



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO.644 OF 2005

REPUBLIC
APPLICANT

VERSUS

THE MINISTER FOR FINANCE **1ST**
RESPONDENT

THE KENYA REVENUE AUTHORITY **2ND**
RESPONDENT

THE COMMISSIONER FOR DOMESTIC TAXES **3RD**
RESPONDENT

JUDGMENT

By an application dated 12th May 2005 the ex-parte applicant the Law Society of Kenya seeks two substantive Judicial review orders against the Minister for Finance, The Kenya Revenue Authority, and the Commissioner for Domestic Taxes, namely:

1. THAT a Judicial Order of Certiorari do issue to call up into the High Court and quash the decision and proceedings of the Minister of Finance on one side and the Kenya Revenue Authority and The Commissioner of Domestic Taxes on the other side dated 8th October 2004 and 16th March 2005 respectively.
2. THAT Judicial Review order of Prohibition do issue directed to the Minister of Finance, The Kenya Revenue Authority and the Commissioner of Domestic Taxes to prevent them jointly and severally by themselves and or their agents from implementing the Value Added Tax (Electronic Tax Registers) Regulations 2004 and or Legal Notice No 110 of 8th October 2004.

The grounds relied on by the Applicants are set out in the statement dated 6th May 2005 as grounds (20-30) – as follows:-

(20) The Applicant is aggrieved because the respondents have made decisions on 8th October 2004 and 16th March 2005 pursuant to S 58 of the Value Added Tax Act which decisions are ultra and intra vires the said section 58 of the Act

(21) As at 8th October 2004 the date of the Legal Notice No 110 of 2004 (When the regulations were gazetted) The Finance Act 2004 which amended the Seventh Schedule of the VAT Act Cap 476 of the Laws of Kenya by introducing sub paragraphs 5 and 6 of paragraph 6 thereof (by giving authority to the Commissioner to require persons to use electronic tax registers) had not come into effect as the same came into effect on 31st December, 2004.

(22) Regulation 1 of the regulations in question provides that the regulations would come into force on 1st January 2004. The retrospective aspect of these regulations contravene the provisions of s 46(6) of the Constitution and Section 28 of The Interpretation and General Provisions Act Cap 2 of the Laws of Kenya.

(23) By having a pilot project for Nairobi City Centre in exclusion of all other tax payers in Kenya the respondents' action amount to discrimination and is biased.

(24) The confidentiality of Client/Advocate relationship is adversely affected by the implementation of the regulations.

(25) The Value Added Tax does not empower the 3rd respondent, the Commissioner of Domestic Taxes to determine when regulations under the Act would come into effect.

(26) No legal Notice was published to postpone the coming into operation of the regulations from the gazetted date of 1st January 2004 to 1st April 2005.

(27) The respondents seek to impose a monetary burden on the applicants without authority of Parliament.

(28) The requirement that the tax registers be purchased from only seven (7) specified (but not gazetted) suppliers smacks of corruption, discrimination and is against rules of natural justice.

(29) Not all transactions by lawyers are capable of being keyed into the register.

(30) The regulations are ultra vires the Advocates Act.

The factual basis of the application is set out in the affidavit of Mr George Mongare Kegoro who is the Secretary of the applicant Society which affidavit was sworn on 6th May 2005.

The other documents filed in support of the application are:

- 1) Skeleton Submissions dated 16th August 2005 ad filed on the 18th August 2005.
- 2) Applicants list of authorities filed on 18th August 2005.

The documents filed in opposition to the application are:

- A) The respondents' Replying Affidavit sworn on 13th December, 2005 by Mr David Mwiraria the then Minister for Finance and filed on 14th December, 2005
- B) 1st Respondent's Skeleton Arguments dated 14th December, 2005 and filed on 20th December, 2005
- C) 1st Respondent's List of Authorities filed on 20th December, 2005
- D) 2nd and 3rd Respondents' replying Affidavit sworn by Philip G. O. Odeny on 6th June 2005 and filed on 7th June, 2005.

