



**Network Technics & Systems Ltd v Commissioner of Domestic Taxes
(Petition E014 of 2022) [2024] KEHC 2601 (KLR) (14 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2601 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
PETITION E014 OF 2022**

OA SEWE, J

MARCH 14, 2024

**IN THE MATTER OF ARTICLE 1, 2, 3, 10, 19, 23, 27, 28, 40,
47, 50 & 260 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF SECTIONS 4, 9 AND 11 OF
THE FAIR ADMINISTRATIVE ACTION ACT, 2015**

AND

IN THE MATTER OF SECTION 42 OF THE TAX PROCEDURE ACT, 2015

BETWEEN

NETWORK TECHNICS & SYSTEMS LTD PETITIONER

AND

THE COMMISSIONER OF DOMESTIC TAXES RESPONDENT

RULING

1. Before the court for determination is a Notice of Preliminary Objection dated 2nd May, 2023. The Notice of Preliminary Objection was filed by the respondent on 25th May 2023 on the ground that this court lacks the original jurisdiction to hear and determine the Petitioner's grievance pursuant to the mandatory provisions of the *Tax Procedures Act* No. 29 of 2015. Directions were accordingly given herein on 29th May 2023 that the Preliminary Objection be canvassed by way of written submissions.
2. Thus, the Respondent relied on its written submissions dated 31st May 2023, as filed on 2nd June 2023. It proposed a single issue for determination; namely, whether the Court has the primary jurisdiction to entertain this matter whose dispute is alleged issuance of Agency Notices by the respondent to recover tax. The respondent's submissions were accordingly hinged on Section 51 of the *Tax Procedures Act*, which requires a person who wishes to dispute a tax decision to first lodge an objection with



the Commissioner. If dissatisfied with the Commissioner's decision then, under Section 52 (1) of the [Tax Procedures Act](#), such a party may appeal to the Tax Appeals Tribunal pursuant to the [Tax Appeals Tribunal Act](#), 2013 No. 40 of 2013.

3. It was further the submission of the respondent that, in that scheme of things, parties can only approach the High Court on appeal under Section 53 of the [Tax Procedures Act](#). Hence, the respondent relied on Section 9(3) of the [Fair Administrative Action Act](#) which provides that the High Court shall not review an administrative action or decision unless internal mechanisms for appeal or review are exhausted. In addition to the [Owners of the Motor Vessel "Lillian S" v Caltex Oil \(Kenya\) Ltd](#) [1989] eKLR the respondent relied on [Geoffrey Muthinja Kabiru & Others v Samuel Muguna Henry & 1756 others](#) [2015] eKLR, for the proposition that where a dispute resolution mechanism exists, the same should be exhausted before the jurisdiction of the court is invoked.

4. The law in respect of preliminary objections is well established, clear, namely that a preliminary objection ought to be demurrer, and should only be raised on a pure point of law. Thus, in [Mukisa Biscuit Manufacturing Co Ltd v West End Distributors](#) [1969] EA 696, it was held:

...a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration....a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion..."

5. Similarly, in [Nitin Properties Ltd v Singh Kalsi & another](#) [1995] eKLR the Court of Appeal held:

...A Preliminary Objection raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion..."

6. Jurisdiction is therefore a fit and proper point to raise on the basis of pleadings, because jurisdiction is a threshold issue. It is what gives the court power to make decisions and therefore without it, a court is expected to down its tools. I am therefore satisfied that the respondent's Preliminary Objection raises a pure point of law for consideration as a preliminary objection. As was pointed out by Hon. Nyarangi, JA in the [Owners of the Motor Vessel "Lillian S" v Caltex Oil \(Kenya\) Ltd](#) [1989] eKLR:

...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 its tools in respect of the matter before it the moment it holds that it is without jurisdiction..."

7. Moreover, where the issue of jurisdiction is raised, the Court is under obligation to consider it right away, as was aptly pointed out by Hon. Nyarangi, JA in [Owners of the Motor Vessel "Lillian S" v Caltex Oil \(Kenya\) Ltd](#) (*supra*). The learned Judge said:

"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."



8. Needless to say that jurisdiction flows either from *the Constitution* or Statute; and this was restated in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, thus:

...A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011*. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law..."

