



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, G.B.M. KARIUKI & KANTAI, JJ.A.)

CIVIL APPEAL NO. 91 OF 2006

BETWEEN

THE LAW SOCIETY OF KENYA.....APPELLANT

AND

THE MINISTER FOR FINANCE..... 1ST RESPONDENT

THE KENYA REVENUE AUTHORITY.....2ND RESPONDENT

THE COMMISSIONER FOR DOMESTIC TAXES....3RD RESPONDENT

(Being an appeal from the Judgment and Order of the High Court of Kenya at Nairobi (Nyamu, J.) dated 24th day of February, 2006 in Misc. Civil Application No. 644 of 2005)

JUDGMENT OF THE COURT

[1] This is an appeal from the judgment of the High Court (Nyamu, J.) (as he then was) dismissing the appellant's application for judicial review for orders of certiorari and prohibition.

[2] By a notice of motion dated 12th May, 2005, the appellant sought two orders, namely:

1. a judicial review order of certiorari to call into the High Court and quash the decision and proceedings of the Minister for Finance (**Minister**) on one side, and the Kenya Revenue Authority (KRA) and the Commissioner for Domestic Taxes (Commissioner) on the other side dated 8th October 2004 and 16th March 2005 respectively.

2. Judicial review order of prohibition directed to the Minister, the Kenya Revenue Authority and the Commissioner of Domestic Taxes, from implementing the value added tax (Electronic Tax Registers) regulations 2004 and or Legal Notice No. 11 of 8th October, 2004.

[3] The application was based on eleven grounds (a) – (k). It is necessary to quote the first three grounds verbatim thus:

a. The applicant is aggrieved because the respondents have made decisions on 8th October, 2004

and 16th March 2005 pursuant to section 58 of the value Added Tax Act (VAT Act) which decisions are *ultra vires* the said section 58 of the Act.

b. As at 8th October 2004, the date of legal Notice No. 110 of 2004 (when the regulations were gazetted) the Finance Act 2004 which amended the Seventh Schedule of the Value Added Tax Act, Cap 476, Laws of Kenya by introducing sub-paragraphs, 5 and 6 of paragraphs 6 thereof (by giving authority to the Commissioner to require persons to use electronic tax registers) had not come into effect, as the same came into effect on 31st December, 2004

c. Regulation 1 of the regulation herein provides that the regulations would come into force on 1st January, 2004. The retrospective aspect of these regulations contravenes the provisions of section 46(6) of the Constitution and section 28 of the General Provisions and Interpretation Act Cap 2 Laws of Kenya.

The other grounds state that by having a pilot project for city of Nairobi, the respondents' actions amount to discrimination; the confidentiality of client/advocate relationship is adversely affected by the implementation of the regulations; the Value Added Tax Act (VAT Act) does not empower commissioner to determine when regulations would come into effect, no legal notice was published to postpone the coming into effect of the regulations, the respondent seeks to impose a monetary burden on the applicants without the authority of Parliament; the requirements that tax registers be purchased from only seven specified suppliers smacks of corruption, discrimination and is against the rules of natural justice, not all transactions by lawyers are capable of being keyed into the register and that the regulations are *ultra vires* the Advocates Act.

[4] The application was supported by the statement which was verified by the affidavit of **George Mongare Kegoro**, the then Secretary of the Law Society of Kenya. The application was opposed on the grounds contained in the replying affidavit of **David Mwiraria**, the then Minister and in the replying affidavit of KRA and the Commissioner sworn by **Phillip B.O. Odeny**.

[5] The Minister in his replying affidavit referred to various statutory provisions of the relevant laws and stated that in publishing the regulations he acted within the law and invoked section 58 of the VAT Act and that in making the regulations he was addressing prevalent problems affecting the administration of VAT Act by KRA which included:

- a. poor record keeping by tax payers.
- b. Deliberate failure to charge value added tax by taxable persons who do not issue tax invoices
- c. Taxable persons keeping various records some of which are excluded from tax declaration.
- d. Manipulation of records for purposes of under declaration of tax due.
- e. Use of fraudulent purchase documents for input tax deductions or claim for value added tax refunds.
- f. Tedious and lengthy exercise carried out by KRA in establishing trader's tax liability.

