REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

APPLICATION NO. E1095 OF 2020

WATERSHOP LTD, NAIVASHA.....APPLICANT

-VERSUS-

KENYA REVENUE AUTHORITY.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL....2ND RESPONDENT

JUDGMENT

According to section 109 of the Tax Procedures Act, 29 of 2015, (hereinafter "the Act"), the Commissioner General is empowered to compound offences where he is satisfied that a person has committed an offence under any tax law and in so doing, he may order the offender to pay a fine that would ordinarily be imposed if the offender had been convicted by a court of law.

The power to compound offences is, however, subject to the offender admitting the offence or offences in writing and requesting the commissioner to deal with the offences as prescribed under this provision of the law. For better understanding and, considering the relevance of section 109 of the Act to the application before court, it is necessary that I reproduce it here in its entirety; it reads as follows:

> **109. Power of the Commissioner to compound offences**
>
> **(1) The Commissioner may, where he is satisfied that a person has committed an offence under a tax law in respect of which a penalty of a fine is provided, or in respect of which anything is liable to forfeiture, compound the offence and may order that person to pay such sum of money, not exceeding the amount of the fine to which he or she would have been liable if he or she had been prosecuted and convicted for the offence, as the Commissioner may think fit and the Commissioner may order anything liable to forfeiture in connection therewith to be condemned:**
>
> **Provided that the Commissioner shall not exercise his or her powers under this section unless the person admits in writing that he or she has committed the offence and requests the Commissioner to deal with the offence under this section.**
>
> **(2) For the purposes of subsection (1), the Commissioner shall constitute a committee of not less than three officers to consider applications for the compounding of offences.**
>
> **(3) An order by the Commissioner in accordance with this section shall—**
>
> **(a) be in writing under the hand of the Commissioner and the offender, and witnessed by an officer;**
>
> **(b) specify the name of the offender, the offence committed, the sum of money ordered by the Commissioner to be paid, and the date or dates on which payment is to be made;**
>
> **(c) have a copy of the written admission referred to under subsection (2) attached; (d) be served on the offender;**
>
> **(e) be final and not be subject to appeal; and**

(f) on production in any court, be treated as proof of the conviction of the offender for the offence specified, and may be enforced in the same manner as a decree of a court for the payment of the amount stated therein.

(4) If the Commissioner compounds an offence under this section, the offender shall not be liable for prosecution or penalty in respect of same act or omission, the subject of the compounded offence except with the express consent of the Director of Public Prosecutions.

On 5 August 2020, the applicant made a request for settlement of a case under section 109 of the Tax Procedures Act after it admitted having committed offences under sections 28, 40 and 41 of the Act. It requested the commissioner to deal with the case under the provisions of section 109 of the Act. According to Form C51 which Anthony Kamotho, the applicant's managing director, filled and signed, the applicant understood that any order made by the commissioner under section 109 of the Act was final and was not subject to appeal.

The pertinent part of the request read:

I Anthony Kamotho of the Watershop Naivasha Limited Box 1515 Naivasha P.I.N. PO57369757Q admit the offence…28,40 & 41…And hereby request the Commissioner to deal with the case under the provisions of Section 109 of the Tax Procedures Act, 205. I understand that any order made by the Commissioner under this section is final and is not subject to appeal. I wish to mitigate as follows:"

Kamotho proceeded to make the mitigation which was couched as follows:

"Excise stamps are not required under the potable (sic) water standard-KS EAS 12: 2018. Excise stamp only applicable under packaged water standard-KS EAS 153:2018 which we do affix on the packaged (sic)."

The wording of the mitigation appears to be the applicant's own understanding of when excise stamps are necessary and the sort of packages on which they ought to be affixed. But having admitted committing the prescribed offences, the applicant's understanding of when and where the excise stamps are to be affixed would, in my humble view, be of little or no consequence.

Unsurprisingly, the Commissioner made an order of settlement pursuant to the provisions section 109 of the Act. The order read in part:

"I Peter Muyongo have inquired into the matter of an offence alleged to have been committed by Kamotho and indeed was satisfied that the offence of offering for sale excisable products without affixing excise stamps in contravention of section 28, 40 and 41 of the Excise Duty Act, 2015 had been committed."

Having been so satisfied, the commissioner compounded the offence as required under section 109 of the Act and ordered the applicant to pay a penalty of Five Million Kenya Shillings. He ordered further that a comprehensive audit be carried out.