E) 2nd and 3rd Respondents' Skeleton Submissions together with a bundle of authorities filed on 9th September, 2005.

F) 2nd and 3rd Respondents' Supplementary List of Authorities filed on 25th January 2006.

All the three respondents have denied that the applicant is entitled to any of the reliefs claimed or at all and the overall effect of the arguments contained in documents A to F is that the grounds relied on each of the issues raised by the applicant are not valid in law. In analyzing the factual and legal basis the court adopted the sequence of the grounds set out above.

20

ATTACKED DECISIONS whether Ultra Vires or Intra vires S 58 of the VAT Act

S 58 of VAT Act states

“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 of the foregoing, the regulations 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 provisions of this Act.**

On 10th June, 2004 Clause 43(a) of the Finance Bill, 2004 amended the 7th Schedule to the VAT Act in para 6 by inserting a new subparagraph 5 which provides as follows:

“(5) For the purposes of this paragraph, the Commissioner may, in accordance with the regulations, require any person to use the electronic tax register of such type and description as may be prescribed for the purpose of accessing information regarding any matter or transaction which may affect the tax liability of such person.”

Section 2 of the Provisional Collection of Taxes and Duties Act Cap 415 states:

“If a Bill is published in the Gazette whereby, if such Bill were passed into law, any tax or duty, or any rate, allowance or administrative or general provision in respect thereof would be imposed, the Minister may, subject to this Act and notwithstanding the provisions of any other written law relating to taxes and duties, make an order that all, or any specified provisions of the Bill relating to taxes, or duties shall have effect as if the Bill relating to taxes, or duties shall have effect as if the Bill were passed into law.”

On 10th June, 2004 by special issue Gazette Supplement No 37 (Legislative Supplement No 21) the Minister for Finance issued Legal Notice No 44 under the title of PROVISIONAL COLLECTION OF TAXES AND DUTIES ORDER 2004 by invoking the powers conferred on him by s 2 as read out above. He invoked the power in these terms:

“NOW THEREFORE in exercise of the powers conferred by s 2 of the Provisional Collection of Taxes and Duties Act, the Minister of Finance orders that all provisions of the Bill relating to taxes

or duties shall have effect as though the Bill were passed into Law.”

Under s 3(c) of Cap 415 the duration of the provisional order is expressed to be six months and six months would have expired on 6th January 2005. However the Finance Bill with the amendment as set out in clause 43 became law ie. Finance Act 2004 on 31st December, 2004 well within the six months duration provided for by the Provisional Collection of Taxes and Duties Act Cap 415. On 24th September, 2004 the Minister invoked s 58 of VAT Act and published the Regulations contained in the Legal Notice No 110 Gazette Supplement No 64 (Legislative Supplement No 40) titled The Value Added Tax (Electronic Tax Registers Regulations 2004 and the Regulations were published on 8th October, 2004. Section 28 of the VAT Act Cap 476 provides:

“The Seventh Schedule shall have effect with regard to the administration, collection and enforcement of Tax”

The heading the 7th Schedule states: “Invoices Records and Returns”. It is the view of the court that an Electronic Register is a record for the purpose of the Act and the Schedule.

It follows therefore that as at the time the Value Added Tax (Electronic Tax Registers) Regulations 2004 were published ie 8th October 2004 the law including the seventh Schedule pursuant to which they were made was valid and enforceable law due to the provisional order, the terms of which I have outlined above. The challenged Regulations are therefore beyond challenge. I further find that the introduction of the Eletronic Tax Register was within the objectives set out in s 58 of the VAT Act. S 28 of the Interpretation and General Provisions Act was complied with because the Regulations were published after the provisional orders in June 2004.

The Regulations were made and published on the strength of the provisional order.

It seems to me that the LSK challenge did not take into account the law which regulates the tax and duty collection for the period between the Finance Bills each year its publication and the passage of the Finance Act. It is quite clear to the court that the LSK seriously misapprehended the law on this hence the challenge to the regulations. I hold that the Minister acted in accordance with the relevant law which empowered his decision concerning the Tax Register Regulations.