He denied that the regulations have any retrospective effect as the Finance Act 2004, which amended the seventh schedule to VAT Act, came to effect on 1st January 2005. He also denied that the implementation of the regulations would have the adverse effects specified by the applicants or contravene any law and explained that the implementation was expected to roll over to cover the entire Republic by 31st January, 2006 and annexed the country wide sector implementation timetable. The contents of the replying affidavit of KRA and commissioner were similar to that of the Minister.

[6] The learned Judge after examining the provisions of the various relevant laws made a finding thus:

“It follows therefore that as at the time the Value Added Tax (Electronic Tax Registers) Regulations 2004 were published i.e. 8th October 2004, the law including the Seventh Schedule pursuant to which they were made was valid and enforceable law due to the provisional order the terms of which I have outlined above. The challenged regulations are therefore beyond challenge. I further find that the introduction of the Electronic Tax Registers was within the objective set out in section 58 of VAT Act. Section 28 of the Interpretation and General Provisions Act was complied with because the regulations were published after the provisional orders in June 2004.

The regulations were made and published on the strength of the provisional order. It seems to me that the LSK challenge did not take into account the law which regulates the tax and duty collection for the periods between the Finance Bills each year, its publications and the passage of the Finance Act.

It is quite clear to the Court that the LSK seriously misapprehended the law on this hence the challenge to the regulations. I hold that the Minister acted in accordance with the relevant law which empowered his decision concerning the Tax Register regulations.”

Regarding the complaint of retrospectivity of the Regulations, the learned judge said:

“Regulations as published in Legal Notice 110 of 8th October 2004 clearly set out that the regulations shall come into operation on 1st January 2004. That commencement date was subsequently corrected by corrigenda contained in Kenya Gazette supplement No. 66 – Legislative Supplement No. 42 of 22nd October 2004 with the effective date being brought forward to 1st January 2005 thereby removing the retrospective effect as pertains to the date of operation.”

The learned Judge further considered the other grounds of the application and found them to be unmeritorious.

[7] Although there are five grounds of appeal, **Mr. Chacha Odera**, the learned counsel for the appellant only argued the three main grounds, namely:

- i. that the learned judge erred in failing to appreciate sufficiently or at all that as at 8th October 2004 when the Minister published the Electronic Tax Registers Regulations 2004, the Finance Act 2004 which he relied on to make regulations, had not come into force;
- ii. the learned judge made a fundamental error of law in holding that the Electronic Tax Register Regulations, 2004 were properly made and published because the Minister had invoked powers purportedly vested upon him by the Provisional Collection of Taxes and Duties Act.
- iii. the learned judge erred in law in failing to appreciate sufficiently or at all that in making the Value Added Tax (Electronic Registers) Regulations, 2004, the Minister exceeded the powers vested upon him by section 58 of the Value Added Tax Act.

The other finding of the learned judge relating to adverse effects, the impracticability and contraventions of other laws that the implementation of the regulation would cause, are not the subject of the appeal. It was also brought to the attention of the Court that after the decision of the High Court the appellant was granted an order for stay of execution of the judgment pending the determination of the appeal and hence the dispute is still alive

[8] The relevant statutory law and chronology of the events preceding the publication of Value Added Tax (Electronic Tax Registers) Regulations are briefly as follows:

The Finance Bill, 2004 published on 10th June 2004 provided in section 43:

“The Seventh Schedule to the Value Added Act is amended –

a. In paragraph 6, by inserting the following sub-paragraphs immediately after subparagraph (4).

5. For the purpose of this paragraph the Commissioner may, in accordance with regulations, require any person to use an electronic tax register of such type and description as may be prescribed for the purpose of accessing information regarding any matter or transaction which may affect the tax liability of such person.

6. Any person to whom sub-paragraph (5) applies shall be entitled with the prior approval of the Commissioner to recover the cost of the electronic tax register from the tax payable by such person”

Section 2 of the Provisional Collection of Taxes and Duties Act – Cap 415 provides:

“If a Bill is published in the Gazette whereby if such Bill were passed into law, any tax or duty, or any rate allowance or administrative or general provision in respect thereof would be imposed, the Minister may, subject to this Act and notwithstanding the provisions of any other written law, relating to taxes and duties make an order that all, or any specific provisions of the Bill relating to taxes or duties shall have effect as if the Bill relating to the taxes or duties were passed into law.”