My major concern in the application before court is that while these facts constitute the transaction or the facts that eventually gave rise to the present suit, they were not disclosed to the court when the applicant sought for leave to file the substantive motion for the prerogative orders of certiorari and prohibition.

The motion which is now the subject of this judgment is stated to be brought under Article 47 of the Constitution of Kenya, Section IA, 1B, 3A of the Civil Procedure Act, cap 21, Order 53 Rule 3 (1), (2), (3), (4) & Rule 4 of the Civil Procedure Rules 2010 and Section 8 of the Law Reform Act, Section 7 and 11 of the Fair Administrative Action Act No. 4 of 2015. The prayers have been framed as follows:

"

1. An order of Certiorari directed at the Kenya Revenue Authority (1st Respondent herein) for purpose of quashing the public notice dated 17th July 2020 named Excise Duty on Water Refill ("the public notice").

2. An order of Prohibition for purpose of prohibiting the Kenya Revenue Authority (the 1st Respondent herein) from enforcing the public notice dated 17th July 2020 named Excise Duty on Water Refill and charging excise duty on the sale of bulk water sold through taps or water vending machines.

3. Costs of this application be borne by the Respondents."

According to the statement of facts dated 9 December 2020 verified by an affidavit sworn by Kamotho, the applicant is in the business of packaging, selling and distributing both bottled and bulk water for domestic consumption. While undertaking this business, it has complied with the necessary regulations and obtained licences from various government agencies.

On 17 July 2020, the 1st respondent published a public notice according to which all persons engaged in the business of bottling, which includes refilling, or packaging water are required to obtain an excise license from the 1st respondent; the purpose of the purpose of the licence is, I assume, to ensure that those engaged in the business pay tax in the form of excise duty.

According to the applicant, the 1st respondent expanded the meaning of 'bottled water' to include water refilled by customers who use their own bottles at the water vending machines.

This action by the 1st respondent, it has been urged, is *ultra vires* section 7(2)(a) of the Fair Administrative Action Act, 2015 since the 1st respondent has no power to expand the meaning of excisable goods or specify the excisable goods to which an excise duty stamp shall be affixed.

In any event, prior to issuing of the public notice of 17 July 2020, the 1st respondent had failed to give the applicant, other persons or entities in similar business a reasonable opportunity to make representations on the public notice considering the effect it would have on them. This, according to the applicant, violates Article 47 of the Constitution of Kenya, 2010 and section 7(2)(a) of the Fair Administrative Action Act, 2015.

The application was opposed and Jeremiah Kinyua swore a replying affidavit on behalf of the 1st respondent. Kinyua swore that he works with the 1st respondent's Domestic Taxes Department, Enforcement Division.

I gather from the affidavit that the 1st respondent is not denying that it published the impugned notice but Kinyua goes further to depose that the 1st respondent was not in any way introducing a new law but that its notice was nothing more than what one may refer to as a public awareness exercise of the existing law with particular reference to certain provisions of the Excise Duty Act, No. 23 of 2015.

As I understand Kinyua's affidavit, the notice was, in a way, a means of implementing Excise Duty Act with special regard to those provisions relating to excise duty payable on packaged water and other non-alcoholic beverages; for instance, section 28 (3) which states that a person should not remove excisable goods from the designated place for affixing of excise stamps until the stamps have been affixed. Again, Regulation 3 (1) of the Excise Duty (Excisable Goods, Management) Regulations 2017 requires every package of excisable goods, except motor vehicles manufactured or imported into Kenya, to be fixed with an excise stamp.

The notice, it has been urged, was consistent with these provisions of the law.

Further, Regulation 30 of the Excise Duty Regulations 2017 prescribes the punishment for a person who is in possession of the excisable goods on which the excise stamps have not been exempted under the Regulations. Subsection (2) provides that a person who contravenes the provisions of paragraph (1) commits an offence and is liable upon conviction to a fine not exceeding five million shillings or imprisonment for a term not exceeding three years or both.

Kinyua swore that the applicant filled Form C under Section 109 of the Tax Procedures Act 2015 and requested the 1st respondent to compound the offences since he admitted the offences under Section 28, 40 and 41 of the Excise Duty Act.

The admission of the offences was as a result of the 1st respondent's seizure notices to the applicant apparently in enforcement of those provisions of the Act on affixing excise stamps.

It was also deposed that, the applicant admitted having breached Section 28, 40 and 41 of the Excise Duty Act and requested for settlement of the case under Section 109 of the Tax Procedures Act, 2015. An order of settlement under which the applicant was required to pay a fine of Five Million Shillings, was eventually made.

