REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

(Coram: A. C. Mrima, J.)

PETITION NO. E042 OF 2021

BETWEEN

DEEPAK LALCHAND NICHANI.....PETITIONER

VERSUS

THE KENYA REVENUE AUTHORITY.....1ST RESPONDENT

DIRECTOR OF IMMIGRATION SERVICES.....2ND RESPONDENT

RULING NO. 1

1. This ruling is in respect of the Respondent's Notice of Preliminary objection dated 1st March, 2021.

2. The Preliminary Objection is tailored as under: -

> *This Honourable Court lacks jurisdiction to hear the Petition by dint of Section 52 of the Tax Procedures Act, Section 12 of the Tax Appeals Tribunal Act, Section 7 of the Fair Administrative Action Act, Section 9(2) of the Fair Administrative Act, and Article 159(2)(c) of the Constitution of Kenya.*

3. The objection is opposed.

4. The Petition mainly challenges a Departure Prohibition Order (hereinafter referred to as '***DPO***') allegedly issued by the Respondent against the Petitioner in respect of tax liability on Skyton Limited, a company in which the Petitioner avers to be an employee and minority shareholder.

5. The Respondent contends that no Court proceedings ought to issue in instances where there are defined alternative ways of dealing with a tax dispute. In this case, the Respondent cites Section 45(6) and (7) of the Act and argues that the Petitioner is to, in the first instance, challenge the DPO through the Commissioner and if still dissatisfied to appeal before the Tax Appeal Tribunal (hereinafter referred to as '***the Tribunal'***). Since the Petitioners failed to do so, it is submitted that the Court is not seized of any jurisdiction over the matter.

6. The decisions in *Motor Vessel 'Lilian S v. Caltex Oil Kenya Limited (1989) 1KLR, Speaker of National Assembly vs. James Njenga Karume (1992) eKLR (2008) 1KLR 428, Geoffrey Muthinja Kabiru & 2 Others v. Samwel Munga Henry & 1756 Others (2015) eKLR, Republic v. Kenya Revenue Authority exparte Style Industries Limited (2019) eKLR, and Jimbise Ltd v. Kenya Revenue Authority (2017) eKLR* were relied on in support of the submission.

7. The Petitioner is opposed to the objection. The Petitioner raises two grounds in opposition. First, the Petitioner submits that the objection is not a proper one in law and cites *Mukisa Biscuits Manufacturing Co. Limited v West End Distributors Limited (1969) EA. 696* to that end. He contends that the 1st Respondent took an erroneous position of the facts by labeling the Petition as a tax dispute. The objection is, therefore, not grounded in law, but on the 1st Respondent's own misinterpretation of the facts of the Petition.

8. It is further submitted that there are many issues in dispute in the matter which call for resolution and as such the objection, which is not on pure points of law, cannot stand. The Petitioner posits that the objection is a veiled attempt by the 1st Respondent to continue to maintain

ambiguity and deny the Petitioner right to legal redress of the violations of his rights, the extent of which can only be determined in a full hearing. He relied in *Republic v Eldoret Water & Sanitation Company Limited Ex-parte Booker Onyango & 2 others [2007] eKLR,* the Supreme Court in *Independent Electoral & Boundaries Commission v. Jane Cheperenger & 2 Others [2015] eKLR and Sollo Nzuki v Salaries and Remuneration Commission & 2 others [2019] eKLR*.

9. According to the Petitioner the state of affairs removes the objection from the realm of arguing a pure point of law and that the objection is not merited.

10. The second ground is that even if the objection was properly raising a pure point of law, the Petitioner contends that the Petition is not about a tax dispute. Instead, the Petition raises significant issues of rights violation which fall within the realm of this Court pursuant to Article 165(3)(b) as read together with Article 23(1) of the Constitution and Rule 4(1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules (hereinafter the "***Mutunga Rules***").

11. The Petitioner made reference to the Supreme Court in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others [2013] eKLR* and in other decisions including *Stephen Nendela v County Assembly of Bungoma & 4 others [2014] eKLR Protus Buliba Shikuku v Attorney General [2012] eKLR Fose v Minister of Safety and Security 1997(3) SA786 (CC) (7) BCLR 851 CC* and *Minister of Health & others v Treatment Action Campaign & others [2002] ZACC 15; 2002(5) SA 721 BCLR (CC)*.

