



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISC CIV APPLI 713 OF 2005

IN THE MATTER OF: AN APPLICATION FOR THE JUDICIAL REVIEW ORDERS OF  
CERTIORARI & PROHIBITION

AND

IN THE MATTER OF: THE LEGAL NOTICE NO. 110; VALUE ADDED TAX  
(ELECTRONIC TAX REGISTERS) REGULATIONS 2004

AND

IN THE MATTER OF: THE VALUE ADDED TAX ACT, CAP 476, LAWS OF KENYA

AND

IN THE MATTER OF: ORDER LIII OF THE PROCEDURE RULES AND THE LAW  
REFORM ACT, CAP. 26, LAWS OF KENYA

BETWEEN

REPUBLIC ..... APPLICANT

VERSUS

THE HON. MINISTER FOR FINANCE ..... 1<sup>ST</sup> RESPONDENT

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

EX-PARTE APPLICANTS..... PETER KINYA & 295 OTHERS

RULING

The ex-parte applicants, **Peter Kinya** and **295 others** applied for leave to initiate Judicial Review proceedings against the 1<sup>st</sup> and 2<sup>nd</sup> respondents. On 30<sup>th</sup> September 2005, the applicants were granted leave and the said leave was to operate as a stay of the 1<sup>st</sup> respondent decision contained in **Legal Notice Number 110** dated 8<sup>th</sup> October 2004 as published in the **Kenya Gazette Supplement Number 62** as **Legislative Supplement number 40** and headed **The Value Added Tax (Electronics Tax Registers)**

## **Regulations, 2004.**

Pursuant to the said leave, the applicants filed the notice of motion under **Order 53 Rule 3 and 4** of the **Civil Procedure Rules**, part **VI** of the **Law Reform Act Chapter 26** of the **Laws of Kenya**. They have sought for five substantive orders namely;

- (a) That an order of certiorari do issue to remove to this Honourable Court for the purpose of being quashed the decisions and/or proposals as contained made by 1<sup>st</sup> respondent on 24<sup>th</sup> September 2004 as contained in Legal Notice Number 110 dated 8<sup>th</sup> October 2004 as published in Kenya Gazette Supplement Number 62 as Legislative Supplement number 40 and headed The Value Added Tax (Electronic Tax Registers) Regulations, 2004.**
- (b) That an order of prohibition do issue to prohibit the 1<sup>st</sup> and 2<sup>nd</sup> respondents prohibiting them by themselves, their agents, their servants or any other agencies from implementing or enforcing the 1<sup>st</sup> respondent's decision and/or proposals made on 24<sup>th</sup> September 2004 as contained in Legal Notice number 110 of 8<sup>th</sup> October 2004 as published in the Kenya Gazette Supplement Number 62 as Legislative Supplement number 40 and headed "The Value Added Tax (Electronic Tax Registers) Regulations 2004."**
- (c) That an order of prohibition do issue prohibiting the 1<sup>st</sup> respondent whether by himself or through the 2<sup>nd</sup> respondent or any other agency from issuing directives imposing monetary burdens on Kenya citizens without the express authority of Parliament.**
- (d) That an order of prohibition do issue prohibiting the 1<sup>st</sup> respondent from acting ultra vires the provisions of The Value Added Tax Act, Chapter 476 of the Laws of Kenya.**
- (e) That an order of prohibition do issue to prohibit the 1<sup>st</sup> respondent from acting contrary to the provisions of the Bill of Rights as contained in Chapter V of the Constitution of Kenya.**

The grounds upon which the above reliefs were sought are stipulated in the body of the application. These grounds are further elaborated on by the matters deposed to in the supporting affidavit of *Shamsei Gilani* sworn on the 18<sup>th</sup> October 2005 and the statement of facts in support of the application.

