

(b) An order of certiorari to remove into the High Court and quash the decision of the respondents demanding the payment of the sum of Kshs. 22,637,389.00 and Kshs. 30,408,344.00 allegedly on account of outstanding Income Tax and Value Added Tax making an aggregate of Kshs. 53,045,735.00.

(c) An order of certiorari to remove into the High Court and quash the agency notices dated 16th September, 2010 addressed to the manager National Bank and the branch Manager Barclays Bank of Kenya dated 16th September, 2010.

(d) An order of prohibition directed at each of the respondents prohibiting each and all of them from collecting or recovering by way of distress or distraint or by any other means the sum of Kshs. 53,045,735.00 based on the assessments of Income Tax and Value Added Tax made against the ex-parte applicant and communicated to the applicant in the letter dated 17th June, 2010 and as further demanded in the letter dated 31st August, 2010.

The grounds relied upon are set out in the Notice of Motion, the Statutory Statement and the verifying affidavit. They are unfairness, unreasonableness, illegality, abuse of power, breach of the Rules of Natural Justice and legitimate expectation.

The Notice of Motion is supported by a statutory statement, and an affidavit sworn by **Wilson Kipkoti**, one of the directors of the applicant. It is deponed in the said affidavit that the applicant has been making its returns and meeting its tax obligations as by law required; that notwithstanding its compliance, on or about 17th June, 2010, the applicant received a document purporting to be an assessment of taxes for it and its directors amounting to Kshs. 53,045,733.00 and demanded payment thereof within 30 days of the date of the letter; that the said assessments were irregularly done under both the Income Tax Act and the Value Added Tax Act; that the said notice did not comply with the law; that it deprived the applicant of its right to object and appeal; that the rules of natural justice were violated; that the notice of 31st August, 2010, demanded payment of the said sums within seven (7) days which contravened the law; that the applicant, on or about 16th September, 2010, received notices addressed to the Managers National Bank of Kenya and Barclays Bank of Kenya appointing them as the respondents' agents for the purpose of collecting the said tax; that the said notices were not signed and were based on an inadequate notice and demanded collection of assessed tax which contravened the law; that the said notice and the respondents' actions were malicious amounted to abuse of power and offended the applicant's legitimate expectation; that no tax is due from the applicant and that the delay in making the tax assessment was unreasonable and inordinate.

The application is opposed and there are two affidavits sworn by **Fredrick O. Osamba**, an Assistant Commissioner, in opposition to the application. It is deponed in the affidavits, *inter alia*, that in execution of their mandate under the Income Tax Act and the Value Added Tax Act, the respondents received information that the applicant was not meeting its tax obligations and investigations commenced with a demand for production of records from the applicant in May, 2009; that examination of those records revealed non-compliance with provisions of the Income Tax Act and the Value Added Tax Act; that the respondents found that various sums were due from the applicant as unpaid cooperation tax, Value Added Tax, P.A.Y.E and Individual Tax; that the applicant had changed its name from **Sirikwa Hotel Limited** to **Hotel Sirikwa Limited** but VAT returns continued to be made in the former name; that the names **Sirikwa Hotel Limited** refer to one and the same company and the tax liability remained unaffected; that the applicant admitted liability in the sum of Kshs. 18,304,263 and proposed to pay the same in six quarterly instalments which proposal, the respondents declined; that the respondent made a counter proposal to the applicant which was not accepted; that the respondents then issued agency notices to the applicant's banks which notices were not effected as the applicant's bank accounts were overdrawn; that the respondents re-assessed the applicant for additional taxes under the Income Tax Act and the Value Added Tax for the years 2005, 2006, 2007 and 2008; that with regard to the tax liability of the applicant's director, enforcement was not issued against the applicant; that the applicant was informed of its right to object; that the respondents did not contravene any provisions of law or rule of natural justice; that the respondents actions were not unlawful, arbitrary, unreasonable, malicious or done in bad

faith; that therefore there was no legitimate expectation accruing to the applicant; that the respondents' investigations and subsequent assessments were based on law and were not caught by latches; that the applicant is challenging the merits of the respondents' actions which is not within the purview of judicial review; that the applicant is guilty of material non-disclosure; that the applicant was engaged in illegal activities leading to under declaration of taxes payable and that the applicant is not entitled to the reliefs sought.

