REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 44 OF 2014

IN THE MATTER ARTICLES 22 AND 165 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLE 10, 19, 20, 22, 23, 25, 27, 35. 47, 50, 159 AND 160 OF THE CONSTITUTION OF KENYA

BETWEEN

BELLA VISTA RESTAURANT MOMBASA LIMITED……APPLICANT

AND

KENYA REVENUE AUTHORITY……..……RESPONDENT

RULING

INTRODUCTION

1. The petitioner, Bella Vista Restaurant Mombasa Limited, who describes itself as a registered tax payer filed a constitutional petition dated 10th July 2014 seeking declarations that its constitutional rights had been violated in the process of assessment of tax against it in the sum of 61,144,681 for VAT, Withholding Tax and Income Tax and distraint for tax and for the quashing of the execution of the tax assessment and compensation for breach of constitutional rights. The petition asserts that the petitioner's constitutional rights under had been violated by the respondents acts in the process of the assessment of tax and enforcement thereof. The gravamen of the complaint is that the respondent had commenced enforcement or execution process for the recovery of the assed tax without hearing the petitioner's objections to the assessment in contravention of the rights to equal protection, fair administrative action and fair hearing, respectively under Articles 10, 27, 47 and 50 of the Constitution and the respondent had failed to return the books of accounts and relevant tax records provided by the petitioner for purposes of assessment in contravention of Article 35, of the Constitution. The petition is yet to be heard.

APPLICATION

2. By a Notice of Motion application dated 10th July 2014, the petitioner principally sought an order as follows:

That pending hearing and determination of the petition there be a stay of enforcement/execution process commenced on 3rd July 2014 for the recovery of impugned assess taxes as against the Petitioner.

3. The application and the Petition was based on the grounds that:

i. In exercise of statutory powers under the Income Tax Act, Cap 470 and Value Added Tax Act, Cap 476 the Respondent carried out an in-depth audit of the Petitioner consequent to which an assessment of taxes of Kshs.61,144,681/= was made as payable.
ii. In exercise of its rights the Petitioner duly lodged its objections to the assessed taxes under both statutes;
iii. Pursuant to the objections afore-stated the legal requirements under the Income Tax Act and the Value Added Tax Act dictates that deemed that the same were to be heard and determined by the Commissioner and/or a duly constituted and convened committee;
iv. No such hearing has taken place;
v. No decision of the Commissioner and/or local committee has been made in relation to the objections and served on the parties as required.
vi. Proceeding with the enforcement/execution process in disregard of the pending process of a hearing by local committee is in violation of Article 10, 27, 47 and 50 of the Constitution.
vii. Despite examination and assessment having been made the Respondent has failed to return to the books of account and tax records so as to enable the Petitioner verify in detail the assessed taxes made which is in breach of Article 35 of the Constitution,
viii. The right to a fair hearing under Article 50 of the Constitution cannot be qualified or limited.
ix. Enforcement if not restrained/stayed shall paralyze the Petitioner's operations.

4. The application was supported by an affidavit sworn by **JAMES G. KINGORI** dated 10th July 2014 in which he deponed that:

i. On 25th January 2013 the Respondent issued and served the Petitioner's auditors notice of intention to audit the Petitioner under section 56 of the Income Tax Act and Value Added Tax.
ii. The Respondent through Court officer impounded the Petitioners books of accounts and tax records which they continue to retain in their possession despite requests for release.
iii. The Respondent in its audit assessment came up with a colossal figure of Kshs. 61, 144,681/= as being the taxes owed.
iv. In order to verify and respond to the Respondents tax assessment by the Petitioner, the petitioner requested vide a letter dated 20th September, 2012for the return of the books and tax records.
v. Through its auditors firm, the Petitioner lodges objections to the Respondents tax assessment. The relevant appeals to the local committee as stipulated in the statutes were lodged as evidenced in the annexures filed before the court.
vi. No decision of the local committee over the dispute has ever been made or served.
vii. The Respondent's enforcement is without due process and amounts to unfair administrative action.

On the 11th July 2014, the court granted the stay of execution pending hearing and determination of the application.

