



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISCELLANEOUS CIVIL CASE NO. 149 OF 2000

**NIZABA INTERNATIONAL TRADING COMPANY
LIMITED.....APPLICANT**

VERSUS

KENYA REVENUE AUTHORITYRESPONDENT

RULING

The applicant Nizaba International Trading Company Limited (hereinafter referred to as the Company) has filed in this Court a Notice of Motion under the provisions of order 53 rule 3 of the Civil Procedure Rules and has asked the Court to use its discretion and issue the orders of judicial review against the actions, the inactions and the intended actions of the Kenya Revenue Authority through the Commissioner of Income Tax (hereinafter referred to as the Commissioner of Income Tax).

The orders that are being sought by the Company are the orders of *certiorari*, prohibition and *mandamus*.

The said application is supported by the verifying affidavit, the statement of facts the verifying affidavit of Nizarali Abbas Jiwa Shamji which had been filed with the Chamber Summons when leave was being sought to file the present application.

Reliance is also based on the further affidavit of Nizarali Abbas Jiwa Shamji sworn on 19th October, 2000 and the annexures annexed to the original statement of facts and the further affidavit.

The Company is also relying on the provisions of sections 52, 76, 85 (3) and 92 of the Income Tax Act chapter 470 of the Laws of Kenya (herein after referred to as the Act).

The grounds upon which the said orders are being sought are that:-

- (a) The additional assessment levied on the Company by the Commissioner of Income Tax is arbitrary and as lacking in any factual basis.
- (b) That the said additional assessment is based on wrong principles.
- (c) That the said additional assessment is bad for disclosing fatal errors on its face.
- (d) That the respondent has abused his discretion in making the said additional assessment.
- (e) That the applicant stands to lose substantially if the orders prayed for are not granted.

What has prompted this application is that on 24th February, 2000 the Commissioner made a decision

contained in the Additional Assessment No 00751997 - 00005/5 in which the Company was charged with tax liability of Shs 43,396,491. This tax liability is said to be in addition to Assessment Notice number 00751997301302 as shown in the Additional Assessment Notice attached to annexure NAJS 13 attached to the statement of facts. The latter Assessment Notice is in controversy as the Company alleges the same was not served upon it, as stated by the Commissioner and is not aware of that Assessment Notice. It is also the Company's case that on the first Assessment Notice dated 24th February, 2000, an objection has been raised against it on 25th February, 2000 and no action has been taken on the objection by the Commissioner of Income Tax.

It is further argued on behalf of the Company that while the Commissioner of Income Tax was working out what he deemed to be undisclosed income, he failed to take into consideration purchases for the local market which when added together with the purchases for export market shows that the total purchases were worth the sum of Shs 159,474,108 and he further failed to take into consideration the fact that the purchases were in US Dollars and did not use the exchange rate of Shs 53 per Dollar as it was existing in 1997.

Finally that the additional assessment was raised when there was a stay order from this Court over a previous assessment which was waiting a hearing and determination and the Commissioner of Income Tax was bent on collecting this taxes irrespective of the court's decision hence the need to file this application and seek the orders of judicial review.

On behalf of the Commissioner of Income Tax it has been submitted that the current application is *res-judicata* as the issues involved in this application were the same ones canvassed in Kisumu HC Misc Application Number 64 of 2000. That the parties were the same in the previous application and in this application.

Secondly that when an objection was lodged the Company's counsel, on 25th February, 2000, the Commissioner of Income Tax was right in refusing to entertain the objection as there is no basis in law to entertain an assessment based on an earlier assessment and the only recourse open to the Company was to appeal to the local committee.

It has further been intended on behalf of the Commissioner of Income Tax that the Company has not demonstrated how the Commissioner of Income Tax has exceeded his powers in performing his duties of assessing and collecting revenue on behalf of the Government. Finally it was also submitted on behalf of the Commissioner of Income Tax that no valid Notice of Objection of the assessment of tax has been given by the Company as the provisions of section 84(2) of the Act have not been complied with by the Company and even if the Company's advocate's letter of 25th February, 2000 be taken as a valid Notice of Objection, the same falls short of what is expected to be contained in the Objection.

