REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

MISCELLANEOUS JR APPLICATION NO 1105 OF 2020

IN THE MATTER OF AN APPLICATION FOR LEAVE BY SONY HOLDING LIMITED TO COMMENCE JUDICIAL

REVIEW PROCEEDINGS AGAINST THE KENYA

REVENUE AUTHORITY FOR ORDERS OF MANDAMUS AND PROHIBITION

PURSUANT TO THE PROVISIONS OF ORDER 53 OF THE CIVIL PROCEDURE RULES. AND

IN THE MATTER OF ARTICLES 21, 22, 23, 27(1) , 47 and 165(6) and (7) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTIONS 4, 7, 8 and 11 OF THE FAIR ADMINISTRATIVE

ACTIONS ACT, 2015 AND

IN THE MATTER OF VALUE ADDED TAX, 2013 SECTIONS 6, 7 and 19

AND

IN THE MATTER OF THE TAX PROCEDURES ACT, 2015 SECTIONS 51, 94 and 95

AND

IN THE MATTER OF THE KENYA REVENUE AUTHORITY ACT, 1995

BETWEEN

SONY HOLDINGS LIMITED APPLICANT

AND

THE COMMISSIONER OF DOMESTIC TAXES RESPONDENT

RULING

The application before court is the applicant's chamber summons dated 17 September 2020 in which the applicant seeks the leave of this honourable court to file a substantive motion for judicial review orders; it is brought under a raft of provisions of the law including Order 53 Rule 1, 2 & 4 of the Civil Procedure Rules, 2010, Sections 8 and 9 of the Law Reform Act, Cap. 26, Sections 4, 7, 8 & 11 of the Fair Administrative Act, 2015, the Value Added Tax Act, Sections 6, and 19, The Tax Procedures Act Sections 51,94and 95 Articles 21(1),24 (2),27(1),47, 165(6) and 210 of the Constitution of Kenya, Sections 3(1) and (2)(a)(ii) and 6A of the Income Tax Act.

The prayers appear to be wordy and I can do no better than reproduce them as they appear on the face of the application; they have been framed as follows:

"1. THAT the Application be and is hereby certified as urgent and be heard and determined expeditiously.

2. THAT the Honourable Court be pleased to and hereby grants leave to the Applicant to file an application for Judicial Review for the following reliefs and orders:

a) (i) THAT this Honourable Court do recall the record of proceedings, before the

Respondent with regards to proceedings in connection with the Applicant's VAT returns under PIN number P051157968P for the period January to May 2018 with respect to the Notices of Objection to Inconsistency Notices by Notices of Objection follows:

- ***i. KRA /2/42/181106 dated 6th November, 2018, for January 2018;***
- ***ii. KRA/2/42/190508/2 dated 8th May, 2019 for February, 2018;***
- ***iii. KRA/2/42/190508/1 dated 8th May 2019 for March, 2018;***
- ***iv. KRA/2/42/190722 dated 22nd July, 2019 for April, 2018; and***
- ***v. KRA/2/42/190807 dated 7th August, 2019 for May 2018.***

And UPON being placed before this Honourable Court, this Honourable do direct the Respondent by way of mandamus to mark the said objections as deemed to have succeeded by virtue of the provisions of Section 51(11) of Tax Procedures Act.

(ii) THAT in the alternative, the Honourable Court be pleased to and hereby declares that the aforementioned Notices of Objection A declaration that the Respondent's additional assessments and Debit Adjustment Vouchers issued on 15th November 2019 assessing the Applicant's total tax liability at KES. KES. 14,992,680.24 for the assessment period of January 2018 to May 2018 as being illegal and unlawful given that the aforementioned objections had been allowed by operation of the law. The Particulars of the unlawful additional assessments and Debit Adjustment Vouchers being:

