



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 84 OF 2019**

**AND**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION.**

**AND**

**IN THE MATTER OF ORDER 53 RULE 1 OF THE CIVIL PROCEDURE RULES**

**AND**

**IN THE MATTER OF THE DOMESTIC TAXES ACT**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES 40,47,48,50,159,259 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF TAX APPEALS TRIBUNAL CASE NUMBER 381 OF 2018**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**AND**

**THE COMMISSIONER FOR DOMESTIC TAXES.....RESPONDENT**

**EX PARTE APPLICANT:**

**FARAB INTERNATIONAL FZE**

**JUDGMENT**

**The Application**

1. The *ex-parte* Applicant herein, Farab International FZE, is a company registered in United Arab Emirates Dubai and will hereinafter be referred to as “the Applicant”. It has sued the Commissioner of Domestic Taxes, (hereinafter “the Respondent”) which is a statutory office established under Kenya Revenue Authority Act. The Applicant is seeking the following orders by way of a Notice of Motion dated 12<sup>th</sup> April 2019:

a) An order of Certiorari to remove into this Court and quash the decision of the Respondent of issuing the agency notice dated 8<sup>th</sup> March 2019 against the Applicant;

b) An order of Prohibition to remove into this Court and direct the Respondent not to issue any other agency notice against the Applicant in respect to the matter herein;

c) Costs of and incidental to the application be provided for; and

d) Such further and other reliefs that the Court may deem just and expedient to grant.

2. The Applicant laid out its case in a statutory statement dated 25<sup>th</sup> March 2019 and a supporting affidavit and further affidavit sworn on 25<sup>th</sup> March 2019 and 7<sup>th</sup> May 2019 respectively by Joseph Gitere Nyamu, its tax agent, who also represented the Applicant in dealings with the Respondent. According to the Applicant, two entities namely, Regen-Terem SSHP and Kenya Power and Lighting Company, entered into a power generating contract in 2013, under which Regen-Terem SSHP was to build a small hydro power generation plant in Terem Fall, Kuya River in Bungoma District.

3. Further, that Regen-Terem SSHP contracted the Applicant to construct the hydro power generating plant on 10<sup>th</sup> September 2014, and that the project was undertaken between 2016-2017. The Applicant stated that Regen-Terem SSHP accordingly opened a letter of credit for the entire contract price amounting to USD 9,650,000/= for the Applicant's benefit, and thereafter amended the original letter of credit for the benefit of Ms. Aysevens Engineering construction and Gugler technology by USD 7,769,727/=.

4. That in line with the terms of the agreement, Regen-Terem SSHP made an advance payment of USD 1,740,017/= to the Applicant between September 2015 and March 2016. The Applicant averred that it supplied various goods and services to project representatives appointed by Regen-Terem SSHP between 2016 and 2017, and paid for the same from the amount it had received as an advance, and further declared input taxes for those supplies. Further, that between 2016 and 2017, Regen-Terem SSHP imported goods and services and paid directly to the respective exporters, namely M/s Aysevens Engineering Construction and Gulger Technology, the sum of USD 7,769,727/=. According to the Applicant, Regen-Terem SSHP opted for direct importation to enable it to benefit from tax exemptions granted in 2015 Finance Act.

5. The Applicant contends that on 27<sup>th</sup> September 2018, the Respondent issued it with a VAT tax demand notice for Kshs. 188,378,324/= as VAT due from the project income. That in response, the Applicant objected to the demand notice on 25<sup>th</sup> October 2018, following which the Respondent issued its objection decision on 7<sup>th</sup> November confirming its decision. The Applicant subsequently appealed the Respondent's decision to the Tax Appeals Tribunal vide appeal number 381 of 2018, which appeal is still pending.

6. It is contended that several meetings subsequently ensued between the Applicant and the Respondent in January and February 2019, with a view of resolving the tax dispute, and that the Applicant in a letter to the Respondent dated 6<sup>th</sup> March 2019 detailing its tax responsibility and the legal basis for its position. It is contended that the Respondent did not respond to the said letter, but instead proceeded to issue an agency notice dated 8<sup>th</sup> March 2019 to Ecobank (K) Ltd, and failed to serve the same on the Applicant and/or its tax agent. The Applicant annexed copies of the correspondence between it and the Respondent. It is the Applicant's case that the issuance of the agency notice was in bad faith, premature, malicious, and in contravention of the Fair Administrative Action Act, 2015 as the appeal before the Tribunal is still pending.

