



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

CORAM: D.S. MAJANJA J.

JUDICIAL REVIEW NO.640 OF 2016

CONSOLIDATED WITH

JUDICIAL REVIEW NO. 246 OF 2017

BETWEEN

REPUBLIC.....APPLICANT

AND

KENYA REVENUE AUTHORITY.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

AND

EQUITY BANK LIMITED.....1ST INTERESTED PARTY

CO-OPERATIVE BANK LIMITED.....2ND INTERESTED PARTY

CENTRAL BANK OF KENYA.....3RD INTERESTED PARTY

WEBTRIBE LIMITED.....4TH INTERESTED PARTY

EX PARTE

NAIROBI CITY COUNTY GOVERNMENT

RULING

Introduction

1. There are two applications filed by the ex-parte applicant, the Nairobi City County Government (“the County”), established under **Article 176** of the Constitution. Its case is principally against the 1st respondent, Kenya Revenue Authority (“KRA”), established under the *Kenya Revenue Authority Act (Chapter 469 of the Laws of Kenya)*. It is charged with the responsibility of collecting and receiving all government revenue. The County maintains accounts with 1st and 2nd interested parties where money, approved by the Controller of Budget from the County Exchequer Account maintained by the 3rd Interested party, is paid for budgeted purposes. The 4th interested party collects parking fees on behalf of the County.

2. The first application, filed in *HC Judicial Review No. 640 of 2016*, is a Notice of Motion dated 9th January 2017 seeking, among others, the following reliefs:

[1] THAT the Honourable Court be pleased and do hereby grant judicial review order of CERTIORARI to remove into this Honourable Court and quash the agency notices dated 6th December 2016 issued by the respondent to the 1st to 4th Interested parties in respect of monies and/or accounts held by the 1st to 4th Interested Parties on behalf of the Ex-parte applicant.

[2] THAT the Honourable court be pleased and do hereby grant judicial review order PROHIBITION to remove into this Honourable Court and prohibit the Respondent from issuing any other or further agency notice(s) to the 1st to 4th Interested Parties in respect of monies and/or accounts held by the 1st to 4th Interested Parties on behalf of the Ex-parte applicant.

3. The application is supported by a Statutory Statement and a Verifying and Supporting Affidavit of Gregory S. Mwakonongo sworn on 19th December 2016 and 9th January 2017 respectively. The application was opposed by the 1st respondent through the Replying Affidavit sworn on 13th March 2017 by Asha K. Salim.

4. The second application, filed in *HC Judicial Review No. 246 of 2017*, is the Notice of Motion dated 6th June 2017 in which the ex-parte applicant seeking the following main reliefs:

[1] THAT the Honourable Court be pleased and do hereby grant judicial review order of CERTIORARI to remove into this Honourable Court and quash the agency notice dated 27th March 2017 issued by the respondent to the Principal Secretary of the National Treasury in respect of funds due and payable to the applicant by the National Treasury.

[2] THAT the Honourable court be pleased and do hereby grant judicial review order PROHIBITION to remove into this Honourable Court and prohibit the 1st Respondent from issuing any other or further agency notice(s) to the Principal Secretary of the National Treasury in respect of funds due and payable to the applicant by the National Treasury.

5. The second application is supported by the Statutory Statement and a Verifying and Supporting Affidavit of Gregory S. Mwakonongo sworn on 19th May 2017 and 6th June 2017 respectively. The application is opposed by the 1st respondent through the Replying Affidavit of Asha K. Salim sworn on 7th July 2017.

Background facts

6. From the depositions filed by the parties, the facts leading to the applications before the court are not disputed and are set out in the parties’ depositions. They were precipitated by agency notices issued by KRA. The first application was precipitated by agency notices issued by KRA dated 6th December 2016 pursuant to **section 42** of the *Tax Procedures Act, 2015* (“the *TPA*”) to the 1st to 4th interested parties to recover taxes owed by the County amounting to **Kshs. 4,776,560,914.00** for the period April 2013 to December 2015.

7. The taxes due were as a result of the County failing to remit income tax (*Pay As You Earn (PAYE)*) deducted from the emoluments of its employees contrary to **section 37** of the *Income Tax Act* (“the *ITA*”). The County also failed to pay taxes withheld from various sources contrary to **section 25A** of the *Value Added Tax Act* and withholding taxes contrary to **section 10** of the *ITA*.

