



Blitz Logistics Limited v Kenya Revenue Authority & another (Civil Suit 41 of 2022) [2023] KEHC 20554 (KLR) (9 February 2023) (Ruling)

Neutral citation: [2023] KEHC 20554 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 41 OF 2022
OA SEWE, J
FEBRUARY 9, 2023**

BETWEEN

BLITZ LOGISTICS LIMITED PLAINTIFF

AND

KENYA REVENUE AUTHORITY 1ST DEFENDANT

BIDCO AFRICA LIMITED 2ND DEFENDANT

RULING

1. The plaintiff, Blitz Logistics Limited, filed this suit on 17th June 2022 against the two defendants, Kenya Revenue Authority and Bidco Africa Limited, seeking the following reliefs:
 - (a) An order directing the 1st defendant to allow the plaintiff access to the Integrated Custom Management System;
 - (b) A prohibitive order restraining the 1st defendant from denying the plaintiff access to the Integrated Custom Management System;
 - (c) Damages to be assessed by the Court;
 - (d) Costs of the suit;
 - (e) Interest on [c] and [d] above.
2. The plaintiff complained that, on the 28th April 2022, the 1st defendant, without any notice or justification disabled its user identity in the Customs Management System, making it impossible for it to carry out any of its transactions as a clearing and forwarding company. The plaintiff further pleaded that the 1st defendant had not assigned any reason for its action; which decision was taken without offering it an opportunity to be heard.
3. Concomitantly, the plaintiff filed a Notice of Motion of even date, seeking orders that:



- (a) Spent
 - (b) Spent
 - (c) Spent
 - (d) Pending the hearing and determination of the suit, a temporary order directing the 1st defendant to allow the plaintiff access to the Integrated Custom Management System by use of User Identification Number ***** be issued.
 - (e) A prohibitive order do issue restraining the 1st defendant from denying the plaintiff access to the Integrated Custom Management System via User Identification Number ***** pending the hearing and determination of this suit.
 - (f) Costs of the application be provided for.
4. The application was expressed to have been brought under Articles 47, 48 and 159 of *the Constitution*; Section 4 of the *Fair Administrative Action Act*, 2015; Sections 1A, 1B, 3A and 63(f) of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya, and Order 51 Rule 1 of the Civil Procedure Rules, 2010. It was supported by the affidavit sworn by one of its directors, Bonface Kioko Wambua, in which it was averred that the plaintiff is a limited liability company incorporated and licensed to carry out clearing and forwarding agency business in Kenya since 2011. That in order to effectively carry out its business, the plaintiff is required to pay custom duty and other related expenses as they arise; and for this reason the 1st defendant generated User Identification Number ***** to facilitate access to the 1st defendant's Custom Management System by the plaintiff.
 5. At paragraph 7 of the Supporting Affidavit, Mr. Wambua averred that, on the 28th April 2022, the 1st defendant disabled the plaintiff's User Identity in the Customs Management System without any notice or justification, thereby making it impossible for the plaintiff to carry out any custom-related transaction. He added that the plaintiff has a constitutional right to be granted a fair hearing before an adverse decision is taken against it; and that negotiations between the plaintiff and the 1st defendant have proved futile. The plaintiff annexed several documents to its Supporting Affidavit to buttress its averments. It prayed for the Court's intervention to cushion it from suffering further losses.
 6. In response to the application, the 1st defendant filed a Notice of Preliminary Objection dated 27th June 2022, contending that the application and the suit are sub judice since the issues raised herein are also the same issues pending determination in Nairobi Judicial Review Application No. E074 of 2022: Blitz Logistics Limited v Commissioner General, Kenya Revenue Authority & 2 Others. The 1st respondent also contended that the Court lacks jurisdiction to entertain the plaintiff's application and suit by dint of Sections 229, 230 and 231 of the East African Community Customs Management Act.
 7. In addition to the Notice of Preliminary Objection, the 1st defendant filed a Replying Affidavit, sworn on its behalf by one of its officers, John Cherutich. According to the 1st defendant, the entire suit is premature as the decision was made pursuant to the EACCMA; and that the plaintiff was yet to exercise its right under Section 229 of the Act. Mr. Cherutich further averred that the suit and the application are an abuse of the process of the Court in so far as the plaintiff has already filed Nairobi Judicial Review Application No. E074 of 2022. A copy of the said application was annexed to the Replying Affidavit as Annexure "JC 1" involving the same parties and the same subject matter.
 8. The 1st defendant explained the genesis of the dispute at paragraphs 9 to 17 of its Replying Affidavit, namely that the 1st defendant suspected undervaluation on the importation of Linear Alkyl Benzene by the 2nd defendant, and that upon verification the 1st defendant noted that the importer had declared



an FOB value of US\$ 140,011.12 yet the original invoice contained a Cost and Freight Value of US\$ 240,019.2. Accordingly, extra taxes amounting to Kshs. 1,780,263.39 was demanded and paid; but that further investigations revealed that eight instances of undervaluation of importation of the same product was perpetrated between January 2019 and December 2020; one of which involved the plaintiff.

