REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 19 OF 2019

AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION.

AND

IN THE MATTER OF: THE IRREGULAR LEVYING OF THE STANDARD

LEVY AND PENALTIES BY THE KENYA BUREAU OF STANDARDS

UPON TAIFA CABLES AND RETREAD LIMITED

AND

IN THE MATTER OF: THE STANDARDS ACT CAP 496, LAWS OF KENYA & ARTICLES

35,40, 47, 48, 50, 258, 259, AND 260 OF THE CONSTITUTION OF KENYA

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

KENYA BUREAU OF STANDARDS.....RESPONDENT

EX-PARTE:

TAIFA CABLES AND RETREADS

LIMITED

JUDGMENT

The Application

1. The ex-parte Applicant herein is Taifa Cables and Retreads Limited, a company incorporated pursuant to the provisions of the Companies Act, Cap 486 of the Laws of Kenya, and hereinafter referred to as "the Applicant". The Applicant has brought judicial review proceedings against the Kenya Bureau of Standards, which is the Respondent herein, and is a statutory corporate body established under the Standards Act. The Applicant, by way of a Notice of Motion application dated 8th February 2019, is seeking the following orders :

(a) An order of Certiorari to issue to remove and to bring before this Court for purposes of quashing the Respondent's decision and/or order of the Respondent and or their officers, servants, agents, subordinates and/or employees dated 24th

July 2018, requiring Taifa Cables and Retread Limited to pay 0.2% of ex factory monthly standard levy.

(b) An Order of Certiorari to issue to remove and to bring before this Court for purposes of quashing the Respondent's decision and/or order of the Respondent and or their officers, servants, agents, subordinates and/or employees dated 24th July 2018, requiring Taifa Cables and Retread Limited to pay a penalty of Kshs. 2,520,640.18 and any other accrued interest

(c) An order of Prohibition do issue prohibiting the Respondent and or their officers, servants, agents, subordinates and/or employees from taking any further steps or action in furtherance of the decision and/or order of the respondent dated 24th July 2018, requiring Taifa Cables and Retread Limited to pay 0.2% of ex factory monthly standard levy

(d) An order of Prohibition do issue prohibiting the Respondent and or their officers, servants, agents, subordinates and or employees from taking any further steps or action in furtherance of the decision and or order of the Respondent dated 24th July 2018, requiring Taifa Cables and Retread Limited to pay a penalty of Kshs. 2,520,640.18

(e) An order of Mandamus do issue directing the Respondent and or their officers, servants, agents, subordinates and or employees to cancel, delete and or remove any and all entries that may have been entered in their records which in any way adversely affects or prejudices the rights and interests of the Applicant.

(f) An order of Mandamus do issue directing the Respondent and or their officers, servants, agents, subordinates and or employees to pay back and refund to the Applicant, Taifa Cables and Retread Limited, amounts over and above ex factory monthly standard levy not provided by law.

2. The Application is supported by a statutory statement dated 22nd January 2019, and a verifying affidavit sworn on the same date by Faiz Ali Taib, a Director of the Applicant. The Applicant is aggrieved by the decision by the Respondent to impose upon it penalties of Kshs. 2,520,640.18 with respect to its Standard Levy remittances, and for it to remit 0.2% of the ex factory monthly as required by the Standards Act. According to the Applicant, it has from the period of January 2011 to date been remitting Standard Levy as provided under paragraph 3 L.N. 154/1998, L.N. 183/1999 s2, L.N. 54/2000 s. 2.] of the Standard Levy Order, 1990 [L.N. 267/1990, L.N. 183/1999, L.N. 54/2000].

3. The Applicant explained that on or about 14th of February 2018, the Respondent wrote to its Directors wishing to carry out verification of its Standard Levy returns, so as to confirm compliance to the requirements of Standards Act. Further, that to carry out this exercise, the Respondent sought documents relating to the period of January 2011 to December 2017 namely, copies of the Standard Levy returns, copies of invoices, and monthly sales analysis.

4. The Applicant averred that upon perusal of the records, the Respondent on or about 12th April 2018 wrote to the Directors of the Applicant informing them that they had established under-remittances which attracted penalties of Kshs. 2,520,640.18. That after a request from the Applicant requesting for a breakdown as to how the Respondent came up with the amount of Kshs. 2,520,640.18, the Respondent on 24th July 2018 wrote to the Directors of the Applicant informing them how the penalties were reached, and further advised that the Applicant was to remit 0.2% of the ex factory monthly as required by the Standards Act.