Assessment Order KRA201915642056 dated 15th November 2019 for an alleged tax liability of KES. 1,675,600.79 for the month of January 2018 together with a Debit Adjustment Voucher Number 2018118802;

ii. ***Assessment Order KRA201915623310 dated 15th November 2019 for an alleged tax liability of KES. 1,848,086.26 for the assessment period***

of the month of February 2018 together with the Debit Adjustment Voucher Number 2018112848;

iii. ***Assessment Order KRA201915622185 dated 15th November 2019 for an alleged tax liability of KES. 8,289,562.84 for the month of March 2018 together with Debit Adjustment Voucher Number 2018112494;***

iv. ***Assessment Order KRA201915622472 dated 15th November 2019 for an alleged tax liability of KES. 1,230,910.60 for the month of April 2018 together with Debit Adjustment Voucher Number 2018112578; and***

v. ***Assessment Order KRA201915623447 for an alleged tax liability of KES. 1,948,519.75 for the month of May 2018 together with Debit Adjustment Voucher Number 2018112903.***

b) ***(i) THAT this Honourable Court do recall the record of proceedings before the Respondent with regards to the Objection Notice against additional assessment for VAT and admitted on 22nd November 2019 as follows:***

KRA201916039415 for January 2018;

KRA201916039501 for February 2018;

iii. KRA201916039553 for March 2018;

iv. KRA201916039592 for April 2018; and

v. KRA201916039632 for May 2018.

AND UPON being placed before this Honourable Court, this Honourable Court, do direct the Respondent by way of Mandamus, to mark the said Notice of Objection as deemed allowed by operation of Section 51(11) of the Tax Procedures Act, 2015.

(ii) ***In the alternative, a Declaration be and is hereby issued with respect to the five objection letters dated 21 st November 2019 and filed on iTax duly acknowledged by the Respondent as having been lodged on 22nd November 2019. The said Objection letters objected to the Respondent's additional assessments and Debit Adjustment Vouchers issued on 15th November 2019. The particulars of the Objection Acknowledgement receipts being:***

Objection Application reference Number KRA201916039632;

ii. Objection Application reference number KRA201916039415;

iii. Objection Application reference Number KRA201916039553;

Objection Application reference Number KRA201916039592; and

v. Objection Application reference Number KRA201916039501

That this court be pleased to declare that these five objection letters as having been allowed and successful pursuant to Section 51(11) of the Tax Procedures Act, 2015 as the Respondent has failed and /or declined to issue its Objection Decision within the statutory stipulated period of Sixty (60) days.

c) ***THAT this Honourable Court do direct the Respondent by way of Mandamus, to reverse the compelled acceptance of the debit adjustment vouchers on the Applicant's I-Tax portal and to restore any amounts effected by the irrational and arbitrary debit adjustment vouchers.***

d) ***THAT this Honourable Court do direct the Respondent by way of Mandamus, to remove any and all restrictions, it has placed on the Applicant's portal restricting its right to effect and make its VAT returns through its portal with the Respondent.***

e) ***THAT this Honourable Court do by way of an Order of Prohibition, prohibit the Respondent, its servants, its agents, staff, employees and persons acting through it from:***

Issuing, claiming or demanding any further or other additional assessments and Debit Adjustments Vouchers with respect to the period of January to May 2018 the objection to the additional VAT for that period having been deemed to have been allowed pursuant to the provisions of Section 51 (11) of the Tax Procedures Act.

(ii) ***Imposing any payment default notices or penalties or interest for the period of October 2019 up to March, 2020, the Respondent having denied the Applicant, the right to file its returns under its i-Tax portal during that period.***

restricting the Applicant's i Tax Portal and any further Respondent's action or decision that interfere with the Applicant's i-Tax Portal and prevents the applicant from complying with its statutory obligations

f) ***THAT this Honourable Court by way of judicial review be pleased to issue an order of mandamus directing the Respondent to remove from the Applicants portal under the iTax all the entries it made in connection with and relating to the inconsistency orders, the additional assessments orders and debit adjustment vouchers made in connection therewith.***

g) ***THAT this Honourable Court make by way of Judicial Review an order prohibiting the Respondent, from issuing any further orders in connection with the period January to May 2018 SAVE as provided and in accordance with the provisions of the relevant statutes.***

