



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**JUDICIAL REVIEW APPLICATION NO. 8 OF 2018**

**IN THE MATTER OF AN APPLICATION BY SIRIKWA**

**ELDORET HOTEL LIMITED FOR LEAVE TO APPLY FOR**

**JUDICIAL AND MANDAMUS ORDERS OF PROHIBITION AND MANDAMUS**

**AND**

**IN THE MATTER OF THE DECISION AND ACTS OF THE COMMISSIONER**

**OF DOMESTIC TAXES TAKEN AND DONE ON THE 13<sup>TH</sup> SEPTEMBER 2018 RESPECTIVELY**

**AND**

**IN THE MATTER OF THE ATTACHMENT BY KEYSIAN AUCTIONEERS ON**

**13<sup>TH</sup> SEPTEMBER 2018 OF THE PROPERTY OF SIRIKWA ELDORET HOTEL LIMITED AND**

**IN THE MATTER OF SECTION 41 OF THE TAX PROCEDURES ACT 2015, LAWS OF KENYA.**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE KENYA REVENUE AUTHORITY.....1<sup>ST</sup> RESPONDENT**

**THE COMMISSIONER OF DOMESTIC TAXES.....2<sup>ND</sup> RESPONDENT**

**KEYSIAN AUCTIONEERS.....3<sup>RD</sup> RESPONDENT**

**AND**

**M/S SIRIKWA ELDORET HOTEL LIMITED.....EX-PARTE APPLICANT**

**RULING**

The ex-parte applicant moved this court through a Notice of Motion dated 11<sup>th</sup> October 2018 in which the ex-parte applicant sought the following orders;

1. An order of prohibition against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents prohibiting the said respondents whether by themselves, their servants, agents, officers or whosoever otherwise from in any manner whatsoever unlawfully acting or continuing to act upon or enforcing or continuing to enforce or maintaining or continuing to maintain in relation to the ex-parte applicant and its property the warrant and notice of distress dated 13<sup>th</sup> September 2018 and addressed to Hotel Sirikwa Limited and subsequent proclamation and attachment of the ex-parte applicants property made on 13<sup>th</sup> September 2013.

2. An order of prohibition against the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> respondents prohibiting the said respondents whether by themselves, their servants, agents, officers or whosoever otherwise from unlawfully taking action, acting or attempting to take any action or issuing or

attempting to issue any further proclamation whatsoever in any of the ex-parte applicants property in relation to a debt due to the 1<sup>st</sup> and 2<sup>nd</sup> respondents by Hotel Sirikwa Limited a company totally distinct, separate and unconnected to the ex-parte applicant.

3. An order of prohibition against the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> respondents prohibiting the said respondents whether by themselves, their servants, agents, officers or whosoever otherwise from in any manner whatsoever otherwise from in any manner whatsoever interfering or attempting to interfere with the business operations of the ex-parte applicant on account of the debts owed to the respondents by a company known as Hotel Sirikwa Limited.

4. An order of mandamus directing the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents to lift the proclamation dated 13<sup>th</sup> September 2018 issued by the 3<sup>rd</sup> respondent on the property of the ex-parte applicant.

5. That the costs of and incidental to this application be borne by the respondent in any event.

#### **Ex-parte applicant's case.**

The ex-parte applicant is an incorporated company, certificate of incorporation number C147309. It was also registered for the purposes of payment of taxes under PIN Number P051332303J.

The ex-parte applicant has its offices at the property known as Eldoret Municipality Block 4/69 pursuant to a periodic lease between the ex-parte applicant and Mayfair Services and Investments Limited commencing on 1<sup>st</sup> July 2014.

The ex-parte applicant was issued with a Notice of Distress dated 13<sup>th</sup> September 2018 by the 1<sup>st</sup> and 2<sup>nd</sup> respondents. The notice indicated that the ex-parte applicant's goods and chattels had been distrained for Kshs. 18,250,615/=

The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents proclaimed on the ex-parte applicant's office furniture and hotel equipment. The ex-parte applicant claims that the proclaimed property does not belong to Hotel Sirikwa Limited, but to a different entity, the ex-parte applicant.

The ex-parte applicant claims that it is a completely different and distinct entity from Hotel Sirikwa Limited and that it is alien to the debt allegedly owed to them by the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

The ex-parte applicant further claims that the respondents' actions is a blatant and unlawful interference with the property and business operations of the ex-parte applicant whose only intention is to recover an alleged debt that has nothing to do with the ex-parte applicant and were done and taken in bad faith and in abuse of office power.

The ex-parte applicant application is premised on abuse of power, bad faith, unfairness, inconsistency, violation of the principle of legitimate expectation, and illegal exercise of discretion by the respondents.

#### **The Respondents' Case.**

The respondents vide their written submissions dated 28<sup>th</sup> November 2018 claims that they have tried to recover the debt owed through a number of measures from the ex-parte applicant but all have failed. They consequently issued a distress order dated 13<sup>th</sup> September 2018 pursuant to *Section 41 of the Tax Procedures Act, 2015*.

