



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**MISCELLANEOUS CIVIL APPLICATION 1201 OF 2007**

**AWAL LIMITED.....APPLICANT**

**Versus**

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

**RULING**

Before me is the Chamber Summons dated 8<sup>th</sup> November 2007 in which the exparte Applicant, Awal Limited seeks the following orders against Kenya Revenue Authority:-

- 1) That the Application be certified urgent and orders be granted forthwith;
- 2) The Applicant be granted leave to apply for,
  - (a) An order of certiorari to issue to remove to this Hon. Court for purposes of quashing the decisions of the Respondent contained in the Notice stamped 9<sup>th</sup> May 2007 and Referenced Assessment Notice Nos. 0995200500005/4, 0995200400011/4, 099520043000134/4 and 0995200200042/4 purporting to contain additional Tax Assessment totalling Kshs.562,986,918/= and purporting to be tax due from the Applicant for the years of income 2002 to 2005;
  - (b) An order of certiorari do issue to remove to this Honourable Court for purposes of quashing the decision of the Respondent contained in the Confirmation Notices dated 19<sup>th</sup> September 2007, referenced IT23 in respect of Assessment Nos. 09952005000054, 09952004000114, 09952004300134, 09952002000424 and Assessment No. 00999999999999 dated 21<sup>st</sup> September 2007 purporting to confirm the requisite Assessment Notices and demanding alleged total tax of Kshs.789,203,113/= from the Applicant for the years of income of 2002 to 2005;
  - (c) An order of prohibition do issue prohibiting the Respondent from exercising its powers under the VAT Act, Cap 477, Laws of Kenya and Income Tax Act Cap 470, Laws of Kenya in an arbitrary and capricious manner;
  - (d) An order of mandamus do issue directing the Respondent to release and handover to the Applicant all accounting information downloaded from its computers as well as its documents and/or copies of its documents, and in particular, the money and/or source documents of accounting, removed from the Applicants premises, offices, godowns, factory and or showrooms on 26<sup>th</sup> September 2006, to enable the

Applicant effectively explain its accounts and Tax Returns for the year 2002-2005 and conveniently and properly prosecute its pending Appeal before the Local Committees Income Tax and the Appeals Tribunal for VAT respectively;

(e) Costs of these proceedings.

3) The grant of leave herein do operate as a stay of the Respondent's Confirmation Notices dated 19<sup>th</sup> September 2007 and 21<sup>st</sup> September 2007 respectively for the years 2002 to 2005 and a stay of any further proceedings in the Local Committee of Income Tax and Appeals Tribunal in respect of the Applicants Appeal thereto against the Respondent's said Confirmation of Assessment Nos. 09952005000054, 0995200400014, 099520043000134, 099525002000424 and 099999999999 for the years 2002-2005 respectively.

The Chamber Summons is grounded on a by Statutory Statement dated 6<sup>th</sup> November 2007 and the verifying Affidavit dated 7<sup>th</sup> November 2007 and an undated further Affidavit of Mohamend Ali filed in court of 26<sup>th</sup> November 2007 and annexures thereto.

When the Applicants Counsel Mr. Nyandieka appeared before the court on 9<sup>th</sup> November 2007, the court directed that the Applicant do serve the Chamber Summons for hearing inter partes.

Upon service of the Chamber Summons, John Rukorio Kimani an Assistant Commissioner with the Investigation and Enforcement Department of the Respondent filed an Affidavit dated 14<sup>th</sup> November 2007. The Respondent was represented by Mr. Okello.

A brief factual background of this matter is that the Applicant is a Limited Liability Company trading in both Mombasa and Nairobi. On 26<sup>th</sup> September 2006, the Respondent's officers stormed the Applicant's Office godowns and premises at Mombasa and Nairobi with Notices dated the same date, and issued under Sections 56 (1) of the Income Tax Act, Section 3 (A) of VAT Act which required the Applicants to produce their books of Accounts for examination.

The documents were to relate to the period 2002 to date. The Respondent's officers carried the documents away and the Applicants were refused permission to make photocopies of them. The Applicant and the sister companies filed **MSA HCMISC APPLICATION 944/2006 REP V KRA ex parte AWAL LTD & OTHERS** challenging the action of the Respondent and while the said matter was awaiting determination, on 12<sup>th</sup> January 2007 and 9<sup>th</sup> May 2007, the Respondent demanded from the Applicant Kshs.789,203,113/= being Corporation Tax and VAT but the demand did not specify how the sum was arrived at, for what goods the said tax related and the basis for the demand,

On 17<sup>th</sup> September 2007, the Respondent issued notices confirming the said Assessments and the Applicant appealed to the Local Committee of VAT but the Applicant has been unable to prosecute the same because it lacks its documents which were taken away by the Respondents. It is the Applicant's contention that the said tax liability relates to 3<sup>rd</sup> parties who may be condemned unheard. The grounds upon which the Applicant relies on are therefore that the Respondent's actions are ultra vires the provisions of the VAT Act Cap 470 Laws of Kenya, are arbitrary and capricious, are contrary to rules of natural justice, unreasonable, unfair and improper exercise of powers, was done in bad faith and breaches the applicant's legitimate expectation.

