



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
JUDICIAL REVIEW DIVISION
MISCELLANEOUS CIVIL APPLICATION NO. 393 OF 2014

**IN THE MATTER OF AN APPLICATION FOR AN ORDER OF CERTIORARI, PROHIBITION
AND MANDAMUS PURSUANT TO ORDER LIII OF THE CIVIL PROCEDURE RULES AND
ARTICLE 23 OF THE CONSTITUTION**

AND

IN THE MATTER OF THE INCOME TAX ACT, CHAPTER 476 OF THE LAWS OF KENYA

BETWEEN

REPUBLIC.....APPLICANT

V E R S U S

KENYA REVENUE AUTHORITY.....RESPONDENT

EX-PARTE

ALTHAUS MANAGEMENT & CONSULTANCY LIMITED

RULING

Introduction

1. On 27th February, 2017, this Court issued an order of issue an order of *mandamus* directing the Respondent to, within 30 days of service of the said order on it, consider the applicant's objections and furnish the applicant with its decision and its reasons therefor. The Court further issued an order of certiorari bringing into this Court for purposes of being quashed all the agency notices dated 4th October 2011 issued to Diamond Trust Bank Kenya Limited and Bank of Africa Limited which decision was thereby quashed.

2. The *ex parte* applicant herein, **Althaus Management & Consultancy Limited** has now moved this Court vide a Notice of Motion dated 16th April, 2017 seeking the following orders:

1) That this application be certified as urgent and a hearing/return date given as a matter of urgency.

- 2) That service of this Application be dispensed with in the first instance.
- 3) That enforcement of the Respondent's 'Objection Decision' dated 24th April, 2017, be stayed and/or suspended pending the hearing and determination of this Application.
- 4) That the Respondent's 'Objection Decision' dated 2017, be set aside as null and void being made in violation of the Orders made by this Honourable Court 27th February, 2017.
- 5) That Mr. Tom M. Okumu, Manager-South of Nairobi, Kenya Revenue Authority, 46285-00100 Nairobi do stand committed for jail for such period as this Honourable Court may determine for contempt of court having knowingly and wilfully violated and/or disobeyed and/or disregarded and/or thwarted and undermine the effect and purpose of the Orders made by this Honourable Court 27th February, 2017 and/or knowingly and wilfully failed to take reasonable steps to ensure that the said Order was adhered to and obeyed by the Respondent.
- 6) That this Honourable Court do impose a fine on the Respondent for breach of the Orders made by this Honourable Court 27th February, 2017.
- 7) That the costs of and occasioned by this application be paid by the Respondent, the Commissioner of Domestic Taxes and its Manager (Mr. T.M Okumu) on an indemnity basis.

Ex Parte Applicant's Case

3. According to the applicant, in the said judgement this Court found and held, *inter alia*, that the Kenya Revenue Authority, the Respondent herein, had failed to address properly or at all the issues raised by the Applicant in its objection to an assessment "*including the request to offset the withholding tax refunds against the tax.*" Pursuant thereto, the applicant on 29th March, 2017, extracted a formal decree embodying the orders granted by the Court in the said judgment and forwarded a copy thereof to the Respondent by its letter dated 4th April, 2017.

4. It was however averred that in purported compliance with the terms of the decree, the Respondent by its letter dated 15th March, 2017 acknowledged the said Judgment and the Applicant's Notice of Objection dated 28th November, 2012. In the same letter, the Respondent proceeded to request for documentation as set out in its previous letter dated 26th May, 2014 to enable it review the Applicant's Objection and determine the quantum of withholding tax available to offset against taxes allegedly payable. Subsequently, the Applicant through its lawyers by their letter dated 23rd March, 2017 notified the Respondent that the Judgment of the Court did not require or allow the Respondent to seek for further documentation as set out in its letter dated 26th May, 2014. More importantly, the letter introduced matters that were not contemplated by the court in its Judgment dated 27th February, 2017.

5. It was averred that the Respondent in its letter dated 27th March, 2017 sought to justify its request for further documentation. Specifically, the Respondent stated that '*...Section 84(2) of the Income Tax Act (now repealed by Section 51(8) of the Tax Procedures Act) permits the Commissioner to either allow the objection in whole or in part, or disallow it...*' The Respondent proceeded to state that '*... In order to allow or disallow the objection, the Commissioner may call for documents to assist him reach a decision. Thus the decision to call for documents was informed by these provisions...*' It is noteworthy that the Respondent did not even attempt to demonstrate how such demand was in conformity with the orders of this Honourable Court.

6. According to the applicant, notwithstanding the foregoing, the Appellant was and has at all times cooperated with the Respondent's requests for documentation and availed all the documents requested for by the Respondent. In any event, the Respondent did not at any time before or during the court proceedings indicate that it could not raise the Objection Decision for want of additional documents

neither did it make a request for additional documents or allege that the applicant failed to provide additional documentation.

