REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW NO. 2 OF 2017

IN THE MATTER OF: THE CONSTITUTION OF KENYA, 2010 ARTICLES 22, 25 (C) & 47

AND

IN THE MATTER OF: THE LAW REFORM ACT (CAP 26) AND FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF: THE TAX PROCEDURES ACT, 2015 AND AN APPLICATION

BETWEEN

PORTSIDE FREIGHT TERMINALS LTD.....APPLICANT

VERSUS

KENYA REVENUE AUTHORITY.....RESPONDENT

RULING OF THE COURT

The Application

1. The Applicant's case for Judicial Review orders is contained in the Notice of Motion dated and filed herein on 14th February, 2017 pursuant to leave given by the court on 8th February, 2017. The motion prays for the following orders:

> **(a) An order of prohibition to prohibit the Respondent from demanding, collecting and or issuing any agency notices for tax for the years 2008 to 2011, both years inclusive, or any other year, either as set out in the Respondent's letter to the Applicant dated 3rd February, 2017, or in any other manner whatsoever.**
>
> **(b) An order of prohibition, to prohibit the Respondent from demanding, collecting and issuing any agency notices for tax for the years 2008 to 2011 both years inclusive, or any other years thereafter, either to its directors, shareholders, bankers or any other of the Applicant's creditors in pursuance of the Respondent's letter dated 3rd February, 2017 or in any manner whatsoever.**
>
> **(c) An order of certiorari to bring to this court, the decision of the Respondent contained in the Respondent's letter dated 3rd February, 2017, and to quash the said decision.**
>
> **(d) An order of mandamus, to compel the Respondent to follow the law as clearly spelt out in the Tax Procedures, Act, 2015 in matters of assessment and recovery of tax, and related matters as by law determined.**
>
> **(e) Costs of these proceedings be awarded to the Applicant.**

2. The motion is premised on the grounds set out therein and is supported by other documents as follows:

> (a) Chamber summons, Statement and Verifying Affidavits all filed on 8th February, 2017.

(b) Respondents Replying Affidavit sworn and filed in court on 27th March, 2017.

(c) Respondent's Supplementary Affidavit sworn and filed on 12th April, 2017

3. The Applicant's case is that these proceedings were actuated by correspondence from the Respondent to the *Exparte Applicant* commencing with its letter dated 3rd February 2017. In that letter the Respondent required the Ex-parte Applicant to pay a certain amount.

4. The Applicant alleges that three days later, on the **6th February 2017,** the Respondent wrote another letter to the Ex parte Applicant to the effect that the Respondent was in the process of reviewing the Applicant's tax affairs for the years of income 2012 to 6th February 2017. The Applicant further alleges that the letter also stated that the Applicant was required to appear in person for an interview as stipulated under Section 61 of the Tax Procedures Act.

5. It is the applicant's case that on the basis of the two aforementioned letters the Applicant brought this motion as the applicant believes that the Respondent has already concluded that the Applicant has committed an offence under an unspecified tax law.

The Response

6. The motion is opposed by the Respondent vide affidavit of Jesse Kamau sworn on 27th March, 2017.

5. The Respondent's case is that pursuant to the provisions of Section 52B of the Income Tax Act, every individual chargeable to tax is required to furnish the Commissioner a self-assessment of his tax from all sources of income and that the self-assessment is to be submitted not later than the last day of the sixth month following the end of a person's year of income being the period of twelve months commencing on 1st January in any year and ending on 31st December which then means that self-assessment returns are filed on or before 30th June of every year.

6. The Respondent claims that where a person fails to remit the self-assessed taxes as provided under Section 52B of the Income Tax Act, **Section 32** of the Tax Procedures Act, 2015, provides that the said tax becomes a debt due to the Government and shall be payable to the Commissioner.

7. It is the Respondent's case that by a letter dated 3rd February 2017, the Respondent wrote to the Applicant outlining the Applicant's outstanding tax liability as per its self-assessed returns for the years of income 2008, 2009, 2010, 2011 and 2012 being a total amount of Kshs.90, 895,, 611/= and also requiring the Applicant to provide financial documents for the years of income 2013, 2014 and 2015.

8. In relation to the letter dated 6th February 2017, the Respondent alleges that the letter was a follow up to the letter dated 3rd February, 2017 and that the Commissioner in exercise of the powers donated to him by the provisions of Section 61 of the Tax Procedures Act, 2015, can summon the Applicant's Directors for an interview.

