



**JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
JUDICIAL REVIEW CASE NO. 65 OF 2015**

BETWEEN:

THE STATE

-AND-

MALAWI REVENUE AUTHORITY RESPONDENT

EX PARTE: MIKE APPEL AND GATTO LIMITED APPLICANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Mr. Mbeta, of Counsel, for the Applicants

Mr. Chungu, of Counsel, for the Respondent

Mrs. A. Mpasu, Court Clerk

ORDER

Kenyatta Nyirenda, J.

INTRODUCTION

This is the Respondent's Summons for an order to vacate Leave to move for Judicial Review granted to the Applicants on 19th June 2015 [hereinafter referred to as the "Summons to Vacate Leave"]. The Summons to Vacate Leave is supported by two affidavits, namely, an affidavit sworn on 20th July 2015 by Anthony Chiletso Chungu, Respondent's legal counsel [hereinafter referred to as the "Respondent's Affidavit"], and a supplementary affidavit sworn on 16th October 2015 by Stanford Khundi, an officer within the Respondent's Tax Investigations Department [hereinafter referred to as the "Respondent's Supplementary Affidavit"].

NOTICE OF APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

Challenged Decisions

The decisions which the Applicant seeks to be judicially reviewed [hereinafter referred to as the “challenged decisions”] are set out in the Notice of Application for Leave to Apply for Judicial Review, commonly known as “Form 86A”. The challenged decisions read, and I quote them in full as they set forth very clearly the case for the Applicant:

- “1. *The decision of the Respondent in demanding immediate payment of the Applicant’s purported tax liabilities in the sum of MK1,236,036,927.20 by Notice of Intent to Distrain Dated 2nd June, 2015 despite knowledge that the same are not the correct taxes (merely estimates) to be paid by the Applicant and without due regard to the Applicant’s financial circumstances.*
2. *The decision of the Respondent in disregarding the Applicant’s tax credit in the sum of over MK26,726,647.00 as well as the sum of MK47,113,000.00 due to the Applicant at the Malawi Defence Force, which the Respondent garnished, in demanding full payment of the purported tax liability from the Applicant in the sum of MK1,236,036,927.20 without providing reasons for such disregard in writing.”*

Reliefs Sought

The reliefs sought by the Applicant are also contained in Form 86A. The Applicant seeks (a) a declaration that the challenged decisions are (i) an abuse of discretionary powers, inequitable and Wednesbury unreasonable and (ii) contrary to section 43 of the Constitution and therefore null and void, (b) a like order to certiorari quashing the challenged decisions, (c) an order staying execution of the challenged decisions and (d) an injunction restraining the Respondent from demanding full payment of the Applicant’s purported tax liabilities pending determination of the judicial review.

Alternative remedy

Paragraph 2 of Form 86A deals with alternative remedies. For reasons which appear presently, it is necessary to reproduce the paragraph *in extenso*:

- “2.1 *The Applicant has no alternative remedy.*
- 2.2 *The Notice of Intent to Distrain was issued by the Respondent despite knowledge of the underlying circumstances and the various representations made by the Applicant on the tax assessment herein*

- 2.3 *In the premises, it is clear that the Respondent is so determined to collect the taxes in any event before determining the appeal herein*
- 2.4 *Furthermore, in terms of the provisions of section 97 of the Taxation Act, the appeal on the Notice of Intent to Distrain will have to be brought before the Commissioner of the Respondent who made or on whose behalf the decision complained of was made. This is clearly against the rule of natural justice.*
- 2.5 *Besides, the right of the appeal to the Commissioner does not amount to stay of the decision to distrain. In that regard, the Applicant will suffer irreparable loss considering the huge sums of money that are sought to be executed. The Applicant will be wiped out and forced to wind up. This clearly amounts to onerous collection of taxes against the Applicant.*
- 2.6 *The future of the Applicant is at stake. It will be wiped out and forced to wind up considering that the Applicant is already operating in losses.”*

FACTS

In as much as is necessary for purposes of the Summons to Vacate Leave, the relevant facts can be briefly stated as follows.

The Applicant carries out motor vehicle sales and repairs business. Sometime in October 2014, the Respondent obtained a search warrant against the Applicant on allegation that the Respondent had reasonable suspicion the offences of suppression of sales, under declaration of imports, hidden income, non-remittance of Pay As You Earn (PAYE), inflation of purchases and non-remittance of VAT have been committed under the Taxation Act, Value Added Tax Act (VAT) and Customs and Excise Act [hereinafter referred to as the “tax laws”. In execution of the search warrant, the Respondent seized business and accounting documents and computers.