8. After KRA issued the agency notices dated 6th December 2016, the County Secretary addressed letters dated 9th and 13th December 2016 requesting the KRA to lift the agency notices while proposing to liquidate the tax debt. In particular, the County, by

the letter dated 9th December 2016 proposed to pay Kshs. 100 million immediately and Kshs. 50 million within 7 days of lifting the agency notices. The County also proposed to ensure that monthly PAYE is paid when it falls due and that it would continue to pay Kshs. 200 million until the arrears are settled. KRA acceded to this proposal and proceeded to write to the interested parties informing them that it had suspended the agency notices. On 19th December 2019, the County wrote to KRA re-affirming and revising its proposal to liquidate the tax debt as follows; Kshs. 50 million, Kshs. 200 million on receipt of the County's equitable share from the National Treasury, Kshs. 500 million in January 2017 and Kshs. 500 million in February 2017.

9. The second application was precipitated by the Agency Notice dated 27th March 2017 issued to the Principal Secretary to recover a tax liability of Kshs. 1,017,393,208.00 for the period October 2016 to March 2017 for failure by the County to remit PAYE, withholding taxes and Withholding tax on VAT.

10. Based on the aforesaid facts, the County, KRA and the Attorney General representing, the Principal Secretary of the National Treasury, filed written submissions and made brief oral arguments to support their respective positions. The interested parties did not participate in these proceedings. I now turn to outline the parties' respective arguments.

The County's Case

11. The County's position is that KRA cannot issue Agency Notice as this is not permitted by the Constitution and laws governing County government revenue and expenditure. The County submits that all the revenue generated by the County is banked with the Central Bank of Kenya in County Revenue Fund in compliance with **Article 207** of the Constitution and **section 109** of the *PFMA*. The County contends no money can be withdrawn from the County Revenue Fund unless the Controller of Budget has approved the withdrawal as required under **Article 207 (3)** of the Constitution.

12. The County further argues that the money held in Equity and Co-operative Bank is money approved by the Controller of Budget and paid from the County Exchequer account in accordance with its approved budget. The County further contends that money collected by the 4th interested party on behalf of the County must first be deposited to the County Exchequer Account and can only be released to the County upon approval by the Controller of Budget. The County's case maintains that by issuing Agency Notices, KRA acted illegally as the said Notices amount to withdrawal of money from the County Revenue Fund and County Exchequer Account without approval of the Controller of Budget.

13. The County therefore submits that the Agency Notices issued by KRA had the effect of freezing all the County accounts hence paralyzing all its operations. It contends that the Agency Notices were illegal for the following reasons:

i. The approval of the Controller of Budget was neither sought nor obtained for any withdrawals from the County Revenue Fund in violation of **Article 207(3)** of the Constitution.

ii. The money sought by KRA from the County Revenue Fund is not a charge against revenue fund that is provided for by any Act of Parliament or by any legislation of the County contrary to **Article 207(2)(a)** of the Constitution.

iii. The money sought by KRA from the County Revenue Fund was not authorized by an appropriation by legislation of the County contrary to **Article 207(2)(b)** of the Constitution.

iv. The money sought by KRA from the County Revenue Fund has the effect of overdrawing the County Exchequer Account contrary to **section 109(5)** of the *PFMA* since the money contained in the County Exchequer Account is less than what the respondent is demanding.

v. KRA intends to have the County spend locally generated revenue at the source held by or received by the 4th interested party on behalf of the County contrary to **Article 207(1)** of the Constitution.

vi. KRA intended to take money approved for other purposes and remitted into Bank Accounts for its own use.

14. The County also submits that the Agency Notices amount to attachment hence it is illegal as it offences the provisions of **section**

21(4) of the *Government Proceedings Act* which grants immunity to the Government and which must necessarily extend to the County Governments.

15. Counsel for the County cited several cases among them *Pastoli v Kabale District Local Government Council and Others* [2008] 2 EA 300, *JGM Marine a/s Western Marine Services Ltd CNPC Northeast Refining & Chemical Engineering Co. Ltd/Pride Enterprises v Public Procurement Administrative Review Board & 2 Others* [2015] eKLR and *Speaker, Nakuru County Assembly & 46 others v Commission on Revenue Allocation & 3 Others* [2015] eKLR which elaborate the grounds upon which this court may issue orders of judicial review. Counsel submitted that the law and procedure of drawing money from the County Revenue Fund is defined and by purporting to issue agency notices, KRA's actions were manifestly illegal and thus the court was entitled to quash and issue an order of prohibition.

