



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. E037 OF 2021

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE TAX APPEALS TRIBUNAL.....1ST RESPONDENT

THE DIRECTORATE OF CRIMINAL

INVESTIGATIONS.....2ND RESPONDENT

THE KENYA REVENUE AUTHORITY.....3RD RESPONDENT

THE COMMISSIONER OF

INVESTIGATIONS & ENFORCEMENT.....4TH RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....5TH RESPONDENT

EX PARTE APPLICANT:AFRICA SPIRITS LIMITED

RULING

The Application

1. The *ex parte* Applicant herein has filed a Notice of Motion application dated 16th March 2021 under certificate of urgency, seeking the following orders:

1. This application be certified urgent and it be heard *ex parte* in the first instance and on a priority basis.

2. Leave be granted to the Applicant to apply for an Order of Prohibition restraining the Tax Appeals Tribunal either by itself, its agents or employees from taking any steps, actions and measures to fix and/or set down Tax Appeal No. 83 of 2019 [Africa Spirits Limited vs Kenya Revenue Authority and The Commissioner of Domestic Taxes] for hearing and determination pending access to and handover of the premises known as Land parcel No. THIKA MUNICIPALITY/BLOCK18/459 to the Applicant for purposes of retrieving all its documents that are relevant to the prosecution of Tax Appeal No. 83 of 2019 including the documents and information seized by the 2nd and 3rd Respondents.

3. Leave be granted to the Applicant to apply for an Order of Mandamus to compel the 2nd & 3rd Respondent to handover the premises of the Applicant herein Land parcel No. THIKA MUNICIPALITY/BLOCK18/459.

4. Leave be granted to the Applicant to apply for a Declaration that the failure by the Respondents to allow the *ex parte* Applicant access to its premises known as Land parcel No. THIKA MUNICIPALITY/BLOCK18/459 and documents seized therein amounts to a violation of the *ex parte* Applicant's constitutional right to access information, fair administrative action, access to justice and fair hearing guaranteed under Articles 35, 47, 48 and 50 of the Constitution of Kenya, 2010,

respectively.

5. The grant of leave do operate as stay of implementation of any directives, decisions and acts of the 1st Respondent as well as a stay of all proceedings in Tax Appeal No. 83 of 2019 [Africa Spirits Limited vs Kenya Revenue Authority and The Commissioner of Domestic Taxes] pending hearing and determination of the motion for judicial review.

6. The costs of this application be provided for.

2. The said application is supported by a statutory statement dated 16th March 2021 and a verifying affidavit sworn on the same date by Kepha Githu Gakure, the *ex parte* Applicant's Tax Manager. This Court (Ngaah J.) directed the *ex parte* Applicant to serve the Respondents with the said application, and that the Respondents file and serve their responses within seven days. On 8th April 2021, the learned Judge further directed the parties to comply with the said directions by today's date, and that this matter be mentioned before this Court, as the Honourable Judge was proceeding on leave.

3. I have perused the Court record and note that the 3rd Respondent has since filed a Replying Affidavit sworn on 9th April 2021 by Teresia Wanjagua an Officer in the 3rd Respondent's Investigation and Enforcement Unit. The *ex parte* Applicant's Advocates on record also sent submissions electronically by an email sent the Deputy Registrar of this Court on 12th April 2021.

4. The main grounds for the *ex parte* Applicant's application is that the *ex parte* Applicant is involved in pending tax and criminal litigation with the Kenya Revenue Authority and various of its Offices, the Directorate of Criminal Investigations, and the Director of Public Prosecutions, whom it has sued as the 2nd to 5th Respondents herein. In particular, that the 5th Respondent is prosecuting the Applicant in several criminal cases which are Milimani CM's Case Nos. 1333, 1334 and 1342 of 2019 of which Milimani CM's Case Nos. 1334 of 2019 was subsequently dismissed. In addition, that the *ex parte* Applicant has filed an appeal before the Tax Appeals Tribunal (which is sued as the 1st Respondent herein), namely Tax Appeal No. 83 of 2019 - **Africa Spirits Limited vs Kenya Revenue Authority and The Commissioner of Domestic Taxes** against the decision by the 4th Respondent on an objection to a tax demand.

5. However, that since filing of the said tax appeal on 1 March 2019, the *ex parte* Applicant has been unable to file the documents necessary to effectively prosecute the said Tax Appeal as the 2nd and 3rd Respondents herein have seized and sealed the *ex parte* Applicant's premises situate at Land parcel No. THIKA MUNICIPALITY/BLOCK18/459 and denied the *ex parte* Applicant access to the Premises which is necessary to obtain documents and material necessary to be able to prosecute the Tax Appeal. This is for the reasons that the objection decision herein was issued on 17 January 2019 by the 4th Respondent, and subsequently on 31 January 2019, the *ex parte* Applicant's premises were declared a scene of crime by the 2nd and 3rd Respondents.

