



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW NO. 38 OF 2017

IN THE MATTER OF: THE CONSTITUTION OF KENYA, 2010 ARTICLES 25 (C) & 47

AND

IN THE MATTER OF: THE LAW REFORM ACT (CAP 26) AND FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF: THE TAX PROCEDURES ACT, 2015 AND AN APPLICATION

BETWEEN

MOSES GAKURI THUO.....APPLICANT

VERSUS

KENYA REVENUE AUTHORITY.....RESPONDENT

KCB BANK KENYA LIMITED.....INTERESTED PARTY

RULING

The Application

1. The Applicant's case for Judicial Review orders is contained in the Notice of Motion dated 24.7.2017 and filed herein on 27.7.2017 pursuant to leave given by the court on 13.7.2017. The motion prays for the following orders:

- a) An order of prohibition to prohibit the Respondent, its servants and or agents from enforcing agency notices, of decisions contained in letter dated 10thApril 2017 and addressed to the Interested party herein, which agency notices are for enforcement against the Applicant.
- b) An order of prohibition, to prohibit the Respondent from issuing the Applicant to either its bankers and or any other Creditors or persons without following the due process of law contained in the Tax Procedures Act 2015, or orders of this Court.
- c) An order of certiorari to bring to this court, the decision contained in the Respondent's letter dated 10.4.2017, and once so called, to quash the same.
- d) The Costs of this Application shall be awarded to the Applicant.

2. The motion is premised on the grounds set out therein and is supported by other documents as follows:

- a. Chamber summons, Statement and Verifying Affidavits all filed on 6.7.2017.
- b. Respondent's Replying Affidavit sworn and filed in court on 21.9. 2017.

3. The Applicant's case is that he has paid all taxes due to the Respondent from the year 2013-2016 and even overpaid the Respondent by Kshs. 14,681= . Therefore, the ex-parte applicant avers that it is unfair, irrational, and unconscionable for the Respondent to issue an Agency Notice to his bankers for a sum that he has already paid.

4. The ex-parte Applicant avers that if the bank honors the agency notice, the total sum remitted to the Respondent will be Kshs. 4,215,307/= which sum will be double that which Respondent claims to be due together with the amount that has been overpaid, rendering the ex-parte Applicant to double taxation.

5. The ex-parte Applicant avers that, he has sought clarifications from the Respondent via his e-mail of 27.4.2017 regarding his tax obligation, but the Respondent has failed to respond to his request and is in total breach of the mandatory provisions of Section 33(3) of the Tax Procedures Act, which in Mandatory terms provides as follows:

“(3) the commissioner shall notify the tax payer in writing of this decision regarding the Application for execution of time.”

6. The ex-parte Applicant avers that instead of complying with the mandatory provisions of Section 33(3) of the Tax Procedures Act, the Respondent flagrantly proceeded to receive a sum of Kshs. 2,100,313/=from the Interested party in settling the alleged tax against him which is contrary to the provisions of the Fair Administrative Actions Act. Further, he avers that the failure to respond to his inquiries is contrary to Section 7(2)(b) (i) and (j) of the Fair Administrative Act Actions. This Court has the duty to intervene

The Response

7. The motion is opposed by the Respondent vide affidavit of **Asha K. Salim** sworn on 14.9.2017. The Respondent's case is that pursuant to the provisions of Section 5(1) of the Kenya Revenue Authority Act, it is mandated to collect and receive all revenue on behalf of the Government and it is in furtherance of that mandate that the Respondent demanded from the Applicant a sum of Kshs. 3,400,313/= as a result of the failure to file return and/or late filing of returns for various years between 1996 to 2010.

8. The Respondent avers that the Applicant being dissatisfied with the tax demand moved to the High Court under Judicial Review Application No. 53 of 2012 seeking for orders of *certiorari* and prohibition, restraining the Respondent from enforcing the tax demand. On the 21.7.2015, the Applicant's Application was dismissed with costs, prompting the Applicant to make a payment of Kshs. 1,300,000/= being a part of the Income Tax assessment, and leaving behind a balance of Kshs. 2,100,313/= which remains unpaid to date, causing the matter to be forwarded to the Respondent's Debt enforcement unit on the 16.2.2016.