12. In the end, the Petitioner prayed that the objection be dismissed with costs.

13. Since the objection is raised by way of a preliminary objection, I will briefly look at the law on the subject. I recently did so in *Nairobi High Court Constitutional Petition No. E260 of 2021* ***Borniface Akusala & Another vs. Law Society of Kenya & 12 Others*** (unreported) and since I still hold that position, I will reiterate what I stated in that decision, and as under: -

> *13. The validity of any preliminary objection is gauged against the requirement that it must raise pure points of law capable of disposing the dispute at once. It is, therefore, mandatory for a Court to ascertain that a preliminary objection is not caught up within the realm of factual issues that would necessitate the calling of evidence.*

14. The foregoing nature of preliminary objections was discussed in ***Mukisa Biscuit Manufacturers Ltd -vs- Westend Distributors*** *Ltd, (1969) E.A. 696 page 700 when the Court observed as follows: -*

> *...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration.*
>
> *...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.*

15. In Civil Suit No. 85 of 1992, ***Oraro vs. Mbaja*** *[2005] 1 KLR 141****, Ojwang J****, as he then was, cited with approval the position in Mukisa Biscuit -vs- West End Distributors (supra) and stated as follows on the operation of preliminary objection: -*

> ***….*** *I think the principle is abundantly clear. A "preliminary objection", correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed.*

16. In ***Omondi -vs- National Bank of Kenya Ltd & Others*** *{2001} KLR 579; [2001] 1 EA 177, it was observed that a Court in determining a preliminary objection can look at the pleadings and other relevant documents but must abide by the principle that the objection must raise pure points of law. It was held thus: -*

> ***…****In determining (Preliminary Objections) the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters…What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done ex debito justitiae (as of right) but as a matter of judicial discretion.*

17. The question whether jurisdiction is a point of law was set out clearly by the Supreme Court in Petition No. 7 of 2013 ***Mary Wambui Munene v. Peter Gichuki Kingara and Six Others,*** *[2014] eKLR****,*** *when the Learned Judges stated that 'jurisdiction is a pure question of law' and should be resolved on priority basis'.*

18. The Preliminary objection in this matter is capable of extinguishing the entire proceedings. The objection rests purely on points of law and does not call for any evidence in its determination.

19. It is, therefore, this Court's finding that the Preliminary Objection passes the propriety test and the objection is for consideration.

20. It is settled that parties must exhaust any alternative dispute resolution mechanism before embarking on a Court process. That is the exhaustion doctrine. Once again, I dealt with the matter in *Petition No. E260 of 2021* ***Borniface Akusala & Another vs. Law Society of Kenya & 12 Others*** case (supra) and do hereunder reiterate what I stated therein: -

25. The doctrine of exhaustion in Kenya traces its origin from Article 159(2)(c) of the Constitution which recognizes and entrenches the use of alternative mechanisms of dispute resolution in the following terms: -

> *159(2) In exercising judicial authority, the Courts and tribunals shall be guided by the following principles-*
>
> *(a)…*
>
> *(b)…*
>
> *(c) alternative forms of dispute resolution including resolution, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause 3.*

26. Clause 3 is on traditional dispute resolution mechanisms.

27. The doctrine of exhaustion was comprehensively dealt with by a 5-Judge Bench in Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 ***William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)*** *(2020) eKLR. The Court stated as follows:*

> *52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of the Constitution and was aptly elucidated by the High Court in* ***R vs. Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya and 6 others [2017] eKLR,*** *where the Court opined thus:*
>
> *42. This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in* ***Speaker of National Assembly v Karume [1992] KLR 21*** *in the following oft-repeated words:*
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> *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.*
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> *43. While this case was decided before the Constitution of Kenya 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine.*
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> *This is* ***Geoffrey Muthiga Kabiru & 2 others – vs- Samuel Munga Henry & 1756 others [2015] eKLR,*** *where the Court of Appeal stated that:*
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> > *It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews…The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The Ex Parte Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.*

28. The Court also dealt with the exceptions to the doctrine of exhaustion. It expressed itself as follows: -

> *59. However, our case law has developed a number of exceptions to the doctrine of exhaustion. In R. vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others ex parte The National Super Alliance Kenya (NASA) (supra), after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:*
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> *What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also Moffat Kamau and 9 Others vs Aelous (K) Ltd and 9 Others.)*
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> *60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in the Constitution or law and allow the suit to proceed before it. It is*

also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others [2018] eKLR.

62. In the instant case, the Petitioners allege violation of their fundamental rights. ***Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.***

29. The above decision was appealed against by the Respondents. The Court of Appeal in upholding the decision and in dismissing the appeal in Mombasa Civil Appeal No. 166 of 2018 ***Kenya Ports Authority v William Odhiambo Ramogi & 8 others [2019] eKLR*** *held as follows: -*

> *The jurisdiction of the High Court is derived from Article 165 (3) and (6) of the Constitution. Accordingly, the High Court has unlimited original jurisdiction in criminal and civil matters, including determination of a question of enforcement of the bill of rights and interpretation of the Constitution encompassing determination of any matter relating to the Constitutional relationship between the different levels of government.*

