



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 479 OF 2013

DR. REV. TIMOTHY NJOYA.....PETITIONER
AND
THE HON. ATTORNEY GENERAL.....1st RESPONDENT
KENYA REVENUE AUTHORITY.....2nd RESPONDENT

JUDGMENT

Introduction

1. The Petitioner, Rev. Timothy Njoya has filed the Amended Petition dated 20th January 2014, challenging the constitutionality of Section 125 of the Income Tax Act (Chapter 470 Laws of Kenya) as it allegedly contradicts the provisions of Article 35(1) of the Constitution. He also claims that the 2nd Respondent has failed to carry out its constitutional duty of enforcing the collection of all taxes due from all the 222 Members of the 10th Parliament and 290 Members of the 11th Parliament including those nominated by Political Parties as well as the 47 Senators in Kenya. He is also aggrieved by the fact that the 2nd Respondent has failed to adhere to the provisions of Articles 201, 209 and 210 of the Constitution as read together with the judgment of Warsame J (As he then was) in **Petition No. 137 of 2011** delivered on 17th January 2013 wherein he held that all State Officers have an obligation to pay taxes.

The Petitioner's Case

2. The Petitioner's case is straight forward, and it is as follows;

3. That in light of the Judgment in **Petition No. 137 of 2011**, the 2nd Respondent is under an obligation pursuant to Section 5(1)[a] of the Kenya Revenue Authority Act to take steps to

collect taxes due and owing from Members of the 10th Parliament. Further, that Articles 201, 209 and 210 of the Constitution prohibit any person from exemption in paying taxes, which position was also settled in **Petition No. 137 of 2011**. That despite the Judgment in the said Petition, the 2nd Respondent has not taken any steps to enforce the same and has therefore declined to undertake its statutory mandate in that regard.

4. He also claims that through his advocate he has on several occasions requested the 1st and 2nd Respondents, under Article 35 of the Constitution, to provide certain information which to date they have neglected to provide. I will deal with the issue and nature of that information in detail later in this Judgment.

5. Further, that the 2nd Respondent has refused to confirm or deny whether tax due and owing from the 222 Members of the 10th Parliament was paid, from what source and how much was in fact paid, if at all.

6. It was therefore the Petitioner's case that for the above reasons, the 2nd Respondent has violated the provisions of the Constitution and in his Amended Petition he seeks the following orders;

"AA. A DECLARATION THAT Section 125 of the Income Tax Act Chapter 470 of the Laws of Kenya is unconstitutional and therefore null and void to the extent that it contradicts the express provisions of Article 35(1) (a) of the Constitution AND CONSEQUENT UPON THIS DECLARATION;

AB. A DECLARATION does issue that the State through the 1st Respondent and the 2nd Respondent herein being a statutory body established by an Act of Parliament and maintained by tax payer's money has a duty under Article 35 (1) (a) and (b) of the Constitution to provide access to the necessary information in their possession to the Petitioner to enable him assert his rights and those of other Kenyans under the Constitution AND CONSEQUENT UPON THIS DECLARATION;

A. A DECLARATION THAT the Petitioner is entitled to the information listed below and the same be provided within five (5) days of the orders herein and the same published and publicized in three (3) mainstream daily newspapers pursuant to Article 35(3) of the Constitution:

i. Information and documents supporting any evidence that all members of the 10th Parliament individually paid up or met their tax obligations as per the law required and in compliance of the orders of Hon. Justice Mohamed Warsame delivered on the 17th of February, 2013.

ii. Information and documents, in tabulated format, with one column showing or confirming the total sum of money in terms of tax remittance each member of the 10th Parliament ought to have paid according to records of the 2nd Respondent and a column against each member of the 10th Parliament showing the actual amount remitted and paid.

iii. Information and documents, in tabulated format, with one column showing or confirming the total sum of money in terms of tax remittance each member of the 11th Parliament ought to pay as taxes per month according to records of the 2nd Respondent and a column against each member of the 11th Parliament showing the actual amount remitted and paid to-date.

iv. Information and documents confirming that the 2nd Respondent herein, the KRA, complied with its statutory duty and obligation to collect taxes from all the 222 members of the 10th Parliament in compliance with the provisions of section 5 of the Kenya Revenue Authority act and how much was realized from such collection.

v. Information and documents confirming that KRA issued to all 222 members of the 10th Parliament demand notices to pay taxes as per the law required.