9. The deponent further avers that the Applicant made payment for withholding tax amounting to Kshs. 1,964,175/= but the same was not in relation to the Income Tax that was due and that if the Applicant is claiming Withholding Tax credit, it is for the Applicant to forward its claim accompanied by tax credit certificate. Further, pursuant to Section 47 of the Tax Procedures Act and Section 105(1) of the Income Tax Act, the deponent maintains that there are no Supporting documents to confirm settlement of the tax liability or an overpayment of the tax due.

10. It is further averred that no extension of the time to pay tax has been applied for by the ex-parte Applicant. Therefore, Section 33(1) of the Tax Procedures Act does not apply in this instant case. Further, the Respondent states that the ex-parte Applicant will not be a victim of double taxation as the amount demanded is yet to be paid and it was procedural for the matter to be referred to the Debt Enforcement Unit, which in turn issued the Agency Notices.

Submissions

11. With leave of Court, parties filed submissions to the Application.

12. **Ms. Nafula**, Learned Counsel for the Applicant submitted that the Respondent violated the provisions of the Tax Procedure Act as no assessment was undertaken by the Respondent before an Agency Notice of 10.4.2017 was issued, and that the self-assessment conducted by the ex-parte Applicant indicated that there was an excess amount paid to the Respondent and as such he is entitled to a refund.

13. **Counsel** further submitted that the Respondent failed in its mandatory duty under Part VI of the **Tax Procedures Act, 2015** by not notifying the Applicant in writing of the amount assessed as income tax, period to which the assessment relates, penalty (if any), due date for payment of the tax and procedure to be followed in cases of objection to the assessment. Counsel relied on **Silver Chain Limited v Commissioner Income Tax & 3 others [2016]** where the Court held that “...it is prudent that while undertaking such an exercise the tax payer be given an opportunity to explain its position.” Counsel submitted that this Court is mandated under Article 47 of The Constitution and Section 7(2) of the Fair Administrative Action Act to quash decision made contrary to law.

14. **Ms. Chelang'at** Learned Counsel for the 1st Respondent submitted that the *ex-parte* Applicant is misleading this Court, and that the amount paid by the ex-parte Applicant was Kshs. 1,964,175/= on account of Withholding Tax and not Income Tax. Counsel submitted that what is being claimed from the ex-parte Applicant is balance of tax on income tax, and not withholding tax.

Determination

15. Having considered the application, submissions of counsel and the authorities relied upon, the issues that arise for determination are:

1. Whether the agency notice dated 10/4/2017 is lawful and justified;

2. Whether Judicial Review Orders of Certiorari and Prohibition should issue;

1. Whether the agency notice dated 10/4/2017 is lawful and justified:

16. It is common ground that the 1st Respondent is a statutory body established under an Act of Parliament for the assessment and collection of revenue; for the administration and enforcement of the laws relating to revenue and for connected purposes. The 1st Respondent can only operate within the Tax laws, and any acts that contravene the law are amenable to judicial review. The question to ask is: What did the 1st Respondent do, which was outside the statute, was it unreasonable, unfair, unjustified?

