



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW MISC. APPLICATION NO. 9 OF 2020

IN THE MATTER OF:

AN APPLICATION FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF:

ORDER 53 RULES (1,2) OF THE CIVIL PROCEDURE RULES, SECTIONS 1A, 1B, 3a OF THE CIVIL

PROCEDURE ACT, SECTION 8 AND 9 OF THE LAW REFORMS ACT (CAP 26)

AND

IN THE MATTER OF:

THE KENYA REVENUE AUTHORITY ACT AND THE TAX PROCEDURES ACT

(NO. 29 OF 2015)

AND

IN THE MATTER OF:

HE CONSTITUTION OF KENYA, ARTICLE 22, 23, 25(a)(c), 28, 47, 50(1) (2), 165(6), (7)

AND

IN THE MATTER OF:

RANA AUTO SELECTION LIMITED, RAS HOLDINGS LIMITED AND SAINIL INVESTMENT

AND

IN THE MATTER OF:

(i) MCCR NO. 975 OF 2019 (MOMBASA) REPUBLIC

VS. PETER MAINA, AGNELLA WAKIO & RIASTAT ALI KHAN, KHAN SULTANI ALI, ALI ADNAN, IFTIKHAR

ADALAT AHMED, MUHAMMED ADIL, TANVEER AHMAD & RANA AUTO SELECTION LIMITED

(ii) MCCR NO. 977 OF 2019 (MOMBASA) REPUBLIC VS. SAID ALI YAWA, AGNELLA WAKIO, VIOLET WAKAIO

KIARA, SAINIL INVESTMENT LTD, RIASTAT ALI KHAN, RANA AUTO SELECTION LIMITED

AND

IN THE MATTER OF:

TAX APPEALS TRIBUNAL CASES:

1. TAT NO. 477 OF 2019 SAINIL INVESTMENT LIMITED VS. KRA, COMMISSIONER OF DOMESTIC TAXES
2. TAT NO. 478 OF 2019 RAS HOLDINGS LIMITED VS. KRA, COMMISSIONER OF DOMESTIC TAXES
3. TAT NO. 469 OF 2019 RANA HOLDINGS LIMITED VS. KRA, COMMISSIONER OF DOMESTIC TAXES
4. TAT NO. 479 OF 2019 RIASAT ALI MAIN VS. KRA, COMMISSIONER OF DOMESTIC TAXES

BETWEEN

1. RANA AUTO SELECTION LIMITED
2. RAS HOLDINGS LIMITED
3. SAINIL INVESTMENT LTD..... EX PARTE APPLICANTS

VERSUS

1. KENYA REVENUE AUTHORITY
2. COMMISSIONER OF DOMESTIC TAXES.....RESPONDENTS

RULING

The Application

1. By the Notice of Motion herein dated 5/3/2020 the Ex parte Applicants pray for the following orders:

(a) AN ORDER OF CERTIORARI to remove into the High Court for purposes of their being all quashed all Decisions, Orders and proceedings in Criminal Cases MCCR NO. 975 of 2019, MCCR NO.976 of 2019 and MCCR NO. 977 of 2019 pending in the Chief Magistrate's Court, Mombasa against the Applicants and their Shareholders, Directors and Employees being the Accused persons in those cases pursuant to the High Court Supervisory Jurisdiction over the Subordinate Court under Article 165(6),(7) of the Constitution.

(b) AN ORDER OF PROHIBITION to prohibit the Respondents from -

1. Proceeding with the prosecution of the Criminal cases MCCR NO. 975 OF 2019, MCCR NO. 976 OF 2019 and MCCR NO. 977 OF 2019 pending in the Chief Magistrate's Court Mombasa.

2. From demanding the tax penalties and interest claimed in the said charges amounting to Kshs. 1,800,000,000 (One Billion Eight Hundred Million Only) that are now the subject of active consideration of the TAX APPEALS TRIBUNAL CASES NO. TAT NO. 477 OF 2019 SAINIL INVESTMENTS LTD -VS- KRA, COMMISSIONER OF DOMESTIC TAXES, TAT NO. 478 OF 2019 RAS HOLDINGS LTD -VS-KRA, COMMISSIONER OF DOMESTIC TAXES, TAT NO. 469 OF 2019 RANA AUTO SELECTION LTD -VS- KRA, COMMISSIONER OF DOMESTIC TAXES, TAT NO. 479 OF 2019 RIASAT ALI MAIN -VS- KRA, COMMISSIONER OF DOMESTIC TAXES Pending the hearing and determination of the Tax Appeals Tribunal cases by the Tax Appeals Tribunal.

