Republic v Commissioner for Investigation & Enforcement; Kenol Kobil PLC (Exparte) (Application 233 of 2018) [2022] KEHC 18097 (KLR) (Nairobi) (29 September 2022) (Judgment)

Neutral citation: [2022] KEHC 18097 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

AT NAIROBI

APPLICATION 233 OF 2018

J NGAAH, J

SEPTEMBER 29, 2022

BETWEEN

REPUBLIC ..... APPLICANT

AND

COMMISSIONER FOR INVESTIGATION & ENFORCEMENT . RESPONDENT

AND

KENOL KOBIL PLC ..... EXPARTE

JUDGMENT

1. Before court is the motion dated 27 June 2018 in which the applicant seeks judicial review orders of certiorari and prohibition; the prayers for these orders have been framed as follows:

> " 1. An order of certiorari to remove into the High Court for purposes of it being quashed the agency notices and orders of the Commissioner for Investigation and Enforcement Department dated May 29, 2018 and June 4, 2018 demanding payment from CFC Stanbic Bank Limited for the sum of Kshs. 59,093,973/- and consequently the respondent's decision to suspend the use of Transit Bonds numbers GCSB 00467/16, GCB 00 468/16, GCB 00469/16, GSCB00467/16, GSCB09107/15 and CSC theGSCB09108/15.
>
> 2. An order of prohibition to prohibit the Commissioner for Investigation and Enforcement Department from issuing any further agency notices for the sum of Kshs. 59,093,973/- and to prohibit the respondent from suspending the use of Transit Bonds GCSB 00467/16, GCB 00 468/16, GCB 00469/16, GSCB00467/16, GSCB09107/15 and CSC theGSCB09108/15."

2. The applicant also prayed for costs of the application.

3. The application is based on a statutory statement dated 7 June 2018 and a verifying affidavit sworn on even date by David Ohana, the applicant company's managing director.

4. The applicant is an oil marketer and it is its case that on 22 March 2018, the respondent demanded from it, Kshs. 226,533,967/= ostensibly for tax, penalty and interest due from the applicant accruing from its sale of petroleum products that were intended for export but were instead diverted and sold or dumped on the local market.

5. The applicant disputed the entire claim and, subsequently, the two parties held various meetings in a bid to iron out the dispute. In those meetings, the applicant provided information relating to the disputed amount. This information included certificates of export issued by the respondent demonstrating, among other things, that it had exported the petroleum products alleged to have been sold locally and, therefore, no tax was payable. Part of this information constituted certificates of export issued by the respondent certifying that the same goods for which tax was being demanded in the mistaken belief that they had been sold locally had, in fact, been exported to Uganda.

6. The applicant also explained that the supplies for the products in issue were made on the basis of "Free On Board/Free on Truck/Free Carrier"; accordingly, it asked the respondent, more particularly on 6 April 2018, to address its demand to the applicant's clients instead of the applicant.

7. Contrary to the applicant's expectations, the respondent proceeded to issue agency notices through its letters dated 29 May 2018 and 4 June 2018 respectively, demanding payment of the sum of Kshs. 59,093,973/= from the applicant's banker, CFC Bank Kenya Limited. The applicant denies owing the respondent this sum of money.

8. The applicant also contends that, having prepared the outward rotations and issued certificates of export whose import is that the products for which tax is demanded were exported, the respondent has no basis to claim tax, penalties or interest in its agency notices as if the products were disposed of locally.

8. And to the extent the respondent has made the claims, its actions are illegal, unfair, unreasonable, and abuse of power actuated by malice and in breach of the applicant's legitimate expectation.

9. The respondent opposed the application and filed two affidavits in its response; a replying affidavit and a supplementary affidavit both sworn by Abdihakim Omar who described himself as an officer in the customs section of the Kenya Revenue Authority, in the Rift Valley Region.

10. According to Omar, at all times material to this suit, the respondent conducted a transit monitoring exercise by reconciling all transit entries at Malaba and Busia borders for fuel products supplied or sold by the applicant, among other suppliers, to partner states for consumption in those states or for export to other countries. It is during this monitoring exercise that the respondent sought and obtained from the Uganda Revenue Authority clearance system information to the effect that that 149 entries declared by the applicant as entries for export never reached Uganda. In Omar's words, the fuel products represented in those entries "did not cross over to Uganda."

