



**Republic v Commissioner of Customes and Border Control Department & another;
United Millers Limited (Exparte) (Judicial Review Miscellaneous Application
E191 of 2021) [2022] KEHC 14354 (KLR) (Judicial Review) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14354 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E191 OF 2021
AK NDUNG'U, J
OCTOBER 27, 2022**

BETWEEN

REPUBLIC APPLICANT

AND

**COMMISSIONER OF CUSTOMES AND BORDER CONTROL
DEPARTMENT 1ST RESPONDENT**

COMMISSIONER, DOMESTIC TAXES DEPARTMENT 2ND RESPONDENT

AND

UNITED MILLERS LIMITED EXPARTE

JUDGMENT

1. Pursuant to leave of this court granted on December 15, 2021, United Millers Limited (hereinafter the applicant) moved this court vide its Notice of Motion dated December 20, 2021 for orders:
 1. An order of *mandamus* compelling the 1st Respondent to forthwith authorize the cancellation of the bank guarantees issued in the Respondent's favour, by KCB Bank Limited on 17/03/2021 in the sum of Kshs 350,000,000.
 2. An order of *certiorari* to bring to the Court, for purposes of being quashed, the decision of the 1st Respondent through its officer namely Franklin Ombaka dated August 6, 2021 demanding from the Applicant a sum of Kshs 527,053,593.10 in taxes allegedly payable to the 1st Respondent.



3. An order of prohibition directed at the 1st Respondent and prohibiting the 1st Respondent from demanding, issuing agency notices, or in any other way howsoever from effecting the collection of taxes in the sum Kshs 527,053,593.10 contained in the 1st Respondent's demand notice of 06/08/2021 or any other sum arising from the tax assessment the subject matter of the Nairobi Customs Tax Appeal No. J of 2018; United Millers Limited versus Commissioner of Customs Services.
 4. An order of mandamus compelling the 2nd Respondent to forthwith process and pay, the Applicant's outstanding value added tax refunds in the sum of Kshs 227,049,507.00.
 5. That costs of this application be provided for.
2. The brief background to the proceedings herein relates to a tax dispute between the applicant and the respondents in which by a tax assessment dated September 24, 2013, the 1st Respondent demanded from the Applicant additional taxes in import duty, value added tax, import declaration fees, penalties and interest thereon in the sum of Ksh 1,496,614,255.
 3. The figure was revised to 792,313,402 as evidenced by a letter by the 1st Respondent dated June 3, 2015. Still dissatisfied with the demand, the applicant lodged Tax Appeals Tribunal Tax Appeal no. 151 of 2015. The appeal was partially dismissed and the applicant appealed the decision to the High Court in Nairobi Income Tax Appeal no. 1 of 2018. A stay of execution was granted subject to a bank guarantee of Ksh 350,000,000.
 4. In a judgment rendered on July 27, 2021, L. Nzioka J ordered that the records subject of the tax dispute be subjected to a thorough independent audit and that if that was untenable, the 1st Respondent was to issue fresh demand to the applicant within 14 days.
 5. It is the Applicant's case that the 1st Respondent issued agency notices against the applicant's bankers on the same day of the judgment of the court. These banks were Standard Chartered Bank, Kenya commercial Bank, Diamond Trust Bank, ABSA Bank Limited, Co-operative Bank and Equity Bank Kenya Ltd.
 6. The Applicant maintains that efforts to have the independent audit as directed by the court were rebuffed by the 1st Respondent who insisted that it was the only authority in law mandated to carry out tax audits. No fresh demand was made to the applicant and the decision of L. Nzioka J has not been appealed against.
 7. The applicant states that on August 20, 2021, the 1st Respondent served it with a reviewed demand via email in the sum of Ksh 527,053,593.10. it is alleged that the said demand was backdated. The demand was objected to vide the applicant's letter dated August 22, 20221 under the provisions of Section 51(1) and (2) of the [Tax Procedures Act](#) (The Act) no. 29 of 2015. No objection decision has been issued by the respondents as required under Section 51(8) and (ii) of the Act.
 8. It is urged that the 2nd Respondent has declined to pay the applicant's Value Added Tax refunds citing the pendency of the tax dispute between the applicant and the 1st Respondent. In the applicant's position, there is no existing dispute as the 1st Respondent's Tax assessment abated with the 1st Respondent's failure to issue a revised demand within 14 days as directed by L. Nzioka J, as well as the 1st Respondent's failure to serve an objection decision to the Applicant's objection.
 9. The Respondent's case is anchored on the affidavit of Franklin Ombaka, a Chief Manager in the Risk Management Division of the Respondent's Customs and Border Control Department.



10. Ombaka depones that after efforts to engage the Applicant through ADR as directed by the court which failed due to the non-cooperation of the Applicant, the Respondents issued a 'Fresh Demand' on or about August 6, 2021 for Ksh 527,053,593 which is lower than the Ksh 792,313,402 in the demand of June 3, 2015 that was substituted by the court in its judgment.
11. It is averred that the delay in the issuance of the fresh demand is not so inordinate, the Respondents having attempted to give the proposal for ADR a chance. Further, that the applicant misconstrued issued pursuant to the court's directions as a fresh assessment hence their purported objection to the same.
12. The applicant is accused of failure to satisfy the 'Fresh demand' hence the failure to cancel the bank guarantees in question and processing of the Applicant's VAT refunds if any.
13. It is urged that the applicant cannot purport to appeal the decision in CTA no. 1 of 2018 by way of judicial review proceedings as this would be expecting this court to sit on appeal over the same.
14. Both parties filed written submissions. The applicant's submissions are dated May 3, 2022 while those on behalf of the respondents are dated May 20, 2022.
15. It is submitted for the applicant that the scope of judicial review reliefs has been expanded in other jurisdiction and for this proposition, the case of *Communication Commission of Kenya v Royal Media Services and 5 others* [2014] eKLR is cited. Counsel too places reliance on the decision in *Child Welfare Society of Kenya v Republic & 2 others, ex parte Child in Family Focus Kenya* [2017] eKLR, *IEBC v National Super Alliance (NASA) Kenya & 6 others* [2017] eKLR and *Polly W. Gitimu v Republic & 2 others* [2018] eKLR.
16. It is acknowledged that the common law grounds applied in *Pastoli v Kabale District Local Government Council and others* [2008] 2 EA 300 also continue to apply in our jurisdiction.
17. It is submitted that the purported reviewed tax demand by the 1st Respondent dated August 6, 2021 not only amounted to an illegality, but was irrational and procedurally flawed and in contravention of the applicant's right to a fair, procedural and lawful administrative action contrary to Article 47 of the *Constitution* and Section 4 of the *Fair Administrative Action Act*.
18. Counsel urges that in raising a tax demand contrary to the express judgment of the court, the 1st Respondent committed an illegality. No fresh demand was issued and the reviewed demand issued was, in any event, served outside the time frame prescribed by the court in its judgment.
19. It is further submitted that the 1st Respondent's action to enforce collection of taxes without issuing an objection decision as required by the law amounted to procedural impropriety.
20. Further, that the 1st Respondent's tax demand violated the Applicant's right to an administrative action that is lawful, procedural and reasonable under Article 147 of the *Constitution*.
21. It is submitted for the Respondents that this court lacks the prerequisite jurisdiction to deal with the matter and ought to down its tools in line with the recent decision in Mombasa JR E013 of 2022, *Chama cha Uzalendo v Registrar of Political Parties* for reasons that:
 - a. The Applicant is in effect inviting the Honourable Court to sit in Appeal against Her Ladyships Judgment dated July 27, 2021, in CTA No. 1 of 2018. The court is urged to rightfully find that the Applicant, who at all material times was ably represented by Counsel, had all the right and opportunity to enforce the said decision within the same matter being CTA No. 1 of 2018 if at all the Respondents were in disobedience, and/or prefer an Appeal



to the next Court if dissatisfied. The Applicant ought not to be allowed to re-litigate CTA No. 1 of 2018 in the name of Judicial Review proceedings.

- b. The Applicant had a right and an opportunity if at all dissatisfied by the 2nd Respondents Tax Decision regarding VAT refunds, to object to the same as by Law stipulated, leading to an Appealable Decision to the Tribunal within the provisions of Sections 3 and 52 of the [Tax Procedures Act](#) No. 29 of 2015 but not to file a Judicial Review Application.
22. It is urged that at paragraph 50 of the superior Court's Judgement in CTA No. 1 of 2018, the Court in finality did not set aside the entire assessed Taxes but only substituted the figures with that in demand dated 3rd June 2015 which both parties herein had in any event agreed upon to be the Taxes due and owing. Accordingly, it is trite that the Applicant was not absolved of any Tax Liability to the Respondents.
23. Counsel urges that after several attempts for ADR, the Respondents had no option but to issue a fresh demand on or about August 6, 2018. It is urged that this was after an independent review of all available documents hence the fresh demand for Ksh 527,053,593.10 which is in fact lower than Ksh 792,313,402 that had not only been confirmed by the court, but also agreed upon by the parties as captured at paragraph 50 of the judgment.
24. Further, that the taxes of Ksh 527,053,593.10 is still due and owing which colossal amount of taxes for the benefit of the public cannot be wished away on technicalities of inordinate delay which delay was caused by the Applicant's failure to co-operate and have the matter resolved amicably as directed by the court.

Determination

25. Gleaned from the pleadings, the affidavit evidence and learned submissions by counsel, the issues for determination crystalize into 2, namely:
 1. Whether the court has the requisite jurisdiction to entertain this suit.
 2. Whether the applicant has established the legal threshold for the grant of the review orders sought.

Whether the court has the requisite jurisdiction to entertain this suit.