(c) The leave granted herein do operate as a stay of proceedings of the criminal cases MCCR No. 975 of 2019, MCCR No. 976 of 2019 and MCCR No. 977 of 2019 pending in the subordinate court at Mombasa the basis of this proceedings.

(d) That all necessary and consequential Orders and Directions be given.

2. The application is premised on the grounds set out therein and is supported by statement of facts dated 27/2/2020 and verifying affidavit of **Angela Wakio** sworn on 27/2/2020.

3. The Ex parte Applicants together with their directors, shareholders and employees face prosecution in MSA Cr. Case No. 975, 976 and 077 all of 2019. They believe the said prosecution is contrary to their constitutional rights under Articles 47, 50(1) (2); is unlawful and has ulterior motive to embarrass them contrary to Section 80(1) (2) (3) of the Tax Procedures Act. They aver that the subordinate court does not have the requisite jurisdiction to try the cases as framed rendering the entire trial process unconstitutional, illegal, irregular, and unlawful in all its facets and thus a nullity under the law. The Ex parte Applicants aver that the only legal avenue available to the Respondent is to pursue the Applicants in the Tax Appeal Tribunal which is currently seized of the matter and that under a compromise and agreement between the Applicants and the Respondents the taxes and penalties not in dispute were agreed at Kshs. 79,000,000 and a payment plan in

installments allowed. The Applicants have fully complied by paying Kshs. 71,000,000 so far. The taxes in dispute are now the subject of appeal in the Tax Appeals Tribunal pursuant to the objection decision by the Ex parte Applicants. The Ex parte Applicants state that the taxes and any penalties in dispute under the Tax Appeals Tribunal are deemed not due until the tribunal renders itself on the matters and therefore until then the demand for taxes cannot be the basis of any enforcement measures by way of criminal prosecution under Part XII, Sections 80 to 109 of the Tax Procedures Act (No. 29 of 2015) and more so since the Applicants have pleaded not guilty to all the charges and have not sought compounding the charges under Section 109 of the Tax Procedures Act and have invoked the jurisdiction of the Tax Appeal Tribunal rendering their continued prosecution otiose and illegal. The Ex parte Applicants state that their prosecution aforesaid is an act in perpetuation of illegalities as Section 80 (1)(2)(3) of the Tax Procedures Act does not allow matters under active consideration of the Tax Appeals Tribunal to be the subject of Criminal Prosecution. The prosecution is also in violation of the provisions of Section 12 of the Tax Appeals Tribunal Act No. 40 of 2013. This provision says:

“A person who disputes the decision of the Commissioner on any matter arising under the provisions of any tax law may subject to the provisions of the relevant tax law, upon giving notice in writing to the Commissioner, appeal to the tribunal.”

4. The Ex parte Applicants state that on 19/6/2019 Riasat Ali Main, the Director of Applicants Companies filed an Objection to the Tax Assessment and Demand. The late objection was received by the Respondents and duly processed for all the Ex parte Applicants herein under Section 51(7) of the Tax Procedures Act. The Applicants were also allowed to pay taxes which are not in dispute. The said offer was for all the 4 companies which have the same directors and are all operated by the Applicants as sister companies with Rana Auto Selection Limited being the main prime mover for the Ex parte Applicant’s business. The Applicants state that taxes not in dispute have been paid leaving a balance of about Kshs. 8,000,000 only as per the payment plan agreed upon by the parties and the payment plan for the taxes not in dispute was amended pursuant to an application to the Commissioner on 12/9/2019 in which the commission allowed the Applicant to pay the balance of Kshs. 24,806,016 in six equal monthly installments of Kshs. 4,134,336 starting September 2018. The Applicants have been complying with the amended payment plan hence the balance outstanding of Kshs. 8,000,000 only. They have not defaulted.

5. The Ex parte Applicants aver that the dispute is in the assessment of tax payable to the Respondents, and there have been unsuccessful attempts to reach an agreement. Due to the said failure the Respondents have instead imposed their own taxes to the Ex parte Applicants. It is this imposition of illegal taxes that caused the Ex parte Applicants to appeal to the Tax Appeals Tribunal.

