



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A)**

**CIVIL APPEAL NO. 112 OF 2015**

**BETWEEN**

**DR REV. TIMOTHY NJOYA..... APPELLANT**

**AND**

**THE HON. ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**KENYA REVENUE AUTHORITY.....2<sup>ND</sup> RESPONDENT**

***(An appeal from the judgment and decree of the High Court of Kenya at Nairobi (Lenaola, J) dated 10th of October, 2014)***

***in***

***H.C. Petition No. 479 of 2013)***

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

This appeal emanates from a decision of the Constitutional and Human Rights Division of the High Court dismissing the appellant's petition on the basis that the petitioner failed to satisfy the conditions for relief set under **Article 35 (1) (b)** of the **Constitution**. By that petition dated 20.01.14 the appellant had challenged the constitutionality of **Section 125** of the **Income Tax Act** which he contended contradicted the said Article.

The appellant claimed that the 2nd respondent (KRA) failed to collect taxes owing from the Members of Parliament pursuant to **Section 5(1)** of the **Kenya Revenue Act**, whereas **Articles 201, 209 and 210** of the **Constitution** prohibits any person from exemption from paying taxes and it was so held in High Court Petition No. 137 of 2011 by **Warsame, J** (as he then was). The appellant sought information on whether the said members of Parliament were paying income tax.

The petition therefore sought the following orders;

- ***A declaration that Section 125 of the Income Tax Act contradicts Provisions of Article 35 (1) (a) of the Constitution and is therefore null and void.***

- *A declaration that the State through the 2nd respondent has a duty under Article 35 (1) (a) to provide access to the necessary information in their possession.*
- *A declaration that the petitioner is entitled to the information requested and the same be provided within 5 days of the orders and published in all the mainstream newspapers.*
- *A declaration that the 2nd respondent has a duty to enforce the collection of taxation from all the Members of Parliament under Section 5(1) (a) of the KRA Act.*
- *An order for mandamus directing KRA to effect tax collection from the Members of Parliament*
- *An order for compensation to the Kenyan taxpayer through surcharging against the Commissioner General of KRA pursuant to Article 23 (2) (e).*

K.R.A opposed the petition contending that the appellant herein, failed to render evidence to demonstrate that K.R.A had colluded with Members of Parliament not to collect taxes and also contended that it had not in any way failed to provide the information sought by the petitioner.

The Attorney General (AG) also opposed the petition on several grounds but mainly that it did not disclose any constitutional violation by K.R.A. and that it did not disclose the unconstitutionality of the impugned sections of the Income Tax Act. He did not challenge the petitioner's contention that every Kenyan is obligated to pay taxes and the same extended to Members of Parliament, but at the same time opposed the petitioner's claim that **Section 125** of the **Income Tax Act** was unconstitutional thus null and void.

The petition was heard by **Lenaola, J** (as he then was) who dismissed it and now the appellant has come up with a memorandum of appeal citing 33 grounds which can be summarized, that the learned judge erred by:

- *failing to hold that the 2nd respondent failed to adhere to the provisions of Articles 201, 209 and 210 of the Constitution when in fact there was a valid judgment in Petition No. 137 of 2011 to that effect.*
- *failing to find that the provisions of Section 125 of the Income Tax Act was inconsistent with and in violation of Articles 27, 35, 201, 209 and 210 of the Constitution, and Section 5(1) (a) KRA Act which expressly obligate K.R.A. to collect taxes from every Kenyan.*
- *failing to hold that the respondents had a duty under Article 35 of the Constitution to provide access to information which was in their possession and that they had a duty to publish and publicize the said information in the newspapers.*
- *in holding that the petitioner failed to demonstrate the manner in which the denial of information sought would violate his rights under Articles 201, 209 and 210 of the Constitution.*
- *failing to find that the principles set out in Article 24 on limitation of rights were not applicable so as to oust the court's jurisdiction.*
- *failing to appreciate that there can be no immunity or non disclosure where tax returns have not been made and which the basis for the information sought was whether the tax was actually paid, and that the respondents were hiding under Section 125 of Income Tax Act to shield the public officers in apparent breach of the Constitution.*

At the hearing of the appeal, learned counsel Mr. Antony Oluoch, Mr. Mutinda and Mr. Ado appeared for the appellant, the AG and K.R.A., respectively.