On 10th June, 2004, the Minister issued Legal Notice No. 44, The Provisional Collection of Taxes and Duties Order 2004 in exercise of powers conferred by section 2 which provided in part –

“Minister of Finance orders that all provisions of the Bill relating to taxes or duties shall have effect as though the Bill were passed into law.”

Section 58 of the VAT Act gives the Minister power to make regulations specified in that section for the better carrying out or giving effect to the purposes and provisions of the Act. Pursuant to section 58 of the VAT Act, the Minister on 8th October 2004 published LN/No. 110 of 2004 containing the impugned Electronic Tax Registers regulations 2004. The regulations have a commencing date of 1st January 2004. Subsequently, by a corrigenda contained in Gazette Supplement dated 22nd October, 2004, the commencement date of the regulations was corrected to read 1st January, 2005.

The Finance Act, 2004 was ultimately enacted and came into effect on 31st December 2004. It retained section 43(a) of the Finance Bill intact and the commencement of that section was postponed to 1st January 2005.

[9] In support of the first ground of appeal, the counsel for the appellant referred to the relevant provisions of the Finance Bill, Finance Act, Section 58 of the VAT Act and the effective date (1st January, 2004) of the Electronic Tax Registers Regulations and submitted, *inter alia*, that the Minister made regulations which came into effect before section 43 of the Finance Act came into effect resulting into regulations being in direct conflict with section 43, the Minister by making regulations to come into operation before section 43 was in force abused his powers and acted *ultra vires*, and, that, the position that the regulations took effect from date of publication cannot be enforced as its enabling provisions had not yet come into effect.

As regards grounds 2 and 3, counsel for the appellant submitted that section 2 of the Provisional Collection of Taxes and Duties Act was not relevant as the issue for determination in the appeal was the Minister’s power to make the regulations and as the provisions relating to taxes and duties were to take effect on 1st January, 2005 by which time the Bill was already an Act of Parliament.

He submitted further, that the key question is whether the regulations can come into operation before the

Act that gives effect to them and that the Minister by giving the regulations an effective date that is earlier than the effective date Parliament gave the Finance Act 2004, acted without power and interfered with the legislative function of the Parliament and was in discord with the doctrine of separation of powers. In his view, the learned judge misapplied the provision of section 2 of the Provisional Collection of Taxes and Duties Act in holding that it empowered the respondent to enforce amendments contained in the Finance Bill, 2004 even before those amendments were expressly stated to come into effect.

[10] Mr. Onyiso learned counsel for the 1st respondent did not file written submissions but relied on the submission of 2nd and 3rd respondents.

[11] Mr. Waweru Gatonye the learned counsel for the 2nd and 3rd respondents submitted, *inter alia*, that, the commencement date of the regulations was corrected to read 1st January 2005; that according to section 27 of the Interpretation and General Provisions Act which has been repealed by Section 23(1) of the Statutory Documents Act, 2013, and re-enacted, the subsidiary legislation comes into effect on the date specified in the subsidiary legislation or if no date is specified on the date of publication subject to annulment where applicable. He pointed out that the issue of the commencement date was abandoned in the High Court.

On the application of section 2 of the Provisional Collection of Taxes and Duties Act, counsel submitted that the regulations were made and published under section 58 of the VAT Act, that section 2 aforesaid was only relevant to breathe life to section 43 of the Finance Bill and that while section 43 had a commencement date of 1st January 2005, it did not restrict the Minister from giving it a provisional application and therefore at the time the regulations were made on 8th October 2004, the provision of section of the Bill were in force. He contended further that, as the commencement date of the regulations were later amended, there was no retrospect effect and neither did they have an effective date earlier than that given by Parliament.

[12] We have considered the grounds of appeal and the respective submissions of counsel. The issue raised in the appeal is whether the Minister acted *ultra vires* his powers under the law when he made the Electronic Tax Registers Regulations. It is contended that the Minister acted *ultra vires* his powers and therefore the regulations are invalid and should have been quashed by the High Court.

