



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, MURGOR & KANTAL, JJA.)

CIVIL APPLICATION NO. 363 OF 2018 (UR No. 296 OF 2018)

BETWEEN

KENYA REVENUE AUTHORITY.....APPLICANT

VERSUS

PROF. TOM ODHIAMBO OJIENDA SC.....1st RESPONDENT

LAW SOCIETY OF KENYA.....2ND RESPONDENT

RULING OF THE COURT

[1] On 22nd November, 2018 Prof. Tom Odhiambo Ojienda SC, (1st respondent) filed before the High Court Constitutional and Human Rights Division, **Petition No 418 of 2018** against Kenya Revenue Authority (applicant). At the same time he filed a notice of motion seeking interim orders pending the hearing and determination of the petition. That motion was heard by **Okwany, J.**, who issued the following orders on the 4th December, 2018;-

1. A mandatory order compelling the 1st respondent, Kenya Revenue Authority, to issue the applicant Prof. Tom Odhiambo Ojienda with a tax compliance certificate for the year 2018/2019 forthwith pending the hearing and determination of the petition.

2. A mandatory order compelling the 2nd respondent to accept the nomination of the petitioner/applicant for the position of the Law Society of Kenya male representative to the Judicial Service Commission nominee and/or candidate for the forthcoming Law Society of Kenya Judicial Service Commission Male Representative Election for 2019-2023 without a tax

compliance certificate for the year 2018/2019, if the 1st respondent fails to comply within 3 days.

[2] Aggrieved by the said orders, the applicant filed a Notice of Appeal on 4th December, 2018 at the High Court, indicating its intention to appeal. This was followed hot on its heels by a notice of motion predicated under Rule 5 (2) (b) of this Court Rules filed on 6th December, 2018 under certificate of urgency. The applicant seeks orders to stay the execution of the above orders and any consequential orders pending the hearing and determination of the appeal.

[3] The motion is supported by the grounds stated in the body of the application, the supporting and supplementary affidavits sworn by Rael Ivayo on 5th December, 2018 and 29th January, 2019. In a nutshell, the applicant states that there is a dispute over tax with the 1st respondent. That on or about the 7th June, 2016 the applicant had demanded tax assessed at a sum of Kshs.443, 631,000/= from the 1st respondent. However, the amount was subsequently amended to Kshs.378, 682,140/= on 5th September, 2010.

[4] The 1st respondent filed **Misc Civil Application No. 471 of 2016** against the applicant seeking orders to prohibit the applicant from demanding the said amounts and the following orders were issued by Odunga J., on 11th May, 2018:

1. An order of certiorari removing into this court and quashing the assessment conducted by the respondent, its agents, employees and/ or servants contained in a letter dated 7th June, 2016 directed at the ex parte applicant demanding payment of Ksh.443,631,900 as total tax due and owing to the respondent by the ex parte applicant for the period 2009-2016.

2. An order of certiorari removing into this court and quashing the decision of the respondent, its agents, employees and/ or servants contained in a letter dated 5th September, 2016 referred to as the amended assessment purporting to be an objection decision directed at the ex parte applicant demanding the payment of Ksh.378, 682,140 as total tax due and owing to the

respondent by the ex parte applicant for the period 2011-2016.

3. An order prohibiting the respondent from demanding the payment of Ksh.443,631,900 as total tax due and owing to the respondent by the ex parte applicant for the period 2009-2016.

4. An order prohibiting the respondent from demanding the payment of Ksh.378,682,140 as total tax due and owing to the respondent by the ex parte applicant for the period 2011-2016.

5. As the issue of how much, if any tax is due from the ex parte applicant to the respondent is still an issue at large, there will be no order as to costs.

