



**Republic v Kenya Revenue Authority & another; Kenya Ports Authority (Exparte Applicant); Standard Chartered Bank (K) Limited & 4 others (Interested Parties) (Judicial Review Application E015 of 2022) [2023] KEHC 23786 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 23786 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
JUDICIAL REVIEW APPLICATION E015 OF 2022**

**OA SEWE, J**

**SEPTEMBER 22, 2023**

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW  
ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS**

**AND**

**IN THE MATTER OF: CONSTITUTIONAL RIGHTS PURSUANT TO ARTICLES 2, 3(1),  
19, 20, 22(1), 27, 40, 47(1) & (2), 50 AND 258(1) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: THE LAW REFORM ACT,  
SECTIONS 8 AND 9 CAP 26 LAWS OF KENYA**

**AND**

**IN THE MATTER OF: THE INCOME TAX ACT, CAP 470 LAWS OF KENYA**

**AND**

**IN THE MATTER OF: THE VALUE ADDED TAX ACT, 2013**

**AND**

**IN THE MATTER OF: THE TAX PROCEDURES ACT, NO. 29 OF 2015**

**AND**

**IN THE MATTER OF: THE PUBLIC FINANCE MANAGEMENT ACT, 2012**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**THE KENYA REVENUE AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**



AND

KENYA PORTS AUTHORITY ..... EXPARTE APPLICANT

AND

STANDARD CHARTERED BANK (K) LIMITED ..... INTERESTED PARTY

KENYA COMMERCIAL BANK ..... INTERESTED PARTY

NCBA BANK ..... INTERESTED PARTY

EQUITY BANK (KENYA) LIMITED ..... INTERESTED PARTY

DIAMOND TRUST BANK ..... INTERESTED PARTY

JUDGMENT

- [1] Upon being granted leave to file a substantive judicial review application, the *ex parte* applicant, Kenya Ports Authority (hereinafter, “the applicant”), filed the Notice of Motion dated 24<sup>th</sup> May 2022. The application was expressed to have been filed under Section 3A of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya, Sections 8 and 9 of the *Law Reform Act*, Order 53 Rule 1 of the Civil Procedure Rules. It seeks orders that:
- (a) The applicant be granted orders of judicial review of Certiorari to remove into this Court and quash all the Agency Notices dated 6<sup>th</sup> May 2022 and 16<sup>th</sup> May 2022 issued by the 1<sup>st</sup> respondent to the applicant’s bankers, namely, Standard chartered Bank (K) Ltd, NCBA Bank, Kenya Commercial Bank, Equity Bank (Kenya) Ltd, Diamond Trust Bank, Co-operative Bank of Kenya Limited and Citi Bank N.A (hereinafter, “the interested parties) in respect of funds due and payable to the applicant.
  - (b) The applicant be granted an order of Prohibition to prohibit the 1<sup>st</sup> respondent from issuing any other or further Agency Notices to its bankers, namely: Standard chartered Bank (K) Ltd, NCBA Bank, Kenya Commercial Bank, Equity Bank (Kenya) Ltd, Diamond Trust Bank, Co-operative Bank of Kenya Limited and Citi Bank N.A. in respect of funds due and payable to the applicant.
  - (c) Any other or further relief which the Court deems fit and just to grant.
  - (d) That costs of and incidental to the application be provided for.
- [2] The application is predicated on the grounds set out in the Statutory Statement and the Verifying Affidavit of Robert Nyawara filed contemporaneously with the Chamber Summons for leave dated 17<sup>th</sup> May 2022; and the Further Affidavit of Robert Nyawara sworn on 15<sup>th</sup> June 2022. What emerges therefrom is that a tax dispute arose between the applicant and the 1<sup>st</sup> respondent in connection with a project known as the Mombasa Port Development Project, in respect of which tax exemptions were extended, courtesy of the Government of Kenya. Thus, according to the applicant, the Ministry of National Treasury and Planning, vide its letter Ref. DFN 415/232/011 dated 4<sup>th</sup> December 2008 advised that the project was exempt from all tax including withholding tax on income accrued from the project.
- [3] The applicant further averred that, thereafter, on 4<sup>th</sup> June 2009, it received another letter from the same Ministry contradicting the first letter by stating that withholding tax on income was not exempted;



