



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISCELLANEOUS APPLICATION NO. 471 OF 2018

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

AND

IN THE MATTER THE FAIR ADMINISTRATIVE ACTION ACT,

AND

IN THE MATTER OF THE TAX PROCEDURES ACT

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

KENYA REVENUE AUTHORITY.....RESPONDENT

EX PARTE:

CMC Di RAVENNA (KENYA)

RULING

Introduction

1. The *ex parte* Applicant herein (hereinafter “the Applicant”) is a subsidiary of CMC Di Ravenna, a company based in Italy. The Kenya Revenue Authority has been sued as the Respondent herein. The Respondent is a corporate body established under section 3 of the Kenya Revenue Authority Act, and has a statutory mandate of assessing and collecting revenue, and of the administration and enforcement of laws relating to revenue.

2. Upon being granted leave by this Court, the Applicant filed an application by way of a Notice of Motion dated 5th December 2018 seeking the following orders:

a) An order of Certiorari to bring into this Court for the purpose of being quashed, the Respondent’s decision dated 19th June 2018 demanding a sum of Kshs 333,220/= on account of VAT from the Applicant and disallowing the Applicant’s application seeking refund of VAT in the sum of Kshs 166,247,378/=.

b) An order of Prohibition to prohibit the Respondent by itself, servants, against employees or whomsoever, from commencing instituting or proceedings with any enforcement action against the Applicant with respect to the Respondent’s demand for a sum of Kshs 333,220/= on account of VAT as set out in the Respondent’s letter dated 19th June 2018.

c) An order of Mandamus to compel the Respondent to make a determination on the Applicant’s application seeking refund of VAT in the sum of Kshs 166,247,378/=, whilst taking into consideration the contents of the Respondent’s private ruling as contained in the letter dated 20th December 2016 and the Respondent’s letter dated 16th May 2017 addressed to the Applicant which provided that the supplies made to the Applicant’s Itare Water supply project are zero rated.

d) That the grant of leave do operate as a stay of the Respondent's decision dated 19th June 2018 demanding the sum of Kshs 333,220/= on account of VAT.

e) The costs of the application be provided for.

3. The said application was supported by facts set out in a statutory statement dated 3rd December 2018 and a verifying affidavit sworn and filed in Court on the same dated by Adriano Donadon, a Director of the Applicant. The Applicant contends that on the 15th May 2015, it entered into a contract with Rift Valley Water Services Board for the construction of Itare dam at a cost of Kshs 28,973,739,492.14. They contend the project is classified as an official funded project under East African Community Customs Management Act of 2013, and Value added Tax 2013, fully funded by a pool of Italian banks. Therefore all goods and services made to the project are classified as zero rated in accord, with the latter Act. It contends that the Respondent in a private ruling in the letter dated 16th May 2017, confirmed the project as a fully Aid funded project. And therefore any excess input VAT over output VAT is refundable subject to verification by the Respondent.

4. It is the Applicant's contention that based on the foregoing, it made an application on diverse dates to the Respondent seeking refund of the VAT. They contend the Respondent through its letter dated 19th June 2018, declined its application for refund of VAT and informed it that the Project was not Zero rated; the private ruling on the 20th December 2016 and Respondent's letter dated 16th May 2017, were issued in error, and further demanded Kshs 333,220/=. This action is what has aggrieved the Applicant, who is claiming violation of its legitimate expectation, and that it was not notified as required under section 68(1) of the Tax procedures Act.

The Preliminary Objection

5. The Respondent thereupon filed a replying affidavit sworn on 18th January 2018 by Patrick Chege, its Chief Manager in the Domestic Taxes Department, as well as a Preliminary Objection of the same date. This Court directed that the Preliminary Objection would be heard and determined first, by way of written submissions. The Preliminary objection raised by the Respondent coming up for determination is as follows:

a) That the Applicant's application is subjudice since the issues raised herein are also the same issues pending for determination in Nairobi Tax Appeals Tribunal Appeal No. 114- CMC Di Ravenna Branch vs Commissioner Of Domestic Taxes.

b) The application is filed contrary to the provisions of section 9(2) of the fair Administrative Action Act.

c) The Application filed contravenes the express provisions of section 52(1) of the Tax Procedures Act.

d) The application has been filed contrary to the provisions of section 12 and 13 of the Tax Appeals Tribunal Act.

e) That the application is therefore an abuse of the Court process.