5. In response the applicant through PETER BASSWETTY, a supervisor in the domestic taxes department of the Respondent swore a replying affidavit dated 8th August 2014. He urged the court to dismiss the application on the reasons that:

i. The applicant has not demonstrated to the court by way of evidence how it stood to suffer if the conservatory orders are not granted.

ii. That if the court in its discretion granted the conservatory orders, the Respondent to be awarded security of the full amount of tax to secure its rights. Such security would not be used to the detriment of the applicant unless the court makes a determination.
iii. That in enforcing the private rights of an individual, the Kenyan Constitution takes cognizance of the rights of the wider public. In this case the public interest to secure the outstanding taxes certainly outweighs the private interest of the petitioner.

SUBMISSIONS

6. The matter was heard inter-partes on 1st December 2014 when counsel for the parties – Mr. Mogaka for the petitioner/Applicant and Mr. Nyaga for the Respondent – made submissions on the respective contentions of the parties. The Court regrets that owing to workload and intervening transfer of the trial judge, the ruling has not earlier delivered.

7. For the Petitioner/Applicant, it was contended that the action of the Respondent was unconstitutional for breach of the principle of the rule of law as a national value and governance principles of the constitution and particular violation of the petitioner's rights to fair hearing with respect to the objections filed against the assessment of taxes. In its attempt to demonstrate a *prima facie* case, the petitioner's submissions went to the entire petition, as shown below, unlike the respondent's submissions which were expressly confined to the question of stay pending determination of the petition.

8. For the respondent it was urged that the respondent had in fact acted within its statutory mandate and provisions for the levy of taxation under the Value Added Tax law.

9. The submissions by counsel are set out verbatim as follows:

> ***"Mr. Mogaka:***
>
> *We rely on the affidavit in support of the Notice of Motion [dated 10th Juky 2014]. Is it constitutional for any statutory body to breach the rule of law as entrenched under Article 10? Is it within the national values and principles of governance under Article 10 (1) of the Constitution? The respondent does not respect its own statutes and subsidiary legislation. Rule of Law under Article 10.*
>
> *Respondent's officers have been whimsical. Acts breached are the Value Added Tax Act cap.476, Income Tax Act, cap. 470. The petitioner is a registered tax payer.*
>
> *Respondent has raised some notices upon assessment of tax. The law requires that once a notice has been issued, if the tax payer objects to the assessment, then the tax payer has a right of objection under VAT Act 2013, section 50 and old VAT Act section 32 repealed in 2013. Objections and appeals to the Commissioner, tribunal and the High Court.*
>
> *The petitioner objected and it is the duty of the Respondent after the commissioner accepted. The Commissioner admitted the objections. The law requires judgment for the amount not objected to. The rest of the amount is objected. The law provides for a hearing before the Commissioner and the Tribunal. The obligation of the tax payer is to lodge an objection. The Petitioner does not convene the tribunal hearings. It is the Respondent's duty. No tribunal has ever been convened and there has never been any communication of any hearing scheduled. It is not disputed that there has been no hearing. The Respondent has not acted. The Commissioner has to start the hearings. The petitioner cannot go to the next stages. The Local Committee has never been convened. The secretary of the local committee is an employee of the Respondent. In the absence of these stages distraint is contrary to the statute itself. Rule of Law is about following statutes.*

Appeal to the High Court requires deposit o fhte tax amount. The right to be heard has not been given.

Article 50 (1) of the Constitution enforces the right to be heard before the court, tribunal or body. The Article has been violated by the refusal of the respondent to hear. Article 25 fair trial cannot be limited. The hearing before the tribunal local committee are a trial. It is not a fair administrative decision o fhte respondent to enforce a tax when an objection has been raised without according a right to be heard. By purporting to enforece the notices, they have violated Article 47 of the Constitution. The action is procedurally unfair, unlawful and unreasonable. A party should not disobey its own statutes. Public Interest on policy that KRA should not violate the law. The Respondent should not disobey the law. ***Public Interest does not require a party's Article 50 rights to be subjected to deposit of the taxes. It opens room for corruption as the officers would come up with unfounded assessment and use it to extort bribes. The Constitution has the rule of law as a foundation of constitutionalism.***

Article 27 – all persons are equal before the law. KRA is equal to the tax payer before the law. The law must protect both parties. The tax payer is protected on the legal procedures for enforcement. It should apply to KRA in the same manner as the tax payer. There is even procedure of appeal from the Respondent. If there is any provision offending the protection of the law [it] is unconstitutional.

