



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 445 OF 2015

CFC STANBIC BANK LTDPETITIONER

VERSUS

THE KENYA REVENUE AUTHORITY.....1ST RESPONDENT

COMMISSIONER OF DOMESTIC TAXES.....2ND RESPONDENT

THE CABINET SECRETARY,

NATIONAL TREASURY.....INTERESTED PARTY

JUDGMENT

1. In its amended petition dated 23rd October 2015, the petitioner herein, a limited liability company incorporated in Kenya sued the respondents herein seeking the following orders:

- a) A declaration that the waiver for penalties and interest that was given by the National Treasury on the 21st of June 2013 and communicated to the 2nd respondent by a letter dated 3rd July 2013 is binding on the respondents.
- b) A declaration that, to the extent that the respondents have contended that the tax exemption that was given by the National Treasury on the 21st of June 2013 and communicated to the 2nd respondent by a letter dated 3rd July 2013 was of no effect, they breached the petitioner's right to property.
- c) An order that respondents refund the petitioner the sum of kshs 9,248,032 together with simple interest at 14% per annum from 3rd of July 2013 until payment in full.
- d) Any other relief this honourable court deems fit.
- e) Costs of and incidental to this petition.

The petitioners case

2. The petitioner's case was that the National Treasury, in the exercise of its authority under Section 37(3) and 94(4) of the Income Tax Act and Section 15(3) of the VAT Act, granted it a 50% waiver in respect to interest and penalties that were assessed following the petitioner's tax audit of income from the year 2008 to 2010 which waiver was communicated to the parties in a letter dated 3rd July 2013.

3. The petitioner's main contention was that since the amount of interest and penalties payable by it was assessed at the sum of Kshs. 122,471,894, a 50% waiver meant that it was supposed to pay Kshs. 61,235,924 however, because it had already paid a total of Kshs. 70,583,957 prior to the waiver, it was therefore entitled to a refund of Kshs. 9, 248,032 which he now seeks through this petition. The petitioner argued that the respondents disregarded the waiver based on the pendency of High Court Constitutional Petition No. 566 of 2012 and adds that the respondents' action imperils the petitioner's right to the money that is the subject of the waiver. The petitioner further stated that it is entitled to protection of its fundamental constitutional rights under Articles 20, 22, 23, and 40 of the Constitution.

4. In his submissions during the hearing of the petition, **Mr. Ogunde**, learned counsel for the petitioner, submitted that the respondents had,

in their submissions conceded that indeed there was a 50% waiver and stated that the only issue in dispute was the implication on the said waiver. Counsel submitted that there was a specific waiver for a specific liability which was not a moving target.

5. It was further submitted that the dispute before court was not a tax dispute but a constitutional issue and that the issue was whether the respondent can overrule the decision of the Cabinet Secretary of the National Treasury. Counsel conceded that the petitioner had previously challenged the assessed tax in a different petition which was dismissed but that the interested party later granted the 50% waiver.

6. Counsel submitted that the respondents' disregard of the waiver is illegal and violates the provisions of Article 40 and 47 of the Constitution. Counsel cited the case of **Dry Associates vs. Capital Markets Authority and Another Nairobi Petition No. 328 of 2011** (unreported) wherein the court observed that relief for administrative grievances is no longer left to the realm of common law or judicial review but is to be measured against the standards established by the Constitution.

7. The petitioner maintained that the respondents' disregard of the waiver reeks of unreasonableness and unfairness thereby failing the constitutional test laid out in Article 47 of the Constitution as it deprives the petitioner of a legally accrued property right over the sums of money waived. The petitioner argued that the respondents did not give any reasons for disregarding the waiver and added that the waiver was not a substantive issue in the earlier petition that had been dismissed.

The respondents' case

8. The respondents opposed the petition through the replying affidavit of **LEMMY MAKAZI** sworn on 9th March 2017 in which he avers that on 20th June 2011, the 2nd respondents audit team raised a tax assessment after which the petitioner paid up all the principal taxes before applying for a waiver of interest and penalties through a letter dated 5th August 2011 but that no waiver was granted by the treasury after which a demand for the same was made on 14th November 2012.