6. The Respondent submitted that the application is *sub judice* as the issue raised herein are the same ones pending in the **Tax Appeals Tribunal Appeal No 114 of 2018 -CMC Di Ravenna-Kenya Branch vs Commissioner of Domestic Taxes.** Further, that paragraph 7 of the statement of facts demonstrates the appeal before the Tax Appeals Tribunal seeks to challenge the objection decision, and that the statement of facts discloses the amount of VAT under appeal as being Kshs 333,220/=. It was also its submission that various parts of the Applicant's pleadings makes reference to the figures and amounts in the Tribunal, and that if the prayers sought are granted by this Court, it will have the impact of determining the appeal without it being heard on merit.

7. Relying on section 6 of the Civil Procedure Act, the Respondent submitted that that no court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties. Reliance was placed on the case of **Thiba Min. Hydro Co Ltd vs Josphat Karu Ndwiga, (2013) eKLR** for the holding that it is not the form in which the suit is framed that determines whether it is *sub judice*, rather it is the substance. The Respondent also cited the cases of **Republic vs Sacco Societies Regulatory Authority ex-parte Joseph Kiprono Maiyo & 3 Others, (2017) eKLR** and **Republic vs District Land Adjudication & Settlement Officer Meru South District & Others ex-parte Njeru, (2018) eKLR** for the position that instituting multiplicity of actions on the same subject matter against the same opponent amounts to abuse of the court process and forum shopping.

8. According to the Respondent, the facts are not disputed and nothing needs to be ascertained as purported by the Applicant, and therefore its preliminary objection is properly on record. Further, that the Applicant is guilty of material non-disclosure as they failed to disclose that there was an appeal pending before the Tax Appeals Tribunal challenging the Respondents objection decision rendered on 19th June 2018 which touches on the private rulings and VAT which are the subject of the application before this Court. The decision in **The Registered Trustees, Kenya Railways Staff Retirement Benefits Scheme vs Chairman Rent Restriction Tribunal & 99 Others, (2018) e KLR** was relied on for the holding that judicial review proceedings in Kenya are now regulated by the statutory framework in the Fair Administrative Action Act 2015, which contains provisions on exhaustion of the statutory mechanism for appeal or review by an applicant before institution of judicial review proceedings. The Respondent referred to sections 51 and 52 of the Tax Procedures Act on the procedure of objecting to a tax decision and appeals of the decision to the Tax Appeals Tribunal. Further, that section 12 of the Tax Appeals Tribunal Act provides that a person who disputes the decision of the Commissioner on any matter arising under the provisions of any tax law may appeal to the tribunal.

9. In closing, the Respondent submitted that the decision it rendered on 19th June 2018 is an appealable decision, and the Applicant has already lodged an Appeal at the Tribunal. They pointed out that the Applicant has not exhausted the statutory mechanism for appeal provided for under the Tax Procedures Act and the Tax Appeals Tribunal Act, and has not provided before the Court any exceptional circumstances in the public interest that exist for filing judicial review in the circumstances. Therefore, that the instant application is premature and should be

dismissed for non-compliance with mandatory provisions of section 9(2) of the Fair Administrative Action Act.

The Response

10. The Applicant in response that the Tax Appeals Tribunal is not an effective remedy as the Term of the members of the Tribunal expired on 1st April 2018 with no appointments made; therefore the Tribunal is not in place to make determinations on Tax disputes; and only the chairperson is left who cannot hear and determine cases alone. Further, that section 13 (7) of the Tax Appeals Tribunal Act stipulates that appeals filed before the Tribunal ought to be heard and determined within ninety days, and the Applicant filed the appeal on 19th July 2018, which is yet to be set down for hearing.

