



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
PETITION NO. 152 OF 2012

CUT TOBACCO (K) LTD.....PETITIONER/APPLICANT

VERSUS

KENYA REVENUE AUTHORITY.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

Introduction

1. In the petition dated 5th April 2012, the petitioner, a limited liability company incorporated under the provisions of the Companies Act, Cap 486 Laws of Kenya, seeks various orders and declarations directed at the respondents in respect of events that took place in 2004. The petition is expressed to be brought under the provisions of the Constitution of Kenya, 2010 and alleges denial, violation, infringement or threat to the fundamental rights and freedoms of the petitioner under Articles 19(1), 20(1), 22(1), 23, 25(a)(c), 27(1), (2), (4) and (5), 28, 29, 40(1), (2),(3), 47, 48 and 50 of the Constitution of Kenya 2010.

2. Together with the petition, the petitioner filed a Chamber Summons application dated 5th April 2012. Both the application and the petition are supported by an affidavit sworn on 5th April 2012 by Avichal Amritlal, the Manager of the petitioner. A supplementary affidavit sworn on the 27th April 2012 and a further affidavit sworn on 20th July, 2012 both also sworn by Avichal Amritlal, were filed in support of the application and petition.

3. The respondents oppose both the application and the petition. The 1st respondent filed a Notice of Preliminary Objection dated 5th June 2012 directed at both the application and the petition. It also filed a Replying Affidavit sworn on 6th June, 2012 by Stanley Mutugi, a Senior Assistant Commissioner, Debt and Compliance Section of the 1st respondent. The 2nd respondent filed Grounds of Opposition dated 4th July 2012. All the parties filed written submissions with respect to the application, which was argued before me on 10th December 2012 by Mr. Mahinda, Counsel for the petitioner, Mr. Ontweka for the 1st respondent, and Mr. Opondo for the 2nd respondent.

The Application

4. In the application which was filed under a Certificate of Urgency dated 5th April 2012, the application seeks the following orders:

a) That this Application be certified as urgent and be heard ex- parte in the first instance on account of the urgency of the issues herein raised.

b) That this matter be admitted for hearing during the Easter vacation owing to its urgency.

c) That an interim injunction and/or conservatory order be granted restraining the Respondents from undertaking any attachment of the Petitioner's properties and/or interfering with the Petitioner's assets in any way howsoever or in any manner whatsoever pending the hearing and determination of this Application.

d) That an interim injunction and/or conservatory order be granted restraining the Respondents from undertaking any attachment of the Petitioner's properties and/or interfering with the Petitioner's in any way howsoever or in any manner whatsoever pending the hearing and determination of this Petition.

e) That the Respondents be restrained from withholding the Petitioner's license and/or authorization to conduct business pending the hearing and determination of this matter.

f) That the Respondents be restrained from withholding the Petitioner's license and/or authorization to conduct business pending the hearing and determination of this Petition.

g) Costs of this Application be provided for.

The Petitioner's Case

5. According to petitioner it was licensed to manufacture cigarettes and was conducting its business on premises known as LR Number 209/10632 along Mombasa Road. The petitioner alleges that in 2004, the 1st respondents sealed its factory situated in the said premises in a bid to enforce payment of taxes due from the petitioner. As at 2004, the tax arrears had accumulated to Kenya Shillings Two Hundred and Forty Million Four Hundred and Sixty Four Thousand and Fifty Six Shillings (Kshs. 240,464,056.00). The 1st respondent also revoked the applicant's licence for non-payment of tax. The petitioner has not denied being indebted in this amount as at the time of the closure of its premises in 2004.

6. The petitioner now seeks orders from the court to restrain the 1st respondent from attaching its assets and interfering with its business, and from withholding its licence. According to Mr. Mahinda in his submissions, the thrust of the petition is that the fundamental right of the petitioner to privacy under Article 31 has been violated. This he submits, was because of the unlawful entry into and closure by the 1st respondent of the petitioner's premises. The petitioner also alleges violation of its rights under Article 47, and that it had been discriminated against as it had not been accorded the same treatment as its competitor.

7. The applicant contends that the sealing of its premises and seizure of its assets by the 1st respondent, which it describes as a violent and unreasonable takeover under the guise of exercising a lien over the applicant's property for non-payment of taxes has denied them income and has violated their constitutional rights to due protection of the law and subjected them to discrimination by failing to accord them equal treatment of the law.

8. The petitioner concedes that there are several suits pending before the High Court in which it is a party. It indicates that it is a party in HCCC No. 768 of 2005, HCCC No.761 of 2005 and HCCC No.882 of 2003, to which the 1st respondent is also a party. The three suits have not yet been determined.