6. It is the Ex parte Applicants’ case that the Respondent cannot prosecute them while at the same time pursue payment of tax at the Tax Appeals Tribunal. Section 80(1), (2) of the Act states thus:

“80 general provisions relating to administrative penalties and offences.

(1) A Person shall not be subject to both the Imposition of a penalty and the prosecution of an offence in respect of the same act or omission in relation to a tax law.

(2) If a person has committed an act or omission that may be liable under a Tax law to both the imposition of penalty and the prosecution of an offence the Commissioner shall decide whether to make a demand for the penalty or to prosecute the offence.

(3) If a person has paid a penalty under a tax law and in respect of the same act or omission for which the penalty was paid, the Commissioner commences a prosecution the penalty shall be repaid to the person as a refund of tax Under S. 48 and the person shall not pay a penalty in the case of a prosecution unless the prosecution is withdrawn”.

7. The Ex parte Applicants state that the actions and failures of the Respondent are unreasonable and are subject to judicial review as sought in these proceedings; that it is likely that the unfairness and injustice perpetrated by the Respondents will continue and escalate unless checked and stopped by this Court in the manner now sought in these proceedings; that the Respondents are engaged in an ultra vires exercise of discretion which is affecting the Applicant’s rights. Eventually it shall lead to miscarriage of justice; that if this Court does not intervene expeditiously as now sought the Respondents will steadily and completely abrogate their legal responsibilities in respect of the rights of the Applicants to fair administration of justice; it is apparent that due to indolence and/or failure, negligence and refusal to act the Respondent will stop at nothing to unjustifiably deprive the Applicant of their reasonable expectations of a fair treatment by a public body such as the Respondent; and for these reasons the Ex parte Applicants pray that the application herein be allowed as prayed.

The Response

8. The application is opposed by the Respondents through a Replying Affidavit sworn by **Dr. Ondimu Onyancha** on 25/9/2020 and a Supplementary Affidavit sworn by **Margaret Wanjiru Pere** on 17/5/2021. Dr. Ondimu Onyancha is the technical officer based at Investigations and Enforcement Department of the 1st Respondent.

9. The Respondents’ case is that on or about January 2019 the 1st Respondent received information that the 1st Ex Parte Applicant herein may have been involved in tax evasion by using proxy companies - Ras Holdings Ltd and Sainil Investments Limited (the 2nd and 3rd Ex Parte Applicants respectively) to import vehicles which were subsequently sold but whose proceeds were not declared for tax purposes. On 20/2/2019 the 1st Respondent commenced investigations into the suspected Ex Parte Applicants’ tax evasion scheme with the aim of establishing their tax compliance status and if there were any form of tax evasion, the amount of taxes evaded. Upon conclusion of the tax investigations, it became apparent that the Ex Parte Applicants had been engaging in a massive fraudulent evasion of taxes and duties. It is alleged that through this tax evasion scheme the Ex Parte Applicants were able to import vehicles, sell them but failed to declare and pay the taxes from the proceeds of sale or they would declare less income for them to lessen taxes payable. Subsequently the 1st Respondent issued a tax demand notice dated 5/4/2019 in respect of custom duties to the 1st Ex Parte Applicant for payment of Kshs. 163, 590, 312. On 24/4/2019, the 1st Respondent issued further tax demand Notices for Kshs. 1, 412, 677, 453 and Kshs. 169, 116, 397 in respect of income tax

and Value Added Tax to the 1st Ex Parte Applicant and Riasat Ali Mian respectively. The investigations having disclosed that the 1st Ex Parte Applicant had failed to pay taxes and committed a fraud in relation to tax by making incorrect statements, the 1st Respondent caused to be charged the directors of the 1st Ex Parte Applicant in the Mombasa Chief Magistrate Court Criminal Case No. 976 of 2019 on 7/6/2019. In relation to the 2nd Ex Parte Applicant, the investigations disclosed that the 2nd Ex Parte Applicant had imported second hand motor vehicles and sold them out but failed to declare the income and pay taxes from the proceeds of sales. At the time of investigations, the 2nd Ex Parte Applicant had not filed any returns for the period under investigations.