The challenged decision of 16th March 2005 is a newspaper advert by the Commissioner of Domestic Taxes concerning the effective date of buying the Electronic Tax Registers namely 1st April 2005 whereas the 16th March is the date of the publication of the advert. This challenge would have been well grounded had the Commissioner relied solely on the newspaper adverts for the validity of the effective date. A newspaper advert is not capable of bringing subsidiary legislation such as the Electronic Tax Register Regulations into effect or to change the operative date from that set out in the Regulation itself. If the effective date was not spelt out in the Regulations and it was so set in this case the effective date would have been the day of publication.

This is clearly set out in s 27 of the Interpretation and General Provisions Act Cap 2 of the Laws of Kenya.

Regulation 1 as published in Legal Notice 110 of 8th October, 2004 clearly set out that the Regulations shall come into operation on 1st January 2004. Thus commencement date was subsequently corrected by a Corrigenda contained in Kenya Gazette Supplement No 66 – Legislative supplement No 42 of 22nd October, 2004 with the effective date being brought forward to 1st January 2005 and thereby removing the retrospective effect as pertains to the date of operation. This second challenge concerning the mode of implementation of the law as regards various industries with different dates for each industry or sector is in the view of this court a matter of discretion by the implementing Agency namely KRA and as long as they do not impose an operation date prior to the operative date set out in the law namely 1st January 2005, I find nothing wrong with this unless it can be demonstrated that the discretion is being exercised

unreasonably or outside the law. For a project of this magnitude which is planned to cover the entire country it cannot be said that the KRA has acted unreasonably or failed to address properly the law that empowers their decision making process. Since there is only one effective date the act of the KRA in giving other dates through adverts does create a legitimate expectation to the targeted industries that notwithstanding the effective date of 1st January 2005 as per the Regulations, the KRA would have to stick to their bargain as per the representations made in the newspaper adverts starting with the challenged advert of 16th March 2005. However it would have been desirable to have set out these phased implementation dates in the Kenya Gazette. If the KRA would purport to change the representations on the effective dates set out in the newspapers a case for breach of legitimate expectations would most likely follow.

21

VALIDITY OF THE REGULATIONS

The applicants' ground 21 is clearly demolished by the reasoning set out in ground 20 above in that due to the provisional order made under section 2 the amendments introducing sub-paragraphs 5 and 6 of para 6 in the seventh schedule were properly made – Clause 43 of the Finance Bill was deemed to be law way back in June 2004 and the regulations subsequently published on 8th October, 2004.

22

OPERATIVE DATE

Again this ground is taken care of by the Corrigenda described above which stipulated the effective date as 1st January 2005. There is therefore no retroactive effect or retroactivity contrary to section 46(6) of the Constitution or s 28 of the Interpretation and General Provisions Act Cap 2. The written law under which the Regulations were made was prior to the regulations and the regulations were published before the operative date.

23

DISCRIMINATION

It is alleged that the pilot project applies to Nairobi City Centre only and therefore discriminatory and biased. However the implementation plan exhibited by the respondent and also availed to the court during the hearing reveals a roll over programme for the entire Republic Country by 31st January 2006. The plan has not been challenged. Moreover the amendment giving rise to the Electronic Tax Register refers to “any person”. This is obviously any taxable person as per VAT Act – ie. Any person who was formerly required to file a Tax Invoice in respect of VAT. The law is therefore of general application and the court finds no discrimination or bias at all. The definition of a taxable person is as set out in VAT Act and the definition is fairly objective and applies across the board to all people in all professions and industries who offer goods or services.