Basing his submissions on **Section 125** of the **Income Tax Act** and **Articles 35, 201, 210** of the

**Constitution, Mr. Oluoch** submitted that the central issue in this litigation is the right of access to information and restrictions thereto. He contended that the High Court (**Warsame, J**) had held that Members of the 11th Parliament had a duty to pay tax and that K.R.A. failed to enforce the orders from that judgment hence the petition before **Lenaola, J**.

In light of the express provisions of the Constitution on the right to access to information, K.R.A. as a state agency is under a duty to maintain, publicize and publish information on the question whether it did recover the tax in question, he urged.

Counsel charged that the judge misapplied **Article 24** of the **Constitution** when considering **Section 125** of the **Income Tax Act** which restricts information on tax matters in that he stopped at “except by law” but did not go to „then only to....?. Had the learned judge looked at the totality of the wording of the Article together with the right to information, the Constitution should have taken precedence with the consequence that the purported limitation of the right to information would have been impermissible. Even assuming the judge was right to deny right of information by upholding privacy rights, counsel continued, then **Article 210** of the **Constitution** states that a public record of each waiver must be produced, publicized and kept with the Attorney General which did not occur. He asserted that the Act should not have been used as a cloak for illegality.

**Mr. Oluoch** rested by arguing that before the High Court was a prayer for mandamus compelling K.R.A. to recover the taxes and it is still feasible for such an order to be made by the Court.

Opposing the appeal, **Mr. Mutinda** submitted that there was no material to show whether after judgment taxes were paid or not paid. He defended the learned judge’s finding that there was no real dispute before him as one cannot seek information in the same court where one wants to enforce rights.

He contended that in so far prayers (e) and (d) of the petition referred to the judgment in petition 137 of 2011, the appellant should have sought to enforce that judgment instead of filing a fresh petition. This was especially necessary since Members of the 10th Parliament who were directly affected had not been enjoined in the suit before him.

He concluded that by virtue of Article 31’s protection of the right to privacy, tax returns are individuals’ self-assessment under **Section 52** of the **Income Tax Act** and are not to be disclosed. There was therefore need to balance the right to individual privacy and the right to information in the manner the judge did. Moreover, it was the Parliamentary Service Commission that would have been in a position to promote the right to information but the appellant did not enjoin it in the suit.

**Mr. Ado** associated himself with those submissions. He then explained that whereas, as already decided in petition 137 of 2011 all citizens must pay taxes, K.R.A. had difficulties with providing tax returns information because such information is protected under **Section 125** of the **Income Tax Act**. This is consistent with the reality that confidentiality of tax returns is internationally recognized and also accords with common law principles. He restated K.R.A.’s position that the source of funds was not within the remit of KRA but the Parliamentary Service Commission. He relied on the Tax Procedures Act, 2016 and added that the right to information is restricted when it comes to tax and this restriction is reasonable because it encourages compliance. What is more, tax returns contain much more than emoluments to include matters outside what was being legitimately inquired about, hence reasonableness is key. If taxes were not paid, contended counsel, it is the Parliamentary Service Commission that should have been held responsible.

Counsel conceded, however, that K.R.A. did not provide an answer to the question whether the taxes were paid or not and admitted that it is the duty of KRA to pursue and collect unpaid tax.

**Mr. Oluoch** responding maintained that although **Section 37** of the **Parliamentary Service Act** requires the Parliamentary Service Commission to collect tax, it did not take away the duty imposed on K.R.A. by **Section 5** of the **Income Tax Act** to collect tax. Information on whether or not K.R.A. discharged its statutory duty should be supplied as there is no condition precedent to enjoyment of right to information

under **Article 35**.

