



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 287 OF 2018

AND

IN THE MATTER OF SECTION 41 OF THE TAX PROCEDURES ACT 2015

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

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

THE COMMISSIONER OF DOMESTIC TAXES.....2ND RESPONDENT

KEYSIAN AUCTIONEERS.....3RD RESPONDENT

EX-PARTE:

SUZAN GENERAL JLT T/A SUZAN DUTY FREE

JUDGMENT

The Application

1. The *ex parte* Applicant herein is Suzan General Trading JLT T/A Suzan Duty Free, and describes itself as a private limited liability company registered in Dubai, United Arab Emirates, and also registered in Kenya as a foreign company. Pursuant to leave granted by this Court on 9th October 2018, the said *ex parte* Applicant (hereinafter “the Applicant”) moved this Court by way of a Notice of Motion of even date seeking orders as follows:

- a) That an order of Prohibition against the 1st, 2nd and 3rd Respondents do issue prohibiting the said Respondents whether by themselves, their servants, agents, officers, or howsoever otherwise from 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 Applicant and its property the warrant and notice of distress dated 9th July 2018 and addressed to Diplomatic Duty Free Limited and subsequent proclamation and attachment of the Applicant’s property made on 9th July 2018.
- b) That an order of Prohibition against the 1st, 2nd and 3rd Respondents do issue prohibiting the said Respondents whether by themselves, their servants, agents, officers, or howsoever otherwise from unlawfully taking action acting or attempting to take any action or issuing or attempting to issue any or any further proclamations whatsoever on the Applicant’s property in relation to a debt due to the 1st and 2nd Respondents by Diplomatic Duty Free Limited a company that is totally distinct, separate and unconnected to the Applicant.
- c) That an order of Prohibition against the 1st, 2nd and 3rd Respondents do issue prohibiting the said Respondents whether by themselves, their servants, agents, officers, or howsoever otherwise from in any manner whatsoever interfering or attempting to interfere with the business operations of the Applicant on account of the debts owed to the Respondents by a company known as Diplomatic Duty Free Limited.
- d) That an order of Mandamus do issue directing the 1st, 2nd and 3rd Respondents to lift the proclamation dated 9th July 2018 issued by the 3rd Respondent on the property of the Applicant.

e) That the costs of and incidental to this application be awarded to the Ex Parte Applicant.

2. The application is supported by a statutory statement filed on 17th July 2018 and the verifying affidavit of Asif Abbas, the Applicant's General Manager, sworn on the same date, a Further Affidavit sworn by the said deponent on 27th February 2019, and a further supplementary affidavit sworn on 25th April 2019 by James Nyiha, the Applicant's Advocate.

3. The Kenya Revenue Authority, which is the 1st Respondent herein is a statutory body established under the Kenya Revenue Authority Act, as the sole agent of the Government for the assessment and collection of taxes and administration of tax laws. The Commissioner of Domestic Taxes, which is the 2nd Respondent herein, is a statutory office established by the said Act for these purposes. The 1st and 2nd Respondents opposed the application by the Applicant by way of a replying affidavit and supplementary affidavit sworn on 21st December 2018 and 28th January 2019 respectively by Solomon Sang, an employee of the 1st Respondent working in its Debt Enforcement Account Management and Refunds Division.

4. The 3rd Respondent is Keysian Auctioneers, which is a firm of auctioneers and debt collectors. The 3rd Respondent did not enter appearance nor participate in these proceedings.

5. The respective Applicant's and Respondents' cases are as follows.

The Applicant's Case

6. The Applicant's case emanates from a Notice of Distress issued by the 1st and 2nd Respondent, and the resultant proclamation of the Applicant's property by the 3rd Respondent. The Applicant in this regard contends that it was registered in Kenya as a foreign company on 30th March 2010 and thereafter registered Suzan Duty Free as a business name on 13th September 2013, under the provisions of the Business Names Act. Further, that the Applicant duly registered with the 1st Respondent for purposes of payment of income tax and value added tax, and was issued with Personal Identification Number (PIN) Number P051416778S, following which the Applicant has faithfully honoured its tax obligations to the 1st Respondent.