17. In the instant case, the ex-parte Applicant is seeking the Judicial Review remedies of *certiorari* and prohibition. In relation to the remedy of certiorari, the ex-parte Applicant prays that the decision of the Respondent contained in the letter dated 10.4.2017 be quashed and the 1st Respondent be prohibited from issuing and or enforcing the Agency Notice contained in letter 10.4.2017. It is to be noted that this is not the first suit filed by the ex-parte Applicant on the same issue. The ex-parte Applicant had earlier filed Judicial Review Suit No. 53 of 2012 seeking a similar relief. That suit was dismissed, after which the ex-parte Applicant made part payment of Kshs. 1,300,000/= leaving a balance of Kshs 2,100,313 which is the subject matter of the Agency Notice herein which amount remains unpaid to date. In JR. 53 of 2012 filed by the ex-parte Applicant, the Court held as follows:

“going by the evidence on record, the ex-parte Applicant has been in communication with Respondent and the Interested Party over the alleged tax arrears. Various letters from the ex-parte Applicant’s auditor refer to meetings with the Respondent. The first notice was in fact received in 2007 when the Respondent assessed the tax arrear at Kshs.1,696,945/= at the time. The ex-parte Applicant cannot be said to have been denied an opportunity to defend itself.”

18. The above decision has never been reviewed, set-aside, and /or appealed against. However, the ex-parte Applicant now avers that he made a further payment of Kshs.1,964,175. But the Respondent states that the payment of Kshs. 1,964,175/= was on account of withholding tax, and not the claimed income tax.

19. The ex-parte Applicant did not file a further affidavit to controvert the averments that the amount of Kshs. 1,964,175/= was for withholding tax, which, according to the Respondent was also due in addition to the income tax due. Therefore, I am persuaded that the outstanding balance of Kshs. 2,100,313/=, in relation to Income tax remains unpaid to date.

20. Accordingly therefore, it is the finding hereof that the *ex-parte* Applicant only paid a sum of Kshs. 1,300,000/= leaving a balance of Kshs. 2,100,313/=. The Agency Notice issued on the 10.4.2017 for payment of the outstanding tax was in compliance with the provisions of Section 42(1) of the Act provides that a tax due from a person is a debt to the Government and is payable to the Commissioner. If a party is not satisfied with the tax decision, he or she has the option of lodging an objection under Section 51 of the Act. The section reads:

“51 (1) A taxpayer who wishes to dispute a tax decision shall first lodge an objection against that tax decision under this section before proceeding under any other written law.

2. A tax payer who disputes a tax decision may lodge a notice of objection to the decision, in writing, with the Commissioner within thirty days of being notified of the decision

3. A notice of objection shall be treated as validly lodged by a tax payer under subsection (2) if:-

a. The notice of objection states precisely the grounds of objection, the amendments required to be made to correct the decision, and the reasons for the amendments; and

b. In relation to an objection to an assessment, the taxpayer has paid the entire amount of tax due under the assessment that is not in dispute.”

21. From the date of the Agency Notice, which was the 10.4.2017, the ex-parte applicant had 30 days to lodge an objection under Section 51(2). There is no evidence at all that the ex-parte Applicant complied with that provision. The Tax Procedure Act provides for alternative remedy within it, and so far, no reason has been given by the Applicant as to why that mode of redress was not adopted by the ex-parte Applicant.

22. Since the *ex-parte* Applicant to date has not paid the outstanding balance in relation to the assessed income tax or file objection to the demand, the 1st Respondent is empowered under Section 42 of the Act to issue agency notice in order to collect taxes. The respondent cannot be faulted for acting within its powers under Section 42 of the Act, which provides for the power to collect tax from a taxpayer who has failed to pay.

2. Whether Judicial Review orders of certiorari and prohibition can issue?

23. The scope of Judicial Review orders was defined in Judicial Review Handbook 6th Edition by Michael Fordham at page 5:

“Judicial Review is a central control mechanism of administrative law (Public Law), by which the Judiciary discharges the Constitutional responsibility of protecting against abuses of power by public authorities. It constitutes a safeguard which is essential to the rule of law promoting the public interest; policing parameters and duties imposed by parliament, guiding public authorities and ensuring that they act lawfully; ensuring that they are accountable to law and not above it; and

protecting the rights and interests of those affected by the exercise of public authority or power.”

24. In *George Maina Kamau vs. The County Assembly of Murang'a and 2 others* [2016] eKLR thus, the Court stated as follows...