KRA's Case

16. KRA takes the position that the County has an undisputed tax liability and that it issued agency notices in accordance with the provisions of **section 42** of the *TPA* after the County failed to honour payment of outstanding taxes in disregard of the applicable tax statutes. It contends that it complied with the applicable procedure in issuing Agency Notices. Despite the County's contention that the Agency Notices are illegal, KRA submits that enforcement and recovery measures for any taxes due is authorised by the *TPA*.

17. KRA submits that in any case, the Agency Notices had already been withdrawn by the time the County applied for leave to commence judicial review proceedings as KRA had suspended the Agency Notices following a request by the County to settle tax arrears by instalments. In the circumstances, it urges the court to dismiss the motion as there is nothing to quash.

18. KRA also submits that the legality or otherwise of its action can only be determined by the Tax Appeals Tribunal which is the appellate body specifically created for that purpose under **section 3** of the *Tax Appeals Tribunal Act, 2013* ("the *TATA*"). Counsel for KRA pointed out that the *TPA* provides that a person dissatisfied with the decision of the Commissioner under any of the tax statutes may appeal to the Tax Appeals Tribunal.

19. KRA submitted that the question of constitutionality or otherwise of **section 42** of the *TPA* cannot be dealt with in a judicial review proceedings and that the issue could only be dealt with by filing a petition in the proper division of the court. Counsel for KRA further submitted that every statute enjoys the presumption of constitutionality and that an action done under a provision of a statute is presumed to be constitutional unless and until declared unconstitutional by a court of law. KRA further contended that to hold its action under **section 42** of the *TPA* contrary to **Article 207** of the Constitution would be akin to stating that **Article 207** was contrary to **Article 209** of the Constitution as such a determination would take away the power of KRA to collect taxes. Counsel for KRA stated that once taxes are lawfully assessed, there is no violation of the Constitution and the taxing authority is entitled to proceed with recovery in accordance with the law.

20. KRA also takes the position that the Agency Notices issued on 6th December 2016 having been lifted prior to the filing of the judicial review proceedings, there was no decision in existence to be quashed by this court hence the proceedings are a nullity. Its counsel relied on **Order 53 rule 7(1)** of the *Civil Procedure Rules* and several decisions including *Roy Imbukure & Others v. Permanent Secretary Ministry of Health and others* [2006] eKLR, *Samson Kirerea M'ruchiu v Minister of Kand Settlement & others* C.A. 21/99 and *Republic v National Transport & Safety Authority & 10 others Ex parte James Maina Mugo* [2015] eKLR. KRA also submitted that the County deliberately withheld material information from Court when it issued the orders of 19th December 2016 and in the circumstances the court ought not to exercise discretion in its favour due to non-disclosure of material facts. It cited *Republic v National Transport & Safety Authority & 10 others Ex parte James Maina Mugo* [2015] eKLR and *Republic v Business Premises Rent Tribunal Interested Party John Mwangi Muturi & 3 others* [2016] eKLR.

Attorney General's Case

21. The Attorney General filed grounds of opposition in which it opposed the second application on the ground that the it was premature, defective and lacked any merit. Its position was that the dispute in this case involved a national government institution and the County and as such it ought to be resolved through alternative dispute resolution mechanisms as provided in **Articles 189(3)** and **189(4)** of the Constitution and **section 31** of the *Intergovernmental Relations Act*. It pointed out that no reasonable effort was made by the County to settle disputes between themselves and in the circumstances, it submitted that the County has not exhausted

alternative dispute resolution mechanisms contrary to **section 9(2), (3) and (4)** of the *Fair Administrative Action Act*.

Issues for Determination

22. As I stated earlier in the judgment, there are two applications for consideration in respect of separate agency notices issued by KRA. The first application deals with agency notices dated 6th December 2016 issued to the 1st to 4th interested parties and the second application deals with the agency notices dated 27th March 2017. In respect of the first application, the issue that requires resolution is whether the notices were withdrawn and hence capable of being quashed.