5. Subsequently, that there was an exchange of correspondence between the Applicant and Respondent, and the Applicant in letters dated 17th August 2018 and 3rd September 2018 sought the following information from the Respondent:

a) The public notification allegedly imposing a standard levy of 0.2% ex-factory on manufacturers and further removing the annual maximum amount ceiling of Kshs 400,000;

b) Confirmation that Kenya Revenue (ITMS) through which the levy was to be remitted was at that time configured to not accept payments exceeding Kshs. 33,333.33;

c) A copy and or date of the notification which increase the monthly Standard Levy from Kshs. 33,333.00 to a 0.2% of ex-factory;

d) A confirmation that the Kenya Revenue Authority platform (ITMS) through which the aforesaid levy was being remitted, was at that time of the aforesaid notification configured to accept payments of more than Kshs. 33,333.00 per month; and

e) Requesting the Director under Section 16D of the Standards Act CAP 496 to issue a Notice referring this dispute to the Tribunal for General Direction within 7 days.

6. That on or about the 5th of October 2018, the Applicant received a letter from the Respondent's Acting Managing Director, who *inter-alia* stated as follows:-

a) The standard levy has always been calculated at 0.2%, but he failed to address the issue of annual maximum ceiling amount of Kshs. 400,000.00; and

b) That the Kenya Revenue (ITMS) platform has been receiving amounts over Kshs. 400,000.00.

The Applicant annexed copies of the correspondence from, and exchanged with the Respondent.

13. According to the Applicant, it will continue to pay illegal taxes, penalties as a result of the erroneous, illegal and unlawful decision of the

Respondent which was not only arbitrary, but was based on false evidence and or assumptions, and made outside the ambit of and the jurisdiction provided by the law. Further, that despite the Applicant writing to the Respondent's Managing Director, its requests have either gone unanswered or have been intentionally evaded by those concerned.

14. The Applicant alleged that the Respondent has been in breach of paragraph 3 L.N. 154/1998, L.N. 183/1999 s2, L.N. 54/2000 s. 2.] of the Standard Levy Order, 1990 [L.N. 267/1990, L.N. 183/1999, L.N. 54/2000] which defines the Levy as follows: "subject to the Act there shall be paid by each Manufacturer a levy recoverable at source at the rate of two tenths of one percent of the ex-factory price in respect of manufacture during each month, subject to a maximum ceiling of Kenya Shillings four hundred thousand per annum and to a minimum ceiling of Kenya shillings one thousand per month". Therefore, that the said Legal Notices impose a levy on manufacturers to be collected at source at the rate of two tenths on one percent of the ex-factory price each month, and imposes a maximum ceiling of Kenya Shillings Kshs. 400,000.00 per annum, which comes to a monthly levy of Kshs. 33,333.33. However, that the Respondent has purported to enforce a payment of 0.2% of the ex-factory price each month and completely ignoring the ceiling set by the Standards Act.

15. The Applicant contended that the Respondent's actions and any alleged powers it purports to exercise under the Standards Act have resulted in a contravention of the Applicant's guaranteed rights under the Constitution of Kenya, and the Respondent has acted *ultra vires*, unfairly, partially, illegally and breached its legitimate expectations.

The Response

16. The Respondent opposed the application through a replying affidavit sworn on 17th April 2019 by Victor Okundi, a senior levy inspector of the Respondent in charge of the Coast region. The Respondent averred that the application herein is incompetent because the Applicant clearly acknowledges that as from the period of January 2011 to the date of filing this matter in court, it has been under remitting standard levy and which was not 0.2% of its ex factory monthly value or sales. Further, that a verification exercise was carried out at the Applicant's premises on 10th April 2018 confirmed the under remittance of the Standard levy leading to attraction of penalties.

17. In addition, that the Kenya Revenue Authority (ITMS) System which the Applicant uses to make remittances of the Standard levy has no monthly limit, and could accept any amount more than what was being remitted monthly by the Applicant. The Respondent stated that there is no limit provided for under the law or any of the Standard levy orders on what should be remitted monthly as Standard levy so long as it is 0.2% of the monthly ex factory value.

18. According to the Respondent, the Applicant was remitting the Standard levy returns by either basing on approximates and not the actual ex factory monthly values, or by spreading the provided for maximum of Kenya Shillings Four Hundred Thousand (Kshs. 400,000/=) annually over 12 months instead of the 0.2% of the monthly Ex factory value. That this necessitated the Respondent herein to write to the Applicant to seek verification of its levy returns and to confirm compliance, and the Respondent attached copies of the letters dated 14/2/2018 and 12/4/2018.