and that upon due diligence being conducted, it was assured vide a letter dated 29<sup>th</sup> August 2011 that withholding tax was indeed exempted. It therefore proceeded to sign the contract. A dispute however arose over the issue of exemption of withholding tax during the implementation of Phase II of the project whereupon the applicant was required to pay Kshs. 1,992,891,722. The applicant, being convinced that the amount was not payable, was constrained to file an appeal in the Tax Appeal Tribunal, being Tax Appeals Tribunal No. 105 of 2021: Kenya Ports Authority v Commissioner of Domestic Taxes.

- [4] The appeal was dismissed on 14<sup>th</sup> April 2022; whereupon the applicant lodged an appeal against the decision. The applicant was perturbed that the 1<sup>st</sup> respondent had issued an additional assessment on the outstanding issues vide a formal assessment dated 22<sup>nd</sup> April 2022 for a sum of Kshs. 1,992,582,700/=; particularly because the letter was not clear as to whether the additional assessment was inclusive of the previous assessment or was a new figure altogether. It consequently lodged an objection to the assessment vide a letter dated 10<sup>th</sup> May 2022. Thus, when the applicant was served with Agency Notices dated 6<sup>th</sup> May 2022 addressed to its bankers, the interested parties, it found it necessary to seek the intervention of the Court vide the instant judicial review application.
- [5] In a detailed Supporting Affidavit, the applicant's Head of Asset Management, Mr. Robert Nyawara, reiterated the applicant's grounds and cross-referenced all the pertinent documents, including the 1<sup>st</sup> respondent's tax assessment letter dated 22<sup>nd</sup> April 2022 and its Notice of Objection dated 10<sup>th</sup> May 2022 (Annexure RN 11). He explained, at paragraphs 24 and 25 that, upon intervention from Government agencies, the 1<sup>st</sup> respondent wrote letters dated 9<sup>th</sup> May 2022 to Cooperative Bank of Kenya and Citi Bank N.A. (marked Annexures RN A 10a and b) lifting the Agency Notices dated 6<sup>th</sup> May 2022 to the two banks. The rest are still in force.
- [6] The applicant filed a Further Affidavit, sworn by Mr. Nyawara on 26<sup>th</sup> May 2022 in which it was averred that, on 29<sup>th</sup> August 2011, the PS Ministry of Finance wrote to the 1<sup>st</sup> respondent informing it that they had studied the agreement for the Mombasa Port Development Project signed by the Minister for Finance; and confirmed that it provided that the Government of the Republic of Kenya would exempt:
- ...Japanese companies operating as suppliers, contractors and/or consultants from all fiscal levies and taxes imposed in the Republic of Kenya with respect to the income accruing from the supply of products and/or services to be provided under the loan.”
- [7] Mr. Nyawara adverted to other letters of a similar kind (Annexures RN 2 and RN 3) and further averred that, in Phase II of the Project, the applicant was procuring port equipment which do not fall in any class of building under the Second Schedule of the *Income Tax Act* (Cap 470) and therefore the tax assessments are erroneous. At paragraph 10 of the Further Affidavit, it was averred that a computation of the total sum in the various Agency Notices to the applicant's bankers bring the total sum over and above the amount assessed by the 1<sup>st</sup> applicant; which is detrimental to the applicant. Thus, Mr. Nyawara concluded his Further Affidavit by asserting that the 1<sup>st</sup> respondent's decision to issue Agency Notices to the applicant's bankers is not only illegal and unprocedural, but is also irrational, and should therefore be quashed as prayed by the applicant in the substantive application.
- [8] In response to the application, the 1<sup>st</sup> respondent filed a Replying Affidavit sworn on 31<sup>st</sup> May 2022 by an officer in its Corporate Taxpayer Account Management Division, Ms. Sheryl Sanya. She confirmed that, following the decision of the Tax Appeals Tribunal in respect of Tax Appeal No. 105 of 2021 filed by the applicant, the 1<sup>st</sup> respondent served Agency Notices dated 6<sup>th</sup> May 2022 upon the applicant's bankers; which notices were withdrawn by consent of the parties, but reinstated thereafter on 16<sup>th</sup> May 2022. She explained that the additional assessments for a sum of Kshs. 1,993,582,700/= related



