Finejet Limited v Commissioner for Customs & Boarder Control, Kenya Revenue Authority & another (Application E003 of 2023) [2023] KEHC 23397 (KLR) (Judicial Review) (13 October 2023) (Ruling)

Neutral citation: [2023] KEHC 23397 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

APPLICATION E003 OF 2023

J NGAAH, J

OCTOBER 13, 2023

BETWEEN

FINEJET LIMITED ..... APPLICANT

AND

COMMISSIONER FOR CUSTOMS & BOARDER CONTROL, KENYA REVENUE AUTHORITY ..... 1ST RESPONDENT

CABINET SECRETARY NATIONAL TREASURY ..... 2ND RESPONDENT

RULING

1. The application before court is an application for leave to file a judicial review application for the orders of prohibition and mandamus. The application is dated 16 January 2023 and it is expressed to be brought under Order 53 rule 1 (1) (2) and (4) of the *Civil Procedure Rules*. The prayers for leave have been framed as follows:

> "2. That the applicant be granted leave to apply for an order of prohibition, prohibiting the Commissioner of Customs and Border Control, Kenya Revenue Authority whether by himself and/or his agents from demanding payment and/or taking any enforcement action to recover the said sum of Kshs. 11,719,252.00 allegedly due from the applicant for the period December 2015 and August 2016.
>
> 3. That the applicant be granted leave to apply for an order of mandamus, to compel the Commissioner of Customs and Border Control, Kenya Revenue Authority to refund forthwith the sum of Kshs. 13,391,180.00 paid by the

applicant in respect of excise duty on jet A1 fuel for local use for the period December 2015 and August 2016."

2. The applicant also prayed that leave, if granted, does operate as stay of the decision of the Commissioner of Customs and Border Control, Kenya Revenue Authority (alternatively referred to hereinafter as KRA) to recover any part of the sum of Kshs. 11,719, 252.00 allegedly due from the applicant.

3. The application is based on a statutory statement dated 16 January 2023 and an affidavit verifying the facts relied upon sworn on even date by John Kimani who has described himself as the managing director of the applicant.

4. According to the applicant, on 19 August 2016, it received a demand from the Commissioner of Customs and Border Control, Kenya Revenue Authority for payment of excise duty on supply of jet A1 fuel during the period of January 2016 to July 2016 amounting to Kshs. 11,582,938.87. In subsequent notices, the Kenya Revenue Authority amended the tax collection period to between December 2015 and August 2016.

5. On 1 September 2016, Supplycor Kenya Limited, a company that coordinates all oil marketing companies in Kenya or OMCs sought a waiver of the said excise duty for all the affected oil marketing companies for the material period owing to apparent challenges in effecting and collecting the excise duty at the time.

6. Kenya Revenue Authority acknowledged receipt of the letter fromSupplycor Kenya Limited on 10 October 2016 and informed the applicant that it had rejected the request by Supplycor Kenya Limited for waiver of excise duty.

7. On 24 October 2016, Supplycor Kenya Limited picked up the issue with the Cabinet Secretary for National Treasury setting out the reasons why it was impracticable to demand payment of the excise duty from various OMCs. In an effort to resolve the matter, Kenya Revenue Authority wrote to the National Treasury on 10 February 2017 recommending that the National Treasury authorises the KRA to refrain from recovering the excise duty by invoking the provisions of section 37 (2) of the *Tax Procedures Act*, 2015.

8. Following the recommendation by the KRA, the applicant and the rest of the OMCs were led to believe that the matter had been resolved. But on 26 September 2019, the applicant received a demand notice for payment of Kshs. 13,931,180 as excise duty. Apparently, when this notice was brought to the attention of the Cabinet secretary, Ministry of Petroleum and Mining, he protested to the Cabinet secretary for National Treasury, through a letter dated 7 November 2019.

9. Nevertheless, when the applicant received the demand notice of 26 September 2019 it issued a notice of late objection dated 20 November 2019 in accordance with section 51 (2 and (6) of the *Tax Procedures Act*. Instead of addressing the request for extension of time to lodge the objection and make a determination on the grounds of objection raised in the said letter dated 20 November 2019, the Kenya Revenue Authority proceeded to issue agency notices on the applicant's banks for recovery of the sum of Kshs. 25,650,432/=. The communication to the banks was done on 21 November 2019.

10. It is the applicant's case that the issuance and enforcement of the said agency notices had the effect of crippling its business operations. The applicant was, therefore, compelled to pay the sum of Kshs. 13,391,180/= under protest. The applicant then proceeded to withdraw its application for leave to institute judicial review proceedings against the Kenya Revenue Authority over the same subject matter in in this Honourable Court's miscellaneous civil application no. 337 of 2019.

