
10. ***Such further or other reliefs as this Honourable Court may deem just and fit to grant.***

The application was filed with a **STATUTORY STATEMENT** dated **18th May, 2009**. It was also filed with an **AFFIDAVIT VERIFYING STATUTORY STATEMENT** sworn on 18th May, 2009 by the Applicant.

The grounds of the application are, inter alia, that the applicant is a tax payer and at all material times was the Executive Chairman of a Limited liability company M/s Goldenberg International Ltd; that about July, 1993, the 1st Respondent made tax assessment for the years 1990, 1991 and 1992 and that by these assessments, the 2nd Respondent demanded as income tax some Kshs.37,756,996/= for the year 1990, Kshs.47,206,996/= for the year 1991, and Kshs.56,652,792/= for the year 1992 from the applicant and that on 30th September 1993 the Applicant objected to the assessments; that on 9th March, 1999 the 1st Respondent issued a Notice under section 85 of the Income Tax Act confirming the assessment for the year 1990, on 6th July, 1999 the 1st Respondent issued a similar Notice confirming the assessed income tax for the year 1991, and on 28th February, 2003, the 2nd Respondent issued a Notice confirming the income tax for the year 1992; that on 19th September, 1999 the Applicant filed an appeal with the 3rd Respondent with respect to the assessed income tax for 1990, on 16th December an appeal in respect of the assessed tax for 1991 and on 20th April, 2003 appeal for the income tax for 1992, which appeals were consolidated and adjourned several times until 20th November, 2008 when the 3rd Respondent delivered its decision; that the 3rd Respondent formally informed the Applicants appeal; that the Applicant on 10th December, 2008 requested for the written ruling of the 3rd Respondent and the 3rd Respondent has failed or ignored to provide the same; that the 2nd respondent by a letter dated 16th December, 2008 had written demanding immediate payment of Kshs.161,025,496/= from the applicant pursuant to the decision of the 3rd Respondent of 20th November, 2008 and communicated on 26th November, 2008; that there was inordinate delay from 1993 to 1999 to issue the confirmation notices for the years 1990 and 1991, and a delay from 1993 to 2003 with respect to assessment for 1992; that there was procedural unfairness and breach of the rules of natural justice; that there was bias and lack of due process; that the 3rd Respondent failed to take relevant matters into consideration and took into consideration irrelevant matters; that there was unfairness and arbitrariness, inconsistency and capriciousness; that there was unreasonableness and a violation of the legitimate expectation of the applicant.

The verifying affidavit gives the details of facts surrounding the matter and alludes to matters, such as HCCC No. 1508 of 1999, wherein the 2nd Respondent wanted to recover Kshs.422,343,406/= from the applicant's income tax assessed from Goldenberg International Ltd. which case was still pending; the Goldenberg Commission & Inquiry and the appointment of one of the witnesses in the Inquiry Professor Terry as a member of the 3rd Respondent, herein; as well as a global settlement recorded in HCCC 111 of 2003 between the Applicant Uhuru Highway Development Ltd. on the one hand and the Treasury, CBK and KACC on the other.

Several documents were filed as annexures to the verifying affidavit.

At the hearing of the application, Counsel for the applicant, Mr. Mwenesi, addressed me in support of the application.

I have considered the application, documents filed and submissions of counsel for the applicant. This is an application for leave to file judicial review proceedings. At this leave stage, I am not required to go into the substantive merits of the matter. However, an applicant is required to demonstrate to the court that he has a sufficient interest in the subject matter, and also that he has an arguable case.

I have no doubt that the applicant has a sufficient interest in the subject matter. He is the targeted party with regard to assessment of taxation which was considered and determined by the 3rd Respondent – The Income Tax Local Committee – Nairobi Area. It is my finding that the applicant has demonstrated a sufficient interest.

On the issue of an arguable case, it is trite that judicial review is concerned with the process rather than the substantive merits of a decision – **See COMMISSIONER FOR LANDS –VS- KUNSTE HOTEL LIMITED C.A. No. 234 of 1995.** The applicant has therefore to demonstrate an arguable case with regard to alleged flaws in the process and the judicial review remedies for which the applicant seeks

leave of court to file the Notice of Motion. In **KENYA NATIONAL EXAMINATIONS COUNCIL – VS- REPUBLIC** – Ex parte Geoffrey Gathenji Njoroge & Others – Civil Appeal No. 226 of 1996 the Court Appeal clearly gave the circumstances under which the judicial review remedies are available.

In my view, in an application for leave to file an application for judicial review remedies, one has to demonstrate to the court an arguable case, inter alia, that there was lack or excess of jurisdiction, or breach of the principles of natural justice, or bad faith, or unreasonableness.