7. The Applicant contends that on 9th July 2018, the Respondents' officers, without any notice or warning, raided the Applicant's business premises at Jomo Kenyatta International Airport, in a bid to attach the Applicant's goods and sell them for the purpose of paying taxes allegedly owed to the 1st Respondent by a company known as Diplomatic Duty Free Limited, holder of PIN Number P051146445Y. That in the process of the raid, the Respondents furnished the Applicants with the documents upon which they justified the raid namely:

a) An order certified bailiff by one Wilson Irungu Mwangi on behalf of the 2nd Respondent to the 3rd Respondent. The order instructs the 3rd Respondent to distrain upon the goods and chattels of Diplomatic Duty Free Limited to recover the amounts owed to the 1st Respondent as set out in the said order;

b) A letter dated 9th July 2018 written by one Asha K Salim on behalf of the 1st Respondent to Diplomatic Duty Free Limited, PIN Number P051146445Y. The letter demands/requires the said company to settle the taxes stated therein immediately, in default of which the 1st Respondent would institute further enforcement measures against the company;

c) A notice of distress address written by the 2nd Respondent to Diplomatic Duty Free Limited, PIN Number P051146445Y notifying it that its assets situated at the 1st Floor of Airport Trading Centre had been distrained;

d) A proclamation Notice issued by the 3rd Respondent setting out the list of the goods distrained.

8. According to the Applicant, the aforesaid proclamation notice informs the Applicant that the attached property would be sold within 10 days from 9th July 2018 unless the Applicant pays the tax and costs namely Kshs. 2,296,210,133/=, which time scale the Applicant terms as unreasonable. It is contended that the Applicant, and not Diplomatic Duty Free Limited (the debtor), owns the goods and chattels purportedly secured and left at the Applicant's premises. Therefore, the 1st, 2nd and 3rd Respondents seek to illegally and unlawfully cause the Applicant to pay the debts of another company (Diplomatic Duty Free Limited) which is a distinct entity from the Applicant. Subsequently, the Applicant has no knowledge of the debtor's business operations and is neither liable for any of its customs duty arrears or other liabilities nor is it concerned with its financial affairs.

9. The Applicant asserts that it is not indebted to the Respondents in the sum alleged, adding that it was not afforded an opportunity to be heard before the 1st and 2nd Respondents arrived at the decision to attach its property and the 3rd Respondent proclaimed upon the same. According to the Applicant, the said actions have negatively impacted its business operations and will continue to do so if its property is sold as threatened. Further, that it filed a Notice of Objection with the 2nd Respondent setting out its objections to the aforesaid conduct of the 1st and 2nd Respondents and the assistance given to the 3rd Respondent in proclaiming the Applicant's property.

10. The Applicant contends that the Respondents at all material times in their correspondences addressed Diplomatic Duty Free Ltd and not the Applicant, including the demand notices and letters annexed to the Respondent's affidavit. It is averred that the litigation between Diplomatic Duty Free Ltd and Kenya Airports Authority does not relate in any way to the Applicant. Further, that the judgments given and/or made in respect of the said litigation are not relevant to the claim by the Applicants as against the Respondents. It is contended that logically speaking, the Applicant cannot be said to have taken over the shops previously run by Diplomatic Duty Free Ltd since the latter was evicted from the said premises and therefore ceased to be tenants. That on the contrary, the Applicant is a tenant in its own right by virtue of a lease granted to it by Kenya Airports Authority, and it attached a copy of the said lease. Further, that in respect of the premises over which

the 3rd Respondent purported to proclaim and attach the Applicant's goods, the Applicant is a tenant of Airport Trade Centre Limited.

