



IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISC. APPL. NO. 349 OF 2013

BETWEEN

REPUBLIC APPLICANT

AND

KENYA REVENUE AUTHORITYRESPONDENT

EX PARTE

MOBILE PLANET LIMITED

JUDGMENT

Introduction

1. The *ex-parte* applicant, Mobile Planet Limited (“MPL”) is a company engaged in the business of developing and providing wireless voice and data applications for mobile devices for the GSM market within and outside of Kenya. It brings the Notice of Motion dated 15th October 2013 seeking the following reliefs:
 - a. *An order of certiorari do issue to remove to this court for purposes of being quashed the decision of the Respondent purporting to reduce the exparte applicant’s VAT credit by Kshs. 89,071,289/= without any legal basis and the demand for the payment of unspecified amount of PAYE from the exparte applicant as contained in the respondent’s letter dated 29th August 2013.*
 - b. *An order of prohibition do issue prohibiting and restraining the respondent acting by itself or through its agents from implementing the decisions relating to purported reduction of the exparte applicant’s VAT credit by Kshs. 89,071,289/= and the demand for payment of unspecified PAYE as contained in the respondent’s letter dated 29th August 2013.*
 - c. *An order of prohibition do issue prohibiting and restraining the respondent from issuing any or further notices regarding the reduction of the exparte applicant’s VAT credit and taxability of the sums claimed as Pay As You Earn.*
 - d. *Costs of this application be provided for.*

Applicant’s Case

3. MPL bases its claim on the supporting affidavit and further affidavit of Nyanjiru Macharia, its director, sworn on 15th October 2013 and 18th November 2013 respectively.

4. MPL challenges the decision of the Kenya Revenue Authority (“KRA”) on two grounds. The first ground is that in its letter dated 29th August 2013, KRA purported to illegally and erroneously reduce its tax credit by a sum of Kshs 89,071,289. This ground was settled by consent as it became apparent during the hearing that there was confusion as to the nature of the credit due to MPL. The parties reached an agreement on the following terms;
 - i. *The respondent hereby agrees that as at 29th August 2013, the applicant had a VAT Credit of Kshs 89,071,289.00.*
 - ii. *By virtue of the letter dated 21st January 2014, issued by the respondent, the applicant is at liberty to file a VAT appeal to the tribunal in accordance with the Act.*
 - iii. *The court is at liberty to determine the issue regarding the claim based on PAYE and costs.*
5. The second ground, concerns the issue of PAYE. After carrying out an in-depth audit KRA informed MPL that it paid Keyman insurance for its directors with foreign insurance companies hence the said amount was treated as a taxable benefit and therefore subject PAYE. The decision by KRA was contained in a letter dated 23rd December 2011 which was forwarded with assessments for PAYE. MPL challenged the assessment through the Notice of Objection dated 6th February 2012 through its advocates *Mboya, Wangong’u and Waiyaki Advocates*. It contended the Keyman policy insures MPL against the loss of key employees and since the premium paid was not a direct benefit to the employees, it was not subject to PAYE. MPL argued that it was entitled to treat the premiums as legitimate business expense as it was the direct beneficiary of the policy.
6. In response to the Notice of Objection, KRA by its letter of 13th November 2012 confirmed the payment of the P.A.Y.E on the insurance as per the amounts computed owing to what it termed as *“the absence of properly executed insurance policy; P.A.Y.E. should be charged.”* The letter concluded that, *“Kindly note that if you are dissatisfied with KRA’s decision as stated above you have the right of appeal under section 86 of the Income Tax Act (CAP 470) and Section 33 of the VAT Act (CAP 476).”*
7. The letter dated 13th November 2013 was followed by a letter of 29th August 2013 which stated in part as follows, *“Further to our letter dated 13th November, 2012 informing you of our decisions on the objection dated 6th February, 2012, the tax computation and the tax now demanded is as follows PAYE There were no changes in the tax computation; the tax demanded will be paid in full in the absence of a properly executed policy Kindly settle the demanded tax as per the amended withholding tax computation to avoid enforced recovery.”*
8. MPL argues that KRA failed to issue a Notice of Assessment in respect of the PAYE claims as required by law under the provisions of **section 85(3)** of the ***Income Tax Act (Chapter 470 of the Laws of Kenya) (“the Act”)***. It argues that as a result of lack of notice, it is unable to proceed to lodge an appeal against the respondent’s decision with the Local Committee as provided under **section 86** of the ***Act***.