- to management and professional fees for payments made to Toyota Tsusho Corporation and Med Marine Kilavuzkulu, and are in no way related to the Agency Notices dated 16<sup>th</sup> May 2022. Annexed to the Replying Affidavit were copies of the Tax Appeal Tribunal's judgment dated 14<sup>th</sup> April 2022, the subject Agency Notices and the Assessment Notice dated 22<sup>nd</sup> April 2022, among other documents.
- [9] Ms. Sanya further deposed that, the applicant, being dissatisfied with the decision of the Tax Appeals Tribunal delivered on 14<sup>th</sup> April 2022, ought instead to have filed an appeal at the High Court and sought for stay pending appeal. She added that the applicant's Objection Notice would be considered and determined by the 1<sup>st</sup> respondent in due course and within the timelines provided for in law. Ms. Sanya accordingly posited that the remedies sought by the applicant are wholly unmerited and that the substantive application ought therefore to be dismissed with costs to the 1<sup>st</sup> respondent.
- [10] There is on record a second Replying Affidavit sworn on behalf of the 1<sup>st</sup> respondent by Mercy Mutisya. It was also filed on 3<sup>rd</sup> June 2022 but makes reference to an application dated 18<sup>th</sup> May 2022 together with a Supporting Affidavit sworn by Turashi Kinyanjui. Her averments were otherwise similar to the averments of Ms. Sanya. She also made reference to the same documents as did Ms. Sanya.
- [11] In addition to the two Replying Affidavits, the 1<sup>st</sup> respondent filed a Notice of Preliminary Objection dated 31<sup>st</sup> May 2022, contending that the Court lacks the jurisdiction to hear and determine the suit because it was filed prematurely and in disregard of the mandatory provisions of the Tax Procedure Act, No. 29 of 2015. The Preliminary Objection was therefore treated as a response to the substantive application and argued as such.
- [12] Lastly, a Replying Affidavit was filed by Diana Rose Okumu on behalf of the 1<sup>st</sup> interested party, Standard Chartered Bank (K) Ltd. She averred that although the bank was served with an Agency Notice with a view of attaching the funds purportedly held by the bank on behalf of the applicant, the bank was not holding any funds for the applicant as the applicant had no active account with it. Ms. Okumu further averred that the 1<sup>st</sup> interested party is not a necessary party and should therefore be removed from these proceedings.
- [13] The application and the Preliminary Objection were canvassed by way of written submissions, pursuant to the directions given herein on 6<sup>th</sup> June 2022. The applicant's written submissions were filed on 15<sup>th</sup> June 2022 by \*Ms. Kaguri, Advocate. According to her, the Agency Notices issued on 6<sup>th</sup> May 2022 to the tune of Kshs. 1,992,891,711/= have never been withdrawn and are therefore still in force. She submitted that, in issuing the Agency Notices, the 1<sup>st</sup> respondent acted in blatant contravention of the law, granted that the applicant had already filed an Objection to the whole assessment. Counsel relied on *Republic v Commissioner General, Kenya Revenue Authority, Ex Parte Martin M. Mugi* [2018] eKLR.
- [14] Thus, counsel submitted that the applicant's Notice of Objection ought to have been heard and determined before the Agency Notices could be issued; and therefore that there was procedural impropriety on the part of the 1<sup>st</sup> respondent in handling the dispute between it and the applicant. In addition to *Republic v Commissioner General, Kenya Revenue Authority, Ex Parte Martin M. Mugi* (supra) counsel also relied on *Republic v Attorney General (sued for and on behalf of the Ministry of Lands) & 2 Others, Ex Parte South and Central (Thika Investments Limited & Another* [2016] eKLR in urging the Court to dismiss the 1<sup>st</sup> respondent's Preliminary Objection and allow the applicant's substantive application dated 24<sup>th</sup> May 2022.
- [15] Ms. Mambo, learned counsel for the 1<sup>st</sup> respondent, relied on her written submissions dated 31<sup>st</sup> May 2022. She submitted that the Court lacks jurisdiction to deal with the matter and ought to down its tools and close the gates to the applicant. She relied on JR No. E013 of 2022: *Chama Cha Uzalendo v*



Registrar of Political Parties and Republic v National Environmental Management Authority [2011] eKLR in urging the Court to find that the Agency Notices were premised on the judgment of the Tax Appeals Tribunal in TAT No. 105 of 2021 and therefore could only be challenged on appeal. She further submitted that orders for judicial review ought to be sought as a last resort and only where there are exceptional circumstances.