10. Upon conclusion of the investigations, the 1st Respondent issued a tax demand notice of Kshs. 169, 187, 999 dated 5/4/2019 in respect of custom duties, Income Tax and Value Added Tax to the 2nd Ex Parte Applicant. The 1st Respondent avers that it became obvious that the 2nd Ex Parte Applicant had failed to file the relevant tax returns and pay taxes which were due from sales of imported vehicles. The 1st Respondent therefore caused to be charged the directors of the 2nd Ex Parte Applicant in the Mombasa Chief Magistrate Court Criminal Case No. 977 of 2019 on 7/6/2019.

11. The 3rd Ex Parte Applicant just like 2nd Ex Parte Applicant, imported second hand motor vehicles and sold them out but failed to declare the income and pay taxes from the proceeds of sales. At the time of investigations, the 3rd Ex Parte Applicant had not filed any returns for the period under investigations.

12. At the conclusion of the Investigations, the 3rd Ex Parte Applicant was issued with a Tax Demand Notice dated 5/4/2019 for payment of Kshs. 36, 282, 053 in respect of income tax, Value Added Tax and custom duties to the 3rd Ex Parte Applicant. The 1st Respondent states that based on these omissions, it became apparent that the 3rd Ex Parte Applicant had failed to file the relevant tax returns and pay taxes which were due from sale of imported vehicles. The directors of the 3rd Ex Parte Applicant were charged in the Mombasa Chief Magistrate Court Criminal Case No. 975 of 2019 on 7/6/2019.

13. The Ex Parte Applicants objected to all these tax assessments issued by the 1st Respondent through demand notices but the assessments were confirmed.

Appeal to Tax Appeals Tribunal

14. Being dissatisfied with the Respondents' assessment of various taxes due, the Ex parte Applicants appealed to the Tax Appeals Tribunal vide Tax Appeal No. 470 of 2019. The Tax Appeal Tribunal delivered its judgment on 12/4/2021 in which it dismissed the Ex parte Applicants' appeal and directed the Ex parte Applicants to pay the assessed taxes. This judgment was delivered well after the current judicial review proceedings were underway.

15. However, the issue in these proceedings is not the validity of the amount of tax payable. The issue here is whether or not the criminal prosecution in MSA Cr. Case No. 975, 76 and 077 all of 2019 are constitutionally founded.

Submissions

16. With the leave of Court parties filed submissions to the application. The Ex parte Applicants' submissions were filed on 19/10/2020; while the Respondents' submissions were filed on 8/4/2021.

17. I have carefully considered the application and rival affidavits and submissions together with the cited case law. In my view the following issue merit my determination.

(i) Whether the Magistrate Courts have Jurisdiction to hear and determine the criminal proceedings in MCCR No. 975 of 2019, MCCR No. 976 of 2019 and MCCR No. 977 of 2019;

(ii) Whether Criminal and Civil Proceedings can run concurrently;

(iii) Whether the Prosecution of the Ex parte Applicants and its directors in MCCR No. 975 of 2019, MCCR No. 976 of 2019 and MCCR No. 977 of 2019 are lawful; and

(i) Whether the magistrates court has jurisdiction to try criminal prosecutions herein

18. The backbone of this Ex Parte Applicants' judicial review application is the issue of jurisdiction of the magistrate courts to hear and determine the Criminal Proceedings in Mombasa MCCR No. 975 of 2019, MCCR No. 976 of 2019 and MCCR No. 977 of 2019. Indeed, it is trite law that where a court has no jurisdiction, there would be no basis for a continuation of proceedings. See **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1** where this Court held:

"... Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction,

there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

19. **Mr. Ado**, learned counsel for the Respondents observed that the Ex Parte Applicants and their directors in MCCR No. 975 of 2019, MCCR No. 976 of 2019 and MCCR No. 977 of 2019 were arraigned in court on 7/6/2019 and on their first appearance before court, they

never raised the issue of jurisdiction of the trial court. Counsel submitted that raising the issue now appears to be an afterthought. However, in law, a dispute to court's jurisdiction can be raised at any time during the proceedings, and even at appeal stage. So there is no bar to a time a party can raise jurisdictional bar to proceedings.

20. It is however true that under Section 5 of Criminal Procedure Code, subordinate courts are conferred with criminal jurisdiction as follows:

“5. Offences under other laws

(1) An offence under any law other than the Penal Code (Cap. 63) shall, when a court is mentioned in that behalf in that law, be tried by that court.

(2) When no court is so mentioned, it may, subject to this Code, be tried by the High Court, or by a subordinate court by which the offence is shown in the fifth column of the First Schedule to this Code to be triable.”