The Response

9. In its Notice of Preliminary Objection, the 1st respondent seeks to have the petition dismissed on the grounds that:

a) The Petitioner has no legal standing both under the Companies Act and the Revenue statutes administered by the 1st respondent to institute any action in law.

b) The Petitioner has failed to disclose very material facts from this Honourable court especially in regard to the various other proceedings before the High Court in relation to the non-payment of the taxes which in the view of the 1st Respondents are efforts to defeat the recovery of admitted taxes due and payable.

c) The Petition does not raise violation of any fundamental rights and freedoms under the Constitution of Kenya 2010 as it challenges normal administrative actions which fall in the realm of judicial review proceedings under the Law Reform Act, Cap 26 Laws of Kenya.

10. The 1st respondent concedes that it did, on or about October, 2004, seal off the petitioner's business premises situated on LR Number 209/10632 in order to recover taxes then due from the petitioner amounting to Kshs. 240,464,056.00. The petitioner then made payment proposals to the 1st respondents, which it did not honour.

11. The 1st respondent asserts that it has powers under Section 102 of the Income Tax Act (Cap 470) Section 18 of the Value Added Tax Act (Cap 476) and Section 225 of the Customs and Excise Act (Cap 472) Laws of Kenya to collect tax by distraint, and it is these powers that it exercised with respect to the petitioner. Mr. Ontweka for the 1st respondent submitted that this petition was improperly before the court as there were a series of suits in the High Court involving the petitioner or brought on its behalf in which it has sought to defeat the recovery of admitted taxes. These suits include **Nairobi HCCC No. 768 of 2005: Euroleaf Tabak Corporation vs. Kenya Revenue Authority, Cut Tobacco Ltd and Sanghani Investments Ltd; High Court Miscellaneous Application Number 882 of 2003; Republic vs. The Commissioner General, Kenya Revenue Authority and the Commissioner of Customs and Excise; ex parte Cut Tobacco Limited; Nairobi HCCC No. 761 of 2005; Sanghani Investments Limited vs. Kaskaz Investments Ltd T/A Cut Tobacco Ltd and Kenya Revenue Authority.**

12. According to the 1st respondent, orders were made in one of the cases for the petitioner to move its machinery and equipment to premises secure for the manufacture of excise goods but it failed or refused to comply with the requirements for licensing under the Customs and Excise Act. The petitioner had also engaged the 1st respondent in discussions and admitted certain taxes but failed to honour its proposals for payment.

13. Mr. Ontweka therefore urged the court to dismiss both the application and the petition as it was an abuse of the court process in view of the matters already pending before courts of competent jurisdiction. He relied on the decision of the court in **John Njenga Mututho -v- A.G High Court Petition No. 657 of 2009.**

14. The 2nd respondent, through Mr. Opondo, learned Litigation Counsel, also opposed the application and the petition. Mr. Opondo submitted that the petitioner has failed to show any violation of its rights; both the acts of the 1st respondent in sealing the premises and its refusal to grant the petitioner a licence upon its failure to comply with the legal requirements for grant of such licence were in keeping with the 1st respondent's power under the Customs and Excise Act. He urged the court to dismiss both the petition and the application.

Determination

15. Having heard Counsel for the parties and read the parties' respective pleadings and submissions on the application before me, I believe this matter turns on a single issue: whether this court has jurisdiction to entertain this petition and or the application for injunctive relief.

16. The acts complained of took place in 2004, when the petitioner's premises were sealed upon its failure to meet its admitted tax obligations. Since then, from the material placed before the court by the 1st respondent and admitted by the petitioner, there have been no less than five suits dealing with or related to the matter now before the court, involving the same parties, and filed either by the petitioner or parties associated with it.

17. I have looked at the pleadings and orders in these cases which are annexed to the Replying Affidavit sworn on behalf of the 1st respondent by Mr. Stanley Mutugi a Senior Assistant Commissioner, Debt and Compliance Section, on 6th June 2012. From these documents, it is clear that the petitioner has sought to litigate by way of the petition now before me the same matters that are pending before the Civil and Judicial Review Divisions of this Court, Mr. Mahinda submitted that this matter is different as it is a constitutional petition alleging violation of constitutional rights, and this court therefore has jurisdiction to hear and determine it notwithstanding the pendency of other matters before other divisions of the High Court.

18. This court has, in several decisions, expressed the view that a party cannot litigate the same matters, under different guises, before different divisions of the court. A court within any of the various divisions of the High Court has jurisdiction, should a constitutional issue arise in a matter pending before it, to hear and determine that issue as a preliminary issue. See in this regard the decision of this court in **John Njenga Mututho -v- A. G High Court Petition No. 657 of 2009** which the 1st respondent relied on.