He defended the appellant's petition as **Article 3** of the **Constitution** allows any citizen to protect and uphold the Constitution and **Article 258** of the **Constitution** implies that one can move the court under apprehension that the Constitution was violated. He pointed out that K.R.A. was not asserting that taxes were paid. He also submitted that nothing stopped KRA from redacting private information when releasing the public information sought. He concluded by arguing that the decisions cited by the respondents are distinguishable as they make no distinction between private and public persons.

Having carefully perused the record, the pleadings, the judgment, the grounds of appeal and the parties' respective submissions thereon, we think that the main issue for determination in this appeal is whether the appellant's right to access to information was violated.

In a petition alleging violation of constitutional rights, it is incumbent on the petitioner, in order to succeed, to demonstrate with a reasonable degree of precision the provision of the Constitution which have been violated with regard to it and the manner of such violation. See: *ANARITA KARIMI NJERU vs. THE*

*REPUBLIC [1979] KLR 154; MUMO MATEMU vs. TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE & 5 OTHERS [2013] eKLR.*

The right to access to information is protected under **Article 35** of the **Constitution** which also sets out the legal principles and standards that one would need to bear in mind with regard to the right. It requires any person seeking information from the State to claim how the Constitution will be violated if the information is not provided.

Therefore, the question raised is whether the provisions of **Section 125** of the **Income Tax Act** are unconstitutional to the extent that they contradict the provisions of **Article 35(1) (a)** of the **Constitution** as alleged by the appellant. K.R.A. stated in answer that its officers are prohibited from disclosing tax information other than in the manner prescribed under **Section 125** of the **Income Tax Act** as read together with **Section 126**. This formed the basis for denial of information to the appellant regarding payment of tax by Members of the 10th Parliament. It is true to say that traditionally confidentiality of tax information is a globally recognized and accepted concept which is meant to be an aid in compliance. See for instance English jurisprudence on the subject including *IN RE THE COMPANIES ACTS 1862 TO 1890 & IN RE JOSEPH HARGREAVES LIMITED [1900] 1CH347 and BROWNS TRUSTEES vs. HAY 3 RTC [1890-1898] 598*

Still we entertain no doubt that the right to information is critical to the attainment of transparent and accountable government and is an enabler to the exercise and enjoyment of other rights by citizens. It has been recognized expressly in the Constitution of Kenya 2010, under article 35 which provides:

***“(1) Every citizen has the right of access to-***

***(a) Information held by the State; and***

***(b) Information held by another person and required for the exercise or protection of any right or fundamental freedom.***

***(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.***

***(3) The State shall publish and publicize any important information affecting the nation.”***

Even though this issue has not been much litigated in our jurisdiction, it has engaged judicial minds elsewhere. The importance of this right was highlighted in the South Africa context in *BRUMMER vs. MINISTER FOR SOCIAL DEVELOPMENT AND OTHERS (10013/07) [2009] ZAWCHC 22* in

which Ncgobo, J (as he then was) held;

*“The importance of this right . . . in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the State. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency „must be fostered by providing the public with timely, accessible and accurate information.?”*

*Apart from this, access to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights. For example, access to information is crucial to the right to freedom of expression which includes freedom of the press and other media and freedom to receive or impart information or ideas. . . . Access to information is crucial to accurate reporting and thus to imparting accurate information to the public.”*

We respectfully agree with those sentiments, as we perceive in our own Constitution a deliberate effort to fashion an open and free country where governance is democratic and accountable to the „*wananchi?*”, the citizenry. More on this point, we reiterate what was enlightened in ***THE PRESIDENT OF RSA vs. M & G MEDIA LTD 2012 (3) SA 50 (CC)*** a decision of the South Africa Constitutional Court;

*“In a democratic society such as our own, the effective exercise of the right to vote also depends on the right of access to information. For without access to information, the ability of citizens to make responsible political decisions and participate meaningfully in public life is undermined.”*

The right of access to information has also been recognized in international conventions to which Kenya is a party and which form part of Kenyan law by virtue of **Article 2(6)** of the **Constitution**.

