

CASE BRIEF

KWASI AFRIFA v. GHANA REVENUE AUTHORITY

Court: High Court of Justice, Kumasi

Suit No: C12/149/19

Date of Ruling: 6th July, 2020

Judge: His Lordship Justice Frederick Tetteh

FLYNOTE

Constitutional Law – Enforcement of fundamental human rights – Article 33(1) of Constitution, 1992 – Whether refusal to issue Tax Clearance Certificate violates administrative justice under Article 23 – Whether Section 42(5) of Revenue Administration Act, 2016 (Act 915) requiring payment of 30% of disputed tax before objection entertained is unconstitutional – Mootness doctrine – Whether issue should be referred to Supreme Court under Article 130(2) – Held: Issue moot as 30% paid; no constitutional interpretation required; proper forum is tax dispute procedure under Order 58 of C.I. 47; application dismissed.

Practice and Procedure – Human rights enforcement – Jurisdiction – Proper forum – Commercial dispute disguised as human rights matter – Tax disputes – Order 58 of High Court (Civil Procedure) Rules, 2004 (C.I. 47) – Substance over form – Court must unmask camouflaged claims – Held: Application improperly brought as human rights enforcement; should have been tax appeal/commercial claim.

Administrative Law – Tax Clearance Certificate – Section 14(3) of Act 915 – Conditions for issuance – Mandamus – Whether court can compel issuance where tax disputes unresolved and documentation not provided – Held: Cannot grant mandamus until disputes resolved through proper procedure.

Statutory Interpretation – Referral to Supreme Court – Article 130(2) – When lower court must refer constitutional question – Clear and unambiguous provisions – Section 42(5) and (6) of Act 915 read together – No ambiguity requiring interpretation – Republic v. Maikankan principle applied.

FACTS

1. **Applicant:** Kwasi Afrifa Esq., a lawyer with Tax File No. KS1207749, TIN: P0008672822
2. **First Assessment (6th June 2017):**
 - GRA assessed tax obligations for January 2010 to April 2017
 - Total: **GHC66,932.58**
3. **First Objection (20th June 2017):**
 - Applicant objected - assessment arbitrary, didn't consider true income level

- Made without his input or information

4. GRA Response (31st July 2017):

- Demanded **GHC20,079.77** (30% of assessed tax) within 7 days as pre-condition for hearing objection
- Threatened enforcement if not paid

5. Suspension from Practice (1st August 2017):

- Applicant notified GRA of suspension by General Legal Council (GLC)
- **No further correspondence from August 2017 to May 2019 (nearly 2 years)**

6. Second Assessment (27th May 2019):

- Upon resumption of practice
- Tax liability for 2012-2016: **GHC342,432.49**
- Penalties for late filing: **GHC8,034.00**
- 30 days to pay or face sanctions

7. Second Objection (28th May 2019):

- Assessment excessive and unjustifiable
- Subject to finalization by field audit

8. Applicant's Payments:

- Paid full outstanding personal income tax 2012-2016: **GHC17,665.07**
- After GRA demand (7th June 2019), paid total of **GHC85,264.68** (including penalty of GHC8,054.00)
- Payments made within 7-day period demanded
- Some payments marked "without prejudice"

9. Tax Clearance Certificate Request (3rd June 2019):

- Needed for visa application for medical attention
- Required by GLC directive

10. Third Assessment (14th June 2019):

- Fresh assessment for year ending 2019
- Amount: **GHC44,345.65**

11. Third Objection (15th July 2019):

- Objected to third assessment

12. GRA Request for Information (5th July 2019):

- Certificate "being processed"
- Requested information on clients' accounts, medical and electricity expenses
- To properly assess 2012-2016 tax liability

13. Refusal to Issue Certificate (26th July 2019):

- Applicant doesn't qualify for Tax Clearance Certificate
- Reasons:
 - Not paid all outstanding taxes
 - Not filed all returns due (2017, 2018, PAYE)
 - Not complied with Section 42(5) of Act 915
 - Not responded to information requests

14. Human Rights Application Filed (8th August 2019):

- Applicant filed enforcement of fundamental human rights application under Article 33(1)
- Challenged constitutionality of Section 42(5) of Act 915

ISSUES

1. Whether Applicant ought to have sought leave before filing further affidavit in support
2. Whether alleged unconstitutionality of Section 42(5)(b) of Act 915 should be referred to Supreme Court under Article 130(2)
3. Whether instant procedure (human rights enforcement) adopted by Applicant is appropriate
4. Whether Applicant entitled to order of mandamus for issuance of Tax Clearance Certificate after payment of GHC85,264.68

ARGUMENTS**Applicant's Arguments**

Relief 1: GRA's refusal to issue Tax Clearance Certificate unreasonable and irrational given circumstances