9. He further states that the issue of waiver of interest and penalties was canvassed in Petition No. 566 of 2012 (hereinafter "**the earlier case**") through an application in which a ruling was delivered on 11th September 2015. He attached a copy of the judgment and ruling in the earlier case as annexures "**LM1**" and "**LM2**". It was therefore the respondent's position that the instant petition is res judicata having been the subject of the earlier case.

10. He confirms that by a letter dated 11th April 2014, the petitioner wrote to the 1st respondent claiming that the 1st respondent owed it Kshs.9, 248,032 but that through a letter dated 26th May 2014, the 1st respondent declined to refund the amount to the petitioner.

11. He further confirms that through a letter dated 3rd July 2013, that the Treasury later granted a waiver of 50% on outstanding penalties and interest but states that since the letter was written during the pendency of the earlier suit, the waiver could not apply to an issue that was still before the court as the question of whether or not the taxes were actually paid was not yet determined.

12. In her submissions during the hearing, **Miss Lavuna**, learned counsel for the respondents submitted that the 50% waiver on interest and penalties was only in respect to the outstanding penalties and interest and explained that the term outstanding related to the amount that had not been paid and could not be extended to include a refund for penalties that had already been paid. Counsel referred to the judgment of Lenaola J. (as he then was) in the earlier case in and observed that the learned judge upheld the respondents' decision to charge the tax.

13. On the alleged violation of Articles 40 and 47 of the Constitution, counsel submitted that the respondent adhered to the legal procedure for demanding the taxes due and that such a demand does not translate into depriving the petitioner of any property.

14. Counsel further submitted that the instant petition is purely a tax dispute and not a constitutional issue.

15. In rejoinder, **Mr. Omino**, learned counsel for the petitioner, submitted that the waiver was to take effect from the time the application for waiver was made which was 25th April 2012 while tax payment was done on 1st December 2012. Counsel therefore maintained that the petitioner was entitled to a refund or a tax credit for the payment following the 50% waiver granted by the Treasury which waiver had not been set aside.

Determination

16. I have considered the pleadings filed herein together with the submissions made by the parties respective advocates I find that the issue that present themselves of determination are:

- a) **Whether the petition falls within the jurisdiction of this court.**
- b) **Whether the petition is res judicata.**
- c) **Whether the petitioner is entitled to the orders sought.**

Jurisdiction

17. As was held in the case of **Owners of Motor Vessel 'Lilians' Vs Caltex Oil Kenya Ltd 1989 K.L. R 1**, the jurisdiction is everything and once a court has no jurisdiction, it has no power to make one more step. That is why issues of jurisdiction are usually raised at the earliest stage of the proceedings because without jurisdiction, the court must down its tools.

18. In the present case, the respondents argued that this was purely a tax dispute that did not all within the purview of Constitutional Court while the petitioner maintained that the case raises the constitutional issue of violation of its rights under Articles 40 and 47 of the Constitution. The rival arguments on jurisdiction call for a determination or whether or not the present petition raises constitutional issues.

19. Under Article 165 (3) of the Constitution, the High Court has unlimited original jurisdiction, subject to Clause (5), in both civil and criminal matters. The various administrative divisions of the High Court have the same powers of the court under Article 165 of the Constitution. Despite the various divisions of the High Court and the general competence of the divisions in all matters that the High Court may hear and determine, the Constitutional Division may only address other civil and criminal claims where “parties so invoke these areas of law.(See Lenaola , J. as he then was in Isaac Aluoch Polo Aluochier v Kenya National Commission on Human Rights and 4 Ors [2016] e KLR). The Constitutional court will, however, defer to the other divisions of the court where the matters raised fall under the branches of private law and may effectively be resolved by used of the mechanism and court procedures prescribed under the respective substantive law.

20. In the case of Gabriel Mutava & 2 Ors –vs- Managing Director Kenya Ports Authority & Anor.[2016]eKLR the Court of Appeal discussed the conventional judicial policy as established by the courts over time and now settled that constitutional litigation is not open for every claim which may properly be dealt with under the alternative existing mechanism for redress in civil or criminal law as follows:

“Then there is the case of Speaker of National Assembly v James Njenga Karume [1992] e KLR, where this court again emphasized:-

“....In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed....”