23. The first application relates to agency notices issued by KRA to the 1st to 4th interested parties on 6th December 2016 for recovery of taxes owed by the County for the period of April 2013 to December 2015. The County through its Secretary wrote to KRA proposing the scheme set out above, to settle its debt which amounted to Kshs. 4,776,560,914/=. The County does not dispute KRA's contention that it suspended the agency notices dated 6th December 2016. **Section 42(8)** of the *Tax Procedure Act* provides:

42(8) The Commissioner shall notify the payer in writing of a revocation or amendment of a notice given under subsection (2) where the taxpayer pays the whole or part of the tax due or has made an arrangement satisfactory to the Commissioner for the payment of the tax. [Emphasis mine]

24. In this case, KRA merely suspended the agency notices following its arrangement with the County on how it would clear its debt. The *Black's Dictionary (8th Ed)* at **Page 4535** defines a suspension as, "*The act of temporarily delaying, interrupting; or terminating something.*" Having suspended its notices to the 1st to 4th interested parties, KRA could still revive the notices it had issued. Since KRA still has power under **section 42** of the *TPA* to issue those notices, it may revive the notices or issue fresh notices to collect the same debt in the event of default. The court therefore is still entitled to pronounce on the legality or otherwise hence I find and hold that the agency notices dated 6th December, 2016 are alive and are capable of being quashed.

25. The second application concerns the Agency Notices dated 6th December 2016 and the notice dated 27th March 2017 against the 1st to 4th interested parties and the Principal Secretary of the National Treasury respectively.

26. In both cases the County's case is that KRA is not allowed to issue Agency Notices against it as doing so amounts to an illegality. In *Konton Trading Limited v Kenya Revenue Authority & 3 Others NRB JR Application No. 646 of 2017 [2018] eKLR* the court held that :

Illegality is divided into two categories: those that, if proved, mean that the public authority was not empowered to take action or make the decision it did; and those that relate to whether the authority exercised its discretion properly.

27. KRA's position is that it issued the Agency Notices pursuant to **section 42** of the *TPA*. Undoubtedly, the Act grants KRA the power to collect tax from a person owing money to a taxpayer by issuing an agency notice to such a person. **Section 42 (2)** of the *TPA* provides:

42 (2) The Commissioner may, in respect of the taxpayer and by notice in writing, require a person (referred to as the "payer")—

(a) who owes or may subsequently owe money to the taxpayer;

(b) who holds or may subsequently hold money, for or on account of, the taxpayer;

(c) who holds or may subsequently hold money on account of some other person for payment to the taxpayer; or

(d) who has authority from some other person to pay money to the taxpayer, to pay the amount specified in the notice to the Commissioner, being an amount that shall not exceed the amount of the unpaid tax or the amount of tax that the Commissioner believes will not be paid by the taxpayer by the due date.

28. The fact that the County is indebted to KRA is not in issue. The County merely contends that the enforcement of the Agency Notices would violate the procedure provided in the Constitution for withdrawing funds from the Revenue Fund. The application provision is **Article 207** of the **Constitution** which provides:

207 (1) There shall be established a Revenue Fund for each county government, into which shall be paid all money raised or received by or on behalf of the county government, except money reasonably excluded by an Act of Parliament.

(2) Money may be withdrawn from the Revenue Fund of a county government only—

(a) as a charge against the Revenue Fund that is provided for by an Act of Parliament or by legislation of the county; or

(b) as authorised by an appropriation by legislation of the county.

(3) Money shall not be withdrawn from a Revenue Fund unless the Controller of Budget has approved the withdrawal.

(4) An Act of Parliament may—

(a) make further provision for the withdrawal of funds from a county Revenue Fund; and

(b) provide for the establishment of other funds by counties and the management of those funds.

29. The aforesaid provisions are given effect by the **PFMA** which sets out a detailed procedure for such withdrawal of funds from the County Revenue Fund. **Section 109 (6)** of the **PFMA** states as follows:

109(6) The County Treasury shall obtain the written approval of the Controller

of Budget before withdrawing money from the County Revenue Fund under the authority of—

(a) an Act of the county assembly that appropriates money for a public purpose;

(b) an Act of Parliament or county legislation that imposes a charge on

that Fund; or

(c) this Act in accordance with sections 134 and 135.