The case before the court has demonstrated prima facie that the right to a fair hearing is being violated. The respondent has refused to follow the machinery guarantees his right to be heard, in breach of Article 50 which is unlimited on any qualifications including public interest. KRA has totally restricted the petitioner's right to hearing. The court should grant the conservatory order pending hearing of the petition. The new VAT Act preserves in the transitional provisions all subsidiary legislation and section 68 (2) of the Act. The previous VAT Act, there is appeal under Sections 33 and 34, with Rules- VAT Distraint Regulations, VAT Tribunal Rules for Hearing.

Section 50 of the New Act provides for objections. The affidavits annex all the relevant documentation. We refer to petition and supporting affidavit and supporting documents.

Income Tax Act cap 470 section 84 provides for Notice of Objections. Section 84 (3). Section 86 provides for appeals – local committee and the tribunal. Further appeal under section 86 (2) to the High Court. The petition challenges the violation of the Rule of Law that the process has not been followed. Section 87 is on appeals procedure. There is n o dispute that no hearing has been given. The Court should not sanction KRA to be in violation of its own statutes. Section 87 (1) (f) conduct of assessment. Finality of assessment. Section 88(1) (b) (iii) – final appeal. The procedure has not been finalized in the present case. Notices are for the period of assessment. The notices do not state that they are for subsequent period. We do not ask that KRA be stopped from assessing subsequent periods. KRA is trying to impose for a period where the amount is in dispute. Section 89 has also not been followed.

This is the only petition in relation to this matter. The only dispute that KRA has refused to institute local committee. I refer to the Rules on Income Tax appeals. Under section 82 (local committees) and the Income Tax Tribunal Rules pp.241-244. At p.245- provisions for appeal to the High Court.

KRA has failed to follow the Rules and it has breached the right to fair hearing. I pray that the conservatory order be granted. I refer to Income Tax (Distraint) Rules, which have also been violated.

Mr. Nyaga

I rely on the replying affidavit of Peter Baswetti and List of Authorities. I make a reply on the application for stay pending hearing of the petition.

The conditions for stay are –

1. *chances of success*
2. *Risk of prejudice and whether the application will be rendered nugatory.*

Affidavit in support of the petition and application. In the affidavit there is no mention of stay or the effect of failure to grant stay. Section 107 of the Kenya Evidence Act. I rely on the ***F & S Scientifc Ltd. v. KRA****. Applicant must prove by evidence the likelihood of being paralysed. The applicant has not shown prejudice, The applicants seek stay on unsupported contention.*

Whether petition will be rendered nugatory. The applicant's counsel has not shown that the petition will be rendered nugatory. The supporting affidavit does not have any such evidence. I refer to ***Coastal Bottlers Ltd. V. Commissioner of Domestic Taxes.***

Arguability chances of success – prima facie case. The KRA demanded taxes under its statutory right. ***The convention of local committee is tasked with members appointed under the Acts. The clerk is an employee of the KRA. If there is no meeting, the KRA is as powerless as the petitioner.***

The Income Tax Rules- the applicable rules are the Income Tax (Local Committee) Rules because there is at present no tribunal to call for the Tribunal Rules under cap.470.

There is no evidence of corruption. They are unfounded and cannot be relied on to grant the interim order. If the Court is minded to allow the petition, the court should order security in the form of a Bank Guarantee to secure the KRA's rights. We rely on Article 27 on equal protection of the law. As the KRA has a mandate as a representative of the Public whose tax we collect. We pray that the court's discretion be exercised in favour of public interest. ***The public interest is that tax be recovered. The tax in issue is significant amount and there is anxiety that the respondent may not be able to collect. The respondent may be able to refund any payment if the petition succeeds.***

I refer to the case of ex parte ***Metro Pharmaceuticals Ltd.*** *I also refer to* ***Biersdoff E.A v. KRA*** *No. 6 and* ***R. v. Commissioner for Investigations and Enforcement.*** *The court considered whether the applicant would suffer hardship. The applicant may seek refund or apply the money to future taxes. Appeal would be rendered nugatory. In the said decisions the applicant was held not to have expounded on substantial loss, which was an important issue to be set out in the affidavit. Applicant to show damage if order for stay is not granted. I submit that the principles for the stay pending appeal apply to conservatory orders pending hearing of the petition. I pray that the stay be refused.*

Mr. Mogaka in reply

The authorities are inapplicable. The Court of Appeal authorities were dealing with a stay under rule 5 (2) (b) of the Court of Appeal Rules after judgment at the High Court. The other two High Court decisions were also dealing with High Court decisions

pending appeal to the Court of Appeal. It was the power of the court to grant injunction pending appeal. It is different for the situation before the court.

