



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. E050 OF 2021

IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE

JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI AND PROHIBITION

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

COMMISSIONER FOR DOMESTIC TAXES.....1ST RESPONDENT

TAX APPEALS TRIBUNAL.....2ND RESPONDENT

EX PARTE:

NEXTGEN OFFICE SUITES LIMITED

RULING

The Application

1. Nextgen Office Suites Limited, the *ex parte* Applicant herein, is aggrieved by the decision made on its objection to a tax assessment by the Commissioner of Domestic Taxes (the 1st Respondent herein) on 16th November, 2018, and by the decision made on 1st April 2021 on its appeal therefrom by the Tax Appeals Tribunal, (the 2nd Respondent herein) in Tax Appeals Tribunal Appeal No. 394 of 2018.

2. The *ex parte* Applicant has consequently filed an application by way of a Chamber Summons dated 14th April 2021, seeking the following orders:

1. THAT leave be granted to the ex-parte Applicant to apply for an Order of Certiorari to remove to the High Court for the purposes of quashing the Objection Decision of the Commissioner for Domestic Taxes of 16th November, 2018 demanding for taxes, penalties and interest.

2. THAT leave be granted to the ex-parte Applicant to apply for an Order of Certiorari to remove to the High Court for the purposes of quashing the decision of the Tax Appeals Tribunal delivered on 1st April, 2021 in Tax Appeals Tribunal Appeal No. 394 of 2018 between Nextgen Office Suites Limited vs Commissioner for Domestic Taxes.

3. THAT leave be granted to the ex-parte Applicant to apply for an Order of Prohibition to prohibit the Commissioner for Domestic Taxes from demanding tax, penalties and interests claimed in the Objection Decision of 16th November, 2018 .

4. THAT leave be granted to the ex-parte Applicant to apply for an Order of Prohibition to remove to the High Court for the purpose of prohibiting the 1st Respondent , its servants and or agents from enforcing agency notices, contained in the 1st Respondent's letters dated 9th April 2021 , which agency notices are for enforcement against the Applicant.

5. THAT the grant of such leave do operate as a stay of the decision of the Commissioner of Domestic Taxes of 16th November, 2018 pending the hearing and determination of the substantive application for Judicial Review.

6. THAT the grant of such leave do operate as a stay of the decision of the Tax Appeals Tribunal in the aforestated Appeal No. 394 of 2018 pending the hearing and determination of the substantive application for Judicial Review

7. THAT the grant of such leave do operate as a stay of the enforcement of the agency notices contained in the 1st Respondent's letter dated 9th April 2021.

8. THAT costs of the application be provided for.

3. The grounds for the application are stated in the *ex parte* Applicant's statutory statement dated 14th April 2021, and a verifying affidavit sworn on the same date by Rameshkumar Kantilal Amlani, the *ex parte* Applicant's Director. In summary, the *ex parte* Applicant averred that on 22nd August, 2018 the 1st Respondent issued it with a Notice of Assessment of tax liability for the sum of Kshs. 1,181,607,658/= inclusive of interest and penalties, and that the *ex parte* Applicant thereafter lodged its objection. However, that on 16th November, 2018, the 1st Respondent issued its objection decision and confirmed the tax assessment obligation of Kshs. 1,181,607,658/= without considering the *ex parte* Applicant's submitted documentation on account of alleged late submission.

4. Further, that the *ex parte* Applicant being aggrieved by the 1st Respondent's Objection decision lodged an Appeal at the Tax Appeals Tribunal, and that on 1st April 2021, the said Tribunal upheld the 1st Respondent's Objection decision confirming its assessment of Kshs. 1,181,607,658./=. Subsequently, that on 9th April 2021 the 1st Respondent issued Agency Notices to ten (10) banks wherein the *ex parte* Applicant holds and operates its accounts which Agency Notices as a result of which it the App is unable to access the funds in the bank accounts.

5. The *ex parte* Applicant contends that the Respondents' action and decision to ignore the submitted documentation was materially influenced by an error of law; was procedurally unfair; biased; was taken with ulterior motive or purpose calculated to prejudice its legal rights; and that the Respondents ignored relevant matters in arriving at the Objection decision and judgment respectively and considered irrelevant issues.