Relief 2: Section 42(5) of Act 915 unconstitutional - forbidding objection unless 30% paid inconsistent with Article 23 (administrative justice)

Relief 3: GRA's letter of 26/07/19 refusing certificate null and void - inconsistent with Article 23

Relief 4: Order of mandamus compelling GRA to issue Tax Clearance Certificate

Relief 5: General damages for violation of fundamental human rights

Key Arguments:

- Paid full amount (GH¢85,264.68) demanded by GRA
- Satisfied statutory requirements for certificate
- Some payments made "without prejudice" preserving right to challenge constitutionality
- Refusal unjustifiable in all circumstances

Respondent's Arguments

1. Tax Assessments Proper:

- Based on Applicant's own records 2012-2017
- Not conjectural but true income level
- Section 42(5)(b) requires 30% payment before objection heard

2. Certificate Properly Refused:

- Section 14(3) conditions not satisfied
- Not paid all outstanding taxes
- Not filed all returns (2017, 2018, PAYE)
- Not responded to information requests (clients' accounts, expenses)
- Failures contravene Section 14(3)(b) and (c)

3. Wrong Forum:

- Not right forum for constitutional challenge
- Should proceed to Supreme Court under Article 2(1) for declaration Section 42(5) unconstitutional
- GRA performing mandated duty ensuring correct taxes paid
- No fundamental rights infringed

HOLDING

APPLICATION DISMISSED IN ITS ENTIRETY.

Order of mandamus **REFUSED**.

REASONING

Issue 1 - Further Affidavit Without Leave

Court's Finding: Applicant filed 23-paragraph further affidavit on 12th November 2019 and supplementary statement of case on 27th November 2019 **without seeking leave** as required by Order 67 Rule 4(3).

Legal Principle: Order 67 Rule 4(3) is mandatory. Where rules require leave before taking a step and no leave sought, failure cannot be saved under Order 81 because court's jurisdiction not properly invoked.

Authorities:

- *Republic v. High Court, Koforidua, Ex Parte Ansa Otu* [2009] SCGLR 141
- *Republic v. High Court, Accra, Ex Parte Allgate Co. Ltd* [2007-2008] SCGLR 104

Ruling: Further affidavit and supplementary statement of case **incompetent**. Court will not have regard to them.

Issue 2 - Referral to Supreme Court

Mootness Doctrine Applied:

Court found the constitutional challenge had become **moot** because Applicant paid the required 30% of disputed tax.

From *CHRAJ v. Attorney General & Baba Camara* [2011] 35 GMJ 1 at 15 per Sophia Akuffo JSC:

Doctrine of mootness comes into play when event or changed circumstances occur rendering continued hearing pointless or unnecessary.

From *Amidu v. President Kuffour* [2001-2002] 2 SCGLR 86 at 106 per Acquah JSC:

"An action is generally considered moot when it no longer presents a justiciable controversy because issues involved have become academic or dead... unless issue is recurring one and likely to be raised again between parties, courts would not entertain such dead issue."

Court's Analysis:

"Once that money has been paid, the Respondent is duty bound to determine the objection raised by the Applicant... It may well be a waste of time to refer a matter which is currently moot to the Supreme Court."

"Without Prejudice" Payments:

Court considered both payments marked "without prejudice" and those without such marking. Concluded required 30% paid, making constitutional contestation moot.

However, Court noted: Since some payments made "without prejudice," Applicant has not lost right to pursue Supreme Court declaration whether Section 42(5)(b) unconstitutional.

No Ambiguity Requiring Interpretation:

Strict Construction of Tax Statutes:

From *Canadian Eagle Oil Company Ltd v. The King* [1946] AC 119 at 140, Viscount Simon LC citing Rowlatt J in *Cape Brandy Syndicate v IRC* [1921] 1 KB 64, 71:

"In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language Used."

Court's Finding:

"Having read Section 42(5) and (6) of Act 915 together, I am of the considered view that, there is **no ambiguity, conflict, doubt** in the meaning of the provisions... and above all, it is **in tandem with the right to administrative justice** guaranteed under Article 23 of the 1992 Constitution."

No Automatic Referral:

"The fact that a party says an issue is unconstitutional does not automatically bind the court to refer same to the Supreme Court for interpretation or declaration."

When Referral NOT Required:

From *Republic v. Maikankan* [1971] 2 GLR 473 at 478 per Edmund Bannerman CJ:

"A lower court is not bound to refer to the Supreme Court every submission alleging as an issue the determination of a question of interpretation of the constitution... **If in the opinion of the lower court the answer to a submission is clear and unambiguous on the face of the provisions** of the Constitution or laws of Ghana **no reference need be made** since no question of interpretation arises... To interpret the provisions... in any other way may entail and encourage references to the Supreme Court of frivolous submissions, some of which may be intended to stultify proceedings or the due process of law and may lead delays such as may in fact amount to denial of justice."

From *Republic v. Special Tribunal: Ex Parte Forson* [1980] GLR 529 at 542 per Taylor J:

"If the utilitarian principle so ably enunciated by Bannerman CJ is not constantly kept in mind, the Supreme Court will be inundated with problems which it can never conveniently handle."

Other Authorities:

- *E Properties Ltd v. Awoonor-Williams* [1970] CC 12
- *Republic v. Asiamah* [1971] 2 GLR 478
- *Yiadom I v. Amaniampong* [1981] GLR 3
- *Ghana Bar Association v. Attorney-General* [1995-96] 1 GLR 598 SC

Court's Conclusion:

"The issue sought to be referred is in my view clear and does not require interpretation/declaration. A reference to the Supreme Court... will in no way resolve any issue before this court... It would be a sheer waste of mental effort and a thoroughly pointless exercise... I am not inclined to refer the issue to the Supreme Court."

Section 42(6) - Waiver Provision:

Court noted GRA failed to inform Applicant about Section 42(6) which gives Commissioner-General power to **waive, vary or suspend** 30% requirement.

"There is no indication that the Applicant had ever relied on Section 42(6) by way of application, [but] the Respondent also failed to indicate to the Applicant the essence of Section 42(6) and the modalities regarding its application."

No indication why Applicant denied benefit of Section 42(6). GRA should consider Article 296 (fair exercise of discretionary powers).

Issue 3 - Wrong Procedure / Wrong Forum

Substance Over Form:

From *Republic v. High Court, Koforidua, Ex Parte Nana Otutu Kono III* [2009] SCGLR per Georgina Wood CJ:

"It is important to bear in mind that **it is possible to couch a purely commercial or labour dispute as a human rights matter**... A Court's duty at all times is to be **on the alert and unmask such clever undertakings or camouflages** so that cases may be assigned to their proper forum."

Court's Analysis:

"Although the Applicant couched his reliefs in the nature of an infringement of his fundamental human rights, it was clear from the affidavit evidence and the respective statements of case that, **the Applicant was in substance and effect seeking for a determination of the assessment of tax liability** served on him by the Respondent... He is in effect seeking this court's intervention to **resolve the tax dispute** he has with the Respondent. **That, indeed is the reality.**"

Proper Procedure - Order 58:

Court explained C.I. 47 provided Commercial Court Division with jurisdiction over tax matters. Proper procedure outlined:

1. **Tax Objection Procedure:** Person dissatisfied with tax decision may lodge objection with Commissioner-General within 30 days
2. **Beyond Objection:** Aggrieved taxpayer can institute legal action on any tax matter in High Court
3. **Order 58:** Provides rules of procedure for commercial claims and tax matters
 - Normal writ procedure applies except where rules provide otherwise
 - Pre-settlement conference with judge
 - Attempt settlement through arbitration, mediation, negotiation
 - If settlement fails, trial before another judge

Authority: Benjamin Kunbour, Abdallah Ali-Nakyea & William Kofi Owusu Demitia, *Law of Taxation in Ghana*, 4th ed., 2017, pages 239-240

Court's Finding:

"It is the **substance of the matter** that the court must seriously consider and not how or the form in which the reliefs have been couched... the basic matters for determination in the case are **purely Taxation** for which reason, the procedure under **Order 58** of C.I 47 is most relevant and applicable... **I do not think the instant application is the right process to adopt.**"

Issue 4 - Mandamus for Tax Clearance Certificate

Multiple Unresolved Issues:

Court identified numerous complications:

- At least **three objection letters** (31/7/17, 28/5/19, 15/7/19)
- **Two different assessment periods** and amounts
- GRA requested documents Applicant failed to submit
- Some Applicant exhibits **unsigned**
- Some transactions "without prejudice," others not
- GRA failed to exhibit **any documents** supporting correspondence
- At least **two assessments** made

Section 14(3) Requirements:

Certificate issued only when Commissioner-General satisfied:

- (a) TIN issued and specified
- **(b) No outstanding tax, returns or other obligations**
- (c) Any other conditions satisfied

Court's Analysis:

"Having regard to the nature and circumstances surrounding this instant application, it would require the **adduction of evidence from all relevant parties and witnesses** or some form of **alternative dispute resolution**. That is exactly what has been provided for under **Order 58** of C.I. 47."

Cannot Grant Mandamus:

"Until a hearing is conducted and the contesting issues resolved to a finality, this court in line with Section 14(3) of Act 915 will not be in a position to determine whether or not the Applicant is entitled to his tax clearance certificate."