7. It was the applicant's case that the Respondents cannot purport to request documentation in respect of an already concluded audit process for which an assessment has been issued when it is statutorily required to issue an objection decision. In any event, the Applicant through its lawyers, by letter dated 30th March, 2017 reiterated the fact that the Court's Order required the Respondent to consider the Applicant's objection. The Applicant also pointed out that the Respondent's request for more documentation in its letter dated 15th March, 2017 was a ploy to circumvent the Orders of the Court. That notwithstanding, the Applicant, without prejudice, informed the Respondent that it was willing to avail any document required for the period relevant to the objection dated 28th November, 2012. The Applicant further requested the Respondent for details of the documents it required if at all but the Respondent failed to issue the Applicant with details of such documents.

8. It was disclosed that in a clear demonstration of the Respondent's lack of regard to the said order, the Respondent in its letters dated 20th March, 2017 proceeded to 'suspend' the agency notices issued to Diamond Trust Bank Limited and Bank of Africa Limited. By subsequent letters dated 5th April, 2017, the Respondent notified the said banks that the agency notice was not suspended but quashed, but conspicuously it did so on a '*without prejudice basis*'.

9. In its letter dated 7th April, 2017, the Applicant averred that, through its lawyers (IKM Advocates), it notified the Respondent that the above stated letters dated 5th April, 2017 quashing the agency notices on a without prejudice basis, was of no legal effect and requested the Respondent to make an unqualified clarification to both Diamond Trust Bank limited and Bank of Africa Limited but the Respondent is yet to make an unqualified clarification to Diamond Trust Bank Limited and Bank of Africa Limited as requested.

10. It was averred that the Respondent ultimately by its letter dated 24th April, 2017 purported to issue its Objection Decision. While referring to the Applicant's Objection dated 28th November, 2012, the Respondent proceeded to raise a tax assessment of amounts totaling Kshs.27,093,432, Kshs.12,596,083 and Kshs.61,020,150 being Corporation Tax, Pay As Your Earn ('PAYE') and Value Added Tax ('VAT') respectively, with interest and penalties thereon, for the period 2009 to 2010.

11. The applicant lamented that notwithstanding the existence of the foregoing Court Order which was in full force and effect when the Respondent issued the Objection Decision, the Respondent proceeded to issue a new assessment in respect of Corporation tax amounting to Kshs.27,093,432 for the period 2009 to 2011. This is despite the fact that Corporation Tax assessment was not raised in the Respondents previous assessments and demand notices as set out in the table below:

Date	Period	Tax	Amount (Kshs)
24 th May, 2010	October 2010-April 2010	PAYE	18, 152,990
11 th June, 2010	October 2009- May 2010	PAYE	21, 232,408
	June 2009- May 2010	VAT	10,908,963
11 th June, 2010	March 2008 – April 2010	VAT	10, 908,965
3 rd November, 2011	July 2010- November	PAYE	17, 105,477

	2011	VAT	14, 267,340
1 st November, 2012	May 2010 – April 2012	VAT	89,223,881
28 th June, 2013	Not specified	VAT	98,053,666

12. To the applicant, it is evident and without a doubt that at no particular time did the Respondent raise a Corporation Tax Assessment and seeking to do so in its Objection decision contravenes the Order of this Honourable Court. Based on legal advice, the applicant contended that subject to section 51(8) of that **Tax Procedures Act**, the Respondent can only allow, disallow or amend an initial assessment but that the provision of the **Tax Procedures Act** does not allow the Respondent to raise a new assessment through an Objection Decision. More importantly, the Respondent has gone beyond its mandate by failing to consider the documents in its possession to reach to a right and fair objection decision and instead maliciously purported to rely on the Applicant's bank statements which were never part of any previous assessment or the Judicial Review Proceedings as a basis of computing the Corporation tax allegedly due for the first time, so as to extinguish the Applicant's Withholding Tax Credit.

13. It was the applicant's case that not only did the Applicant remit all taxes due, it filed, without fail, its annual self-assessment returns and corresponding financial statements which were a true reflection of its financial position. However, the Respondent through its Senior Assistant Commissioner has cynically sought to frustrate and/or undermine the effect of this Court's Order and the Respondent has acted in absolute disregard of the said Order and with complete disdain towards this Court.

14. It was therefore the applicant's position that the Respondent is and continues to be in wilful and blatant contempt of the Order made by this Court on 27th February, 2017 hence it is just, equitable and in the interests of justice that this Court acts swiftly and decisively in the face of such wilful and blatant disregard of its authority and dignity.