Briefly stated, on 8<sup>th</sup> October 2004, the Minister for Finance in exercise of the powers conferred by **Section 58** of the **Value Added Tax Act** made regulations to be cited as the **Value Added tax (Electronic Tax Registers) Regulation 2004**, which was to come into operation on the 1<sup>st</sup> January 2004. In those Regulations paragraph **6 (5)** of the seventh schedule to the Act, the word register was amended to refer to Electronic Tax Printer. The Regulations stated that the persons referred to under paragraph **6 (5)** of the seventh schedule of the Act are to use a register.

**Regulation 2** stated that "a user of register shall use the register as required and in accordance with these regulations." The registers to be used are the ones prescribed by this gazette notice and the user of the register is supposed to;

- (a) Submit a logo unique to his business to the Commissioner, who shall keep a register of such logos;**
- (b) have the register examined and recorded by the Commissioner and obtain a unique register, identification number in respect of that register before putting it into use;**
- (c) permanently affix the register's identification number obtained under paragraph (b) on the register;**
- (d) use the register to record only own sales and not to allow its use to record the sales of any other**

**person;**

The applicant argued that the 1<sup>st</sup> respondent had no powers to impose an obligation upon the applicants to purchase at their own costs sophisticated electronic devices, thereafter pay highly trained computer programmers to the programme the same. To engage the services of the electronic technicians to install the same and to impose a strict liability duty of having trained technicians to service the expensive devices every six (6) months failure of which whereof the applicants will be prosecuted.

*Secondly*, the applicants argued that in essence the tax payer would be compelled to shut down their business in the event that the expensive electronic device malfunctions breaks down or it is damaged.

*Thirdly*, the sophisticated devices are required to be bought from approved dealers in Kenya at an exorbitant price while a trader can source the same from other parts of the world at a lower price. Thus the regulations impose a huge financial burden upon the tax payer.

*Fourthly*, the 1<sup>st</sup> respondent is purporting to place the burden of collecting taxes upon the tax payer instead of the 2<sup>nd</sup> respondent who has the obligation of the collection of taxes as the law provides. The 2<sup>nd</sup> respondent has not issued detailed guidelines and therefore there is no proper basis for enforcing the regulations which would in any event lead to a confusion and chaos if the regulation is implemented before the guidelines.

*Fifthly*, the regulation which was applicable to the central business of Nairobi and as the area of initial implementation is discriminatory and it is against the provisions of **Section 82 of the Constitution of Kenya**.

During the hearing of this application, **Mr. Karanja Mbugua** the learned Counsel for the ex-parte applicants further argued that the regulations as contained in the **Legal Notice number 110** of 8<sup>th</sup> October 2004, is null and void as it was to become effective on 1<sup>st</sup> January 2004 which is one year before the gazettment. He further argued that by asking the applicants to install the Electronic Tax Registers, the Minister was exceeding his powers which are ultra vires the statute. Further by making the regulations, the Minister breached or usurped the powers under the Kenya Industrial Property Act by requiring a trader to submit the logo, the logo is protected under the provisions of **Cap 509 of the Laws of Kenya** were breached by his regulations. In this regard, Counsel for the applicants relied on Court of Appeal decision in the case of **Njuguna Vs The Minister of Agriculture E.A.L.R [2001] E.A page 184** where the Court of Appeal set out the principles to be taken into consideration when an applicant can be granted leave to institute Judicial Review Proceedings and considerations to be taken into account.

On the part of the respondents, this application was opposed. The Learned Counsels **Mr. Waweru Gatonye** appeared with **Ms Judith Kamande** for the 1<sup>st</sup> respondent, The Minister for Finance while the learned State Counsel, **Ms Stella Munyi** appeared for the 2<sup>nd</sup> respondent, The Kenya Revenue Authority. They also relied on the replying affidavit of the 1<sup>st</sup> respondent, **Amos Kimunya** which was sworn on 1<sup>st</sup> August 2006 and another affidavit by **Patrick Asuma Chongo**, the Deputy Commissioner Department of Domestic Taxes on behalf of the 2<sup>nd</sup> respondent.

