



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION
MISC. APPLICATION NO. 325 OF 2014

**IN THE MATTER OF BY SAMUEL KIMONDO THEURI BY WAY OF JUDICIAL REVIEW
FOR ORDERS OF CERTIORARI PROHIBITION AND MANDAMUS DIRECTED TO THE
KENYA REVENUE AUTHORITY**

AND

IN THE MATTER RENTAL INCOME TAX

BETWEEN

THE REPUBLIC.....APPLICANT

VERSUS

COMMISSIONER FOR DOMESTIC TAXES.....1ST RESPONDENT

KENYA REVENUE AUTHORITY.....2ND RESPONDENT

KENYA COMMERCIAL BANK LIMITED.....3RD RESPONDENT

EX PARTE: SAMUEL KIMONDO THEURI

JUDGEMENT

Introduction

1. By a Notice of Motion dated 16th September, 2014, the *ex parte* applicant herein, **Samuel Kimondo Theuri**, seeks the following orders:

1. That certiorari do issue to remove to this honourable court for purposes of being quashed and forthwith quash the decision of the Kenya Revenue Authority (Commissioner for Domestic Taxes-Medium and Small Tax payers Department) contained in his Agency Notices dated 3rd March 2014 and 18th July 2014 together with the notice under Section 96 of the Income Tax Act dated 22nd July 2014 requiring he 3rd Respondent to remit to the 1st Respondent all the Applicant's money deposited in Kenya Commercial Bank Limited.

2. That Prohibition do issue prohibiting the Respondents from withdrawing or causing the withdrawal of the Applicant's money deposited in his account with the 3rd Respondent.

3. That Mandamus do issue to compel the 1st Respondent to refund to the Applicant and amount of money which may have been withdrawn from his account held with the 3rd Respondent.

Ex Parte Applicant's Case

2. The application was based on the following grounds:

1. On 3rd March 2014 the Applicant received a notice of assessment requiring him to pay rental income tax in the sum of Kshs 8,190,476/=.

2. The said assessment was done as a result of review of the income tax returns and rent schedules submitted by the Applicant to the 1st Respondent.

3. That review undertaken by the 1st Respondent was unilateral and arbitrary as the Applicant was not heard.

4. The said assessment contradicts the Applicant's self assessment which reflects the correct position of the Applicant's rental income and the tax payable therefor. The 1st Respondent's assessment is exorbitant unconscionable and overly oppressive.

5. The Applicant duly lodged an objection on 25th March 2014 under Section 84 of the Income Tax Act (Cap 470) through his then Accountants M/s Ndambuki Associates but the objection was rejected on the ground that it offended the provision of Section 84(2) of the Income Tax Act (Cap 470).

6. The Applicant then instructed another firm of accountants Flexi Consultants Limited who neglected to provide the requisite services with the result that the applicant received a Demand Notice on 14th May 2014 for the sum of Kshs 9,173,888/=

7. The correct amount of Tax payable by the applicant for years ended 2008-2012 and the year 2013 is that which is computed in the applicant's self assessment. the tax arrears for the years 2008 and 2012 had regularly been paid but a subsequent computation disclosed arrears of Kshs 1,022,315/= which the applicant paid by two instalments of Kshs 500,000/= and Kshs 522,315/= on 20th May and 24th July 2014 respectively. The 2013 tax amounted to Kshs 364,568/= and was paid on 18th June 2014.

8. Notwithstanding the payment as herein above set out the 1st Respondent vide his Agency Notice dated 18th July 2014 directed the 3rd Respondent to freeze the applicant's account.

9. The 1st Respondent vide his letter dated 22nd August 2014 demanded the payment of all the applicant's money deposited in the Applicant's account with the 3rd Respondent.

10. The 1st Respondent's treatment of the applicant is arbitrary, oppressive and unjust and ought to be stopped as the case may be, restitution made by an order of this honourable court.

3. According to the Applicant, he regularly paid his rental income tax as per individual returns for the years 2008 to 2012 (both inclusive) but a subsequent audit disclosed arrears of Kshs 1,022,315/= for the same period which he paid in two cheques of Kshs 500,000/= on 20th May and Kshs 522,315/= on 24th

July 2014. With respect to 2013, it was averred by the Applicant that he paid the sum of Kshs 264,568/= by cheque on 18th June 2014.