6. Therefore, that by preventing access to the said premises, the 2nd – 4th Respondents are preventing the *ex parte* Applicant from ventilating its right to access to justice as guaranteed under Article 48 of the Constitution of Kenya, 2010. In addition, that the *ex parte* Applicant has a constitutional right to access the information and documentation as guaranteed by Article 35 of the Constitution.

7. The 3rd Respondent in its replying affidavit on its part gave a background to the dispute between and the *ex parte* Applicant and Respondents, and detailed the proceedings in the criminal courts and at the Tax Appeals Tribunal. According to the 3rd Respondent, there is no relation between the criminal proceedings and the proceedings before the Tax Appeals Tribunal, and that the said the Tribunal has indulged the *ex parte* Applicant for a period of over two years for it to produce its documents and moved to hear the matter on 26th March 2021, having been served with no orders of stay. The Respondent attached a copy of documents on the subject tax demand and objection, and of the proceedings of the Tax Appeals Tribunal hearing held on 26th March 2021.

The Determination

8. I have considered the application dated 16th March 2021 and the reasons offered in support of the urgency, and I am satisfied that the *ex parte* Applicant has demonstrated that this matter is urgent. This is for the reason of the imminent conclusion of the hearing of the *ex parte* Applicant's appeal at the Tax Appeals Tribunal.

9. On the orders sought by the *ex parte* Applicant for leave to commence judicial review proceedings, the applicable law is Order 53 Rule 1 of the Civil Procedure Rules, which provides that no application for judicial review orders should be made unless leave of the court was sought and granted. The main reason for the leave as explained by Waki J. (as he then was), in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996**, is to ensure that an applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration.

10. It is also trite that in an application for leave such as the present one, the Court ought not to delve deeply into the arguments of the parties, but should make a cursory perusal of the evidence before it, and make a decision as to whether an applicant's case is sufficiently meritorious to justify leave. It was in this respect explained by Lord Bingham in **Sharma vs Brown Antoine (2007) 1 WLR 780**, that a ground of challenge is arguable if its capable of being the subject of sensible argument in court, in the sense of having a realistic prospect of success.

11. In the present application, the *ex parte* Applicant has provided evidence of the pleadings filed in its appeal at the Tax Appeals Tribunal, of correspondence with the Tribunal seeking extension of time, and of a ruling dated 23 November 2020 delivered in MC Cr. Case No. 1333 of 2019 ordering that the subject premises be handed over to the *ex parte* Applicant. The *ex parte* Applicant has also averred as to why it considers the continued hearing at the Tax Appeals Tribunal and lack of access to its premises to be unlawful and unconstitutional. To this extent I find that the *ex parte* Applicant has met the threshold of an arguable case, and is therefore entitled to the leave sought to commence judicial review proceedings against the Respondents.

12. On the question of whether the said leave can operate as a stay of the hearing at the Tax Appeals Tribunal, the applicable principle is that the grant of such leave is discretionary, but the Court should exercise such discretion judiciously. Order 53 Rule 1(4) of the Civil Procedure Rules provides as follows in this respect:

“The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise.”

13. In **R (H). vs Ashworth Special Hospital Authority (2003) 1 WLR 127**, it was held that such a stay halts or suspends proceedings that are challenged by a claim for judicial review, and the purpose of a stay is to preserve the *status quo* pending the final determination of the claim for judicial review. The circumstances under which a Court may grant a direction that the grant of leave do operate as a stay of proceedings or of a decision, and the factors to be taken into account by the Courts in this regard were laid down in the said decision, and in various decisions by Kenyan Courts.

14. The main factor is whether or not the decision or action sought to be stayed has been fully implemented. It was thus held in **Jared Benson Kangwana vs. Attorney General, Nairobi HCCC No. 446 of 1995** that stay of proceedings should be granted where the situation may result in a decision which ought not to have been made being concluded. A similar decision was made by Maraga J. (as he then was) in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006** .

15. This factor was also discussed in **R (H). vs Ashworth Special Hospital Authority (supra)** where Dyson L.J. held as follows:

“As I have said, the essential effect of a stay of proceedings is to suspend them. What this means in practice will depend on the context and the stage that has been reached in the proceedings. If the inferior court or administrative body has not yet made a final decision, then the effect of the stay will be to prevent the taking of the steps that are required for the decision to be made. If a final decision has been made, but it has not been implemented, then the effect of the stay will be to prevent its implementation. In each of these situations, so long as the stay remains in force, no further steps can be taken in the proceedings, and any decision taken will cease to have effect: it is suspended for the time being.”

16. It therefore follows that were the action or decision is yet to be implemented, a stay order can normally be granted in such circumstances. Where the action or decision is implemented, then the Court needs to consider the completeness or continuing nature of such implementation. If it is a continuing nature, then it is still possible to suspend the implementation.

