



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CONSTITUTIONAL PETITION NO. 12 OF 2018

BETWEEN

PIUS MUNGAI NGANGA.....PETITIONER

-AND-

KENYA REVENUE AUTHORITY

COMMISSIONER GENERAL.....1ST RESPONDENT

KENYA REVENUE AUTHORITY.....2ND RESPONDENT

COMMISSIONER OF DOMESTIC TAXES... 3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

ASSOCIATED MOTORS.....5TH RESPONDENT

J U D G M E N T

1. By a Petition dated 9th April, 2018, **Pius Mungai Nganga** (“the petitioner”) sought the following orders:-

- a) declaration that the petitioner’s rights and freedoms under Article 47 of the Constitution have been infringed upon by the 1st, 2nd and 3rd respondents;**
- b) an order for compensation as assessed by the court;**
- c) payment of Kshs 100,000/=;**
- d) an order compelling the 1st respondent to reinstate the petitioner Personal Identification Number;**
- e) costs of the petition.**
- f) such further or other relief as this Honourable court may deem fit and just to grant.**

2. The petitioner’s case was that the domestic taxes department of the 1st respondent (“KRA”), made certain demands with regard to Pay As You Earn (PAYE) remittances and withholding taxes which were allegedly due from him. That pursuant thereto, KRA instituted enforcement actions against him for recovery of the said sums whereby he filed the present petition challenging the said actions.

3. The petitioner contended that, when he learnt of the alleged unpaid taxes to the 1st respondent amounting to Kshs. 600,000/=, he promptly sought full information on the same from the 1st respondent which was in vain. He denied ever having supplied the 5th respondent with any goods valued at Kshs.3 million with tax assessment. That his application for a loan from Amica Savings and Credit had been declined because his Personal Identification Number (PIN) had been cancelled due to the alleged tax arrears owing to the 1st respondent.