11. On 20 April 2022, the applicant demanded a refund of the sum of Kshs. 13,391,180/= from the Kenya Revenue Authority. In response to this demand, the Kenya Revenue Authority demanded a further payment of Kshs. 11,719,252 being the accrued interest and penalties in the subject excise duty.

12. Mr. Andrew Nyamoko swore a replying affidavit on behalf of the 1st respondent opposing the application. He has identified himself as an officer appointed under and in accordance with section 13 (3) of the *Kenya Revenue Authority Act* cap. 469, and for that reason, he is competent to swear the affidavit on behalf of the 1st respondent.

13. More importantly, he has sworn that he was involved in the review and analysis of the applicant's payments of excise duty relating to supply of jet A1 fuel.

14. On or about August 2016, the 1st respondent pursuant to section 235 and 236 of the *East African Community Customs Management Act*, 2004 (EACCMA), conducted what he described as a desk audit of the applicant's supply of jet A1 fuel for local use for the period 1 December 2015 to August 2016 to ascertain whether the applicant declared the sales correctly and made the subsequent payments of taxes arising therefrom.

15. The desk audit revealed that the applicant, for the period in question, delivered 2,420,709 litres of jet A1 fuel. The applicant, it was noted, failed to remit excise duty on the supply of jet fuel for local use contrary to the First Schedule to the *Excise Duty Act* 2015 that required the applicant to pay Kshs.5.755 for every 1000 litres of jet fuel supplied for local use.

16. Consequently, on 19 August 2016, the 1st respondent demanded payment by the applicant of Kshs. 11, 582,938.87 being the underpaid taxes.

17. On 6 September 2016, the 1st respondent received a letter dated 1 September 2016 fromSupplycor Kenya Limited which proposed to the 1st respondent to waive the tax payable for the period 2015 to August 2016. The letter did not, however, indicate how much was to be waived and for which specific companies. In any event, the letter did not make any specific reference to the applicant.

18. Nonetheless, on 10 October 2016, the 1st respondent wrote to the applicant and stated that he did not have legal powers to waive the said taxes and, therefore, the request by Supplycor Kenya Limited could not be granted.

19. It is the 1st respondent's case that the applicant was required to lodge an application for review of the respondent's decision to demand for extra taxes on or before 19 September 2016 in accordance with section 229 (1) of the *EACCMA* but as at 10 October 2016 the 1st respondent had not received any objection or application from the applicant.

20. On 25 October 2016, the 1st respondent reviewed the earlier demand after the applicant failed to lodge an application for review and demanded payment of taxes due including the excise duty for the December 2015 and August 2016 period in accordance with section 110 (1) of the *EACCMA*. The 1st respondent did not receive any response from the applicant and, consequently, the 1st respondent issued a final reminder to the applicant to pay the taxes due on 23 November 2016. The applicant was given until 28 November 2016 to pay the taxes.

21. Another reminder was issued on 26 September 2019 requesting the applicant to pay the sum of Kshs. 13,931, 180/= being the "principal extra taxes". On 29 October 2019, the 1st respondent informed the applicant that the taxes demanded are due and ought to be paid.

22. When the applicant lodged a late notice of objection under section 51 (2) of the *Tax Procedures Act*, 2015 against the 1st respondent's demand for extra taxes of 7 of November 2019, the 1st respondent

responded and informed the applicant that its letter was not valid in law and consequently the same was rejected.

23. On 19 November 2019, the applicant wrote to the 1st respondent stating that it intended to lodge an appeal to the Tax Appeals Tribunal in accordance with section 52 (1) of the *Tax Procedures Act* and that it was in the process of preparing the appeal documents. On 20 November 2019 the applicant lodged a written notice of objection under section 51 (2) and (6) of the *Tax Procedures Act* against the 1st respondent's demands for extra taxes of 19 August 2016, 10 October 2016 and 7th of November 2019.

24. The 1st respondent contends that upon lapse of the timelines granted to the applicant to pay taxes due, and since there was no valid response from the applicant, the 1st respondent was entitled to enforce the collection of the taxes due under section 131 of the EACCMA through issue of agency notices to the applicant's bankers.

25. On 26 November 2019, the applicant wrote to the 1st respondent abandoning its initial stance of appealing against the tax demand and pledged to settle the outstanding principal amounts in four equal monthly instalments. In that regard, it made an immediate payment of Kshs. 3,482, 795/=. The applicant's proposal was approved by the 1st respondent and payments were made on diverse dates between 27 November 2019 and 3 March 2020.