9. It is the Respondent's case that its actions were not actuated by ill-will towards the Applicant but were rather premised on provisions of tax statutes.

10. It is also the Respondent's case that this application is premature and that the Applicant ought to have sought a remedy under the Tax Appeals Tribunal established under the Tax Appeals Tribunal Act, 2013.

Submissions and Analysis

11. Mr. Buti, learned Counsel for the Applicant submitted that the Applicant has not complied with the law specifically Section 29 (1) and (2) of the Tax Procedures Act which provide:

> **29(1) where a tax payer has failed to submit a tax return for a reporting period in accordance with the provisions of a tax law, the Commissioner may….make an assessment of:**
>
> **a) The amount of the deficit in the case of a deficit carried forward under the Income Tax Act for the period.**
>
> **(2) The Commissioner shall notify in writing a tax payer assessed under subsection (1) of the assessment and the Commissioner shall specify:**
>
> **(a) ……**
>
> **(b) ……**
>
> **(e) the due date for the payment of the tax, penalty and interest being a date that is not less than 30 days from the date of service of the notice.**
>
> **(f) the manner of objecting to the assessment**.

12. Mr. Buti counsel submitted that the Respondent's letter of 3rd February 2017 completely deprived the Applicant of all its benefits and

remedies afforded to it in **The Tax Procedures Act, 2015** through the whimsical decision contained in that letter and that the figures set out therein amounting to a claim of **Ksh. 90,895,611** is not a self-assessment sum by the Ex parte Applicant but rather the result of an investigation undertaken by the Respondent.

13. Mr. Buti submitted that Section 29 provides that a person shall be notified of the assessment arrived at by the Respondent and further the due date for payment of the tax which should not be less than 30 days from the date of service of the notice. Counsel contended that the Applicant was not notified of either of these nor was the Applicant informed the manner of objecting to the Respondent's findings.

14. Mr. Buti stated that **Section 61** of the Act does not allow any of the Respondent's officers to summon any of the Applicant's Directors for an interview either in the manner spelt out in their letter or in any other manner whatsoever. Counsel referred to Section 61 which states as follows:

> **61: where the Commissioner is satisfied that a person has committed an offence under a tax law, the Commissioner may, by notice in writing, require the person to appear before him.**

Counsel contended that this Section only applies where an offense is suspected to have been committed and that to require the Applicants Directors to appear before it for an interview while the commissioner is in the process of reviewing its tax affairs and where no offense is suspected to have been committed, is to act *ultra-vires* the powers conferred by that Section of the law.

15. Mr. Buti submitted that Article 47 of The Constitution mandates a public body such as the Respondent to give reasons for its decision to a person affected thereby while the letters dated **3rd February 2017** and **6th February 2017** do not give any reasons why the Respondent is desirous to take the actions specified in those letters.

16. Mr. Buti contended that the Applicant had not been given an opportunity to state its case as the Respondent had already made up its mind that the Applicant had already committed an offence.

17. Counsel cited the case of **Municipal Council of Mombasa vs. Umoja Consultants** where the Court held:

> **"Judicial review is concerned with the decision making process, not with the merits of the decision itself. The Court would only be concerned with the process leading to the making of the decision.**
>
> **(i) How was the decision arrived?**
>
> **(ii) Did those who made the decision have the power, i.e. the jurisdiction to make it?**
>
> **(iii) Were the persons affected by the decision heard before it was made?**
>
> **(v) In making the decision, did he take into account irrelevant matters?**

Counsel submitted that in the instant proceedings principles at Paragraph (iii) and (iv) were wholly ignored by the Respondent. It is therefore prayed that this Motion be allowed.

18. Further, Mr. Buti submitted that the matters that are raised in this application are not matters that fall to be determined by the **Tax Appeals Tribunal** by reason of the provisions of **Sections 12 and 13** of the **Tax Appeals Tribunal Act, No. 40 of 2013** which provide as follows:

> **12. A person who disputes the decision of the commissioner on any matter arising under the provisions of a tax law may, subject to the provisions of relevant tax law, upon giving notice in writing to the commissioner appeal to the Tribunal.**
>
> **13(1) A notice of appeal to the tribunal shall**
>
> **(b) be submitted to the tribunal within thirty days upon receipt of the decision of the commissioner.**

