



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL & JUDICIAL REVIEW DIVISION
MISCELLANEOUS CIVIL APPLICATION NO. 460 OF 2017

ANNE WAMBUI NJOROGE (SUING IN HER CAPACITY
AS THE ADMINISTRATOR OF THE ESTATE
OF JOSEPH NJOROGE MURIGI.....APPLICANT

VERSUS

KENYA REVENUE AUTHORITY.....1ST RESPONDENT
COMMISSIONER OF DOMESTIC TAXES.....2ND RESPONDENT

RULING

Introduction

1. The applicant herein, **Anne Wambui Njoroge**, instituted these proceedings in her capacity as the Administrator of the Estate of **Joseph Njoroge Murigi**, seeking leave of this Court to apply for orders of certiorari to quash the Respondents' decision made in September, 2013 issuing a tax assessment against the deceased in the sum of Kshs 14,817.849 (sic); an order of certiorari to quash the Respondents' Notification of charge and sale of the suit properties; an order prohibiting the Respondents from enforcing the payment of said sum and mandamus compelling the Respondents to supply the applicant with the relevant financial statement.
2. The grounds upon which the application was made were that the demand was made outside the statutory period, that the demand failed to take into account a relevant matter i.e. the expenses that went into the making of the profits; that the applicant was never afforded a hearing before the decision was arrived at.
3. From the submissions made on behalf of the applicant by her learned counsel **Mr Ochwa**, it is clear that being aggrieved by the said decision, the applicant lodged an objection against the said assessment but the same was disallowed on the ground that the objection was invalid. A fresh objection was lodged but the same had not been determined by the time these proceedings were commenced since in the applicant's own view, the same is similarly bound to fail as the applicant is out of time.
4. This ruling is simply on the issue whether this Court ought to entertain these proceedings.
5. Section 51 of the **Tax Procedures Act**, provides as hereunder:

- (1) A taxpayer who wishes to dispute a tax decision shall first lodge an objection against that tax decision under this section before proceeding under any other written law.**
- (2) A taxpayer who disputes a tax decision may lodge a notice of objection to the decision, in writing, with the Commissioner within thirty days of being notified of the decision.**
- (3) A notice of objection shall be treated as validly lodged by a taxpayer under subsection (2) if—**
 - (a) the notice of objection states precisely the grounds of objection, the amendments required to be made to correct the decision, and the reasons for the amendments; and**
 - (b) in relation to an objection to an assessment, the taxpayer has paid the entire amount of tax due under the assessment that is not in dispute.**
- (4) Where the Commissioner has determined that a notice of objection lodged by a taxpayer has not been validly lodged, the Commissioner shall immediately notify the taxpayer in writing that the objection has not been validly lodged.**
- (5) Where the tax decision to which a notice of objection relates is an amended assessment, the taxpayer may only object to the alterations and additions made to the original assessment.**
- (6) A taxpayer may apply in writing to the Commissioner for an extension of time to lodge a notice of objection.**
- (7) The Commissioner may allow an application for the extension of time to file a notice of objection if—**
 - (a) the taxpayer was prevented from lodging the notice of objection within the period specified in subsection (2) because of an absence from Kenya, sickness or other reasonable cause; and**
 - (b) the taxpayer did not unreasonably delay in lodging the notice of objection.**
- (8) Where a notice of objection has been validly lodged within time, the Commissioner shall consider the objection and decide either to allow the objection in whole or in part, or disallow it, and Commissioner's decision shall be referred to as an "objection decision".**
- (9) The Commissioner shall notify in writing the taxpayer of the objection decision and shall take all necessary steps to give effect to the decision, including, in the case of an objection to an assessment, making an amended assessment.**
- (10) An objection decision shall include a statement of findings on the material facts and the reasons for the decision.**
- (11) Where the Commissioner has not made an objection decision within sixty days from the date that the taxpayer lodged a notice of the objection, the objection shall be allowed.**

6. It was argued on behalf of the applicant that since the provision states that a taxpayer who wishes to dispute a tax decision shall first lodge an objection against that tax decision under this section before proceeding under any other written law, the provision does not bar such taxpayer from invoking the jurisdiction of the Court as long as an objection is filed with the Commissioner. With due respect to the applicant this kind of approach fails to appreciate the principles of statutory interpretation. As was appreciated by the Court of Appeal in **Kimutai vs. Lenyongopeta & 2 Others Civil Appeal No. 273 of 2003 [2005] 2 KLR 317; [2008] 3 KLR (EP) 72** while citing with approval *The Discipline of Law* 1979 London Butterworth at page 12 by **Lord Denning**:

“The grammatical meaning of the words alone, however is a strict construction which no

longer finds favour with true construction of statutes. The literal method is now completely out of date and has been replaced by the approach described as the “purposive approach”. In all cases now in the interpretation of statutes such a construction as will “promote the general legislative purpose” underlying the provision is to be adopted. It is no longer necessary for the judges to wring their hands and say, “There is nothing we can do about it”. Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it – by reading words in, if necessary – so as to do what Parliament would have done, had they had the situation in mind.”

