



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Case 2480 of 1998**

**MUSIC MINES LIMITED.....**  
**.....PLAINTIFF**

**VERSUS**

**MATIMU**  
**KINYUA.....DEFENDANT**

**JUDGMENT**

This suit was brought by way of “A CASE” stated and this court has been prevailed upon to exercise its interpretative jurisdiction in respect of the legal meaning and interpretation of Gazette Notices Nos. 2895 and 2894 of 11<sup>th</sup> June, 1998.

But I have to pause here and on the outset ask the following preliminary questions.

- (i) Is this court seized of jurisdiction to determine this matter as brought before it?
- (ii) If the answer to (i) above is in the affirmative, has such jurisdiction been properly invoked;

The first question can be dispensed with fairly quickly. The High Court has jurisdiction bestowed to it by Section 2 (i) of the Income Tax Act Cap. 470 as well as the unlimited jurisdiction bestowed upon it by the Judicature Act Cap. 8. This act does cast the High Court’s jurisdiction net widely enough to include admiralty matters. The Jurisdiction of the High Court can only be ousted either by the res judicata rule or by the express provisions of a statute. None of the above situations obtains here and I find that this court does have jurisdiction to have and determine this matter.

The matters herein have been scaled down to interpretation of Statute and determination which has reduced the time to be spent on exhibits and evidence and have stated a case for the court’s decision.

Section 60 of the Civil Procedure Act (Cap. 21) provides as under:

“Where any person agrees in writing to state a case of the opinion of the court, then the court shall try and determine the same in the manner prescribed.”

The manner in which a case may be stated has been prescribed under O.XXXIV and the rules there under which I need not reproduce. Suffice to say that this matter falls inter alia under Rule 1 (i) © of Order XXXIV. The parties are asking the court to make a finding with respect to questions of fact and law. Consequent upon which, depending on the court's declaration and may make orders for restraining persons or parties and or agents from undertaking or doing things that shall contradict the provisions of Section 123 of Cap. 470 and Section 14 of Cap. 476 Laws of Kenya.

Briefly the facts of this case and which are not in dispute are as follows:

“The defendants are consultants in matters of accountancy, tax collection and general business advisory. Over a period of time the plaintiffs have consulted the services of the defendants.

On 11<sup>th</sup> June, 1998 the Minister for Finance published the following two legal notices No. 2895 under the Income Tax Act Cap. 470 and No. 2894 under the Value Added Tax Cap. 476.

Under Gazette Notice No. 2895 the Minister gave the following direction.

“It is notified for the information of the general public that in the exercise of the powers conferred by Section 123 of Income Tax Act the Minister for Finance has directed the Commissioner of Income Tax to refrain from assessing or recovering tax, interest and penalty from any person on income chargeable to tax under section 3 of the Act in respect of the years of income prior to the 1<sup>st</sup> January, 1998, not disclosed to the Commissioner in any return of income made prior to the 11<sup>th</sup> June, 1998.

Provided that:-

- (i) the direction shall only apply and be limited to the amount of undisclosed income applied to the purchase by that person of registered government bonds of a duration of at least two years; and
- (ii) the person shall submit all appropriate return or amended returns containing a full disclosure of the previously undisclosed income including all registered government bonds purchased under paragraph (I) to the Commissioner of Income Tax, and
- (iii) the purchase of bonds under paragraph (I) and the disclosure under paragraph (iii) are effected not later than 31<sup>st</sup> December, 1998.”

Under the value Added Tax he gave the following direction.

“It is notified for the information of the general public that in exercise of the powers conferred by Section 14 of the Value Added Tax Act the Minister for Finance has directed that where any person has been granted amnesty in accordance with the direction issued under section 123 of the Income Tax Act on undisclosed Income for years of Income prior to 1<sup>st</sup> January, 1998, the Commissioner shall refrain from assessing or recovering tax from the person on undeclared taxable supplies made or imported taxable services received under section 6 of the Value Added Tax Act in respect of the business activities from which such undisclosed income was earned.

Provided that;

- (a) the tax charged on such supplies and not remitted to the Commissioner shall be paid to the Commissioner without any additional tax or penalty.
- (b) the supplies and imported services shall be declared to the Commissioner by the person on or before 31<sup>st</sup> December, 1998.
- (c) the direction shall not apply to a person who has been assessed or is under inspection or investigation on any matter relating to the undisclosed income”.

The amnesty was limited for tax liability for undisclosed income prior to 1<sup>th</sup> January, 1998 and the deadline for the amnesty is ending on 31<sup>st</sup> December, 1998. Amnesty is derived from the doctrine of necessity, thus a legal order where one is allowed to break the law within the law. That which otherwise is not lawful necessity makes it lawful. For the sake of legality itself the rule of law must be broken.

The correct interpretation of Sections 123 of Cap 470 and Section 14 of Cap 476 is that once the Minister for Finance has invoked his powers under the Acts all the other provisions of those Acts are rendered inoperative for the period indicated. By the Legal Notice mentioned above the Minister directed the Commissioner of Income Tax to refrain from assessing or recovering tax prior to 1<sup>st</sup> January, 1998. Tax recoverable prior to 1<sup>st</sup> January, 1998 is deemed to be extinguished or abandoned or remitted.

The 2<sup>nd</sup> provision of the direction from the Minister states as follows:

“ the person shall submit all appropriate returns or amended returns containing a full disclosure of the previously undisclosed income including all registered government bonds purchased under paragraph

(i) to the Commissioner of Income tax.

The issue of returns is dealt with under part VIII of the Income Tax Act Cap. 470 and more so under the provisions of Section 52, 53, 54, 55 and 56 among others.”

The provisions of Section 123 of the same are very explicit. Once the provisions of Section 123 have been invoked the other provisions of the Act Cap. 470 other than the provisions Section under 123 SHALL no longer apply thereto. The Legislature used the word SHALL which means it is mandatory that all the provisions of the Act be suspended during the period of the Amnesty and as far as it relates to undisclosed tax liability prior to 1<sup>st</sup> January, 1998.

The defendant, his agent/servants or any other person or authority is prohibited from making any returns or to undertake any other thing or acts except what is provided for under Section 123 of Cap. 470 and Section 14 of Cap. 476.

In view of Section 123 of Cap. 470 and Section 14 of Cap. 476 the defendant, his agents or any other person or authority are in regard to Gazette Notices No. 2894 and 2895 refrained from assessing, or recovering taxes prior to 1<sup>st</sup> January, 1998 and such taxes are deemed to have been extinguished or abandoned or remitted.

The plaintiff is empowered to and can at his own free will determine the undisclosed income prior to 1<sup>st</sup> January, 1998 and is at liberty to invest the said undisclosed income in Government Registered Bonds for the period indicated in the amnesty for at least two years.

The Defendant had on 2<sup>nd</sup> October, 1998 written to the plaintiff requesting if he could purchase the bonds on his behalf at a fixed fee for assessing, evaluating, computing and making the returns as provided for under the law.

As I have said earlier the defendant is restrained during the period of amnesty from assessing, evaluating, computing, and making returns on behalf of the plaintiff.

All that the plaintiff has to do is to determine the undisclosed income prior to 1<sup>st</sup> January, 1998 and purchase Government registered bonds and write to the Commissioner notifying him of the action taken.

The plaintiff does not require the services of a professional to write to and notify the Commissioner that he has purchased so many Government Registered Bonds and for that matter the defendant has no business to do what he intends to do and therefore not entitled to any fee for the purported services to be rendered in that regard.

A judge is bound by a legal norm and the only sound he should hear is the clarion call of the rule of law and not the mixed sound of its disregard.

But as I have said earlier amnesty makes lawful that which otherwise is not lawful. The position in law in respect of this matter is that all the provisions of Cap. 470 other than section 123 shall no longer apply and all the provisions of Cap. 476 shall no longer apply other than Section 14 of Cap. 476 as far as it relates to any undisclosed income prior to 1<sup>st</sup> January, 1998 until the period of the amnesty on 31<sup>st</sup> December, 1998.

The correct interpretation of Section 123 of Cap. 470 and Section 14 of Cap. 476 is that the Commissioner has been directed to refrain from assessing or recovering tax prior to 1<sup>st</sup> January, 1998 and that tax shall be deemed to be extinguished or abandoned and further the provisions of Cap 470 and Cap 476 no longer apply thereto.

Since the Provisions of Cap 470 and Cap 476 no longer apply thereto, the defendant, his Agents/Servants or any other person or authority are hereby prohibited from making returns under the Acts or undertaking any other thing under the Act except what is provided for under Section 123 of Cap 470 and section 14 of Cap 476.

In regard to Gazette Notices Nos. 2895 and 2894 the Plaintiff or the Defendant, his agents or any other person or authority are refrained from assessing or recovering taxes prior to 1<sup>st</sup> January, 1998 and such taxes are deemed to have been extinguished or abandoned or remitted.

The Plaintiff is empowered to and can at his own free will determine the undisclosed income prior to 1<sup>st</sup> January, 1998 and is at liberty to invest the said undisclosed income in Government Registered Bonds.

By so doing he will have met the legal requirement in respect of the above stated legal notices as well as Section 123 of Cap. 470 and Section 14 of Cap. 476.

This is the position in law and it is so declared.

Dated and delivered this 30<sup>th</sup> day of November, 1998.

J.L.A. Osiemo

JUDGE