The pleadings were in that state when the application came up before me for hearing on 26th July, 2011. Counsel agreed to file written submissions which they highlighted on 15th May, 2012. The submissions reiterate the parties' stand-points taken in their respective pleadings and affidavits.

I have considered the application, the supporting documents, the affidavits in opposition and the submissions of counsel. Having done so, I take the following view of the matter. The decisions impugned are as follows:-

- 1) Income Tax and Value Added Tax assessments contained in the letter dated 17th June, 2010.**
- 2) Decision to demand the payment of the sum of Kshs. 22,637,389.000 and Kshs. 30,408,344.00 respectively on account of outstanding Income Tax and Value Added Tax making an aggregate sum of Kshs. 53,045,733.00 as contained in the letter dated 31st August, 2010.**
- 3) Agency notices dated 16th September, 2010, issued to National Bank of Kenya and Barclays Bank of Kenya dated 16th September, 2010.**

The background of the decisions impugned is stated by the respondents as follows:-

They received information from an informer that the applicant was not remitting Income Tax and Value Added Tax and further that it had failed to account for Pay As You Earn (PAYE) Tax. Upon receipt of the information, the respondents commenced investigations into the tax affairs of the applicant. They accordingly served the applicant with a notice to produce their records on 15th May, 2009. The information was sought in order to ascertain the veracity of information received from their informer. On examination of the applicant's records, the respondents determined that the applicant had not been complying with the provisions of the Income Tax Act and the Value Added Tax Act. According to the respondents, the records revealed that the applicant had underpaid PAYE; had under declared VAT; had failed to keep proper records; had failed to declare all income received; had failed to make proper declaration of all monies paid to third parties; had failed to tax allowances paid out to management staff and had failed to remit Value Added Tax.

By their letter dated 17th June, 2010, the respondents served the applicant with assessment notices of tax due and on 31st August, 2010, the respondents demanded payment of the assessed amounts. On 16th September, 2010 the respondents served agency notices upon the National Bank of Kenya Limited and Barclays Bank of Kenya Limited.

There is no dispute that the respondents are statutorily empowered to collect revenue for the Government from tax payers: the relevant statutes being the Kenya Revenue Authority Act (Chapter 469 Laws of Kenya), the Income Tax Act Chapter 470 Laws of Kenya) and the value Added Tax Act (Chapter 476 of Laws of Kenya). There is also no dispute that the respondents in executing their mandate under both the Income Tax Act and the Value Added Tax Act may carry out investigations on information they receive.

Section 56(1) of the Income Tax Act, reads as follows:-

“56 (1), For the purpose of obtaining full information in respect of the income of a person or class of persons, the Commissioner may, by notice in writing, require in the case of the income of a

person, that person or any other person, and in the case of persons, any person.....

(a) To produce for examination by the commissioner at the time and place specified in the notice, any accounts, books of account, and other documents which the Commissioner may consider necessary; and the Commissioner may inspect such accounts or other documents and may take copies of any entries therein;

(b) To produce forthwith for retention by the Commissioner for such period as may be reasonable for their examination any accounts, books of account and other documents which the Commissioner may specify in the notice;

(c) Not to destroy, damage or deface on or after service of the notice of any of the accounts, books of account and other documents so specified without permission of the Commissioner in writing: Provided that in the case of a banker the powers of the Commissioner under this section shall be limited to the inspection of books or documents at the place at which they are kept and to the taking of copies of any relevant entries therein.”

And Section 30 of the Value Added Tax Act reads as follows:-

“30(1). For the purpose of obtaining full information in respect of the tax liability of any person or class of persons or any other purposes, the Commissioner or an authorised officer may require:-

(a) the production for examination, at such time and place as he may specify any records, books of account statements of assets and liabilities, or other documents which he may consider necessary for such purposes;

(b) the production forthwith, for retention for such period as may be reasonable for the examination thereof, of any records, books of account and other documents which he may specify;

(c) any person to attend at such time and place as may be specified for the purpose of being examined respecting any matter or transaction appearing to be relevant to the tax liability of any person.”