That the same do not contain the grounds and the tax due has not been deposited with the Commissioner of Income Tax.

I propose to deal with the question of *res-judicata* first. Section 7 of the Civil Procedure Act provides as follows:-

7. "No Court shall try any suit or issue in which the matter directly and substantially has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

The main features that must subsist when a plea of *res-judicata* is raised are that; there must have been a former suit involving the same parties or between parties under whom they claim or any of them claim.

The issues in the current suit must be directly and substantially in issue in the former suit and the suit must have been heard and finally decided by a Court competent to try the suit.

The word suit is also given a definition by section 2 of the Civil Procedure Act which is defined as follows:-

“Suit” means all civil proceedings commenced in any manner prescribed.

The order in the Civil Procedure Rules which prescribes the manner of institutions of suits is order 4 rule 1 which provides that

1. “Every suit shall be instituted by presenting a plaint to the Court or in such other manner as may be prescribed.”

I do not need to belabor the point in this cause by stating that neither were the previous proceedings in Kisumu HC Misc Application Number 64 of 2000 nor in this application were commenced by a plaint presented in Court. The presentation were as provided for by order 53 of the Civil Procedure Rules and the same cannot be termed as a suit.

Secondly proceedings under judicial review do not determine the issues between the parties finally. It makes provisions to quash a decision on the ground that the decision is *ultra- vires* or that the person applying for the orders has been prejudiced by the non-compliance of the statutory provisions. A stage is then set for the body exercising statement power to act properly so that an aggrieved party may know the case before him and prepare his defence or have the body exercising the statutory power compelled to act so that the prejudice faced by the person aggrieved party may know the case before him and prepare his defence or have the body exercising his defence or have the body exercising the statutory powers compelled to act so that the prejudice faced by the person aggrieved is remedied.

Thirdly, the matter in issue must have been directly and substantially been in issue in the subsequent suit as it was in the former suit and must have been heard and decided. *Mulla on the Code of Civil Procedure* 12th Edition at page 80 has passage which states:

“*Res-judicata*” by its very words means a matter on which the Court has exercised its judicial mind and has after argument and consideration come to a decision on a contested matter. The issue in the former proceedings relates to the decision of the Commissioner of Income Tax contained in Additional Assessment Notice No 095770000574 and the amount in controversy was the sum of Shs 175,093,737 to which an objection had been raised and not acted upon.

The current application is based on an Additional Assessment Notice No 007519970000575/5 for the sum of Shs 43,391,695 which Assessment was confirmed on 24th February, 2000.

It is very clear that the amounts are different and the Assessment Notice therein are completely different.

Even if the Commissioner of Income Tax in this course could raise the plea of *res- judicata* which I doubt in judicial review proceedings, the same cannot succeed as the issues are not the same but quite different.

I would therefore reject the plea of *res-judicata* and discount it. Once again the Company has come to this Court complaining against the decision of the Commissioner of Income Tax on its tax affairs. The current Additional Assessment Notice was raised when the former proceedings were pending in Court. One would have thought it was prudent for the Commissioner of Income Tax to have waited until the Court had made its decision and thereafter move accordingly in dealing with the objection which had been filed with it.

The Company has raised issue with the controversial Assessment Notice No 00751997301302 saying it has never received the same. It was incumbent upon the Commissioner of Income Tax to show that the same was served upon the Company. This was very important because the contentious Notice Assessment has been lumped together with Additional Assessment Notice Number 0075519900005/5.

In disputing the figures of taxes mentioned in the Additional Assessment Notice the Company states that

the Commissioner of Income Tax failed to take into consideration the purchases made by the Company for the local market which were made in Kenya Shillings and the total purchases for the local market amounted to Shs 57,146,907.

The Company has also contended that the purchases for the export market were made in US Dollars at the rate of Shs 53 per Dollar and the total purchases for the export market came up to Shs 102,327,201.

These assertions which are also contained in the further affidavit of Nizarali Abbas Jiwa Shamji has not been refuted by the Commissioner of Income Tax.

The only logical conclusion is that the Commissioner of Income Tax omitted to consider material facts which he was bound to consider under the law.