vi. In the event that such tax was not collected, Information and documents showing any steps taken to recover taxes including proclamation and attachment of goods and property of the defaulting 222 former members of the 10th Parliament.

vii. Information and documents confirming or otherwise that the members of the 10th Parliament were not exempted from payment of taxation by virtue of a circular widely published in the newspapers and attributed to the then Head of the Public Service and Secretary to the Cabinet, and which stated that Members of Parliament were to be exempted from payment of tax on their salaries and allowances and those on whom deductions had been made were to be refunded.

viii. Information and documents showing which particular members of the 222 members of the 10th Parliament paid up their taxes, and if the MPs salaries were attached and deducted from their employer [the Parliamentary Service Commission] or if paid up from tax payers Consolidated or other funds of the Government.

B. A DECLARATION that under Section 5(1)(a) the Kenya Revenue Authority, the 2nd Respondent herein has a statutory duty to enforce the collection of taxation from all the 222 members of the 10th Parliament as well as members of the 11th Parliament (290 members of the National Assembly plus those nominated from Party lists, as well as the 47 Senators) and to take cognizance of the provisions of Articles 201, 209 and 210 as read with the Judgment of Hon. Justice Mohammed Warsame dated and delivered on the 17th of January, 2013.

C. AN ORDER OF MANDAMUS directing the Kenya Revenue Authority, being the body statutorily mandated to collect revenue, which includes taxes, to carry out its mandatory duty to effect tax collection from the 218 member of Parliament enjoined to Petition number 137 of 2011 in terms of the Judgment of Hon. Justice Mohamed Warsame dated and delivered on the 17th January, 2013.

D. AN ORDER pursuant to Article 23(2)(e) of the Constitution, for compensation to the Kenyan tax payer through surcharge against the Commissioner General of the Kenya Revenue Authority or any other authority and or instructions to exempt Members of Parliament from payment of taxation or authorized payment from the Consolidated or other funds levied upon the tax payer, to repay by way of surcharge, inclusive of interest, all the sums in unpaid taxes by the 218 members of the 10th Parliament for the Period starting January, 2008 to February, 2013.

E. Costs of the Petition be awarded to the Petitioner."

The 1st Respondent's Case

7. The Petition is opposed. The 1st Respondent, the Attorney General, filed grounds of opposition dated 15th November 2013 which read as follows;

(a) "THAT the Petitioners have not met the evidential threshold test in proof of the allegations raised in the Petition;

(b) THAT the principles of Constitutionalism and the Rule of law should be applied to the circumstances of the case at play without pure generality as nuanced in the Petition herein;

(c) THAT under article 24 of the Constitution, 2010, fundamental rights and freedoms including the right to information are not absolute in an open and democratic society based on the factual circumstances at play;

(d) THAT the prayers for surcharge is a means to bring a contempt application contrary to the established procedural law amounting therefore

to an attempt to manoeuvre the Court's jurisdiction in a manner incompatible with the goals of justice".

8. It is the 1st Respondent's contention in the above regard that the Petitioner had failed to render evidence to demonstrate that the 2nd Respondent had colluded with Members of Parliament not to collect taxes. And that the 1st Respondent had not in anyway failed to provide the information sought by the Petitioner. As to the issue of disobedience of court orders in **Petition No. 137 of 2011**, he submits that disobedience of a court order is not a constitutional issue as it is a factual issue which must be proven within a competent application where all the procedural underpinnings have been met. That where there was a clear procedure for the redress of any particular grievance prescribed by the Constitution or the law, that procedure must be strictly followed. He relies on the case of **The Speaker of the National Assembly v Njenga Karume (2008) 1 KLR 42** in that regard.

Lastly, he prays that the Petition should be dismissed with costs.

The 2nd Respondent's case

9. The 2nd Respondent, the Kenya Revenue Authority, opposes the Petition through its grounds of opposition dated 11th July 2014, and they are as follows;

"i. The Petition is incompetent and does not lie and ought to be struck out/dismissed for reasons that:-

(a) Persons who are likely to be individually and adversely affected have not been made Parties herein.

(b) The Petition does not disclose any constitutional violation by the 2nd Respondent herein.