4. However, on 3rd March 2014, he received a notice of tax assessment from the 1st Respondent of Kshs 8,190,476/= which assessment contradicted his returns and was not supported by any factual evidence. Thereupon, he handed over the assessment to his accountants to lodge the necessary objection but later learned that the objection filed by the said accountants was rejected for being defective and offending the provisions of section 84(2) of the **Income Tax Act** (Cap 470) (hereinafter referred to as “the Act”). His effort to rectify his objection through another firm of accountants was not successful as this second firm of accountants neglected to do what was required of them.

5. It was the Applicant’s case that he however had made returns for the years 2008 to 2012 and 2013 and duly paid the rental income tax properly due and payable.

6. Despite that the 1st Respondent’s froze his account and demanded from the 3rd Respondent to remit all the money deposited in his account with the 3rd Respondent.

7. In the Applicant’s view, the 1st Respondent’s move to forcibly freeze his bank account amounted to double taxation and was thus wrongful as the said demand was made notwithstanding that the said Respondent had given him leave in writing to lodge an appeal and the period stipulated within which to lodge the appeal had not expired.

8. These averments were reproduced by the Applicant in his submissions filed herein.

Respondent’s Case

9. In response to the application the Respondent averred that it is established under the **Kenya Revenue Authority Act**, Cap 469 Laws of Kenya and under section 5(1) thereof, it is an agency of the Government for the collection and receipt of all revenue. Further, under section 5(2) with respect to the performance of its functions under subsection (1), it is required to administer and enforce all provisions of the written laws set out in Part 1 and 2 of the first Schedule for the purposes of assessing, collecting and accounting for all revenues in accordance with those Laws. It disclosed that under Part 1 of the First Schedule to the Act, it enforces the **Income Tax Act** (hereinafter ‘ITA’) Cap 470 Laws of Kenya.

10. According to the Respondent, for purposes of obtaining full information in respect of the tax liability of any person or class of persons or any other purposes of ascertaining correct declaration of taxes under section 56(1) of the Act, the Commissioner and his authorized agents may by notice in writing require the production for examination at such time and place as he may specify, any records, books of accounts, statements of assets or other documents which he may consider necessary for such purposes; and/or the production forthwith for retention for such period as may be reasonable for examination thereof, any records, and books of accounts and other documents which he may specify.

11. It was averred that acting on this authority the Respondent issued the Applicant with a notice of compliance check to confirm whether the Applicant was in compliance with the law as per section 56 of the Act vide a letter dated 22nd February 2013. However, the Applicant failed to produce all the records as requested in the notice and only availed a copy of Income Tax returns for the Year 2011 and a cheque of Kshs 50,000 dated 29th April 2013. On the 25th of September 2013 the Respondent issued a notice under section 56 of the Act requesting Equity Bank to avail the Applicants’ bank statements and accounts opening documents and the said Bank sent the Respondent the account opening documents and a bank statement covering the period between 12th January 2013 when the account was opened to 30th August 2013.

12. According to the Respondent, the audit of the documents and records obtained revealed that the Applicant had not fully complied with the requirements of the Act and after that tax due was computed from the deposits made in the taxpayers Equity Bank Account Number 0600298681887 and credits given

for income declared as per his tax returns for the period 2006 to 2012. Subsequently on the 3rd of March 2014 a Notice of assessment was issued under section 73 of the Act based on the computations done and the taxpayer was informed of his right to object to the assessment within 30 day.

13. Vide a letter 25th March 2014 the Applicants through their agents Ndambuki & Associates responded to the Notice of assessment and requested that they be given additional time preferably (3) weeks to be able to review the issues raised and advice on the way forward. After the three (3) weeks had lapsed without lodging an objection the respondent on the 29/4/2014 issued a notice of tax demand for the year 2008-2012 as required under the departmental debt and compliance procedures a demand which the Applicant failed to respond to as well as a subsequent reminder dated 5th May 2014 giving him a further seven (7) days.

