



Nanku Company Kenya Limited v ISGAR Group (Kenya) Limited & another (Civil Suit 870 of 2021) [2024] KEHC 10179 (KLR) (Commercial and Tax) (16 August 2024) (Ruling)

Neutral citation: [2024] KEHC 10179 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 870 OF 2021
A MABEYA, J
AUGUST 16, 2024**

BETWEEN

NANKU COMPANY KENYA LIMITED PLAINTIFF

AND

ISGAR GROUP (KENYA) LIMITED 1ST DEFENDANT

COMMISSIONER OF DOMESTIC TAXES 2ND DEFENDANT

RULING

1. Before Court is an application dated 20/11/2023 brought under Order 17 rule 2(3), 51 rule 1 of the Civil Procedure rules 2010, section 1 and 1B of the Civil Procedure Act chapter 21 Laws of Kenya. It seeks the striking out of the suit for being res-judicata, an abuse of the court process and not having met the doctrine of exhaustion.
2. The applicant relied on the grounds on the face of the application and the supporting affidavit of Alice Muthoni of even date. The applicant's case was that the appellant filed an appeal at the Tax Appeals Tribunal ("the Tribunal") and further filed an application for lifting the Agency Notices. That the Tribunal considered the application and dismissed the same vide a ruling dated 17/9/2021
3. The applicant contended that the appellant filed an appeal before Court challenging the applicant's decision dated 14th February 2020 on the grounds that it had paid all the taxes. That it was wrong to have filed a fresh suit instead of challenging the decision of the Tribunal. That the matters in dispute had been settled in TAT Appeal no 205 of 2020.
4. The plaintiff did not file any response to the application. The plaintiff instituted this suit vide a plaint dated 19/10/2021 seeking orders that the 1st defendant be compelled to give an account and indemnify



the plaintiff of any accrued taxes and a permanent injunction compelling the 2nd defendant to lift the Agency Notice and restraining it from making any tax demands.

5. That prior to filing the application, the plaintiff had lodged an appeal at the Tax Appeals Tribunal seeking to set aside the objection decision. In *Speaker of National Assembly v Karume* [1992] KLR 21, the Court of Appeal held:-

“Where there is a clear procedure for redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.”

6. Section 3 of the *Tax Appeals Tribunal Act* establishes the Tribunal to hear appeals filed against any tax decision made by the Commissioner. It is imperative that anyone with a claim do exhaust any mechanism that exists outside courts before resorting to litigation. The plaintiff had already preferred a claim against the 2nd respondent at the Tribunal and a judgment was delivered on 10/3/2023 dismissing the appeal.
7. There can be no proper claim herein against the 2nd defendant save by way of an appeal against the decision of the Tribunal. The issues touching on the taxes having been properly concluded by the Tribunal, they cannot be a subject of a fresh suit.
8. Accordingly, I find that the applicant has made out a case for striking out the 2nd defendant from the suit and I hereby order as follows: -
- a. The case against the 2nd defendant is hereby struck out.
 - b. The costs of the suit shall be borne by the plaintiff.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF AUGUST, 2024.

A. MABEYA, FCI Arb

JUDGE