(c) The Petition does not disclose any unconstitutionality of any impugned sections of the Income Tax Act, Cap 470 Laws of Kenya.

ii. The Orders prayed for in the Petition, if granted, will offend the provisions of the Constitution of Kenya, 2010, particularly Articles 24, 27, 28 and 31.

iii. That no admissible evidence has been placed before Court to support the allegation that the 2nd Respondent, Kenya Revenue Authority, has failed to undertake its statutory mandate as expressed under Section 5 of the Kenya Revenue Authority Act, Cap. 469.

iv. That [under] Section 125 as read together with section 126 of the Income Tax Act, Cap.470 Laws of Kenya, the 2nd Respondent's officers are by law

prohibited form disclosing tax information other than in the manner prescribed thereunder.

v. That confidentiality of tax information is a globally recognized and accepted concept and in tune with Articles 24 and 31 of the Constitution of Kenya, 2010.

vi That under Section 35 as read together with Section 37 of the Income Tax Act, it is not the responsibility of the 2nd Respondent to verify the source of funds used to settle taxes.

vii. That there is nowhere in the Judgment of Justice Warsame delivered on 17th January 2013 in Petition Number 137 of 2011 where it was directed that the tax information relating to any of the parties therein be made public.

viii. That there is no material placed before Court to prove that members of Parliament have declined to comply with the demand by the 2nd Respondent, Kenya Revenue Authority, as alleged under paragraph 22 of the Amended Petition.

ix. That the attached newspaper articles are mere hearsay and do not meet the requirements of Order 19 Rule 3 of the Civil Procedure Rules 2010 and relate to a period prior to 17th January 2013 when Justice Warsame delivered his Judgment in Petition No.117 of 2013.

x. That in the circumstances, the Petitioner's Amended Petition is vexatious and an abuse of the Court process and ought to be dismissed with costs to the 2nd Respondent."

10. The 2nd Respondent in its submissions does not challenge the deposition of the Petitioner that every Kenyan is obligated to pay taxes irrespective of their position in society and that the said obligation extends to Members of Parliament and that it therefore agrees with the decision in Petition No. 137 of 2011. However, the 2nd Respondent opposes the Petitioner's claim that Section 125 of the Income Tax Act is unconstitutional and thus null and void to the extent that it contradicts Article 3 5(1) (a) of the Constitution and also denies that the Petitioner is entitled to tax information of Members of the 10th and 11th Parliaments.

11. The 2nd Respondent's position is based first on the presumption of constitutionality of statutes; that the power to declare a statute unconstitutional should be exercised as a last resort since all statutes are enacted with a presumption that they are constitutional. He relies on the case of Kenya Union of Domestic. Hotels. Education Institutions and Hospital Workers v Kenya Revenue Authority (2014) e KLR in support of that submission.

12. It is also its position that under Article 209 of the Constitution, the power to collect, impose and administer tax is conferred on the 2nd Respondent and that the Court has no role in

the process unless there is a lawful justification for it to intervene which justification does not exist in the present case.

13. That the 2nd Respondent's officers who administer Section 125 of the Income Tax Act must uphold an oath of secrecy under Section 13 of the Income Tax Act and under Section 125(2), a document that has come into the possession of an officer in the performance of his duties under the Income Tax Act shall not be produced in Court. It thus submits that since the current proceedings are not concerned with the carrying into effect the provisions of the Income Tax Act in the course of a prosecution for an offence committed in relation to tax, the information sought cannot be granted.

14. Secondly, it submits that the 2nd Respondent does not keep with it tax information and records which are of a public nature and that it only keeps individual tax returns which are self-declarations of the income of individuals and are therefore confidential and held in confidence by the 2nd Respondent. It thus claims that those documents are subject to "crown privilege" and cannot be released to third parties.

15. Thirdly, that even if a Member of Parliament is a state officer, his or her tax affairs are confidential and cannot be made public without the individual's consent and since none of the Members of Parliament concerned has been enjoined in these proceedings, such orders cannot issue against them. Further, that the Parliamentary Service Commission, which is the de facto employer of Members of Parliament has not been enjoined in these proceedings either. And in any event, if the 2nd Respondent was to be compelled to disclose such personal details, it would be against public policy and interest and prejudicial to each Member of Parliament. It relies on the cases of **Re Joseph Hargreaves Ltd Tax Case Volume IV (1898 -1900) 173** which upheld the confidentiality of tax returns forms.

