REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 38 OF 2020

DENNIS JOESPH SHIJENJE..APPLICANT

VERSUS

KENYA REVENUE AUTHORITY...RESPONDENT

AND

NATIONAL SAFETY TRANSPORT AND

SAFETY AUTHORITY..INTERESTED PARTY

RULING

Before court is the applicant’s chamber summons dated 3 February 2020 seeking leave of this honourable court for the applicant to apply for an order of certiorari to remove into this court and quash the decision of the respondent to enter a caveat on motor vehicle registration number KCQ 373 E (Toyota Fortuner) belonging to the applicant. The applicant also seeks leave to apply for an order of mandamus compelling the respondent to lift or cause to be lifted the caveat entered on motor vehicle registration number KCQ 373 E. He has also sought for the costs of the application.

In the affidavit sworn in verification of the statutory statement, the applicant has stated that he entered into a financial arrangement with NIC Bank Limited according to which the bank financed the acquisition of the motor vehicle in question from Toyotsu Kenya Limited.

After repayment of the bank’s loan, he sought to have the motor vehicle transferred into his name; it is then that he was informed by the interested party that the respondent had placed a caveat on the motor vehicle. The respondent never communicated its decision to the applicant and thus the caveat was placed without the applicant’s prior knowledge.

The applicant also swore that at the time of purchase of his motor vehicle, it was free of any encumbrances and it is in bad faith, as I understand him, for the respondent to have only placed the caveat against the vehicle after he cleared his loan to the bank.

In the written submissions filed on behalf of the respondent, Ms. Nyaringita, the learned counsel for the respondent made reference to a replying affidavit sworn by one Dominic Kengara; however, I have not been able to trace this affidavit in the court record or on the judicial review division case tracking system portal.

But I have been able to gather the respondent’s case from the submissions filed on its behalf; it is simply this: Sometimes in October 2018 the respondent conducted what it referred to as ‘a compliance check’ on the applicant’s company known as Bachmann Enterprises to determine whether the company complied with the filing of tax returns and payment of taxes.

The respondent is alleged to have established from its iTax System and Integrated Tax Management System (ITMS) that the applicant had not filed any Income Tax-Company returns (Corporation taxes) since its incorporation on 28 November 2012 despite earning what the respondent has described as ‘huge income’.

Further, the respondent established from its investigations that the applicant's company, with other related companies, were involved in a tax fraud scheme which saw the government of Kenya loose Kshs, 821, 973, 607/=. Out of this amount, Kshs, 599,013, 562/= was diverted to the applicant's company accounts held in various banks.

Considering the nature of the tax fraud perpetrated by the applicant and his related companies, the respondent wrote to the Director of Asset Recovery Agency (ARA) on 11 January 2019 requesting her to institute recovery of tax measures against the applicant and his company in line with ARA's statutory mandate.

It is the respondent’s case the that taxes demanded are due on account of fraud and not customs VAT as suggested by the applicant.

Christopher Wanjau, swore a replying affidavit on behalf of the interested party; he stated that he is the director in charge of Registration and Licensing at the National Transport and Safety Authority which is a state corporation established under the National Transport and Safety Authority Act No. 33 of 2012; it has the key mandates of, *inter alia*, planning, managing and regulating the road transport system, and implementing policies relating to road transport and safety.

He also swore that the Authority also registers motor vehicles, conducts motor vehicle inspections and certifications, regulates public service vehicles, develops and implements road safety strategies, conducts research and audits of road safety, among other functions.

It is also the authority’s duty to keep records of registered vehicles and secure interest of their owners; accordingly, the interested party places caveats to the motor vehicles either at the request of the registered owner or upon an order from the court or upon requests from investigative agencies such as the police and the respondent.

As far as the motor vehicle in question is concerned, the records show that it is registered in the joint names of the applicant and the NIC Bank Kenya PLC. He admitted that on 22 November 2018, a caveat was registered against the vehicle by the interested party at the request of the respondent ‘*on grounds of fraudulent activity*’. Accordingly, it is Wanjau’s position that the caveat is lawful.

In submissions filed on behalf of the applicant, it was urged that question at hand is not a tax dispute that ought to have been taken at Tax Appeals Tribunal. To be more precise, a decision to enter a caveat against the Applicant's motor vehicle does not amount to an appealable decision as envisaged under Section 3 of the Tax Procedures Act.

Counsel for the applicant cited the decision in **Grain Bulk Handlers Limited vs J.B. Maina & Co. Ltd & 2 Others (2006) eKLR** on the proposition that judicial review supervises the process by which a decision-making power given by the law is exercised by the person or body given the jurisdiction and that the subject matter of Judicial Review is the legality of such decisions.

On whether the applicant has made out an arguable case, the applicant argued that first he has the *locus standi* having been directly affected by the respondent’s decision to place a caveat on his motor vehicle. The respondent, on the other hand, entered the caveat in discharge of a public function. To this end, the applicant cited the decision in **R vs Panel on Take-Overs and Mergers, ex parte Datafin Plc, (1987) QB 815** where it was held that in order to ascertain whether a particular action, decision or failure to act is amenable to judicial review, courts will generally consider whether the relevant matter arose out of the exercise of a public function. Therefore, if legislation is the source of power, this is a strong indicator that the matter in question is subject to judicial review.

The applicant also made submissions on whether leave, if granted, should operate as stay; however, submissions on this question would only be of academic importance because no prayer was made for leave to operate as stay in the application that is now the subject of this ruling. I see no reason to dwell on that subject.