- [16] Regarding the applicant's Objection Notice dated 10<sup>th</sup> May 2022, Ms. Mambo submitted that a decision was yet to be rendered in accordance with Section 51(11) of the [Tax Procedures Act](#) by the 1<sup>st</sup> respondent; and therefore that the applicant still has the right to approach the right forum as by law stipulated. She therefore prayed that the application be dismissed with costs to the 1<sup>st</sup> respondent.
- [17] Counsel for the 2<sup>nd</sup> respondent and the 1<sup>st</sup> interested party opted not to make any submissions. Ms. Osewe for the 1<sup>st</sup> interested party opted to rely entirely on the Replying Affidavit sworn by Diana Rose Okumu on 18<sup>th</sup> August 2022.
- [18] I have given careful consideration to the Notice of Motion dated 24<sup>th</sup> May 2022 and the responses filed thereto by the 1<sup>st</sup> respondent and the 1<sup>st</sup> interested party. The 1<sup>st</sup> applicant having raised a Preliminary Objection touching on the jurisdiction of the Court, it is imperative that the issue be disposed of first before engaging in a merit consideration of the substantive Motion, for it is trite law that jurisdiction is primordial. In Owners of Motor Vessels "Lilian S" v Caltex Oil (K) Ltd [1989] KLR 1653 the Court of Appeal held:

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 the opinion that it is without jurisdiction."

- [19] In the same vein, Hon.Emukule, J. (as he then was) in the case of John Kipng'eno Koech & 2 others v Nakuru County Assembly & 5 others [2013] eKLR held: -

...By definition, "jurisdiction is the practical authority granted to a formally constituted legal body to deal with and make pronouncements on legal matters and by implication to administer justice within a defined area of responsibility. It is the scope, validity, legitimacy or authority to preside or adjudicate upon a matter..."

- [20] Hence, in the case of Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, the Supreme Court made it clear 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] Whereas there is no doubt that the Court has the jurisdiction to grant judicial review orders pursuant to Article 23 and Article 165 of the Constitution that jurisdiction is limited in certain instances either by Constitution itself, for instance by Article 165(5), or by legislation. The disputation herein is in connection with the letter dated 22<sup>nd</sup> April, 2022 pursuant to which the 1<sup>st</sup> respondent asked the applicant to pay tax in the sum of Kshs. 1,993,582,700/=. This assessment came shortly after the applicant’s appeal to the Tax Appeals Tribunal challenging a previous assessment of Kshs. 1,922,891,722/= was dismissed. Thus, at paragraph 14 of the Statutory Statement the applicant averred that:

The said letter dated 22<sup>nd</sup> April 2022 is not clear as to whether the additional assessment is inclusive of the previous assessment to make a cumulative figure or whether the additional assessment on outstanding issue is a new figure altogether and further noting the figures in both the previous Notice and the current Notice are similar.”

[22] The same averment is to be found at paragraph 22 of the applicant’s Supporting Affidavit; and it is common ground that the Agency Notices dated 6<sup>th</sup> June 2022 and 16<sup>th</sup> June 2022 were premised on the assessment letter dated 22<sup>nd</sup> April 2022. Indeed, the Agency Notices marked Annexures RN9a-g to the Verifying Affidavit leave no doubt in this regard. It is therefore instructive that Section 31(1) of the [Tax Procedures Act](#) provides: -

- (1) Subject to this section, the Commissioner may amend an assessment (referred to in this section as the “original assessment”) by making alterations or additions, from the available information and to the best of the Commissioner’s judgement, to the original assessment of a taxpayer for a reporting period to ensure that—
  - (a) in the case of a deficit carried forward under the [Income Tax Act](#) (Cap. 470), the taxpayer is assessed in respect of the correct amount of the deficit carried forward for the reporting period;
  - (b) in the case of an excess amount of input tax under the [Value Added Tax Act](#), 2013 (No. 35 of 2013), the taxpayer is assessed in respect of the correct amount of the excess input tax carried forward for the reporting period; or
  - (c) in any other case, the taxpayer is liable for the correct amount of tax payable in respect of the reporting period to which the original assessment relates.