16. As regards the place of Article 35 of the Constitution, the 2nd Respondent submits that the said Article applies only when a citizen has demonstrated that the information is held by a person against whom he is claiming and that the information is being sought for the purpose of enforcing fundamental rights and freedoms. It relies on the case of **Nairobi Law Monthly v Kengen (2013) eKLR** in that regard and submits further that the Petitioner has failed to show that the information being sought is held by the 2nd Respondent and that it is required for the enforcement of fundamental rights and freedoms.

17. Lastly, that under Section 37 of the Income Tax Act, it is not the function of the 2nd Respondent to deduct taxes from employees' emoluments but in the present case that is the role of the Parliamentary Service Commission and in any event, the law does not allow the 2nd

Respondent to enquire into the sources of the funds used to pay taxes. It therefore seeks that the Petition should be dismissed for the above reasons.

Determination

18. Having stated the Parties' contentions as above, it is clear that the facts of this case are not in dispute and it is also not in dispute that Members of the 10th Parliament were obligated to pay taxes as held by Warsame J in **Petition No. 317 of 2011**. It is now the Petitioner's contention however, that the 2nd Respondent has violated the provisions of Article and 210 of the Constitution as it has failed to enforce the judgment in **Petition No. 317 of 2011** and collect the taxes due from Members of the 10th Parliament. It therefore follows that there are two issues for determination in this Petition; first, whether the 2nd Respondent has violated the provisions of Article 209 and 210 of the Constitution and secondly, whether Section 125 of the Income Tax Act is unconstitutional and is a violation of the Petitioners fundamental rights and freedoms under Article 35 of the Constitution to the extent that it denies the Petitioner access to certain information.

Whether the 2nd Respondent has acted in violation of Article 209 and of the Constitution.

19. Article 209 (1] provides as follows:

(1) "Only the national government may impose -

(a) Income tax;

(b) Value-added tax;

(c) Customs duties and other duties on import and export goods; and

(d) Excise tax

(2) An Act of Parliament may authorize the national government to impose any other tax except a tax specified in clause (3) (a) or (b)

(3) A county may impose -

(a) Property rates

(b) Entertainment taxes; and

(c) Any other tax that it is authorized to impose by an Act of Parliament.

(4) The national and county governments may impose charges for the services they provide.

(5) The taxation and other revenue-raising powers of a county shall not be exercised in a way that prejudices national economic policies, economic activities across county boundaries or the national mobility of goods, services, capital or labour."

And Article 210 provides that:

(1) "No tax or licensing fee may be imposed, waived or varied except as provided by legislation.(2) If legislation permits the waiver of any tax or licensing fee -

(a) A public record of each waiver shall be maintained together with the reasons for the waiver; and

(b) Each waiver, and the reason for it, shall be reported to the Auditor-General;

(3) No law may exclude or authorize the exclusion of a State officer from payment of tax by reason of-

(a) The office held by that State officer; or

(b) The nature of the work of the State Officer."

20. It is not contested that the 2nd Respondent is the government agency responsible for the collection and receipt of all taxes. Specifically, it has the duty and obligation to collect and account for all revenues in accordance with the provisions of the law and this mandate has been well captured under the provisions of Section 5(1) (a) of the Kenya Revenue Authority. The Petitioner in his Petition claims that it is not clear whether the 2nd Respondent has indeed collected taxes due from the 222 Members of the 10th Parliament as ordered in **Petition No. 317 of 2011** or not. He thus claims that the 2nd Respondent is in violation of the Constitution, in particular Article 209 and 210 of the Constitution as reproduced above.

21. I must state at the outset that this Court deals with real and not hypothetical or perceived disputes. It is therefore a court of law mandated to deal with real disputes and a party must approach the court with hard facts which would reveal a violation of the Constitution and as a result, get a relief for that violation. That is why the Court in **John Harun Mwau and Others v Attorney General and Others . Petition No. 65 of 2011** warned that;

"...this court should not deal with hypothetical and academic issues. In our view, it is correct to state that the jurisdiction to interpret the constitution under Article 165(3) (d) does not exist in a vacuum and it is not exercised

independently in the absence of a real dispute. It is exercised in the context of a dispute or controversy''.