26. The 1st respondent noted that the applicant paid the principal taxes only but failed to settle the penalties and interest which had accrued. Consequently, the 1st respondent demanded for payment of penalties and interest from the applicant.

27. The 1st respondent admitted having received a demand from the applicant for a refund of the sum of 13,391,180 on 20 April 2022. But on 19 May 2022 it declined the applicant's demand and instead asked the applicant to either pay Kshs. 11,719, 252/= or ask for waiver of the interest and penalties.

28. On his part, the 2nd respondent filed grounds of objection opposing the applicant's application. In these grounds, it is urged that the application is an abuse of the due process of the Court and that it offends the doctrine of exhaustion of remedies. The original jurisdiction to hear and determine the applicant's dispute, it is urged, rests with the Tax Appeals Tribunal. The applicant ought to have first approached the Tax appeals tribunal as required by section 9 (2) of the *Fair Administrative Action Act*, No. 4 of 2015 as read with section 52 (1) of the *Tax Procedures Act*, No. 29 of 2015. Further, the applicant has not made an application to this Honorable Court to be exempted from the obligation to exhaust the statutory available remedies under the *Tax Procedures Act*, 2015 and the *Tax Appeals Tribunal Act*, 2013. Failure to exhaust administrative remedies, it is urged, has deprived the Tax Appeals Tribunal the opportunity to adjudicate on the matter, and consequently, the respondents have been denied an opportunity to address the matter in a specialized forum. The effect of the applicant's application is to undermine the efficiency and effectiveness of the tax administration system.

29. In their respective written submissions parties have gone as far as arguing the merits of the applicant's application as if it is the substantive motion before court. I will not take that path in determining the application because all that a judicial review court would ordinarily be concerned with at this stage of the proceedings would be whether the applicant has made out an arguable case. In other words, whether it is a case which upon consideration may merit the grant of all or any of the judicial review orders that the applicant is seeking. The leave stage of the proceedings is not meant to determine whether or not the applicant's case will succeed but whether it is arguable.

30. In *IRC V National Federation of Self-Employed and Small Businesses Ltd* (1982) 617, (1981) 2 ALL ER 93) Lord Diplock as explained the need for leave as follows:

> " Its purpose is to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived."

31. Thus, the purposes identified for leave are one, to save the court's time and, two, so as not to leave public authorities in a state of uncertainty as to whether they can safely proceed with their operations.

32. In the same case, Lord Scarman saw the need for leave as 'an essential protection against abuse of legal process'. In his words "It enables the court to prevent abuse by busybodies, cranks and other mischief makers". (see pages 653 and 113).

33. On his part, Woolf LJ referred to the need for leave, in the same case, as 'the unique statutory means by which the court can protect itself against abuse of judicial review'.

34. In order to guard against delving into the merits of the case, Lord Diplock, *IRC V National Federation of Self-Employed and Small Businesses Ltd* (*supra*) suggested the following approach.

> " If, on a quick perusal of the material then available, the court thinks the application discloses what might on further consideration turn out to be an arguable case in favor of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief."

35. Thus, on this basis, the applicant only has to show not that it is, but that it might turn out to be, an arguable case.

36. The prayers in the chamber summons are clear that it is the decisions by the 1st respondent to demand from the applicant taxes, interests and penalties which, in the 1st respondent's assessment were due and payable at particular times. The prayer for leave to file the application to file a motion for the order for the order of prohibition is targeted at the demand for Kshs, 11,719, 252/= that is said to be made up of accrued interest on the principal taxes that the applicant ought to have paid, and which it eventually paid for the period December 2015 and August 2016.

37. If leave was to be granted, the prayer for mandamus would be targeted at the 1st respondent's decision to demand taxes amounting to Kshs. 13,391,180/= which is the principal amount of taxes that are stated to have been due between the period December 2015 and August 2016 and the interest and penalties amounting to Kshs. 11,719,252/=.

38. These decisions by the 1st respondent are no doubt, tax decisions. A "tax decision" is defined in section 3 of the *Tax Procedures Act* to mean:-

    (a) an assessment;

    (b) a determination under section 17(2) of the amount of tax payable or that will become payable by a taxpayer;

    (c) a determination of the amount that a tax representative, appointed person, director or controlling member is liable for under section 15, section 17 and section 18

(d) a decision on an application by a self-assessment taxpayer under section 31(2);

(e) a refund decision;

(f) a decision under section 48 requiring repayment of a refund; or

(g) a demand for a penalty;

39. The 1st respondent's demands would fit the description of "an assessment" and a "penalty" under section 3(a) and (g).