6. The *ex parte* Applicant annexed copies of the 1st Respondent's Notice of Assessment dated 22nd August 2018, the *ex parte* Applicant's Objection dated 17th September 2018, the 1st Respondent's decision thereon dated 16th November 2018, correspondence with the 1st Respondent, the pleadings and submissions filed in Tax Appeals Tribunal Appeal No. 394 of 2018 and a copy of the impugned judgment delivered therein on 1st April 2021, and of the Agency Notices issued by the 1st Respondent.

The Determination

7. I have considered the application dated 14th April 2021 and the reasons offered in support of the urgency, and I am satisfied that the *ex parte* Applicant has demonstrated that this matter is urgent. This for reasons that the impending effects of the Respondents' decisions and agency notices.

8. On the orders sought by the *ex parte* Applicant for leave to commence judicial review proceedings, the applicable law is *Order 53 Rule 1* of the Civil Procedure Rules, which provides that no application for judicial review orders should be made unless leave of the court was sought and granted. The main reason for the leave as explained by Waki J. (as he then was), in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996**, is to ensure that an applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration.

9. It is also trite that in an application for leave such as the present one, the Court ought not to delve deeply into the arguments of the parties, but should make cursory perusal of the evidence before it and make the decision as to whether an applicant's case is sufficiently meritorious to justify leave. It was explained by Lord Bingham in this respect in **Sharma vs Brown Antoine (2007) 1 WLR 780**, that a ground of challenge is arguable if its capable of being the subject of sensible argument in court, in the sense of having a realistic prospect of success.

10. In the present application, the *ex parte* Applicant has provided evidence of the Objection decision by the 1st Respondent dated 16th November 2018 and judgment by the 2nd Respondent delivered on 1st April, 2021 in Tax Appeals Tribunal Appeal No. 394 of 2018, and has averred as to the grounds and reasons why it considers the Respondents' decisions to be unlawful. To this extent I find that the *ex parte* Applicant has met the threshold of an arguable case, and is therefore entitled to the leave sought to commence judicial review proceedings against the Respondent.

11. On the question of whether the said leave can operate as a stay of the impugned report, the applicable principle is that the grant of such leave is discretionary, but the Court should exercise such discretion judiciously. Order 53 Rule 1(4) of the Civil Procedure Rules provides as follows in this respect:

“The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise.”

12. In **R (H) vs Ashworth Special Hospital Authority (2003) 1 WLR 127**, it was held that such a stay halts or suspends proceedings that are challenged by a claim for judicial review, and the purpose of a stay is to preserve the *status quo* pending the final determination of the claim for judicial review. The circumstances under which a Court may grant a direction that the grant of leave do operate as a stay of proceedings or of a decision, and the factors to be taken into account by the Courts in this regard were laid down in the said decision, and in various decisions by Kenyan Courts.

13. The main factor is whether or not the decision or action sought to be stayed has been fully implemented. It was thus held in **Jared Benson Kangwana vs. Attorney General, Nairobi HCCC No. 446 of 1995** that stay of proceedings should be granted where the situation may result in a decision which ought not to have been made being concluded. A similar decision was made by Maraga J. (as he then was) in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006** .

14. This factor was also discussed in **R (H). vs Ashworth Special Hospital Authority (supra)** where Dyson L.J. held that the effect of a stay is to prevent the taking of the steps that are required for the decision to be made, and that if a final decision has been made, but it has not been implemented, then the effect of the stay will be to prevent its implementation. It therefore follows that were the action or decision is yet to be implemented, a stay order can normally be granted in such circumstances. Where the action or decision is implemented, then the Court needs to consider the completeness or continuing nature of such implementation. If it is a continuing nature, then it is still possible to suspend the implementation.

15. In this regard, the orders given by the 1st Respondent in the impugned objection decision and judgment have been implemented to the extent that the 1st Respondent agency has issued agency Notices to the *ex parte* Applicant's banks. The said implementation is however of a continuing nature, to the extent that it prevents any future transactions on the affected bank accounts of the *ex parte* Applicant. It is also notable in this regard that the *ex parte* Applicant is disputing the manner and method of assessment of its tax liability, and the Respondents are therefore likely to suffer prejudice if the impugned decisions and agency notices are stayed without any security being offered for payment of any tax due from the *ex parte* Applicant. Consequently, while the impugned decisions and agency notices are amenable to stay, any stay orders granted herein will have to be conditional on reasonable security being provided by the *ex parte* Applicant.

