Pantech Kenya Limited v Kenya Revenue Authority & 3 others (Constitutional Petition E177 of 2022) [2023] KEHC 1610 (KLR) (Constitutional and Human Rights) (10 March 2023) (Ruling)

Neutral citation: [2023] KEHC 1610 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

CONSTITUTIONAL PETITION E177 OF 2022

AC MRIMA, J

MARCH 10, 2023

BETWEEN

PANTECH KENYA LIMITED ..... PETITIONER

AND

KENYA REVENUE AUTHORITY & 3 OTHERS ..... RESPONDENT

RULING

Introduction

1. This ruling relates to the notice of preliminary objection dated May 9, 2022 taken out by the 1st, 2nd and 3rd respondents in response to the petition herein.

2. The objection impugned the jurisdiction of this court on the principle of exhaustion.

3. Parties filed written submissions which were quite elaborate and referred to several decisions. This court is indeed grateful to all the parties.

Analysis

4. Given the length and nature of the submissions, I will not reproduce the same verbatim in this ruling. However, I will consider the parties' positions, arguments and decisions referred to in the discussion herein.

5. The objection was tailored as follows: -

> Take notice that at the hearing of the petition dated April 26, 2022, counsel for the 1st, 2nd, and 3rd respondents will raise a preliminary objection to the effect that the application be struck out for the following reasons.
>
> 1. *Tax Procedures Act* confers original jurisdiction upon the Tax Appeals Tribunal for tax disputes such as the one that is currently before this honourable court, and the High Court can only take up appellate jurisdiction in such instance.
> 2. The petition offends section 230 of the *East Africa Community Customs Management Act, 2004*, section 52, 53 and 56(2) of *Tax Procedure Act* section 7(1)(b) and 9(2) of the *Fair Administrative Actions Act*: section 12 of *Tax Appeals tribunal Act*, rules 3 and 5 of the *Tax Appeals Tribunal (appeals to the High Court) Rules 2015*; article 23(2) of the *Constitution* of Kenya.

6. Since the issue at hand is on the jurisdiction of this court, such can be raised at any time of the proceedings and even on appeal (See Court of Appeal in *Jamal Salim v Yusuf Abdullahi Abdi & another* civil appeal No 103 of 2016 [2018] eKLR). The court can also raise such issue on its own motion.

7. The Supreme Court in petition No 7 of 2013, *Mary Wambui Munene v Peter Gichuki Kingara and six others*, [2014] eKLR, while affirming its earlier position in *Samuel Kamau Macharia & anther v Kenya Commercial Bank Limited Kenya & 2 others* (2013) eKLR on jurisdiction, observed as follows: -

> ... jurisdiction is a 'pure question of law' and should be resolved on priority basis.

8. The respondents strongly argued that the dispute before court was a challenge to the tax demand notices and the agency notices issued by the 1st respondent in fulfilling its mandate to collect taxes on behalf of the Republic of Kenya. As such, the petitioner was to challenge the tax demand notice with an objection or review and if still dissatisfied to lodge an appeal before the Tax Appeal Tribunal.

9. It was posited that the above jurisdiction was created under the *East African Community Customs Management Act, 2004* (hereinafter referred to as 'the EACCM Act') and the *Tax Procedures Act*, No 9 of 2015 (hereinafter referred to as 'the TPA Act').

10. The petitioner vehemently disagreed with the respondents. It contended that the petition was not challenging the contents of the tax demand notices and the agency notices per se, but the manner in which the demand notices and the agency notices were issued which infringed its constitutional rights and as such the dispute was outside the purview of the EACCM Act and the TPA Act.

11. Going forward, since the objection is centered on the doctrine of exhaustion, I will now deal with the legal position of the doctrine of exhaustion and its applicability in this matter.

12. The doctrine of exhaustion in Kenya traces its origin from article 159(2)(c) of the *Constitution* which recognizes and entrenches the use of alternative mechanisms of dispute resolution in the following terms: -

> 159
>
> (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles-

(a) ...

(b) ...

(c) alternative forms of dispute resolution including resolution, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause 3.

13. Clause 3 is on traditional dispute resolution mechanisms.

14. The doctrine of exhaustion was comprehensively dealt with by a 5-judge bench in Mombasa High Court constitutional petition No 159 of 2018 consolidated with constitutional petition No 201 of 2019 *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (interested parties)* (2020) eKLR. The court stated as follows:

> 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* and was aptly elucidated by the High Court in *R v Independent Electoral and Boundaries Commission (IEBC) Ex Parte National Super Alliance (NASA) Kenya and 6 others* [2017] eKLR, where the court opined thus:
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> > 42. This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in *Speaker of National Assembly v Karume* [1992] KLR 21 in the following oft-repeated words:
> >
> > 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.
> >
> > 43. While this case was decided before *the Constitution* of Kenya 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine.
> >
> > This is *Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others* [2015] eKLR, where the Court of Appeal stated that:
> >
> > 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.

15. The court also dealt with the exceptions to the doctrine of exhaustion. It expressed itself as follows: -

> 59. However, our case law has developed a number of exceptions to the doctrine of exhaustion. In *R v Independent Electoral and Boundaries Commission (IEBC) & Others ex parte The National Super Alliance Kenya (NASA)* (supra), after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:
>
> > What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the *Shikara Limited Case* (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the *Constitution* or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also *Moffat Kamau and 9 others v Aelous (K) Ltd and 9 others*)
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> 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.
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> 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.