40. The letter demanding payment of the principal sum reads as follows:

26th September, 2019

The Managing Director

Finejet Limited,

Box 103329-00100,

Nairobi-Kenya

Dear Sir/Madam

Re: Demand Notice-kshs. 13,931,180

Pursuant to section 236 of the *East African Community Customs Management Act* (EACCMA)2004, a desk/system review of your jet A1 local deliveries covering the period from December, 2015 to August, 2016 has been conducted.

On the operationalization of *Excise Duty Act* (2015), Excise Duty of Kshs. 5.755 per litre was chargeable on the local jet A1deliveries. From our desk review/system review, we have established that during the period under review, you delivered 2,420,709 litres of jet A1 locally. However, you did not remit the Excise Duty chargeable on the deliveries as per the requirements of the *Excise Duty Act* (2015). Therefore, Excise Duty of Kshs. 13, 931,180 (see attached schedule) has been assessed and is payable to the Commissioner of Customs and Border Control.

You are hereby called upon to pay the taxes assessed within thirty (30) days from the date of this letter in accordance with the provisions of section 135 of the aforesaid *Act*.

I wish to advise that the assessment as summarised in the attached schedule was limited to Simba 2005 and conclusions drawn from them and that the Commissioner of Customs and Border Control reserves the right for re-audit where new information becomes available.

Yours faithfully,

Signed

M. Mageto (Ms)

For: Commissioner, Customs and Border Control Department

41. The applicant was under no illusion that this was a tax decision and that is why in its letter dated 20 November 2019 addressed to the Commissioner, Customs and Border Department, it invoked section 51 (2) and (6) of the *Tax Procedures Act* to object to the tax decision. This letter read in part as follows:

The Commissioner

Customs and border Department

Kenya Revenue Authority

12th floor, Times Tower Building,

Haile Selassie Avenue

Nairobi, Kenya

Attention: J.M. Ojee

Dear Sir

Re: Notice Of Objection To Assessment-demand For Payment Of Kshs. 13,931,180 Being Uncollected Excise Duty On Jet A1 Fuel Supplied To Local Aviation Industry Between December, 2015 And August, 2016.

We act for Ms. Finejet Limited (hereinafter "Finejet") on whose instructions we write to you as hereunder. Attach appointment letter as Appendix 1.

We make reference to the demand letters dated 19 August 2016, 10 October 2016 and 7th of November 2019 of reference number HQ/PCA/PRI/63/2019-B. We have attached the above referenced letters for your ease of reference as Appendix II.

Pursuant to section 51 (2) and (2) of the *Tax Procedures Act* ("TPA"), Finejet objects the demand of principle tax of Kshs. 13,931,180.00 not declared and the excise duty on importation of jet A1 fuel of tariff number 2710. 19. 21 ("jet fuel") as outlined under the demand letter dated 10th October 2016. The excise duty demanded was as reflected in the table below..." (Emphasis added).

42. In conclusion, the applicant's representative wrote as follows:

> "In view of the above-mentioned objection grounds, we request that you accept our late objection and vacate the assessment issued to Finejet.
>
> With reference to the letter dated 19th November 2019, Finejet seeks to confirm that it will not be filing a notice of appeal at the Tax Appeals Tribunal. In this regard, Finejet hereby seeks to withdraw the referenced letter as the tax dispute resolution mechanisms envisioned under the TPA were not exhausted prior to the submission of the said letter. Our action was informed due to improper advice at the time. We have attached the letter for your ease of reference as appendix V..." (Emphasis added).

43. Section 51 of the *Tax Procedures Act* which the applicant invoked in objection to the tax decision reads as follows:

> 51. Objection to tax decision:
>
> (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.
>
> (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) in relation to 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 immediately 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.

(6) A taxpayer may apply in writing to the Commissioner for an extension of time to lodge a notice of objection.

(7) The Commissioner may allow an application for the extension of time to file a notice of objection if—

(a) the taxpayer was prevented from lodging the notice of objection within the period specified in subsection (2) because of an absence from Kenya, sickness or other reasonable cause; and

(b) the taxpayer did not unreasonably delay in lodging the notice of objection.

(8) Where a notice of objection has been validly lodged within time, the Commissioner shall consider the objection and decide either to allow the objection in whole or in part, or disallow it, and Commissioner's decision shall be referred to as an "objection decision".

(9) The Commissioner shall notify in writing the taxpayer of the objection decision and shall take all necessary steps to give effect to the decision, including, in the case of an objection to an assessment, making an amended assessment.

(10) An objection decision shall include a statement of findings on the material facts and the reasons for the decision.