Concerning the point raised by the Attorney General that because the application alleges discrimination and that the penalty as levied is unconstitutional the application must be bad in law for mixing judicial review remedies with constitutional law remedies. The court rejects that view because the thrust of the Judicial Review Application is not to seek constitutional relief but Judicial review mainly on the ground of the Tax measures being allegedly ultra vires the VAT Act. The issue of retroactivity is also statutory in that s 28 of the Interpretation and General Provisions Act does raise this and the Constitution does also frown upon penalties being retroactive. Subsidiary Legislation can be retroactive in the specified instances as described in the Interpretation and General Provisions Act. Every court is supposed to exercise its jurisdiction in accordance with the Constitution and these are issues of law even in judicial review and must be seen from this standpoint. A Court of law cannot countenance taking any unconstitutional position in law regardless how the application is brought to court.

I am therefore unable to uphold the Attorney General's objection. The current situation is distinguishable from the case of *R v Commissioner of Police Ex-parte Nicholas Kariha* HC MISC 534/2003 unreported cited to the court. The applicant in that case purported to seek Constitutional reliefs under s 84 by invoking the Judicial Review jurisdiction.

Turning to the allegations of bias the court finds nothing whatsoever to suggest of any aspect of bias that is either perceived bias or actual bias. Judicial Review is concerned with appearance of partiality or its actual existence. It is not in dispute that the challenged law applies to all taxable persons and nearly all persons have the potential of being taxable persons although at any given time only certain persons answer the description because of their levels of income. Those outside the definition are outside by virtue of an objective criteria. In the view of the court this differential or criteria are understandable and reasonable hence it can never be said to be discriminatory. Most laws are of general application but some can be targeted provided the criteria for the deferential in treatment are based on reasonable grounds.

Although Counsel for the Law Society of Kenya was silent on what he meant by discrimination this court would like to take a few moments to consider what discrimination is in law, quite apart from the observations the court has made above on the topic.

BLACKS LAW DICTIONARY 6th edition at page 467 defines discrimination as follows.

DISCRIMINATION: "In constitutional law, the effect of a statute or established practice which confers particular privileges on a class arbitrarily selected from a large number of persons, all of whom stand in the same relation to the privileges granted and between whom and those not favoured no reasonable distinction can be found. Unfair treatment or denial of normal privileges to persons because of their race, age, sex, nationality or religion. A failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured – see *BAKER v CALIFORNIA LAND TITLES DC Cal, 349 F Supp 235, 238, 239.*

Under our Constitution the provision on equal protection is s 82 which sets out the derogations in s 82(8).

The Tax law which has been challenged is being applied or has been applied to all taxable persons throughout the country and therefore the challenge on the grounds of discrimination must fail.

In the Permanent Court of International Justice case of *MINORITY SCHOOLS IN ALBANIA* PCJ Series A/B No64 p19 (1935) 8 ILR pp 386 389 - 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.

"The principle of non discrimination requires the establishment of equality in fact as well a formal equality in law.

Thus the United Nations Human Rights Committees General Comment on Non Discrimination para 13 states:

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

24

CONFIDENTIALITY

It is contended that the details which the Electronic Tax Register requires will breach the client/advocate confidentiality.

Again this contention cannot be sustained because both the Tax Invoice (former para 6 of Schedule

seven) which was the record required by the taxman did not violate any confidentiality. By extension or analogy Regulation 6 and requirements include on a daily/monthly and annual

- a) correct allocation of tax rates and programming of the description of services or goods
- b) the date of the report and the period in respect of which it applies
- c) the name and address of the user of the register
- d) the VAT (PIN) number of the user of the register
- e) unique PIN number of the User as per regulation 5(b)
- f) the total value of sales in respect of the period covered by the report
- g) the total amount of tax paid in respect of the period covered by the report
- h) Under Regulation 8 there is a requirement that the user shall maintain a Register Ledger for inspection by the Commission
- i) The receipt has to contain the particulars as per second schedule to the Regulations.

Commissioners have in the past asked for records and files from Advocates (without challenge) the requirement now is for the examination of Register Ledger – this is a much better situation for advocates and others as well in terms of safeguarding advocate/client confidentiality with particular emphasis on privileged communication such as letters etc. I find no threat on the privileged communication at all and I disallow the challenge on this ground.

