



REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CONSTITUTION AND HUMAN RIGHTS DIVISION

PETITION NO.1 OF 2014

**IN THE MATTER OF ARTICLES 22, 23, 25 AND 47 OF THE CONSTITUTION OF THE
REPUBLIC OF KENYA**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF THE FUNDAMENTAL RIGHTS TO
A FAIR TRIAL, EQUALITY AND FAIR ADMINISTRATIVE ACTION UNDER ARTICLES 22,
23, 25 AND 47, 49 OF THE CONSTITUTION OF KENYA**

BETWEEN

CATTANI ALBERTO.....PETITIONER

VRS

1. KENYA REVENUE AUTHORITY

2. THE COMMISSIONER DOMESTIC TAXES KENYA REVENUE AUTHORITY

3. THE HON. ATTORNEY GENERAL..... RESPONDENTS

JUDGMENT

1. The petition herein was filed on 12/3/2014. Some of the prayers have already been spent. What is pending is prayer (a), (b), (e) and (f).

These prayers seek the following orders:

- a. That a declaration be issued to the effect that the petitioner's right to fair administrative action afforded by article 47 and the right to property under article 40 of the constitution were violated by the respondents.
- b. That the notice dated 12th February 2014 and the court order issued ex-parte by the Chief Magistrate's court dated 15th January 2014 in Misc. Criminal Case No.10 of 2014 to the petitioner be quashed.
- c. That the 1st and 2nd respondent be ordered to immediately return all the documents and any electronic storage devices and any other items that its officers carried away from the

petitioner on 12th February, 2014.

d. That the 1st and 2nd respondent hereby restrained from acting or enforcing the letter or notice dated 12th February 2014 and the court order issued ex-parte on 15th January 2014 until a proper notice and due process is issued to the petitioner.

e. That the 1st and 2nd respondent be ordered to compensate the petitioner for the financial loss he has suffered due to their unlawful actions.

f. That the respondents be ordered to bear the petitioner's costs.

Both parties agreed to determine the petition by way of written submissions:

Petitioner's Case and Submissions:

2. The petitioner filed this petition after officers from the 2nd respondent went to his business premises and carted away certain documents for investigation purposes. The items taken included the petitioner's tools of trade including computers, business ledgers and other personal items.

The petitioner maintains that he was not given any notice or tax demand to enable him take advantage of statutory procedures. There was no tax claim against him. The petitioner has been tax compliant and even had a tax compliant certificate from the 1st and 2nd respondents covering up to the year 2012. Contrary to the rules of natural justice which demands that every person be given full information on the case against him and an opportunity to present a response, this was not the case for the appellant. The respondents' action amounted to violation of the petitioner's constitutional rights.

3. It is further contended that the petitioner used to deal with the Malindi KRA Office and it was not clear why officers from Mombasa invaded his office. Counsel for the petitioner contends that the petitioner's right to fair administrative action under Article 47 was violated. Similarly, the petitioner's rights to property under Article 40 of the Constitution were violated.

It is further submitted that the petitioner is a director in the plaintiff company. He has *locus standi* to file the petition. Article 22 of the Constitution and Rule (4) of the Constitution of Kenya (Protection of rights and Fundamental Freedoms) Practice and Procedure Rules allows everyone to institute court proceedings whenever a fundamental right or freedom is about to be infringed or is infringed. The fact that the respondent's actions were directed upon a limited liability company cannot stop the petitioner from prosecuting the petition.

4. The petitioner's counsel relies on the Case of **Samura Engineering Limited & Others V. KRA, Nairobi Petition No.54 of 2011 [2011] eKLR**. The court in that case held that the process of collection of taxes must comply with the Bill of Rights. Counsel urges the court to award damages for violation of the petitioner's rights. A sum of ksh.20 million is proposed as a fair amount in form of damages as the petitioner's tools of trade were held for a period of six (6) months. The petitioner also suffered humiliation and trauma due to the respondents' actions. The petitioner is seeking a further sum of ksh.1.8 million for that injury.