The Disposition

16. In light of the foregoing observations and findings, the *ex parte* Applicants' Chamber Summons dated 14th April 2021 is found to be merited only to the extent of the following orders:

I. The *ex parte* Applicants' Chamber Summons application dated 14th April 2021 is hereby certified as urgent, and is hereby admitted for hearing *ex parte* in the first instance.

II. The *ex parte* Applicant is granted leave to apply for an order of Certiorari to remove to the High Court for the purposes of quashing the Objection Decision of the Commissioner for Domestic Taxes of 16th November 2018 demanding for taxes, penalties and interest.

III. The *ex parte* Applicant is granted leave to apply for an order of Certiorari to remove to the High Court for the purposes of quashing the decision of the Tax Appeals Tribunal delivered on 1st April, 2021 in Tax Appeals Tribunal Appeal No. 394 of 2018 between Nextgen Office Suites Limited vs Commissioner for Domestic Taxes.

IV. The *ex parte* Applicant is granted leave to apply for an order of Prohibition to prohibit the Commissioner for Domestic Taxes from demanding tax, penalties and interests claimed in the Objection Decision of 16th November, 2018 .

V. The *ex parte* Applicant is granted leave to apply for an order of Prohibition to remove to the High Court for the purpose of prohibiting the 1st Respondent , its servants and or agents from enforcing agency notices, contained in the 1st Respondent's letters dated 9th April 2021 , which agency notices are for enforcement against the Applicant.

VI. The grant of leave herein shall operate as a stay of the decision of the Commissioner of Domestic Taxes dated 16th November 2018; of the judgment of the Tax Appeals Tribunal in Tax Appeal No. 394 of 2018; and of the enforcement of the agency notices contained in the 1st Respondent's letters dated 9th April 2021 pending the hearing and determination of the *ex parte* Applicant's substantive Notice of Motion, only on condition that the *ex parte* Applicant herein deposits in this Court as a Banker's guarantee for the sum of Kenya Shillings Six Hundred Million (Kshs 600,000,000/=) from a reputable commercial bank operating in Kenya as security, within thirty (30) days of the date of this ruling, and upon default, the stay orders herein shall lapse.

VII. The costs of the *ex parte* Applicants' Chamber Summons application dated 14th April 2021 shall be in the cause.

VIII. The *ex parte* Applicant shall file and serve the Respondents with (i) the substantive Notice of Motion, (ii) the Chamber Summons dated 14th April 2021 and its supporting documents, (iii) a copy of this ruling, and (v) a hearing notice, within fourteen (14) days from today's date.

IX. Upon being served with the said pleadings and documents, the Respondents shall be required to file their responses to the substantive Notice of Motion within fourteen (14) days from the date of service.

X. The hearing of the substantive Notice of Motion shall be held on 26th May 2021.

XI. In view of the Ministry of Health directives on the safeguards to be observed to stem the spread of the current COVID-19 pandemic, this Court shall hear and determine the *ex parte* Applicant's substantive Notice of Motion on the basis of the electronic copies of the pleadings and the written submissions filed by the parties.

XII. All the parties shall file their pleadings and submissions electronically, by filing them with the Judiciary e-filing system, and send copies by electronic mail to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com

and asunachristine51@gmail.com.

XIII. The service of pleadings and documents directed by the Court shall be by way of personal service and electronic mail, and in the case of service by way of electronic mail, the parties shall also email a copy of the documents so served to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com with copies to asunachristine51@gmail.com.

XIV. The parties shall also be required to file their respective affidavits evidencing service in the Judiciary's e-filing system.

XV. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for hearing by email on 26th May 2021.

XVI. The Deputy Registrar of the Judicial Review Division shall send a copy of this ruling to the *ex parte* Applicant by electronic mail by close of business on Thursday, 22nd April 2021.

XVII. Parties shall be at liberty to apply.

17. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF APRIL 2021

P. NYAMWEYA

JUDGE