16. The above decision was appealed against by the respondents. The Court of Appeal in upholding the decision and in dismissing the appeal in Mombasa civil appeal No 166 of 2018 *Kenya Ports Authority v William Odhiambo Ramogi & 8 others* [2019] eKLR held as follows: -

> The jurisdiction of the High Court is derived from article 165 (3) and (6) of the *Constitution*. Accordingly, the High Court has unlimited original jurisdiction in criminal and civil matters, including determination of a question of enforcement of the bill of rights and interpretation of the *Constitution* encompassing determination of any matter relating to the Constitutional relationship between the different levels of government.
>
> At the High Court, we note that the learned Judges dealt with this matter under the question framed as follows: Is the court barred from considering the suit at present by virtue of article 189 of the *Constitution* and sections 33 and 34 of Inter-Governmental Relations Act of 2012 (IGRA)? The parties have advanced similar arguments as before the learned judges of the High Court. The High Court went further than just looking at the ruling by Ogola J. They also took into account the doctrine of exhaustion as enunciated in *Republic v Independent Election and Boundaries Commission (IEBC) ex parte National Super Alliance (NASA) Kenya & 6 others* [2017] eKLR. They applied a dual pronged approach before concluding that the dispute was not an inter-governmental dispute under IGRA. First, they considered that the test for determining the matter as an inter-governmental dispute for purposes of application of IGRA was not simply to look at who the parties to the dispute were, but the nature of the claim in question and; secondly, they considered that the claimed Constitutional violations seeking to be enforced are not mere "bootstraps." We have keenly addressed our minds to the learned Judges' decision and are satisfied that they stayed within the expected contours and properly directed themselves. Once they determined that the dispute was not inter-governmental in nature, we do not think it is necessary to consider whether the petitioners had exhausted their legal avenue. Jurisdiction by the High Court under article 165 (5) of the *Constitution* became automatic. And in our view, it could not be ousted or substituted.

17. Further, in civil appeal 158 of 2017, *Fleur Investments Limited v Commissioner of Domestic Taxes & another* [2018] eKLR, the learned judges of the Court of Appeal relied on an earlier decision in *Speaker of National Assembly v Njenga Karume* (1990-1994) EA 546 to assume jurisdiction by bypassing the mechanism under Income Tax Tribunal. They observed as follows: -

> 23. For the reasons we have given earlier and others that will become apparent, there were definitely exceptional circumstances that existed in this case that were outside the ambit of the Income Tax Tribunal which called for intervention by way of judicial review. 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.

18. Courts have in many occasions reiterated the position that where there are alternative avenues legally provided for in dispute resolutions, there should be postponement of judicial consideration of such disputes until after the available avenues are fully adhered to or unless it is adequately demonstrated that the matter under consideration falls within the exception to the doctrine of exhaustion.

19. Returning to the matter at hand, the petition seeks the following prayers: -

    a. A declaration that the 1st, 2nd and 3rd respondent's demand notice and notice of enforcement and as attached in an email dated April 4, 2022 and agency notice constitutes a violation of the petitioner's rights under article 10,28,29,31,33,35,40,50 and 47 of the *Constitution* of Kenya.

    b. An order of *certiorari* to bring into this court and quash the decision to demand and the notice of demand dated February 9, 2022 and notice of enforcement contained in the 1st, 2nd and 3rd respondent's email dated April 4, 2022 and subsequent agency notice dated April 12, 2022.

    c. A permanent injunction restraining the 1st, 2nd, 3rd and 4th respondents whether by themselves its officers, employees, and or agents from commencing instituting or proceeding with any decisions enforcement or prosecution against the petitioner or its directors and or officers in relation thereto or on account of the disputed tax sum of Kshs 2,622,936.00 and the interest and penalties claimed therein.

    d. General damages.

    e. Special and exemplary damages for the violation and continuous violation of the petitioner's rights.

    f. Costs and interests of this petition.

    g. Any other orders reliefs which this honourable court deems fit, just and expedient to grant

20. This court has carefully considered the parties' positions alongside the manner in which the petition was technically framed. it has, as well, considered the provisions of the EACCM Act and the TPA Act.

21. What comes out clearly from the reading of the petition is that the petitioner is not, *vide* the instant proceedings, challenging the contents of the notices (tax demand and agency), but is rather contesting the alleged fact that the respondents issued the tax demand notices, but did not serve the petitioner within the stipulated time in law thereby infringed the petitioner's right to challenge the same. As a result, the agency notices which the respondents issued as a consequence of the petitioner's failure to challenge the tax demand notices or to pay the taxes, further infringed upon the petitioner's rights as it was inter alia condemned unheard.

22. The petition is, therefore, not challenging the contents of the tax demand notices or the subsequent agency notices, but rather the process upon which they were issued. The petitioner is, hence, not challenging a 'tax decision' or an 'appealable decision' as defined in section 3 of the TPA Act. At this point in time, the petitioner is concerned with the constitutionality of the alleged deliberate failure to serve the tax demands upon it and the respondents' consequential actions.

23. The manner in which the petition is tailored, therefore, renders the EACCM Act and the TPA Act inapplicable at the moment. Such will be subject to once the petitioner challenges a tax decision or an appealable decision, which is not the case in the instant proceedings.

24. With such a finding, the objection is determined as follows: -

    a. This court has the jurisdiction to hear and determine the petition.

    b. The notice of preliminary objection dated May 9, 2022 is dismissed with costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 10TH DAY OF MARCH, 2023.

A. C. MRIMA

JUDGE

Ruling No. 1 virtually delivered in the presence of:

Mr. Adera, Counsel for the Petitioner.

Mr. Said, Counsel for the 1st, 2nd & 3rd Respondents.

Miss. Muhia, Counsel for the 4th Respondent.

Regina/ Chemutai – Court Assistants.

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