15. It was submitted on behalf of the applicant that the Respondent has sought to justify its request for documentation by relying on the provisions of section 84(2) of the **Income Tax Act** (repealed by section 51(8) of the **Tax Procedures Act**, 2015 which '*...permits the Commissioner to either allow the objection in whole or in part, or disallow it... In order to allow or disallow the Objection, the Commissioner may call for documents to assist him reach a decision. Thus the decision to call for documents was informed by these provisions...*' According to the applicant, nothing in that section authorizes the Commissioner when considering an objection to an assessment to call for additional documents either as it purported to do or at all. Further, the Respondent has failed to show how its demand for additional documentation required for an audit which was to be done after the objection and covering periods that was not the subject of the assessment objected to, is in conformity with the orders of the court. Despite this, rather than let the matter wallow, the Applicant informed the Respondent that it was willing to avail any documentation it required for the period in dispute, on a without prejudice basis but no response has been forthcoming from the Respondent to this offer.

16. According to the applicants, it was not only this Court's order of Mandamus that the Respondent has been playing fast and loose with, but even though the terms of the order of certiorari is quite clear, by letters dated 20th March, 2017, the Respondent purported to '*suspend*' the Agency Notices issued to Diamond Trust Bank ("DTB") and Bank of Africa Limited ("BOA"). When questioned as to the propriety of the so-called suspensions (which it now derisively denigrates as quibbling over words) the Respondent relented a little bit and by letters dated 5th April, 2017, to both banks it did inform them that the agency notices had been quashed but inexplicably, this was done on a "**Without Prejudice**" basis. A request for an unqualified clarification, vide a letter dated 7th April, 2017, remains unheeded.

17. It was submitted that though ultimately, the Respondent issued what it characterised as its "Objection Decision" dated 24th April 2017, the scepticism as to the nature of this decision is justified since the Respondent did not act in accordance with **Tax Procedures Act** which only authorizes what can be

done on an objection by a tax payer. Rather, he raised a fresh an assessment of an amount totalling Kshs. 27,093,432, Kshs. 12,596, 083 and Kshs. 61,020,150 being Corporation tax, Pay As You Earn ('PAYE') and Value Added Tax ('VAT') for the period 2009 to 2011 respectively.

18. According to the applicant, in effect, the Respondent through its Senior Assistant Commissioner has sought to frustrate and/or undermine the effect of this Honourable Court's Order.

19. In its submissions, the applicants relied on sections 3(a) and 4 of the ***Contempt of Court Act, 2016, Commercial Bank of Africa vs. Ndirangu [1990-1994] EA 71, Shimmers Plaza Limited vs. National Bank of Kenya Limited [2015] eKLR*** and ***Hadkinson vs. Hadkinson [1952] ALL ER 567***.

20. As regards the need for state officers (public officials) to respect and uphold the rule of law, the applicant cited Article 10 of the Constitution as well as Article 232(1)(a) as read together with section 5(2)(h) of the ***Public Service (Values and Principles) Act, 2015***. In this respect the applicant relied on the decision of Nolan, LJ in ***M vs. Home Office(1993) 3 All ER*** and ***Trusted Society of Human Rights Alliance vs. Cabinet Secretary for Devolution and Planning & 3 Others [2017] eKLR***.

21. It was submitted that the Respondent failed and/or refused to issue the unqualified clarification to the banks. Instead, they further acted contemptuously by raising an entirely new corporation tax assessment; contrary to section 51(8) of the ***Tax Procedures Act***, which provides that, '*...where a notice of objection has been validly lodged within time, the Commissioner shall consider the objection and decide either to allow the objection in whole or in part, or disallow it, and Commissioner's decision shall be referred to as an "objection decision"...*' This provision does not allow the Respondent to issue an entirely new assessment, it can only allow the objection in whole (*set aside the assessment*), in part (*amend the assessment*) or disallow it (*confirm the assessment*). The Respondent therefore acted in excess of its statutory mandate and in contravention of the orders of this court.

22. From the Respondent's action of raising a new Corporation Tax which was not at any time the subject of the assessment against which the Notice of Objection had been lodged, it was submitted that it is clear that the Respondent failed to consider the Applicant's objections (as required by statute) in its entirety including the aspect of the VAT demanded which was to be off set against a withholding tax credit owed to the Applicant. It is evident that the Respondent raised the new corporation tax assessment for purposes of offsetting the withholding tax against it; contrary to what the Applicant had requested in its numerous correspondences and Notice of Objection.

23. To the applicant these actions, and in particular, its Manager, **Mr. Tom Okumu** point to contempt of court; the court's orders were clear and unambiguous, the Respondents had adequate knowledge of the said orders and yet they *deliberately* acted in *breach* thereof;

a) By 'suspending' the Agency Notices issued to Diamond Trust Bank and Bank of Africa, instead of quashing the same. It is more telling that it took protests from the Applicant's lawyers for the Respondent to quash the Agency Notices on a *without prejudice* basis.

b) Failing to duly consider the Applicant's Notice of Objection, and instead requested for more documentation.

c) When it eventually 'considered' the Applicant's objection, the Respondent proceeded to issue a completely new corporation tax assessment, which was not part of the initial assessment objected to by the Applicant. In so doing the Respondent subjected the Applicant to unwarranted penalties and interest on the VAT assessment.