The facts material to the applicant's application are not in dispute; for instance, it is not in dispute that on 20 July 2020, the 1st respondent issued the impugned notice. That notice read as follows:

> **"Public Notices 17/07/2020**
>
> **Kenya Revenue Authority (KRA) has noted cases of persons engaging in the business of water refilling who are not licensed and who are not charging and remitting excise duty as required by the law.**
>
> **KRA wishes to remind all persons who are engaged in the business of bottling (including through refilling) or packaging water that they are required to obtain an excise license from KRA and also charge and remit excise duty as required by the law.**
>
> **Further, they are also reminded that they are required to affix stamps on each bottle that has been refilled or packaged.**
>
> **It is important to note that, it is an offence to manufacture excisable goods without an excise license and it is also an offense to be found in possession of, purchase or offer for sale excisable goods that have been manufactured by unlicensed persons and on which excise stamps have not been affixed or on which counterfeit stamps have been affixed.**
>
> **Should you need any further clarification, please contact the contact centre on Tel: 02024999999,07110999999 or email callcenter@kra.go.ke?**
>
> **Commissioner of Domestic Taxes."**

It is not in dispute that on 29 July 2020, the 1st respondent seized the applicant's goods and deposited them in a customs warehouse for the reason that the goods had been offered for sale without excisable stamps contrary to sections 28, 40 and 41 of the Excise Duty Act, 2015 together with the regulations made thereunder.

It is also common ground that as a result of this seizure, the applicant invoked section 109 of the Act and admitted the offences for which the goods had been seized; it proceeded to requested for settlement of the case under that provision. Pursuant to the same provision, the commissioner compounded the offences and made an order for settlement.

The record shows that the application for leave to file the substantive motion was filed on or around 9 September 20202.

When the applicant sought for leave to file the motion for judicial review, it never disclosed that it had filed with the 1st respondent a request for settlement of a case in accordance with the provisions of section 109 of the Tax Procedures Act, 2015 and that an order for settlement had been made.

If only for emphasis sake, Anthony Kamotho Gikunju, the managing director of the applicant company filed Form C51 in accordance with regulation no. 263 of the Regulations and admitted committing offences under sections 28, 40, and 41 of the Act; in particular, he admitted that he offered for sale excisable products without offering excise stamp contrary to these provisions of the law.

Upon the admission, he requested the 1st respondent's commissioner to deal with the case in accordance with the provisions of section 109 of the Tax Procedures Act. In doing so, he understood that any order made by the commissioner under this particular provision was final and not subject to appeal. Further he also mitigated.

The applicant never disclosed that upon admission of the offences, an order of settlement of the case under section 109 of the Tax Procedures Act, 2015 was made against him by the Commissioner and that he was ordered to pay Kshs. 5 Million subject to a comprehensive audit, probably of the company's accounts or returns.

Against this background, it was in bad faith for the applicant to file these proceedings essentially questioning the same offences which he had admitted committing.

For our purposes, the applicant is guilty of non-disclosure of facts material to his application. If these facts were known to the court, it is unlikely that leave would have been granted. Strictly speaking, the applicant ought not to have been heard.

In **The King v. The General for the Purposes of the Income Tax Acts for the District of Kensington, ex parte, Princess Edmond de Polignac. (1917) 1KB 486** it was held:

> **"It is perfectly well settled that a person who makes an ex parte application to the Court - that is to say, in the absence of the person who will be affected by that which the Court is asked to do - is under an obligation to the Court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him. That is perfectly plain and requires no authority to justify it."** (Per Warrington, L.J. at p.509).

In the same case Scrutton L.J. said at page 514 as follows:

> **"…it has been for many years the rule of the Court, and one which it is of the greatest importance to maintain, that when an applicant comes to the Court to obtain relief on an ex parte statement he should make a full and fair disclosure of all the material facts - facts, not law. He must not misstate the law if he can help it - the Court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts, and the penalty by which the Court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the Court will set aside any action which it has taken on the faith of the imperfect statement. This rule applies in various classes of procedure."**

He also cited with approval the case of **Castelli v. Cook (1849) 7 Hare, 89, 94** where Wigram V.-C. is quoted to have said as follows:

> **"A plaintiff applying ex parte comes (as it has been expressed) under a contract with the Court that he will state the whole case fully and fairly to the Court. If he fails to do that, and the Court finds, when the other party applies to dissolve the injunction, that any material fact has been suppressed or not properly brought forward, the plaintiff is told that the Court will not decide on the merits, and that, as he has broken faith with the Court, the injunction must go."**

