REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISCELLANEOUS APPLICATION NO. 85 OF 2012 (JR)

IN THE MATTER OF: ORDER 53 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF: THE VALUE ADDED TAX (CAP 476-LAWS OF KENYA)

AND

IN THE MATTER OF: AN APPLICATION BY CORRUGATED SHEETS LIMITED TO APPLY FOR ORDERS OF JUDICIAL REVIEW AGAINST THE DECISION BY THE KENYA REVENUE AUTHORITY DEMANDING PAYMENT OF ALLEGED ARREARS OF VAT TAX

BETWEEN

REPUBLIC……...…APPLICANT

VERSUS

KENYA REVENUE AUTHORITY……..……RESPONDENT

AND

CORRUGATED SHEETS LTD…….…...…EXPARTE APPLICANT

RULING

Introduction

1. The Notice of Motion the subject of this Ruling is dated and was filed on 17th October 2012. It sought two judicial review orders –

> (1) an order of certiorari to remove into this court for purposes of quashing the decision of the Kenya Revenue Authority (KRA) to demand and collect (from the Applicant Shs.50,500,743.00 in respect of V.A.T, tax liability allegedly payable by the Applicant and referred to in the Demand letter dated 30th August, 2012 and subsequently in the further letter dated 10th September, 2012 and

(2) an Order of prohibition to prohibit the KRA from continuing to wrongfully demand from the Applicant the sum of Kshs.50,500,743.00 on account of the Value Added Tax allegedly payable by the Applicant for the period January to September, 2008, and

(3) that costs of and occasioned by this Motion be taxed and paid by the Respondent to the Applicant be provided for.

2. The Notice of Motion (hereinafter referred to as "the Application") was grounded upon the Statutory Statement dated and filed on 5th October, 2012 together with the Chamber Summons of even date herewith seeking leave to commence judicial review proceedings for said orders. The application was also grounded upon the Affidavit of Zuher Kassamali Taibjee Verifying the Facts of sworn on the said 5th October, 2012 and the Further Affidavit of the said Zuher Kasssamali Taibjee sworn on 17th October, 2012, together with grounds on the face of the application.

3. Though the application was opposed by KRA (the Respondent) through the Replying Affidavit of Tomkys Kandie Kigen, sworn on 17th December, 2012, and filed on 15th December, 2012, and replied to by the Further Affidavit of Zuher Kassamali Taibjee sworn and filed on 22nd April, 2013, neither the ex parte Applicant nor the Respondent sought to fix the application for hearing between the period 2nd April, 2013 to 29th June, 2015, a period of over three years when the Respondent filed its Replying Affidavit, and over two and half (2 1/2) years, from the time the Applicant Zuher Kassamali Taibjee, filed his Further Affidavit on 22nd April, 2013.

4. Due to the inordinate delay in prosecuting the application, the Court of its own motion sent out notices on 29th June, 2015 to the Counsel for both the Applicant and the Respondent to show cause why the Application should not be dismissed.

5. In the absence of either Counsel the court dismissed the application on 22nd July, 2015. However, for reasons given in the Ruling dated 21st October, 2015 the court set aside the orders of dismissal and reinstated the application, on terms set out in the said Ruling, including the fixing within thirty (30) days of the hearing date for the application.

6. The application was fixed for hearing on 18th November, 2015, but due to other assignments, this court was not sitting on that date. The matter was not heard until 29th June, 2016 when the Applicants' submissions were taken, and adjourned to 30th June, 2016, when the Applicants' Counsel completed his submissions and the Respondent's Counsel made his submissions.

THE APPLICANT'S CASE

7. The ex parte Applicant's case is summarized in the statutory statement attached to the Chamber Summons aforesaid for leave, and also reiterated in the grounds to the Application.

8. The Applicant contends that the Respondent, KRA is wrongfully demanding from the Applicant payment of Kshs.50,500,743.00 on account of Value Added Tax (V.A.T) for the period January 2008 t0 September 2008 without any legal justification, and that the Respondent is acting with lack of candour and **mala fides** in making a demand for the said amount well knowing that the amount, was not neither due nor owing.

9. The ex parte Applicant argued that it has always been a diligent and faithful tax as well as V.A.T payer, and the Respondent's failure to take into account and give credit to the ex parte Applicant for the amount of Kshs.75,605,085.30 is a ploy and a scheme designed to paint the Applicant in bad light and extort monies not due and owing by it on account of V.A.T.

10. It was the ex parte Applicants further argument that the Respondent's treatment of the credit due and owing to the Applicant has no basis or justification in law whatsoever as the actual credit refund was not

received until September 2008, and then only for Kshs.63,900,394.70, and that it is unfair, oppressive and unjust, in terms of the provisions of the Value Added Tax, to treat the claim for refund (on account of V.A.T already remitted) in the manner the Respondent seeks to do.