19. Mr. Buti submitted that the import of the letters of **3rd February 2017** and **6th February 2017** was that the *Ex parte Applicant* was deemed to have committed offences. Counsel stated that the proper forum for dealing with the transgressor is not at the **Tax Appeals Tribunal** and that the correct forum for such matter is spelt out in **Section 104** of the Tax Procedures Act as follows:

> 104: **Sanctions for offences.**
>
> **(1)…a person convicted of an offence under this Act shall be liable to a fine not exceeding one million shillings and to imprisonment for a term not exceeding three years, or to both".**

Counsel submitted that matters related to any offences are placed outside the purview and jurisdiction of both the Tax Appeals Tribunal Act, and the Tribunal constituted thereunder.

20. On the part of the Respondent, Mr. Nyaga submitted that the letter dated 3rd February, 2017 was premised on Section 28 of the Tax

Procedures Act which deals with self-assessment and not Section 29 which deals with default assessment. Counsel submitted that the Income Tax Act is predicated on a system of self-accounting and self-assessment where every person is required to make a return of his income and assess how much tax is payable by him from all the sources of his income. Counsel cited Section 52B. (1) (a) which provides that:

> **"Notwithstanding any other provision of this Act every individual chargeable to tax under this Act shall for any year of income commencing with the year of income 1992, furnish to the Commissioner a return of income, including a self-assessment of his tax from all sources of income, not later than the last day of the sixth month following the end of his year of income**."

21. Mr. Nyaga submitted that the Applicant herein complied with the provisions of Section 52B (1) (a) by filing the self-assessment tax returns for the years of income 2008, 2009, 2010, 2011 and 2012. In the self-assessment, Applicant voluntarily declared that it owed the Respondent the sums of Kshs.10,636,215/-, Kshs.10,810,613/-, Kshs.15,385,107/= Kshs.33,698,801/= and Kshs.21,165,650/= for the respective years of income. Counsel stated that by dint of the provisions of Section 92A of the Income Tax Act, the due date for the self-assessed taxes by the Applicant who had furnished a return under Section 52B, was on the last day of the fourth month following the end of its year of income or accounting period.

22. Mr. Nyaga submitted that according to Section 92A (1) of the Income Tax Act, the debt owed by the Applicant to the Respondent crystallized on the last day of the fourth month following the end of the Applicant's year of income or accounting period meaning that the self-assessed taxes by the Applicant were due and payable on 30th April of every following year from the year 2008 to 2012.

23. Mr. Nyaga stated that the Applicant herein has not remitted the self-assessed taxes for the years of income 2008-2012 which prompted the Commissioner to notify the Applicant of the outstanding taxes due and payable to the Commissioner.

24. Mr. Nyaga distinguished between a '***self-assessment***' and a "default assessment" by stating that a self-assessment is a voluntary declaration of the taxes payable by a person, which was the case in the present application while a '***Default Assessment***' under Section 29 of the Tax Procedures Act is where a person who fails to submit a tax return for a period in accordance with the provisions of the Income Tax Act, his tax liability is assessed by the Commissioner based on the information available to the Commissioner and to the best of the Commissioner's judgment.

25. Mr. Nyaga submitted that this being an issue of self-assessment the issue of the Applicant being accorded an opportunity to raise an objection does not arise. To support this assertion Counsel contended that the Commissioner did not review or revise the Applicant's tax liability but sought to notify the Applicant of the taxes due and payable to the Commissioner pursuant to the Applicant's self-assessment and that the Applicant was at liberty to amend the self-assessment.

26. Mr. Nyaga pointed out that the Applicant had made partial remittances of the self-assessed taxes, albeit late, for the years of income 2009, 2010, 2011 and 2012 wherein the Applicant remitted Kshs.12,791,320/=, Kshs.6,030,000/=, Kshs.25,707,117/= and Kshs.26,328,578/= respectively. Thus, the taxes in dispute in this application had already been admitted by the Applicant and partial payments made by the Applicant thus the issue of objection does not arise.