26. Jurisdiction of a court is that authority reposed on the court of law to adjudicate over a matter before it. That jurisdiction may be general or specific, limited or unlimited. It may be conferred by the constitution, statute or both. The Supreme Court has set the law on this issue in a number of decisions. In the case of [Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & another](#) the Court stated;

“(68) A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

27. Referring to its earlier decision [In the Matter of the Interim Independent Electoral Commission](#), Constitutional Application Number 2 of 2011 the court added;

“Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court



of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

The legal position flowing from the above decisions is that a court of law must only exercise jurisdiction conferred on it either by the constitution, the law or both but cannot exercise jurisdiction it does not have, exceed jurisdiction conferred on it or even confer jurisdiction on itself through some form of innovation. Any action taken by the court without jurisdiction or exceeding jurisdiction would be unconstitutional and illegal.

28. As held by Mativo J in *Chama Cha Uzalendo and 4 others v Registrar of Political Parties and 2 others* Judicial Review no. E013 of 2022;

“Undeniably, a court has to be competent in the sense that it has jurisdiction before it can undertake to probe and decide the rights of the parties. But because jurisdiction is regarded as a threshold issue and a lifeline for continuing any proceedings, objection to jurisdiction ought to be taken at the earliest opportunity if there are sufficient materials before the court; to consider it and a decision reached on it before any other step in the proceedings is taken because if there is no jurisdiction, the entire proceedings are a nullity no matter how well conducted.”

29. In the South African decision in *Vuyile Jackson Gcaba v Minister for Safety and Security First & Others* CCT 64/08(2009) ZACC26, the court stated:

“Jurisdiction is determined on the basis of the pleadings ... and not the substantive merits of the case. In the event of the court’s jurisdiction being challenged at the outset (in limine), the applicant’s pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court’s competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant’s claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognizable only in another court. If, however the pleadings, properly interpreted, establish that the applicant is asserting a claim ... one that is to be determined exclusively by (another court), the High Court would lack jurisdiction....”

30. Under Article 165 (6), the High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function but not over a superior court. The Article states in plain language that this court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial junction but not over a superior court. Superior courts in terms of Article 162 (1) of the *Constitution* are the Supreme Court, the Court of Appeal, the High Court and courts of equal status namely; the Employment and Labour Relations Court and the Environment and Land Court. The edict in Article 165(6) is in form of a constitutional limitation imposed on this court not to do anything that would amount to supervising or superintending other superior courts.
31. The parties in the instant suit have had a considerably long history of a tax dispute which has as per the provisions of the *Tax Procedures Act* gone through an Objection, an Objection decision, an appeal at the Tax Appeals tribunal and a further appeal at the High Court in Nairobi High Court Income Tax Appeal No. 1 of 2018.



32. The High Court (L. Nzioka J) in a judgment dated July 27, 2021 in her final finding expressed herself as follows:

“51. I further order that, in view of the fact that, the parties kept on adjusting the figures claimed and I have also noted from the proceedings that, there was a lot of arguments on production of additional and/or substituted documents, it will be in the interest of justice that, the records herein be subjected to a thorough audit by an independent party to reconcile the same preferable ADR, if that is not tenable, then, the Respondent must serve a fresh demand within fourteen (14) days of the order of the court to the Appellant as aforesaid.”

33. As drawn and prosecuted, the import of the application herein is that the Respondents have acted contrary to the orders of the High Court by:

1. In the absence of a successful ADR mechanism, failing to issue a fresh demand within 14 days.
2. Issuing a ‘reviewed demand’ out of the time set by the court.

34. In essence the application seeks to have this court enforce the orders of the High Court. To my mind, if the applicant’s contention is that there has been breach of the court orders issued at the High Court, the applicant has ready remedies in enforcement of the orders before that court. The steps taken by the respondents are pursuant to orders of the High Court. If in so doing the Respondents breached the commands of the court, recourse for redress should be had in that court as this court does not possess the necessary legal wherewithal to supervise a superior court.

35. The invoking of the judicial review jurisdiction in this court is in my considered view legally untenable. This court has no supervisory jurisdiction over the High Court. The court cannot assume the role of interpreting and enforcing the orders of the High Court. Any issues arising from enforcement of the judgment of the learned judge ought to be placed before the court that issued the orders. There was no default clause(s) in the judgement of the court. This court would trode a dangerous path should it attempt to speculate the consequences of default on the part of a party who breached the judgment. The High Court is well endowed to give the appropriate remedy including determining whether the impugned actions by the Respondents are contrary to the orders issued and the effect of such transgression if at all.

36. In light of the above, it is my finding that the judicial review jurisdiction of this court has been wrongly invoked. This court lacks the jurisdiction to interpret and enforce a judgement of a superior court. Without jurisdiction, I must down my tools.

37. With the result that the application dated December 20, 2021 is dismissed. Each party to bear its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF OCTOBER 2022

A. K. NDUNG’U

JUDGE