The Respondents' Reply and Submissions:

5. The respondents filed a replying affidavit sworn by Abdulkadir Idow on 7th May, 2014. The totality of the affidavit and the submissions is that section 119 (1) of the Income Tax Act empowers officers of the Kenya Revenue Authority to enter any premises and remove items or documents for purposes of investigating offences. The respondents obtained a court order as required by that section before they took the petitioner's documents. It is further submitted that an advance notice to the person whose items are to be taken is not a condition precedent. The application to the court orders allowing the tax officers to take away the documents has made to be made ex-parte. This is necessary so as to avoid the person

being investigated from removing the items. Counsel rely on the Case of **James Humphrey Oswago v. Ethics & Anti-corruption Commission** where the court held that an application for search warrants under section 118 of the Penal Code need not be heard inter-partes.

6. Counsel for the respondents maintains that, the right to property under Article 40 of the Constitution is not absolute. It can also be denied in cases where public interest is involved. The respondent contends that, article 40 (3) of the Constitution provides for circumstances under which a right to property can be denied. This include public interest. The investigations by the respondents were carried out in public interest and were justified in law. No Constitutional rights were violated in the circumstances.

The main issue for determination is where the respondents violated the petitioner's Constitutional rights and whether damages are payable to the petitioner. The main Constitutional rights cited by the petitioner is the right to fair administrative action under article 47 and the right to property under article 40. With regard to the latter, parties did confirm to the court that the documents that had been taken away were returned. A letter dated 16/9/2014 by the respondent returned the items that had been collected on 12th February, 2014. The respondent wrote a letter dated 9/9/2014 seeking certain information from the petitioner. The letter was written after the respondent had completed examination of the petitioner's documents.

It is clear that, the petitioner lost the use of its documents for a period of about seven (7) months. Section 119 of the Income Tax Act, Chapter 470 Laws of Kenya empowers the respondent to search and seize documents for purposes of income tax examination. Section 120 grants the 1st and 2nd respondents the powers to inspect books and documents. The respondents issued a notice dated 12th February 2014 and it is the same day when the petitioner's documents were seized. The respondents obtained a court order from the Mombasa Chief Magistrate's Court issued on 15/1/2014. The order lists the items to be examined and this include import and export documents, books of accounts and electronic storage devices.

7. Since the respondents are empowered to seize and take away documents for purposes of examination so that the respondents can satisfy themselves of the petitioner's tax compliance status, I do find that the documents were properly taken as the objective is lawful. The fact that, a tax compliance certificate had been issued is not a bar to further tax examination by the Kenya Revenue Authority. Indeed the tax compliance certificate issued to the petitioner was for the period upto the year 2012. The notice was issued in February 2014. The denial of the petitioner's documents for the period of seven (7) months when the respondent was examining the petitioner's books is long but not unreasonable. There is no evidence that the respondents were driven by malice or ill will.

8. The next issue relates to article 47 on the right to fair administrative action. The petitioner submits that no notice was issued. Its right to fair administrative action was denied. The petitioner's contention must be examined in relation to the respondents' obligations. The Kenya Revenue Authority is mandated to collect taxes in Kenya. The law empowers the KRA to take away documents of a tax payer for purposes of examination. This is done so that the KRA can confirm that the tax payer is compliant. Where the KRA is suspicious and would like to take quick action so that the relevant documents are not hidden or altered, there would be no need to issue advance notice. In the current case, the notice was issued on the same day. The petitioner's business was not closed down. It was still able to carry on its business. There was no issue of underpayment of taxes whereby the KRA could have engaged the petitioner administratively. I do find that there was no violation of the petitioner's Constitutional rights. Although the collection of tax has to be conducted within the law, at times the KRA has to take quick action in an effort to fulfill its mandate. Such action as taking away some documents for purposes of tax examination should not be penalized as unconstitutional. The actions are permitted by the law.

9. In the end, it is my finding that there was no violation of the petitioner's Constitutional rights. The respondents were within their mandate to do what they did. That being the case, no damages are payable to the petitioner. The petition herein is hereby dismissed. Each party to meet their own costs.

Dated, signed and delivered at Malindi this 4th day of November, 2015.

SAID J. CHITEMBWE

JUDGE