Of course, violations of constitutional rights may nonetheless be different, and more serious than the violations of statutory or contractual rights. There is no clear demarcation however, where one violations begins and ends, and when one violation should attract desperate remedies. In employment matters, such as was the case here, the contract of employment should have been the entry point. The terms and conditions of employment in the contract, govern the employment relationship, except to the extent that the terms are contrary to the law; or have been superseded by statute. Certainly invoking the constitutional route in the circumstances of this case was misguided. The Constitution should not be turned into a thoroughfare for resolution of every kind of common grievance.

A corollary to the foregoing is the principle of constitutional avoidance. The principle holds that where it is possible to decide a case without reaching a constitutional issue that should be done. In the case of Communications Commission of Kenya & 5 Others v Royal Media Services & 5 Others, Petition No. 14, 14A, B & C of 2014, the Supreme Court delivered itself thus on the issue:-

“[256] The appellants in this case are seeking to invoke the “principle of avoidance”, also known as “constitutional avoidance”. The principle of avoidance entails that a court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in S v, Mhlungu, 1995 (3) SA 867 (CC) the Constitutional Court, Kentridge AJ, articulated the principle of avoidance in his minority as follows [at paragraph 59]:

“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue that is the courts which should be followed.”

“ [257] Similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936)).”

In saying all these, we are not oblivious to the fact that a party is entitled to sue under the Constitution even if there is an alternative remedy, and or other mechanism for the resolution of the dispute. However, it has since emerged on the authorities that constitutional litigation is a serious matter that should not be sacrificed on the altar of all manner of frivolous litigation christened constitutional when they are not and would otherwise be adequately handled in other legally constituted forums. Constitutional litigation is not a panacea for all manner of litigation. We reiterate that the first port of call should always be suitable statutory underpinned forums for the resolution of such disputes.”

21. The three Judge High Court bench in Rose Wangui Mambo & 2 Others v Limuru County Club & 17 Others [2014] e KLR while accepting that the Bill of Rights had horizontal application to bind private individuals as well as state actors, took the same view as follows:

“In this regard, we must hasten to place a caveat that horizontal application of fundamental rights and freedoms is not an open cheque and whether and to what extent the court will exercise jurisdiction will be informed by the circumstances of each individual case. For instance, if there are alternative civil or other remedies available to a party, then courts may decline to exercise jurisdiction. In this case of Isaac Ngugi v Nairobi Hospital & 3 others (supra) the court held as follows regarding the application of the Constitution to private relationships:

“ [22] The issue whether the Bill of Rights applies horizontally or vertically is beyond peradventure. (See Satrose Ayuma and 11 others v Registered Trustees of Kenya Railway Staff Retirement Benefits Scheme Nairobi Petition No. 65 of 2010[2013] e KLR). The real issue is whether and to what extent the Bill of Rights is to apply to private relationships. The question as to whether it is to be applied horizontally or just vertically against the state depends on the nature of the right and fundamental freedom and the circumstances of the case.....”

[23] For instance, the court will be reluctant to apply the Constitution directly to horizontal relationships where specific legislation exists to regulate the private relations in question. In other cases, the mechanisms provided for enforcement are simply inadequate to effectuate the constitutional guarantee even though there exists private law regulating a matter within the scope of application of the constitutional right or fundamental freedoms. In such cases the court may proceed to apply the provisions of the constitution directly.” [Emphasis added]

22. The question that therefore, arises is whether the petitioner’s constitutional rights have been violated by the respondents. Or put another way, is there a genuine constitutional petition before the court or is it, as submitted by the respondents, purely a tax dispute clothed as constitutional petition?

23. My finding on the above question is that the main bone of contention in this petition is the claim for refund of money paid by the petitioner in respect to interest of penalties on taxes following a waiver of the same by the interested party. To my mind, therefore and going by the dictum in the above cited cases, I find that this is a matter that could adequately and properly be handled by the tax Appeal Tribunal or the Tax/Commercial Division of this court. The petitioner did not tender evidence to show that the mechanisms for the enforcement of its rights under the tax laws are inadequate or ineffectual. It is therefore my finding that this court was not the proper forum for the petitioner to file its case.