Our present application arises from the proceedings and decision of the 3rd respondent, which might be enforced against the applicant by the 1st and 2nd Respondents. The complaints of the applicant arise from exercise of powers conferred under the Income Tax Act and Regulations made thereunder. Though the applicant complains against the conduct of the 3rd Respondent, he does not give any instance that shows that the said 3rd respondent failed to comply with the written laws and regulations. The applicant complains that the 3rd respondent did not give reasons for the decision. He relies on the case of **RICHARD BOHMAN SAFARIS LTD –VS- THE COMMISSIONER OF INCOME TAX** – Nairobi High Court Income Tax Appeal No. 318 and 319 of 1998 (*consolidated*). This case does not help the applicant because the Judge in that appeal did not rule that the Income Tax Local Committee was required by law or regulations to give its reasons. The Judge merely expressed his dissatisfaction with the provision that the Local Committee was exempted, by the Rules, from giving reasons. The judge stated –

“Before delving into the submissions on each of the grounds of appeal, I wish to raise several problems or difficulties that arise from appeals arising from Income Tax matters. I may not be, and I have every reason to believe that I am not the first judge or person to raise these concerns. But until the situation is attended to, the concerns will perpetually be repeated in such appeals as the one before me. I begin with the springboard provided by the respondent when he states, in the statement of facts that:

“... The Local Committee is not required to given reasons for arriving at any particular decision.”

Notwithstanding the above remarks of Mutungi J., there is no dispute that the Regulations exempt the Local Committee from giving reasons for its decisions. The request for leave to file judicial review proceedings herein has not been brought in order to challenge the legality of the rules. In my view, If the Local Committee (*3rd respondent*) followed the existing rules by not giving the reasons for its decision, then I will find no basis for granting leave to question their decision or the procedure followed through judicial review proceedings. Compliance with existing rules cannot be a basis for filing judicial review proceedings.

References have been made to the Goldenberg Inquiry Proceedings, consent agreements in HCCC 1111 of 2003, and another case HCCC No.1508 of 1999, the last of which is still pending. I personally do not see the connection between all those proceedings or cases and the issue of taxation of the applicant herein. And, if they had a connection, especially the pending HCCC 1508 of 1999, the applicant should in my view have moved to that cause for appropriate orders from the court, since I was told in documents filed that there were injunctive orders issued in that case. Again I find no basis for granting leave to file judicial review proceedings.

It has also been contended and argued that Professor Ryan’s inclusion in the Local Committee would or actually prejudiced the applicant because the said Professor Ryan had testified against the applicant in the Goldenberg Inquiry. In my view, the fact that one testifies against someone in a matter which is not related, and is later appointed in a Committee relating to a different subject matter in respect of the same person, is not evidence of bias or prejudice. In any case that could be a ground for appeal from the decision of the Local Committee and there was an avenue for appeal in the present case.

Lastly, though judicial review proceedings can be sustained, and leave granted even where other remedies are available, in my view where there are clear provisions on how to challenge a certain decision, someone coming to the judicial review court has to explain clearly the reasons why he or she did not opt

to use the other available legal process. In our present the applicant was clearly informed of his right of appeal to the High Court by the letter dated 26th November, 2008, the relevant part of which reads-

26th November, 2009

“RE- DECISION

At a meeting held on 20th November, 2008, the Income Tax Local Committee made the following decision in your cases(s).

The 1991 and 1992 Appeals dismissed and Assessments confirmed.

The 1990 Assessment to be amended on Total Income Tax K. Pounds 203,900.

Yours faithfully

Irene Kaibe Clerk to the Local Committee

If you are dissatisfied with this decision, you may appeal against it to the Court. You must give notice to the Commissioner of Domestic Taxes of your intention to appeal within 15 days after date of service on you of the above Local Committee decision. Furthermore within 30 days after the date of your notice of intention, you must present to the Registrar of the High Court, a Memorandum of appeal and also serve a copy of it on the Commissioner. Your attention is drawn to the Income Tax **(High Court)** Rules.”

I have not been told that the High Court would be biased against the applicant in an appeal or that the applicant was prevented from anything beyond his control to appeal as required by law. I have not been told that the High Court is not able, on appeal, to grant reliefs that will not adequately satisfy the interests of applicant.

For all other above reasons, I find that the applicant has not demonstrated an arguable case, and I therefore will disallow the application.

Consequently I dismiss the application and decline to grant the leave and stay orders requested.

Dated and delivered at Nairobi this 29th May, 2009.

George Dulu

Judge

In the presence of-

Mr. Mwenesi for the applicant

Kevin Court Clerk.