At the High Court, we note that the learned Judges dealt with this matter under the question framed as follows: Is the court barred from considering the suit at present by virtue of Article 189 of the Constitution and sections 33 and 34 of Inter-Governmental Relations Act of 2012 (IGRA)? The parties have advanced similar arguments as before the learned Judges of the High Court. The High Court went further than just looking at the ruling by Ogola J. They also took into account the doctrine of exhaustion as enunciated in Republic vs. Independent Election and Boundaries Commission (IEBC) ex parte National Super Alliance (NASA) Kenya & 6 Others [2017] eKLR. They applied a dual pronged approach before concluding that the dispute was not an inter-governmental dispute under IGRA. First, they considered that the test for determining the matter as an inter-governmental dispute for purposes of application of IGRA was not simply to look at who the parties to the dispute were, but the nature of the claim in question and; secondly, they considered that the claimed Constitutional violations seeking to be enforced are not mere "bootstraps." We have keenly addressed our minds to the learned Judges' decision and are satisfied that they stayed within the expected contours and properly directed themselves. Once they determined that the dispute was not inter-governmental in nature, we do not think it is necessary to consider whether the petitioners had exhausted their legal avenue. Jurisdiction by the High Court under Article 165 (5) of the Constitution became automatic. And in our view, it could not be ousted or substituted.

30. Further, in Civil Appeal 158 of 2017, ***Fleur Investments Limited -vs- Commissioner of Domestic Taxes & another*** *[2018] eKLR, the Learned Judges of the Court of Appeal relied on an earlier decision in Speaker of National Assembly vs Njenga Karume (1990-1994) EA 546 to assume jurisdiction by bypassing the mechanism under Income Tax Tribunal. They observed as follows: -*

> *23. For the reasons we have given earlier and others that will become apparent, there were definitely exceptional circumstances that existed in this case that were outside the ambit of the Income Tax Tribunal which called for intervention by way of judicial review. Whereas courts of Law are enjoined to defer to specialised Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of Justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under the Constitution and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly.*

31. The High Court has variously reiterated the position that it is only the High Court and Courts of equal status which can interpret the Constitution. (See ***Royal Media Services Ltd. -vs- Attorney General & 6 Others*** *(2015) eKLR among others).*

32. Returning to the case at hand, I have patiently considered the provisions of Section 52 of the Tax Procedures Act, Section 12 of the Tax Appeals Tribunal Act, Sections 7 and 9(2) of the Fair Administrative Act and Article 159(2)(c) of the Constitution of Kenya which are the basis of the objection. As correctly submitted by the Petitioner, the Act, the Tax Appeal Tribunal (Procedure) Rules 2016 and the Tribunal deal with tax decisions. The Rules clearly define *tax decisions.* Such decisions do not include any aspects of infringement of rights and fundamental freedoms and the interpretation of the Constitution.

33. The Petition before Court challenges the manner in which the DPO was allegedly issued, but from a constitutional perspective. The Petition alleges abuse of discretion by the 1st Respondent where arbitrariness, malice, capriciousness and disrespect of the Constitution and the Rules of natural justice are raised which allegedly adversely affect the rights and fundamental freedoms of the Petitioners. The High Court, therefore, has exclusive jurisdiction under Article 165(3) of the Constitution to interrogate the issues raised. In such instances the jurisdiction of the 1st Respondent created under the Act cannot apply.

34. As rightly so stated by the Court of Appeal in ***Fleur Investments Limited -vs- Commissioner of Domestic Taxes & another*** case (supra) '*… the Court cannot, being a bastion of Justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under the Constitution and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly.'*

35. This Court is, hence, satisfied that the Petition primarily seeks to enforce fundamental rights and freedoms and it is not demonstrated that the claimed constitutional violations are mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court.

36. The Petition is, therefore, not barred by the doctrine of exhaustion.

37. The objection is overruled.

38. That being the case, given the nature of the Petition herein, there is need for its expeditious disposal.

39. In the end, the following orders hereby issue: -

(a) The Preliminary objection dated 1st March, 2021 is hereby dismissed with costs.

(b) The Petitioners shall extract and serve a copy of the orders arising from this ruling upon the 2nd Respondent within 10 days.

(c) The Respondents shall have 14 days within which to file and serve any response to the Petition and the Notice of Motion dated 4th February, 2021. For clarity, time will start running in respect of the 2nd Respondent from the date of service.

(d) The Petition and the Notice of Motion dated 4th February, 2021 shall be heard be heard together and by way of reliance on the Affidavit evidence and written submissions.

(e) To that end, the Petitioner shall file and serve any supplementary response, if need be, together with written submissions within 14 days of (c) above.

(f) The Respondents shall file and serve their respective written submissions within 14 days of service.

(g) Highlighting of submissions on a date suitable to the Court and the parties.

Orders accordingly.

DELIVERED, DATED and **SIGNED** at **NAIROBI this 25th day of August, 2021.**

A. C. MRIMA

JUDGE

Ruling No. 1 virtually delivered in the presence of:

Miss. Mac' Oriwa, Counsel for the Petitioner.

Miss. Gitau, Counsel for the 1st Respondent.

No appearance for the 2nd Respondent.

Elizabeth Wambui – Court Assistant.