17. In this regard, I have perused the copy of the proceedings of the hearing of the *ex parte* Applicant’s appeal at the Tax Appeals Tribunal on 26th March 2021, and note that the Tribunal gave directions as to filing of submissions by parties and that judgment would be on notice. There are accordingly certain actions of a continuing nature required to be taken by the *ex parte* Applicant and 1st to 3rd Respondents in the said proceedings, and the said hearing is therefore amenable to stay. In addition, if stay orders are not granted, the *ex parte* Applicant’s application will be rendered nugatory. The stay orders are therefore merited to this extent.

The Orders

18. In light of the foregoing observations and findings, the *ex parte* Applicant’s Chamber Summons dated 16th March 2021 is found to be merited to the extent of the following orders:

I. The *ex parte* Applicants’ Chamber Summons application dated 16th March 2021 be and is hereby certified as urgent, and is hereby admitted for hearing on a priority basis.

II. The *ex parte* Applicant is granted leave to apply for an order of Prohibition restraining the Tax Appeals Tribunal either by itself, its agents or employees from taking any steps, actions and measures to fix and/or set down Tax Appeal No. 83 of 2019 - Africa Spirits Limited vs Kenya Revenue Authority and The Commissioner of Domestic Taxes for hearing and determination, pending access to and handover of the premises known as Land parcel No. THIKA MUNICIPALITY/BLOCK18/459 to the *ex parte* Applicant for purposes of retrieving all its documents that are relevant to the prosecution of Tax Appeal No. 83 of 2019 including the documents and information seized by the 2nd and 3rd Respondents.

III. The *ex parte* Applicant is granted leave to apply for an order of Mandamus to compel the 2nd and 3rd Respondents to handover the premises of the *ex parte* Applicant herein namely land parcel No. THIKA MUNICIPALITY/BLOCK18/459.

IV. The *ex parte* Applicant is granted leave to apply for a Declaration that the failure by the Respondents to allow the *ex parte* Applicant access to its premises known as land parcel No. THIKA MUNICIPALITY/BLOCK18/459 and documents seized therein amounts to a violation of the *ex parte* Applicant’s constitutional right to access information, fair administrative action, access to justice and fair hearing guaranteed under Articles 35, 47, 48 and 50 of the Constitution of Kenya, 2010, respectively.

V. The grant of leave shall operate as a stay of implementation of any directives, decisions and acts of the 1st Respondent as well as a stay of all proceedings in Tax Appeal No. 83 of 2019 - Africa Spirits Limited vs Kenya Revenue Authority and The Commissioner of Domestic Taxes pending hearing and determination of the *ex parte* Applicant’s substantive Notice of Motion or until further orders of this Court.

- VI. The costs of the *ex parte* Applicant's Chamber Summons application dated 16th March 2021 shall be in the cause.
- VII. The *ex parte* Applicant shall file and serve the Respondents and with (i) the substantive Notice of Motion, (ii) the Chamber Summons dated 16th March 2021 and its supporting documents, (iii) a copy of this ruling, and (v) a hearing notice, within fourteen (14) days from today's date.
- VIII. Upon being served with the said pleadings and documents, the Respondents shall be required to file their responses to the substantive Notice of Motion within fourteen (14) days from the date of service by the *ex parte* Applicant.
- IX. The *ex parte* Applicant shall, upon service of the Respondents' responses or default thereof, file and serve the Respondents with submissions on the substantive Notice of Motion within fourteen (14) days.
- X. The Respondents are granted corresponding leave to file and serve reply submissions within fourteen (14) days from the date of service of the *ex parte* Applicant's submissions.
- XI. The hearing of the *ex parte* Applicant's substantive Notice of Motion shall be held at a virtual hearing on 16th June 2021 at 3.00 pm.
- XII. In view of the Ministry of Health directives on the safeguards to be observed to stem the spread of the current COVID-19 pandemic, this Court shall hear and determine the *ex parte* Applicant's substantive Notice of Motion on the basis of the electronic copies of the pleadings and the written submissions filed by the parties.
- XIII. All the parties shall file their pleadings and submissions electronically, by filing them with the Judiciary e-filing system, and send copies by electronic mail to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com and asunachristine51@gmail.com.
- XIV. The service of pleadings and documents directed by the Court shall be by way of personal service and electronic mail, and in the case of service by way of electronic mail, the parties shall also email a copy of the documents so served to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com with copies to asunachristine51@gmail.com.
- XV. The parties shall also be required to file their respective affidavits evidencing service in the Judiciary's e-filing system.
- XVI. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for a virtual hearing by video link on 16th June 2021 at 3.00 pm, and shall send the electronic link for the hearing to the parties by the close of business on 15th June 2021.
- XVII. The Deputy Registrar of the Judicial Review Division shall send a copy of this ruling to the *ex parte* Applicant by electronic mail by close of business on Thursday, 15th April 2021.
- XVIII. Parties shall be at liberty to apply.

19. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 12TH DAY OF APRIL 2021

P. NYAMWEYA

JUDGE