24. The applicant relied on the decision of the Court of Appeal in ***Central Bank of Kenya & Another vs. Ratilal Automobiles Limited & Others Civil Application No. 247 of 2006***, as cited in ***Judicial Service Commission vs. Speaker of the National Assembly (2013) eKLR***.

25. According to the applicant, an objection is provided for by section 84 which at 84(2) requires the

objection to be accompanied together with all supporting documents. As the process was court mandated, the Respondent had recourse to court in the event that the Applicant had failed to comply with the provisions of the Act. It was the applicant's submission that whereas the original assessment against which the objection and subsequent judicial Review application was made was with respect to Pay As You Earn (PAYE) and Value Added Tax (VAT) and which were the only subject matter of the order of Certiorari, instead of determining the objection as directed by the Court, the Respondent decided to make a fresh assessment in the sum of Kshs 27,093,432/ - in respect of Corporation Tax and then proceed to select and apply the amounts held for withholding Tax against the purported Assessment without any notice to the Applicant.

26. The Applicant therefore prayed in the circumstances that the application herein be granted with costs.

Respondents' Case

27. In response to the application, the respondents contended that they have complied with the terms of the judgment delivered on 27th February 2017 and Court Order dated 29th March 2017 served upon them on 4th April 2017.

28. It was the Respondents' position that this application is premised on a misinterpretation and misrepresentation of the two orders made by this Honourable Court as the Respondent has complied with the letter and spirit thereof. In the Respondents' view, by quashing all the agency notices dated 4th October 2011 the Honourable Court was merely directing the Respondent to withdraw the said agency notices and not to collect any sums of money pursuant thereto. It was contended that in compliance with the said order, by a letter dated 20th March 2017 the Respondent wrote to the Applicant's Bankers directing them to treat the Agency Notices as suspended since the taxpayer (Applicant) had engaged the Authority in resolving the Tax matter.

29. To the Respondents, in so doing the Respondent had withdrawn the Agency Notices and communicated to the banks that they were not to deduct and/or remit to the Respondent the sums of Kshs.16,272,431/- income tax and Kshs.12,992,260/- quoted on the Agency Notices. According to the Respondents, these letters were addressed to the Applicant's bankers who were the main consumers of the information therein and upon receipt of the said letters, no sums of money were deducted from the Applicant's bank accounts in satisfaction of the Agency Notices. Upon receipt of the letters dated 20th March 2017 which were copied to it, the Applicant was displeased with the wording of the letters and demanded the Respondent clarify to its bankers that the Agency Notices had been quashed by the Court.

30. It was averred that notwithstanding the superfluous nature of such a clarification, the Respondent proceeded to clarify to the bank that the said agency notices had not been suspended but rather quashed through a Court Judgment. In the Respondents' view, whether the Respondent stated in the letters that the agency notices were suspended or that the agency notices had been quashed by the Court, the effect of the letters was the same, that is, no sums of money were to be deducted and remitted to the Respondent which was the very essence of quashing the agency notice.

31. It was contended that in any event, what the Honourable Court did by quashing the agency notices was to ensure the Respondent would not get any sums of money from the Applicant's bankers and that was the effect of the letters sent by the Respondent. They therefore averred that it would have been contemptuous conduct if the Respondent had not notified the banks not to deduct and remit the sums of money to it, but in the present case the Respondent moved with haste and instructed the banks not to deduct and remit the sums to it.

32. The Respondents further averred that section 84(2) of the **Income Tax Act** requires a notice of objection to be accompanied by a return of income together with all supporting documents which documents are meant to assist the Commissioner arrive at a decision whether to amend the assessment in accordance with the objection; or amend the assessment in light of the objection according to the best of his judgment; or refuse to amend the assessment, as per the provisions of section 85 (1). Section 51(8) of

the **Tax Procedures Act, 2015**, provides that the Commissioner shall consider the objection and decide either to allow the objection in whole or in part, or disallow it.

33. It was the Respondents' case that the request for documents by Commissioner, vide a letter dated 15th March 2017, was made in good faith and was only meant to assist the Commissioner arrive at a decision as per the provisions of section 84(2) of the **Income Tax Act** and section 51(8) of the **Tax Procedures Act** and that this position was explained to the Applicant by the Respondent vide a letter dated 27th March 2017. Despite the explanation by the Respondent the Applicant, vide a letter dated 30th March 2017, expressed its reluctance to furnish the Respondent with further documents and the Commissioner proceeded to determine the Applicant's objection based on the documents earlier furnished to the Commissioner.