11. The ex parte Applicant contends that the conduct of the Respondent is in contravention of Article 47 of the Constitution which entitles the Applicant the right to fair administrative action.

12. In the circumstances, Counsel argued that judicial review was the most efficacious remedy, and that the existence of an alternative remedy is not a bar to judicial review. The court, Counsel argued, still retains a discretion to determine the judicial review application. The decision of this court in **REPUBLIC vs. KENYA REVENUE AUTHORITY**, ex parte **Abdalla Brek Said t/a Almony Distributors and 4 others** (JR App. No. 57 of 2010), where the court held that the existence of an alternative remedy is a bar to judicial review proceedings should be distinguished .

13. There was no alternative remedy in this case because the ex parte Applicant's case is based upon the provisions of Section 38 – 39 of the Value Added Tax Act which make provision for the establishment of a Tax Appeals Tribunal to determine disputes between the ex parte Applicant and the Respondent. Further, the Tribunal envisaged under those provisions was not established until the 24th April, 2015 while the application herein was filed on 5th October, 2012.

14. In this regard Counsel relied on the case of Ex parte **WALDRON [1986], 1QB 824 at 825 G-H,** [cited in **Republic vs. Commissioner for Cooperative Development & Another, ex parte Lawrence Mwangangi Mwania [2015] e KLR**] 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 in issue fully and directly."**

15. The ex parte Applicant's Counsel also relied on the decision of the Court in **REPUBLIC vs. KENYA REVENUE AUTHORITY**, ex parte **Paragon Electronics Limited [2015] eKLR** where Counsel for the Applicant [in that case] argued that the Tax Tribunal Rules were gazetted in 2015, and that unlike the provisions of Section 38 of the repealed Value Added Tax, under which a stay was automatic, the Rules do not empower the Tribunal to grant a stay, and that since the Tribunal was yet to commence its sittings, it was necessary to apply for the orders sought herein, and therefore in this application.

16. In similar vein Counsel also relied upon the case of **REPUBLIC vs. MINISTRY OF INTERNAL SECURITY AND COORDINATION OF NATIONAL GOVERNMENT (2) PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD, ex parte ZTE CORPORATION & ZTE CORPORATION (KENYA) LTD [2014] eKLR** where the court decided **inter alia** -

> "**45. The remedy of judicial review is now not only a statutory remedy but is a Constitutional remedy underpinned under Article 165 (6) of the Constitution. The remedy, in my view, is one of the additional legal remedies contemplated under section 99 aforesaid. However, one must not lose sight of the fact that a decision whether or not to grant judicial review orders is an exercise of judicial discretion. As it was it held by Ochieng J in John Fitzerald Kennedy vs. The Postmaster General Postal Corporation of Kenya & 2 others (Number HC Misc. Appl. No. 997 of 2005).**
>
> "**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. This position was re-affirmed by the Court of Appeal in SPEAKER OF THE NATIONAL ASSEMBLY vs. KARUME (Civil Application No. 92 of 1992), where it**

was held that there was considerable merit in the submission that where there is a clear procedure for redress of any particular grievance provided by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedure."

17. In summary, the ex parte Applicant's Counsel's argument is **firstly** hat the onus or burden is upon the Respondent to show or bring evidence of the existence of the alternative remedy, and the efficacy of such remedy. In the absence of such material, the existence of an alternative forum cannot be held or found in favour of the Respondent. **Secondly,** Counsel argued, the right to request a review is not merely statutory under the Law Reform Act (Cap 26, Laws of Kenya), but is now underpinned by Article 165 (6) of the Constitution, and the question of the right to apply for judicial review as discussed in **Republic vs. Ministry of Interior and Coordination of National Government (supra)** is a constitutional remedy.

18. Counsel argued that a party should not be shut out by virtue of the existence of an alternative remedy. In this case, Counsel argued, there was no alternative remedy, there is no Tax Appeals Tribunal, and that even if there was an alternative remedy, judicial review was still the most efficacious remedy, and neither was an appeal an appropriate remedy.

19. The issue, Counsel argued was not whether the Respondent had power to raise demand notices for payment of additional taxes, but whether the right procedure was followed. Though the demand refers to the year 2008, the demand was made after the coming into force of the Constitution of Kenya 2010. The claim of the ex parte Applicants is therefore subject to the provisions of Article 47 of the Constitution regarding **"fair administrative action,"** and concluded that it is illegal to demand a tax which is not due, that there is no law which prohibits a tax payer from seeking a refund even where a credit is carried forward to the next accounting period.