And also Kay J. in Republic of **Peru v. Dreyfus Brothers & Co. 55 L. T. 802, 803**, where he stated the law in this way:

> **"I have always maintained, and I think it most important to maintain most strictly, the rule that, in ex parte applications to this Court, the utmost good faith must be observed. If there is an important misstatement, speaking for myself, I have never hesitated, and never shall hesitate until the rule is altered, to discharge the order at once, so as to impress upon all persons who are suitors in this Court the importance of dealing in good faith with the Court when ex parte applications are made."**

Similar sentiments were echoed by Farwell L.J. in the case of **The Hagen (1) [1908] P. 189, 201** where he stated that:

> **"Inasmuch as the application is made ex parte, full and fair disclosure is necessary, as in all ex parte applications, and a failure to make such full and fair disclosure would justify the Court in discharging the order, even although the party might afterwards be in a position to make another application."**

While the applicant has narrowed his application on the notice of 17 July 2020, that notice cannot be isolated from the subsequent events that

ensued after it had been published; these events would certainly include seizure of the applicant's goods not necessarily for non-compliance with the notice but for non-compliance with the provisions of the Excise Duty Act on the requirement of excise stamps which the impugned notice made reference to.

It was incumbent upon the applicant to disclose to this Honourable Court that even though it complained about the notice of 17 July 2020, it had subsequently admitted committing offences with respect to certain provisions of the Excise Duty Act and that it had been penalised for those offences. By suppressing this material facts, the court would be entitled to assume that the applicant was simply seeking to circumvent the order for settlement that was made by the commissioner considering that the court was never told whether the fine imposed was paid or not.

No doubt the applicant was well aware that that the settlement order under section 109 of the Act was not subject to appeal in this court and rather than confront it directly, it preferred attacking the notice of 17 July 2020 so that if the prayers were granted in terms of the motion, the applicant would end up achieving the same results that the law appears to have barred it from achieving. In other words, allowing the application would be tantamount to allowing an appeal against the settlement order contrary to the express provisions of section 109 of the Act.

It is also clear to me that the applicant's complaint is, by and large, a tax dispute. If its mitigation when it requested for settlement of a case is anything to go by, its complaint is simply that some goods or products do not attract excise duty depending on how they are packaged. This being the case, I would agree with 1st respondent that the appropriate forum to determine the dispute would have been the Tax Appeals Tribunal established under section 3 of the Tax Appeals Tribunal Act, No.40 of 2013.

The Tribunal has been established to hear appeals filed against any tax decision made by the Commissioner. If the applicant is of the firm view that by his notice of 17 July 2020 the commissioner expanded the meaning of excisable goods and therefore subjected them to excise duty tax which ought not be paid, I would be humble view that is a decision against which the applicant ought to have appealed in the prescribed manner and laid it at the door steps of the Tax Appeals Tribunal.

According to interpretive section of the Tax Appeals Tribunal Act, an "appeal" means an appeal to the Tribunal against a decision of the Commissioner under any of the tax laws. It has not been denied that the commissioner's impugned decision is such a decision which would be subject to an appeal as contemplated under section 2 of the Tax Appeals Tribunal Act.

As far as these appeals are concerned, Section 12 of this Act states:

> **12. Appeals to the Tribunal**
>
> **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, provided that such person shall before appealing, pay a non-refundable fee of twenty thousand shillings.**

I have not found any reasons in the applicant's affidavit or the submissions filed on its behalf why the applicant chose to sidestep the prescribed procedure of resolving its complaint against the decision of the commissioner.

I note that amongst the laws that the applicant invoked in its application is the Fair Administrative Action Act, No. 15 of 2015; section 9(2) of the Act reads as follows:

> **9. (2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted**.

It is trite that where there is an alternative remedy provided by an Act of Parliament which is as effective, the court ought to ensure that the dispute is resolved in accordance with the relevant statute. This was so held in **National Assembly vs. Karume Civil Application No. Nai. 92 of 199 where the Court of Appeal said as follows:**

> **In our view, there is considerable merit in the submissions that 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. We observe without expressing a concluded view that Order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions.**

For all I have said, it is inevitable that I have to reach the conclusion that the applicant's motion is misconceived and an abuse of the process of this Honourable Court. It is hereby dismissed with costs.

SIGNED, DATED AND DELIVERED ON 27TH JANUARY, 2022

NGAAH JAIRUS

JUDGE