14. It was averred that vide a letter dated 16th July, 2014 the respondents gave an immediate demand for the taxes assessed and when the Applicant failed respond to all the reminders and demand notices the respondent issued an Agency Notice to the applicants Bankers, Equity Bank and Kenya Commercial Bank dated 18th July 2014. On receipt of the agency notice, the applicant raised a late objection on the 24th July 2014 which late objection was acknowledged on the 1st of August 2014 by way of a letter indicating that the application had been rejected on the grounds that it was received after 30 days from the notice of assessment; no evidence was given that the applicant had been misadvised by his auditor; and that all correspondences had been sent to the applicant.

15. To the Respondent, the assessments in this case were based on deposits made into the taxpayers Equity Bank Account which were then compared with the Rental income declared in his Income Tax Returns for the period under review and the variance was then treated as undeclared income. It was contended that the Applicant's self assessment for the years 2008 to 2012 were found to be incorrect after establishing undisclosed rental income as was computed from the bank statements. Besides, the fact that the applicant did not lodge a notice of objection to those assessments within the required time line is an adequate testament of his acknowledgement of the validity of the assessments as provided under section 73 of the Act.

16. In the Respondent's view, the applicant has not stated grounds upon which the Respondent or its agents demonstrated bias, bad faith and improper motive in his dealings with him. To the contrary, all these facts were brought to the attention of the Applicant before and after raising additional assessments thereof as demonstrated in the correspondences exchanged with the Applicant and the minutes of meetings held by the parties. Contrary to the Applicants allegations, the Respondent averred that the applicant was provided with a breakdown and the basis of the tabulation of the taxes due, the basis years of income they related to after the audit and subsequent demand letter.

17. The Respondent therefore believed that the demand for taxes and the issuance of Agency notices were legitimate because the Taxes were due and owing to the Respondent.

18. To the Respondent, an order of certiorari cannot issue to quash a notice made pursuant to statutory provisions and regulations under an Act of Parliament, more specifically the Act and the applicant failed to exhaust all the avenues of dispute resolution available under the Act and slept on his rights before rushing to court. The Respondent denied that it has immense powers to enforce the assessed taxes without recourse to the law but explained that if the Applicant had lodged the notice of objection within time, all taxes that were demanded would be stood over to nil and at that stage, taxes in dispute could not be enforced until the matter was determined either by the Applicant and the Respondent by agreement, by the Local Committee or the Court.

19. To the Respondent, an order of prohibition cannot issue against the respondent since the court cannot prohibit what has been sanctioned by statute as the respondent is empowered by law to issue additional assessments for purposes of enforcing compliance with revenue laws and for purposes of safeguarding Government Revenue. To the Respondent, the jurisdiction of this Court under judicial review does not extend to the merits with which the decision was executed, but only extends to the decision making

process of which no fault has been demonstrated by the applicant on the factors leading to the issuance of additional assessments. It was its position that its actions were all within the purview of the law and having fully complied with the procedures thereof as elaborated in the foregoing paragraphs and being actions taken in exercise of its statutory duties.

20. To the Respondent, the applicant's application can therefore not stand, as it is made in bad faith, completely lacking in merit and an abuse of the court process and if the orders sought are allowed, there will be substantial loss to the government in terms of revenue hence it is only fair and just in the circumstances to allow the respondents to undertake its statutory duties unhindered and to safeguard much needed government revenue.

Determination

21. 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.

22. Whereas this Court is not entitled to question the merits of the decision of taxing authority, that authority must exercise its powers fairly and there ought to be a basis for the exercise of such powers. A taxing authority is not entitled to pluck a figure from the air and impose it upon a taxpayer without some rational basis for arriving at that figure and not another figure. Such action would be arbitrary, capricious and in bad faith. It would be an unreasonable exercise of power and discretion and that would justify the Court in intervening. In **Republic vs. Institute of Certified Public Accountants of Kenya ex parte Vipichandra Bhatt T/A J V Bhatt & Company Nairobi HCMA No. 285 of 2006**, it was held that in the absence of a rational explanation, one must conclude that the decision challenged can only be termed irrational within the meaning of the *Wednesbury* unreasonableness, was in bad faith and constitutes a serious abuse of statutory power since no statute can ever allow anyone on whom it confers a power to exercise such power arbitrarily and capriciously or in bad faith.

23. In this case the issue for determination is whether the applicant was afforded an opportunity to object to the assessment and if the same was done, then whether the Respondent followed the due process subsequent to the said objection. If such due process was not followed the next issue is whether in the circumstances of this case, the process alleged by the applicant was applicable.