11. It was further discovered that the 149 declared entries were irreconcilable with the data received from the Uganda Revenue Authority and its system did not have record of these transit entries.

12. When the respondent brought to the attention of the applicant these inconsistencies, the applicant only accounted for 30 entries leaving a balance of 119 entries unaccounted for. And in an effort to keep these entries from scrutiny by Kenya Revenue Authority and evade payment of tax due from diverted exports represented by these entries, the applicant sought to cancel their bonds.

13. It is only after the respondent intervened, more particularly on 21 February 2018, that the cancellation section of the Customs & Border Control of the Kenya Revenue Authority stopped the applicant in its tracks.

14. The respondent agreed with the applicant that indeed a meeting was held between the representatives of either parties on 12 March 2018 to address the issue of the unaccounted for entries. According to Omar, it was greed in that meeting that the applicant would obtain the T1's, which I understand to be certificates from the importing country, in this case, Uganda, confirming receipt of goods exported from Kenya, for the outstanding unaccounted for entries within 14 days.

15. It is only after the applicant failed to produce the T1's that the respondent issued it with a letter dated 22 March 2018 notifying the applicant of the taxes due and payable in accordance with the provisions of regulations 109 (1) and regulation 104(23) of the *East African Community Customs Management Act* (EACCMA).

16. The applicant reacted and wrote to the respondent on 23 March 2018 seeking for more time to submit the information sought. True to the applicant's word, it obtained and produced 30 of the 149 T1's. The respondent gave it seven more days to produce the remaining T1's but despite extending this period even further, the T1s were not forthcoming. Instead, the applicant provided the respondent with a list of its clients to whom the applicant had supplied fuel products and asked the respondent to address its demand to those clients since the supplies were made on Free On Board Basis.

17. Out of the 119 transit entries, the respondent identified 45 entries that were covered by the active bonds amounting to Kshs. 120,000,000/=. The respondent computed the taxes payable as Kshs. 39,291,593/= and fines amounting to Kshs. 19,645,797/= bringing the total amount due to Kshs. 58,937,390/=.

18. With this figure, the respondent issued an enforcement notice under section 109 of the *EACCMA, 2004* to the applicant's guarantor, CFC Stanbic Bank on 29 May 2018, with a copy to the applicant, demanding payment of the sum of Kshs. 58,937,390/=.

19. The guarantor requested for details of the guarantee. The respondent provided the breakdown through its letter to the guarantor dated 4 June 2018. The total amount was Kshs. 59,093,973/=. The respondent admitted that the amount demanded in the enforcement notice was less because of a miscalculation but the amount demanded of each of the entries remained unchanged.

20. So, while the applicant's position is that the tax demanded is not due because the products for which it is demanded were exported, the respondent's case is to the contrary; that though the products were initially meant for export, they were dumped on the local market and for this reason, the applicant should pay the tax or taxes that would ordinarily be payable on goods disposed of on the local market. In a summary way, this is the dispute that this Honourable Court is asked to resolve.

21. The nature of the goods or products whose sale provoked this dispute is not contested. It is common ground that they were export-oriented. The dispute is largely whether, considering their merchantable character, the products ended on the intended market and, as far as the applicant is concerned, if they did, the agency notices by the respondent demanding payment of taxes as if the products were sold locally are misplaced.

22. If am right in the diagnosis of the dispute, it would follow that, to a greater degree, the applicant is asking this Honourable Court to interrogate the evidence presented before it and come to the conclusion that the products were in fact exported. Now, whether a judicial review court can go that far is a question that has to be answered but before addressing it, there is what I consider to be a preliminary

issue that, in my humble view calls for my immediate attention for the reason that it may as well dispose of the entire suit depending, of course, on my opinion on it.

23. Having considered the applicant's application, the verifying affidavit and the affidavits filed in response to the application together with the parties written and oral submissions, this issue that, in my humble view, turns out to be pivotal on the fate of the applicant's application is whether the application is premature or, to be precise, misconceived. This is a legal point which ought to be determined *in limine* for the simple reason that if it turns out that the applicant sidestepped any provision of the law prescribing when, where and how such disputes should be resolved, it would be pointless to proceed any further to interrogate the application on its own merits.

24. The law on this question is found in the *Tax Procedures Act* No. 29 of 2015 and, inevitably, it is a befitting point from which to begin.