11. It is also the Applicant's case that there is no relationship whatsoever in the shareholders and directors of the Applicant and Diplomatic Duty Free Ltd. In this regard, the Applicant annexed a copy of a CR 12 (marked "AAB.3") obtained by the Applicant's Advocates in respect of its directors, and a copy of CR12 (marked "AAB.4") obtained by its Advocates in respect of the directors of Diplomatic Duty Free Ltd. It is contended that the two documents reflect a variance between the Applicant's directors and those of Diplomatic Duty Free Ltd. The Applicant avers that the Respondents have not tendered any evidence to demonstrate that the Applicant took over the business of Diplomatic Duty Free Limited.

The 1st And 2nd Respondents' Case

12. The crux of the 1st and 2nd Respondent's case is that the Applicant is an affiliate and/or sister company to Diplomatic Duty Free Limited which was no longer trading. It is averred that Diplomatic Duty Free Limited incurred import duty taxes which were demanded on 5th August 2013 and reminders sent on 25th September 2013. It is contended that Diplomatic Duty Free Limited operated duty free shops at Jomo Kenyatta International Airport and Moi International Airport in Mombasa, after it was given exclusive rights by the Kenya Airports Authority vide a 1989 concession agreement to run the duty free shops.

13. The 1st and 2nd Respondents contend that Diplomatic Duty Free Limited responded to the said demand vide letter dated 2nd September 2013, stating its inability to pay the arrears since there was a court litigation between it and Kenya Airports Authority among others, which the 1st Respondent established to be true. Subsequently, any efforts to recover the debt proved futile as Kenya Airports Authority repossessed the duty free shops under which the import duty had incurred. According to the 1st and 2nd Respondents, the court proceedings show that Diplomatic Duty Free Ltd, its affiliated sister company World Duty Free Ltd and Kenya Airports Authority reached an agreement in 2013 to put an end to the legal battles. It is contended that the Applicant was nominated by Diplomatic Duty Free Ltd and its affiliated sister company World Duty Free limited to take over the duty free shops business at the airports in their place.

14. The 1st and 2nd Respondents therefore aver that the Applicant and Diplomatic Duty Free Ltd have similar and/or related email address. To wit, the Applicant's email address under the iTax system is ACCOUNTS@SUZANDUTYFREE.COM, while the latter's main email in the iTax system is given as HR@SUZANDUTYFREE.COM. Further, that Diplomatic duty Free and Suzan General Trading JLT, a director company at Suzan Duty Free have common directors, namely Arif Yusuf Hafiz and Sankar Anantha *alias* Sankar Ananthanarayan.

15. In the circumstances, it is their contention that the Applicant is liable for the tax liability of Diplomatic Duty Free Ltd since all/some of its business assets were transferred to the Applicant. It is contended that upon taking over the business of duty free shops from Diplomatic Duty Free Ltd in 2013, the Applicant was incorporated and took over Diplomatic Duty Free Ltd's business operations at the same location. They contend that the two companies are affiliated as evidenced by common directorship and newspaper publications depicting both companies as among those affiliated to and/or associated with a businessman by the name of Kamlesh Patni.

16. It is the 1st and 2nd Respondents' contention that the Applicant took over the business of Diplomatic Duty Free Ltd fraudulently and without requisite notice contrary to the provisions of Section 3(1) of the Transfer of Business Act. They averred that they acted in accordance with the law, particularly pursuant to Section 131 of the East African Community Customs Management Act, 2004 and Section 41 and 46 of the Tax Procedures Act, 2015. That, the Applicant is thus approaching equity with unclean hands and ought to be denied the orders sought.

The Determination

17. The Application was canvassed by way of written submissions that were supplemented by oral submissions made during its hearing. Nyiha, Mukoma & Company Advocates filed submissions dated 25th April 2019 on behalf of the Applicant, which were highlighted during the hearing by Mr. Nyiha. The Respondent's submissions were dated 17th April 2019 and were filed by Marion Gitau Advocate, who also made oral submissions during the hearing.

18. I have considered the pleadings, submissions and arguments made by the parties and find that the issues arising for determination are as follows:

- a) Whether the Applicant's application is properly before this Court. If this issue is resolved in the affirmative, the Court will then proceed to consider the other remaining two issues set out hereunder.
- b) Whether the Respondents acted illegally, unreasonably and in bad faith, in proclaiming the Applicant's property to effect the payment of taxes owed by Diplomatic Duty Free Ltd.
- c) Whether the Applicant merits the prayers sought .