24. My above findings on the issue of the jurisdiction of this court notwithstanding, I am still minded, in the wider interest of justice for all the parties herein, to make a finding on the merits of the petitioners case and whether its rights under Article 47 and 40 of the Constitution were violated by the respondents. Article 40 provides for the protection of the right to property while Article 47 deals with fair administrative action. It was the petitioner’s case that its right to property was violated when the respondents declined to refund to it the sum of Kshs. 9,248,032 following the waiver on outstanding penalties and interest.

25. I have perused the impugned waiver letter dated 3rd July 2013 and I note that it states, in part, as follows

After due consideration, the Cabinet Secretary for the National Treasury on 21st June 2013 approved waiver of 50% (Fifty percent) of the outstanding penalties and interest owed by M/S CFC Stanbic Bank in accordance with Section 15(3) of the VAT Act, and Section 37(3) and 94(4) of the Income Tax Act.

26. I note that it was not in dispute that the petitioner paid the sum of Kshs. 70,583,957 in respect to interest and penalties on 1st December 2012 which was several months before the waiver was granted in July 2013. It is to be noted that the waiver was only in respect to outstanding interest and penalties.

Blacks Law Dictionary defines the word ‘outstanding’ as follows:

“Unpaid uncollected”

27. Going by the above definition of the word ‘outstanding’ I find that the 50% waiver granted to the petitioner was only applicable to penalties and interest that had not been paid as at the time the waiver letter was written being 3rd July 2013 and cannot therefore be interpreted to relate to the sums of money that had already been paid by the petitioner several months before the waiver was granted. It is therefore my finding that the claim for a refund of Kshs. 9,248,032 is misplaced, unfounded and unmerited in the circumstances of this case. Similarly the petitioner’s argument that it had applied for the waiver much earlier April 2012 and is therefore entitled to a refund does not hold any water in view of the fact that the waiver letter is clear on the waiver decision was made in June 2013 and cannot therefore operate in a retrospective manner.

28. Even though the petitioner claims that its rights under Articles 40 and 47 of the Constitution were violated, I am not satisfied that it established the manner of such violation. The undisputed facts of the case are that the respondents carried out an audit of the taxes that were to be paid by the petitioner. The petitioner did not challenge the outcome of the audit or the manner in which it was conducted so as to justify its claim that Article 47 of the Constitution on fair administrative action was violated. Following the audit and the demand for the payment, the petitioner applied for waiver of the penalties and interest through a letter dated 25th April 2012 which application was at first rejected before being allowed on 3rd July 2013. The petitioner did not claim that there was anything unlawful in the manner in which the interested party exercised its statutory mandate in accepting or rejecting the request for the waiver. For the above reasons, I find that the claim on violation of Articles 40 and 47 of the Constitution was not proved.

Res Judicata

29. It was not disputed that there existed an earlier case between the same parties and over the same subject matter of taxes being HC Petition No. 566 of 2012 which case was on 7th March 2014 dismissed by Lenaola J(as he then was).

The doctrine of *res judicata* is set out in the **Civil Procedure Act** at **Section 7** as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

30. The **Civil Procedure Act** also provides explanation with respect to the application of the *res judicata* rule. Explanations 1-3 are in the following terms:

“Explanation. (1) —The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation.(2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3) —The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.”

31. Arising from the above provisions and explanation, the doctrine implies that for a matter to be *res judicata*, the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been determined on merits by a Court of competent jurisdiction. In the celebrated English case of ***HENDERSON VS HENDERSON (1843-60) ALL E.R.378***, the court observed thus:

“...where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”

32. It therefore follows that a Court will as well invoke the doctrine in instances where a party raises issues in a subsequent suit, wherein he/she ought to have raised the issues in the previous suit as between the same parties. In the instant case, the petitioner did not offer any explanation on the special circumstances that prevented it from canvassing the issue of the tax waiver in the earlier case and it is therefore my finding that the instant petition offends the *res judicata* doctrine.

33. Having regard to my findings and observations in this judgment, I find that the instant petition is not merited and the order that commends itself to me is the order to dismiss it with no orders as to costs.

Dated, signed and delivered in open court at Nairobi this 7th day of November 2018.

W. A. OKWANY

JUDGE

In the presence of:

Miss Segal for the 1st respondent

Miss Omamo for the petitioner

Court Assistant – Kombo