7. In Alfred Muhadia Ngome & Another vs. George W. Sitati & 2 Others Civil Application No. Nai. 268 of 1999 it was held that:

“The duty of the Court in construing a statute is to ascertain and to implement the intention of the Parliament as expressed therein. Where Parliament has used non-technical legislation (sic) words which, in their ordinary meaning cover the situation before the Court, the Court will generally apply them literally provided that no injustice or absurdity results. In such case it is a reasonable presumption that Parliament or its draftsman has envisaged the actual forensic situation. But in many cases it will seem probable that Parliament or its draftsman have not envisaged the actual situation before the Court; and the duty of the Court in such circumstances will be to surmise, as best as it can, what Parliament would have stipulated if it had done so... A number of rules, founded on common sense have been evolved to assist the Courts in this task - e.g. Parliament will be presumed not to intend injustice or absurdity or anomaly; but the most useful approach was laid down as long ago as *HYDON’S CASE* that the Court will ascertain what was the pre-existing “mischief”, (that is to say, defect) which Parliament was endeavouring to remedy; this will often give a guide to what remedy Parliament has provided, and to its extent and its sanction.”

8. Therefore in understanding section 51(1) above this Court must ask itself what was the mischief that the legislature intended to cure by the enactment of the said provision. In my view the purpose of section 51(1) is to permit the Commissioner not only to entertain a dispute arising from the decision of the Commissioner but to determine the same before any other body can purport to be seised of the matter as long as the dispute falls within the jurisdiction of the Commissioner. To contend that once the objection is lodged the tax payer may then move to the High Court during the pendency of the objection would defeat the purpose for which section 51(1) was enacted in the first place. In other words such an interpretation would defeat the legislative intent.

9. Where a specialized authority is set up by an Act of Parliament it is trite that as long as they are acting within their jurisdiction, the Court only ought to step in to ensure that the proceedings are being conducted fairly. This position was appreciated by the Court of Appeal in Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 Others (2012) e KLR where the Court expressed itself as follows:

“The Review Board is a specialized statutory tribunal established to deal with all complaints of breach of duty by the procuring entity...S.98 of the Act confers very wide powers on the Review Board. It is clear from the nature of powers given to the Review Board including annulling, anything done by the procuring entity and substituting its decision for that of the procuring entity that the administrative review envisaged by the Act is indeed an appeal. From its nature the review board is obviously better equipped than the High Court to handle disputes relating to breach of duty of the procuring entity. It follows that its decision in matters within its jurisdiction should not be lightly interfered with. Having regard to the wide powers of the Review Board we are satisfied that the High court erred in holding that the Review Board was not competent to decide whether or not the 1st respondent’s tender had met the mandatory conditions. The issue whether or not the 1st Respondent’s tender was rightly rejected as unresponsive was directly before the Review Board and the Board had jurisdiction to deal with it. In conclusion, it is manifest that the application for Judicial Review was not well founded. The 1st Respondent did not establish that the Review Board

had acted without jurisdiction or in excess of jurisdiction or in breach of natural justice of that the decision was irrational. The Judicial review was not confined to the decision making process but rather with the correctness of the decision on matters of both law and fact. So long as the proceedings of the Review Board were regular and it had jurisdiction to adjudicate upon the matters raised in the Request for Review, it was as much entitled to decide those matters wrongly as it was to decide them rightly. The High Court erred in essence in treating the Judicial Review Application as an appeal and in granting review orders on the grounds which were outside the scope of Judicial Review jurisdiction”.

10. It ought to be appreciated that judicial review is a remedy of last resort. As was held by this Court in **Republic vs. Ministry of Interior and Coordination of National Government and Another ex parte ZTE** Judicial Review Case No. 441 of 2013:

“...one must not lose sight of the fact that the decision whether or not to grant judicial review orders is an exercise of judicial discretion and as was held by Ochieng, J in John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003, for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort though the applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. Therefore, unless due to the inherent nature of the remedy provided under the statute to resort thereto would be less convenient or otherwise less appropriate, parties ought to follow the procedure provided for under the statute.”