19. In considering the said issues, it is imperative at the outset to delineate the parameters of this Court's powers in judicial review. The broad grounds for the exercise of judicial review jurisdiction were stated in the case of **Pastoli vs Kabale District Local Government Council & Others [2008] 2 EA 300** at pages 303 to 304 thus:

“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: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, miscellaneous application number 643 of 2005 (UR)*.

Illegality is when the decision making authority commits an error of law in the process of taking the decision 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.....

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: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph “E”.

Procedural impropriety is when there is 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. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876).”

20. In addition, the parameters of judicial review were addressed by the Court of Appeal in the case of **Municipal Council of Mombasa vs Republic & Umoja Consultants Limited**, Nairobi Civil Appeal No. 185 of 2001, [2002] eKLR as follows:

“The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review.”

21. It was also emphasized by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others**, (2016) KLR that while *Article 47 of the Constitution* as read with the grounds for review provided by section 7 of the *Fair Administrative Action Act* reveals an implicit shift of judicial review to include aspects of merit review of administrative action, reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act.

22. This Court will proceed to examine and determine the issues raised by the parties in light of the foregoing principles.

Whether the Application is Properly before this Court

23. Notably, the 1st and 2nd Respondents raised the issue of lack of jurisdiction of this court in their written submissions. They did not raise any Preliminary Objection at the outset or tender any documentary evidence to this effect. Nevertheless, the question of jurisdiction is one so fundamental that it may be raised at any stage of proceedings. This court is therefore tasked to address the same as a preliminary issue because without jurisdiction, the only recourse is to down its tools in the manner set out in the case of **Owners of Motor Vessel “Lillian S” vs Caltex Oil (Kenya) Ltd**, [1989] KLR 1 where the court held:-

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

24. The Respondents submitted that this Court lacks the jurisdiction to determine the correctness of the decision reached by the 1st and 2nd Respondents to collect the taxes owed by Diplomatic Duty Free Limited from the Applicant. They submit that this power is only within the mandate of the Tax Appeals Tribunal established under the Tax Procedures Act, 2015. They argue that the issuance of agency notices by the 1st and 2nd Respondents under Section 41 of the Tax Procedures Act is an appealable decision, as defined under Section 3 of the Tax Procedures Act. Further, that under Section 52 of the Act, such an appeal lies in the Tax Appeals Tribunal. The Respondents relied on the case of **R vs Kenya Revenue Authority Ex parte CMC Di Ravenna (Kenya)**, Nairobi High Court Miscellaneous Application No. 471 of 2018 where the Court stated that it is not in dispute that under Section 52 of the Tax Procedures Act, 2015, it is provided that a person who is dissatisfied with an appealable decision may appeal the decision in accordance with the provisions of the Act.

25. It is submitted that the Applicant indeed commenced review process vide letter dated 10th July 2018 which was received by the Respondents on 13th July 2018. However, the Applicant then moved this Court on 17th July 2018 before a decision could be issued within the sixty (60) days provided under the law. Reference was made to Section 229 of the East African Community Customs Management Act, 2004, which allows a taxpayer aggrieved with any decision of the Commissioner with regards to customs may apply for review to the Commissioner within 30 days of the making the decision. The Respondents cited the case of **R vs Kenya Revenue Authority and 3 Others Ex parte New Frarims Wholesalers Limited** (2017) e KLR for this position. The 1st and 2nd Respondents therefore in a nutshell contend that the Applicant ought to have exhausted the statutory mechanisms available to challenge the correctness of the tax decision(s) by the Respondents. According to the Respondents, this power is only within the mandate of the Tax Appeals Tribunal established under the Tax Procedures Act, 2015.

26. The Applicant on its part submitted that it is not the debtor, and no demand or assessment of taxes has been made against it to trigger the procedures under section 52 of the Tax Procedures Act. Further, that it is only a person who has an assessment of tax that can make use of

the said provisions.