11. The Applicant submitted that the preliminary objection is based on a wrong contention that the instant application raises similar issues as the ones in **Nairobi Tax Appeals Tribunal No. 114 of 2018- CMC Di Ravenna vs Commissioner of Domestic Taxes**. Further, that it is neither a preliminary objection as known in law as set out in the cases of **Mukisa Biscuit Manufacturing Co.Ltd vs West End Distributors Ltd (1969) E.A** and **Republic vs Public Procurement Administrative Review Board & Another ex parte Kenya Veterinary Vaccines Production Institute, (2018) eKLR**, as the contention raised by the Respondent calls for the ascertainment of facts as regards the issues raised in the Tax Appeals Tribunal and the issues raised in the judicial review proceedings.

12. According to the Applicant, in the instant application it has challenged the decision making process by the Respondent in respect to its decision dated 19th June 2018 demanding on account of VAT Kshs 333,220/= from the Applicant, along with disallowing its application of seeking refund of VAT in the sum of Kshs 166,247,378/= in respect of the water Supply project. Further, that the application is based on a private ruling dated 20th December 2016 and the Respondent's letter dated 16th May 2017, where the Respondent confirmed that the Itare water supply project is zero rated. But that thereafter, through its decision dated 19th June 2018, the Respondent stated that the private ruling dated 20th December 2016 had been withdrawn. That on the other hand, in the Tax Appeals Tribunal, it has sought the vacation of the assessment and demand of Kshs 898,170,254/= by the Respondent in its entirety on account that its erroneous.

13. It is the Applicant's submission that the decision by the Respondent to disallow the application seeking refund of the VAT was *ultra vires* as the procedure adopted in withdrawing the Respondent's private ruling dated 20th December 2016 was in contravention of section 68 and 69 of the Tax Procedures Act. Therefore, that it only this Court that can make a determination on whether the same was in accord with the law pursuant to its supervisory jurisdiction. Reliance was placed on the case of **Republic vs Public Procurement Administrative Review Board & 2 Others ex parte Rongo University, (2018) eKLR** for the proposition that judicial review is about the decision making process, not the decision itself, and that the role of the court in judicial review is supervisory. Therefore, that the provisions of section 52(1) of the Tax Procedures Act and section 12 and 13 of the Tax Appeals Tribunal Act do not apply to these proceedings.

The Determination

14. The circumstances in which a preliminary objection may be raised was explained by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696**, as follows:

“a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

The effect of a preliminary objection if upheld, renders any further proceedings before the court impossible or unnecessary.

15. A preliminary objection cannot therefore be raised if any fact requires to be ascertained. In the case of **Oraro -vs- Mbaja (2005)1KLR 141**, the court held that any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. The Court of Appeal also stated in **Mukisa Biscuit Company -vs- West End Distributors Ltd(supra)** that a preliminary objection cannot be raised if what is sought is the exercise of judicial discretion.

16. The issues for determination herein therefore are whether the grounds raised in the 2nd Respondent's preliminary objection raise pure points of law, and if so, whether the said preliminary objection has merit and should be upheld. It is in this respect not in dispute that the Applicant has filed an appeal against decision made by the Respondent dated 19th June 2018 with the Tax Appeals Tribunal in **Nairobi Tax Appeals Tribunal No. 114 of 2018- CMC Di Ravenna vs Commissioner of Domestic Taxes**.

17. The decision dated 19th June 2018 was annexed by the Applicant as “Annexure CDR6” to its verifying affidavit, while the memorandum of appeal and accompanying statement of facts filed in **Nairobi Tax Appeals Tribunal No. 114 of 2018- CMC Di Ravenna vs Commissioner of Domestic Taxes**. was annexed by the Respondent as “Annexure PC1” to its replying affidavit. It is also not disputed that under section 52 of the Tax Procedures Act, it provides that 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 of 2013. Section 12 of the Tax Appeals Tribunal Act in this regard provides that a person who disputes the decision of the Commissioner on any matter arising under the provisions of any tax law may appeal to the tribunal.

18. The Applicant however argues that the preliminary objection raises issues of fact, as this Court will have to delve into an assessment of the facts of the appeal filed in **Nairobi Tax Appeals Tribunal No. 114 of 2018- CMC Di Ravenna vs Commissioner of Domestic Taxes** and of this application, and does not therefore raise a pure point of law. Furthermore, that this remedy is not available to it as the Tax Appeals Tribunal is not properly constituted. The Respondent on the other hand argues that the instant application is *sub judice* to the extent that the decision made on 19th June 2018 is also the subject of the appeal.