(11) The Commissioner shall make the objection decision within sixty days from the date of receipt of—

(a) the notice of objection; or

(b) any further information the Commissioner may require from the taxpayer, failure to which the objection shall be deemed to be allowed.

44. The procedure for disputing a tax decision is well-laid out here.

45. The applicant lodged an objection as it ought to have done with the Commissioner in accordance with section 51(1) of the Act. Upon considering the objection, the Commissioner would have been bound to make what is described an 'objection decision' under section 51(1). As the Acts states, in an objection decision, the Commissioner may allow the objection either in whole or in part, or disallow it altogether.

46. If the Commissioner reached a decision contrary to the applicant's expectation, it would still be open to the applicant to invoke section 12 of the *Tax Appeals Tribunal Act*, No. 13 of 2014 which provides that

'a person who disputes the decision of the Commissioner on any matter arising under the provisions of any tax law may, subject to the provisions of the relevant tax law, upon giving notice in writing to the Commissioner, appeal to the Tribunal. Section 13 of the Tax Appeals Act details the procedure for making of the appeal'.

47. If still dissatisfied with the decision of the Tax Appeals Tribunal, the applicant would be entitled to move this court under section 32 of the *Tax Appeals Tribunal Act* to impeach that decision. Under this provision of the law, a party to proceedings before the Tribunal may, within thirty days after being notified of the impugned decision or within such further period as the High Court may allow, appeal to this Honourable Court.

48. Considered from the perspective of the foregoing provisions of the *Tax Procedures Act* and the *Tax Appeals Tribunal Act*, it can be concluded that the applicant has overlooked certain necessary steps before seeking to move this Honourable Court for the judicial review orders of prohibition and mandamus.

49. The 1st respondent urged that, as matter of fact, what the applicant ought to have applied for is for review of the Commissioner's decision under section 229 of the *EACCMA*. This section reads as follows:

> 229.(1) A person directly 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.
>
> (2) The application referred to under subsection (1) shall be lodged with the Commissioner in writing stating the grounds upon which it is lodged.

50. The demand notice dated 26 September 2019 stated that the excise duty payable was in respect of "local deliveries". "Local deliveries" are not defined in the *EAMCCA* but I assume they refer to deliveries to domestic market rather that than to the export market. If my assumption is correct, I do not see how such deliveries would be considered as "matters relating to customs" unless, of course, local deliveries meant imports to which excise duty applied.

51. But for purposes of determination of the instant application, it does not seem to matter because, either way, the applicant was enjoined to a pursue to its conclusion the review or appeal mechanisms either under section 51 of the Tax Procedure Act or under section 229 of the EACMMA.

52. In failing to embrace the alternative means prescribed under *Tax Procedures Act* or the EAMMCA, the applicant not only breached either of the two Acts but its application is also in breach of section 9(2) of the *Fair Administrative Action Act*, No. 4 of 2015 which provides in peremptory terms that '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.'

53. It is trite that the existence of an alternative remedy is never enough to oust jurisdiction in judicial review (see *Leech versus Deputy Governor of Parkhurst Prison* (1988) AC 533 per Lord Bridge at 562D). However, it has been held in *R versus Inland Review Commissioners, ex p Preston* (1985) AC 835 that:

> A remedy by way of judicial review is not to be made available where an alternative remedy exists...Judicial review is a collateral challenge: it is not an appeal. Where parliament has provided by statute appeal procedures, as in taxing statutes, it will only be very rarely that the

courts will allow the collateral process of judicial review to be used to attack an appealable decision..."

54. Addressing the same issue in *R versus Peterkin, ex p Soni* (1972) Imm AR 253 Lord Widgery CJ had this to say:

> 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 applicant complains this court should in my judgement 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 were 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 other and adequate jurisdiction exists elsewhere."

55. Our very own Court of Appeal has held in the Speaker of the national assembly v. karume, civil application no. nai 92 of 1992 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.

56. Thus, both the statute and precedent point to the conclusion that it is pertinent for an aggrieved party to embrace alternative remedies including appellate procedures before moving court for judicial review remedies. The reviewing courts will always be conscious that in considering whether a public body may have abused its powers they must not abuse their own by entertaining matters which they otherwise need not have entertained.

57. In conclusion, I am not persuaded that the applicant merits leave to file a substantive motion for the judicial review orders of mandamus or prohibition. The application is dismissed. Parties will bear their respective costs. It is so ordered.

SIGNED, DATED AND DELIVERED AT NAIROBI ON 13 OCTOBER 2023

NGAAH JAIRUS

JUDGE