21. Further under Section 106 of Tax Procedures Act, No. 94 of 2015, jurisdiction to try tax offences is expressly conferred by the statute upon the subordinate (Magistrates) courts. The Section states:

“106. Jurisdiction to try cases

(1) Despite any other written law and subject to subsection (2), a person charged with the commission of an offence under a tax law may be prosecuted in any place in Kenya in which the person may be in custody for the offence as if the offence had been committed in that place, and the offence shall be treated as having been committed in that place.

(2) Nothing in subsection (1) shall preclude the prosecution, trial or punishment of a person in any place in which, but for this section, the person might have been prosecuted, tried or punished.

(3) Despite any other written law, an offence under this Act may be tried in the court designated to try offences of corruption or economic crimes.”

22. From the foregoing it means that the Mombasa Chief Magistrate Court, the court in which MCCR No. 975 of 2019, MCCR No. 976 of 2019 and MCCR No. 977 of 2019 were registered, has jurisdiction to try the tax offences including any application that emanates from those proceedings. That is, however, the theoretical legal position. This position is necessarily tampered with by the conduct and dispositions of the parties on case by case basis.

23. It was submitted by **Mr. Opolu**, learned counsel for the Ex parte Applicants that the fact that a Tax Appeal has been filed by the Ex parte Applicants at the Tax Appeals Tribunal precludes their trial at the magistrate's court. However, Mr. Ado refuted this assertion observing that it is clear from the statute establishing the Tribunal that its jurisdiction only covers civil aspects of tax disputes but does not extend to criminal violations of the tax laws. Mr. Ado's position is correct. But that is still subject to individual case and disposition of parties. Section 3 of The Tax Appeals Tribunals Act, No. 40 of 2013 provides as follows:

“3. Establishment of the Tribunal

There is established a Tribunal to be known as the Tax Appeals Tribunal to hear appeals filed against any tax decision made by the Commissioner.

24. Clearly, the Tax Appeals Tribunal cannot make a finding of whether an accused person is guilty or not of any tax offence. The Tribunal does not have that jurisdiction. Its jurisdiction relates to determining amount of tax payable. It is the magistrate court only that has been statutorily granted the jurisdiction to try tax offences. Therefore, the Tax Appeals Tribunal and the Magistrates Court have different jurisdictions when it comes to civil and criminal aspect of tax matters respectively and both have competent concurrent jurisdictions to hear and determine matters within their respective jurisdictions. To expound on this finding, it is noteworthy that the Ex Parte Applicants in MCCR No. 975 of 2019, MCCR No. 976 of 2019 and MCCR No. 977 of 2019 have been charged with various tax offences which include failure to submit tax return by the due date contrary to section 94 (1) of the Tax Procedures Act, No. 94 of 2015 as read with section 104(1) of the same Act; aiding another person to commit an offence under a tax law contrary to section 101 of the Tax Procedures Act, No. 94 of 2015 as read with section 104(1) of the same Act; making an incorrect statement affecting tax liability contrary to section 97(c) of the Tax Procedures Act, No. 94 of 2015 as read with Section 104(3) of the same Act; and failure to pay tax by the due date contrary to section 95 of the Tax Procedures Act, No. 94 of 2015 as read with section 104(1) of the same Act.

25. Clearly, these are offences the trial of which is within the jurisdiction of the Chief Magistrate's Court. The difference is the motive which may be read behind these prosecutions.

(ii) Whether criminal and civil proceedings can run concurrently

26. The next issue is whether the proceedings in the Tax Appeals Tribunal and the criminal trial in the Mombasa Chief Magistrates Court can run concurrently. Section 193A of the Criminal Procedure Code Cap 75 Laws of Kenya provides for concurrent civil and criminal proceedings. The Section reads:

“193A. Concurrent criminal and civil proceedings

Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”

27. In **Republic v Inspector General of the National Police Service & another Ex parte Beatrice Hilda Omunia; Peter Nganga Chege & 2 others (Interested Parties) [2019] eKLR**, Justice John Mativo J. while commenting on the above provision held as follows at paragraph 30 of his Judgement:

“30. Even though it is not for this court to consider the defense of the accused persons, which is basically a function of the trial court, the core issue raised by the ex parte applicant is that the dispute is purely civil. Section 193A of the Criminal Procedure Code permits parallel civil and criminal proceedings, hence, even if there was a civil suit in court, the existence of a parallel civil case is not bar to criminal proceedings. [14] The offence being investigated is known to the law, hence, the cited provision. The conduct under investigation can attract a criminal sanction if proved.”