34. It was contended by the Respondents that pursuant to the provisions of section 51(9) of the **Tax Procedures Act, 2015**, the Commissioner communicated the objection decision vide a letter dated 24th April 2014 which objection was in response to the Applicant's objection notice dated 28th November 2012 which the Respondent had been directed by the Court to consider and communicate to the Applicant, within thirty (30) days of being served with the order, the decision and reasons thereof. By its objection decision the Respondent raised an assessment of Kshs.100,709,665/- which constituted Corporation Tax of Kshs.27,093,432, Pay As You Earn (PAYE) of Kshs.12,596,083/- and Value Added Tax (VAT) of Kshs.61,020,150/-. It was the Respondents' case that it is evident from the Supporting Affidavit of **Alex Trachtenberg** dated 16th May 2017 at Paragraphs 14 to 16 the VAT and PAYE assessments are not contested in these proceedings but the Applicant is aggrieved by the decision of the Respondent to raise a Corporation Tax assessment. The Respondents however averred that contrary to assertions by the Applicant at Paragraph 15 of its Supporting Affidavit, the Respondent has not raised a new assessment by raising a Corporation Tax assessment.

35. According to the Respondents, withholding tax is a component of Corporation Tax and any adjustments made to a person's withholding tax credits or dues, significantly affects a person's Corporation Tax obligation and that withholding tax is deducted pursuant to the provisions of section 35 of the **Income Tax Act** and is calculated and accounted for in accordance with the provisions of the **Income Tax (Withholding Tax) Rules 2001**. It was contended that pursuant to the provisions of section 35 of the **Income Tax Act** and the **Income Tax (Withholding Tax) Rules 2001**, a person who offers management or professional services suffers deductions of its income at the rates prescribed by the **Income Tax Act** (between 5% - 20% of the income) when receiving payments from its clients or customers which deductions are directly remitted to the Commissioner of Domestic Taxes by the said clients or customers and in return the person is issued with a withholding tax certificate stating the amount deducted.

36. It was explained that when a person makes a return of income at the end of the year, the withholding taxes deducted, by its clients or customers, are supposed to be subtracted from the final tax payable as per one's self-assessment. Therefore where a person's withholding taxes deducted by its clients or customers exceed the final tax payable, a person is said to have a withholding tax credit. However, where a person's withholding taxes deducted by its clients or customers do not exceed the final tax payable, a person has to pay the taxes due. This tax is known as Corporation Tax.

37. It was averred that in the present case, upon examination of the Applicant's withholding tax claim, the Respondent established that the withholding taxes deducted and remitted on behalf of the Applicant were less than the final tax due and payable to the Commissioner, thus the corporation tax assessment.

38. It was averred that when the Respondent was directed to consider the Applicant's tax objection, the Respondent proceeded to allow the entire withholding tax claim by the Applicant as demonstrated in the objection decision and based on the documents/information availed to the Respondent during the compliance check, the Respondent determined the Applicant's turnover based on the Applicant's VAT output. They further proceeded to determine the Corporation Tax due and payable to the Commissioner from the resultant turnover derived from the VAT output and the bank statements that had been

previously obtained from the Applicant's bankers and upon making all the requisite deductions in order to arrive at a fair tax assessment, the Respondent also allowed the Applicant's withholding tax claims and established that the Applicant's withholding tax claims were less than the final tax demand.

39. It was contended that the Respondent in its objection decision has extensively elaborated how it arrived at a Corporation Tax assessment and it is evident from the foregoing that the Corporation Tax assessment was a product of reviewing the Applicant's withholding tax claim which was part of the objection filed by the Applicant. In the Respondents' view, it is not possible for one to carry out a withholding tax review without affecting the Corporation Tax liability of a person. This is because a withholding tax credit will occur where a person's corporation tax is less than the withholding tax deducted by a person's clients or customers.

40. The Respondents therefore denied that they exceeded their mandate as the use of the bank statements by the Respondent is well within its statutory mandate by dint of section 56 of the **Income Tax Act**. It was therefore averred that the assertions by the Applicant that it has filed returns and remitted all taxes due, can only be verified by the Respondent after an examination of the Applicant's records as per provisions of section 56 of the **Income Tax Act**.

41. The Respondents were of the view that the issues raised herein by the Applicant are challenging the objection decision by the Commissioner rather than disclosing a contemptuous act by the Respondents. Accordingly, these issues are best ventilated at the Tax Appeal Tribunal which can examine the merits of the objection decision and arrive at a conclusion on the accuracy of the decision. It was in fact disclosed that the Applicant had indeed filed an appeal at the Tax Appeal Tribunal being **Appeal No. 95 of 2017** hence this Application was only meant to cower and intimidate the Respondent's officers from undertaking their statutory mandate without fear or favour.

42. The Respondents therefore contended that these proceedings are brought in bad faith and are only meant to paint the Respondents in bad light and this Court ought to dismiss the application with costs to the Respondents.

43. It was submitted on behalf of the Respondents that relied on this Court's conclusion at Paragraphs 95, 97 and 99 of the judgment and submitted that they were meant to '**consider the said applicant's objection and furnish the application with its decision and its reasons therefor**' in accordance with the relevant provisions of the law, in this case, the **Tax Procedures Act, 2015** as the order of the Court did not direct the Respondent to offset the withholding tax refunds against the tax.