So, under both the Income Tax Act and the Value Added Tax Act, the respondents have the power to demand production of records of any one for the purpose of obtaining full information in respect of the tax liability of any person. The respondents were therefore entitled to call for and examine the applicant’s records for the said purpose. The applicants were not, as a matter of law, required to be informed of how the respondents had become seized of information which formed the basis of the demand for their records. The respondents were also not, mandatorily, required by the said statutes to be heard on receipt of those records. What happened after the records were received? The respondents examined and scrutinized them and then determined that re-assessment was necessary. They therefore wrote the letter dated 17th June, 2010 headed: **“Assessment for Hotel Sirikwa Limited and the directors.”**

In addition to informing the applicant of the assessments, the letter concluded as follows:-

“In view of the foregoing, you are hereby advised to come up with a payment schedule for the total outstanding tax of Kshs. 53,045,733 within 30 days from the date of this letter, failing which we shall institute enforcement measures to recover the same.”

The demand was for amounts assessed by the respondents for Corporation Tax, Income Tax (PAYE), Value Added Tax alleged to be due from the applicant, and its executive director.

The said letter had the following attachments:-

- (i) Assessment No. 0995200600044/4
- (ii) Assessment No. 2120100000090
- (iii) Assessment No. 0995200500055/4
- (iv) Form 11 H.O.(BD) - Schedule of additional emoluments and further tax due
- (v) Assessment No. 0991200800008/4
- (vi) Assessment No. 0991200700013/4
- (vii) Assessment No. 0991200600010/4
- (viii) Form 11 H.O.(BD) - Schedule of additional income and further tax due.

The assessments were made under the provisions of the Income Tax Act and Value Added Tax Act aforesaid. But did the respondent's letter dated 17th June, 2010 and the said attachments aforesaid amount to a valid notice as envisaged under the provisions of section 78 of the Income Tax Act and the provisions of the Value Added Tax?

I will first consider the position under the Value Added Tax Act. The Notice of Assessment in this case was addressed to an entity called **Sirikwa Hotel Limited**. The detailed explanation of the reasons for the assessment and the calculations related thereto, were for that entity. On the respondents' own admission, that entity had a separate PIN Number distinct from the PIN Number of the applicant. It is significant that PIN numbers are issued by the respondents who alone keep records of the tax payers. The respondents themselves treated the applicant and the said entity as separate and distinct legal entities complete with separate tax files. The respondents also exhibited annexure A77 to the replying affidavit of **Fredrick O. Osamba** aforesaid. The annexure is a letter from **M/s. Ndettei and Associates** addressed to the Assistant Commissioner, Investigations and Enforcement Department of the respondents. At paragraph 6 of that letter, the said firm stated that the applicant purchased the assets of the entity called **Sirikwa Hotel Limited** which was under receivership and it was then issued with its own PIN number. In the premises, **M/s Ndettei and Associates**, alerted the respondents that the assessment in respect of **Sirikwa Hotel Limited** did not apply to the applicant. The plain language of **M/s. Ndettei's** letter meant that the applicant had a separate legal existence distinct from **Sirikwa Hotel Limited** and was accordingly a different body for purposes of taxation. That, in my view, is elementary. Yet the respondents do not appear to have appreciated the import of the legal status of the applicant and **Sirikwa Hotel Limited**. They treated the applicant as a synonym of **Sirikwa Hotel Limited** during the assessment. With all due respect to the respondents, the difference between the applicant and **Sirikwa Hotel Limited** is not one of form as they contended; they are separate and distinct bodies for purposes of taxation-indeed even in the eyes of the law. Section 81 (1) of the Income Tax Act and paragraph 19(d), of the 6th Schedule of the value Added Tax Act do not therefore apply.

That being my view of the matter, the inescapable conclusion is that assessment number 2120100000090 dated 9th June, 2010 with respect to Value Added Tax of **Sirikwa Hotel Limited**, was not a valid assessment of the applicant's Value Added Tax liability. The respondents accordingly did not serve the applicant with a valid notice of taxation with respect to Value Added Tax.

The respondents were therefore guilty of an impropriety of procedure in first demanding of the applicant value added tax without notice and demanding tax not due from the applicant. The demand had no basis and was therefore arbitrary. To demand, of the applicant, tax due from a different entity was also grossly negligent and blatantly in breach of the Law. As **Nyamu J**, as he then was, held in **Keroche Industries Limited -Vs- Kenya Revenue Authority and Four others, [Misc. Civil Appeal No. 743 of 2006] UR**, judicial review remedy is available where there is, *inter alia*, proof of Wednesbury unreasonableness, illegality and impropriety of procedure. Judicial review is not limited to the decision making process alone. Indeed the court of Appeal did not limit its application in **Pili Management**

Consultants -Vs- Commissioner of Income Tax - KRA [Nairobi CA NO. 154 of 2007] UR as the respondents contended. Judicial review is also available where there is an error of law, arbitrariness, illegality and abuse of power. Its purview continues to expand.

I turn now to the assessment of Income Tax due from the applicant's executive director. It cannot be gainsaid that the applicant as a separate legal entity distinct from its directors, has no legal obligation to pay its director's tax burden. The respondents indeed acknowledged that position in paragraph 27 of the replying affidavit of **Fredrick O. Osamba** aforesaid. That paragraph reads as follows:-

"27. That further to the fore foregoing, I wish to state that the assessment notices issued to the Executive Director of the Ex-parte Applicant company were sought to be enforced against the said director and not on the ex-parte applicant company and the assessment Notices were only included in the cover letter of 17th June, 2010 as being part of the findings of the investigation concluded on the Ex-parte Applicant's tax affairs and the amounts due from the said director were not enforced against the Ex-parte Applicant but on the personal Account of Wilson Kipkemboi Kipkoti."

Yet the respondents demanded the Executive Director's tax liability from the applicant in their letter dated 17th June, 2010. **M/s. Ndettei and Associates'** letter dated 8th July, 2010, in response to the demand for payment of the said tax, purportedly admitted the said liability not on behalf of the Executive Director, but on behalf of the applicant. The inclusion of the said director's unpaid tax in the demand notice addressed to the applicant was therefore clearly unlawful.

Then there is the primary issue of the adequacy of the notice. The starting point is the statutory provision and of course the relevant parts of the notices. I say notices because the respondents served the letter of 17th June, 2010 and the notices of assessment. Section 92(1) (2) of the Income Tax Act reads as follows:-

"92

(1) Save as otherwise provided by this Act and any rules made thereunder, tax charged in any assessment shall be due and payable in accordance with this section.

(2) the tax charged in an assessment other than a provisional assessment shall be due and payable.

.....

in all other cases within thirty days from the date of service of the notice of the assessment."

It cannot be disputed that the object of the notices under the Income Tax Act and the Value added Tax is to protect the rights of a tax payer. So, for a notice under the Income Tax Act to be valid it should give the tax payer thirty (30) clear days to effect payment. The letter of 17th June, 2010 demanded the outstanding tax of Kshs. 53, 045,733 within 30 days of the date of the letter. Although there is no evidence that the said letter was served on the date it was written, the applicant, at paragraph 4 of its verifying affidavit, averred that the applicant received the same on or about 17th June, 2010.

My conclusion therefore in view of that averment is that the applicant was given adequate notice since the respondents demanded payment of the sums assessed within the statutory period.

The respondents also served assessment notices, which notices were indicated as attachments to the said letter.

But did the letter and the notice comply with the requirement to inform the applicant of its right to lodge objections to the assessments? The letter of 17th June, 2010 plainly did not notify the applicant of its said right. The respondents contend that the notification of the said right was contained in the said notices of assessment and that the applicant indeed raised objection to part of the assessment. In that

regard, the respondents exhibited the letter of **M/s. Ndettei and Associates** dated 8th July, 2010 already referred to herein before. The letter unequivocally acknowledged the respondent's letter dated 17th June, 2010 and the notices of assessment and proposed to pay the undisputed tax in instalments. The letter also challenged assessment made in respect of **Sirikwa Hotel Limited**. The respondents averments in the replying affidavit were not challenged by the applicant in a subsequent affidavit. Those averments must therefore be taken to be true. That being my view of the matter, I find and hold that, save for the assessment of value Added Tax due from **Sirikwa Hotel Limited**, the respondents validly assessed tax due by the applicant in the notices of assessment served upon the applicant together with the letter dated 17th June, 2010. The case of **Nizaba International Trading Company Limited -Vs- Kenya Revenue Authority**, on which the applicant relied, is clearly distinguishable from this case. There, the applicant was not informed of its rights at all.

For the same reasons, I find and hold that the applicant has not demonstrated that the respondents violated its legitimate expectation. The position of the applicant is quite different from the position of the applicant in **Keroche Industries -Vs- The Kenya Revenue Authority and 5 Others (Supra)**. There, the court found that the assessment of tax due was based on the need to block a valid refund lodged by the applicant. Further, in assessing tax due, the respondent applied a new tariff when the applicant had been taxed on a different tariff for over 8 years. The position in our case is different as the level of taxation remained the same and the applicant's agent admitted the respondents' assessment in part.

For the same reasons also, the fact that the letter of 17th June, 2010, demanded payment of both income tax and value added tax does not vitiate the assessment notices. The amounts demanded under the two tax regimes were distinct and assessment notices permitted no confusion as to taxes due. In any event given the response of **M/s. Ndettei and Associates**, the applicant suffered no prejudice.

With regard to the agency notices issued to National Bank of Kenya and Barclays Bank of Kenya, I find that nothing much turns on the same. I have so found because the applicant challenged the same on the grounds that they were not signed; that they were in enforcement of a demand dated 31st August, 2010 which contravened section 92 (2) of the Income Tax Act; that the notices were issued before the expiry of 30 days from 31st August, 2010, and that the notices purport to enforce assessments which contravene the law. Save for the assessment of value Added Tax due from **Sirikwa Hotel Limited**, the rest of the assessments in my judgement did not contravene the law. The statutory notice in my view was not contained in the letter dated 31st August, 2010 but that of 17th June, 2010 and its attachments. Indeed the letter of demand dated 31st August, 2010 was superfluous and was not pursuant to the Act. With regard to the agency notices, the same are exhibited by the respondents in their further replying affidavit sworn by **Fredrick O. Osamba** on 28th June, 2011. The copies exhibited are duly signed.

As I have found that only the Value Added Tax due from **Sirikwa Hotel Limited** is not recoverable from the applicant, I find no basis to quash the entire recovery process as a substantial amount assessed by the respondents must still be recovered. The agency notices are therefore limited to the recovery of taxes validly assessed.

Before concluding this judgment, I am impelled to comment on the respondents' contention that prohibition in this case cannot issue. They have made that submission because the decisions intended to be prohibited have already been made. To buttress that proposition the respondents invoked the decisions of **Kenya National Examinations Council -Vs- Geoffrey Gathenji Njoroge and 9 others [Nairobi CA NO. 266 of 1996][UR]** and **Kenya Revenue Authority -Vs- Aberdare Freight Services Limited [HC.MISC. NO. 946 of 2004] [UR]**. Those decisions indeed enunciated the correct legal position that prohibition looks to the future. In this case however, the applicant seeks to prohibit collection and recovery by way of distress or distraint or by any other means of the tax assessed. Those actions have not been effected. They may however, be being contemplated. The cases relied upon by the respondents are therefore clearly distinguishable from this case. In the premises, the order of prohibition can issue herein.

The upshot is that the applicant partly succeeds. I grant orders in terms of paragraphs (a), (b), (c) and (d) of the application with respect to the assessment of Value Added Tax due from **Sirikwa Hotel Limited** otherwise, the applicant's Notice of Motion in respect of the rest of the assessments is without merit and is dismissed.

Each party shall bear its own costs of the Notice of Motion.

It is so ordered.

DATED AND DELIVERED AT ELDORET

THIS 3RD DAY OF JULY, 2012.

F. AZANGALALA
JUDGE

Read in the presence of:-

Mr. Barasa H/B for Mr. Omusundi for the Applicant and

Ms. Odudno for the Respondents

F. AZANGALALA
JUDGE

3RD JULY, 2012