The Respondent conducted investigation and, on or about 14th January 2015, released its findings. The Applicant was called upon to respond to the tax quantification in the sum of MK2, 129,056,288.03. The Respondent gave the Applicant 14 days within which to respond to the findings before tax assessments would be raised. The Applicant and the Respondent jointly reviewed the findings and, consequently, the Respondent adjusted the tax amounts to the sum of MK1,324,518.536.60.

The Applicant, through its Tax Consultants, EK Tax Consultants, lodged objections to the findings on or about 24th March 2015. Under the said objections,

EK Tax Consultants assessed the taxes due and payable by the Applicant in the sum of MK88,312,299.31. The Respondent replied to the said objections and reduced the tax amount to the sum of MK1,236,036,927.20 and the Applicant was given 5 days within which to pay the said sum of money.

On 2nd June 2015 the Respondent issued a Notice of Intent to Distrain for the sum of MK1,236,036,927.20 under which the Applicant was required to settle the said amount within 7 days failing which the Applicant's goods and chattels which included trade goods would be seized and sold to satisfy the tax debt.

THE CASE OF THE RESPONDENT

In terms of the Summons to Vacate Leave, the grounds for vacating the Leave are stated in the Respondent's Affidavit. Paragraphs 4 to 6 of the Respondent's Affidavit are relevant and these read thus:

- "4. **THAT** we refer to the grounds on which the relief is sought by Mike Appel & Gatto (Applicant) and state as follows:-
- a) *That the law has not changed requiring the taxpayer to first of all appeal to the Commissioner General of Malawi Revenue Authority in case such taxpayer is aggrieved by a decision of its subordinates as was the case in the present matter.*
 - b) *That the taxpayer did not show this Court that he had exhausted that legal requirement.*
 - c) *That even if he claims that the Commissioner General would be in a position of likelihood of bias, he has not substantiated/proved that possibility as supported by empirical evidence and not just mere prejudice.*
 - d) *That the taxpayer still has the option to exercise the remedy he wants from this Court through the Commissioner General's office; applying for a waiver pending hearing of the appeal.*
 - e) *That we refer to the foregoing paragraphs and state:-*
 - i. *That Mike Appel & Gatto suppressed the existence of a Legal requirement as a matter of fact;*
 - ii. *That Mike Appel & Gatto had and still has an alternative remedy.*
5. **THAT** further, assuming (which has already been vehemently denied) that Mike Appel & Gatto had exhausted the appeal/waiver procedure before the Commissioner General; still, Mike Appel & Gatto would have to have an alternative remedy as follows:-

- a) *That if he were aggrieved by the Commissioner General's decision, he would be entitled to appeal before the Special Arbitrator.*
 - b) *That said Special Arbitrator is as proved by the law to be the Resident Magistrate.*
 - c) *That the present Court is reserved for the instance where Mike Appel and Gatto would still be aggrieved by the Resident Magistrate's outcome on their tax appeal/waiver application.*
 - d) *That accordingly, Mike Appel & Gatto had and still has an alternative remedy which is not connected to the Commissioner General, whatsoever.*
 - e) *That, for reasons best known to Mike Appel and Gatto, that remedy has not been exhausted; neither has the existence of the same as a fact been disclosed to the Court when they made their application for leave for Judicial Review.*
6. ***THAT*** *we refer to the paragraphs stating how huge the sum involved is and stated as follows:-*
- a) *That if indeed Mike Appel & Gatto feared that this sum is huge, it would timely have made a further appeal to the Special Arbitrator. Neither has there been one to the Commissioner General.*
 - b) *That even if that were true; what is in issue is what is due to the Authority in line with the tax laws and not whether the amount is huge or not.*
 - c) *That even if there were an appeal lodged, despite the amount involved the law requires that the assessed tax involved be paid before such an appeal is heard; unless there is a waiver via back door, unlawfully without exhausting alternative remedies."*

THE CASE FOR THE APPLICANT

The Applicant opposes the Summons to Vacate Leave and it has, to this end, filed an affidavit in opposition, sworn by Mr. Nazeer Osman, the Applicant's Chief Executive Officer [hereinafter referred to as the "Applicant's Affidavit"]. Paragraph 4 of the Applicant's Affidavit is relevant and it is as follows:

- 4.1 *I repeat the contents of the Notice of Application for Leave to Apply for Judicial Review generally and in particular paragraph 2 of the said Notice.*
- 4.2 *I verily believe that the Notice of Intent to Distrain was issued by or with express authorization of the Commissioner General. Hence requiring the Applicant to seek waiver of the payment of the assessed taxes meant that the Applicant was*

effectively appearing before the very person who decided that the Notice of Intent to Distrain should be issued against the Applicant.