44. In support of their submissions the Respondent relied on sections 51(1) & (8) and 52 (1) of the **Tax Procedures Act** as well as the definition of "contempt" in section 4(1)(a) of the **Contempt of Court Act** and **Black's Law Dictionary**.

45. In Kenya, it was submitted that it is settled by judicial precedence that in order to make a case for civil contempt, an applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:-

- a. The terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
- b. The defendant had knowledge of or proper notice of the terms of the order;
- c. The defendant has acted in breach of the terms of the order; and
- d. The defendant's conduct was deliberate.

46. In the Respondents' view, although contempt proceedings are civil in nature, it is well established that an applicant must prove the elements beyond reasonable doubt, at least higher than the standard in civil cases. It is therefore necessary that in considering the above four elements, an applicants must convince

the court (**to a standard almost beyond reasonable doubt**) that the elements exists. Reliance was placed on the case of **Hakika Transport Services Limited vs. Kenya Long Distance Truck Drivers & Allied Workers Union [2015] EKLK**, where **Rika, J** cited with approval the decision of the Court of Appeal in **Mutitika vs. Baharini Farm limited [1985] KLR 229, 234** with respect to the standard of proof in contempt proceedings being higher than proof on the balance of probabilities, almost but not exactly, as beyond reasonable doubt. It was however submitted that Respondents' actions were not in breach of the terms of the order and were within the four corners of the ***Tax Procedures Act, 2015*** and were in compliance with the order of the Court. To the Respondents, the Applicant has misconstrued the Court Order or has adopted a narrow interpretation that the Respondent was directed by the Court to offset the withholding tax refunds against the tax, which was not the case.

47. As regards the Agency Notices the Respondents relied on section 96 (2) and (3) of the ***Income Tax Act*** and contended that based on the decision of the Court, which forbade the Respondents from demanding or recovering any monies from the Applicant's bankers, any act that fell short of calling for the taxes from the Applicant's bankers cannot amount to contempt. According to the Respondents, contempt, in this regard and in accordance will the definition ascribed to the word by section 4 of the ***Contempt of Court Act***, would mean that the Respondent proceeded to call for the taxes from the Applicant's bankers despite the order of the Court. However, in the present case, the Respondent by a letter dated 20th March 2017 wrote to the Applicant's bankers directing them to treat the Agency Notices as suspended which meant that no monies were to be remitted to the Respondent.

48. In the Respondents' view, whether the letters stated that the agency notices were suspended or quashed by the Court, the effect of the letters was the same, that is, no sums of money were deducted and remitted to the Respondent by the Applicant's bankers which was the very essence of quashing the agency notices. In the Respondents' view, the letters stating that the agency notices had been suspended or had been quashed by the Court, bearing the phrase "***without prejudice***", did not amount to Contempt of Court.

49. It was reiterated that the Respondent sought documents from the Applicant to assist it make an accurate assessment of the Applicant's tax liability. This decision was informed by the provisions of section 84(2) of the ***Income Tax Act*** that requires a notice of objection to be accompanied by a return of income together with all supporting documents. However, when the Applicant protested the decision of the Commissioner to call for more documents, the Commissioner through a letter dated 27th March 2017 gave the Applicant the reasons for calling for the documents and did not pursue the matter farther. To them, it is conceivable that a person who seeks to make a determination on a weighty issue may call for more information to assist the person arrive at an accurate outcome since to the Respondents, the term '***Consider***' has been defined in the Oxford Dictionary to mean, "***think carefully about (something), typically before making a decision; take (something) into account when making a judgment.***"

50. Contrary to the allegations of the applicant, the Respondents were of the view that they did not raise a fresh assessment but the assessment flowed from the consideration of the Applicant's withholding tax claim. They contended that in the objection decision dated 24th April 2017 the Respondent raised an assessment of Kshs.100,709,665/- which constituted Corporation Tax of Kshs.27,093,432, Pay As You Earn (PAYE) of Kshs.12,596,083/- and Value Added Tax (VAT) of Kshs.61,020,150/- and reiterated that Withholding Tax is a component of Corporation Tax and any adjustments made to a person's withholding tax credits or dues, significantly affects a person's corporation tax obligation. The Objection Decision communicated to the Applicant clearly demonstrates that the Applicant's withholding tax credits were considered and found to be less than the corporation tax due and payable to the Commissioner. Consequently, the Commissioner raised a corporation tax assessment for corporation tax amounting to Kshs.27,093,432/-.

51. In the Respondents' view, it is implausible that when the Court ordered the Respondent to '***consider the said applicant's objections and furnish the applicant with its decision and its reasons therefor***' it only meant that a favourable outcome for the Applicant was the only way forward in this matter. In their view, the Respondents were meant to act in a judicious manner and communicate the outcome to the Applicant without fear or favour, which the Respondent did.