The stay sought in the matter is conservatory in terms of the constitution under Articles 23 (3) of the Constitution and the Mutunga Rules. It is not a stay of execution pending appeal. There is no judgment in the case to stay.

The court is being moved under supervisory powers to prevent infringement of rights. NO decision has been made by the court, tribunal or local committee.

KRA only communicates convention of setting up of the local committee. There is no communication that the local committee has been convened. No evidence of any proceedings.

Counsel has submitted that there is no tribunal. It is not the job of the petitioner. Income Tax Tribunal Rules are inapplicable because there is n o tribunal. Counsel has not shown that there are local committees.

There is an admission that the Act has not been complied with. There is no attempt to comply with the statutory procedure.

Public interest – KRA cannot violate its own statutes and require tax payers to pay tax without hearing as provided by statute. Is it in the public interest that they should be ignored?

KRA has not communicated that there is a local committee. There is a legal requirement of a fair hearing.

The order of security is to penalize a person before an opportunity to be heard. The security is to be given when one ;loses at the local committee and the tribunal; it is a requirement under the statute. The present matter has not reached there because the hearing has not been given by the local committee. I refer to Kamau Muchuha v. Ripples Ltd. A party cannot be allowed to steal a march on another.

I pray that the court distinguishes the stay in the authorities cited to the present case. The stay before the court under the constitution is the conservatory order.

Affidavit of the petition supports relief. It demonstrates that the procedure of eh local committees and appeal is not complied with. The substantial loss is important in stay pending appeal. It is however not such an important point against the constitutional breach of a right to hearing. It is only one of the issues to be considered. Can the court sanction the officers of KRA for disobeying the Constitution. Courts should favour compliance with the constitution.

Equal protection of law as support to security requirement - Article 27. The KRA should wait for the local committee. The stature has procedures for the taxation and enforcement. KRA must comply with the Act. KRA should wait for the setting of the local committee. The two statutes do not allow KRA to enforce notice if local committee is not convened. The Act provides for the committee but is there is no objection, it can be enforced. If objections are given and the commissioner does not respond within 60 days, the commissioner will be deemed to have admitted. KRA cannot benefit without compliance of the law."

Summary of the cases filed in court by the Respondent

i. ***F & S Scientific Limited versus Kenya Revenue Authority & Another****, Civil Application*

*No. Nai. 26 of 2012 [2013] eKLR t*he Court expressed itself as follows;

> *"We reiterate that the Applicant sought in the High Court, the orders of certiorari, prohibition and mandamus. All the High Court did after hearing the arguments was to dismiss the motion with no orders as to costs. Asking for "stay of implementation" of a decision by the Respondent is tantamount to asking for either stay of execution or an injunction. To begin with, in law, it is not possible to grant an order of stay of "execution" or "implementation" where the action has been dismissed. This is the view of this Court as expressed in many decisions. For instance in the case of Republic vs Kenya Wildlife Services & 2 Others, Civil Application No. Nai.12 of 2007 the Court said in part: "the Superior Court has not therefore ordered any of the parties to do anything or refrain from doing anything. There is therefore no positive order made by the Superior Court which can be the subject matter of the Application for injunction or stay ..."*

ii. ***Coastal Bottlers Limited v. the Commissioner of Domestic Taxes,*** Civil Application NO. 91 of 2008, the court in considering whether to grant a stay of execution and statutory recovery proceedings under the Customs & Excise Act by the Respondent pursuant to the decision and order of the High Court of Kenya stated -

> *"…In the circumstances, we do not see that the applicant's intended appeal will be rendered nugatory in any way. We may also add that no relevant evidence was placed before the Court, e.g. the balance sheet of the applicant, from which we could come to the conclusion that if the applicant was to be compelled to pay the outstanding balance, it might be forced out of business…"*

iii. ***Republic v. Commissioner For Investigations & Enforcement Ex-parte Wananchi Group Kenya Limited*** [2014] eKLR Misc. Application No. 51 of 2013 in which Justice Odunga dismissed the application and on the issue of security held that

> *"It is therefore not sufficient to merely state that the decretal sum is a lot of money and the applicant would suffer loss if the money is paid. In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted since by granting stay would mean that the status quo should remain as it were before the judgment and that would be denying a successful litigant of the fruits of his judgment which should not be done if the applicant has not given to the court sufficient cause to enable it to exercise its discretion in granting the order of stay. See* **Kenya Shell Limited vs. Kibiru & Another** *[1986] KLR 410. In this case, there is no allegation at all that the respondent will be unable to repay the decretal sum if the same is paid over to the respondent."*

Issue for determination

10. The following issues arise for determination from the application, the affidavits and submissions buy counsel for the parties –

a. What are the principles for the grant of conservatory order in constitutional litigation?
b. Whether a conservatory order shall issue to restrain the respondent from executing its statutory mandate to collect tax pending the determination of the petition.