19. The **Black's Law Dictionary Tenth Edition** at page 1652 defines the term “*sub-judice*” to mean a matter or case that is “*before a judge or Court for determination*”. Section 6 of the Civil Procedure Act also makes provision for the principle of *sub-judice* in the following terms:

“No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed.”

20. The purpose of this principle is to avoid instances where multiple suits are filed by the same parties on the same issues before Courts of competent jurisdiction. In **Standard Chartered Bank Limited vs Jenipher Atieno Odok, HCCC No. 120 of 2003**, Warsame J. (as he then was), had the following to say about the doctrine of *sub judice*:

“It is not within the rights of parties to engage in multiplicity of suits as the multiplicity of suits is meant to obstruct due process of law, and when a party shows design to abuse the powers of the Court, such actions must be stopped to avoid unnecessary costs and waste of judicial time.”

21. If indeed a matter is found to be *sub judice*, the effect is to oust the jurisdiction of a Court to deal with the same issue. This is thus a pure point of law that has been raised by the Respondent. The test to be utilized to determine if a matter is *sub judice*, is whether the parties in the two suits are the same; whether the issues raised or subject matters of the suits are the same; and whether the matter is pending before a Court clothed with appropriate jurisdiction. Therefore the court will not be delving into the facts of the two cases in this regard, as the applicable test involves matters that are regulated by law, or self-evident from the pleadings in the two cases.

22. In the present application it is not in dispute that the parties in **Nairobi Tax Appeals Tribunal No. 114 of 2018- CMC Di Ravenna vs Commissioner of Domestic Taxes**. are also parties in the present application. The Tax Appeals Tribunal also has jurisdiction under section 12 of the Tax Appeals Tribunal Act to hear and determine the appeal filed by the Applicant. This Court in this regard also takes judicial notice of the fact that the Tax Appeals Tribunal has been reconstituted and is now fully operational by Gazette Notice No.3620 published on 15th April 2019 in **Kenya Gazette Vol. CXX1-No 46**. Lastly, the orders the Applicant seeks in the appeal in **Nairobi Tax Appeals Tribunal No. 114 of 2018- CMC Di Ravenna vs Commissioner of Domestic Taxes** and in this application are on the Respondent's decision dated 19th June 2018, which decision was an assessment and demand of tax, and after taking into account the issues raised by the Applicant in this application.

23. In addition, as the issues raised in the instant application were still pending before the 1st Respondent, sections 9(2) (3) and (4) of the Fair Administrative Action Act are therefore operative, as the Applicant is yet to exhaust the alternative review mechanisms, and no viable exceptional reason exists why it should be exempted from the proceedings before the Tax Appeals Tribunal. Sections 9(2) (3) and (4) of the Fair Administrative Action Act provide as follows in this regard:

“(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 applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

(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.”

24. The Respondent's Preliminary Objection is to this extent therefore merited, and the only outstanding issue is whether this Court should in the circumstances strike out the Applicants' application or keep it alive pending the decision of the Tax Appeals Tribunal in **Nairobi Tax Appeals Tribunal No. 114 of 2018- CMC Di Ravenna vs Commissioner of Domestic Taxes**. The requirements of Order 53 of the Civil Procedure Rules as regards applications for leave to commence judicial review require the application to be accompanied by a statement specifying the relief sought and grounds on which it is sought, and the facts relied upon to be verified by affidavits. Given that the nature of the Applicant's case may change depending on the decision made by the Tax Appeals Tribunal, it may be prudent and more orderly for the Applicant to commence fresh proceedings, if it is still desirous of moving this Court for judicial review orders.

25. I accordingly order as follows:

I. The Applicants' Notice of Motion dated 5th December 2018 is hereby struck out.

II. As the Tax Appeals Tribunal was not properly constituted at the time these judicial review proceedings were filed, there shall be no order as to costs.

26. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 16TH DAY OF MAY 2019

P. NYAMWEYA

JUDGE

DELIVERED AT NAIROBI THIS 22ND DAY OF MAY 2019

J. MATIVO

JUDGE