52. It was submitted that the Respondents acted within the provisions of the ***Tax Procedures Act*** and the Applicant ought to have contested the corporation tax assessment at the Tax Appeals Tribunal since section 52(1) of the ***Tax Procedures Act*** provides the Applicant herein an avenue to contest and challenge the decision of the Respondent to raise a corporation tax assessment. The Respondents' understanding of the court order was that the Applicant was expected to pursue the next cause of action under the ***Tax Procedures Act***. In their view, their actions were guided by the provisions of the Tax Procedures Act, 2015, and any omissions under the said Act ought to be contested under the said Act. In this regard the Respondents relied on this Court's decision in ***Africa Management Communication International Limited vs. Joseph Mathenge Mugo & Another [2013] eKLR***, in which the Court cited with approval the decision in ***Teachers Service Commissioner vs. Kenya National Union of Teachers & 2 Others [2013] eKLR***. And urged the Court to be guided thereby in finding that the Respondents' actions are not in contempt of court and do not threaten the rule of law. The Court directed the Respondent to '***consider***' the Applicant's objection which the Respondent did in good faith and communicated its decision to the Applicant as directed by the Court.

53. The Court was therefore urged to find that the Application dated 16th May 2017 lacks in merit and the same should be dismissed with costs to the Respondents.

Determination

54. I have considered the application, the affidavits both in support of and in opposition to the application as well as the submissions and authorities cited.

55. The matter before me is an application for contempt and pursuant to section 4(1)(a) of the ***Contempt of Court Act*** contempt of Court is defined to include:

Civil contempt which means wilful disobedience of any judgment, decree, direction, order, or other process of a court or wilful breach of an undertaking given to a court.

56. In this case the contempt in question is the wilful disobedience of the judgment, decree or order of this Court. On their part the learned authors of ***Black's Law Dictionary*** define "contempt" as '***Conduct that defies the authority or dignity of a court.***'

57. In its decision that provoked these proceedings this Court as stated at the beginning of this ruling issued an order of *mandamus* directing the Respondent to, within 30 days of service of the said order on it, consider the applicant's objections and furnish the applicant with its decision and its reasons therefor. The Court further issued an order of certiorari removing into the Court for purposes of being quashed all the agency notices dated 4th October 2011 issued to Diamond Trust Bank Kenya Limited and Bank of Africa Limited which decision was thereby quashed.

58. One of the issues that has arisen before this Court is the effect of the order quashing the agency notices. According to ***Black's Law Dictionary*** the phrase "to quash" means "to abate; to annul, to make void". The same work defines "to suspend" to mean "to interrupt; to cause to cease for a time; to stay, delay, or hinder; to discontinue temporarily, but with an expectation or purpose of resumption." From the said definitions, it is clear that by quashing the earlier decisions, it meant that the same were "dead on arrival". There was therefore no question of the said agency notices resurrecting. It follows that the said decision cannot by any stretch of imagination have amounted to the suspension of the impugned agency notices. Therefore the communication by the Respondents to the bank that the agency notices had been suspended was mischievous on the part of the Respondents. By stating that the said agency notices were suspended, the Respondents created an impression that there was a possibility that the same would be resuscitated in future, which was a false impression. Having quashed the said agency notices, the same became null and void and could not be placed in a state of dormancy which is what the phrase "suspended" means.

59. The effect of the said decision was that the said agency notices could not be enforced as they had been nullified. The question that arises is whether by communicating to the respective banks that the agency

notices had been suspended, the Respondents were in contempt of the court order. By its decision the Court barred the Respondents from enforcing the said decisions. It is not contended that the said decision were in fact enforced. Whereas this Court forms a dim view of the conduct of the Respondents in not communicating the effect of the Court decision to the Banks, strictly speaking, that action does not amount to wilful disobedience of the Court order as the said agency notices were in fact not enforced. I agree that the Respondents compounded the problem by purporting to clarify the position “on a without prejudice basis”. Once an Court of competent jurisdiction issues an order, subject to its being set aside by a superior court, the enforcement of the order cannot be expressed to be “on without prejudice basis”.

60. It must however be emphasised as restated by the Court of Appeal in **Mutitika vs. Baharini Farm limited [1985] KLR 229, 234** that the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, as beyond reasonable doubt. Accordingly, I agree with **Mativo, J** in **Trusted Society of Human Rights Alliance vs. Cabinet Secretary for Devolution and Planning & 3 Others [2017] eKLR** that:

“...There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:

- i. the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;**
- ii. the defendant had knowledge of or proper notice of the terms of the order;**
- iii. the defendant has acted in breach of the terms of the order; and**
- iv. the defendant's conduct was deliberate...”**

61. In my view where the order restrains the respondent from acting in a particular manner, it is contempt to act in that manner. On the other hand if the order compels the Respondent to act in a particular manner failure to do so amounts to contempt. In this case the order was in terms of the former and it is not contended that the Respondents have acted contrary to the orders of the Court though they misinterpreted the effect of the Court order. Whereas I find that this misinterpretation, considering the Respondents’ subsequent act of properly communicating the effect of the order “on without prejudice” basis, was deliberate, I am unable to find that in the circumstances of this case the Respondents’ action amounted to contempt of court.