4. For the foregoing reasons, the petitioner contended that the actions of the 1st, 2nd and 3rd respondent were in direct contravention of **Article 47 of the Constitution**. That the court should therefore order the reinstatement of his Personal Identification Number to enable him continue with his business unencumbered.
5. The petition was opposed through replying affidavits sworn on behalf of the 1st, 2nd and 3rd respondent and the 5th respondent on 25th June 2018, respectively. The 1st, 2nd and 3rd respondent, contended that, on the basis of information on its i-Tax system, the 1st respondent established that the petitioner had VAT arrears of Kshs.600,000/= which had become due and payable from February, 2017 but had remained unpaid. It was explained that the returns made by the 5th respondent disclosed a withholding of VAT of Kshs.600,000/= on the part of the petitioner who, although registered, had failed to file his returns for that month.
6. That on 3rd August, 2017, the 1st respondent had issued a notice to all taxpayers that it would deactivate all PIN's which had not migrated to i-Tax platform and those already in i-Tax platforms but do not file returns. That, the said notice was widely published. After the material date, the 1st respondent deactivated the PINs of the defaulting taxpayers and proceeded to issue notices on how the deactivated PINs could be reactivated.
7. It was contended that the decision to deactivate PINs was a decision made under tax law and was an appealable decision as provided for under **Section 3 of the Tax Procedure Act 2015**. That a party who is dissatisfied with an appealable decision should have appealed to the Tax Appeal Tribunal as provided for under **section 52 of the Tax Procedures Act, 2015** and not to come to this court.
8. On the other hand, the 5th respondent gave a detailed account of how the petitioner had sought to purchase from its Meru Branch a motor vehicle, Isuzu FRR 33L August 2015. That the petitioner arranged the purchase to be effected through an asset finance facility from KCB Bank. After the said facility was duly approved, the 5th respondent duly transferred the said motor vehicle to the names of the petitioner and the bank in the usual manner and released the registration documents to the petitioner's bankers. That the 5th respondent raised an invoice which had a VAT element of KShs.600,000/= which was forwarded to the petitioner's bankers with the other purchase documents.
9. However, despite as aforesaid, the petitioner failed to collect the subject vehicle or get in touch with the 5th respondent until June 2016, when he intimated that he was withdrawing from the purchase due to financial constraints. That since the vehicle was already registered jointly in the names of the petitioner and the bank, the 5th respondent could not validly transfer the vehicle back to itself without the return of the registration certificate and the duly executed transfer forms executed by the petitioner and the bank. This took long to be effected whereby the time for issuing a credit note to the petitioner for the VAT of Kshs.600,000/- had already expired.
10. The 5th respondent contended that later it was able to find a willing purchaser to whom it transferred the log book and paid VAT for the same. That in view of the foregoing, the 5th respondent was not liable to pay Kshs.600,000/= as claimed by the petitioner or at all. That it was just and proper that the petitioner settles any VAT obligations arising or consequential to the aborted purchase of the motor vehicle.
11. The court directed that the parties do file and exchange written submissions but only the petitioner and the 1st, 2nd and 3rd respondent filed theirs. The 5th respondent did not. It was submitted for the petitioner that the bone of contention was the cancellation of the petitioner's Personal Identification Number (PIN). That he had visited the respondent's respective offices for explanation but the respondent had refused to render true and proper accounts and/or provide full information on the purported unpaid taxes and the assessment report. That the tax arrears demanded were fictitious and unsupported by any facts. That there had been no audit carried out by the 1st respondent and that its actions were therefore in direct contravention of **Article 47 of the Constitution of Kenya**.
12. Regarding jurisdiction, it was submitted that the petition was grounded in **Article 165 (3) of the Constitution** to the effect that subject to sub-article (5) thereof, the High Court has unlimited jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been violated/ infringed or threatened.
13. On the other hand, it was submitted for the 1st, 2nd and 3rd respondent that the 1st respondent had an obligation to ensure compliance with tax laws. That PIN suspension was one of the administrative actions that enables it to undertake this mandate. That notices were issued prior to cancellation of PINs which notices clearly provided the grounds upon which the PIN would be deactivated as well as reactivated. That the petitioner had ignored the said notices leading to deactivation of his PIN and further immediately after deactivation ignored the laid down procedures for reactivation.
14. That since the cancellation of a PIN was a decision made under a tax law which is an appealable decision, the petitioner should have appealed against that decision to the Tax Appeals Tribunal rather than come to this court.
15. I have carefully considered the affidavits on record, the rival submissions by the parties and the authorities relied on. It is not in dispute that the petitioner's PIN was cancelled by the 1st respondent. This was prompted by information in its i-Tax system which showed that the petitioner had VAT arrears of Kshs.600,000/= which had become due and payable from February, 2017. The issue therefore is, how the 1st, 2nd and 3rd respondents' decision to cancel the petitioner's PIN should be challenged.
16. The preamble to the **Tax Procedures Act No.29 of 2015** identifies it as **"AN ACT of Parliament to harmonise and consolidate the procedural rules for the administration of tax laws in Kenya, and for connected purposes."**
17. **Section 14 of the said Act** provides the circumstances under which a PIN can be cancelled. Section 3 of the Act defines an appealable decision as follows:-

"Appealable decision" means an objection decision and any other decision made under a tax law other than—

a) a tax decision; or

b) a decision made in the course of making a tax decision.

18. **Section 11,12 and 14 of the Act** makes provision as to issuance and cancellation of PINs. The decision to cancel the petitioner's PIN lies squarely within the definition of an **"appealable decision"** under the Act. **Section 52 of the Act** provides that appealable decisions are appealable to Tax Appeals Tribunal with jurisdiction to hear appeals filed against any decision made by the Commissioner under the tax laws. The decision under **section 14 of the Act** was an appealable decision.

19. Whereas it is correct **that Article 165 (3) of the Constitution of Kenya** clothes this court with wide jurisdiction to determine questions as to whether fundamental rights and freedoms in the Bill of Rights have been infringed/denied or violated, it has been held severally that where other avenues for resolutions of disputes exist, the same must be exhausted before approaching the High Court.