[13] The genesis of the dispute is the publication of the Finance Bill, 2004 which amended the Seventh Schedule to the VAT Act by inserting subparagraph 6(5) which gave the Commissioner power in accordance with the regulations to require any person to use an electronic tax register for the purpose of information regarding any matter or transaction which affects the tax liability of such person. As the learned trial judge observed, section 28 of the VAT Act provides that the Seventh Schedule has effect with regard to the administration, collection and enforcement of Tax. The learned judge further observed that the Seventh Schedule deals with invoices, records and returns and correctly held that an electronic tax register is a record for the purpose of the VAT Act and the schedule. Pursuant to the power granted to the Minister by section 2 of the Provisional Collection of Taxes and Duties Act which includes cases where the Bill, if passed, would impose administrative or general provision relating to taxes, etc, the Minister by Legal Notice No. 44 issued an order that the provisions of the Finance Bill would have legal effect.

As the learned judge appreciated, the duration of the provisional order is six months which would have expired on 6th January 2005. The effect of the provisional order was that it was lawful for the Commissioner in accordance with regulations to require any person to use an electronic tax register before the Bill was enacted into law. The regulations that the Commissioner required in order to exercise his powers – the Electronic Tax Register Regulations were made by the Minister on 8th October 2004 pursuant to section 58 of the VAT Act.

[14] The appellant does not question the validity of the invocation of section 2 of the Provisional Collection of Taxes and Duties Act by the Minister or the validity of LN No. 44 of 2004. What the appellant contends is that the exercise of that power was not relevant as the provisions were meant to take effect on 1st January 2005 by which time the Finance Act had already been enacted. That contention is

not, with respect, valid. When making the provisional order and making the enabling regulations, the Minister's intention was obviously to make the use of Electronic Tax Registers lawful before the enactment of empowering law. It is not reasonable to assume that the Minister had envisaged that the empowering law would be enacted before the provisional law could take effect. If so, he could not have taken the trouble to have the provisional law in place.

[15] As clause 6(5) of the Finance Bill provided, the Commissioner had to act in accordance with regulations before he could require any person to use an Electronic Tax Register. The Minister had already made a provisional order legalising the use of electronic tax registers before the empowering law was passed. Section 58 of the VAT Act gave the Minister powers to make wide ranging regulations for the better carrying out or giving effect to the provisions of VAT Act. The Seventh Schedule under which electronic tax registers were introduced by the Finance Bill is part of the VAT Act. We would agree with the finding of the learned judge that the introduction of electronic tax registers was within the objective of section 58 of the VAT Act and hold that the Minister had power to make VAT, Electronic Tax Registers Regulations.

[16] The Finance Act, just like the provisional order, legalized the use of electronic tax registers. The fact that the Finance Act was ultimately enacted and came into effect on the same date as the provisional order did not render the previous provisional order unlawful. It had only the consequence that the provisional order expired and was replaced by the Finance Act on the effective date.

[17] Contrary to the submissions of the appellant's counsel, the effective date of the regulations was 1st January 2005. The regulations were not intended to give effect to the Finance Act which had not been enacted. They were intended to give effect to provisional order made lawfully legalizing the use of Electronic Tax Registers before the enactment of the proposed law. The provisional order had the force of law as if the Finance Act had been enacted.

[18] The regulations were not in conflict with the Finance Act. As a subsidiary legislation, the regulations remained in force so far as they were not inconsistent with the Finance Act until they were revoked or repealed. As section 24 of the Interpretation and General Provisions Act provides, even in cases where an Act or part of an Act is repealed, the subsidiary legislation under the repealed Act continue in force, if it is not inconsistent with the repealing Act until revoked or repealed.

It has not been contended that the regulations are inconsistent with the Finance Act or that they have been revoked or repealed.

For the foregoing reasons we find that the appeal has no merit.

[19] Lastly, orders of judicial review are discretionary. The electronic tax registers had been in use in the whole country for several years. It has not been applied to the legal services because the order of stay of execution. Had we found that the appeal has merit, we could, nevertheless, have rejected the appeal on the ground of public interest having regard to the detrimental effect an order allowing the appeal would have on the VAT tax administration.

In the premises, the appeal is dismissed with costs.

Dated and Delivered at Nairobi this 16th day of June, 2017.

E. M. GITHINJI

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JUDGE OF APPEAL

G.B.M. KARIUKI

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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