27. The applicable law cited by the Applicant and 1st and 2nd Respondents is section 52 of the Tax Procedures Act, which provides as follows as regards appealable decisions to the Tax Appeals Tribunal:

“(1) A person who is dissatisfied with an appealable decision may appeal the decision to the Tribunal in accordance with the provisions of the Tax Appeals Tribunal Act, 2013 (No. 40 of 2013).

(2) A notice of appeal to the Tribunal relating to an assessment shall be valid if the taxpayer has paid the tax not in dispute or entered into an arrangement with the Commissioner to pay the tax not in dispute under the assessment at the time of lodging the notice.”

28. As regards appealable decisions, section 3 of the Tax Procedures Act defines the term to mean an objection decision and any other decision made under a tax law other than (a) a tax decision; or (b) a decision made in the course of making a tax decision. Section 12 of the Tax Appeals Act provides that a person who disputes the decision of the Commissioner on any matter arising under the provisions of any tax law may, subject to the provisions of the relevant tax law, upon giving notice in writing to the Commissioner, appeal to the Tribunal. Likewise section 229 (1) of the East African Community Customs Management Act, 2004, provides that a person directly affected by the decision or omission of the Commissioner or any other officer on matters relating to customs shall within thirty days of the date of the decision or omission lodge an application for review of that decision or omission.

29. Therefore, it is not only a taxpayer who is objecting to a tax assessment who has right of audience before the Tax Appeals Tribunal as alleged by the Applicant. Any person aggrieved by a decision made pursuant to an objection of implementation of a tax law, including proclamation for payment of tax as in the present application, has a right of appeal to the Tax Appeals Tribunal. In addition, having perused the record before the Court, I note that the Applicant vide letter dated 10th July 2018 issued a notice of objection to the 2nd Respondent, and has made reference to this Notice of Objection in its pleadings. The Applicant thereafter proceeded to move this Court on 17th July 2018 seeking leave to file the instant proceedings. The Applicant did not furnish this Court with an explanation and/or reasonable cause why it did not, upon properly invoking the statutory remedy, wait for the alternative process to take its lawful course. The Applicant ought to have demonstrated that judicial review is a more effective and convenient remedy than the statutory laid down dispute resolution mechanism.

30. In this respect, the provisions of Section 9(2), (3) and (4) of the Fair Administrative Action Act, 2015 are relevant. It is provided therein that:

“(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.”

31. Exhaustion of alternative remedies is also now a constitutional imperative under Article 159 (2)(c) of the Constitution, and was explained by the Court of Appeal in Geoffrey Muthinja Kabiru & 2 Others vs Samuel Munga Henry & 1756 Others (2015) eKLR as follows:

“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.”

32. In the circumstances, I am inclined to find that the instant application is prematurely before this Court.

33. In any case, and related to the issue of this Court’s jurisdiction, is that fact that the instant Application raises a number of issues that are disputed, and whose resolution is relevant and necessary in determining the issue as to whether the subject proclamation was properly and legally issued by the Respondents.

34. It was submitted by the Applicant in this respect that the Respondents are using their power to coerce the Applicant to bear the debts of another party that it has no relationship with. The Applicant terms the said actions by the Respondent as being in bad faith in the face of clear and incontrovertible evidence that the Applicant is a stranger to the debtor, and cited the case of Re Bivac international SA (Bureau Veritas); Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others, (2007) KLR 240 in this respect. The Applicant refuted the Respondents’ reliance on Section 46 of the Tax Procedures Act in holding the Applicant liable for the said tax liability by Diplomatic Duty Free Limited as the two entities are not related, and no evidence was produced to this effect. It is submitted that whereas the Applicant is a foreign company incorporated in Dubai, Diplomatic Duty Free Ltd is a local company incorporated in Kenya. That neither has common directors or shareholders and therefore cannot fall within the meaning of related persons under the Tax Procedures Act. The Applicant cited the case of Republic vs. Commissioner General, Kenya Revenue Authority & 2 Others [2010] e KLR for this position.