In opposing the Application, John Rukorio deponed that the Respondent acting on information that the Applicant was involved in accounting malpractices leading to massive tax evasion, the Respondent's officers visited the Applicant's premises on 26<sup>th</sup> September 2006 and removed several documents pertaining to revenue for purposes of inspection and examination and thereafter the Applicant filed MSA HMISC 944/06 which has been heard but is pending ruling and that the prayers in that Application and the present one are substantially the same in that they relate to release of the documents and that this application is an abuse of the court's process.

As relates to the filing of the appeal before the Local Committee of Income Tax and appeals Tribunal for VAT, it is contended that the same is inferior to this court and cannot proceed before this matter is heard and determined and that no document has been exhibited to show that hearing dates have been given in those appeals. That after going through the documents found in the Applicants premises, the Respondents have reasonable grounds for believing that the Applicants are in breach of the Revenue Acts and Regulations and the allegation of the Respondent's acts being arbitrary or motivated by bad faith do not arise and that there are no requirements that notices be given to the Applicants before a search was conducted in such premises. That prayer 2 in the chamber summons that the Respondent be restrained from carrying out its statutory duties under the VAT Act and Income Tax Act will be granting the Applicant immunity from investigation or supervision if granted and that since appeals were filed prayers 2 (a) and 2 (b) are spent, Mr. Rukorio also deponed that the remedies sought are not available as Judicial Review does not deal with merits of the impugned decision but the review of the decision making process and so far the Applicant has not pointed to any statutory duty that has not been performed or which has been breached.

At this stage of these proceedings, all that the Applicant needs to demonstrate is that they have an arguable case that is likely to succeed after the hearing, without necessarily considering the matter in considerable detail. (See **NJUGUNA V MINISTER OF AGRICULTURE 2000 IEA 184**)

The Applicant disclosed that they filed MSA HMISC 944/06 and the proceedings were exhibited by both parties. At prayer 2 (d) of the chamber summons herein, the Applicant is seeking the release of the documents that were taken away from their premises by the Respondents. In the Notice of Motion in HMISC 944/06, prayer 1 seeks to quash the decision of 26<sup>th</sup> September 2006 removing the documents of the Applicant from their premises. These two prayers have exactly the same effect that is, the release of the documents. Similarly, prayer 2 (c) of the chamber summons herein and prayer 3 of the Notice of Motion in HMISC 944/06 are similar. Besides, the prayers are vague – seeking to prohibit the Respondent from exercising its powers under the Vat Act and Income Tax Act arbitrarily and capriciously. They should have been more specific. Seeking prayers that have already been sought in HMISC 944/07 is an abuse of the court process as those prayers are awaiting determination in MSA HMISC 944/07 which is pending for ruling. If this court were to consider the same prayers, that might lead to contradictory decisions that might be embarrassing to the court. The only prayers that could be considered in this Chamber Summons are prayers 2(a) & (b) that seek to quash the Assessment Notices of the Respondents demanding additional tax from the Applicant because they were issued after MSA HMISC 944/06 had been filed.

It is the Applicant's contention that the assessment has been done and notices confirmed without them being heard, that the tax relates to other parties, that the assessment is ultra vires the provisions of the VAT Act. Those are issues to be considered at the substantive hearing. However, I believe this Application can only be heard after the ruling in MSA HMISC 944/07 because it will have been determined whether or not the Applicants can have the documents that they seek to be released so that they can use the said documents to prove their case.

In view of the foregoing, I hereby grant leave to bring Judicial Review proceedings in terms of prayer 2(a) and (b) of the chamber summons dated 8<sup>th</sup> November 2007. Due to the large sums claimed as additional tax, Prayer 3 of the chamber Summons will be granted to a limited extent, that it will only stay the confirmation Notices of 19<sup>th</sup> September 2007 and 21<sup>st</sup> September 2007 for the years 2002-2005. No stay is granted in respect of the Appeals before the Local Committee of Income Tax & Appeal Tribunal. The Notice of Motion be filed and served within 15 days of today's date. Thereafter the Applicant to move the court for directions as to the hearing of the Notice of Motion. Costs to abide the Notice of Motion.

Dated and delivered this 14<sup>th</sup> day of March 2008.

R.P.V. WENDOH

JUDGE

Mr. Macharia holding brief for Mr. Mabea for Applicant

Mr. Mwaniki for Respondent

Daniel: Court Clerk