



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
MISC CIV APPLI 809 OF 2005
IN THE MATTER OF: AN APPLICATION BY DAVID G. KINYANJUI
AND SAMMY MWEMA WAMBUA TO
APPLY FOR LEAVE FOR JUDICIAL
REVIEW ORDERS OF CERTIORARI AND
PROHIBITION

AND

IN THE MATTER OF: LEGAL NOTICE NO. 110, VAT REGULATIONS 2004

- 1. DAVID G. KINYANJUI1ST APPLICANT**
- 2. SAMMY MWEMA WAMBUA2ND APPLICANT**

VERSUS

- 1. HON. DAVID MWIRARIA**
(MINISTER FOR FINANCE).....1ST RESPONDENT
- 2. KENYA REVENUE AUTHORITY2ND RESPONDENT**

RULING

Pursuant to leave given by this court on 3rd October 2005, David Kinyanjui and Sammy Mwema Wambua, the *ex parte* applicants herein, took out a motion pursuant to order LIII rule 3(1) of the Civil Procedure Rules and under Sections 8 and 9 of the Law Reform Act in which they sought for the following orders against the Minister for Finance and the Kenya Revenue authority being the 1st and 2nd Respondents:

- (i) An order of certiorari to quash the 1st Respondent's decision dated 24.9.2004 contained in Legal Notice no. 110 of 8/10/2004 published in Kenya Gazette Supplement number 62 as Legislative Supplement No. 40 and headed the Value Added Tax (Electronic Tax Registers) Regulations, 2004.
- (ii) An order of prohibition do issue to prohibit the 1st and 2nd Respondents from issuing directives imposing monetary burdens on Kenyans without the express authority of parliament.
- (iii) An order prohibiting the 1st Respondent from acting *ultra vires* the provisions of the Value Added Tax Act.
- (iv) An order prohibiting the 1st Respondent from acting contrary to the provisions of the Bill of Rights as contained in Chapter V of the Constitution of Kenya
- (v) Costs.

David Kinyanjui swore an affidavit to verify the motion and the facts set out in the Statutory Statement.

The motion is strenuously opposed by the Respondents who filed their responses in form of replying affidavits and grounds of opposition.

It is the submission of the applicants that the 1st Respondent has no jurisdiction in law to promulgate and make the aforesaid regulations referred to as the Value Added Tax (Electronic Tax Registers) Regulations 2004. It is the applicants' argument that the Minister for Finance (1st Respondent) had no power under Section 58 of the Value Added Tax Act (Chapter 476 Laws of Kenya) to make such regulations. It is further the submission of the applicants that the penalty of a fine of Kshs.500,000/- proposed to be imposed on one who breaches the regulations contravenes the provisions Section 77(8) of the Constitution because the Criminal offence purportedly created by the said regulations are not a creature of the express provisions of the V.A.T. Act and the penalty thereof has not been approved by parliament. It is the submission of the applicants that the 1st Respondent overshot his powers under the aforesaid Act.

It is the averment of the Respondents that the Minister for Finance had jurisdiction under Section 58 of the V.A.T. Act to promulgate the regulations. I have considered the rivaling submissions over this ground. I have carefully perused the provisions of section 58 of the Value Added Tax Act (Cap 476 Laws of Kenya) and paragraph 7 of the Seventh Schedule of the V.A.T. Act.

My appreciation of the above provisions of the law clearly shows that the Minister for Finance is given the power and discretion to make the regulations. My take in the matter is that the Minister acted

within the laid down law. Section 58(e) of the V.A.T. Act provides as follows:

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

(a).....

(b)

(c)

(d)

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

Paragraph 6 of the 7th Schedule provides:

“Every taxable person shall in accordance with this regulations keep full and true records written up to date of all transactions which may affect his tax liability.”

The above provisions of the law in my mind gave the 1st Respondent a general power to make regulations such as the ones in dispute.

It has also been argued that the regulations in dispute are unfair, unreasonable and irrational. I have carefully perusal the entire set of the regulations. I must admit that I am unable to trace anything unreasonable in those regulations. I am convinced that the introduction of the Electronic Tax Registers will be to the benefit of both the applicants and the entire country in that there it will be easy to ascertain the tax due.

It has further been argued that the Respondents sought to implement the regulations before seeking the approval of parliament. I do not intend to spend much time on this issue because my reading of section 2 of the Provisional Collection of Taxes & Duties Act (Cap.415 Laws of Kenya) empowered the 1st Respondent to make provisional orders for collection. In a nutshell the Minister acted within the law hence he cannot be faulted.

It is the submission of the applicants that the regulations proposed by the Minister for Finance are discriminatory and biased hence they are subject to judicial review. It is averred that the tax payer should not be overburdened by costs of policing, monitoring and accounting for the payment of V.A.T. by requiring them to purchase, programme, install and maintain a sophisticated electronic tax register. This submission was resisted by the Respondents who cited para 6(6) of the seventh Schedule of the V.A.T. Act. My reading of the above provisions clearly shows that the applicants and other tax payers complying with the proposed regulations will at the end of the day recover the cost incurred on the electronic tax registers.

The sum total of the entire motion is that I see no merit. The same is ordered dismissed with costs to the respondents.

Dated and delivered at Mombasa this 9th day of February 2007.

J.K. SERGON

J U D G E

In open court in the presence of Mr. Gatonye for 2nd Respondent and N/A for Applicants.

Court:: The certified copies of the proceedings and ruling be
supplied on payment of fees.

Sergon, J