Respondent’s case

9. KRA opposes the application on the basis of the affidavit of Daniel Kibaara, the Senior Revenue Officer in KRA, sworn on 6th November 2013.
10. KRA argues that the Commissioner responded to MPL’s Notice of Objection dated 6th February 2012 by the letter dated 13th November 2012 in which KRA informed MPL that its objection had been rejected. Although the parties continued to negotiate, KRA’s argues that the letter of 29th August 2013 served as an adequate notice that the Commissioner had refused to amend the assessment. It contends that MPL was issued with Notices of Assessment as provided for under **section 78** of the ***Act***.

- 11.KRA contends that the Commissioner was not obliged by law to issue MPL with fresh assessments but was only bound to issue a notice setting out the amendment and the amount of tax payable by the MPL which was done by the letters of 13th November 2012 and 29th August 2013. Further, that by the letter dated 13th November 2012, the MPL was duly notified and advised on the action to take if dissatisfied with the Commissioner’s decision.
- 12.KRA contends that its action of charging MPL’s officers PAYE on premiums payable under the insurance policies was grounded on **section 5(2)(f)** of the **Income Tax Act** after MPL failed to produce a letter of acceptance from the insurer clearly showing beneficiaries under the insurance policy.

Determination

- 13.MPL contests the issue whether PAYE should have been paid on Keyman insurance premiums paid by it. This is an issue outside the concern of the court dealing with a judicial review application. It has been said that the remedy of judicial review is not concerned with reviewing the merits of the decision impugned but the decision making process leading to that decision. The purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected. It is not part of that purpose to substitute the opinion of the individual judge for that of the authority constituted by law to decide the matter in question (See **Republic v The Retirement Benefits Appeals Tribunal ex parte Augustine Juma and 8 Others HC Misc. JR App. No. 205 of 2011 [2013] eKLR**).
- 14.The only issue then falling for my determination is whether MPL was issued with a proper notice in order to exercise its statutory right of appeal against the refusal by the Commissioner to allow its objection. **Section 78** of the **Income Tax Act (“the Act”)** provides for the service of notice of assessment as follows; “*The Commissioner shall cause a notice of an assessment or provisional assessment, instalment assessment to be served on each person assessed, and such notice shall state the amount of income assessed and the amount of tax payable and shall inform the person assessed of his rights under section 84 of the Act*”
- 15.The **Act** also provides for the procedure to challenge the notices by a person aggrieved. The procedures are set out in **sections 84, 85** and **86** of the **Act** whose pertinent parts I set out below;

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

85. (1) Where a notice of objection has been received, the Commissioner may—

(a) amend the assessment in accordance with the objection; or

(b) amend the assessment in the light of the objection according to the best of his judgment; or

(c) refuse to amend the assessment

(2) Where the Commissioner either—

(a) agrees to amend the assessment in accordance with the objection; or

(b) proposes to amend the assessment in the light of the objection and the person objecting agrees with the Commissioner as to the proposed amendment,

the assessment shall be amended accordingly and the Commissioner shall cause a notice setting out the amendment and the amount of the tax payable to be served on

that person.

(3) Where the Commissioner—

(a) proposes to amend the assessment in the light of the objection and the person objecting does not agree with the Commissioner as to the proposed amendment, the assessment shall be amended as proposed by the Commissioner and he shall cause a notice setting out such amendment and the amount of the tax payable to be served on such person; or

(b) refuses to amend the assessment, he shall cause a notice confirming the assessment to be served on such person.

86. (1) A person who has been served with a notice under section 83(5) of this Act may

—
(a) if his assessment is based upon or consequent upon a direction issued under section 23 or 24 of this Act, appeal from the decision of the Commissioner to the Tribunal; or

(b) in any other case, appeal from such decision to the local committee appointed for the area in which he resides or, if he is a non-resident person, to a local committee appointed for the Nairobi Area,

upon giving notice of appeal in writing to the Commissioner within thirty days after the date of service upon him of the notice under the said subsection.

16. The right of the KRA to exercise its statutory mandate in collection of taxes must be protected as the importance of tax cannot be gainsaid. However, the same must be squared within the tenets of due process which encompass the right to receive notice prior to enforcement and the right of the subject to invoke appeal or review processes. This court has had the chance to address the issue of what constitutes a proper notice. In ***Geothermal Development Company Limited v Attorney General & 3 others, Petition 352 of 2012 [2013] eKLR***, while noting that a notice is a key component of due process, observed as follows; “[28] As a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against it. Elementary justice and the law demands that a person be given full information on the case against him and given reasonable opportunity to present a response. This right is not limited only in cases of a hearing as in the case of a court or before a tribunal, but when taking administrative actions as well..... Hilary Delany in his book, ***Judicial Review of Administrative Action, Thomson Reuters 2nd edition, at page 272***, notes that, “Even where no actual hearing is to held in relation to the making of an administrative or quasi-judicial decision, an individual may be entitled to be informed that a decision which will have adverse consequences for him may be taken and to notification of the possible consequences of the decision.” [29] Fair and reasonable administrative action demands that the taxpayer would be given a clear warning on the probable consequences of non-compliance with a decision before the same is taken; in this case, the Company should in no uncertain terms have received information as to the implication of the letter and the consequences of its failure to make good the payments demanded in the notice. [30]. In many jurisdictions around the world, it has long been established that notice is a matter of procedural fairness and an important component of natural justice. As such, information provided in relation to administrative proceedings must be sufficiently precise to put the individual on notice of exactly what the focus of any forthcoming inquiry or action will be As to whether the notice issued passes the standards of procedural fairness is both a question of law and fact dependent on the circumstances of each particular case, the statutory provisions and the nature of the matter to be decided. In the circumstances of this case, I find that the ***Tax Demand*** letter of 20th June 2011 sent to the Company fell short of the requirements of a proper notice in as far as it did failed to disclose its nature and the implication and consequences of non-

compliance as well as notifying the taxpayer of the avenues of appeal or review available to it. A notice of the nature issued to enforce collection of taxes must clearly state to be such a notice, state the amount claimed, state the legal provision under which it is made and draw the taxpayers attention to the consequences of failure to comply with the law and the opportunity provided by the law to contest the finding. Such a notice would give the opportunity to any Kenyan to know the case against it and utilise the legal provisions to contest the decision. The right to fair administrative action and the right of access of justice now enshrined in our Constitution demand nothing less. [Emphasis added]

17. It is not in contention that the KRA in its letter dated 23rd December 2011 sent what was referenced, ‘In-depth Audit’ on additional income and tax liability to MPL accompanied by assessment notices under **section 78** of the **Act**. MPL lodged its objection by the Notice of Objection dated 6th February 2012. In response to the Notice of Objection, KRA through its Senior Assistant Commissioner sent the letter of 13th November 2012. The letter of 13th November 2012 is critical as it clearly set out the decision of the Commissioner in respect of the PAYE claim. The substance of the letter was that the Commissioner dismissed MPL’s objection and upheld the original assessment which has already been issued under **section 78** of the **Act**.
18. In my view the letter of 13th November 2012 constituted a decision by the Commissioner to refuse to amend the assessment under **section 85(1)** of the **Act**. Under **section 83(3)(b)** where the Commissioner refuses to amend the assessment, he shall cause a notice confirming the assessment to be served on the person to enable the person lodge an appeal under **section 86** of the **Act** as the case may be. I find and hold that for purposes of **section 83(3)(b)**, the letter dated 13th November 2012 constituted a notice as it clearly communicated the decision disallowing the objection by reference to the Notice of Objection filed, confirming that the assessment that had been issued under **section 78** of the **Act** and informing the applicant the remedy available to it under the **Act**. This is consistent with the *dicta* in ***Geothermal Development Company Limited v Attorney General & 3 others (Supra)*** I have outlined above.
19. The letter dated 29th August 2013 neither adds nor subtracts from the fact that KRA had met its obligation under the **Act** as regards the notice. It was merely a demand for payment following subsequent negotiations between the parties after the objection had been rejected.

Disposition

20. I have taken into account the parties’ consent agreement on the issue of VAT credit which in effect renders the applicant's prayers with regard to VAT Credit claims as settled on the terms incorporated in the final order.
21. The final orders are therefore as follows;
- a. ***The parties hereby agree that as at 29th August 2013, the applicant had a VAT Credit of Kshs 89,071,289.00.***
 - b. ***By virtue of the letter dated 21st January 2014, issued by the respondent, the applicant is at liberty to file a VAT appeal to the Appeal Tribunal in accordance with the Value Added Tax Act.***
 - c. ***The Notice of Motion dated 15th October 2013 is hereby dismissed.***
 - d. ***The ex-parte applicant shall bear half the respondent’s costs.***

DATED and DELIVERED at NAIROBI this 14th February 2014

D.S. MAJANJA

JUDGE

Mr Waiyaki with him Mr Mwaura instructed by Mboya Wangong'u and Waiyaki Advocates.

Mr Nyagah, Advocate instructed by the Kenya Revenue Authority.