22. I agree with the above reasoning, and with respect, the Petitioner cannot come to court to seek facts and information he intends to use to prove the very case that he is arguing before the Court. He must also plead his case with some degree of precision and set out the manner in which the Constitution has been violated, by whom and even state the Article of the Constitution that has been violated and the manner in which it has been violated - See **Anna Rita Karimi Njeru v Republic (1976-1980) 1 KLR 14** and **Trusted Society of Human Rights v Mumo Matemu and Another Petition No. 279 of 2012.**

23. Looking at the Petition before me in the above context, it is not stated how the 2nd Respondent has violated Articles 209 and 210 of the Constitution as alleged. Indeed at paragraph 15 of the Petition, the Petitioner stated as follows;

"15. On the 30th of June, 2013 the Petitioner through his Advocates wrote a letter to the 1st and 2nd Respondents under Article 35 of the Constitution on the right of access to information seeking inter alia the following information or access to documents thereof but which the Respondents have to date declined or neglected to respond to:

a. Information and documents supporting any evidence that all members of the 10th Parliament paid up or met their tax obligations as per the law required and in compliance of the orders of Hon. Justice Mohamed Warsame delivered on the 17th of February, 2013.

b. Information and documents confirming that the 2nd Respondent herein the KRA complied with its statutory duty and obligation to collect taxes from all the 222 members of the 10th Parliament in compliance with the provisions of section 5 of the Kenya Revenue Authority Act.

c. Information and documents confirming that KRA issued demands to all 222 members of the 10th Parliament with demand notices to pay taxes as per the law required.

d. Information and documents showing any steps taken to recover taxes including proclamation and attachment of goods and property of the defaulting 222 former members of the 10th Parliament.

e. Information and documents showing which particular members of the 222 members of the 10th Parliament paid up their taxes, and if they paid where the source of the money was from and whether from the Mps salaries attached and deducted from their employer the Parliamentary Service Commission or if paid up from tax payers money the authority thereof to

charge such payment upon the consolidated or other funds of the Government."

24. As can be seen above, the Petitioner has sought from KRA the facts from which he intends to claim a violation of Article 209 and 210 of the Constitution in the Petition. He has not therefore disclosed the manner in which the Constitution has been violated by the above information not being provided.

25. I say so because there is already a decision that all Members of the 10th Parliament should pay taxes. If they haven't refused to do so, the correct procedure is to go back to **Petition No.317 of 2011** and seek whatever reliefs are available within those proceedings. To state that KRA has acted unconstitutionally in a vacuum can hardly enhance this Court's legitimate authority to enforce compliance with the Constitution. As regards Members of the 11th Parliament and the Senate, again the Petition is full of generalities and it has not been shown that the said persons are not paying taxes nor has it been shown that KRA is not collecting taxes from them. Where then is the dispute?

26. In any event, the affected parties have not been enjoined in the present proceedings for their side of the story to be heard. How can this court make adverse orders against them without them being heard?

27. Without clear answers to the above questions, this court cannot engage in a fishing expedition with its orders and whose efficacy in reality may end up being in doubt. That is all there is to say on this aspect of the Petition and I see no evidence to support the claim that Articles 209 and 210 of the Constitution were violated.

Whether the provisions of Section 125 of the Income Tax Act are unconstitutional

28. The Petitioner has claimed that Section 125 of the Income Tax Act is unconstitutional to the extent that it contradicts the provisions of Article 35(1) (a) of the Constitution.

29. In that regard I am being called upon to determine the constitutionality or otherwise of Section 125 of the Income Tax Act in the context of Article 35(1) (a) of the Constitution and in order to do so, I must set out the relevant principles which would guide the Court in such a task. First, there is a general presumption that every provision of an Act of Parliament is constitutional and the burden of proof lies on any person who alleges otherwise save that where there are limitations to fundamental rights, the onus is on the body restricting the right to show that such limitation was justified - See **Ndvanabo v Attorney General [2001] EA 495** Further, in **Pearlberg v Varty [1972] 1 WLR 534**, as was cited in **Re Application Bahadur [1986] LRC 545 (Const.)** the Learned Judge stated, thus:

"I would only emphasise that one should not start by assuming that what Parliament has done in a lengthy process of legislation is unfair. One should rather assume that what has been done is fair until the contrary is shown..."

30. I agree and I would add that this Court will start from the presumption that a provision of a statute as enacted by Parliament is constitutional and is fair unless the contrary is proven.

