Katahira and Engineers Limited v Kenya Revenue Authority (Application E019 of 2024) [2024] KEHC 10274 (KLR) (Judicial Review) (20 August 2024) (Ruling)

Neutral citation: [2024] KEHC 10274 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

APPLICATION E019 OF 2024

J NGAAH, J

AUGUST 20, 2024

BETWEEN

KATAHIRA AND ENGINEERS LIMITED ..... APPLICANT

AND

KENYA REVENUE AUTHORITY ..... RESPONDENT

RULING

1. The applicant's application is a chamber summons dated 26 January 2024, expressed to be brought under sections 3 and 3A of the *Civil Procedure Act*, cap. 21 and Order 53 Rule 1 (2) and (4) of the *Civil Procedure Rules*. It seeks leave for the applicant to file a motion for judicial review reliefs of *certiorari*, prohibition and *mandamus*. The prayers for these orders have been framed, thus:

> " 2. That leave be granted to the *ex parte* Applicant to commence proceedings in the nature of Judicial Review for orders: -
>
> (a) An order of *certiorari* to remove into this Honourable Court and quash the Objection decision dated 8th October 2021.
>
> (b) An order of Prohibition to remove into this Honourable Court and prohibit the Respondent from issuing any other or any other or further demand notices or agency notice(s) against the *ex parte* Applicant in respect of any alleged tax monies allegedly owed to the Respondent up to June 2021.
>
> (c) An Order of *mandamus* compelling the Respondent to compensate the Applicant for the actual quantifiable financial loss and general damages to the name, reputation, commercial

interests costs and expenses of the Applicant as shall be determined by this Honourable Court."

2. The application also seeks for leave to operate as a stay of execution of the respondent's decision dated 8 October 2021. It is based on the statutory statement dated 26 January 2024 and a verifying affidavit sworn on even date by Ms. Ivy L. Odhiambo Ouko who states that she is an accountant in the applicant company.

3. According to the documents filed by the applicant, the applicant is a contractor with Japan International Cooperation Agency (JICA), which is an entity that is engaged in various construction projects in Kenya under a bilateral agreement between the Governments of Kenya and Japan. The applicant, it is sworn, has at all times material to this application, complied with its tax obligations towards the respondent and to demonstrate this compliance, it applied for and was issued with a Tax Compliance Certificate by the respondent on 30 June 2021. The certificate was valid for one year.

4. That notwithstanding, by a letter dated 15 April 2021, the respondent issued the applicant with an assessment of tax notice to which the applicant objected and lodged a Notice of Objection accordingly. Consequently, the respondent undertook a re-assessment of the applicant's records of accounts and issued final adjusted assessment amounts for Value Added Tax (VAT) and Income tax. Upon communication to the applicant of the adjusted value added tax and income tax, the applicant paid the taxes due in June 2021 as a result of which it was issued Tax Compliance Certificate. The tax compliance certificate has neither been recalled nor revoked.

5. Following the applicant's objection, the respondent issued an objection decision dated 8 October 2021 but which the applicant claims was received late and, therefore, it could not lodge an appeal against it. Even then, the respondent subsequently issued two Agency Notices respectively dated 16 May 2022 and 23 September 2022 for unpaid Value Added Tax of Kshs 72,486,992/= without any prior notice to the applicant. The applicant disputes this claim and, in any event, the demand and agency notices are said to have been issued arbitrarily and are without any legal basis.

6. Nevertheless, the two agency notices dated 16 May 2022 and 23 September 2022 have since been withdrawn upon a consent recorded between the parties in this Honourable Court's Judicial Review Application No E150 of 2022. According to the consent, the applicant and the respondent were to resolve their dispute through alternative dispute resolution mechanisms. However, no agreement was reached, hence this application.

7. In response to the application, the respondent filed a preliminary objection dated 16 April 2024 on the following three grounds:

> " 1. The *Tax Procedures Act* confers original jurisdiction upon the Tax Appeals Tribunal for tax disputes such as the one that is currently before this Honourable Court, and the High Court can only take up appellate Jurisdiction in such an instance.
>
> 2. The Application offends sections 52, 53 & 56(2) of the *Tax Procedures Act*; Sections 7(1) (b) and 9(2) of the *Fair Administrative Actions Act*; Section 12 of the *Tax Appeals Tribunal Act*; Rules 3 and 5 of The *Tax Appeals Tribunal (Appeals to the High Court) Rules 2015*; Article 23 (2) of the *Constitution* of Kenya.
>
> 3. The Orders as prayed for are *res—sub judice* since the ex-parte applicant has preferred an appeal to the High Court (Commercial & Tax Division)

in Income Tax Appeal No E002 of 2022: Katahira & Engineers Ltd v Commissioner of Domestic Taxes essentially seeking the same prayers as the ones prayed in the application herein against the Ruling of the Tax Appeals Tribunal dated 2nd December 2022 in TAT Misc. Application No 177 of 2022."

8. I have considered the application and the parties' respective submissions both on the application and the preliminary objection. At this stage of judicial review proceedings, a judicial review court would not delve into the merits of the applicant's case, in the event leave is granted. All the court enquires in an application for leave is whether, based upon the material before it, the applicants' case would be arguable upon further interrogation to such a degree that the court would consider granting any of the reliefs of judicial review.

9. According to Lord Diplock, in *IRC v National Federation of Self-Employed and Small Businesses Ltd* (1982) 617, (1981) 2 ALL ER 93 the following approach ought to be adopted in considering an application for leave:

> " If, on a quick perusal of the material then available, the court thinks the application discloses what might on further consideration turn out to be an arguable case in favor of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief."

Thus, on this basis, the applicant only has to show not that it is, but that the case might turn out to be, an arguable case.

10. The question upon which this Honourable Court ought to consider in exercise of its discretion whether or not to grant leave is whether it is open to the applicant to invoke judicial review jurisdiction in the first place. This question has risen in this court from time to time and among the cases in which I have attempted to answer it is the case of *Havi v Kenya Revenue Authority* (2024)KEHC 3006(KLR) which, incidentally, the applicant has also cited for the submission a party may, in exceptional circumstances, invoke the judicial review jurisdiction without exhausting internal dispute resolution mechanisms such as appeal or review.

At the risk of repeating myself I need not say anything more than what I said in the *Havi case* (*supra*) to the extent that there is a common question of law between that case and the instant application.

11. To begin with, both parties are in agreement that the resolution of the applicant's dispute would ordinarily be subject to the *Tax Procedures Act*. Section 2(2) of that Act is to the effect that procedures in administration of tax law specified in this Act would apply unless any particular tax law provides for a specific procedure. It follows that the respondent's impugned decision would fit the description of a "tax decision" which is defined in section 3 of the *Tax Procedures Act* to mean:

> " (a) an assessment;
>
> (b) a determination under section 17(2) of the amount of tax payable or that will become payable by a taxpayer;
>
> (c) a determination of the amount that a tax representative, appointed person, director or controlling member is liable for under section 15, section 17 and section 18 (d) a decision on an application by a self-assessment taxpayer under section 31(2); (e) a refund decision;
>
> (f) a decision under section 48 requiring repayment of a refund; or

(g) a demand for a penalty;

The respondent's decision would probably fall under section 3 (1) (a) and (b). According to the same interpretation section, "an assessment" has been defined to mean:

> "a self-assessment, default assessment, advance assessment, or amended assessment, and includes any other assessment made under a tax law."

12. If the respondent's decision is a tax decision, then any grievance arising therefrom would be subject to section 51 of the Act which provides for objection to the tax decision. It states as follows:

> 51. Objection to tax decision:
>
> (1) A taxpayer who wishes to dispute a tax decision shall first lodge an objection against that tax decision under this section before proceeding under any other written law.
>
> (2) A taxpayer who disputes a tax decision may lodge a notice of objection to the decision, in writing, with the Commissioner within thirty days of being notified of the decision.
>
> (3) A notice of objection shall be treated as validly lodged by a taxpayer under subsection (2) if—
>
> (a) the notice of objection states precisely the grounds of objection, the amendments required to be made to correct the decision, and the reasons for the amendments;
>
> (b) in relation to an objection to an assessment, the taxpayer has paid the entire amount of tax due under the assessment that is not in dispute or has applied for an extension of time to pay the tax not in dispute under section 33(1); and
>
> (c) all the relevant documents relating to the objection have been submitted.
>
> (4) Where the Commissioner has determined that a notice of objection lodged by a taxpayer has not been validly lodged, the Commissioner shall immediately notify the taxpayer in writing that the objection has not been validly lodged.
>
> (5) Where the tax decision to which a notice of objection relates is an amended assessment, the taxpayer may only object to the alterations and additions made to the original assessment.
>
> (6) A taxpayer may apply in writing to the Commissioner for an extension of time to lodge a notice of objection.
>
> (7) The Commissioner may allow an application for the extension of time to file a notice of objection if—
>
> (a) the taxpayer was prevented from lodging the notice of objection within the period specified in subsection (2) because of an absence from Kenya, sickness or other reasonable cause; and
>
> (b) the taxpayer did not unreasonably delay in lodging the notice of objection.
>
> (8) Where a notice of objection has been validly lodged within time, the Commissioner shall consider the objection and decide either to allow the objection in whole or in

part, or disallow it, and Commissioner's decision shall be referred to as an "objection decision".