28. The Ex Parte Applicants have alleged that the Criminal Proceedings in MCCR No. 975 of 2019, MCCR No. 976 of 2019 and MCCR No. 977 of 2019 are contrary to section 80(1)(2)(3) of the Tax Procedures Act, 2015. The Section provides as follows:

“80. General provisions relating to administrative penalties and offences

(1) A person shall not be subject to both the imposition of a penalty and the prosecution of an offence in respect of the same act or omission in relation to a tax law.

(2) If a person has committed an act or omission that may be liable under a tax law to both the imposition of penalty and the prosecution of an offence, the Commissioner shall decide whether to make a demand for the penalty or to prosecute the offence.

(3) If a person has paid a penalty under a tax law and, in respect of the same act or omission for which the penalty was paid, the Commissioner commences a prosecution, the penalty shall be repaid to the person as a refund of tax under section 47, and the person shall not pay a penalty, in the case of a prosecution, unless the prosecution is withdrawn.”

29. Mr. Ado submitted that the import of the above section is that the Commissioner must elect to either impose a penalty or prosecute an offence relating to a tax liability. Counsel submitted correctly in my view that even where any penalty had been levied and collected by the Commissioner and a criminal proceeding subsequently commenced, that penalty must be refunded. Looking at the tax assessments issued to the Ex Parte Applicants, (as annexed to Respondents’ Replying Affidavit and marked as ‘001,’ ‘002,’ ‘003,’ ‘005,’ ‘007,’ ‘009,’ ‘010’ and ‘011’) it is clear that the Respondents have not imposed any penalty. Indeed, at the last page of every demand letter, the Respondents have expressly stated as follows:

“The above taxes exclusive of interest and penalties are hereby assessed and by this letter demanded. Make arrangements to settle the outstanding taxes immediately.”

30. Clearly, Mr. Opolu’s submission that the Ex Parte Applicants’ have paid penalties and therefore should not be prosecuted is not correct. No penalties have been imposed on the Ex Parte Applicants’ tax liabilities and the Criminal Proceedings in MCCR No. 975 of 2019, MCCR No. 976 of 2019 and MCCR No. 977 of 2019 are properly before that court. Therefore, there is no violation of Section 80 of the Tax Procedures Act, 2015.

31. That however, is not enough for this matter. The appropriateness of criminal prosecution at the same time that an appeal at Tax Appeals Tribunal is happening raises serious issue of fair trial under Article 50.

I will address this at the next issue for determination.

Whether the criminal prosecution in the Chief Magistrate’s Court should be stayed

32. Mr. Opolu submitted that in compliance with Section 52(2) of the Tax Procedures Act a compromise and agreement between the Applicants and the Respondents for payment of the taxes not in dispute were set at Kshs. 79,000,000, and a payment plan was agreed on. The Applicant was then allowed to appeal the objection decision to the Tax Appeals Tribunal upon complying with the conditions set by the Respondents pursuant to that Section 52(2) which states:

“52.(2) A Notice of Appeal to the Tribunal relating to an assessment shall be valid if the Tax payer has paid the tax not in dispute or entered into an arrangement with the commissioner to pay the tax not in dispute under the assessment at the time of lodging the Notice”.

33. Counsel submitted, rightfully in my view, that taxes in dispute under Section 52(2) are not taxes due and recoverable until the determination of the Appeal. Counsel submitted that therefore, any prosecution based on taxes in dispute is an illegality. However, as I have said herein before the charges faced by the Ex parte Applicants are not based on any assessed tax due. They are based on alleged violations of the law, which are clearly stated in the charge sheets. They relate to alleged acts and omissions on the part of the ex parte Applicants.

34. The Applicants invoked the provisions of Articles 47, 50(1) (2) 165(6) (7) of the Constitution. Article 47 of the Constitution protects the right to a fair administrative action. Article 50(1) of the Constitution guarantees the Applicants right to a fair hearing. Article 47 states:

“47(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration.”

Article 50(1)(2)(a), (b) and (c):

“50.