31. Second, in determining whether a provision of an Act is constitutional, the overall object and purpose of the Act must be considered. That is why in **Hamdardda Wakhama v Union of India AIR 1960 at 554** the Court stated as follows;

"..when an enactment is impugned on the ground that it is ultra vires and unconstitutional what has to be ascertained is the true character of the legislation and for that purpose, regard must be had to the enactment as a whole, to its objects, purpose and true intention and the scope and effect of its provisions or what they are directed against and what they aim at".

32. Back home, that principle has been established and applied in a long line of cases including those of **Murang'a Bar Operators and Another v Minister of State for Provincial Administration and Internal Security and Others Nairobi Petition No. 3 of 2011 (Unreported)**, **Samuel G. Momanvi v Attorney General and Another Nairobi Petition No. 341 of 2011 (Unreported)**, **Hon. Chirau Ali Mwakwere v Robert Mabera & 4 others. Nairobi Petition No. 6 of 2012 (Unreported)**.

33. I will therefore apply the above principles in the determination of the issue as to whether Section 125 of the Income Act is unconstitutional.

That Section states as follows;

"125(1) An officer and any other person employed in carrying out the provisions of the Act shall have regard and deal with all documents and information relating to the income of a person and all confidential instructions in respect of the administration of the Income Tax Department which may come into his possession or to his knowledge in the course of his duties as secret.

(1A) An officer appointed under section 13 of the Kenya Revenue Authority Act for purposes of this Act shall, on appointment, make and subscribe before a magistrate or commissioner for oaths, a declaration in the prescribed form.

(2) No officer and no other person employed in carrying out the provisions of this Act, shall be required to produce in court a document, or to communicate to a court, information, which has come into his possession or to his knowledge in the performance of his duties under this Act except as may be necessary for the purpose of carrying into effect the provisions of the Act or in order to assist in the course of a prosecution for an offence committed in relation to tax.

(3) Nothing in this section shall prevent -

(a) an officer or person from revealing a document or information relating to the income of a person or confidential instructions in respect of the administration of the Income Tax Department to another officer or person so employed in the course of his duties, or to a person authorized in that behalf by the Minister in relation to a person resident in Kenya, or to a court or person for the purposes of this Act.

(b) an officer from revealing a document or information solely for revenue or statistical process to a person in the service of the Government in a revenue or statistical department where that document or information is needed for the purpose of the official duties of that last mentioned person and where the last mentioned person has made a subscribed declaration of secrecy in relation to information coming to his knowledge in the course of his official duties;

(c) an officer from revealing a document or information to the Controller and Auditor General, or to an authorized member of his Department, where that document or information is needed for the performance of his official duties.

(d) An officer from providing to the Board established under the Higher Education Loans Board Act, the name and address of any person granted an education loan or his employer, where such information is required for the performance of the Board's official duties in recovery of the education loans.

(4). Where under a law in any country, or under a special arrangement, provision is made for the allowance of relief from income tax in respect of the payment of tax in Kenya, the

obligation as to secrecy imposed by this section shall not prevent the disclosure to the authorized officers of the government of the place with which that arrangement was made of such facts as may be necessary for the obtaining of that relief or for the prevention of fraud or for the administration of statutory provisions against legal avoidance in relation to those taxes."

34. In my view, the provisions of this section are clear and require no more than a literal interpretation. Section 125 inter alia requires an officer of the 2nd Respondent to deal with all documents and information relating to income of a person as secret and this means that the information therein is confidential. The Section further bars the officer from producing, even in court, documents or information which has come to his knowledge in the course of his duties. The issue therefore is whether Section 125 of the Income Tax Act contradicts Article 35(1) (a) of the Constitution and whether it is thus null and void to the extent of that inconsistency. Article 35(1) (a) states as follows;

" 35 (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 of 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 persons.

(3)The State shall publish and publicise any important information affecting the nation."

35. A plain reading of Section 35(1)(a) reveals that every citizen has a right of access to information held by the State which includes information held by public bodies such as the 2nd Respondent. In Nairobi Law Monthly v Kengen (supra) the Court dealt with the applicability of the right to information as follows;

"The second consideration to bear in mind is that the right to information implies the entitlement by the citizen to information, but it also imposes a duty on the state with regard to provision of information. Thus, the state has a duty not only to proactively publish information in the public interest... this, I believe, is the import of Article 35(3) of the Constitution of Kenya which imposes an obligation on the state to 'publish and publicise any important information affecting the nation', but also to

provide open access to such specific information as people may require from the state."