3. ***THAT the costs of this Application be provided for.***

4. ***THAT the Honourable Court be pleased to exempt the Applicant from exhausting the alternative remedies under the Tax Procedures Act and the Tax Appeals Tribunal Act due to the exceptional circumstances of the matter and in the interest of justice pursuant to Section 9(4) of the Fair Administrative Actions Act.***

5. ***THAT the leave granted do operate as a stay of any further action by the Respondent on the order restricting the Applicant's iTax Portal and any further action or decision that continues to interfere with the Applicant's i-Tax Portal and preventing the applicant from complying with its statutory obligations, until the hearing and determination of this application, by way of Judicial Review."***

The applicant's case is encapsulated in the statutory statement obviously filed under Order 53 Rule 1(2) of the Civil Procedure Rules, the affidavit verifying the statement and the submissions made in support of the application.

By its very nature, the application for leave does not require detailed analysis of the evidence since all that the court is required to do at the leave stage is to consider whether, based on what the applicant has presented, an arguable case has been made out.

For this reason, I will attempt to summarise the applicant's case and, of course, the respondent's rebuttal to such an extent that is necessary for determination of the single question whether leave ought to be granted. Looking at the material presented before court, the applicant is a limited liability company incorporated under the laws of Kenya.

Its grievances against the respondent arises from what I gather are tax liability assessments which the respondent insists are due and payable by the applicant.

When one looks at the affidavit verifying the statutory statement, it is largely made up of depositions on the alleged assessments and objections raised against them by the applicant.

The affidavit was sworn by Duncan Kibunyi, the Chief Finance Officer of Sony Holding Limited; he deposed that the Applicant is a limited liability company incorporated in Kenya for purposes of carrying out the business of development, owning and letting real estate and has a registered KRA PIN Number P051157968P.

At all material times, the Applicant has duly filed its annual returns and fully declared its income and equally filed its Value Added Tax ("VAT") returns as by law required.

The genesis of the applicant's grievances against the respondent appears to have stemmed from an e-mail dated 26th October 2018, in which the Respondent informed the Applicant that it had inconsistent VAT returns for the period of January 2018 and that the invoice details declared by the applicant in Section F of the VAT return did not match the respective Supplier invoices details.

Accordingly, the Applicant was required to amend the return within 30 days thereof. Attached to the e-mail was the Notice Number 62624298 on Inconsistent Invoice Summary for the Tax Period: 01/01/2018-31/01/2018 against Return Acknowledgement Number: KRA201801228032.

Upon receiving the Respondent's e-mail of 26th August 2018, the Applicant, in conformity with Section 51 (1), (2) and (3) of the Tax Procedures Act, filed its Notice of Objection dated 6th November 2018 contesting the Respondent's assessment vide Notice Number 62624298 on the following grounds:

> a) The Respondent's allegation that 7 invoices were not by the respective suppliers was baseless as the said invoices were valid tax invoices for supplies made to the Applicant and that they were in any event, claimable under the VAT Act as input VAT which was in fact done within 6 months from the date of invoice.
>
> b) If by any chance and for whatever reason, the Applicant's suppliers had not declared their relevant VAT output as required, then the Respondent ought to have pursued the said suppliers and not the Applicant who had fully complied with all the VAT filings and the relevant tax compliance requirements on its part.

Although the Applicant filed a Notice of Objection on 6th November 2018, the Respondent failed to issue an objection decision within 60 days as required by law. This prompted the Applicant to write to the Respondent, on 10th September 2019, indicating to it that due to its failure to issue an Objection decision within 60 days as required, it had in effect allowed the Applicant's Notice of Objection of 6th November 2018 pursuant to the provisions of the Tax Procedures Act.

Instead of the Respondent addressing the Applicant's Notice of Objection of 6th November 2018, the Respondent issued yet another Notice vide an e-mail dated 5th April 2019 forwarding Notice Number 74580097 on VAT Inconsistent Returns with respect to 7 other invoices that were allegedly either Under declared or were Non-declared.

Again on 11th April 2019, the Respondent issued another reminder e-mail to the Applicant forwarding reminder Notice Number 74967431 for VAT inconsistencies for the month of February 2018. In the said e-mail, the Respondent indicated that the Applicant had 60 days to amend its returns lest KRA would auto assess the respective VAT returns by removing the inconsistent invoices.