20. Lastly, Counsel argued that judicial review was the appropriate remedy as there was no appeals Tribunal as envisaged under section 33 of the VAT Act.

21. For those reasons Counsel for the Applicants urged the Court to find that the Respondent acted in breach of the law, and allow the application.

THE RESPONDENT'S COUNSEL'S SUBMISSIONS

22. The Respondent's case is set out in the Replying Affidavit of Tomkys Kandie Kigen sworn on 17th December, 2012, and filed on 18th December, 2012 in which the deponent explains in paragraphs 7 – 12 thereof the circumstances in which the claim for additional payment was demanded by the Respondent from the ex parte Applicant. This was also reiterated in the Respondent's Counsel's submissions filed on 1st April, 2016, supported by the list of authorities dated and filed on 26th May, 2016.

23. In brief, the Respondent's answer to the application is that it acted within the relevant provisions of the V.A.T Act, and in particular Sections 11 (2) thereof and therefore within the law, and that the Application has no basis in law and should consequently be dismissed with costs.

ANALYSIS AND ISSUES

24. I have perused the application herein, the Applicant's Statutory Statement and Affidavit Verifying the Facts, the subsequent Further Affidavits of Zuher Kasamali Taibjee as well as the extensive submissions and authorities relied upon by Counsel for the ex parte Applicant.

25. I have likewise considered the Replying Affidavit on behalf of the Respondent as well as the written and oral submissions by the Respondent's Counsel. In similar light I have considered the authorities cited by respective Counsel for the Applicant and the Respondent.

26. In my view the Application raises one basic issue, whether the action by the Respondent in

demanding V.A.T. tax from, the ex parte Applicant was within the law or **ultra vires** the process of the Respondent under the Value Added Tax (Cap 476). The subsidiary issue raised by the Respondent was whether judicial review relief order of certioraris was the most appropriate remedy in light of the procedure for dispute resolution provided for under the V.A.T. Act.

27. The facts in relation to the dispute are not in dispute. The ex parte Applicant is one of those tax payers which are categorized as "**large tax payers."** In a sense therefore the **"accounts**" are therefore subject to close scrutiny by the Respondent's officers.

28. In the course of one such scrutiny the Respondent called it, reconciliation, the Respondent found that the ex parte Applicant had on 24th January, 2008 lodged for a V.A.T **Refund Claim** for the period August – September 2007. Over and above lodging a claim for the refund, the Respondent also discovered that the ex parte Applicant had also carried forward in its account with the Respondent a sum of Kshs.75 million.

29. The Respondent's officers (the Respondent) contended that making a claim for a refund and seeking to carry a credit forward was contrary to the provisions of Section 11 (2) of the V.A.T Act as read with the explanatory Public Notice No.37 of 2003, issued by the then Commissioner of V.A.T and which provision prohibited the carrying excess **input tax** over **output tax** over the respective tax period(s). It was the Respondent's position that where a claim for a refund has been lodged, and was pending and carrying forward a credit, would amount to a double claim. The question is, what does the law and in particular Section 11 (2) say?

30. The contentious Section 11 (2) of the Value Added Tax is titled "**Credit for input tax against output tax"** and says-

> **"11(2) Subject to the regulations and provisions of this section, input tax or tax withheld by a tax withholding agent may, at the end of either the period in which the supply, importation or withholding of tax occurred, or the next following tax period, be excluded by the registered person, so far as not previously deducted and to the extent and subject to the exemption provided under this section, from the tax payable by him or supplies by him; Provided that no input tax may be deducted –**
>
> **(a) more than twelve months after that tax becomes due and payable pursuant to section 13 or the tax is withheld as the case may be made,**
>
> **(1A). [sets out the conditions under which input or tax withheld may be deducted under sub-section (1)]**
>
> **(2) where an amount of input tax may be so deducted under subsection (1) exceeds the amount of output tax due the amount of the excess shall be carried forward to the next tax period;**
>
> **(2A) Where excess input tax is payable under sub-section (2), a registered person shall lodge a claim for the amount payable within twelve months from the date the tax became payable, or such longer period not exceeding twenty-four months, as the Commissioner may allow."**

31. For proper determination of the application herein, I also set out Section 6 which is contained in Part III **Charges** to **Tax**, of the V.A.T Act. It provides –

> "**6(1) Tax shall be charged on any supply of goods or**
>
> **services made or provided in Kenya where it is a taxable supply made by a taxable person in the course of or in furtherance of any business carried on by him.**

(2) – (4)

(5) Tax on importation of goods into Kenya shall be charged as if it were a duty of customs and shall be payable by the person who imports the goods"