Section 2 of this Act provides for the object and purpose of the Act and for this reason it is of particular relevance to the question at hand; it states as follows:

> 2. Object and purpose of the Act
>
> (1) The object and purpose of this Act is to provide uniform procedures for—
>
> (a) consistency and efficiency in the administration of tax laws;
>
> (b) facilitation of tax compliance by taxpayers; and
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> (c) effective and efficient collection of tax.
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>
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>
> (2) Unless a tax law specifies a procedure that is unique to the administration of a tax thereunder, the procedures provided for under this Act shall apply.
>
> (3) This Act shall be interpreted to promote the object of the Act. (Emphasis added).

25. Looking at the factual basis of the applicant's application together with the affidavits filed in response to the application, there is no doubt that dispute arises from what, in the applicant's view, is inconsistent, inefficient or otherwise improper administration of tax law. On his part, the respondent is of the view that his issuance of enforcement and demand notices for payment of tax, penalties and interest is, in the words of section 2(b) and (c) of the Tax Procedure Act, facilitation of tax compliance by tax payers and to ensure that the means adopted for the collection are effective and efficient.

26. The point is, there should not be any dispute that the *Tax Procedures Act* applies to the dispute at hand and of specific note to the question in issue, section 2(2) of the *Act* which 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.

27. The question that logically follows is whether there is any specific procedure that has been prescribed by this Act or any other tax and whether the dispute at hand is subject to such a procedure.

28. To answer this question, one has to go back to the origin of the dispute which, as I understand it, is the respondent's decision that the applicant owed him taxes, penalties and interest which he assessed at Kshs. 59,093,973/=. This assessment triggered issuance of notices of enforcement

or agency notices demanding payment of the assessed sum and, subsequently, suspending the use of the applicant's Transit Bonds Numbers GCSB 00467/16, GCB 00 468/16, GCB 00469/16, GSCB00467/16, GSCB09107/15 and GSCB09108/15.

29. The respondent's impugned decision would, in my humble view, fit the description of a "tax decision" which is defined in section 3 of the *Tax Procedures Act* to mean:-

tax decision" means—

> "(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;

30. The respondent's decision would fall under section 3 (1) (a) and (g). It was an assessment and a penalty. Under 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."

31. Having come to the conclusion that the respondent's decision was a tax decision, the next question is whether there is any procedure in the Act for contesting such a decision by an aggrieved party. My answer to this question is in the affirmative and in this regard I find guidance in section 51 of the *Act* which provides for objection to the tax decision. At the material time it stated 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.

32. What this boils down to is that the applicant ought to have lodged an objection with the Commissioner in accordance with section 51(1) of the *Act*. Upon considering the objection, the Commissioner would have been bound to make what is described an 'objection decision' under section 51(1). As the Acts states, in an objection decision, the Commissioner may allow the objection either in whole or in part, or disallow it altogether.

33. I suppose that if the Commissioner was to be persuaded by the applicant's case that the products upon which tax has been imposed do not attract any domestic tax because they were meant for the export market and were indeed exported and, therefore, the agency notices are of no consequence he would certainly allow the objection.

34. But if he reached a decision contrary to the applicant's expectation, it would still be open to the applicant to invoke section 12 of the *Tax Appeals Tribunal Act*, No. 13 of 2014 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'.

35. If still dissatisfied with the decision of the Tax Appeals Tribunal, the applicant would be entitled to move this court 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.

36. Considered from the perspective of the foregoing provisions of the *Tax Procedures Act* and the *Tax Appeals Tribunal Act*, it is easy to conclude that the applicant has, to say the least, overlooked certain necessary steps before moving this honourable court for the judicial review orders of certiorari and prohibition. In doing so, the applicant not only breached the two Acts but its application is also in breach of section 9(2) of the *Fair Administrative Action Act*, No. 4 of 2015 which provides in peremptory terms that '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.'

37. It is trite that the existence of an alternative remedy is never enough to oust jurisdiction in judicial review (see *Leech versus Deputy Governor of Parkhurst Prison* [1988] AC 533 per Lord Bridge at 562D). However, it has been held in *R versus Inland Review Commissioners, ex p Preston* [1985] AC 835 that:

> " A remedy by way of judicial review is not to be made available where an alternative remedy exists...Judicial review is a collateral challenge: it is not an appeal. Where parliament has provided by statute appeal procedures, as in taxing statutes, it will only be very rarely that the courts will allow the collateral process of judicial review to be used to attack an appealable decision..."