“Nevertheless, the court is not setting a hard rule that its jurisdiction is limited to only an inquiry into procedural matters. The rule the court is setting is that it will consider all cases where illegality is alleged both in matters of substance and procedure. The court says that it would have to look into merits of the grounds for removal in an appropriate case where a petitioner may seek to show illegality founded upon the county assembly moving against the petitioner under the said section 40 upon illegal grounds; such that illegality would be founded upon the principle of unreasonableness per Lord Greene in *Associated Provincial Picture Houses Limited –Versus- Wednesbury Corporation* (1947) 2ALL ER 680 at 682-683 thus, “It is true the discretion must be exercised reasonably. What does that mean? Lawyers familiar with the phraseology commonly used in relation to the exercise of statutory discretions often use the word ‘unreasonableness’ in a rather comprehensive sense. It is frequently used as general description of the things that must not be done. For instance, a person entrusted with discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey these rules he may truly be said, and often is said, to be acting ‘unreasonably’. Similarly, you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J., I think it was, gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith. In fact, all these things largely fall under one head.”

25. The *ex-parte* Applicant has attempted to demonstrate that the decision of the 1st Respondent is unfair, unreasonable, or prompted by malice but the same was not proved. As observed earlier in this Ruling, the 1st Respondent has strictly followed the provisions of the law under the Tax Procedure Act.

26. It was the duty of the *ex-parte* Applicant to prove that it does not owe the outstanding income tax and proving that he had paid both his withholding tax and the income tax. However, no Supporting documents to confirm settlement of the tax liability or an overpayment of the tax due has been furnished by the Applicant. In any event, it would then require evidence from both parties to show the correct amount due as income tax, and or withholding tax, if any. These are matters, which need proof by way of viva voce evidence, and cannot therefore be the subject of Judicial Review proceedings.

27. An order of certiorari lies to quash a decision that has been made in excess of jurisdiction, in breach of rules of natural justice, and/or an illegality. Since the 1st Respondent is acting under its mandate under Section 42 of the Act, *Certiorari* orders cannot issue.

When Will An Order Of Prohibition Be Issued?

28. The order of prohibition was defined in the case of *Kenya Examination Council v Republic ex-parte Geoffrey Githinji Njoroge & others* [1997] e KLR, where the Court of Appeal said:

“What does an order of prohibition do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings in excess of its jurisdiction or in contravention of the laws of the land. It has not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal or owing decision on the merits of the proceedings”

29. At no time did the *ex-parte* Applicant persuade this Court to grant the said order. The 1st Respondent Agency Notice was not issued outside its jurisdiction nor was it in contravention of the law, nor did it depart from Rules of Natural Justice. The 1st Respondent had initially notified the *ex-parte* applicant of the payment of income tax that was due, and the *ex-parte* Applicant only paid a sum of kshs.1,300,000/= leaving a balance of Kshs. 2,100,313/= that remains unpaid to date. What is being disputed here was already the subject of JR No. 53 OF 2012 which was dismissed. The same issue cannot be canvassed again in this judicial review. In the JR No. 53 of 2012 the learned Judge had this to say:

“(10) the main issue of contention therefore is what amount of tax arrears are due from the *ex-parte* Applicant. The most appropriate remedy for the *ex-parte* Applicant would have been to have the decision examined on merits. As far as Judicial Review is concerned, the remedies sought are not available to the *ex-parte* Applicant”

30. It is my view that even in this particular Judicial Review Application, the judicial review remedies are not available to the *ex-parte* Applicant.

31. The upshot is that the Judicial Review orders sought are not merited. The Notice of Motion dated 24.7.2017 is dismissed with costs to the Respondent.

Dated, Signed and Delivered at Mombasa this 6th day of May, 2020.

E. K. O. OGOLA

JUDGE

In the presence of:

Ms. Nafula fholding brief Khalid for Applicant

Ms. Nyabenge for Interested Parties

No appearance for 1st Respondent

Mr. Kaunda Court Assistant