32. Neither Section 11 nor any other provision of the VAT Act defines "**input**" or "**output**" tax. "**Input tax**" means the tax which a trader or manufacturer pays for its acquisitions. In this context, it is the meaning which the ex parte Applicant is charged by its suppliers. "**Output tax**" is the sum charged to the purchaser of the ultimate product, at the rate currently of 16%, unless the product is for export and in which event, it is "**zero rated."**

33. For instance for the purposes of a manufacturer the V.AT. charged on the finished product sold to a Kenyan customer would be Kshs.16/= on Kshs.200/=. The manufacturer would however refund Kshs.16/= but remit also 16/= to the taxman, or the Respondent.

34. Carrying forward of the tax comes only where the V.A.T element charged exceeds what the supplier paid. Once a claim for refund is made, no sum can be carried forward to the next tax period. Generally it is expected that once a claim is lodged, steps are taken to process the claim, either a refund is made or adjustments made under the law. Paragraph 9 of the Respondents Replying Affidavit of **Tomkys Kandie Kigen**) explains-

"9. hat in carrying forward as credit amounts which the ex parte Applicant had previously claimed from the Respondent the ex parte Applicant failed to comply with section 11 (2) of the V.A.T Act as read together with Public Notice Number 37 of 2003 which prohibits carrying forward of the excess of input tax over output to the next tax period in the event that a claim in respect of the credit has been lodged for refund purposes…"

10. That a result of the ex parte Applicant's filing its returns contrary to the above directions, there was a double claim that interfered with the subsequent payment returns.

11. That in view of the said anomaly and in a bid to correct the same, the Respondent's Debt Recovery Unit thus proceeeded to make the necessary adjustments and raise an assessment and demand tax and interest due amounting to Kshs.50,000,743.00 [from the ex parte Applicant]

12. That in response to the said demand by the Respondents, the ex parte Applicant communicated to KRA stating that they had made adjustments to their VAT calculations at the time of receipt of the tax refunded rather than at the time of making the claim." The said action by the Applicant was obviously contrary to the provisions of the law specifically Section 11(2) of the VAT Act as read together Public Notice number 37 of 2003."

35. Though the ex parte Applicant has tried to explain away these averments through the Further Affidavits of **Zuher Kassamali Taibjee** its Chief Accountant, sworn and filed on 22nd April, 2013, the explanations do not detract from the fact that the Respondent was acting within the provisions of the law.

36. It sounds but like a "**cliché** because we in the Courts and practitioners of this branch of the law hear and apply these words and expressions every day. It nevertheless, for the sake of the record, pays to repeat them here -

"…..the remedy of judicial review is concerned with

reviewing not the merits of the provisions of which the application for judicial review is made, but the decision-making process itself. It is important to remember the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he/she has been subjected and it is no part of that purpose to substitute the opinion of the judiciary or that of the individual judges for that of the authority

constituted by law to decide the matter in question" - **Republic Vs. Kenya Revenue Authority, ex parte Yaya Towers Limited [2008] eKLR".**

37. In the English case, **CIVIL SERVANTS UNION Vv. THE MINISTER FOR CIVIL SERVICE [1985] AC** the Court paraphrased the remedy of judicial review, and in particular the remedy of **"Certiorari"** is founded upon the three "I's, "**illegality** "**irrationality"** and "**procedural impropriety,**" all summarized in the doctrine of "**Ultra Vires ",** and is intended and meant to correct the various improprieties which may be committed by those entrusted with the exercise of public authority. As this court stated in **Republic vs. Hon. B. Koech, the Senior Resident Magistrate Mombasa ex parte Zawadi Hamisi and Klaashendrik Kamminga, (Mombasa H.C. Misc. Application No. 10 of 2015), the Yaya Centre case (Supra),** expanded Lord Diplock's three I's into **inter alia.**

(i) abuse of discretion

(ii) Irrationality,

(iii) excess of jurisdiction,

(iv) improper motives,

(v) failure to exercise discretion;

(vi) abuse of the rules of natural justice,

(vii) fettering discretion

(viii) error of law;

38. I**n REPUBLIC vs. ANTI-COUNTERFEIT AGENCY & 2 OTHERS ex parte SURGIPHAM LIMITED [2011] eKLR, referring to Halsbury's Laws of England 4th Edition, Vol. III,** paragraph 12, at page 270, the Court said –

"**The remedies of quashing orders (formerly known as orders of Certiorari), prohibiting orders (formerly known as orders of prohibition) mandatory orders formerly known as orders of mandamus) are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief, undue delay, unmeritorious conduct, acquiescence in the irregularities complained of or waiver to the right to object may also result in the court declining to grant the relief."**

39. The application herein is essentially based on the ground that the Respondent's conduct in demanding payment of Kshs.50,500,743.00 from the ex parte is contrary to the provisions of Article 47 of the Constitution of Kenya 2010, which provision guarantees the Applicant the right to fair administrative action which is expeditious, fair and just. Contrary to the said guarantees, the Applicant claims that the action of the Respondent is unfair, oppressive and unjust, and that therefore the Applicant is entitled to the orders sought.