11.

DETERMINATION

The Law

The Principles for Grant of Conservatory Order

12. As I understand the matter of conservatory orders in its technical sense as a remedy under Article 23 (3) of the Constitution in a constitutional litigation for enforcement of the Bill of Rights under Article 22, the question whether or not to grant a conservatory order must fall to be considered under the broad mandate of the High Court of Article 20 of the Constitution to give uphold and enforce the Bill of Rights and, under Article 20 (3) (b), in so doing to apply the construction of provisions of the Bill of Rights that most favours the enjoyment of rights. In this regard, I would agree with the counsel for the petitioner that conservatory orders in constitutional litigation must be considered in the light of the purpose of constitution to uphold and enforce the Bill of Rights. See Articles 10 and 19 of the Constitution. When used loosely in ordinary litigation, the 'conservatory order' may lose its sting as a tool for enforcement of the Bill Rights to become a mere interlocutory relief pending hearing and determination of the cause before the court. I agree that in ordinary litigation, the principles of arguability and substantial loss set out in the cases relied on by the respondent will meet the justice of the case.

13. In constitutional litigation for enforcement of rights, a consideration of the impact of the constitutional obligation to enforce constitutional rights against the public interest in such a matter because of the constitutional injunction under Article 24 (1) (d) of the Constitution that –

> ***"(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others".***

14. This court has had occasion to deal with the question of the principles for the consideration of applications for conservatory orders. In ***MUSLIMS FOR HUMAN RIGHTS (MUHURI) & 4 Ors. v. INSPECTOR GENERAL OF POLICE & 2 Ors.,*** Mombasa PETITION NO. 62 OF 2014 of 22nd December 2014, the court held as follows:

> "*The emerging principles for the grant of injunction or conservatory orders under the constitutional litigation, as I understand them, are* ***firstly, that the applicant must demonstrate an arguable case - sometimes called prima facie arguable case - the reference to arguable case distinguishing it from the prima facie test of the Giella v. Casman Brown (1973) EA 385 traditionally applied in regular civil cases; secondly, that that the applicant must show that the petition would be rendered nugatory or that the damage that would be suffered in the absence of the conservatory order would be irreversible; and, thirdly, that in constitutional cases, the public interest in the matter would be considered and generally upheld.*** *See* ***Kenya Transport Association Limited v. Cabinet Secretary for Transport and Infrastructure and Ors., Mombasa HC Petition No. 16 of 2014*** *where I considered some of the decisions on the matter as follows:*
>
> > *'The tests for the grant of conservatory orders has been variously expressed by different courts. See Mombasa High Court petition No. 7 of 2011,* ***Muslim for Human Rights and 2 Ors v the Attorney General,*** *per Ibrahim J. (as he then was), Mombasa High Court Petition No. 47 of 2011* ***Harun Barky Yator v. Judicial Service Commission (JSC),*** *per Okwengu J, (as she then was), Nairobi High Court Petition No. 557 of 2013, per Majanja J, and* ***Mecha Magaga v Jackson Obiero Magaga*** *(2014) eKLR, per Okong'o, J. All the courts require for the grant of conservatory orders a prima facie case or a prima facie arguable case as in Yator's case; irretrievability or irreparability if conservatory order is not granted and the subject matter is irretrievably lost (akin to the irreparability by damages test) and a balancing of the interests of the applicant and the respondents. There arises confusion as to whether the test of standard of the applicant's case is on the prima facie or arguable case. Once accept that the court cannot determine the disputed merits of the case at the interlocutory stage, the correct standard must be the standard of arguable case. See* ***Mbuthia v. Jimba Credit Corporation*** *(1988) KLR 1. I also consider that Under Article 23(3) of the Constitution, the court may*