Being dissatisfied by the assessments and the Notices issued on 5th April 2019 and n 11th April 2019 respectively, the Applicant objected to the assessments through a Notice of Objection dated 8th May 2019.

The Respondent failed to issue an Objection Decision to the Applicant's Notice of Objection dated 8th May 2019 within 60 days of objection as required by law. The applicant then wrote to the Respondent, on 10th September 2019, reiterating that failure to issue an Objection decision effectively meant that the object had been allowed in line with the Tax Procedures Act.

On 22nd April 2019 the Applicant received an e-mail from the Respondent forwarding a Reminder Notice Number 75843214 for VAT inconsistencies for the month of March 2018 and like in the previous Reminder Notice, the Respondent reminded the Applicant that it had 60 days to amend its returns lest KRA would auto assess the respective VAT returns by removing the inconsistent invoices.

Since the applicant was dissatisfied with the Notices issued on 16th and 22nd April 2019, the Applicant filed Notice of Objection dated 8th May 2019.

The rest of the affidavit shows that while the respondent was relentless in its assessments and issue of notices and reminders to the applicant, the latter was, on its part, unrelenting in raising objections to the various assessments. Neither party appears to have been willing to bulge until at some stage in the course of this ping-pong the respondent blocked the applicant's i-tax portal account. From what I gather it is then that the applicant took matters to the present level, where its is now seeking the intervention of this court for specific orders against the respondent.

Against this background, the applicant contends that its application is based on the judicial review grounds of illegality, irrationality and procedural impropriety and a violation of the Applicant's right to fair administrative action. According to the applicant, its application is all about abuse of power, misuse of power to collect and administer tax laws and violation of its right to fair administrative action by the Respondent, who has devised an unlawful and illegal practice of blocking the Applicant's i-Tax Portal and preventing it from filing its tax returns unless the Applicant accepts undue and non-existent liabilities.

It is its case that the Respondent's conduct is ultra vires the Constitution, Value Added Tax Act and the Tax Procedures Act and it is also unjust and un-procedural.

It also submitted that the Respondent's actions are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; that they are contrary to constitutional right, power, privilege, or immunity; that they are also in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; without observance of procedure required by law; or unsupported by substantial evidence.

The respondent did not file any replying affidavit to the applicant's verifying affidavit and therefore the applicant's allegations of fact are, as of now, uncontested.

In the submissions on the respondent's behalf, counsel for the respondent urged that the Applicant has not demonstrated that the impugned decision is illegal, unfair or irrational. It was submitted further that Judicial Review is concerned with the process and not the merits of the decision yet whatever the applicant is seeking to challenge goes to the merits as opposed to the process by which the decision was arrived at.

Again, the Applicant has not demonstrated a serious arguable issue that can be taken up at the hearing of a substantive motion for Judicial Review orders. To the contrary, a glance at the issue for determination clearly shows that this is a tax dispute, which ought to be substantially dealt with on its merits and as such, not appropriate for Judicial Review jurisdiction.

It is the Respondent submissions that in view of the foregoing, the applicant has not met the threshold required for grant of leave and that any further judicial review proceedings would be untenable.

Counsel relied on the case of **Republic vs County Council of Kwale & Another Ex-parte Kondo & 57 Others** (full citation not given) where the Waki, J is said to have stated as follows on the question of leave:

> "***is to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived."***

On this same point the learned counsel also cited the case of **Meixner & Another vs A. G, (2005) 1KLR -189** where it was held that:

> ***"the leave of court is a prerequisite to making a substantive application for Judicial Review with a view to filtering out frivolous applications and the grant or refusal involves an exercise of judicial discretion and the test to be applied is whether the applicant has an arguable case."***

As to whether this court has jurisdiction to determine this matter, the learned counsel for the respondent submitted that the applicant was caught up by the doctrine of exhaustion; in particular, he referred to section 9 of the Fair Administrative Action Act which specifically provides circumstances when this honourable court may entertain an application of judicial review. That section reads as follows:

> ***9. Procedure for judicial review.***
>
> ***(1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the Constitution.***
>
> ***(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.***
>
> ***(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).***
>
> ***(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.***
>
> ***(5) A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.***

It was urged on behalf of the respondent that the Applicant's application is contrary to the mandatory provisions of section 9 (2) of the Fair Administrative Action Act in the sense that the applicant ought to have exhausted the laid down appellate mechanism before approaching this honourable court. Accordingly, its case is premature.