40. **"Fair"** connotes the right to be granted an opportunity to be heard on the matter under dispute. It is clear from both the ex parte Applicant's own pleadings that it was given adequate opportunity to question the basis of and legality of the computation, and demand for the sum of Kshs.50,500,743.00. That the ex parte Applicant and the Respondent failed to agree as to which of the computation was correct is a question of merit and not process of decision-making.

41. As indicated in my decision in **Republic Vs. Kenya Revenue Authority** ex parte **Abdalla Brek Said t/a Al Amry Distributors & 4 Others** (Mombasa Miscellaneous Application No. 57 of 2010), this is one

of those disputes which revolved around the merits of the demand of the **"input and output"** taxes. The determination of such disputes is subject to appeal under Section 33 of the Act to the Appeals Tribunal established under Section 32 of the V.A.T Act. It was the ex parte Applicant's Counsel's contention that the Tribunal did not exist as of the time when the dispute arose, and the filing of the application and that consequently, judicial review was the most efficacious remedy.

42. This contention is of course not correct in **REPUBLIC Vs. NATIONAL ENVIONMENTAL MANAGEMENT AUTHORITY [2011] eKLR**, where after reviewing the various authorities cited herein, the Court of Appeal concluded at page 16-

> **". . . the principle running through these cases is that 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..."**

43. Several questions arise. **Firstly,** whether there existed a Value Added Tax Tribunal as envisaged under Sections 32 and 33 of the V.A.T Act. **Secondly**, would it make a difference, if such Tribunal did not exist? In other words would orders of judicial issue as a matter of course or right?

44. I will answer the second question first. The existence of an appropriate Tribunal would require the judicial review court to determine that the complainant or dispute ought to have been referred to the Tribunal. This is because it is the body charged or burdened with the function to determine the complaint or dispute on merit.

45. The first question would be answered by a finding that if there was no appropriate Tribunal then the Court is bound to inquire into the **legality**, **irrationality** or **propriety** of the decision-making process. If the court were to establish that decision was fraught with procedural impropriety, illegality or irrationality, then the court must find in favour of the ex parte Applicant and grant the appropriate judicial review relief(s).

46. The ultimate question here therefore is whether the decision by the Respondent to examine the ex parte Applicant's account arising from the Applicant's simultaneous claim for refund, and carry over credit within the same tax period was lawful.

47. Section 9 of the Seventh Schedule to the VAT Act provides as follows –

> **"9(1) Where, in the opinion of the Commissioner, any person has failed to pay any of the tax which has become payable by him under this Act by reason of –**
>
> **(a) his failure to keep proper books of account, records of documents, required under any Act, or the incorrectness or inadequacy of those books of account, record or document; or**
>
> **(b) his failure to make any return enquiries under this Act, or delay in making any such return or the correctness or inadequacy of any such return, or**
>
> **(c) his failure to apply for registration as a taxable person under this Act, the Commissioner may, on such evidence as may be available to him, assess the amount of the tax due and that amount of tax shall be due and payable forthwith by the person liable to pay the tax."**

48. The Respondent's case is that the registered tax payer such as the ex parte Applicant may claim for a

refund where the output tax exceeds the input tax, that is, in terms of Section 11(2) of the V.A.T Act. The tax payer has also an option to carry forward such sum as credit within the tax period. A tax payer cannot however do both. It may amount to a double claim.

49. Once the taxman's antennae are raised and he acts in accordance with the provisions of Section 9 of the Seventh Schedule to the Act, there can be no ground for holding either that be acted **illegally**, **irrationally**, or without candour and fairness, when he has also complied with the rules of natural justice (procedural impropriety).

50. In the circumstances therefore, I find no merit in the ex parte Applicant's Notice of Motion dated and filed on 17th October, 2012, and dismiss the same with costs to the Respondents.

51. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 14th day of October, 2016.

M. J. ANYARA EMUKULE, MBS

JUDGE

In the presence of:

Mr. Ondego holding brief Mr. Khagram for Petitioner

Mr. Lemiso holding brief Mr. Ado for Respondent

Mr. Silas Kaunda Court Assistant