62. As regards the issue whether the Respondents’ decision to request for further documentation amounted to contempt, one must again consider what the effect of both orders was. By quashing the impugned decision and directing the Respondents to consider the objection, it means that the status quo prior to the earlier objection decision was to be restored and resorted to. It follows that the Respondent was expected to pick up the issue from the point of the objection. It is true that the procedure subsequent to the receipt of an objection was as provided by section 85(1) of the ***Income Tax Act*** which was repealed by section 51(8) of the ***Tax Procedures Act***. However there is no provision for calling for further documentation at that stage.

It must however be emphasized that the mere fact that a person in purporting to implement a Court order makes mistakes thereby does not necessarily amount to contempt of Court. However the aggrieved party is not barred from challenging the said decision on the grounds that the decision was either not in conformity with the decision of the Court or the law where the Court directed that the action be taken in accordance with the relevant law. That was this Court’s view in **Republic versus Public Procurement Administrative Review Board & 3 Others ex parte Fursys Kenya Limited [2014] eKLR** when it held that:

“..where a Court or Tribunal has nullified the first process and ordered that either a fresh process be undertaken or that the process be undertaken in accordance with specified

directions, the body or authority to which the directions are directed is not entitled to ignore the law or directions in its fresh undertaking. If it does so a party aggrieved would still be properly entitled to move the body which made the directions or gave the orders for the nullification of a process not undertaken in compliance with the directions or orders and would not by that mere fact fall foul of the doctrine of *res judicata*. Therefore, if in the first decision made by the Review Board, the decision of the 1st interested party was nullified and directions given on how to carry out the Tender and the 1st interested party in purporting to comply therewith fell foul of the said directions, the 2nd interested party would not be barred from moving the Respondent once again to have the second decision by the 1st interested party nullified since the second challenge arose out of the changed circumstances given rise to by the decision of the Board which circumstances arose after the first decision of the 1st interested party. To contend therefore that the 2nd interested party ought to have appealed against the second decision of the 1st interested party is to miss the point...It is therefore my view that taking into account the contentions made by the 2nd interested party the Respondent was properly entitled to and had jurisdiction to entertain the second challenge.”

63. In this case it seems that the applicant’s complaint is not that the Respondents willfully failed to comply with the Court order but that in purporting to do so, the Respondents considered irrelevant material or failed to take into account relevant ones. In my view such action can only form the basis of a fresh cause of action and cannot be elevated to contempt of court. This, in my view was the position in Anismnic Ltd -vs- Foreign Compensation Commission [1969] 2 AC 147 where Lord Reid held that at pages 213-214 *inter alia* rendered the Courts decision as follows:

“...if one party submits to a tribunal that its powers are wider than in fact they are, then the tribunal must deal with that submission. But if they reach a wrong conclusion as to the width of their powers, the court must be able to correct that- not because the tribunal has made an error of law but because as a result of making an error of law they have dealt with and based their decision on a matter with which, on a true construction of their powers, they had no rights to deal. If they base their decision on some matter which is not prescribed for their adjudication, they are doing something which they have no right to and, if the view which is expressed earlier is right, their decision is a nullity. It cannot be for the commission to determine the limits of its powers. Of course if a party submits to a tribunal that its powers are wider than in fact they are, the tribunal must deal with that submission.”

As the Court held in East African Railways Corp. vs. Anthony Sefu [1973] EA 327, the tribunal is entitled to decide a question wrongly as to decide it rightly. Where it decides wrongly it then falls upon the Court to decide whether the Court ought to interfere. However the mere fact that the decision is wrongfully decided in purported implementation of a Court order does not *ipso facto* amount to contempt of court.

64. In this case the applicant formed the view, and I am not prepared to make a determination thereon at this stage in order not to prejudice the outcome of the pending appeal to the Tax Appeals Tribunal, that it was not obliged to furnish further documentation.

65. In my view the applicant has taken the correct steps in challenging the decision before the Tax Appeals Tribunal where the dispute rightfully belongs.

66. It is therefore my finding that the facts of this case do not meet the threshold of contempt of court and I find no merit in this application.

Order

67. In the premises, I disallow the application but considering the Respondents’ conduct in wilfully misdirecting the Banks on the effect of the Court order there will be no order as to costs.

68. It is so ordered.

Dated at Nairobi this 5th day of February, 2018

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Onchwari for the ex parte applicant

Mr Nyagah for the Respondent

CA Ooko