> *make a broad spectrum of orders as conservatory orders to preserve the status quo where circumstances warrant and that may include fashioning a remedy to fit the particular circumstances of the application before the court.''"*

15. In my, view, Conservatory Order may be available as a permanent relief, in similar fashion as a permanent injunction, or at interlocutory order pending hearing and determination of the suit. The duty of the court at the interlocutory stage must be, as much as possible, to forestall breach or further breach of rights subject to public interest considerations, as aforesaid. See this court's decision in ***GABRIEL KIRIGHA CHAWANA & 26 OTHERS v. THE KENYA DEFENCE FORCES COUNCIL & 6 OTHERS,*** Mombasa Petition No. 21 of 2014 of 30th April 2014.

> *"At this interlocutory stage of the proceedings, it is not the duty of the court to make any final determination of fact or law with regard to the dispute between the parties. The Court should only examine the pleadings and the affidavits taking into account the submissions thereon by the parties to see whether there is an arguable case or serious questions to be presented to the court on the hearing of the main petition, noting that the arguable case does not mean a case that must succeed so that the respondents' terminology of prima facie case is inappropriate."*

16. In considering whether or not to grant the conservatory order in this constitutional litigation, the court will, therefore, examine the circumstances of the case before it to determine –

a. whether the petition has an arguable case for the grant of the constitutional relief sought in the petition;
b. whether there has been, or there is a risk or threat of irreparable damage; irretrievability of damage or injury; or substantial loss by any name with respect to the alleged breach of rights;
c. whether public interest militates against the grant of the conservatory order for enforcement of rights, in terms of limitation of rights under Article 24 (1) (d) of the Constitution for the enjoyment of rights by others.

17. I would agree with counsel for the petitioner that the fact that there is no 'judgment' in this case distinguishes the matter from the usual application for stay pending appeal in which the rights of the parties have been determined in the first instance court or tribunal so as to require demonstration of substantial loss and provision of security. In such circumstances, to grant a stay of execution, in the words of Odunga, J. in ***Republic v. Commissioner For Investigations & Enforcement Ex-parte Wananchi Group Kenya Limited,*** supra:

> "*would mean that the status quo should remain as it were before* ***the judgment and that would be denying a successful litigant of the fruits of his judgment*** *which should not be done if the applicant has not given to the court sufficient cause to enable it to exercise its discretion in granting the order of stay.*"

On the facts of the case

18. The tax Assessment subject of these proceedings was communicated to the petitioner by the Respondent through a letter of 24th August 2012 in terms as follows:

> ***"****24th August, 2012*
>
> *THE DIRECTORS*
>
> *BELLA VISTA RESTAURANT MOMBASA LIMITED*
>
> *P O BOX 98895 – 80100*
>
> *MOMBASA*

Dear Sir(s)

RE: INDEPTH AUDIT FINDINGS – ACCOUNTS, VAT, WHT AND P.A.Y.E

We refer to the in-depth audit carried out for your company. The findings are as shown below;

Accounts – 2008 & 2009

*After examination of **daily sales summaries/stock** records, we made a conclusion that sales had been under declared as follows,*

- *2008-Undeclared income of Ksh 5,170,964 was established. Total additional tax including penalty and interest amounted to Kshs.3,028,588 (see attachment for details)*
- *2009 – Undeclared income of Ksh37,493,554 was established Total additional tax including penalty and interest amounted to Ksh 20, 807.131 (see attachment for details)*

Total tax raised from accounts audit is Ksh 23,835,719

VAT- November 2008 to December 2011

VAT payable is Ksh 37,308,962. This was arrived at after computing incomes for the period under audit derived from sales summaries/stock records.

***Note** that PAYE and withholding tax audits are still pending awaiting provision of the relevant records.*

Please immediately issue a cheque for Ksh61,144,681 in settlement of the tax due.

V. M. MINO

Station Manager

*Mombasa South Station**"***

19. It is clear that the assessed tax was based on allegedly undisclosed income for the periods 2008 and 2009 and VAT for the period November 2008 to December 2011. By a letter of 12th November 2012 the petitioner raised an objection to the tax assessment which Objection was lodged and acknowledged by the respondent on 13th November 2012. By notices date stamped 24th January 2013, respectively under section 85 of the Income Tax Act for the undisclosed income assessment for the years 2008 and 2009 and section 32A (5) (b) of the Value Added Tax Act, the respondent responded to the Objections declining to amend the tax assessments. By a letter dated 20th February 2013, the petitioner responded to the respondent's notices of 24th January 2013 indicating its intention to appeal to the Local Committee against the decision not to amend the tax assessments.