In response to the applicant’s submissions, the respondent submitted that the applicant does not deserve the order of certiorari since he has not complied with the provisions of Order 53 Rule 7(1) of the Civil Procedure Rules 2010 and thus this application is incompetent. That rule provides as follows:

> ***“In the case of an Application for an order of certiorari, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition, or record unless before the hearing of the motion he has lodged a copy thereof verified by affidavit or accounts for the satisfaction of the High Court.”***

The respondent’s case is that the applicant has not attached to his application a copy of the impugned caveat placed on motor vehicle registration number KCQ 373E Toyota Fortuner to establish a prima facie case that would enable the court to make a determination. In the absence of the impugned decision, so it has been urged, the court is not in a position to establish whether there indeed exists a caveat capable of being quashed. Counsel relied on the decisions in cases of **Nelly vs Office of the Registrar Academic Affairs Dedan Kimathi University of Technology (2016) eKLR** and **Waweru vs District Veterinary Office Maragua & Another (2006) eKLR**.

The respondent also urged that Section 43 of the Tax Procedures Act, 2015 empowers the Commissioner to undertake measures to preserve funds where he reasonably believes that the taxpayer has collected a tax that has not been accounted for. In this regard, counsel relied on the decision in **Republic vs Kenya Revenue Authority Ex- arte Bata Shoe Company Kenya Limited (2001) eKLR**.

Again, Section 51(6) of the Tax Procedures Act, 2015 also places the burden on the taxpayer to dispute a tax position. The respondent, according to counsel, discharged its burden by demonstrating that the applicant, despite having a substantial amount of income in his company, he filed nil returns. Counsel relied on the decision in **Republic —vs- Commissioner for Income Taxes & Another Ex parte Uniplast Industries Limited (2015) eKLR** where it was held that the respondent is clothed with powers to estimate taxes payable in certain circumstances particularly where those circumstances have been proved to exist.

Having considered the applicant’s application, the response thereto and the respective submissions filed in support of or in opposition to the application, it is apparent that the disputants have delved very much into merits or lack thereof of the applicant’s bid for the judicial review orders should leave be grant. It is always tempting for the court to take a similar path of interrogating the merits of the envisaged main suit but, legally speaking, it cannot. All that the court would be concerned with at this stage of the proceedings is whether the applicant has made out what, upon further interrogation of the material placed before it, would be an arguable case. If it can be shown that the applicant has surmounted this hurdle, the court is more likely to exercise its discretion in the applicant’s favour and grant the leave.

It is trite that the purpose of the leave stage is not to determine whether or not the applicant’s case will succeed but whether is arguable.

Lord Diplock as explained the need for leave this way:

> ***"Its purpose is to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived. (See IRC V National Federation of Self-Employed and Small Businesses Ltd (1982) 617, (1981) 2 ALL ER 93)."***

Thus the purposes identified for leave are one, to save the court's time and, two, so as not to leave public authorities in a state of uncertainty as to whether they can safely proceed.

In the same case, Lord Scarman saw the need for leave as 'an essential protection against abuse of legal process. In his words "*it enables the court to prevent abuse by busybodies, cranks and other mischief makers.*" (At page 653 and 113).

On his part, Woolf LJ has referred to the need for leave as 'the unique statutory means by which the court can protect itself against abuse of judicial review.

To guard delving into the merits of the case, Lord Diplock, **IRC V National Federation of Self-Employed and Small Businesses Ltd** (supra) suggested the following approach.

> ***"if on a quick perusal of the material then available, the court thinks the application discloses what might on further consideration turn out to be an arguable case in favor of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief."***

I am of the humble view that based on the material placed before court, the applicant's quest for leave to file a substantive motion for the judicial review orders of certiorari and mandamus is not frivolous; he has made out a case for such an application.

As noted earlier, I could not get my hand on the respondent's replying affidavit and therefore apart from the statements made from the bar by the respondent's learned counsel, the circumstances under which the applicant's vehicle was placed under a caveat are not clear. There is no proof, for instance, of the connection between the applicant and a company called Bachmann Enterprises; indeed, no evidence has been presented to demonstrate that such a company exists and, if does, it has been involved in fraudulent activities in which the applicant is a key player.

Again, no evidence has been presented to show that despite this company earning what the respondent has termed as 'huge income' it has persistently filed nil tax returns in a tax evasion scheme.

Despite the respondent talking of the company having caused the government to loose Kshs, 821, 973, 607/= in taxes out of Kshs, 599,013, 562/= was diverted to the applicant's company accounts held in various banks, no material has been provided to support these allegations.

Again, although it has been urged that the Asset Recovery Agency is involved in recovery of the lost taxes, there is no evidence of any communication between the respondent and the agency on the applicant's or the applicant's company's activities or whether the Agency has commenced any action against the applicant.

On the question whether the impugned decision ought to have been attached to the application, neither the respondent nor the interested party has denied that such a decision was ever made; on the contrary, they have both admitted that indeed a caveat was registered against the applicant's motor vehicle; as a matter of fact, the interested party's representative exhibited to his affidavit the registration book showing that it placed a caveat on the vehicle at the instance of the respondent.

The decisions cited by the respondent on this point would only be relevant where there is doubt whether the decision sought to be quashed was ever made; in this case there is no such doubt as both the respondent and the interested party have conceded that the decision was made and, if understand them correctly, they have, in opposing the applicant's application, presented what would be a justification for their decision.

In the ultimate, I allow the applicant's application and leave is hereby granted for the applicant to file the substantive motion for prerogative orders of certiorari and mandamus in terms of prayers (1) and (2), respectively, of the chamber summons dated 3 February 2020. Costs shall abide the outcome of the main motion. Orders accordingly.

Signed, dated and delivered on 9th April 2021

Ngaah Jairus

JUDGE