[5] The 1st respondent also filed another suit being; **Nairobi**

Constitutional Petition No. 377 of 2018; Prof Tom Odhiambo Ojienda vs Kenya Revenue Authority and 2 others where orders were issued on 2nd November, 2018 by Chacha Mwita J., restraining the applicant from undertaking any tax investigations or questioning the 1st respondent of his tax affairs for the period 2009-2016. This is how the specific order read;

“A conservatory order be and is hereby granted prohibiting the respondents, their officials, agents, servants, employees and or anybody working under them from commencing any civil or criminal proceedings, arresting, summoning, questioning, threatening or in any way harassing the petitioner/ applicant with respect to any tax issues or questions for the period 2009 to 2016 that was the subject of Misc. Application No. 471 of 2016 Prof. Tom Odhiambo Ojienda SC t/a Prof. Tom Ojienda & Co. Advocates and is the subject of Civil Appeal No 285 of 2018 Kenya Revenue Authority Vs Prof. Tom Odhiambo Ojienda T/A Prof Tom Odhiambo Ojienda & Co Associates or any other tax question for that period (2009 and 2016) until 21st November, 2018.”

[6] During the plenary hearing of the application, Mr. Nyaga, learned counsel for the 1st respondent submitted that in order for the applicant to comply with the orders of 4th December, 2018 and issue the 1st respondent with a Tax compliance certificate (TCC), it is imperative for the applicant to satisfy itself of the 1st respondent’s tax status by undertaking a tax compliance check. If the applicant did any check it would amount to a violation of the orders of 2nd November, 2018 issued by Chacha Mwita, J; if the applicant issues a TCC without following the laid down procedure, it would be acting contrary to the law. Counsel also highlighted some specific issues to be raised in the intended appeal, that was on whether the Ruling of 4th December, 2018 and consequential orders are in violation of **Section 2 and 72 (2) of the Tax Procedures Act** and **Article 27 of the Constitution** of Kenya; whether a tax compliance certificate is indicative of full compliance in respect of filing returns and payment of all taxes due and not for a calendar period compliance; whether by ordering the applicant to issue the tax compliance certificate, the court in essence performed the statutory mandate of the revenue administration. These are but some of the issues raised in the draft memorandum of appeal.

[7] On the appeal being rendered nugatory if the orders of 4th December, 2018 are not stayed, counsel for the applicant submitted that issuance of a tax compliance certificate to a taxpayer without following the due process and conditions laid down under Section 2 and 72 (2) of the Tax Procedures Act, not only violates the provisions of the law but also sets a bad precedent to tax administration, defeats the very essence of granting of TCC and erodes public confidence. The matter is of great public importance because if the orders granted to the 1st respondent are not stayed, they have immense precedent setting implications so that if any person applying for a TCC should be denied, they would flood the courts seeking mandatory orders to compel the applicant to issue them.

[8] Opposing this application was Mr. Havi, learned counsel for the 1st respondent appearing with Mr. Makokha and Mr. Awuor. The 1st respondent swore a detailed affidavit on 18th January, 2019. Mr. Havi submitted that the applicant is in disobedience of the court order as it was directed to issue the TCC by the 6th December 2018 which it has not done; alternatively the Law Society of Kenya (LSK) was ordered to accept the 1st respondent nomination to run for the position of LSK male representative to Judicial Service Commission (JSC) without the TCC in the event that the applicant will not have issued it. According to Mr. Havi, there is no arguable appeal because when the 1st respondent was preparing to vie for the position of LSK male representative, for JSC for a second term, he obtained all the clearances and on the 12th November, 2018 he made an application for issuance of TCC for the year 2018-2019. However, that the application for issuance of TCC for 2018 was malicious, irrational and calculated to deny him an opportunity to vie for the said position was rejected.

[9] This rejection was based on assessments for the years 2009-2014 that were quashed by the judgment dated 11th May 2018. In this case there was no order of stay. Moreover the 1st respondent was issued with TCC for 2011-2017 thus this is not a tax dispute but a concerted effort by the applicant to block him from vying for the said position in JSC. Counsel went on to submit that there are no conflicting orders but that the orders were complimentary, in that the order of 2nd November 2018, prohibited the applicant from questioning the 1st respondent on tax matters and the one for 4th December, 2018 ordered the applicant to issue a TCC. The applicant can issue a TCC as ordered and revoke it if need be according to the provisions of **Section 72 (3)** which provides;-

“The commissioner may revoke the Tax Compliance Certificate issued under sub-section (2) if the Commissioner finds that the person has failed to honour a demand for tax issued by the Commissioner or has violated the provisions of a tax law.”