Counsel for the respondents invited this court to look at three institutions; The Minister for Finance who has the overall responsibility of revenue collection. The second institution is the Kenya Revenue Authority which is established under **Chapter 469 of the Laws of Kenya** in particular **Section 5** which provides as follows: -

**(a) to administer and enforce the written laws or the specified provisions of the written laws set out in the First Schedule and for that purpose assess, collect and account for all revenues in accordance with those laws;**

**(b) to advise on matters relating to the administration of, and the collection of revenue under the**

*written laws or the specified provisions of the written laws set out in the First Schedule; and*

*(c) to perform such other functions in relation to revenue as the Minister may direct.*

The responsibility of collecting revenue is vested upon the Kenya Revenue Authority who are supposed to administer all written laws in regard to revenue collection. The collection of Value Added Tax (VAT) is also included under the Kenya Revenue Authority Act. The Minister has the overall responsibility to amend the schedule. The duties and functions of the Commissioner of Value Added Tax are specifically set out in the Act. The officers appointed under the Act must enforce the Act and they have no discretion, they must collect the revenue according to the law. **Section 58** of the **Value Added Tax Act** gives the Minister power to make regulations for the implementation of the Act. The said section provides as follows;

*“The Minister may make regulations for the better carrying out or giving effect to the purposes and provisions of the Act, and without prejudice to the generality or the foregoing, the regulation may –*

*(a) prescribe conditions and procedure for the registration of taxable persons;*

*(b) provide for the submission of returns and the place at which returns are to be submitted and tax is to be paid;*

*(c) allow for the remission of small amounts of tax at the discretion of the Commissioner;*

*(d) prescribe the form of notices, returns or other forms required for the purposes of this Act;*

*(e) prescribe any other thing which is to be prescribed for the purposes of any provision of this Act.”*

Counsel for the respondent further submitted that the law can not set out all the details of all what is required of a Minister and the test is whether the rules and regulations made by the Minister are within the mandate derived under **Section 58** and whether they serve the purpose of the Act. In this case, the Minister has power to make the rules requiring traders to install the Electronic Tax Registers which are a form of record keeping. Under **Section 28 of the Value Added Tax Act** which makes reference to the seventh schedule, there are already existing regulations requiring a trader to keep records regarding all the transactions of Value Added Tax collections. With time and due to exigencies of time, the form of record was bound to be inadequate as there was poor record keeping by the tax payers. There was also deliberate failure to charge Value Added Tax by taxable persons who do not issue tax invoices. Also taxable persons keeping various records some of which are excluded from tax declaration. There was also manipulation of records for purposes of under declaration of tax due. There was use of fraudulent purchase documents for income tax deductions or claim for Value Added Tax refund.

*Lastly*, it was tedious and lengthy exercise which was carried out by Kenya Revenue Authority to establish the traders' tax liability. It is against this background that **Legal Notice Number 110 of 2004** was formulated and the regulations were made to enable the Kenya Revenue Authority carry out the statutory duties efficiently and effectively.

Counsel for the respondents contended that the Electronic Tax Register machine is not complex because when a customer goes to a shop they are issued with a cash receipt. The machine has a memory and its manipulation is difficult. That memory capacity can go up to five years. In addition Electronic Tax Register machine issues physical receipts and it is possible to establish the source of the receipt which is also a benefit to a tax payer.

On the issue of whether the regulation was ultra vires the powers vested upon the Minister and exercisable by Parliament, Counsel submitted that Parliament passed the **Finance Bill 2004** which introduced the Electronic Tax Register and the said bill was debated in Parliament first and it received the Presidential assent on 31<sup>st</sup> December 2004 and it became the **Finance Act 2004 Number 4 of 2004**. It is therefore not correct for the applicants to argue that the regulation would usurp the powers of Parliament

by requesting the traders to recover the money expended in purchasing the Electronic Tax Register from the revenue collection.

In the **Finance Act Number 4 of Section 43** allows the Minister to introduce the Electronic Tax Register as a form of record keeping. As regards the argument that the regulations were published one year after the effective date, the applicants submitted that **Legal Notice Number 110 of 2004** was amended on 22<sup>nd</sup> October 2004 by **Kenya Gazette Supplement number 66** which corrected the error and the effective date was amended to begin on 1<sup>st</sup> January 2005. The error having been collected, the Kenya Revenue Authority is empowered to introduce the **Electronic Tax Register and Section 43 of the Act** requires the traders to use the Electronic Tax Registers with effect from 1<sup>st</sup> January 2005.

As regards the argument that the regulation was introduced without due regard to the rules of Natural Justice, there is no requirement under the law that traders must be heard before the regulations are changed or amended. And if indeed Parliament intended traders to be heard, that particular provision would have been inbuilt in the legislation. For this proposition, Counsel put forward the case of **Commissioner General, Kenya Revenue Authority –Vs- Vano Onema Omwaki t/a Marenga Filling Station C.A. Civil appeal No. 45 of 2000 page 23-30** where the Court of Appeal held

*”It is in the context of the Act that the allegations of malice and denial of opportunity to be heard are to be examined and tested. For it is in the Act that duties of the Revenue are spelt out and that the liabilities of every taxpayer to pay tax are contained...*

*We should observe that the revenue in carrying out the duties imposed on it by Parliament could not, without proof be said to be acting maliciously. The next step in the process of forfeiture is that under Section 200 of the Act in which the procedure on seizure is set out in detail. If any seizure took place in the absence of the owner of the thing seized a notice to that effect and the reason for it is to be given within one month of the seizure. It would seem in this case that the sealing and seizure was effected in the presence of the manager of the applicant and there was no other notice needed.”*

The respondent is merely enforcing the law and there is no prove that there was malice as it would be impossible to hear every tax payer in a matter of this magnitude.

On the issue of Electronic Tax Register being discriminatory the provisions of **Section 74 and 75** of the **Constitution of Kenya** allows the collection of taxes. The Electronic Tax Register had to begin somewhere before rolling over to the whole country. However presently, the programme has been rolled over the whole country and thus no trader is discriminated.

The use of the logo is like the personal identification number and it is only for purposes of tax, it is not to be used for any other purposes. If the Electronic Tax Register broke down, the suppliers would be notified and they would be repaired in the ordinary cause of business.

In considering the remedies sought it is important to bear in mind that these are discretionary remedies which must be granted on the basis of clear evidence of abuse of power, excess in exercise of jurisdiction or where the rules of natural justice are not complied with. In this case, the applicants sought for orders of certiorari to quash the decision of the 1<sup>st</sup> respondent and an order of prohibition directed to the respondents prohibiting them from imposing monetary burdens on Kenyan citizens without authority by Parliament. In the case of **Kenya National Examination Council Vs Republic Civil Appeal 266 of 1966**, the Court of Appeal said *inter alia*

*“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice an order of prohibition would not be efficacious against the decision so made...*

***Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”***

The test applicable in this case is whether the regulations sought to be quashed were enacted by the Minister for Finance without jurisdiction or in excess of the powers granted by the Act. Under **Section 58** of the **VAT Act**, it is provided that the Minister may make the regulations for the better carrying out or giving effect to the purposes and provisions of the Act, and without prejudice the Minister may make regulations. (*see page 9 of the ruling*).

It is pursuant to those provisions that the Minister of Finance made the regulations contained under **Legal Notice Number 110** which became operational with effect from *1<sup>st</sup> January 2005*. It is clear from the records that the operative date of **Legal Notice number 110 of 2004** was duly amended on *22<sup>nd</sup> October 2004* vide the **Kenya Gazette Supplement Number 66** and the operative date was corrected to read *1<sup>st</sup> January 2005*.

In this regard, there was no prejudice caused to the applicants as argued by Counsel that due to retroactivity of the operative date his clients were bound to suffer prejudice. I find that the **Legal Notice number 110 of 8<sup>th</sup> October 2004** was properly promulgated by the Minister of Finance in pursuant of the powers conferred by **Section 58** of the **VAT Act**. The introduction of the Electronic Tax Register was within the mandate and the objectives set out within **Section 58** of the **VAT Act**.