Criticism of Both Parties:

GRA's Failures:

- Failed to inform Applicant about Section 42(6) waiver provision
- Requested documents but Applicant failed to submit
- Failed to exhibit any supporting documents
- Failed to determine objection after 30% paid
- Two-year silence (August 2017 - May 2019)

"The Respondent must not lose sight of the fact that, one of its key objectives is to administer tax legislation **fairly, uniformly and impartially** as well as with **diligence, courtesy and efficiency**. **I do not think they have done so in the present circumstances.**"

Applicant's Issues:

- Some exhibits unsigned
- Mixed "without prejudice" and regular payments
- Failed to provide requested documents
- Failed to follow proper tax dispute procedure
- Both parties "went to sleep" for two years with no explanation

RATIO DECIDENDI

1. **Mootness in Constitutional Challenges:** Where the specific requirement challenged as unconstitutional (payment of 30% of disputed tax) has been complied with by the applicant, the constitutional challenge becomes moot as it no longer presents a justiciable controversy. Courts will not entertain academic or dead issues unless recurring and likely to be raised again.
2. **Referral to Supreme Court - Clear Provisions:** A lower court is not bound to refer every submission alleging unconstitutionality to the Supreme Court. Where statutory provisions are clear, unambiguous and consistent with constitutional provisions, no question of interpretation arises requiring referral under Article 130(2). Automatic referrals would inundate Supreme Court and stultify proceedings.
3. **Tax Statutes - Strict But Complete Construction:** Tax statutes must be strictly construed. When Section 42(5) requiring 30% payment is read together with Section 42(6) providing waiver/variation power, there is no ambiguity or conflict. The complete statutory scheme provides both requirement and discretionary relief mechanism, consistent with administrative justice under Article 23.
4. **Substance Over Form - Disguised Tax Disputes:** Courts must look to substance of claims, not form. A tax dispute regarding assessment, objections and certificate issuance cannot be properly brought as enforcement of fundamental human rights under Article 33(1) merely by couching reliefs in rights language. Courts must unmask such camouflages and direct cases to proper forum.
5. **Proper Forum for Tax Disputes:** Tax disputes, including challenges to assessments and refusals to issue certificates, must be brought under Order 58 of C.I. 47 (Commercial Claims and Tax Matters), not as human rights enforcement applications. Order 58 provides structured process including pre-settlement conferences, alternative dispute resolution, and trial procedures appropriate for tax matters.
6. **Mandamus - Prerequisites:** Mandamus to compel issuance of Tax Clearance Certificate under Section 14(3) of Act 915 cannot be granted where:
 - Multiple unresolved tax disputes exist
 - Evidence from parties and witnesses required
 - Objections pending determination
 - Documentation requested but not provided
 - Unclear whether statutory conditions (no outstanding taxes/returns/obligations) satisfied

7. **Personal Interest Requirement - Article 33(1):** Article 33(1) requires person seeking human rights enforcement to show fundamental right contravened "in relation to him" - personal interest requirement. However, this alone insufficient where substance of claim is commercial/tax dispute rather than rights violation.
8. **Further Affidavits - Mandatory Leave Requirement:** Order 67 Rule 4(3) requiring court's leave before filing further affidavits is mandatory, not directory. Failure to obtain leave cannot be saved under Order 81 as it goes to jurisdiction. Further affidavits filed without leave are incompetent.
9. **Without Prejudice Payments:** Payments made "without prejudice" preserve right to challenge underlying legal requirement in separate proceedings. Such payments satisfy immediate statutory requirement (enabling objection hearing) while reserving right to constitutional challenge in proper forum (Supreme Court under Article 2(1)).
10. **GRA's Duty - Fairness and Information:** Ghana Revenue Authority must:
 - Inform taxpayers of all available options including waiver provisions (Section 42(6))
 - Administer tax legislation fairly, uniformly, impartially, with diligence, courtesy and efficiency
 - Exercise discretionary powers considering Article 296 (duty to be fair, not arbitrary)
 - Process objections after conditions satisfied rather than raising new requirements

Connection to Other Cases:

This case preceded the Supreme Court decisions on Section 42(5):

- *Kwasi Afrifa v. GRA* (Reference) - J6/02/2022 (30th November 2022)
- *Kwasi Afrifa v. GRA* (Writ) - J1/23/2021 (30th November 2022)
- *Richard Amo-Hene v. GRA* - J1/08/2021 (30th November 2022)
- *Export Finance Company Ltd v. GRA* - J1/07/2021 (30th November 2022)

The High Court's approach was vindicated when the Supreme Court eventually held Section 42(5) constitutional when read with Section 42(6) - the same complete reading this High Court applied.

The procedural points on forum selection align with *Republic v. High Court, Koforidua, Ex Parte Nana Otutu Kono III* on unmasking disguised claims.