



**Soy Afric Limited v Kenya Revenue Authority & another (Commercial Case E030 of 2023) [2023] KEHC 18842 (KLR) (Commercial and Tax) (13 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18842 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E030 OF 2023  
JWW MONG'ARE, J  
JUNE 13, 2023**

**BETWEEN**

**SOY AFRIC LIMITED ..... PLAINTIFF**

**AND**

**KENYA REVENUE AUTHORITY ..... 1<sup>ST</sup> DEFENDANT**

**TIMOTHY NJAMA ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. By a Notice of Motion Application brought by way of a Certificate of Urgency dated 30/1/2023 under Section 1A, 1B, 3A of the *Civil Procedure Act*, Order 40 Rules 1, 2, 3 & 4 and Order 51 Rule 1 of the *Civil Procedure Rules*, seeking the following orders;
  - i. Spent.
  - ii. That this Honourable Court be pleased to grant an order that the Applicant reopen its factory and resumes with the manufacturing and selling of the extruded fortified composite flour under the brand name “Ndume”.
  - iii. That pending the hearing and determination of this application this Honourable Court can be pleased to issue a mandatory injunction compelling the Respondents to release and return the Applicants No KBH 369S and the perishable confiscated goods detained belonging to the Applicant and their customers within three (3) days of the order.
  - iv. That there be a temporary injunction restraining Respondents either by themselves, their agents, servants, employees, proxies and /or any persons claiming under them from raiding the Applicant’s premises or any of their customers or confiscating and detaining fortified foods



produced by the Applicant's and their other tools of the Applicant's trade pending the hearing of this application.

- v. That there be a temporary injunction order restraining Respondents either by themselves, their agents, servants, employees, proxies and/or any persons claiming under them from raiding the Applicant's premises or any of their customers or confiscating and detaining fortified foods produced by the Applicant's and their other tools of the Applicant's trade until the hearing and determination of this application.
  - vi. That in the interest of justice herein it is fair and just that all parties herein be ordered to exploit the possibility of settlement and reconciliation within timelines as set out and limited by this Honourable Court.
  - vii. That such other and/or further order be made and issued by this Honourable Court as it may deem fit and just in the interest of justice.
  - viii. That costs of this Application be provided for.
2. The application is supported by the grounds thereto and a supporting affidavit sworn on 30/1/2023 by Cornelius Muthuri, the Managing Director of the Plaintiff/Applicant. The application is opposed and the Respondent has filed a replying affidavit sworn by Nancy Jemutai and a notice of Preliminary Objection.
3. Before dealing with the substantive application this court will first determine the Preliminary Objection filed by the Respondents as it goes to the core of its jurisdiction to determine the matter before it. The Respondents have raised an objection to the jurisdiction on the following grounds;
- i. The Application and Complaint filed herein contravenes the express provisions of Section 52(1) of the [Tax Procedures Act](#).
  - ii. The Application and Complaint are filed contrary to the provisions of Section 9(2) of the [Fair Administrative Act](#).
  - iii. The Application and Complaint have been filed contrary to the provisions of Section 12 and 13 of the [Tax Appeals Tribunal Act](#).
  - iv. The Application and the Complaint are in breach of the doctrine of exhaustion; and
  - v. That the Application and the Complaint are therefore an abuse of the court process and should be struck out with costs to the 1<sup>st</sup> Defendant.
4. In the celebrated locus classica case of [Owners of the Motor Vessel "Lillian S" v Caltex Oil \(Kenya\) Ltd](#) [1989] eKLR, Justice Nyarangi stated;-
- “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. 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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
- It is therefore important that this court determines whether it has jurisdiction to hear this matter.
5. The Respondents have raised the objection and contend that there is a statutory bar to this court in handling this matter at this stage. The Respondents' contend that there is an elaborate regime of tax



laws that have set out an elaborate dispute resolution mechanism for matters falling within the tax regime and that parties are legally bound to explore before resorting to the courts which they should do as a last port of call. The Respondents further stated that under the *Tax Procedures Act*, this matter should be referred to the Commissioner or the Tax Appeals Tribunal before parties move to the High court for determination of the issues.