19. More importantly, this issue has been dealt with in no uncertain terms by the Court of Appeal in **Peter Ng'ang'a Muiruri v Credit Bank Limited & Others Nairobi Civil Appeal No. 203 of 2006 (Unreported)** where the court clarified the jurisdiction of the High Court in respect of constitutional matters and stated as follows:

"We want to set the law straight on the jurisdiction of what the learned Judge called "the Constitutional Court." The part of the Constitution which deals with the establishment and jurisdiction of courts in Kenya is headed "The Judiciary." Section 60 of the Constitution establishes the High Court with "unlimited original jurisdiction in Civil and Criminal matters and such other jurisdiction and powers as may be conferred on it by this Constitution or any other law." Although the Constitution stipulates that the jurisdiction of the High Court in criminal and civil matters is unlimited it is circumscribed by rules of practice and procedure to enable the court to function side by side with courts and tribunals subordinate to it and to guide it in the manner of exercising its jurisdiction and powers. Section 64 of the Constitution establishes the Court of Appeal with such "... jurisdiction and powers in relations to appeals from the High Court as may be conferred on it by law." On the basis of this provision the Court of Appeal cannot directly entertain an appeal from any other court other than the High Court. Sections 65 and 66 of the Constitution establish courts subordinate to the High Court which are Magistrates Courts and Kadhi Courts, and also Courts Martial. Each of those courts exercises such jurisdiction and powers as "may be conferred on it by law." There is no provision in the Constitution which establishes what Nyamu J. referred to as Constitutional Court. In Kenya we have a division of the High Court at Nairobi referred to as "Constitutional and Judicial Review" Division. It is not an independent Court but merely a division of the High Court. The wording of Section 67 of the Constitution which donates the power to the High Court to deal with questions of interpretation of sections of the Constitution or parts thereof does not talk about a Constitutional Court. Instead it talks about the High Court. With regard to protective provisions Section 84 of the Constitution does not in any of its sub-sections talk about the Constitutional Court. Instead it talks about an application being made to the High Court. In view of what we have stated above, it is quite clear that Nyamu J.'s remarks which we earlier reproduced were based on the mistaken belief that the Constitution had created a court called the Constitutional Court with supervisory powers over all other courts. The Hon. the Chief Justice must have been aware that no such Court is established under the Constitution and that, we think, would explain why he created a Constitutional Division and not a Constitutional

Court. The creation of the Constitutional and Judicial Review Division was an administrative act with the sole object of managing the cause list. The Chief Justice would have no jurisdiction to create a constitutional court as opposed to creating a division of the High Court. Any single Judge of the High Court in this country has the jurisdiction and power to handle a constitutional question. The fact that a Constitutional Division was established did not by such establishment create a court superior to a single Judge of the High Court sitting alone. It would be a usurpation of power to push forward such an approach and whatever decision which emanates from a court regarding itself as a Constitutional Court with powers of review over decisions of Judges of concurrent or superior jurisdiction such decision is at best a nullity. Courts must exercise the jurisdiction and powers vested in them. As the late Nyarangi JA once remarked in the case of The Owners of the Motor Vessel "Lillian" -v- Caltex Oil Kenya Ltd [1989] KLR 1 "Jurisdiction is everything. Without it, a court has no power to make one more step."(Emphasis added)

20. Further, the jurisdiction of courts to deal with constitutional issues arising before them is provided for expressly in Rule 23 of ***the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of The Individual) High Court Practice and Procedure Rules, 2006*** which is in the following terms:

'Where a constitutional issue arises in a matter before the High Court, the court seized of the matter may treat such issue as a preliminary point and shall hear and determine the same.'

21. The events that the petitioner complains of in this petition and the application dated 5th April 2012 relate to events that occurred in 2004, eight years before the filing of the petition. Those events are the subject of no less than five suits pending before different courts in various divisions of the High Court, all of which have the jurisdiction and the competence to deal with such alleged violations of the petitioner's constitutional rights as the facts before them may disclose. To permit the application or the petition now before me would be to allow a blatant abuse of the court process, and this the court will not do.

22. The application and the entire petition is hereby struck out as being an abuse of the court process. The petitioner shall bear the costs of the petition and the application.

Dated, Delivered and Signed at Nairobi this 11th day of April 2013.

**MUMBI NGUGI
JUDGE**

Mr. Mahinda, instructed by the firm of Nzioka & Co. Advocates for the Petitioner

Mr. Ontweka, instructed by the firm of D.O. Otweka & Co. Advocates for the 1st Respondent

Mr. Opndo, Litigation Counsel, instructed by the State Law Office, for the 2nd Respondent.