- 4.3 *In addition to that, the Respondent's Commissioner General subsequently refused to process the appeal until the assessed taxes were paid. I exhibit a copy of the Commissioner General's letter dated 26th June 2015 marked NO 11.*
- 4.4 *Further, the Commissioner General's aforesaid letter came well after the Applicant had paid the sum of MK88, 312,299.31, which the Applicant genuinely believes to be the correct amount of taxes due and payable. I exhibit copies of remittance letter and the Respondent's acknowledgement letter dated 20th June 2015 and 13th August 2015 respectively marked NO 12 and NO 13.*
- 4.4(sic) *I further verily believe that an alternative remedy must also be an effective remedy in the particular circumstances of a matter. In the Applicant's case, the Notice of Intent to Distrain was hanging over the Applicant with the effect of forcing the Applicant to wind up if the same was executed as it meant that all its assets would be frozen.*
- 4.5 *In that regard, the effective and alternative remedy was to have recourse to this Court which could grant any orders or reliefs such as an order for stay of the Notice of Intent to Distrain that would effectively preserve the status quo of the Applicant's circumstances.*
- 4.6 *In the premises, the Applicant did not suppress any material fact as to availability of an alternative remedy but rather did provide the reasons why there was no effective alternative remedy other than judicial review under paragraph 2 of the Notice of Application for Leave to Apply for Judicial Review:*
- 4.7 *The Respondent's application is therefore without merit in the circumstances of this particular case and ought to be dismissed."*

ANALYSIS

In considering the Summons to Vacate, I deem it imperative for the Court to warn itself at the outset of the danger of being dragged into delving into matters meant for determination at the substantive judicial review proceedings. However, the Court has to examine whether in light of the matters raised by the Respondent herein, the case of the Applicant deserves to go to the next stage of substantive judicial review proceedings. In this regard, the Court per force would have to consider the nature of judicial review vis-à-vis the facts obtaining herein.

I believe the first point to make is that this Court retains discretion to vacate leave to move for judicial review in appropriate cases. That this Court has such power was put beyond question in the **The State v. Secretary to Treasury and Others, Ex-parte Mponda and Others**, supra, where Mkandawire J, put the point thus:

“Both the Attorney General and Counsel Kaphale have formidably submitted that leave for judicial review granted herein should be set aside.. This Court has the inherent jurisdiction to set aside orders including orders granting permission to apply for judicial review, which have been made without notice being given to the defendant as was the case herein. The case authority in point is R v DPP ex parte Camelot PLC [1997] 10 Admin. L. Rep 93 – Order53.

Practice note 53/1-14/34 is also very clear on this point that such an application has to be made promptly after the person had discovered the grant of leave. Thus the power of this court to set aside leave, already given for judicial review is covered in several case authorities from various jurisdictions.” – [Emphasis by underlining supplied]

However, the power to vacate leave to move for judicial review has to be sparingly used. This is how it ought to be: see **R v. Customs and Excise Commissioners ex parte Eurotunnel PLC [1995] CLC 392** where the court said:

“It is obvious that the whole purpose of the leave stage would be violated if the grant of leave were to be regularly followed by an application to set aside”

Leave will be vacated where the application discloses absolutely no arguable case: see **In Re: Ministry of Finance, Ex-parte SGS Malawi Limited, Miscellaneous Civil Application Number 40 of 2003** (unreported) wherein Mwaungulu J, as he was then, said:

“..where given, the other party may apply to have the leave set aside because the application discloses absolutely no arguable case (R v. Secretary of State for the Home Department ex parte Khalid Al-Nafeesi [1990] C.O.D. 306) or because the applicant has not frankly disclosed material facts or material aspects of the law. (R v. Jockey Club Licensing Committee ex parte Wright [1991] C.O.D. 306” – [Emphasis by underlining supplied]

The relevant statutory legislation pertaining to the present application is set out in ss. 97, 98 and 105 of the Taxation Act and ss. 43 and 44 of the Value Added Tax Act.

S. 97 of the Act governs appeals to the Commissioner General:

“(1) a taxpayer who is aggrieved by-

- (a) any assessment made upon him by the Commissioner under this Act;*
- (b) any decision of the Commissioner in relation to an assessment;*
- (c) the determination of the reduction of tax under section 123 or section 124,*

may appeal to the commissioner against such assessment, decision or determination in the prescribed manner.

- (2) *Where an appeal is made to the Commissioner under subsection (1), he-*
- (a) *may amend the assessment, decision or determination to disallow the appeal;*
 - (b) *shall send to the appellant written notice of his decision;*
 - (c) *shall record any amendment of the assessment in the assessment register."*

S. 98 provides that a tax payer aggrieved by a decision of the Commissioner General under s. 97 may appeal in the prescribed manner to a Special Arbitrator appointed either generally or specifically for the purpose by the President.