The failure has prejudiced the Company. Also when an assessment was made under Assessment Notice Number 00751997301302 without the same being served upon the Company, it was denied the right to challenge the said notice and that was against the Rules of Natural Justice.

The provisions of section 78 of the Act are very clear. They are to the effect the Notice of Assessment must be served upon the person assessed and top of informing him the amount of income assessed and the amount payable that person must also be explained his rights under section 84 of the Act.

The rights under section 84 of the Act are the rights granted to the taxpayer to lodge an objection. That objection was lodged in February, 25th 2000 yet no action has been taken on it.

Once an objection has been raised its incumbent upon the Commissioner of Income Tax to act in any of the ways provided for by section 85 of the Act.

It is not enough for the Commissioner to remain inactive and state that there is no provisions in the Act to amend an assessment which has been made pursuant to an earlier assessment. It is even strange to hear from the Commissioner of Income Tax that the Additional Assessment Notice Number 0075199700005/5 was in response to the objection which had been filed by the Company on 4th May, 1999. If that was the case then the decision was made when the matters relating to that objection were awaiting the determination in this Court and that amounted to misuse of the legal provisions of the Act and was an action to pre-empt the decision the Court was going to make.

The Commissioner of Income Tax derives his powers from the provisions of the Income Tax Act. His appointment is contained in the provisions of section 122 of the Act. That section states:-

122. "There shall be appointed a Commissioner of Income Tax and such other officers as may be necessary for the due administration of this Act and the efficient working of Income Tax Department and the Commissioner of Income Tax so appointed shall subject to the control of the Minister, be responsible for the control and management of the department and for the collection of and accounting for tax."

His powers to deal with additional assessments are contained in section 77 of the Act and section 78 of the Act makes provision for his powers to serve the Notice of Assessment on the tax payer. Section 84 of the Act makes provision for those assessed to file their objection with the Commissioner of Income Tax and his powers to deal with the objection raised are contained in section 85 of the Act.

It is therefore obvious that the Commissioner of Income Tax is a creature of the statutes and can only do what the Act allows him to do. If he gets outside the powers granted to him by the Act or fails to perform his duties, he is amenable to be supervised by the High Court.

The supervisory powers of the High Court are contained in the orders of judicial review in the name of the order of *mandamus*, *certiorari* and prohibition which are remedies available against public bodies.

In the case of *Kenya National Examination Council vs Republic Ex parte Geoffrey Gathenji Njoroge and*

9 others Nairobi Civil Appeal No 266 of 1996 the Court of Appeal said concerning the said orders that:-

“To conclude this aspect of the matter an order of *mandamus* compels the performance of a public duty imposed by statute where the person or body on whom the duty so imposed fails or refuses to perform the same.”

And on the question of the order of *certiorari* the said Court said:-

“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.”

And on the question of the order of prohibition the said Court also said:-

“What does an order of prohibition do and when will it issue? It is an order from this High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land.

It lies, not only for excess of jurisdiction or absence of it but also for a departure from the Rules of Natural Justice”

The Company has clearly demonstrated the Commissioner of Income Tax has made an improper assessment in failing to consider material facts and his decision contained in Additional Assessment Notice Number 0075199700005/5 issued to the Company on 24th February, 2000 be removed and brought to this Court for the purposes of being quashed.

Further that his decision to proceed to collect taxes and penalties on taxes allegedly due on the Additional Assessment Notice 0075199700005/5 be brought also to this Court for purposes of quashing the same:

The Commissioner of Income Tax is also hereby prohibited from proceeding to collect any monies from the Company on the basis of Additional Assessment Number 0075199700005/5 or any penalties calculated therefrom until the Company’s objection dated 25th February, 2000 is heard and determined.

Finally, an order of *mandamus* is hereby issued to the Commissioner of Income Tax compelling him to take action on the Company’s objection to Additional Assessment Number 0075199700005/5 filed with the Commissioner of Income Tax on 25th February, 2000.

I order that the Company shall have the costs of the application.

P.K.K.ARAP BIRECH

COMMISSIONER OF ASSIZE