19. That the said verification exercise established that the Applicant had been under remitting the monthly Standard levy as from July 2014 to July 2017 giving rise to an under payment of Kenya Shillings Seven Hundred Thousand (Kshs. 700,000.00/=) on levy, and Kenya Shillings Two Million Five Hundred and Twenty Thousand Six Hundred and Forty shillings and Eighteen Cents (Kshs. 2,520,640.18/=) on penalties. It was averred that failure to remit part of the levy attracts a penalty of 5% per month cumulatively as provided for under Section 10B (3) of the Standards Act.

20. Further, that under the Standards Levy Order 1990 and the Standards Levy (Amendment) Order 1999, each manufacturer ought to either pay a maximum of Kenya Shillings Four Hundred Thousand (Kshs. 400,000/=) yearly at once, or pay 0.2% of the monthly ex factory value assessed monthly on or before the 20th day of every succeeding month, and stop to continue remitting once the monthly remittances attain a total of Kenya Shillings Four Hundred Thousand (Kshs. 400,000/=) only every year.

21. In addition, that the Standards levy under the Standards levy order 1990 and the Standards levy (Amendment) order 1999 has always been calculated at the rate of two tenths of one percent which is equivalent to 0.2% of the monthly Ex-factory value, and there was thus no need of the Respondent to notify the Applicant of the rate when there was no increase or revision of the rate. The Respondent annexed copies of the Standard levy order 1990, the Standard levy (Amendment) Order 1999, and a notice placed in the East African Standard daily on 5th January 2000.

22. The Respondent further averred that section 16D of the Standards Act that requires the Managing Director of the Respondent to issue a notice referring a matter or a dispute to the Tribunal for general directions is limited to only matters that appear to involve a point of law or unusual importance or complexity, and that this matter did not fall within those three categories. However, that even before the Director of the Respondent could contemplate on whether to refer this matter to the Standards Tribunal or not, the Applicant moved to court and failed to explore that available mechanism of resolution as provided for under section 16D of the Standards Act.

23. Therefore, that the Applicant has not established the threshold upon which the court can be persuaded to grant the orders sought, and has failed to demonstrate which of its rights has been denied, violated, infringed or threatened to warrant the grant of the said orders .

The Determination

7. The Application was canvassed by way of written submissions. Taib A. Taib Advocates filed submissions dated 11th June 2019 on behalf of the Applicant. The Respondent's submissions were dated 17th April 2019 and were filed by Olando, Okello and Lusenaka Advocates. I have considered the pleadings, submissions and arguments made by the parties and find that the issues arising for determination are as follows:

a) Whether the Applicant's application is properly before this Court. If this issue is resolved in the affirmative the Court will then consider the other remaining two issues set out hereunder.

b) Whether the Respondent acted in error of the law in demanding the payment by the Applicant of penalties for under remittance of standard and of a monthly standard levy of 0.2% of ex-factory value.

c) Whether the Applicant merits the prayers sought .

8. In considering the said issues, it is imperative at the outset to delineate the parameters of this Court's powers in judicial review. The broad grounds for the exercise of judicial review jurisdiction were stated in the case of **Pastoli vs Kabale District Local Government Council & Others [2008] 2 EA 300** at pages 303 to 304 thus:

> **"In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University*, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).**
>
> **Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality…..**
>
> **Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph "E".**
>
> **Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876)."**

9. In addition, the parameters of judicial review were addressed by the Court of Appeal in the case of **Municipal Council of Mombasa vs Republic & Umoja Consultants Limited, Nairobi Civil Appeal No. 185 of 2001, [2002] eKLR as follows**:

> **"The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review."**

10. It was also emphasized by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) KLR that while** *Article 47* **of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act reveals an implicit shift of judicial review to include aspects of merit review of administrative action, reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act.**

11. This Court will proceed to examine and determine the issues raised by the parties in light of the foregoing principles.

Whether the Application is properly before this Court

12. The Applicant submitted that there are two exemptions to the doctrine of exhaustion of dispute resolution mechanisms where an alternative forum for dispute resolution exists. Further, that one of the exemptions is that the statutory provision providing an alternative forum for dispute resolution must be carefully read so as not to oust the jurisdiction of the Court to consider valid grievances from parties who may not have audience before the forum created, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit.

13. That this exemption fits with the application herein, as the Respondent in response to the Applicant's application have stated that our claim wouldn't be referred for resolution before the Standard Tribunal as it does not involve a point of law, unusual importance or complexity. The decision in **Okiya Omtatah Okoiti v Commissioner General, Kenya Revenue Authority & 2 Others [2018] eKLR** was cited in this regard**.** Nevertheless, that the Applicant herein did write to the Managing Director seeking to have the dispute at hand placed before the Standards Tribunal but to date no reply has been received. Therefore, that the Applicant's suit is not premature and does not offend the doctrine of exhaustion of dispute resolution mechanisms.

14. The Respondent on the other hand submitted that there are available mechanisms of dispute resolution for a manufacturer who feels aggrieved by any decision in relation to a standards levy order under section 10B (5) of the Standards Act which states that "any person who is aggrieved by an act or decision under Standards levy order may appeal in writing to the tribunal".That the Applicant if at all was

aggrieved by the decision of the Respondent to call for the unpaid Standard levy remittances and penalties for the stated period, it ought to have appealed to the Standards Tribunal in writing instead of coming to court when there was an available mechanism provided for by the Standards Act to aid in resolving this matter.

15. Further, that the Applicant did not need to write to the Respondent requesting it to refer the dispute to the tribunal at all. As such that the Applicant did not explore all the available mechanisms of resolving this dispute before coming to this Court, and is therefore not eligible to seek and benefit from the sought prayers herein.

16. Three sections of the Standard Act are pertinent to the arguments made by the parties herein as regards exhaustion of the alternative remedies. The first is section 11 which provides for appeals in writing to the Tribunal established under section 16A of the Act, by any person who is aggrieved by a decision of the Respondent within fourteen days of the notification of the act complained of being received by him. Second, and specifically in relation to standard levy orders, section 10B(5) provides that any person who is aggrieved by an act or decision under a standards levy order may appeal in writing to the Tribunal.

17. Third and lastly, section 16D on the other hand provides for references to the Tribunal by the Director as follows:

> (1) If a matter appears to involve a point of law or to be of unusual importance or complexity the Director may refer the matter to the Tribunal for a general direction.
>
> (2) The Director shall give notice of the reference to any party to the matter and that party shall be entitled to be heard by the Tribunal.
>
> (3) The Bureau and the Director shall be bound by the directions of the Tribunal on the reference, subject to any appeal to the High Court.

18. Sections 9(2) (3) and (4) of the Fair Administrative Action Act provide as follows as regards following the procedure set out in the Standards Act:

> **"(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."**

19. Exhaustion of alternative remedies is also now a constitutional imperative under Article 159 (2)(c) of the Constitution, and is exemplified by emerging jurisdiction on the subject, which was initially stated in **Speaker of National Assembly vs Karume (1992) KLR 21** in the following words:

> **"Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."**

20. The doctrine of exhaustion of alternative remedies was further explained by the Court of Appeal in **Geoffrey Muthinja Kabiru & 2 Others vs Samuel Munga Henry & 1756 Others (2015) eKLR** as follows:

> "**It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews….. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. The Ex Parte Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution."**

21. In the present application it is not disputed that the Applicant has not filed an appeal before the Tribunal, nor has the dispute herein been referred to the Tribunal by the Respondent's Director. The dispute in the instant application arises from the decision communicated to the Applicant about penalties due to be paid by it for under remittances of the standard levy, and payment of the of 0.2% of ex factory as stated in a letter from the Respondent's officer dated 4th December 2018 which was as follows

> **"REF: KEBS/COR/LEVY/1/2 Vol 2(41)**
>
> **DATE: 2018-04-12**
>
> **THE DIRECTOR**

TAIFA CABLES &RETREADS LTD

P.O. BOX 2153

MOMBASA

Dear Sir,

RE: STANDARD LEVY COMPLIANCE - ENTRY 7004

This is further to our Ref: KEBS/COR/LEV/1/2/Vol 2 (25) dated 14th February 2018 and verification on 10th April 2018 of your returns to confirm compliance to the requirements to Standard Levy Order.

The exercise established under remittances which attracted penalty of Kshs. 2,520,640.18.

Kindly pay a total of KES . 2,520,640.18 and pay 0.2% of ex-factory to comply with the requirements of the Standard Act.

Thank you for your continued cooperation and support.

Yours faithfully,

MARTIN M. NYAKIAMO

REGIONAL MANAGER- COAST REGION"

22. Therefore, the applicable provisions to the Applicant once it was aggrieved with the said decision was the appeal under section 10B(5) of the Standard Act, as the decision expressly concerned payment of the standard levy. Section 16D applies on application by the Director with respect to a matter that is before him or her, and involves points of law or complexity. The applicant has not demonstrated what points of law or complexity warrants this matter to proceed under section 16D, so as to be availed the exemption he seeks as a result of the Director declining to refer the matter to the Tribunal.

23. In the premises this Court finds that the Applicant's Notice of Motion dated 8th February 2019 is not properly before this Court, and that the Applicant needs to first comply with the provisions of section 10(B) of the Standards Act, and exhaust the remedy provided therein. It is also notable in this regard that judicial review is a remedy of last resort.

24. The said Notice of Motion is accordingly struck out with no order as to costs.

25. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 23RD DAY OF JULY 2019

P. NYAMWEYA

JUDGE