24. It is not in contest that the Applicant was served with a letter indicating that a sum was due. Whether or not that sum was due is not for this Court to determine. As was held in **Pili Management Consultants Ltd vs. Commissioner of Income Tax, Kenya Revenue Authority Civil Appeal No. 154 of 2007**:

“As the trial Judge rightly pointed out, the jurisdiction of a court in judicial review is concerned primarily with the decision making process not with the merits of the decision. For the Judge to be able to conclude that no tax was due from Pili for the year 2004, the Judge would have to determine first whether the money in Pili's account at the Bank was or was not liable to tax. No material was placed before the Judge on that point... it was not the role of the superior court nor of this Court to determine the correctness or otherwise of the tax which Pili was liable or whether Pili was liable to pay any tax at all for the year 2004.”

25. However the Applicant was expected to lodge an objection to the assessment within 30 days of the date of the assessment thereof. Again it is clear that this was not done. Although the Applicant contends that the Respondent permitted it to lodge the appeal out of time there is no evidence to that effect. As was held in **Nairobi H.C. Misc. Civil Application No.81 of 2011; Republic vs. The Commissioner of Customs Services; Ex-parte: SDV Transami**:

“It is therefore my view that the decision envisaged under Section 229(1) was made on 17th August 2010. The demand letter dated 30th December 2010 was a follow up to the previous demand made upon the Applicant and the interested party. Once the Respondent had communicated in August 2010 that tax was due, it was incumbent upon the Applicant to lodge an appeal within the stipulated or specified period under section 229. That was not done.

Therefore it was not open or available to the Applicant to lodge an appeal 5 months after the offensive decision was made. It was not within the jurisdiction and powers of the respondent to entertain an appeal outside the time allowed.”

26. Although the above decision was in respect of a different legal regime, it is my view that the principles are the same.

27. Section 84 of the Act provides that:

(1) A person who disputes an assessment made upon him under this Act may, by notice in writing to the Commissioner, object to the assessment.

(2) A notice given under subsection (1) shall not be a valid notice of Objection unless it states precisely the grounds of objection to the assessment and is received by the Commissioner within thirty days after the date of service of the notice of assessment; but if the Commissioner is satisfied that owing to the absence from Kenya, sickness or other reasonable cause, the person objecting to the assessment was prevented from giving the notice within that period and there has been no unreasonable delay on his part, the Commissioner may, upon application by the person objecting, and after deposit by him with the Commissioner of so much of the tax as is due under the assessment under section 92, or such part thereof as the Commissioner may require, and the payment of any interest due under section 94, admit the notice after the expiry of that period and the admitted notice shall be a valid notice of objection:

Provided that the objection made within the thirty days shall not be valid unless it is accompanied by a return of income together with all the supporting documents, where applicable.

(3) A person aggrieved by the refusal of the Commissioner to admit a notice of objection under subsection (2) may, on depositing with the Commissioner if he so requires, the whole or such part as the Commissioner may require of the amount of tax assessed under the assessment to which objection is made and on paying any interest due under section 94, appeal against the refusal to a local committee, whose decision shall be final

28. In the absence of a valid objection having been lodged, the sum demanded in the assessment became payable under section 88(1)(a) of the Act.

29. In the absence of a valid objection, the Respondent was in my view entitled to issue the agency notices under section 96 of the Act and cannot be faulted for having done so.

30. Although the Applicant contended that he was not treated fairly, the record is clear that there were correspondences exchanged between the parties in respect of the subject assessment. A similar contention was raised before **Majanja, J** in **H.C.Misc.Civil Appl. No. 449 of 2001; Republic –vs- KRA; Ex-parte: Total Kenya Limited**, and the learned Judge responded in the following terms:

“I agree with Counsel for the Respondent that the exchange of correspondence in this instance provided the Applicant an opportunity to be heard and to present its case. That opportunity was afforded from the time the first demand was issued on 08th February 2011 and this opportunity was available until at least 04th May 2001.”

31. Similar circumstances prevailed in the instant application.

32. In the premises I find no merit in this application.

Order

33. Consequently, the Notice of Motion dated 16th September, 2014 fails and is dismissed with costs to

the Respondent.

Dated at Nairobi this 9th day of May, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Mulecho for Mr Mulwa for the applicant

Cc Mutisya