35. The 1st and 2nd Respondents on their part submitted that they undertook investigations and established that the Applicant had taken over the business of Diplomatic Duty Free Limited as part of the settlement of the court cases between Diplomatic Duty Free Limited, World Duty Free Limited and Kenya Airports Authority. And, that this was despite the taxes owed to the Respondents on account of businesses previously run by Diplomatic Duty Free Limited currently operated by the Applicant. The Respondents further submitted that Section 46 of the Tax Procedures Act envisaged a situation where a company owing tax to the 1st and 2nd Respondent formulates a plan to evade payment thereof by transferring part or all of the assets of its business to another company. Therefore, the other company would be held liable to enable the collection and/or recovery of that tax.

36. The 1st and 2nd Respondents further submitted that Diplomatic Duty Free Limited transferred its assets to the Applicant knowing well that there were taxes owing to the 1st and 2nd Respondents, and were aware of the legal implications thereof. In this regard, it is their submission that the Applicant is liable for the said taxes under Section 46 of the Tax Procedures Act. The said Respondents also cited section 3 of the Transfer of Businesses Act, and submitted that neither of the companies took any step to notify them of the transfer of assets, hence the Respondents rightly relied on Section 3 of the Transfer of Businesses Act and Section 46 of the Tax Procedures Act to demand for taxes from the Applicant.

37. To resolve the issues raised by the Applicant and 1st and 2nd Respondent as to whether the Applicant is related to Diplomatic Duty Free Ltd would require this Court to handle conflicting evidential matters, and to delve into the merits of the case. This in my humble opinion would be overstepping the judicial review mandate vested upon this Court. Some of the obvious disputed issues include:

- a) Whether the Applicant and Diplomatic Duty Free Ltd were related and/or affiliated entities.
- b) Whether there was a transfer of the assets of the taxpayer, Diplomatic Duty Free Ltd, to the Applicant.
- c) Whether there was transfer of the liabilities of the said taxpayer to the Applicant.
- d) Whether the facts from the observation and investigation findings of the 1st and 2nd Respondents were accurate and/or properly applied in arriving at the decision to proclaim against the Applicant herein; and
- e) Whether the Proclamation Notice was properly issued.

38. This Court is not in a position to decide on these issue as it is not a trial court, and especially as the disputed issues require tabling of the necessary evidence and examination of the same. The Court of Appeal sitting in the case of **Kenya Revenue Authority & 2 others v Darasa Investments Limited** [2018] eKLR held as follows in this regard:

“As the Judge readily accepted matters were disputed, and the decision being challenged was fundamentally to do with the date of loading of sugar for a port in Kenya, we find the Judge erred by proceeding to issue judicial review orders on disputed facts as the underlying dispute of whether the consignment of sugar was loaded between 12th May to 31st August as per the Gazette Notices remained unresolved. We appreciate that under Section 107(1) of the Evidence Act, whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. In the absence of such proof, such in this case, rendered the respondent’s claim that it had shipped the consignment within the exemption period moot. See also Halsbury’s Laws of England Volume 12 (2015) para 702.”

39. The Court of Appeal went on to state as follows:

“To the extent that the learned Judge despite cautioning himself delved deep into the evidence to consider letters dated 12th January, 2018 and 29th January, 2018 which were authored way after the decision contained in the letter dated 22nd November, 2017 was made and during the litigation, we find that he acted beyond the scope of his jurisdiction.”

40. In the circumstances, it is my view that this Court is not the proper forum to entertain this application.

41. In the premises this Court finds that the Applicant’s Notice of Motion dated 9th October 2018 is not properly before this Court, and that the Applicant needs to first comply with the provisions of section 52 of the Tax Procedures Act, and exhaust the remedy provided therein. In addition, the issues raised in the application are not amenable to resolution by way of judicial review as explained in the foregoing.

42. The said Notice of Motion is accordingly struck out with no order as to costs.

43. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 23RD DAY OF SEPTEMBER 2019

P. NYAMWEYA

JUDGE