20. Faced with a similar situation in the case of **INTERNATIONAL CENTRE FOR POLICY AND CONFLICT & 5 OTHERS V ATTORNEY GENERAL & 4 OTHERS (2013) EKLR as referred to in the case of DIANA KETHI KILONZO & ANOTHER -V- IEBC & 10 OTHERS 2013 (2013) EKLR** the court stated as follows:-

"An important tenet of the concept of the rule of law is that this court before exercising its jurisdiction under Article 165 of the constitution in general must exercise restraint. It must first give an opportunity to the relevant constitutional bodies or state organs to deal with the dispute under the relevant provision of the parent statute. If the court were to act in haste, it would be presuming bad faith or inability by that body to act. For instance, in the case of IEBC, the court would end up usurping IEBC's powers. This would be contrarily to the institutional independence of IEBC granted by Article 249 of the constitution."Where there exists sufficient and adequate mechanism to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the court should not be invoked until such mechanisms have been exhausted....."

21. Similarly in the case of **PETER OCHARA ANAM & OTHERS -V- CONSTITUENCIES DEVELOPMENT FUND BOARD & OTHERS KISII PETITION NO.3 OF 2010 (unreported) (2011) eklr**, Makhandia J, as he then was, held:-

"The provision is couched in mandatory terms and has no exceptions and or provisos. Coming to court by way of a constitutional petition is not expected either as much as the constitution is superior law to the statute aforesaid. In view of this provision and there being no allegations or evidence that the petitioners exhausted these remedies, in bringing this petition, the petitioners have deliberately avoided the procedure and remedy provided for under the Act. They have not proffered any explanation as to why they did not refer any of the complaints they have raised to the 1st respondent as required by law. It has been stated constantly that where there exists sufficient and adequate Legal Avenue, a party ought not to trivialize the jurisdiction of the court pursuant to the constitution. Indeed, such a party ought to seek redress under the relevant statutory provision; otherwise such available statutory provisions would be rendered otiose..."

22. In the case of **STANLEY MUNGATHIA DAUDI & 4 OTHERS -V- HON CYPRIAN KUBAI KIRINGO & 3 OTHERS MERU HIGH COURT PETITION NO. 5 OF 2013**, Makau J held of **section 49 of the CDF Act 2013:-**

"The section herein above is not a formality but is mandatory. A petitioner cannot be heard to say he has come to court by way of a constitutional reference with a view to oust a specific provision of a statute. The petitioner is obliged to just exhaust all the remedy as laid down in the respective statute before bringing up a petition to the High Court. A petitioner has no choice but to comply with the specifically spelled out procedure and pursue his remedy accordingly. He cannot be heard to hide behind the constitutional provisions."

23. From the foregoing, it is crystal clear that notwithstanding that a party may be complaining about an alleged infringement of fundamental rights and freedoms, if a statute has spelled out a procedure for rectifying the alleged breach, that procedure must strictly be adhered to before approaching this court for a remedy.

24. For the foregoing reasons, it is evident that the petitioner ought to have first appealed the decision of the 2nd respondent to cancel/deactivate his Personal Identification Number (PIN) to the Tax Appeals Tribunal before lodging the present petition. I believe that although time may have now expired, there still may be avenue for him to approach the said Tribunal for extension of time and necessary remedies.

25. In this regard, I find the petition to be premature. Since the petition was s determined without considering its merits, I will struck it out with costs to the respondents.

SIGNED at Meru

A. MABEYA

JUDGE

DATED and DELIVERED at Meru this 11th day of October, 2018.

In the presence of: -

Ms. Nganga H/B for G. Ochie'ng for

1st, 2nd & 3rd respondent

Mr. Abubakar Adv H/B for Kiogora Mugambi for

Petitioner.

AG Ms. Kungu

Mr. Mutegi Adv for 5th Respondent

A. ONG'INJO

JUDGE

COURT: Copies of judgment shall be supplied to counsel by Monday 15.10.2018.

A. ONG'INJO

JUDGE