9. Thus, Mr. Cherutich averred that it was on the basis of the foregoing that the 1st defendant suspended the plaintiff's PIN pursuant to Section 145, 146 and 147 of the EACCMA and issued a demand letter for additional taxes in the sum of Kshs. 28,171,697 to the 2nd defendant. He added that the 1st defendant was in the process of instituting criminal proceedings against the directors of the plaintiff for the fraudulent entries as well as for tax evasion. Hence, Mr. Cherutich averred that the actions of the 1st defendant were justified and in accordance with the law; and that notice thereof was duly sent to the plaintiff's registered email address. Thus, the 1st defendant was of the posturing that the plaintiff is not entitled to the orders sought.
10. Another Notice of Preliminary Objection was filed by the 2nd defendant on 15th July 2022 in response to the plaintiff's application. The 2nd defendant thereby contended that:
 - (a) The Court has no jurisdiction to hear and determine the Plaintiff and the application dated 17th June 2022 against the 1st defendant's decision made on 28th April 2022.
 - (b) The contested decision by the 1st defendant was anchored under Section 148(2) of the EACCMA.
 - (c) The plaintiff being dissatisfied with the 1st defendant's tax decision arising from a tax law ought to have filed an appeal against the said decision with the Tax Appeals Tribunal as per Sections 3 and 12 of the *Tax Appeals Tribunal Act*, 2013.
 - (d) The plaintiff's Plaintiff and application amount to an abuse of the court process as the intention is to circumvent well-defined appeal process which the Tax Appeals Tribunal is bestowed with under Article 169(1)(d) and (2) of *the Constitution*.
 - (e) The plaintiff's Plaintiff and application offend the sub judice rule under Section 6 of the *Civil Procedure Act*, which prohibits any court from proceeding with a suit already instituted between the same parties.
11. As the defendants have impugned the jurisdiction of the Court in their respective Notices of Preliminary Objection, it is imperative that the Court pronounces itself thereon before embarking on the merits of the application. Thus, I have perused and considered the written submissions filed on behalf of the 1st defendant by Ms. Kithinji on 18th July 2022. She reiterated the 1st defendant's stance that what the plaintiff seeks to challenge is a decision made under EACCMA; and therefore that it was under obligation to first comply with the mandatory provisions of Sections 229, 230 and 231 of EACCMA. Hence, it was the submission of counsel that, the plaintiff having failed to comply with those provisions, it follows that the Court has no jurisdiction to entertain its suit. She relied on *Adero & Another v Ulinzi Sacco Society Limited* [2002] 1 KLR 577 and *Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1 for the proposition that jurisdiction either exists or does not ab initio, and that where a court has no jurisdiction it must down its tools in respect of the matter before it.
12. Ms. Kithinji further submitted that, where a statute establishes a specific procedure for handling a particular issue, that procedure needs to be strictly followed and exhausted before a party comes to Court. She relied on *Republic v Kenya Revenue Authority, Ex Parte Style Industries Limited* [2019] eKLR, *Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others* and *William*



- Odhiambo Ramogi & 3 Others v Attorney General & 4 Others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR and urged the Court to find that it lacks the jurisdiction to entertain the plaintiff's application as well as the suit.
13. On whether the application and suit are res judicata, Ms. Kithinji urged the Court to rely on the documents annexed to the 1st defendant's Replying Affidavit. She pointed out that the Judicial Review matter is premised on the 1st defendant's decision dated 28th April 2022 to suspend access to the Integrated Customs Management System (ICMS); and therefore that the two suits are in respect of the same subject matter between the same parties. Counsel made reference to Section 6 of the *Civil Procedure Act* as well as the cases of Republic v Paul Kihara Kariuki, Attorney General & 2 Others; Daniel Kipkemoi Bett & Another v Joseph Rono [2022] eKLR and Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 Others (Interested Parties) [2020] eKLR as to the rationale for the sub judice rule, namely to prevent courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of the same cause of action with a view of avoiding the possibility of contradictory verdicts by two courts in respect of the same subject matter.
 14. In response, Mr. Nyongesa relied on his written submissions dated 5th July 2022. He made reference to Article 165(3)(a) of *the Constitution* to augment his argument that the Court has unlimited original jurisdiction in civil and criminal matters; and that at the time of filing the suit the plaintiff had no knowledge that the dispute involved tax related issues. He consequently submitted that the plaintiff had no basis for approaching the Tax Appeals Tribunal in the absence of communication from the 1st defendant that it had been access due to non-payment of tax.
 15. As to the argument that the suit is res judicata, Mr. Nyongesa urged the Court to find that the parties to this suit and Judicial Review Application No. E074 of 2022 are not litigating under the same title. He pointed out that in the Judicial Review matter, Bidco Africa Ltd is enjoined as an interested party and not as a defendant. According to him, this has a different implication on the orders the Court may ultimately issue in respect of the 2nd defendant. Counsel relied on Marigat Ranch & 3 Others v Wesley Chepkoimet & 19 Others [2014] eKLR in which it was held that an interested party is not strictly a plaintiff or defendant, but simply a person who has a close connection to the subject matter of the suit and yet not claiming any rights over it.
 16. I have given due consideration to the grounds set out in the defendants' Notices of Preliminary Objection and note that they essentially raise the same issues of jurisdiction and res judicata. What amounts to a preliminary objection was aptly captured in Mukisa Biscuits Manufacturing Co. Ltd. vs. West End Distributors [1969] EA 696 thus:

“...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...”



17. Similarly, in *Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 Others* [2015] eKLR the Supreme Court emphasized the point that: -

“...a preliminary objection may only be raised on a “pure question of law”. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record...”

18. It is therefore plain that the issue of res judicata, as raised herein, is not such a point, in so far as the 1st defendant had to resort to its Supporting Affidavit to establish its contention that there is in existence a previous suit over the same subject matter. Moreover, the plaintiff expressed a divergent position as to whether the Judicial Review matter is between the same parties, suing or sued in the same capacity; thereby putting the Court to inquiry as to establish the facts relied on. In this regard, I find succor in *Oraro vs. Mbaja* [2005] 1 KLR 141, in which Hon. Ojwang, J. (as he then was) held that:

“...A “preliminary objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed...Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...”

19. In the light of the foregoing, I am not persuaded that the sub-judice argument amounts to a pure point of law that can be resolved without further inquiry by the Court.

20. As to whether the Court has jurisdiction to entertain the application and the suit, the Supreme Court was explicit in *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others* [2012] eKLR, that:

“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 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...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 on 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.”

21. Thus, the jurisdiction of the High Court is provided for under Article 165(3)(a) of *the Constitution* which stipulates, in part, that:

Subject to clause (5), the High Court shall have-



(a) Unlimited original jurisdiction in criminal and civil matters;

22. On the face of it therefore, the Court has jurisdiction to hear and determine this suit as presented. Indeed, in *Kenya Ports Authority v Threeways Shipping Services (K) Limited* [2019] eKLR in which an issue arose as to whether the High Court had jurisdiction to entertain a dispute that ought to have been referred to arbitration under the *Kenya Ports Authority Act*, the Court of Appeal held that:

We also bear in mind that access to justice as enshrined in Article 48 of *the Constitution* is a fundamental right, that cannot be derogated from. Whereas Alternative Dispute Resolution (ADR), such as arbitration, is crucial in expeditious disposal of disputes, by its very nature ADR is inferior to the principle of access to justice.

23. The issue therefore is not so much about jurisdiction as it is about the doctrine of exhaustion. To my mind, what this means is that, whereas the Court has jurisdiction to entertain and determine this suit, a question has been raised as to whether or not the suit is premature, granted the provisions of the EACCMA. Indeed, in *Fleur Investments Limited v Commissioner of Domestic Taxes & Another* [2018] eKLR:

Whereas courts of law are enjoined to defer to specialised Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of Justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under *the Constitution* and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly.”

24. Hence, in *Speaker of National Assembly v Karume* [1992] KLR 21 it was held that:

“Where there is a clear procedure for redress of any particular grievance prescribed 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 procedures.”

25. Likewise, in *Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others* [2015] eKLR, the Court of Appeal restated its position thus:

“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.”



26. It follows therefore that upon the impugned decision being made, the plaintiff the plaintiff ought to have resorted to Section 229(1) of the EACCMA which provides that:

“A person affected by the decision or omission of the Commissioner or any other officer on matters relating to Customs shall within thirty days of the date of the decision or omission lodge an application for review of that decision or omission.”

27. The applicable procedure is duly set out in Subsections (2) to (6) of Section 229 of the EACCMA. Moreover, Section 230 of the Act provides that:

“A person dissatisfied with the decision of the Commissioner under section 229 may appeal to a tax appeals tribunal established in accordance with Section 231.”

28. Admittedly, the plaintiff did not attempt to have its dispute with the 1st defendant resolved within the framework of Sections 229 to 131 of the EACCMA; the consequence thereof being that the suit is premature. Indeed, in *William Odhiambo Ramogi & 3 Others v Attorney General & 4 Others* (supra) it was held that:

“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*.”

29. The foregoing being my view of the matter, it is my finding that the instant application is untenable. The same is hereby struck out with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 9TH DAY OF FEBRUARY 2023

OLGA SEWE

JUDGE

