**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**APPLICATION NO. 293 OF 2020**

**REPUBLIC.....APPLICANT**

**-VERSUS-**

**KENYA REVENUE AUTHORITY.....RESPONDENT**

***ex parte*:**

**CONVEX COMMODITY MERCHANTS LIMITED**

**JUDGMENT**

Before Court is the applicant's motion dated 7 August 2018. I have not managed to trace the motion itself on record but there is no doubt it was filed because both the applicant and the respondents have made referenced to the motion in their affidavits and submissions. Going by the applicant's submissions, the prayers in the motion must have been framed as follows:

> *"*
>
> ***(a) That an order of certiorari do issue to bring up before this honourable Court to quash the decision, procedure, proceedings or act by the respondent dated or made on the 4th of July 2018 purporting to freeze the applicant's bank account at Equity Bank Limited and directing the managing director of Equity Bank Limited to make payment of Kshs. 240, 387,341 being tax allegedly due by the applicant.***
>
> ***(b) That an order of certiorari issue to bring up before this honourable Court to quash the decision, procedure, proceedings or act by the respondent dated or made on the 28th June 2018 purporting to demand for payment of Kshs. 280 536, 728 allegedly as additional tax assessed by the respondent and due and payable by the applicant.***
>
> ***(c) That an order of prohibition to issue directed to the Kenya Revenue Authority the respondent herein from demanding for payment of the amount of Kshs. 240,387,341 or the amount of Kshs. 280, 586, 728 from the applicant or any of the applicant's banks or any other amount whatsoever relating to importation of sugar for the period between May 2017 and August 2017.***
>
> ***(d) That such leave so granted do operate as a stay of the respondent's order/decision to freeze the applicant's Equity Bank account or any other bank account whatsoever pending the full hearing and determination of the substantive notice of motion application."***

According to the verifying affidavit sworn by James Waithaka, the applicant's managing director, sometimes between May 2017 and August 2017, the applicant imported sugar from Mauritius Sugar Syndicate and Egyptian Sugar Integrated Industries Company Limited. The applicant subsequently made the requisite sugar import declarations.

On 12 April 2018, the applicant received a letter from the respondent indicating that there was an additional tax payable on the imports amounting to Kshs. 280,586, 727.94. The respondent subsequently sent a demand notice to the applicant dated 28 June 2018 for the payment of the amount of Kshs. 280,586,728 as tax due and payable; the notice demanded payment within 14 days of the date of the notice.

According to the applicant, the assessment of the tax amount was incorrect as it was contrary to the provisions of paragraph 2 of the Fourth Schedule to the East African Community Customs Management Act, 2004 (EACCMA) which provides that the customs value of imported

goods shall be the transaction value; this is the price actually paid or payable for the goods sold for export.

Again, the applicant's representative swore, paragraph 3 of the said Fourth Schedule further provides that where the customs value of the imported goods cannot be determined, the customs value shall be the transaction value of identical goods sold for export to the partner states and exported at or about the same time as the goods being valued.

The respondent is said to have arbitrarily, illegally and without reasonable cause opted to rely on the provisions of paragraph 3 of the Fourth Schedule of the East African Community Customs Management Act while blatantly disregarding the provisions of paragraph 20 that were applicable in this case. The value of the transaction which was the price actually paid and could easily be ascertained from the available import documentation.

It is the applicant's contention that the respondent did not request for this documentation as it should have done under section 235 of the EACCMA for the relevant period in order to determine the transaction value.

But even before the expiry of the 14 days stated in the demand notice dated 28 June 2018, the applicant received information from its bank, Equity Bank Limited on 4 July 2018 to the effect that the respondent had issued an order directing the bank to pay the amount of Kshs. 240,387,341.

The respondent is said to have issued this order freezing the applicant's bank account without affording the applicant an opportunity to defend itself and also without any explanation by the respondent on the method employed in the assessment of the additional tax.

On 12th July 2018, the applicant responded to the demand notice explaining its position with regard to the assessment of the additional tax but, by then, its bank account had already been frozen. It is against this background that the applicant has sought for the judicial review orders in terms expressed in the motion.

Two affidavits were sworn in response to the motion, the first of which was sworn by Pamela Ahago, who described herself in the affidavit as an officer appointed under Section 13 of the Kenya Revenue Authority Act cap. 469.

As far as the question of Kshs. 280,586,727.94 is concerned, Ahago swore that the applicant underwent what she referred to as "a Customs Post Clearance audit" for the period May to August 2017 in accordance with the provisions of section 235 and 236 of the EACCMA. The purpose of the audit was to determine the applicants level of compliance with the customs laws, regulations and procedures.

After the audit, the Post Clearance Audit unit of the respondent issued a tax demand of Kshs. 280,586,727.94 based on a value from the valuation and tariff where it established the value for brown sugar declared by the various entities.

The manager of the valuation department of the respondent gave evaluation report that the applicable free-on-board value is $600 per metric ton. The respondent's Commissioner was not, however, satisfied with the transaction value of the applicant's consignment; he therefore opted to use the second method of the Fourth Schedule of the EACCMA based on the transaction value of identical goods.

The respondent implemented the valuation report of $600 per metric ton across-the-board on identical goods and did not restrict it to an importer whose consignment had been intercepted. It was further found that the free on board value of $600 per metric ton was not arbitrary or baseless as alleged as this assessment is in accordance with the provisions of paragraph 8 of the Fourth Schedule of the EACCMA.