27. Mr. Nyaga submitted that Section 61 of the Tax Procedures Act permits the Commissioner to invite a person, who the Commissioner is satisfied has committed an offense under a tax law, to appear before him and on the basis of this Section the Respondent, by letters dated 6th February 2017, invited the Applicant's Directors, Mr. Abubakar A. Joho and Mr. Hussein J. Khamis, to appear before the Commissioner in the company of the Applicant's Tax Agent, if they so wished, as the failure by the Applicant to remit the self-assessed taxes to the Respondent amounted to an offence under Section 95 of the Tax Procedures Act, 2015. Counsel cited the case of **H. C. Miscellaneous Civil Application No. 534 of 2007, Republic vs. Kenya Revenue Authority & 2 Others, Ex-parte Arrow Hi-fi (E. A.) Limited**, where the Court held:

> **"I hold that what the Respondents did was within the clear meaning of the relevant law and also specifically permitted by law. The clear words of statute as set out above allowed the respondents to make the assessment… Where the taxman is within the four corners of the enabling law, the court must uphold the provisions and it cannot substitute its sense of fairness or decision and would have no right to do so**."

Counsel stated that the Respondent's acts were founded in law and did not go beyond the scope of its mandate.

28. Mr. Nyaga submitted that Article 47 of the Constitution entitles a person to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair and also entitles a person who is likely to be adversely affected by administrative action the right to be furnished with written reasons for the action. The Respondent submitted that the letter dated 3rd February 2017 complied with the provisions of Article 47 as it was a notification that the Applicant owed taxes that were due and payable to the Commissioner and the said letter accorded the Applicant an opportunity to seek clarification before the Commissioner took any further action. With regards to the letter dated 6th February, 2017, Counsel submitted that rather than the Respondent instituting recovery measures without giving the Applicant an audience, the Respondent invited the Applicant for an interview.

29. Mr. Nyaga cited the case of **Republic vs. The Retirement Benefits Appeals Tribunal Ex Parte Augustine Juma & 8 others [2013] eKLR,** where the Court held,

> **"To put the essence of this application in perspective, it must be remembered that the function of this court sitting in judicial review is not concerned with the merits of the decision…I will add that judicial review is not an appeal from a decision, but a review of the manner in which the decision was made. Once a body is vested with the power to do so something under the law, then there is room for it to make that decision, wrongly as it is rightly. That is why there is the appellate procedure to**

test and examine the substance of the decision itself. It follows, therefore, that the correctness or 'wrongness' or error in interpretation or application of the law is not appropriately tested in judicial review forum. In simple terms, a 'wrong' decision done within the law and in adherence to the correct procedure can seldom be said to be ultra vires as to attract remedy for the prerogative writs. The Court of Appeal in Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 Others, CA Civil Appeal 145 of 2011 [2012] eKLR expressed this view as follows; Moreover, where the proceedings are regular upon their face and the inferior tribunal has jurisdiction in the original narrow sense (that is, to say, it has power to adjudicate upon the dispute) and does not commit any of the errors which go to jurisdiction in the wider sense, the quashing order (certiorari) will not be ordinarily granted on the ground that its decision is considered to be wrong either because it misconceived a point of law or misconstrued a statute (except a misconstruction of a statute relating to its own jurisdiction) or that its decision is wrong in matters of fact or that it misdirects itself in some matter…"

30. Mr. Nyaga submitted that this matter ought to have been placed before the Tax Appeals Tribunal for determination as it deals with the issue of self-assessment. Counsel referred the court to the case of **Republic vs. National Environment Management Authority [2011] eKLR,** where the Court of Appeal stated:

"**The Principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was 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 – see for example R vs. BIRMINGHAM CITY COUNCIL ex parte FERRERO LTD case. The learned trial judge, in our respectful view, considered these strictures and came to the conclusion that the Appellant failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute. With respect, we agree with the Judge**."

31. Counsel also cited Section 9 (2) of the Fair Administrative Action Act that provides:

"**The High Court or a subordinate court under sub-section (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**."

32. Mr. Nyaga submitted that there was no exceptional case why this matter should not have been referred to the Tax Appeals Tribunal.

Determination

33. I have carefully considered the application and the submissions by the Counsel. The issues that arise for determination are whether the prayers sought in the Judicial Review can be granted by this court.

34. Judicial Review proceedings as rightly put by the ex-parte Applicant are not concerned with the merits of the decision but rather with the decision making process. In the case of **Cortec Mining Kenya Limited vs. Cabinet Secretary, Attorney General & 8 others [2015] eKLR** the Court of Appeal discussed the judicial review remedies as follows:

"…certiorari issues to quash decisions for errors of law in making such decisions or for failure to act fairly towards the person who may be adversely affected by such decision. Prohibition is directed to an inferior tribunal or body from continuing proceedings in excess of its jurisdiction or in contravention of the laws of the land. The order of mandamus compels the performance of a public duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same."