23

EFFECTIVE DATE

The coming into effect of the Regulations is contained in the Regulations a set out above in ground 20 above. The effective date as per Regulations is 1st January 2005.

In order to safeguard revenue the Commissioner is empowered under Regulation 7(3) of VAT Regulations 1999 in these terms.

“Where the Commissioner considers that a taxable person is not complying with the requirements of this provision or when he considers that other records should be kept by the taxable person to safeguard revenue, he shall issue a Notice to such taxable person requiring him to keep such records or take such action as the Commissioner may specify ...

The Newspaper adverts are in the view of the court well covered by this provision as regards various categories of taxable persons, whether natural or juristic persons.

The office of the Commissioner of Domestic Taxes was established under s 13 of the Kenya Revenue Authority Act Cap 469 and the merger of the Income Tax and Value Added Tax Departments effected pursuant to s 13A of the Kenya Revenue Authority Act – see Gazette No 4381 where the new Department was designated as the Domestic Taxes Department from 1st July 2005. The newspaper adverts by the Commissioner of Domestic Taxes cannot therefore be faulted and he is perfectly capable of creating a legitimate expectation as stated above.

26

LEGAL NOTICE TO ALTER/CHANGE EFFECTIVE DATE

The corrigenda mentioned in ground 20 takes care of this. Moreover counsel for the applicant did concede this ground during his submissions.

The ground has no merit in law.

27

MONETARY BURDEN WITHOUT THE AUTHORITY OF PARLIAMENT

The Finance Act 2004 was piloted through Parliament with clause s 43 of the Finance Bill remaining intact as a provision in the Act. The same with the provision to recoup the cost of the Tax Register from tax dues. Thus the answer to this ground lies in Regulation 6(6) of the seventh schedule which states:

“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 payable by such person.”

Moreover with the Provisional Order in place and the Finance Act having become law any monetary burden is perfectly lawful because it is placed on the taxable persons with the authority of an Act of Parliament.

I find no merit in this ground as well after taking into account that the user of the register would not require technical training to use the register being a slight innovation to the hitherto widely used Cash Register. This ground is disallowed as well.

28

DEALERS

Although at the initial stages only a specified number of dealers had tested their equipment with the tax authorities a close scrutiny of the Regulations indicates that the purchase of the Registers need not have been confined to them and that the buyers may cast their nets outside the seven or so dealers. In other words they could buy from other dealers provided they offer Registers of such type and descriptions as prescribed in the Regulations.

Regulation 6(5) stipulates that the Commissioner may in accordance with the regulations require any person to use the Electronic Tax Register of such type and description. The technical requirements of the device are set out in the First Schedule to the Regulations.

29

LAWYER TRANSACTIONS

The contention here is that not all transactions by lawyers are capable of being keyed into the register.

With respect no arguments were presented in support of this ground. The register is aimed at encouraging inter-alia a fairly accessible record tax details with a memory say of 5 years and also make it possible for computer audits to be effected. The overall objective is to avoid evasion and to enhance revenue. The court is not convinced that there was anything unique to the lawyers that would single them out as a disadvantaged group in the use of the Registers.

30

ADVOCATES ACT AND REGULATIONS

The argument that the Regulations are ultra vires the Advocates Act is hollow. Advocates just like other

members of the society from which they are extracted owe certain civic duties including the payment of taxes. The Electronic Tax Register is not another licence but an accounting devise and it does not interfere whatsoever with the overall objective of their profession – to remain a self regulating professional body.

LOGOS

The court finds no conflict between the use of existing logos which fall under the mandate of KIPO because the Commissioner is not going to be involved in the approval or making a new logos. The Electronic Registers will automatically bear an identification number.

CONCLUSION

From the above it is quite clear that the LSK case was based on a serious misapprehension of the relevant Tax law and the same is dismissed with costs.

Dated AND DELIVERED AT Nairobi this 24th day of February 2006. J.G. NYAMU

JUDGE