38. Addressing the same issue in *R v Peterkin, ex p Soni* [1972] Imm AR 253 Lord Widgery CJ had this to say:

> " Where Parliament has provided a form of appeal which is equally convenient in the sense that the appellate tribunal can deal with the injustice of which the applicant complains this court should in my judgement as a rule allow the appellate machinery to take its course. The prerogative orders form the general residual jurisdiction of this court whereby the court supervises the work of inferior tribunals and seeks to correct injustice were no other adequate remedy exists, but both authority and common sense seem to me to demand that the court should not allow its jurisdiction under the prerogative orders to be used merely as an alternative form of appeal when other and adequate jurisdiction exists elsewhere."

39. Our very own Court of Appeal has held in the *Speaker of the National Assembly v. Karume*, Civil Application No. NAI 92 of 1992 that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.

40. Thus, both the statute and precedent point to the conclusion that it is pertinent for an aggrieved party to embrace alternative remedies including appellate procedures before moving court for judicial review remedies. The reviewing courts will always be conscious that in considering whether a public body may

have abused its powers they must not abuse their own by entertaining matters which they otherwise need not have entertained.

41. There was the question whether a judicial review court can interrogate the evidence before it and come and resolve what is, otherwise disputed facts. This question was considered in *R v Secretary of State for the Home Department, ex p Khawaja* [1984] AC 74:

> " The migration officer, whether at this stage of entry or at that of removal, as to consider a complex of statutory rules and non-statutory guidelines. He has to act upon documentary evidence and such other evidence as inquiries may provide. Often there will be documents was genuineness is doubtful, statements which cannot be verified, misunderstandings as to what was said, practices and attitudes in a foreign state which have to be estimated. There is room for appreciation, even for discretion. The Divisional Court, on the other hand, on judicial review of a decision to remove and detain, is very different situated.It considers the case on affidavit evidence, as to which cross-examination, though available, does not take place in practice. It is, as this case well exemplifies, not in a position to find out the truth between conflicting statements-did the applicant receive notes, did he read them, was he incapable of misunderstanding them, what exactly took place at the point of entry? Nor is it in a position to weigh the materiality of personal or other factors present, or not present or partially present, to the mind of the immigration authorities. It cannot possibly act as, in effect, a court of appeal as to the facts on which the migration officer decided. What it is able to do, and this is the limit of its powers, is to see whether there was evidence on which the immigration officer, acting reasonably, would decide as he did. (Per Lord Wilberforce at p. 949B-D). (Emphasis added).

42. Though this case related to immigration and the questions are pertinent to the immigration issues that had been raised, the principle applied as to the limits of a judicial review court entertaining disputes on factual issues is applicable in this case. It relies on the affidavit before it and, for this very reason, it is not in a position to tell the truth between conflicting depositions. A judicial review court cannot assume appellate jurisdiction and interrogate the evidence afresh so as to come to its own conclusion different from, as in the instant case, that which the Commissioner arrived at in making a tax assessment and issuing agency or enforcement notices.

43. Lord Woolf was more apt in *R v Derbyshire County Council, ex p Noble* [1990] ICR at p. 813C-D where he stated:

> " The present application is one which is unsuitable for disposal on an application for judicial review-unsuitable because it clearly involves a conflict of fact and conflict of evidence which would require investigation and would involve discovery and cross examination. Cross-examination and discovery can take place on application for judicial review, but in the ordinary way judicial review is designed to deal with matters which can be resolved without resorting to those procedures."

44. On the same point Lord Diplock at p.316G in *Hoffmann-La-Roche (F) & Co AG v Secretary of State for Trade and Industry* [1975] AC 295 was of the view that the procedure on a judicial review motion is unsuited to enquiries into disputed facts. Oral evidence and discovery, although catered for by the rules are not part of the ordinary stock in trade of the prerogative jurisdiction.

45. It follows that even if the applicant's application was not procedurally deficient, it would still fail to the extent that it demands of this court an inquiry into disputed facts.

46. In the final analysis, I have to reach the inevitable conclusion that the applicant's application is misconceived and an abuse of the process of this Honourable Court. It is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED ON 29 SEPTEMBER 2022

NGAAH JAIRUS

JUDGE