20. The Appeal was filed by letter of 26th February 2013 in the following terms:

***"**26th February, 2013*

The Clerk to the Local committee

Domestic Taxes Department,

P. O. Box 90520 – 80100

MOMBASA

Dear Sir,

RE: MEMORANDUM OF APPEAL AGAINST ASSESSMENT

- ***NOS.00552008000336,05/01/0040/2012 AND 00552009000196***
- ***BELLA VISTA RESTAURANT LIMITED***
- ***PIN NO. P0512353333V AND VAT REG NO.0195138V***

We, on behalf of our clients, being aggrieved by the above Tax now appeal to the Local Committee on the grounds that the total Tax demanded amounting to KSh 61,144,681.00 is excessive.

Pursuant to the Income Tax (Local committee) Rules, we attached herewith:

1. *Statement of Facts – appendix "A"*
2. *A copy of Letter of intention to appeal – Appendix "B"*

We pray the Local Committee to direct the Senior Assistant Commissioner to review this tax.

Yours faithfully,

OGOT AND ASSOCIATES **"**

21. The respondent acknowledged receipt of the appeal by a letter of 28th February 2013 by which it required the petitioner to provided supportive documents, as follows:

"*28/02/2013*

TO; OGOT AND ASSOCIATES

P.O. BOX 81942-80100

MOMBASA

Dear Sir,

SUBJECT: APPEAL TO LOCAL COMMITTEE:

BELLA VISTA RESTAURANT MOMBASA LTD

We refer to your notice of intention to appeal to Local Committee in respect to the above Taxpayer.

Under Rule 6(1) (d) of the Income Tax (Local Committees) Rules we certify that Return of Income as required by Section 52 of the Income Tax Act for the Year of Income 2008/2009 have been furnished to us.

However the Taxpayer has not availed all supporting Accounts and Certificates as specified in Section 54 of the Income Tax Act.

Therefore your appeal to the Local Committee cannot be accepted unless the above requirement is met and should be done within the next fourteen days.

VICTOR MINO

Senior Assistant Commissioner"

22. In response to the respondent's letter of 28th February 2013, the petitioner by a letter dated 13th March 2013 supplied the documents:

1. Financial statements for the year ended 31st December 2008 with Self-Assessment Tax Return
2. Financial Statements for the Year ended 31sst December 2009 together with Self – Assessment Tax Return
3. PAYE Credit Slips
4. Bank Statements.

23. The petitioner was not invited for the hearing of his appeal but on 3rd July 2013, its property were proclaimed upon Warrant of Distress for the assessed Tax dated 3rd July 2013, issued under section 102 of the Income Tax Act and section 16 of the VAT Act.

24. Both the Income Tax Act and the VAT Act have provisions for the hearing of appeals by a Local Committee or a tribunal, respectively, under section 86 of the Income Tax Act and sections 32A and 33 of the VAT Act.

25. The Counsel for the Respondent opined that the appeal should have been heard by the local committee as the tribunal had not been established, and that the respondent was as helpless as the petitioner with regard to the hearing by the local committee as it is the local committee that convened its sittings, even though its clerk was an employee of the respondent. It is not material whether the respondent had any control over the hearing of appeals by local committee or the tribunal. The important point is that the respondent concedes that the petitioner had not been heard on its appeal by the local committee and the tribunal by whomsoever convened. It would also appear that the appeal form the assessment of tax, being taxes on income and VAT, must be heard by the local committee and the tribunal, for the respective portions of the assessments in accordance with the different provisions under the Income Tax act and the Value Added Tax Act.

26. In the meantime, VAT Act NO. 35 of 2013 (Assent 14th August 2013) repealed old VAT Act but the repeal did not in terms of section 68 (6) (c) -

> ***"affect an investigation, legal proceedings or remedy in respect of a right, privilege, obligations, liability, penalty, forfeiture or punishment, and any such investigation, legal proceedings of remedy may be instituted, continued or enforced and such penalty forfeiture or punishment may be imposed as if this Act had not been passed;"***