S. 105 of the Taxation Act deals with payment of tax on assessment and it is couched in the following terms:

- "(1) Any tax chargeable under this Act is payable by the due date as provided in this Act.*
- (2) Notwithstanding that an appeal against an assessment has been made under section 97, the tax shall be paid as provided in subsection (1) unless the Commissioner otherwise directs:*

Provided that, if the Commissioner has reason to believe that the tax payer may attempt to leave Malawi without intending to return without settling his liabilities under this Act, the Commissioner may require the taxpayer to pay the whole of such tax forthwith."

S. 43 of the Value Added Tax Act sets out appeal procedures against decisions not made by the Commissioner General and it is as follows:

- "(1) a person who is dissatisfied with any decision of an officer of the Authority, other than the Commissioner General, may lodge an appeal with the Commissioner General within 30 days after decision of the notice has been served on him or her upon his or her becoming aware of the decision."*
- (2) ...
- (3) ...
- (4) The Commissioner General shall make a decision on an appeal within 30 days after receipt of the appeal, and where necessary, after interviewing the appellant."*

S. 44 of the Value Added Tax deals with against decisions made by the Commissioner General:

- “(1) a person dissatisfied with the decision of the Commissioner General may lodge an appeal with any Court of a Resident Magistrate.*
- (2) An appeal under this section shall be lodged by the aggrieved person 30 days after being notified of the decision of the Commissioner General.*
- (3) No appeal lodged with the Court shall be heard unless all return all return due under this Act have been submitted to the General Commissioner and all Value Added Tax assessed or due has been paid:*

Provided that the Court may, for good cause, waive the requirement to pay all or part of the Value Added Tax due before hearing of the appeal.
- (4) Where, after hearing the appeal, the appellant is found to be entitled to any refund of Value Added Tax, interest shall be paid on the refund at the prevailing bank rate from the date of the judgment.”*

It is clear from the above-mentioned provisions that the appeal procedures provided therein have already addressed the fears of the Applicant, that is, an appeal against a decision of an officer of the Respondent lies to the Commissioner General and an appeal against a decision of an officer of the Respondent lies to the Commissioner General and an appeal against a decision of the Commissioner General lies to the Resident Magistrate Court. In the apt observation by Kachale, J. in **Siku Transport Limited v. Malawi Revenue Authority, HC/CD Commercial Case No. 112 of 2013 (unreported)** at page 4 and 5:

“the relevant law has created mechanisms and procedures for addressing any grievances with any purported assessment of tax by the Commissioner General of MRA or any other officer. Thus where the assessment is done by anyone else section 43 of the VAT Act creates an appeal to the Commissioner General. In the event of further dissatisfaction with determination of the Commissioner General section 44 (1) of the VAT Act stipulates that ‘a person ... may lodge an appeal with any Court of a Resident Magistrate.’ Section 44(2) provides that the appeal should be lodged within thirty days of the notification of the CG’s decision. Furthermore under subsection (3) the appellant is 18 required to meet two conditions before such appeal can be heard: first he must file all returns due under the VAT Act and second he must pay all the assessed VAT (provided that this second condition may be waived by the court for good cause)”

In light of the foregoing, if the understanding of the Applicant was that the Notice of Intent to Distrain was issued by the Commissioner General, it should have lodged its appeal with the Resident Magistrate Court. Equally true, if the Applicant apprehended financial difficulties in meeting the statutory condition that requires a tax payer to pay the assessed sum prior to the hearing of the appeal, it should have sought a waiver in terms of s. 44(3) of the Value Added Tax Act.

As regards the Applicant’s contention that should the Respondent enforce the claimed amount, the Applicant will suffer irreparable loss considering the huge

sums of money that are sought to be executed, it is noteworthy that, where an appeal lodged by a taxpayer succeeds, the tax laws provide for not only a refund of the relevant sums, but also interest thereon at the bank lending rate of the judgment day.

All in all, it is my finding that the Applicant prematurely sought relief from this Court before fully exhausting the appeal procedures provided under the tax laws. In the premises, the Leave to move for Judicial Review granted herein to the Applicant on 19th June 2015 is vacated. As the leave order for judicial review has been discharged, the interim reliefs granted herein, that is, (a) an order staying execution of the challenged decisions and (b) an injunction restraining the Respondent from demanding full payment of the Applicant's purported tax liabilities pending determination of the judicial review cannot stand. In the circumstances, I also discharge the interim reliefs granted herein.

The issue of costs has greatly exercised my mind. Normally costs follow the event. What this simply means is that the successful party gets the award of costs. The Court, however, has wide discretion as to what order to make. The present case raised questions of law of benefit to both parties and the industry. In the premises, I consider that the appropriate order to make would be that each party should bear its own costs and so it is ordered.

Pronounced in Chambers this 29th day of January 2016 at Blantyre in the Republic of Malawi.



Kenyatta Nyirenda

JUDGE