30. The **PFMA** further provides:

109 (7) The approval of the Controller of Budget to withdraw money from the

County Revenue Fund, together with written instructions from the County Treasury requesting for the withdrawal, is sufficient authority for the approved bank where the County Exchequer Account is held to pay amounts from this account in accordance with the approval and the instructions.

31. A reading of **Article 207** of the Constitution and **section 109** of the **PFMA** shows that recovery of taxes through agency notices issued by KRA under the **TPA** are not contemplated as one of the means of withdrawing money from the County Revenue Fund or County Exchequer Account. If executed, the agency notices would bypass or sidestep the procedures established by the Constitution and the **PFMA**.

32. Another reason for shielding the County Revenue Fund from the attachment by Agency notices is that County expenditures are regulated by statute. The County's budgetary process is provided for in **section 125** of the *PMFA* which gives specific timelines to be followed in this process. Withdrawals made from the County's Revenue Fund outside this procedure would not only curtail the County's operations but would also be a violation of the Constitution and the law.

33. I therefore find and hold that KRA's decision to issue the Agency Notices dated 6th December 2016 and the Agency Notice dated 27th March 2017 was illegal. This finding should not diminish the fact that the County is required to remit its taxes in accordance with the various tax laws. Some of the principles of fiscal responsibilities to be adhered to by the County Treasury as provided in **section 107** of the *PMFA* include maintaining the county debt at a sustainable level and having a reasonable degree of predictability with respect to the level of tax rates and tax bases. **Part VII** of the *TPA* provides various avenues for the Commissioner to recover unpaid taxes such as filing a suit for recovery in **section 39**, security on property for unpaid tax in **section 40**, distress orders in **section 41**, preservation of funds in **section 43**, seizure and forfeiture of goods in **section 44** and departure prohibition orders in **section 45**. In providing these options to the Commissioner, it was anticipated that different methods would be used depending on the circumstances. In the present case, KRA's exercise of its discretion to issue agency notices failed to take into account the procedures for withdrawal of money from the County as provided by the Constitution and the *PFMA*.

Alternative remedies

34. Before I conclude this decision let me touch on the submissions by KRA and the Attorney General regarding the use and availability of alternative dispute resolution procedures. The availability of an alternative remedy is not a bar to judicial review proceedings but in order to avoid the alternative dispute resolution mechanism clearly anchored in **Article 159** of the Constitution, an applicant must show that there are exceptional circumstances that would allow the court sidestep its constitutional imperative to promote alternative dispute resolution. That is why **section 9(4)** of the *FAA* provides that:

9(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice. [Emphasis added]

35. In this case the alternative remedy for challenging Agency Notices is clearly provided by **section 2** of the *TATA* which has created the Tax Appeals Tribunal. This case though falls outside the purview of the Tribunal. First, the County admits that it owes the taxes hence there is no dispute to resolve regarding the tax liability. Second, the issue raised by the County concerns the constitutional validity of the law. The Tribunal cannot determine the constitutionality or otherwise of a statutory provision which is a matter reserved for the High Court in any of its attributions. It is for this reason I reject the argument advanced by KRA that the County ought to have filed a constitutional petition. Under **Article 165(3)(d)** of the Constitution, the High Court has the jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of the, "*the question whether any law is inconsistent with or in contravention of this Constitution.*"

36. It is for the same reasons that I find that the failure to follow alternative dispute resolution mechanisms under **Articles 189(3)** and **189(4)** of the Constitution and **section 31** of the *Intergovernmental Relations Act* is not fatal to the County's case.

Conclusion

37. For the reasons I have set out above, I allow the applications dated 9th January, 2017 and 6th June 2017. I issue judicial review orders of certiorari quashing the agency notices dated 6th December 2016 and the notice dated 27th March 2017 and issue prohibitory orders against KRA from issuing agency notices to the 1st to 4th interested parties and to the Principal Secretary of the National Treasury in respect of funds due and payable or monies held by them on behalf of the County.

38. As the parties in dispute are State entities, there shall be no order as to costs.

SIGNED AT KISHII


D. S. MAJANJA

JUDGE

DATED and **DELIVERED** at **NAIROBI** this __ 27th __ day **FEBRUARY** 2019.

P. NYAMWEYA

JUDGE

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