36. I am in agreement with the learned Judge and while it is not in doubt that the State has the obligation to provide the Petitioner with information it holds, the question at this stage is; what is nature and form of information that should be availed by the State and what is the extent to which that information should be disclosed? In that regard in Nairobi Law Monthly v Kengen (supra) the Court stated as follows;

"36. The recognized international standards or principles on freedom of information, which should be included in legislation on freedom of information, include maximum disclosure: that full disclosure of information should be the norm; and restrictions and exceptions to access to information should only apply in very limited circumstances; that anyone, not just citizens, should be able to request and obtain information; that a requester should not have to show any particular interest or reason for their request; that 'Information' should include all information held by a public body, and it should be the obligation of the public body to prove that it is legitimate to deny access to information."

37. It is therefore clear that while disclosure should be the norm, there may be need to restrict access to information and that is also why Article 19(3) of the International Covenant on Civil and Political Rights states as follows;

'The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (order public), or of public health or morals.'

38. While I am in agreement therefore that the Petitioner is entitled to access information as he alleges, I do not think he can obtain such information in the present situation. I say so because the Constitution has certain in-built limitations to fundamental rights which must be exercised in the framework of public interest and subject to the rights and interests of other people. Article 24 of the Constitution has generally set the restrictions or limitations to fundamental rights and freedoms as follows;

"24. (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors, including -

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purposes and whether there are less restrictive means to achieve the purpose."

39. Applying the provisions of Article 24 of the Constitution to the present Petition, it is clear that the right to access information has been limited by the operation of law, that is Section 125 of the Income Tax Act as reproduced elsewhere above. To my mind, that limitation is reasonable and justifiable. I must agree therefore with the 2nd Respondent that it only keeps individual tax returns which are a self-declaration of the income of an individual. And that under the crown privilege doctrine, tax returns are confidential documents which are held in confidence by the 2nd Respondent. In that regard, Halsburvs Laws of England. 4th Edition Volume 23(2) states as follows;

"Income tax returns and information in the possession of the Inland Revenue Authority are normally the subject of a claim to crown privilege'.

Further, In **Re Joseph Hargraves Ltd (supra)** it was held that;

"It may be of the utmost importance to the public service that persons should be able to be certain that returns made by them for those purposes should in no case be disclosed. It seems to me that it must be a matter of public concern that persons should have confidence in the secrecy of that procedure. If it were shown that these documents were not confidential returns, or returns made for the purposes of Income Tax, but were merely documents belonging to the Company which by some accident had got into the hands of the Inland Revenue officers, the case might be different - I do not say that it would- the certificate might still be enough to protect them. But that is not the case here. "

40. I am in agreement and I adopt the same words as if they were mine and so long as the production of the named documents may be prejudicial to the individual and public service, then the same cannot be produced. Indeed the circumstances of this case would not allow the court to make such orders because I have already said that tax affairs are confidential and cannot be made public without the individual's consent. I have also said that in this Petition, the Petitioner did not enjoin any of the Members of the 10th Parliament or 11th Parliament and Senators against whom he is claiming directly. It is trite law that a court cannot issue orders against a person who is not a party to Judicial Proceedings especially where such orders are core to the privacy of that person, a right protected by Article 31 of the Constitution.

41. As much therefore as I recognize the hardship the Petitioner is facing in in trying to realize the fruits of his judgment in **Petition No. 317 of 2011**, and as much as he has no other way of proving his case, and possibly he may not be able to prove it otherwise, this court is mindful of the fact that it must protect the rights of every person including those who are not parties to the Petition and who may be adversely affected by the orders sought. I do not therefore think that the Court should exercise its discretion in the present case and grant orders as prayed. In that regard, agree with the decision in **Re Brown Trustee's Report of Tax Cases (1890-1898) Volume 3 598**, where Lord Ordinary stated as follows;

"Its important in the public interest that crime should be punished than that money should be recovered for revenue; but they are both things in the public interest, and if the Commissioners of Inland Revenue, speaking through the mouth of the Lord Advocate, represent to me that in their view it will embarrass them in the future collection of revenue to have documents of that kind recovered, I am afraid I must, at whatever hazard to private litigation, give effect to that objection. The proper order, I should think, would be to sustain the Haver's appeal and allow the documents to be returned to him." In that case private interests were allowed by law to override public interest, a fact that applies to the instant case.

