



Altech Stream East Africa Ltd v Commissioner of Domestic Taxes (Miscellaneous Application E172 of 2023) [2024] KEHC 2413 (KLR) (Civ) (1 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2413 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS APPLICATION E172 OF 2023
JM CHIGITI, J
MARCH 1, 2024

BETWEEN

ALTECH STREAM EAST AFRICA LTD EXPARTE APPLICANT

AND

COMMISSIONER OF DOMESTIC TAXES RESPONDENT

RULING

1. Before this court is an *Ex-parte* Chamber Summons dated 6th November, 2023. The Application is said to be brought under Order 53 Rule 1(1) and (2) of the *Civil Procedure Rules*. The *Ex-parte* Applicant is seeking for the following orders, that: Leave be granted to the applicant to file an application for judicial review by way of an order of mandamus directed to the Commissioner of Domestic Taxes to compel him to process and refund the applicant excess tax of Kshs.48, 385,977.62 and pay the sum of Kshs. 3,104,765 being the costs awarded to the applicant in High Court Income Tax Appeal no. E138 of 2020 *Commissioner of Domestic Taxes v Altech Stream (E.A) Limited*; and The costs of this application be awarded to the applicant.
2. The Application is accompanied by a Statutory Statement evenly dated; and a Verifying Affidavit dated 18th October, 2023 sworn by Johannes Jacobus Benjamin Schutte - described as the director of the *Ex-parte* Applicant.
3. I have considered the Application and the annexure therein; I find the issue for determination is: Whether the Application for leave is merited.

Analysis and determination:

4. The requirement to seek for leave to file for judicial review orders is provided for under Order 53 Rule 1 of the *Civil Procedure Rules* which stipulates under mandatory terms that no Application for an



order of Certiorari, *Mandamus* or Prohibition shall be made unless leave therefore has been granted in accordance with the rule.

5. In *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1982] 617, [1981] 2 ALL ER 93 Lord Diplock explained the need for leave as follows:

“Its purpose is to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived.”

6. It would therefore appear that the reasons for leave are therefore two-fold and that is number one to save the court’s time and, two, so as not to leave public authorities in a state of uncertainty as to whether they can safely proceed with their operations.
7. In the same case, Lord Scarman saw the need for leave as ‘an essential protection against abuse of legal process’. In his words, “it enables the court to prevent abuse by busybodies, cranks and other mischief makers”. (see pages 653 and 113).
8. On his part, Woolf LJ referred to the need for leave, in the same case, as ‘the unique statutory means by which the court can protect itself against abuse of judicial review’.
9. In order to avoid from delving into the merits of the case, Lord Diplock, in *IRC V National Federation of Self-Employed and Small Businesses Ltd (supra)* suggested the following approach:

“If, on a quick perusal of the material then available, the court thinks the Application discloses what might on further consideration turn out to be an arguable case in favor of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief.”

10. Thus, on this basis, the applicant only has to show not that it is, but that it might turn out to be, an arguable case.
11. The question of whether a case is arguable or not may occasionally require some questioning on the case's merits, but this type of questioning won't go far enough to determine whether the case will win or fail. The questioning will be severely constrained or limited, only going as far as is required to decide whether the matter can be argued, and nothing beyond. It is from this perspective that I will consider the applicant’s Application.
12. On a quick perusal of the material then available, the court thinks the Application discloses what might on further consideration turn out to be an arguable case in favor of granting to the applicant the leave sought.
13. Without getting into merits which this court must not do at this stage, I am satisfied that the Application brings out issues around enforcement of a judgment/decreed order against the government that calls for a deeper analysis which no doubt must be heard at the subsequent stage within Order 53 of the *Civil Procedure Act*.

Disposition:

14. The Applicant has made out a prima facie case as a result of which leave to institute Judicial Review proceedings do issue, and I so hold.



Order:

1. The Application is allowed.
2. Leave is hereby granted as prayed in the Chamber Summons dated 6th November, 2023.
3. The Substantive Motion shall be filed and served within seven (7) days of today's date.
4. The Respondent shall file and serve their responses within fourteen (14) days of the date of service of the Applicant's Motion.
5. The Applicant shall thereafter file and serve its submissions within 14 days of the date of service.
6. The Respondent shall file and serve their submissions within fourteen (14) days thereafter.
7. The matter shall be mentioned on 18.6.24 with the view to securing a judgment date.

It is so ordered.

DATED, SIGNED, AND DELIVERED AT NAIROBI THIS 1ST DAY OF MARCH, 2024.

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J. CHIGITI (SC)

JUDGE