According to Ahago, the respondent did not act arbitrarily since the valuation report was subjected to all importers who have complied and have always paid the free on board value which, in any event, had been arrived at in accordance with the provisions of the EACCMA.

The respondent's Post Clearance audit unit issued the applicant with a demand letter dated 12 April 2018; however, the applicant did not respond to that letter. The respondent denied issuing agency notices to the applicant's bank; it only issued demand notices and a reminder of the demand notice.

The applicant did serve the respondent with an objection letter dated 12 July 2018 disputing the tax demanded and the free on board value. The post clearance audit unit of the respondent acknowledged the applicant's letter dated 1 October 2018 and requested for supporting documents to review and report on payment of taxes demanded.

It is the respondent's case that the demands issued were based on the applicant's undervalued consignment. The demands were issued to prevent tax evasion. In the circumstances, the demand was reasonable, lawful as the same was issued within the confines of the law and in accordance with the provisions of the EACCMA.

The second affidavit by the respondent sworn in response to the applicant's motion was sworn by Luka Chepng'ar who again described himself as an officer appointed under the Section 13 of the Kenya Revenue Act.

It was his evidence that the domestic taxes department of the respondent undertook an audit of the extent of the applicant's compliance with its tax liabilities based on information from the respondent's head of operations in the Nairobi region. The period in question was July 2017 to May 2018 and in its audit, the domestic taxes department of the respondent relied on data from the cost insurance freight value of Kshs. 1,584. 169,783. The applicant had declared sales of Kshs. 589,266,637. Thus the assessed tax liability was Kshs. 240, 387,339/=.

It issued a notice of assessment vide its letter dated 26 June 2018 demanding payment of taxes due and informed the applicant of the right to object to the assessment within 30 days. The demand for payment was not arbitrary as alleged but was based on undeclared sales and the applicant's own self-declaration.

After considering the affidavits of the respective parties together with their respective submissions, one of the legal issues that has emerged for determination and which, in my humble view, is pivotal to the outcome of the instant application, is whether the judicial review jurisdiction of this Court has been properly invoked. It is for this reason that I suppose it is a question that ought to be determined *in limine* since it may very well determine the fate of the applicant's application.

The relevant law in this regard are sections 51(1) and 52 (1) of the Tax Procedures Act No. 29 of 2015.

Section 51(1) of this Act provides 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.***

And section 52(1) provides as follows:

> ***52. Appeal of appealable decision to the Tribunal***
>
> ***(1) A person who is dissatisfied with an appealable decision may appeal the decision to the Tribunal in accordance with the provisions of the Tax Appeals Tribunal Act, 2013 (No. 40 of 2013).***

The essence of these provisions in so far as the question at hand is concerned is that judicial review is not an alternative to the appellate procedure prescribed in the Act for resolution of tax assessment disputes. It is trite that where a particular procedure is prescribed for a remedy, that procedure must be followed. In any event, the availability to the applicant of remedy that is equally convenient, beneficial and effective is a relevant factor in the exercise of this honourable court's discretion whether a judicial review application for all or any of the prerogative orders ought to be granted.

I find two English decisions on this point to be quite apt.

In **R vs Inland Revenue Commissioners, ex parts Preston (1985) AC 835 Lord Scarman** said at page 852D-F as follows:

> ***"A remedy by way of judicial review is not to be made available where an alternative remedy exists. This is a proposition of great importance. Judicial review is a collateral challenge: it is not an appeal. Where Parliament has provided by statute appeal procedures as in the 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."***

In the same case Lord Templeman said as follows on the same point:

> ***"Judicial review should not be granted where an alternative remedy is available... Judicial review process should not be allowed to supplant the normal statutory appeal procedure."( see page 862 D&F).***

And in **R vs Panel on Take-overs and Mergers, ex parts Guinness Plc (1990) 1QB 146, 177-178** Donaldson MR said as follows:

> ***"It is not the practice of the court to entertain an application for judicial review unless and until all avenues of appeal have been exhausted, at least insofar as the alleged cause of complaint could thereby be remedied... it is not for the court to usurp the functions of the appellate body."***

In this country, this position of the law has been codified in the Fair Administrative Act No. 4 of 2015; section 9 (2) thereof states as follows:

> ***9. Procedure for judicial review.***
>
> ***(1)…***
>
> ***(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) …***
>
> ***(4) …***
>
> ***(5) …***

Turning back to the applicant's case, the applicant has not demonstrated that it complied with all the provisions of the Tax Procedures Act relating to disputes over assessment of taxes before it lodged the present application. Neither has it demonstrated that it is exempted from

complying with these provisions. In appropriate cases, such an exemption would be granted under section 9(4) of the Fair Administrative Actions Act which states as follows:

> ***(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice***.

The decisions I have cited coupled with these provisions are self-explanatory and point to the conclusion that as long as the applicant has not exhausted the mechanisms that are otherwise available for resolution of a particular dispute, the institution of a suit in court for the same purpose would be premature, at the very least.

I am minded that the substantive motion here was filed on the basis of a consent between parties to the effect that leave be granted in that regard. That consent, in my humble view is, legally speaking, inconsequential in so far as it purports to ignore or disregard the express provisions of the law with respect to the mechanisms for resolution of disputes.

It is for the foregoing reasons that I find the applicant's motion dated 7 August 2018 misconceived and an abuse of the due process of the court. It is hereby dismissed with costs.

**SIGNED, DATED AND DELIVERED ON 2ND JULY 2021**

**Ngaah Jairus**

**JUDGE**