[23] That being the case, the applicant had the right, under Section 51 of the [Tax Procedures Act](#) to object to the alterations and additions made to the original assessment. The provision states: -

- (1) A taxpayer who wishes to dispute a tax decision shall first object to 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.
- (3) A notice of objection shall be treated as validly lodged by a taxpayer under subsection (2) if—
  - (a) the notice of objection states precisely the grounds of objection, the amendments required to be made to correct the decision, and the reasons for the amendments;



- (b) about an objection to an assessment, the taxpayer has paid the entire amount of tax due under the assessment that is not in dispute or has applied for an extension of time to pay the tax not in dispute under section 33(1); and
  - (c) all the relevant documents relating to the objection have been submitted.
- (4) Where the Commissioner has determined that a notice of objection lodged by a taxpayer has not been validly lodged, the Commissioner shall within a period of fourteen days notify the taxpayer in writing that the objection has not been validly lodged.
- (5) Where the tax decision to which a notice of objection relates is an amended assessment, the taxpayer may only object to the alterations and additions made to the original assessment.

[24] As matters stand, the applicant has not only filed a Notice of Appeal in respect of the judgment of the Tax Appeals Tribunal but also a Notice of Objection dated 10<sup>th</sup> May, 2022 (Annexure 11) to the additional assessment of 22<sup>nd</sup> April 2022. It is manifest therefore that the instant suit is premature from the standpoint of Section 9 of the *Fair Administrative Action Act*, which provides that:

- (1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of *the Constitution*.
- (2) The High Court or a subordinate court under subsection (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.
- (3) The High Court or a subordinate court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that the applicant shall first exhaust such remedy before instituting proceedings under subsection (1)."

[25] In the premises, I entirely agree with position taken in *Republic v Joe Mucheru, Cabinet Secretary Ministry of Information Communication and Technology & 2 others; Katiba Institute & another (Ex parte); Immaculate Kasait, Data Commissioner (Interested Party) (Judicial Review Application E1138 of 2020) [2021] KEHC 122 (KLR) (Judicial Review) (14 October 2021) (Judgment)*, where it was held:

44. Cases now abound for the position that where there is an alternative remedy and parliament has prescribed a particular form of procedure for resolution of a complaint that procedure ought to be followed.

45. In *R vs Peterkin, ex parte Soni (1972) Imm AR 253 Lord Widgery CJ* held as follows:

“Where parliament has provided a form of appeal which is equally convenient in the sense that the appellate tribunal can deal with the injustice of which the complaint complains this court should in my judgment as a rule allow the appellate machinery to take its course. The prerogative orders form the general residual jurisdiction of this Court whereby the court supervises the work of inferior tribunals and seeks to correct injustice where no other adequate remedy exists, but both authority and common sense seem to me to demand that the court should not allow its jurisdiction under the prerogative orders to be used merely as an alternative form of appeal when and adequate jurisdiction exists elsewhere.”

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46. Section 9(2) of the *Fair Administrative Action Act* goes a step further to imply that in fact, where there exist internal mechanisms for resolution of the dispute which, inevitably, would yield an alternative remedy, it is no longer a matter of the court's discretion to entertain, let alone grant, an application for judicial review. In that event, the court will not review the administrative action until the internal mechanism has been exhausted..."

[26] The same position was taken by the Court of Appeal in *Republic v National Environmental Management Authority* [2011] eKLR thus:

The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that 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."

[27] In the premises, it is my finding that the application dated 24<sup>th</sup> May 2022 is premature. The same is hereby struck out with no order as to costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 2023.**

**OLGA SEWE**

**JUDGE**

JUDICIAL REVIEW APPLICATION NO. E015 OF 2022 JUDGMENT 5