9. In the premises, the single issue that presents itself for determination herein is whether the Court has the primary jurisdiction to entertain the issues raised in the Petition in view of the provisions of Section 51 of the *Tax Procedures Act*. The provision states:
- (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.
10. I have looked at the Petition before the court and it revolves around the issue of agency notices issued by the respondent which the petitioner claims were issued to their clients Anjarwalla & Khanna LLP on 21st July, 2021 for the sum of Kshs. 12,790,601/=. The Petitioner has indicated that she settled the sum of Kshs. 430,000/= on 23rd July, 2021 and sought audience with the respondent who demanded a sum of Kshs. 1,000,000.00/= which was settled in part in the sum of Kshs. 570,000/=-, paid on the 27th July, 2021; whereupon the agency notice dated 21st July, 2021 was lifted. The petitioner then averred that it was agreed that the sum of Kshs. 1,000,000/= be paid monthly, which was complied with and the sums of Kshs. 1,000,000/=-, Kshs. 1,139,000/= and Kshs. 1,011, 695/= were paid on 25th August, 2021, 30th September, 2021 and 28th October, 2021 respectively.
11. Thus, by the end of November, 2021, the Petitioner had paid a total of Kshs. 5, 390, 965/= and was dismayed when on 6th January, 2022 the respondent issued an Agency Notice dated 3rd January, 2022 for a revised amount of Kshs. 10,472,743/=. It is on account of the foregoing that the petitioner contends that the respondent violated Articles 1, 2, 3, 27, 28, 47, 50 of the Constitution.
12. The petitioner has, in the main, alleged violations or threatened violations of its rights under the Bill of Rights. In particular, the petitioner cited Articles 27 and 46 of the *Constitution*; on which account it prayed for declaratory and other reliefs from the Court in that regard pursuant to Articles 22 and 23 of the *Constitution*. Looked at from that perspective, there can be no doubt that this Court has



jurisdiction to hear and determine both the Petition and the interlocutory application. This is because Article 165(3)(b) of the Constitution is explicit that:

Subject to clause (5), the High Court shall have— (b)jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;”

13. Correspondingly, Sub-article (3)(d) clothes the High Court with jurisdiction:

- (d) ...to hear any question respecting the interpretation of this Constitution including the determination of—
- (i) the question whether any law is inconsistent with or in contravention of this Constitution;
 - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - (iv) a question relating to conflict of laws under Article 191; and [*Constitution of Kenya, 2010*](#)

14. What the respondent has challenged is the original jurisdiction of the Court to handle the tax dispute that is the subject of this Petition. In particular, the petitioner disputes the sum of Kshs. 10,472,743.00/ = claimed vide the respondent’s Agency Notice dated 3rd January, 2022. The petitioner complained that it was not given an opportunity to be heard before the said notice was issued.

15. Since Section 51 (1) of the [*Tax Procedures Act*](#) is explicit that a person who objects to a tax decision must first lodge an objection before the Commissioner, it would appear that that the Petition was prematurely filed before exhaustion of the procedure provided for in the [*Tax Procedures Act*](#).

16. I have gone further to consider whether the circumstances hereof constitute an exception to the exhaustion doctrine. Indeed, it is necessary for the court to look carefully at the suitability of the alternative dispute mechanism in the context of each particular case in making its determination to ascertain whether or not exceptional circumstances exist to warrant direct approach. For instance, in the case of [*Krystalline Salt Limited v Kenya Revenue Authority*](#) [2019] eKLR, it was held:

...what constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. Thus, where an internal remedy would not be effective and/or where its pursuit would be futile, a court may permit a litigant to approach the court directly. So too where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile...

...The [*Fair Administrative Action Act*](#) does not define ‘exceptional circumstances.’ However, this court interprets exceptional circumstances to mean circumstances that are out of the ordinary and that render it inappropriate for the court to require an applicant first to pursue the available internal remedies. The circumstances must in other words be such as to require the immediate



intervention of the court rather than to resort to the applicable internal remedy...”

17. This position was reiterated by the Court of Appeal in *National Assembly of Kenya v Kina & another* (Civil Appeal 166 of 2019) [2022] KECA 548 (KLR) (10 June 2022) (Judgment), where it was held:
- ...On exhaustion of other legal relief or other constitutional remedies, where an alternative remedy would entail delay or uncertainty in providing a remedy, then such an alternative remedy is not available or effective and the doctrine of exhaustion does not apply. In addition, when the constitutionality of a statute is legitimately challenged, the only available remedy is to urge the court to nullify the offending provisions...”
18. In this case, the petitioner has not shown any exceptional circumstances as to why it was unable to employ the procedures laid down under the *Tax Procedure Act* No. 29 of 2015 to challenge the impugned Agency Notice. The dispute resolution mechanism therein is, in my careful consideration, adequate for handling the complaints raised herein by the Petitioner. In *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 Others (Interested Parties)* [2020] eKLR, it was held:
52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency’s action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine 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. This encourages alternative dispute resolution mechanisms in line with Article 159 of *the Constitution*...
60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in *the Constitution* or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.
61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court’s jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in *Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others* [2018] eKLR.
62. In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere “bootstraps” or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court...”



19. It is consequently my finding that no exceptional circumstance has been shown for this court to intervene in the matter. I, therefore, find and hold that the Petition offends the doctrine of exhaustion. Indeed, in *Geoffrey Muthinja Kabiru & Others v Samuel Muguna Henry & 1756 others* (*supra*)

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.”

20. In the result, it is my finding that the respondent’s Preliminary Objection dated 2nd May, 2023, is merited. The same is hereby upheld with the result that the Petition dated 6th April 2022 is found to be premature. It is accordingly struck out with an order for each party to bear own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 14TH DAY OF MARCH 2024

OLGA SEWE

JUDGE