(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

(2) Every accused person has the right to a fair trial, which includes the right—

(a) to be presumed innocent until the contrary is proved;

(b) to be informed of the charge, with sufficient detail to answer it;

(c) to have adequate time and facilities to prepare a defence;”

35. In my view, the Respondents have not violated Article 47 rights of the Ex parte Applicants. This is so because the Respondents have at all times indicated their intentions; they have issued demand for taxes they believe are due; they have given the Ex parte Applicants the reasons for their action and the right to reply. Further, the protagonists have even discussed, and negotiated taxes which are due, and which have been paid, or are being paid. Therefore, the Ex parte Applicants’ rights to fair administrative action under Article 47 and the Fair Administrative Actions Act have not been violated as alleged or at all. Therefore, prosecution herein was fully explained to the Ex parte Applicants.

36. However, what I find as an anomaly is the Article 50(1) right to fair hearing. The question to be asked is whether or not the Ex parte Applicants will get a fair hearing in the criminal court while the Respondents are determining taxes due in the Tax Appeals Tribunal. There is the possibility, active or latent, that the Respondents can use the criminal proceedings to put undue pressure on the Ex parte Applicants in the Tax Appeals matter. The adage that justice should not just be done, but should be seen to be done is applicable here.

37. I find and hold that there exists duality of jurisdiction under the Tax Procedures Act between the Magistrate’s court and the Tribunal, and that both jurisdictions can be invoked concurrently over questioned tax demands provided the Respondent has observed Article 47 rights of the Ex parte Applicants. The only issue would then be to consider the effect of the concurrent prosecution on the Applicants’ right to fair hearing under Article 50(1) of the Constitution. The Respondent’s decision to prosecute the Ex parte Applicants deliberately undermines the jurisdiction of the Tax Appeals Tribunal which is seized of appeals over the said Tax objection decisions. Whereas the objection decisions are being questioned by the tribunal on appeal, the Respondents are, on the other hand, invoking their power to prosecute under Section 107 of the Tax Procedures Act fully cognisant of the fact that their tax demand notices and assessment may not be conclusive, and may not be the basis of a charge in a criminal court during the pendency of an Appeal before the tribunal under Sections 51, 52, 53 of the same Act. The absurdity of the criminal proceedings would be clear should the Tax Appeals Tribunal conclude that there is no tax due from the Ex parte Applicants. This is a clear reason why it would be necessary to stay the criminal prosecutions.

Can this court grant orders of judicial review?

38. The main aim of judicial review remedy is not concerned with the merits of a decision the subject of the application for Judicial Review but the decision making process itself. In The **Republic v Permanent Secretary to the Cabinet and Head of Public Service and another Ex parte Nga’ng’a and others [2006] LLR 5958 HCK, 2 EA 294 HCK** per Visram J.):

“The purpose of Judicial Review is to check that Public bodies do not carry out their duties in a manner that is detrimental to the public at large. The institution of a Judicial review is not a bar to seeking other forms of relief as Judicial review posit that as soon as a public body exceeds its jurisdiction or acts unfairly or disregards the principles of natural justice then the very act of the public body must be scrutinized.”

39. In this matter however, the arguments for restraining the prosecution of the Ex parte Applicants have solely been based on the ongoing assessment of taxes due at the Tax Appeals Tribunal. The Tax Appeals Tribunal rendered its judgment on 12/4/2021 and dismissed the Ex parte Applicants’ appeal. The net result of that judgment is that the Ex parte Applicants are to pay the tax levies as assessed by the

Respondents. There is no further doubts about the amount of tax due. Therefore, the Ex parte Applicants cannot have it both ways. This Court on 6/10/2020 granted conservatory orders suspending the hearing of the said criminal cases. With the judgment of the Tax Appeals Tribunal already out, and in the absence of any appeal or stay of that judgment the Ex parte Applicants have no option but to comply. And since there is no evidence of compliance provided to this Court since the said judgment was delivered, the conservatory orders issued herein on 6/10/2020 stopping the prosecution of the Ex parte Applicants is hereby lifted, and the Criminal Cases MCCR NO. 975 of 2019, MCCR NO.976 of 2019 and MCCR NO. 977 of 2019 shall proceed to their logical conclusion.

40. The result is that the Notice of Motion application before this Court dated 5/3/2020 is dismissed. Parties shall bear own costs.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 8TH DAY OF JUNE, 2021.

E. K. OGOLA

JUDGE

Ruling delivered via MS Teams in the presence of:

Mr. Opolu for Ex parte Applicants

Mr. Ado for Respondent

Ms. Peris Court Assistant