11. 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.

12. There is now a chain of authorities from the High Court as well as the Court of Appeal that where a statute has provided a remedy to a party, this Court must exercise restraint and first give an opportunity to the relevant bodies or State organs to deal with the dispute as provided in the relevant statute. This principle was well articulated by the Court of Appeal in **Speaker of National Assembly vs. Njenga Karume [2008] 1 KLR 425**, where it held that;

“In our view there is considerable merit....that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”

13. Therefore confronted with a question as to which remedy a litigant ought to seek, a Court should examine whether the alternative remedy provides an efficacious and satisfactory answer to the litigant's grievance. In other words the Court ought to consider whether the alternative remedy is less convenient, beneficial and effectual. That was also the position in the English case of **Ex parte Waldron [1986] 1QB 824 at 825G-825H**, where **Glidewell LJ** observed that the court should always interrogate relevant factors to be considered when deciding whether the alternative remedy would resolve the question at issue fully and directly.

14. It is now therefore a cardinal principle that, save in the most exceptional circumstances, the judicial review jurisdiction would not be exercised and the court must not exercise it where there exist alternative remedy. In **Re Preston [1985] AC 835 at 825D** Lord Scarman was of the view that a remedy by judicial review should not be made available where an alternative remedy existed and should only be made as a last resort.

15. 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.

16. Subsection (3) thereof provides:

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).

17. From the foregoing it is clear that the applicant's contention that the existence of an alternative remedy is not a bar to judicial review is no longer good law. This position was grounded on the decision of the Court of Appeal sitting in Kisumu in **Eliud Wafula Maelo vs. Ministry of Agriculture and 3 Others [2016] KLR** where it was held that:

“The jurisdiction of the High Court in particular matters or instances can be ousted or restricted by statute...The subject's right of access to the courts may be taken away or restricted by statute...Where a tribunal with exclusive jurisdiction has been specified by a statute to deal with claims arising under the statute, the County Court's jurisdiction to deal with those claims is ousted, for where an Act creates an obligation to and enforces the performance of it in a specified manner only, the general rule is that performance cannot be enforced in any other manner.”

18. In **International Centre for Policy and Conflict and 5 others-vs- The Hon. Attorney-General & 4 Others [2013] eKLR** the Court recognized the need to let relevant statutory bodies deal with matter within their mandate fully before interfering in manner sought in these proceedings by holding that a Court of law:

“...must first give an opportunity to the relevant constitutional bodies or State organs to deal with the dispute under the relevant provision of the parent statute. If the court were to act in haste, it would be presuming bad faith or inability by that body to act...Where there exists sufficient and adequate mechanisms to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the court should not be invoked until such mechanisms have been exhausted...”

19. The Court will therefore only interfere notwithstanding the existence of an alternative remedy where that remedy is less convenient, beneficial and effectual. However a party cannot successfully argue that a remedy is less convenient, beneficial or effectual simply because he has failed to comply with the legal requirements such as in this case where the objection falls short of the legal requirements or where the objection is out of time. In other words the party cannot create a crisis and seek to rely on the self-created crisis to bypass the statutory bodies created for the purpose of resolving disputes.

20. In this case if this Court were to entertain the dispute, it would have not only truncated the procedure provided under the law but would render the second objection filed by the applicant superfluous yet that objection though admittedly out of time is curable if the applicant is properly advised.

21. 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.

22. It is however my view that the onus is upon the applicant to satisfy the Court that he ought to be exempted from resorting to the available remedies. In this the applicant actually invoked the jurisdiction

of the Commissioner. After the objection was disallowed for being invalid by the Commissioner, a power that the Commissioner no doubt had pursuant to section 51(4), the applicant attempted to file a fresh objection which is admittedly out of time.

23. The applicant now contends that she is now left with no remedy. That obviously cannot be correct since pursuant to section 51(7) of the said Act, the applicant had the option of seeking extension of time. Instead of doing so the applicant decided to short-circuit the law by leaving the objection undetermined and invoking this Court's jurisdiction.

24. In this case, as no reason has been advanced for the failure to invoke the available statutory remedies before invoking this Court's jurisdiction, I find that this application is misconceived and incompetent and the same is struck out with costs.

25. It is so ordered.

Dated at Nairobi this 31st day of July, 2017

G V ODUNGA

JUDGE

Delivered in the absence of the parties.

CA Mwangi