CONCLUSION

Whether there is an arguable case

27. Having not been afforded a fair opportunity to be heard on its appeal to the Local Committee, the petitioner has, in my view, established not only an arguable case but a prima facie case for breach of its constitutional right to fair administrative action under Article 47 for the respondent's order for distraint for assessed Tax while an appeal to the Local Committee challenging the assessment was pending hearing. In addition, the fair hearing right under Article 50 of the constitution would appear to have been violated as the same entitles every person, including a corporation, a ***'right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body'.***

28. The presence of an arguable point in the matter is sufficient and the court does not have to

consider whether the refusal to return the books for purposes of verification of the assessment of tax offended Article 35 of the Constitution, for the reason given that the records are the basis of our assessments [and] in case you would like to verify anything from these records, you are free to come to the office and verify. Or the question whether the petitioner's right to equal protection of the law has been breached.

Irreparability of injury

29. The court considers that although there is no '*balance sheet of the applicant, from which we could come to the conclusion that if the applicant was to be compelled to pay the outstanding balance, it might be forced out of business'* in the words of the Court in the ***Coast Bottlers Ltd.*** case, supra, it is clear from the assessed tax at Ksh.61,144,681 was for a period of up to four years 2008 - 2011 for the VAT tax and two years 2008 - 2009 for the Income Tax, and the court accepts that requiring the petitioner to pay this tax at one go must, if not forcing it out of business, significantly adversely affect its operations and, therefore, profitability as to amount to substantial loss. Indeed, counsel for the respondent in opposing the application for conservatory order was anxious that the respondent may not be able to recover the 'substantial' amount of tax from the petitioner:

> "***The tax in issue is significant amount and there is anxiety that the respondent may not be able to collect.***"

If it is thus substantial, a recovery thereof will cause substantial loss to the petitioner!

30. Moreover, from the Proclamation of Distraint of Moveable Property dated 3rd July 2014 upon proclamation of the petitioners goods by Galaxy Auctioneers upon instructions from the respondent by Order to Certified Bailiff of the same date, the entire list moveable properties proclaimed therein are shown to be items in the petitioner's business including motor vehicle, furniture, air conditioners, alcoholic beverages, coolers, fridges , cookers, generators among others, all given a value of about Ksh,17.4 million only. With such tools of trade how can a recovery of Ksh.64, 929,430 shown in the proclamation be possible, and without forcing the petitioner out of business? I find that the petitioner has demonstrated by the attachments in his supporting affidavit ample evidence of substantial loss. Even if the respondent is able to refund the collected amount, if the challenge on the tax assessment is successful, the petitioner will long have been driven out of business.

Provision of security

31. For the same reasons of substantial loss, the court does not consider it appropriate to order deposit of security in the form of bank guarantee or otherwise for the tax assessment as urged by counsel for the respondent, because such security must be backed by financial arrangements which may well lead to closure of the petitioner's business in view of the huge tax assessment.

Public interest

32. I agree with the counsel for the respondent that it has a public mandate to recover tax for the finance of expenditure in the growth and development of the nation. This is a most important public duty for which the public must have an immense interest. As pointed out by counsel for the petitioner, there is public interest too in the observance of the Rule of the Law as system of constitutional good governance under Article 10 of the Constitution. In balancing these two public interests, I find that the public interest in recovery of tax must give way to the public interest in due process mechanism for the determination the due tax in the first place. As there has not been a judicial determination of the tax payable, it cannot be deemed to be tax due having regard to the process of determination of objections and appeals from assessment. The petitioner is, in accordance with Article 50 of the Constitution, entitled to a judgment on his challenge of the tax assessment. Furthermore, there cannot be public interest in extraction of tax from tax payer businesses in a manner that drives the operators out of business as that would finally extinguish the tax sources for the future.

Balance of convenience

33. The balance of convenience must lie in allowing the petitioner to proceed with its business while an expedited determination of the tax dispute and, consequently, recovery if due, is implemented. As a regulator in the field of tax collection, there is a sense in which the respondent is responsible for the dilatory determination of the tax dispute herein and I do not accept that "*the KRA is as powerless as the petitioner*" in that regard.

ORDERS

34. Accordingly, for the reasons set out above, I grant the Petitioner's Notice of Motion dated 10th July 2014, as prayed in terms of Prayer No. 3, thereof.

35. Costs in the Cause.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 1ST DAY OF JULY, 2016.

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JUDGE

In the presence of:-

Mr. Olwande for the Petitioner/Applicant

Miss Angawa holding brief Almondi for the Respondent

Mr S. Kaunda - Court Assistant.