(9) The Commissioner shall notify in writing the taxpayer of the objection decision and shall take all necessary steps to give effect to the decision, including, in the case of an objection to an assessment, making an amended assessment.

(10) An objection decision shall include a statement of findings on the material facts and the reasons for the decision.

(11) The Commissioner shall make the objection decision within sixty days from the date of receipt of—

(a) the notice of objection; or

(b) any further information the Commissioner may require from the taxpayer, failure to which the objection shall be deemed to be allowed.

13. No doubt, the applicant is not only aware of the import of this provision of the law but it also applied it when it lodged an objection with the Commissioner, more, particularly in accordance with section 51(1) of the Act. The Commissioner, on his part, considered the objection and made an 'objection decision' under section 51(11). As the Acts states, in an objection decision, the Commissioner may allow the objection either in whole or in part, or disallow it altogether. In the applicant's case, he disallowed the objection.

14. Being dissatisfied with the objection decision, the applicant was bound to invoke section 12 of the *Tax Appeals Tribunal Act*, cap. 469A which provides that 'a person who disputes the decision of the Commissioner on any matter arising under the provisions of any tax law may, subject to the provisions of the relevant tax law, upon giving notice in writing to the Commissioner, appeal to the Tribunal'. Section 13 of the Tax Appeals Act details the procedure for making of the appeal.

15. Again, going by the applicant's own pleadings and depositions, it was conscious of the appellate procedure under section 12 of the Act. In paragraph 15 of the affidavit of Ms. Odhiambo, for example, she swore as follows:

> "15. That the Respondent subsequently issued an Objection decision dated 8th October 2021 which the *ex parte* applicant did not receive until it was too late to lodge an appeal against the decision."

16. If the applicant had filed the appeal to the Tax Appeals Tribunal and, peradventure, it was dissatisfied with the decision of the Tribunal, the applicant would be entitled to move this Honourable Court by way of an appeal under section 32 of the *Tax Appeals Tribunal Act* to impeach that decision. Under this provision of the law, a party to proceedings before the Tribunal may, within thirty days after being notified of the impugned decision or within such further period as the High Court may allow, appeal to this Honourable Court.

17. It follows that even if the applicant's failure to exhaust the appellate mechanisms prescribed by the *Tax Appeals Tribunal Act* was excusable, it could only appeal to this Honourable Court and not file an application for judicial review.

18. Needless to say, an appeal is not synonymous with judicial review. The distinction between the two jurisdictions has been discussed by David Foulkes in his book *Foulkes Administrative Law*, 7th Edition.

Citing the case of *Customs and Excise Commissioners v J.H. Corbitt (Numismatists) Ltd* (1981) AC 22, (1980) 2 2ALL ER 72, the learned author noted as follows:

> " It is to be noted that an appeal lies from, whether to an appellate tribunal or to a court of law, only when and to the extent that statute so provides, and the powers of the appeal body to review, reconsider etc. the decision of the tribunal likewise depend on the statute. To be contrasted with appeal is judicial review. The decision of tribunals, as bodies exercising judicial functions, have always been subject to review by the courts (that is, to judicial review) by means of the order of *certiorari*. This enables the court to quash a decision on certain grounds. Whereas appeal lies only when and to the extent that statute provides, the court's common law power of judicial review exists unless it is take away or limited by statute. Thus where no appeal to the court is provided by statute the only possible challenge in the courts is by way of judicial review..." (at p.150-151). (Emphasis added).

19. And no doubt this was the principle applied by Lord Wright in *General Medical Council v Spackman* (1943) AC627, at 640 where he stated as follows:

> "I have observed that Parliament has not provided for any appeal from the decisions of the council. The only control of the court to which the council is subject (apart from proceedings by way of *mandamus*) is the power which the court may exercise by way of *certiorari*. *Certiorari* is not an appellate power."

20. These decision are, more or less, self-explanatory. They are clear that judicial review and appeal are separate and distinct jurisdictions. Appeals against decisions of courts, tribunals and such other like bodies exercising quasi-judicial functions only lie where the statute expressly provides for the appeals. Where no such provision is expressly made, it does not necessarily follow that a party aggrieved by the decisions of these bodies is left without a remedy. In such a case, judicial review kicks in to check abuse of power by these bodies.

21. In the instant case, the statute is clear that the recourse available to the applicant is an appeal and not judicial review. It does not matter that the applicant has sidestepped the Tax Appeals Tribunal, for whatever reason. That being the case, I need not belabour the point that, to the extent that the applicant has filed an application for leave to file a judicial review application rather than an appeal, his application is incompetent, misconceived and an abuse of the due process of this Honourable Court. Leave is declined and the application is dismissed with costs.

SIGNED, DATED AND UPLOADED ON THE CTS ON 20 AUGUST 2024

NGAAH JAIRUS

JUDGE