To buttress his point counsel cited the decision in the **Speaker of National Assembly vs Karume (1992) KLR 21** where the Court of Appeal noted as follows:

> ***"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***"

This same point was taken up in the **Matter of Mui Coal Basin Local Community (2015) eKLR**.

The respondent urged that the section 9 (2) was couched in mandatory terms and therefore the applicant has no alternative but to comply with it.

Although section 9(4) provides for exemptions of certain cases where one may proceed to court without exhausting the laid down appellate mechanism, the applicant has not demonstrated exceptional circumstances that would entitle it to such an exemption under this provision of the law.

It was therefore submitted on behalf of the respondent that the applicant's application is not merited and leave ought not to be granted.

The submissions made mainly on behalf of the applicant go to the merits of the substantive motion should leave be granted. On my part, I have to resist the temptation of delving into any discussion on the merits of the applicant's case and in the process, prejudging it at this stage. All that I ought to be concerned with is whether the applicant has made out an arguable case which upon consideration may merit the grant of all or any of the judicial review orders sought. This is the purpose for leave stage; it is not to determine whether or not the applicant's case will succeed but whether is arguable.

Lord Diplock as explained the need for leave this way:

> ***"Its purpose is to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived. (See IRC V National Federation of Self-Employed and Small Businesses Ltd (1982) 617, (1981) 2 ALL ER 93).***

Thus the purposes identified for leave are one, - to save the court's time and, two, so as not to leave public authorities in a state of uncertainty as to whether they can safely proceed.

In the same case, Lord Scarman saw the need for leave as 'an essential protection against abuse of legal process. In his words "It enables the court to prevent abuse by busybodies, cranks and other mischief makers. (At page 653 and 113).

On his part, Woolf LJ has referred to the need for leave as 'the unique statutory means by which the court can protect itself against abuse of judicial review.

To guard delving into the merits of the case, Lord Diplock, **IRC V National Federation of Self-Employed and Small Businesses Ltd** (supra) suggested the following approach.

> ***"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 it might turn out to be, an arguable case.

A summary of the applicant's case from this perspective would lead to the conclusion that the applicant has an arguable case. As I understand it, it is simply this: the applicant filed objections to various tax assessments by the respondent of the applicant's tax liability. According to section 51 of the Tax Procedures Act, the respondent ought to have made a decision on the objections within a prescribed time limit. It is the applicant's case that the respondent has not made any decision. The matter would have ended there and the objections deemed to have been allowed but if I understand the applicant correctly, the respondent has continued to act as if no objection has ever been filed to any of its assessments

It is further alleged that rather than decide on the objections as by law provided the respondent has reconfigured its portal with a sole purpose of blocking the applicant from filing its returns.

I must say that the question whether any decision has been made on the applicant's objections is a question of fact and as such an affidavit demonstrating that a decision was indeed made or, in any other way countering, the applicant's allegation would have sufficed. But no affidavit was ever filed to respond to these allegations of fact. All that the respondent filed was a statement of grounds of objection and its submissions were more or less on matters of law, in particular, the doctrine of exhaustion. It therefore follows that the factual basis of the applicant's application has not been displaced.

I am persuaded that in these circumstances, the applicant has made out a case worth of grant of leave to file the substantive motion for judicial review in terms of the prayers set out in its application. I must hasten to add that the prayers appear convoluted but whether they ought to be framed in more certain terms before they are granted is a question on which I am prepared to accept the parties' submissions at the hearing of the substantive motion.

The applicant's application is thus allowed and granted in terms of prayers 2, 5. The costs of the application shall abide the outcome of the

substantive motion. Orders accordingly.

Signed, dated and delivered on 22nd day of January 2021

Ngaah Jairus

JUDGE