The respondent was issued with a tax assessment dated 17<sup>th</sup> June 2010 in which the ex-parte applicant was informed of the tax owed to him to the respondent. The ex-parte applicant proposed to pay the same in six installments but the respondent was against the arrangement. A counterproposal was furnished by the respondent to the ex-parte applicant but the applicant never responded to the counterproposal.

The 1<sup>st</sup> respondent then issued a demand notice to the ex-parte applicant dated 31<sup>st</sup> August 2010 in which the ex-parte applicant was given 7 days to comply failure to which recovery proceedings be instituted against the ex-parte applicant.

The respondent, on 13<sup>th</sup> September 2018 issued a distress order for the recovery of the taxes owed in debt. The distress order resulted in the movable properties of the ex-parte applicant being proclaimed by the 3<sup>rd</sup> respondents.

This court will consider whether there was a transfer of tax liabilities from Hotel Sirikwa to Sirikwa Eldoret Hotel Limited. *Section 3 (1) of the Transfer of Business Act* states,

***“(1) Whenever any business or any portion of any business is transferred, with or without the goodwill or any portion thereof, the transferee shall, notwithstanding any agreement to the contrary, become liable for all the liabilities incurred in the business by the transferor, unless due notice in accordance with this Act has been given and has become complete”***

Further, *Section 46 of the Tax Procedure Act* states,

***“When a taxpayer (referred to as the "transferor") has a tax liability in relation to a business carried on by the taxpayer and the taxpayer has transferred all or some of the assets of the business to a related person (referred to as the "transferee"), the transferee shall be liable for the tax liability (referred to as the "transferred liability") of the transferor. (2) Despite subsection***

***(1), the Commissioner may recover the whole or part of the transferred liability from the transferor.’’***

Given the foregoing it is clear there was transfer of tax liabilities from Hotel Sirikwa to Sirikwa Eldoret Hotel Limited.

Judicial Review, is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected.

In the case of ***Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300*** it was held:

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission... Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety are when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.....When Parliament prescribes the manner or form in which a duty is to be performed or power exercised, it seldom lays down what will be the legal consequences of failure to observe its prescriptions. The courts must therefore formulate their own criteria for determining whether the procedural rules are to be regarded as mandatory, in which case disobedience will render void or voidable what has been done (though in some cases it has been said that there must be “substantial compliance” with the statutory provisions if the deviation is to be excused as a mere irregularity). Judges have often stressed the impracticability of specifying exact rules for the assignment of a procedural provision of the appropriate category. The whole scope and purpose of enactment must be considered and one must assess the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act. In assessing the importance of the provision, particular regard may be held to its significance as a protection of individual rights that may be adversely affected by the decision and the importance of the procedural requirement in the overall administrative scheme established by the statute. Although nullification is the natural and usual consequences of disobedience, breach of procedural or formal rules is likely to be treated as a mere irregularity if the departure from the terms of the Act is of a trivial nature or if no substantial prejudice has been suffered by those for whose benefit the requirements were introduced or if a serious public inconvenience would be caused by holding them to be mandatory or if the Court is for any reason disinclined to interfere with the act or decision that is impugned. In a nutshell, the above principles indicate that to determine whether the legislature intended a particular provision of Statute to be mandatory, the Court must consider the whole scope and purpose of the Statute. Then to assess the importance of the impugned provision in relation to the general object intended to be achieved by the Act, Court must consider the protection of the provision in relation to the rights of the individual and the effect of the decision that the provision is mandatory.”

This court considers whether the actions by the respondents were tainted with illegality, irrationality and procedural impropriety.

In ***Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR*** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power.

It was similarly held in ***Republic vs. National Environment Management Authority [2011] eKLR***, that where there is an alternative remedy and especially where Parliament has provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial

review would be granted. It was however appreciated that it is necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it.

The issue whether or not tax is due and payable by the applicant ought to be left to the statutory bodies and Tribunals as opposed to a judicial review Court since such issues go to the merit of the decision rather than the process. Specialized bodies established under statutes ought to be given the leeway to conduct their proceedings freely without unnecessary interference by the Court. Where such bodies are acting within their jurisdiction, the Court only ought to step in to ensure that the proceedings are being conducted fairly.

Section 9(2) of the *Fair Administrative Action Act*, No. 4 of 2015 provides:

***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.***

Subsection (3) of the same Act provides that:

***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).***

Subsection (4) of the said Section however provides:

***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.***

This court finds that the ex-parte applicant has failed to satisfy the Court that the Respondent acted in excess of his statutory jurisdiction. I am also not convinced that the Respondent's decision was unreasonable. I am also not satisfied that the ex-parte applicant exhausted all the alternative remedies given under Section 84 of *The Income Tax Act*. The grounds upon which the court exercises its judicial review jurisdiction have not been established to court's satisfaction. I do therefore dismiss this Judicial Review application in its entirety with costs to the ex-parte applicant.

**S. M GITHINJI**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 25<sup>th</sup> day of June, 2019.**

In the absence of:-

Mr. Tororey for the exparte Applicant for petitioner

Mr. Lemiso for 1<sup>st</sup> and 2<sup>nd</sup> Respondents and 3<sup>rd</sup> Respondent

Ms Sarah – Court assistant