Similarly, in **Nairobi Law Monthly v Kengen (supra)** the Court stated, *"As correctly submitted by the 1st Interested Party and the Amici Curiae, the reasons for non-disclosure must relate to a legitimate aim; disclosure must be such as would threaten or cause substantial harm to the legitimate aim; and the harm to the legitimate aim must be greater than and override the public interest in disclosure of the information sought. It is recognised that national security, defence, public or individual safety, commercial interests and the integrity of government decision making processes are legitimate aims which may justify non-disclosure of information."*

I am in agreement with the Learned Judges in both cases and it is therefore my finding that Section 125 of the Income Tax Act provides a reasonable and justifiable limitation to the right to access information under Article 35(1) (a).

42. I say so well aware that it is not in dispute that the Petitioner has a right to access information under Article 35(1) (a) of the Constitution, but as I have held above, he cannot access such information on tax affairs of the Members of the 10th Parliament or any other person which information is held by the 2nd Respondent because these are private matters properly protected by both Section 125 of the Income Tax Act and Article 31(c) of the Constitution. The latter provides that every person has the right to privacy including "information relating to their family or private affairs unnecessarily required or revealed".

43. Having so held, I note that the Petitioner further claims that he was also seeking the information under Article 35(1) 9a] so as to enable him assert his fundamental rights and freedoms. Article 35(1)(b) of the Constitution states as follows;

"35.(1) Every citizen has the right of access to -

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

44. While it is crystal clear to me that one would enforce the provisions of Article 35(1) (b) where such information is required for the exercise or protection of a fundamental right and freedom, in the present Petition, the Petitioner has not stated what fundamental right or freedom he intends to protect or exercise were he to be given the information he is seeking. In **Cape Metropolitan Council v Metro Inspection Services Western Cape and Others (2001) ZASCA 56** the Court stated as follows;

"Information can only be required for the exercise or protection of a right if it will be of assistance in the exercise or protection of the right. It follows that, in order to make out a case for access to information...

An applicant has to state what the right is that he wishes to exercise or protect, what the information is which is required and how that information would assist him in exercising or protecting that right.:(Emphasis added)"

The same position was adopted in **Unitas Hospital v Van Wvk and Another (231/05) (2006) ZASCA 34** where the Court expressed itself as follows;

"[17] The threshold requirement of 'assistance' has thus been established. If the requester cannot show that the information will be of assistance for the stated purpose, access to that information will be denied. Self-evidently,

however, mere compliance with the threshold requirement of 'assistance' will not be enough"

45. I am duly guided and looking at the Petition before me, nowhere has the Petitioner stated which of his fundamental rights and freedoms need to be enforced and protected if he is given the information he has sought from the 2nd Respondent. I did not hear the Petitioner to mention any of the provisions of the Bill of Rights that has been violated and that he wishes to specifically enforce. In that regard the Court in Nairobi Law Monthly v Kengen (supra) stated as follows;

"The intention in Article 35(1) was clearly to create two distinct situations with regard to the right of access to Information: one in which the citizen was entitled as of right to information held by the State; the other in which a citizen could access information from another, a private person, for the exercise or promotion of another right or freedom."

I am in agreement with the Learned Judge and in the present case, none of the two situations seem to have been proved to the required standard and in a nutshell I am not able to find that Section 125 of the Income Tax Act is unconstitutional nor that Article 35 of the Constitution has been properly invoked.

Conclusion

46. By now it is obvious that the Petitioner has failed to satisfy the criteria and the conditions set under Article 35(1)(b) for him to qualify to access the information sought and accordingly, in my view therefore, the denial of the information is not a violation of his rights under Article 35(1)[b] of the Constitution. If anything, the information he has sought is so abstract, however noble his intentions may otherwise be and so I have no other option but to politely dismiss the Petition. In doing so, I must commend the Petitioner for his vigilance in ensuring that the Constitution, 2010 has meaning and effect in the conduct of public affairs.

47. As to costs, I am certain that the Petitioner filed this Petition in public interest and such a matter is one that would pain the court to punish him with costs. The order that is proper in the circumstances is one that demands that each party should bear its costs.

48. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF OCTOBER, 2014.

ISAAC LENAOLA

JUDGE

In the presence of:

No appearance for the Petitioner

No appearance for the Respondents



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