



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT BUNGOMA**

**Civil Misc Cause 133 of 2006**

**REPUBLIC.....APPLICANT**

**VS**

**MINISTER FOR FINANCE .....1<sup>ST</sup> RESPONDENT**

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

**RULING**

By an ex-parte Chamber Summons, pursuant to the provisions of Order LIII Rules 1(1), 2, 3, 4, 2 and 3(1) and Order XLIX Rules 5 of the Civil Procedure Act, the applicant seeks orders:

- (1) *That this matter be certified as urgent.*
- (2) *That leave to be granted to the applicant to institute judicial review proceedings seeking orders:*
  - (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 made by 1<sup>st</sup> Respondent as contained in Legal Notice No.64 dated 16<sup>th</sup> June, 2006 as published in the Kenya Gazette supplement and headed the Value Added Tax (Amendment) Regulations, 2006.*
  - (b) *That an order of prohibition do issue to the 1<sup>st</sup> Respondent whether by himself or through the 2<sup>nd</sup> Respondent or any other agency from enforcing the said regulations.*
  - (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 or 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.*

3. *That the said leave if granted do operate as a stay of the implementation and/or enforcement by the Respondents or any other agency in respect of the said Regulations or any other agency in respect of the said Regulations as contained in Legal Notice No.64 of 16<sup>th</sup> June, 2006 referred to in paragraph 2(a)*

and (b) above.

4. That the costs of this application be provided for.

The application is based on the statutory statement and the following grounds:

1. That the 1<sup>st</sup> Respondent in promulgating the Regulation complained of has purportedly relied on Section 58 of the Value Added Tax Act which section does not confer any power on the 1<sup>st</sup> Respondent to make the said regulations.
2. That the said regulations will be punitive on tax payers and the applicants that shall have obtained their goods from persons who are not electronic tax register compliant, as they shall not be issued with a tax refund.
3. That the said Regulations seek to impose a monetary burden on certain members of the Kenya Public including the applicants without any clear or express authority of the Kenya Parliament.
4. That the said Regulations are not in any way geared towards achieving the intention of Section 58 of the Value Tax Act under which they are purportedly made.
5. That the said Regulations are an attempt by the 1<sup>st</sup> respondent to transfer the role of the 2<sup>nd</sup> respondent of monitoring and policing payment of Value Added Tax to the Tax Payers.
6. That the said regulations are in violation of the individual freedoms provided for under Chapter V of the Constitution of Kenya.
7. That the intended initial implementation of the said Regulations is discriminatory contrary to Section 82 of the Constitution of Kenya.
8. That the requirement that tax registers be purchased from specified suppliers also smacks of discrimination and is contrary to the rules of fair competition
9. That the Regulations are likely to force many small business persons and upcoming professionals to close their businesses thereby denying them, their employees and their families a source of livelihood which is contrary to public policy and unconstitutional.
10. That the 1<sup>st</sup> respondent through the 2<sup>nd</sup> respondent seeks to enforce the Regulations without alleged detailed guidelines, which are to be issued in the future by the 2<sup>nd</sup> respondent.
11. That the Regulations are burdensome, impractical and contrary to good public policy.
12. That the Regulations are generally ultra vires the Value Added Tax Act under which they are purportedly made and contradict various sections of the Act.
13. That enforcement of the said regulations is bound to have a negative impact on the national economy, and is bound to impoverish many, in stark contrast to the objects of the Millenium Development goals.

For the applicant, it was argued that the first respondent made Regulations as contained in Legal Notice no.64 of 2006, as published in the Kenya Gazette Supplement on 16<sup>th</sup> June 2006 and headed The Value Added Tax (Amendment) Regulations 2006 purportedly pursuant to Section 58 of the Value Added Tax Act.

That in effect of the said Legal Notice enjoins all traders to purchase their goods only from traders who will issue them with Electronic Tax Register, generated invoices and the first respondent has no power to

do so.

That being aggrieved of the Legal effect as aforesaid the applicants filed and obtained orders in Bungoma High Court Miscellaneous Civil Application No.261 of 2005, barring the respondents herein from implementing and effecting The Value Added Tax (Electronic Tax) Regulations as published in the Kenya Gazette Supplement No.62 as Legislative Supplement No.40.

It is the applicant's contention that the said Legal Notice No.64 of 2005, made by the first respondent has the effect of introducing by the back-door means compliance with the Electronic Tax Register Regulations in utter defiance of the Court Order obtained in Bungoma High Court Misc. Application No.26 of 2005.

It is the applicant's further contention that the said Legal Notice is discriminatory as well as punitive as it:

(i) *Forces tax payers to purchase their goods from only such traders or individuals that shall be installed the tax-payers Electronic Tax Register.*

(ii) *Traders who shall find that their suppliers do not have Electronic Tax Register shall not receive tax refunds.*

(iii) *It makes out punishment to the innocent purchaser.*

The applicant also contends that the said Legal Notice also intends to make the tax-payer the fall person for the acts and or omission of the said parties over whom the tax payer has no control, and hence acting ultra-vires the powers accorded him under Section 58 of the Value Added Tax Act.

That in any event, the said legal notice departs from the well established national and international business practice.

It was applicant's final position that the said Legal Notice *inter-alia* violates the applicant's individual rights, it disregards persons trading in areas without electricity and it discriminates against suppliers and traders who do not have Electronic Tax Registers. Furthermore, the electronic devices are required to be brought only from "*approved dealers*" in Kenya at a colossal sum of Sh.150,000/= each when the same can be obtained in Dubai and other countries at US Dollars 250. Hence the same is tailored to line the pockets of selected individuals and by-passes the tender procurement procedures.

I have scanned through the application and is of the view that it is urgent. Accordingly, I certify it so. I have carefully weighed the complaints raised by the applicants and take the position that leave is merited on the evidence.

Accordingly, I grant leave to the applicants in terms of prayer 1,2,3 and 4.

DATED and DELIVERED at BUNGOMA this 3rd day of July 2006.

N.R.O. OMBIJA

JUDGE