6. The *Tax Procedures Act* Section 52(1) & (2) provide as follows; -

"(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. No 29 of 2015 Tax Procedures [Rev 2018] 40 (3) A notice of objection shall be treated as validly lodged by a taxpayer under Subsection."

7. Further, the Respondents urged the court to find that under the *Fair Administrative Act*, Section 9(2), the Applicant was under duty to exhaust other dispute resolution measures available to it before moving to the High Court as it has done. Section 9(2) of the *Fair Administrative Act* states as follows; -

"The High Court or a subordinate court under Sub-section (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted."

8. The Respondents argued that they seized the Applicant's goods because they determined that the same were goods that attracted excise duty and that the Applicant's had not paid the necessary excise duty as required by the *Excise Duty Act*, which is the law that regulates the importation, manufacture and distribution of excisable goods, and that the goods so seized fell under Schedule 1 of the said Act. The Respondents therefore argue that their action is a tax decision and the right procedure should be followed before the Applicant can approach the High Court for relief. That the goods so seized fall under Part III of the Interpretation of the Schedule which defines Powdered Beer as follows; "Powdered Beer" -means any powder, crystals or any other dry substance which after being mixed with water or any other non-alcoholic beverage, ferments to, or otherwise becomes an alcoholic beverage." The Respondent argue that the Applicant's Ndume beverage falls within the above interpretation and that it seized a total of 373 bags of 5kgs each together with the Motor Vehicle in which they were being ferried.

9. On the flip side, the Applicant argued that it did not consider the seizure to be a tax decision capable of being processed under the *Tax Procedure Act*. That the Respondent seized its goods and motor vehicles as part of Multi agency team and wishes to have its vehicle released and the seized goods returned.

10. I have considered the mandate of the Respondent which is clearly defined by law under the Section (5) (2) of the *Kenya Revenue Act*, Cap 470 laws of Kenya, among other things is to "(2) In the performance of its functions under Subsection (1), the Authority shall— (a) administer and enforce— (i) all provisions of the written laws set out in Part I of the First Schedule and for that purpose, to assess, collect and account for all revenues in accordance with those laws; (ii) the provisions of the written laws set out in Part II of the First Schedule relating to revenue and for that purpose to assess, collect and account for all revenues in accordance with those laws;"



11. I note that despite the fact that the 1<sup>st</sup> Respondent was acting as part of a multi-agency team, the Applicant elected to file this case against the 1<sup>st</sup> Respondent and not include the other players in the taskforce. Having established that the 1<sup>st</sup> Respondent's role in matters such as the one before me is a statutory one, then one can only conclude that for it to be sued, the cause of action must relate to its mandate as set out in the law that has established it. Further and as rightly argued by the Respondent, courts have argued that parties must exhaust all available mechanisms in resolving disputes before moving to the High Court to avoid running afoul of the doctrine of exhaustion. In the case of the *Speaker of the National Assembly v Karume* (Civil Application 92 of 1992) [1992] KECA 42 (KLR)

“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”.

12. I have considered all the arguments for and in opposition to the Preliminary Objection and I am persuaded that the application and the suit before this court has been brought prematurely and without adherence to the tax regime as elaborately set out in the various tax laws. Having elected to file a suit against the 1<sup>st</sup> Respondent alone in an activity that involved other government agencies, the Applicant, in my view, elected to bring the claim before the court within the confines of the tax laws. As stated above, there are other dispute resolution mechanisms provided by the tax laws regime that a party must exhaust before moving to the High Court for review as provided for by the *Fair Administrative Act* cited above.

13. I therefore find and hold that the Preliminary Objection has merit and I will allow it. At this stage of this dispute, this court lacks jurisdiction to entertain the suit and the application. The same is therefore struck out with costs to the Respondents. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 13<sup>th</sup> DAY OF JUNE 2023.**

.....

**J.W.W. MONG'ARE**

**JUDGE**

In the Presence of:-

Mr. Kariu for the Applicant.

No appearance for the Respondent.

Sylvia - Court Assistant