35. In the instant case, the ex-parte Applicant is seeking all the three Judicial Review remedies. In relation to the remedy of certiorari, the ex-parte Applicant prays that the decision of the Respondent contained in the letter dated 3rd February, 2017 be quashed.

36. I have carefully looked at a copy of the letter dated 3rd February, 2017 which is attached to the verifying affidavit of **Aboubakar Joho** sworn on 7th February, 2017. In the said letter written by the Respondent and addressed to the ex-parte Applicant, the Respondent demands a sum of Kshs. 90,895,611/= from the ex-parte Applicant being outstanding corporation tax owed to it. Also, the Respondent explains that the amount is owed as a result of tax assessment for the years 2008, 2009, 2010, 2011 and 2012 that has not been fully paid by the ex-parte Applicant.

37. The ex-parte Applicant contends that Section 29 of the Tax Procedures Act, 2015 requires a person to be notified of the assessment arrived at by the Respondent and further the due date for payment of the tax which shall not be less than 30 days from the date of service of the notice and that in this case the Applicant was informed of neither nor was he informed the manner of objecting to the Respondent's findings.

38. The Respondent on the other hand states that the Commissioner did not review or revise the Applicant's liability but sought to only notify the ex-parte Applicant of the taxes due pursuant to the Applicant's self-assessment which the Applicant was at liberty to amend.

39. Was the decision in the said letter unreasonable, or did the Respondent consider irrelevant matters in reaching the said decision? The ex-parte Applicant has not proved that the said decision was unreasonable or that it was based on irrelevant matters or that it was unprocedurally written. The ex-parte Applicant only claims that the Respondent did not meet the requirements of Section 29. The court can only establish the veracity of this claim by going into the merits of this case to find out whether the said tax was self-assessed or was assessed by the

Respondent. This, however, is not the purview of Judicial Review proceedings.

40. Further, the aforementioned letter also provided that the ex-parte Applicant could seek any clarification from the Respondent. The ex-parte Applicant was afforded an opportunity to be heard in line with the principles of natural justice.

41. The ex-parte Applicant claimed that Section 61 of the Tax Procedures Act only applies where an offence is suspected to have been committed. Therefore, to require the ex-parte Applicant to appear before the Respondent for an interview, while the Commissioner is in the process of reviewing its tax affairs, and, where no offence is suspected to have been committed, is *ultra vires* of the powers conferred to the Respondent.

42. Section 61 of the Tax Procedures Act provides:

> **"Where the Commissioner is satisfied that a person has committed an offence under a tax law, the Commissioner may, by notice in writing, require the person to appear before him."**

While the ex-parte Applicant contends that the Respondent acted *ultra vires* by summoning the Applicant while still reviewing the Applicant's case, I do not find this to be the case. The above Section does not state that a person cannot be summoned before the Commissioner if their affairs are still under review. It only states that the Commissioner needs to be satisfied that a tax offence has been committed. In this instance the Respondent had earlier written to the Applicant demanding payment of the balance of its taxes owed for the years 2008-2012. The offence, I would believe, would be non-payment of the tax balance by the ex-parte Applicant.

43. I therefore find that the order of certiorari and prohibition cannot issue in this matter.

44. As regards the order of mandamus, mandamus is normally issued to compel a public body to perform a certain duty when the said public body has refused to do so. However, the said duty must have been imposed on the public body in the first place. In this case the ex-parte Applicant prays that the Respondent be compelled to follow the law as provided in the Tax Procedures Act. I do not find that the Respondent has blatantly refused to follow the law warranting an order of mandamus.

45. This Court is only concerned with the process of the decision making. It is the finding of the court that the letters dated 3rd and 6th February, 2017 did not offend the tenets of natural justice. Further, it is the finding hereof that if the ex parte Applicant was aggrieved by the decision disclosed in the letters aforesaid, it should file an appeal with the Tax Appeal Tribunal, since the issue remains dispute on amount of tax payable.

46. For the foregoing reasons the application dated 14th February, 2017 is dismissed with costs to the Respondent.

Dated, Signed and Delivered in Mombasa this 20th day of March, 2018.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Paul Buti for ex parte Applicant

Mr. Nyaga for Respondent

Mr. Kaunda Court Assistant