*Was the Minister for Finance in breach of the rules of natural justice which would imply that the Minister was obliged to hear the members of public before making regulations on taxation?* I agree with Counsel for the respondents that such an obligation is not imposed by the law. There is no provision under the law for the Minister to hear traders or tax payers. Parliament intended that, before any taxation is effected tax payers be heard, the legislation would have made provisions for the hearing and consultation of the tax payers. The Minister was executing his mandate and since the order of certiorari is not concerned about the merit of the decision but how the decision was arrived at, am satisfied that the allegations of breach of natural justice are misplaced.

Furthermore, the **Finance Act Number 4 of 2004** which was debated and passed by Parliament made provisions for the Electronic Tax Register. **Regulation 66** of the seventh schedule provides that

***“A person to whom sub paragraph (5) applies shall be entitled with prior approval of the Commissioner to recover the cost of the electronic tax register from the tax payers by such person.”***

This therefore answers the claim by the applicants that the acquisition of the Electronic Tax Register would be burdensome and an additional cost to them.

The other issue to consider is the issue of discrimination which was argued was against the provisions of **Section 82** of the Constitution which outlaws discrimination or differential treatment. Under **Section 82 Sub section 3** ‘discrimination’ means

***“Affording different treatment to different person attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.”***

The question that begs for an answer is whether by the implementation of the Electronic Tax Register the applicants were being discriminated. The regulation that is being challenged is applied to all taxable persons throughout the country. Due to the challenges of implementing the regulations throughout the country it was intended to begin at the Nairobi Central Business District and to roll out throughout the country. During the presentation of this application it was confirmed that the regulation is being applied

throughout the country. I agree with the judgment of *Nyamu J* in a similar case of **Republic –Vs- Minister for Finance and 2 others Ex-parte Law Society of Kenya HC Misc Appl. 644 of 2005** where the learned Judge while dealing with the principle of discrimination quoted a persuasive case of **Minority Schools in Albania PCJ Series A/B No.64 P19 [1935] 8 ILR page 386 -90**

*“The court held that equality in law precludes discrimination of kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations...”*

*Not every differentiation of treatment will constitute discrimination of the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legislative under the covenant.”*

Arising from the above, it is clear there no discrimination which was intended by the regulation and this ground is without merit. Counsel for the respondents also invited this court to consider that this application is bad in law and leave ought not to have been granted in the first place. This is because the applicants did not come to court within the stipulated period as provided for under **Order 53 of the Civil Procedure Rules**.

**Mr. Gatonye** argued that the applicants came to court almost one year after the publication of the **Legal Notice Number 110** which is contrary to the provisions of the law that orders of certiorari should be sought within six (6) months after the decision which is supposed to be quashed is published. He relied on a decision of this court in a similar matter **Kisumu Misc. Civil Appli. No.288 of 2005 Republic Vs Minister for Finance Ex-parte Virash Cash & Carry & 14 others** where *Justice Mwera* held that

*“An application for leave may be refused if it is made tardily or if it is premature. Application for leave must be made promptly --- from the date when the grounds for the application first arose. The primary requirement is always of promptness and leave may be refused --- the question of delay remains relevant to the discretion of the court to grant or refuse relief at the full hearing.”*

While on this issue of delay, another matter which is of concern to this court was also raised about the abuse of the court process. It is clear that applications of this nature were filed throughout the country. The first application was filed in the High Court Nairobi where the applicants sought similar orders. The applicants were granted leave but they were denied the orders of stay. Some other applicants filed another suit in High Court Mombasa, Bungoma, Kisumu and in Nakuru, this present application. This practice of forum seeking by litigants should be deprecated. It is obviously an abuse of the court process when parties engage in a multiplicity suits.

I think I need not say more in this application; the upshot of the above analysis is that this application should be dismissed and I hereby dismissed it with costs to the respondents.

**Ruling read and signed on the 15<sup>th</sup> February 2007.**

**MARTHA KOOME**

**JUDGE**