The Constitution declares its own supremacy in **Article 2** that states that;

*“(1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government....*

*(4) Any law, including customary law that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.”*

This means, simpliciter, that no law supersedes the Constitution and that therefore, the law-making freedom of Parliamentary cedes to the requirements and precepts of the Constitution. It follows that any interpretational approach, no matter how esoteric and esteemed its source, must pass muster the principles set out in **Articles 259** and **10** of the Constitution. In ***JUDGES & MAGISTRATE VETTING BOARD (JMVb) & 2 OTHERS vs. THE CENTRE FOR HUMAN RIGHTS & DEMOCRACY & 11 OTHERS, S.C. PETITION NO. 13A, 14 & 15 (CONSOLIDATED)*** the Supreme Court restated the guidelines for the construction and interpretation of the 2010 Constitution as follows:

a. No Constitutional provision is “**unconstitutional**”

b. The historical context is relevant to the accurate interpretation of the Constitution. In his words, **Mutunga, CJ** stated:

*“Thus in interpreting the Constitution, courts must take cognisance of Kenya’s unique historical context.”*

With that approach in mind, we must take judicial notice that the people of Kenya in their aspiration for more accountable government installed a system of servant leadership that eschewed certain unjustifiable principles such as tax exemption for Members of Parliament. From that perspective, K.R.A has violated the provisions of **Articles 209 and 210** of the **Constitution**. These Articles imply that no person shall be

exempted from taxation and that the tax burden of the nation shall be shared equally. The Members of the 10th Parliament took umbrage under the provisions of **section 125** of the **Income Tax Act** in order to avoid or evade payment of taxes on their full salary and perks. They claimed that tax affairs are private matters and cannot be made public. Therefore, no one has a right to access this information and so the petitioner was denied information pertaining to payment of tax by those members of Parliament. This violated his rights under **Article 35** as read with **Articles 201, 209 and 210** of the **Constitution** purposively interpreted. In ***TIMOTHY NJOYA & 17 OTHERS vs. ATTORNEY GENERAL & 4 OTHERS [2013] eKLR***. Warsame, J held that payment of taxes was a constitutional obligation, and by virtue of **Article 2** of the **Constitution** of the Republic, is binding on all persons including the Executive and Members of Parliament. There was no appeal against that holding which remains a sound statement of the law on the subject.

That being the case, the State has only one option to obey the Constitution by enforcing and applying the clear provisions of the Constitution for purposes of implementation and application of taxation to public officers. This is to be achieved through K.R.A., which has clear statutory obligation pursuant to **Section 5 (1) (a)** of its eponymous Act to collect taxes due and owing from all state officers including Members of Parliament as provided under **Article 210** as read with **Article 201 and 230** of the **Constitution**.

There was therefore, no proper basis for the learned judge to decline the appellant's prayers in the petition and the denial thereof was an error of law that invites our interference with the learned judge's exercise of discretion. We think that in view of the clear constitutional provisions the learned judge was plainly wrong and his decision resulted in injustice. See ***MBOGO vs. SHAH [1968] EA 93***.

Having come to that conclusion, the appeal succeeds and is therefore allowed. The judgment and decree of the High Court is set aside and substituted by a decree granting the amended petition as prayed save that the information to be released shall relate only to the taxes paid or payable on the salaries allowances and emoluments of Members of Parliament and not their private incomes and that the time for compliance under prayer A shall be

**Thirty (30) days.**

The appellant shall have the costs of this appeal and of the petition.

***Dated and delivered in Nairobi this 29th day of September, 2017.***

**P. N. WAKI**

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**JUDGE OF APPEAL**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**P.O. KIAGE**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**