Mr. Havi submitted that if a stay order is issued the harm anticipated by the 1st respondent is immutable, as he will be stopped from running for an office. Counsel urged us to dismiss the application.

[10] Mr. Muite SC with Mr. Olemba appeared for the Law Society of Kenya who were joined in the suit before the High Court by the applicant as an interested party. Although LSK had not sworn an affidavit because the dispute in this application and the intended appeal in his view are over taxation, which is purely between the applicant and the 1st respondent, he stated that there were grave legal implications regarding the mandatory order issued against the LSK requiring them to accept the nomination of the 1st applicant without compliance with the criteria set out.

[11] According to Mr. Muite, TCC is just one requirement and LSK cannot give one candidate differential treatment, all candidates must be vetted using the same criteria. The matter of vetting nominees to run for the office of Commissioner to JSC that is charged with the responsibility of recruitment of Judges, magistrates and judicial staff as well as their promotion and discipline is a matter of great public importance. Vetting of the nominees is crucial as the perception regarding the administration of justice in regard to several orders issued in favour of the 1st respondent to an ordinary Kenyan is that there is a category of people who obtain orders from court according to their whims. All these are arguable matters. Mr Muite urged us to grant the order of stay so as to allow LSK a free hand to vet all the nominees using the same criteria.

[12] We have anxiously considered the arguments for and against the order of stay of execution of the orders issued on 4th December, 2018 as sought in the notice of motion before us. It is trite that two principles must be satisfied by an applicant who applies for stay of execution under Rule 5 (2) (b) – firstly, the applicant must establish there is an arguable appeal which is to say that it is not frivolous, and secondly, that if the appeal, if filed, or intended appeal, would be rendered nugatory if stay of execution applied for was not granted - see **ISHMAEL KAGUNYI THANDE V HOUSING FINANCE COMPANY LIMITED (Civil Application No. 156 of 2006 (ur))** where these principles were restated thus:

“The jurisdiction of the court under rule 5(2) (b) is not only original but also discretionary. Two principles

guide the court in the exercise of that jurisdiction. The principles are well settled. For an applicant to succeed, he must not only show his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of the appeal will be rendered nugatory.”

[13] We also need to throw a caution that an arguable appeal is not one that must necessarily succeed but one which merits to be argued fully before Court. Looking at the summary of the material that was presented before us, rival submissions and several authorities that were cited, we are satisfied that there are some arguable points that have been demonstrated for determination in the intended appeal. Some of them being:-

I. Was refusal by the applicant to issue 2018-2019 Tax Compliance Certificate to the 1st respondent unreasonable?

II. Whether compelling the applicant to issue a Tax Compliance Certificate to the 1st respondent without checking compliance according to the laid down procedure, the applicant would be contravening the provisions of the Tax Procedure Act and the Constitution?

III. What is the mandate of the applicant in tax administration, was this mandate usurped by the order compelling the applicant to issue the TCC.

IV. Are the orders made on 2nd November, 2018 by Mwita J., in conflict with the orders of 4th December, 2018?

V. Did the orders of 4th December, 2018 undermine the statutory duty of the 2nd respondent and the standards/criteria set to vet nominees to the position of LSK male representative to JSC.

VI. What is the public interest implication of the impugned orders vis vis the exercise of judicial authority over other statutory bodies.

[14] To us these are some of the issues we have gleaned that we think will merit a full hearing in the intended appeal.

On the nugatory aspect, we are also satisfied that if the orders are not granted, the applicant will be compelled to issue a TCC without it first being established whether it would be contrary to the laid down procedure required by law. Secondly, LSK will be denied an opportunity to vet the nominee for the position of LSK male representative to the JSC using the same criteria and the appeal will be rendered nugatory.

[15] Accordingly, we are satisfied that the applicant has satisfied the principles upon which an application of this nature is granted and we therefore grant a stay of execution of the Ruling delivered on 4th December, 2018 in Nairobi High Court Constitutional Petition No. 418 of 2018 and any consequential orders pending the hearing and determination of the applicant’s intended appeal. Costs of the application shall abide the outcome of the appeal.

Dated and Delivered in Nairobi this 6th day of February, 2019

M. K. KOOME

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR