



Blitz Logistics Limited v Commissioner General Kenya Revenue Authority & another; Bidco Africa Limited (Interested Party) (Judicial Review Application E074 of 2022) [2023] KEHC 616 (KLR) (Judicial Review) (9 February 2023) (Ruling)

Neutral citation: [2023] KEHC 616 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW APPLICATION E074 OF 2022
AK NDUNG'U, J
FEBRUARY 9, 2023**

BETWEEN

BLITZ LOGISTICS LIMITED APPLICANT

AND

**COMMISSIONER GENERAL KENYA REVENUE AUTHORITY 1ST
RESPONDENT**

THE HONOURABLE ATTORNEY GENERAL 2ND RESPONDENT

AND

BIDCO AFRICA LIMITED INTERESTED PARTY

RULING

The Application

1. By way of a chamber summons dated May 16, 2022, under order 53 rule 1, 2, and 3 of the [*Civil Procedure Rules*](#), the applicant sought for orders:
 1. Spent
 2. That the applicant be granted leave to apply for the following orders:
 - a. An order of certiorari to quash the decision of the 1st respondent dated April 28, 2022 disabling the applicant's user identify number P051352331PA in its integrated customs management system



- b. An order of mandamus compelling the respondent to enable the applicant user identity number P051352331PA in its integrated customs management system
 - c. An order of prohibition do issue restraining the 1st respondent from further interfering with the said applicant's user identity number P051352331PA in its integrated customs Management System
 - d. That the leave so granted does operate of stay of any disabling, interfering and or tampering with the applicant's under Identity Number P051352331PA in the respondents integrated Customs Management System.
3. That a declaration that the decision and conduct of the respondent and in particular the impugned disabling of the applicant's user identity Number P051352331PA in its integrated Customs Management System is ultra vires, unlawful, wednesbury, unreasonable, unfair, breaches the principle of legitimate expectation, manifesting unjust and in blatant disregard of the rules of natural justice.
 4. That any other and or further relief that this Honourable Court may deem fair and just to grant.
 3. That the cost of this application be provided for.
2. The application was supported by the grounds on the face thereof and by a verifying affidavit and a Statutory Statement of even date.
 3. The case against the 2nd respondent was withdrawn and the party (*AG*) expunged from the proceedings.
 4. In response and opposing the application, the 1st respondent filed their replying affidavit dated June 22, 2022.

Notices of Preliminary Objections

5. The interested party, opposed the application by filing their notice of preliminary objection dated July 14, 2022, on the grounds:
 1. That the Honourable Court has no Jurisdiction Ratione Materiae to the Application filed by the applicant seeking leave to apply for judicial review orders against the 1st respondent's decision made on April 28, 2022.
 2. That the contended decision by the 1st respondent was anchored under Section 148(2) of the [East African Community Customs Management Act, 2004](#).
 3. That the applicant being dissatisfied with the 1st respondent's tax decision arising from a tax law that is East African Community Customs Management Act, 2004 ought to have filed an appeal against the said tax decision with the Tax Appeals Tribunal as per Section 3 of the [Tax Appeals Tribunal Act, 2013](#) read together with Section 12 of the [Tax Appeals Tribunal Act, 2013](#).
 4. That the applicant's Application also offends Section 9(2) & (3) of the [Fair Administrative Actions Act, 2015](#) which, in mandatory terms, directs the High Court or a subordinate court not to review an administrative action unless the mechanisms including internal mechanisms for appeal or review and all remedies available under other written law are first exhausted.



5. That the Application is an abuse of the Court Process as it is filed with a view to circumventing a well-defined appeal process by which the Tax Appeals Tribunal is bestowed by the Constitution to exercise its jurisdiction under Article 169 (1)(d) and (2) of the [Constitution of Kenya, 2010](#) as well as [Tax Appeals Tribunal Act, 2013](#).
6. The 1st respondent filed their Notice of preliminary objection dated July 20, 2022, on the grounds:
 - i. That the Honourable Court lacks the requisite jurisdiction to adjudicate a matter of this nature in the first instance.
 - ii. That the subject Application contravenes the provisions of Section 229 of the [East African Community Customs Management Act \(EACCMA\), 2004](#) since the decision for which judicial review orders are sought is an "alleged omission" by the Commissioner.
 - iii. That further, the subject Application offends section 230 of [EACCMA, 2004](#) which expressly states that any person aggrieved/dissatisfied with the decision of the Commissioner under section 229 may appeal to the Tax Appeals Tribunal established in accordance with section 231 of [EACCMA, 2004](#).
 - iv. That Section 229 & 230 of [EACCMA, 2004](#) applies squarely to the case at hand, and the application is therefore fatally defective and an outright abuse of court process.
 - v. That the subject Application also offends the provision of Section 9 (2) & (3) of the [Fair Administrative Actions Act, 2015](#), which primarily defers the jurisdiction of this trial court until all remedies available under any written law are first exhausted.
 - vi. That the instant Application offends the doctrine of exhaustion which is now trite law as felicitously espoused in the Court of Appeal case of: [Speaker Of National Assembly v Njenga Karume](#) (2008) 1KLR 425 and In [Geoffrey Mutbinja & Another v Samuel Muguna Henry & 1756 Others](#) (2015) Eklr.
 - vii. That the Application is therefore an outright abuse of the court process and it ought to be struck out with costs to the 1st respondent.

Applicant's response on the notices of preliminary objection

7. In response to both Preliminary Objections, the applicant filed a Response on the Notices of Preliminary Objection dated November 14, 2022. In sum, the applicant averred that this court has jurisdiction to determine the matter as the respondents actions were taken without notice, without opportunity to be heard, was an abuse of their powers, illegal and unfair. That this Application does not intend to deal with the merit of the case, but rather the process that the respondent employed leading to their impugned actions.

Respondent's submissions on the notice of preliminary objection

8. In advancing their Notice of Preliminary Objection dated July 20, 2022, the 1st respondent file written submissions dated August 11, 2022. It was their submissions that this Honourable Court lacks the requisite jurisdiction to determine this matter in the first instance pursuant to the provisions of Section



- 229, 230 and 231 of *East African Community Customs Management Act (EACCMA), 2004*. That the decision that the applicant seeks to challenge, before this Honourable Court was made under EACCMA.
9. That the applicant failed to comply with the mandatory provisions of sections 229, 230 and 231 of *EACCMA*. Section 231 of EACCMA obligates each Partner State to set up a Tax Appeals Tribunal for hearing appeals against the decision of the Commissioner under Section 229. That in Kenya, section 3 of the *Tax Appeals Tribunal Act* (TATA) establishes a Tax Appeals Tribunal (TAT) to hear appeals filed against any tax decision by the Commissioner. Under Section 2 of TATA, part of the tax laws for which the Tax Appeals Tribunal exercises jurisdiction includes *EACCMA*. That, thus this Court lacks jurisdiction to entertain the suit and Application herein since the same should be adjudicated upon by the Tax Appeals Tribunal upon the applicant complying with Sections 229 (1) and (2) of *EACCMA*.
 10. The 1st respondent further submitted that its decision to disable the applicants PIN is an appealable decision, as per the provision of section 3 and Section 52(1) of the *Tax Procedures Act*. That the Application is premature as the applicant has an avenue to seek redress by preferring an Appeal at the Tax Appeals Tribunal. Also, that the subject suit offends the provisions of section 9(2) & (3) of the *Fair Administrative Action Act, 2015* which anchors the doctrine of exhaustion. Reliance was placed on the Court of Appeal decision in *Speaker of National Assembly v Karume* (2008) 1KLR 425; and in *Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others* (2015) eKLR.
 11. The 1st respondent posited that the applicant has neither shown any exceptional circumstances excusing it from following the laid out procedure as provided for under Section 9(4) of the *Fair Administrative Action Act, 2015*; nor, sought to be exempted from this obligation imposed by section 9(2) & (3) of the *Fair Administrative Action Act, 2015*. That, inevitably, the applicant ought to have exhausted the available mechanism under EACCMA before approaching this Honourable Court. The 1st respondent sought for the Application to be dismissed with costs.

Interested party's submissions on the notice of preliminary objection

12. The interested party, in advancing their Notice of Preliminary Objection dated July 14, 2022, submitted that any court, tribunal, or panel in exercising judicial or quasi-judicial duties must be clothed with the appropriate jurisdiction in order to act; and that jurisdiction is everything, without it a court, a tribunal, or a panel has no power to make one more step. Reliance was placed on the case of *Owners of the Motor Vessel 'Lilian S' v Caltex Oil (Kenya) Ltd*, Civil Appeal No 50 of 1989.
13. It was the interested party's submission that this Honourable Court lacks the requisite jurisdiction to deal with the present matter on basis that the Application offends the doctrine of exhaustion of statutory remedies. *Speaker of National Assembly v Karume* (supra) and *Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others* (supra) cases were relied upon.
14. That in any decision which is made by the 1st respondent under the *East African Community Customs Management Act, (EACCMA) 2004* and is unsatisfactory to the applicant, the first port of call under Section 229 *EACCMA* is to make an application for review to the Commissioner. That upon review and the same result is maintained, Section 12 of the *Tax Appeals Tribunal Act* No 40 of 2013 entitles the applicant to proceed and appeal to the Tax Appeals Tribunal which is established under Section 3 of the *Tax Appeals Tribunal Act* No 40 of 2013, Laws of Kenya (the *TAT Act*).
15. The interested party maintained that the applicant ought to have exercised its right of review under Section 229 of *EACCMA*, and if dissatisfied with the respondent's decision proceed to institute an appeal with the Tax Appeals Tribunal as recommended under Section 230 of *EACCMA* read together with Section 12 of the *TAT Act* which accords the Tribunal its jurisdiction to hear appeals filed against



any tax decision, made under any tax law by the commissioner. Reliance was placed on Judicial Review Application 99 of 2018 *Republic -versus- Commissioner of Domestic Taxes: -Panalpina Airflo Limited (Ex-parte)* [2019] eKLR.

16. That the applicant has not demonstrated any exceptional circumstances. Additionally, that the doctrine of exhaustion of statutory remedies is well established under Section 9(2) & (3) of the *Fair Administrative Actions Act* No 4 of 2015 (FAA Act) which provides for exhaustion of internal mechanisms of appeal and it is couched in mandatory terms. Thus, that the only way out is the exception provided by section 9(4) of the *FAA Act*.
17. Two requirements flow from section 9(4) of the *FAA Act*. First, the applicant must demonstrate exceptional circumstances and the second requirement is that on application by the applicant, the court may grant an exemption based on the exceptional circumstance. That in the present matter, the applicant has not demonstrated any exceptional circumstances that warrant side stepping the well-articulated dispute resolution mechanism set out under two statutes, EACCMA and *TAT Act*, where a tax decision is involved.
18. Further, the interested party posited that this Honourable Court is not the court of the lowest grade competent to try this suit. That section 1B as read with Section 11 of the *Civil Procedure Act* Cap 21 Laws of Kenya, provides that suits shall be instituted at the court of the lowest grade competent to try it in recognition of the duty of the court, and their aim of efficient use of available judicial resources. That the Tax Appeals Tribunal is the lowest court competent to hear this matter and the applicant erred in filing the suit before this Honourable Court.

For this proposition, the interested party relied on the cases: Supreme Court Petition No 3 of 2016: *Albert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) -versus- Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme)* [2019] eKLR, and Petition (Application) 4 of 2021: *United Millers Limited v Kenya Bureau of Standards, Director, Directorate of Criminal Investigations & 5 others* [2021] eKLR.

19. Therefore, that the applicant has neither made an application for any exceptions that may bypass the doctrine of exhaustion and demonstrated that their case has any special circumstances that warranted the same nor have they demonstrated that the Tax Appeals Tribunal is not the lowest grade forum to adjudicate the tax decision being challenged. The interested party contended that this court lacks jurisdiction to hear this matter, and urge the court to find the same.
20. On costs, the interested party averred that the costs of dismissing the Application be awarded to the interested party. The Court is given full discretion in the awarding of costs as per Section 27 of the *Civil Procedure Act* Cap 21. The case of *Republic -versus- Rosemary Wairimu Munene, Ex-Parte applicant Ihururu Dairy Farmers Co-operative Society Ltd*, was relied on.

Applicant's submissions on the notices of preliminary objections

21. In opposition to both Notice of Preliminary Objections, the applicant filed their written submissions dated November 14, 2022. It is contended that it (applicant) is not appealing a decision of the respondent, but rather invoking the inherent powers of the High Court under Article 165(6) of the *Constitution* to conduct a judicial review of the actions taken by the 1st respondent. Also, that the 1st respondent's failure to provide the applicant with sufficient notice violated the applicant's right to a fair hearing, as provided for under Article 50 of the *Constitution*. Reliance was placed on the cases of *Fleur Investmanes Limited v Commissioner of Domestic Taxes & Another* (2018) eKLR; *Republic v*



Attorney General & 4 Others Ex Parte Diamond Hashim Lalji & Ahmed Hasham Lalji (2014) eKLR; and *Republic v Commissioner of Domestic Taxes Ex-Parte Fleur Investments Ltd.*

Issue(s) for determination

22. I have had occasion to consider to the Chamber Summons application, the statutory statement and affidavit in support. I have considered the replying affidavits, and the notices of preliminary objections on record. I have had due regard to the learned submissions by counsel. At this stage of the proceedings, and arising from the material before me, one (1) issue crystalize for determination: whether the Notices of Preliminary Objections are sustainable in law.

Analysis and determination

23. To begin with, this court is obligated to consider and determine the propriety of the preliminary objections by establishing whether they meet the legal threshold of a preliminary objection. It is trite law that a preliminary objection must be one that 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 had to be ascertained or if what is sought is the exercise of discretion. From a cursory glance at the preliminary objections as drawn, it is quite clear that the same raise a pure point of law as the court will be grappling with the question whether the application herein offends the doctrine of exhaustion of remedies under Section 9(2) of the *Fair Administrative Actions Act*. In sum, the underlying issue that unlocks the impasse in this matter is whether this court has jurisdiction to determine the dispute in light of the principles in the doctrine of exhaustion.
24. It is the respondent's and interested party's submission that the instant proceedings are invalid as judicial review is a remedy of last resort, which ought not to be resorted where another statutory procedure lies. Further, that the instant Application seeks to delve into the merits as opposed to the process by which the impugned decision was arrived at which is not within the province of judicial review. That, it is apparent that the instant matter deals with matters under the *Tax Procedures Act*, which ought to be substantially dealt with on its merits and as such not suited for judicial review.
25. It is clear from the text of the law that this court has jurisdiction to review impugned administrative action by way of judicial review. Section 9(2) of the *FAAA* places a caveat to the exercise of this jurisdiction. The court shall not review an administrative action or decision under the *FAAA* unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. Courts have had occasion to consider the application of the doctrine of exhaustion espoused under section 9(2) of the *FAAA*. In the case of *Republic v Commissioner of Cooperative Development & another Ex parte Paul Manwa & Others* JR Application No52 of 2021 the court stated;

“Should the applicants have appealed to the minister before approaching this court? It is mandatory for a party to exhaust any alternative mechanism for dispute resolution before approaching the court. Section 9 of the FAAA is couched in mandatory terms. Majanja J in Misc Civil App no 139 of 2014, Vania Investments Pool limited v Capital market Authority and Others (a decision upheld on appeal in Civil Appeal No 92 of 2014) at para 37 stated;

“In my view, the Tribunal ought to have been the first port of call. The applicant argues that the Tribunal is not quorate but I think there is nothing that prevented it from filing his appeal within the time provided by the Act. In the event the matter could not be dealt with the applicant would be at liberty to seek appropriate relief from this Court. Permitting the



matter to proceed to substantive hearing would be to impose on the Court the mandate of the Tribunal contrary to the general principle I have cited.....

“I am in agreement with the interested party’s submission that where there is an internal dispute mechanisms provided, the Court ought to exercise its jurisdiction with utmost care so as to avoid usurping the powers of the body vested with that mandate.”

26. In *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR the court of appeal put it succinctly thus;

“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that Order 53 of the Civil Procedure Rules cannot oust clear constitutional provisions.”

27. It is only in exceptional cases that this Court can entertain judicial review proceedings, where such alternative remedies are not exhausted. This was the finding by the Court of Appeal in *Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others* (2017) eKLR. The Court in *Republic v National Environmental Management Authority*, (2011) eKLR, also set out the said principle as follows:

“...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 ...”

28. Pursuant to section 9(4) of the *FAAA*, it is upon the applicant by application to demonstrate before the court exceptional circumstances warranting such party’s exemption from the obligation to exhaust any remedy if the court considers such exemption to be in the interests of justice. In our instant suit no application has been made in that regard and thus no exemption is available to the applicant. In the circumstances the applicant falls afoul of Section 9 of the *Fair Administrative Action Act* which provides that this Court shall not review an administrative action or decision under the Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. Sub-section (3) provides that this Court shall, if it is not satisfied that the remedies referred to in sub-section (2) have been exhausted, direct that an applicant shall first exhaust such remedy before instituting proceedings.

29. The applicant states that this case is exceptional as the 1st respondent decision to disable their PIN and access to the online tax platform was done without notice to it (applicant), and without an opportunity to be heard first. The question is whether these are matters than can adequately be dealt with by the Commissioner in a review and by the Tribunal on appeal or by the High Court in a further appeal or can be properly seized of this court. It is my view that these are issues that would be properly ventilated, first, before the Commissioner in an application for review, and secondly, if the applicant be aggrieved by the results of the review, by way of an appeal at the Tax Appeals Tribunal and a further appeal to the High Court as would be deemed necessary. (See *Republic v Commissioner for Domestic Taxes Ex parte Farab International FZE* [2019] eKLR).

30. In the premises this Court finds that the Notices of Preliminary Objections by interested party dated July 14, 2022, and by 1st respondent dated July 20, 2022 are merited and sustainable in law.



31. With the result that I allow the preliminary objections and dismiss the chamber summons application dated May 16, 2022. Each party is to bear its own costs.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF FEBRUARY 2023

A. K. NDUNG’U

JUDGE