7. According to the Applicant, the amount quoted in the agency notice is deliberately exaggerated due to the failure by the Commissioner to take into account the procedures provided under Section 12(3) (b) of the Value Added Tax Act, 2013 in determining the time of supply in the Applicant's situation thereby failing to make the required amendments to the original assessment returns by the taxpayer .

### **The Response**

8. In response to the application, the Respondent filed the Replying Affidavit sworn on 29<sup>th</sup> April 2019 by Martin Wachira Karoki, an officer in the Kenya Revenue Authority's Investigation and Enforcement Department. The Respondent avers that it carried out investigations into the Applicant's Tax affairs for the period 2015-2017, to establish claims that the Applicant had been conducting business in Kenya since 2014 without filing returns and paying taxes. The Respondent contends that it, having discovered that the Applicant had entered into contract with Regen-Terem SSHP for the construction of a power dam in Bungoma County, requested for documentation and records of accounts to establish the tax liability of the Applicant. That, the Applicant however only provided a few documents, one of them a copy of the contract between itself and Regen-Terem SSHP dated 10<sup>th</sup> September 2014 whose contractual value was USD 9,650,000/=.

9. According to the Respondent, upon the conclusion of the project, the Applicant did not declare or pay VAT on payments received from the projects it had carried out, yet the project was viable. The Respondent contends that the Applicant provided an exemption letter from the Ministry of Treasury dated 10<sup>th</sup> January that provided:

*“In accordance with the provisions of the 1<sup>st</sup> Schedule Part 1 (A) item 29 of the VAT Act, the National Treasury Approved on 24<sup>th</sup> December 2015, remission of VAT and IDF fees in respect of materials and equipment being imported by Regen-Terem SHPP Ltd to operate a 5.2 MW run-of the river Hydro-electric power plan on Kuywa River in mount Elgon District of Bungoma County and sell 5MW to KPLC being an independent power producer (IPP).”*

10. It is the Respondent's contention that the letter did not indicate that the Applicant was exempted from VAT on payments received from the project, upon which the Respondent based the demanded amounts. It is contended that the exemption was specifically on imports where customs duties and IDF charges apply, not the project. It is averred that Regen-Terem SSHP supplied the Respondent with a schedule of payments made to the Applicant totaling to USD 8,787,503.97, for which it was established the Applicant had not remitted tax. According to the Respondent, the Applicant had introduced two companies into the contract; hence any payments paid to the said companies were to be construed as payments made to the Applicant. The Respondent averred the Applicant's appeal against the ensuing tax decision by the Respondent is pending hearing and determination before the Tribunal.

11. It is further contended that from the material placed before the Court, the Applicant has no arguable case. That in any case, the Applicant

has invoked the statutory established mechanism for dispute resolution by filing an appeal at the Tribunal, and is engaging in a parallel litigation process vide the instant proceedings. It is contended that judicial review proceedings challenge the manner in which a decision has been made, rather than the rights and wrongs of the conclusion reached. Instead, the Applicant is seeking to have technical and substantive issues resolved by this Court. According to the Respondent, the Applicant seemingly does not have an issue with the agency notice itself but the figure therein, a matter which can be well canvassed before the Tribunal. The Respondent also noted that the Applicant wrote to the Respondent on 19<sup>th</sup> February 2019 indicating that tax of Kshs. 24,041,034/= was not in dispute.

12. According to the Respondent, the Applicant has not paid any taxes including the tax not in dispute, yet Section 52 (2) of the Tax Procedures Act states that the Appeal shall only be valid if the tax not in dispute is paid. The Respondent also terms the Applicant and/or its directors a flight risk, in light of the fact that the Applicant has permanent residence in Dubai. The Respondent avers that it acted in accordance with the law, hence the instant proceedings are unwarranted and ought to be dismissed with costs.

13. The Respondent also filed a preliminary objection dated 27<sup>th</sup> May 2019, wherein it is argued that the instant application is *sub judice* since the issues raised herein are the same issues pending determination in **Nairobi Tax Appeal No. 381 of 2018-Farab International FZE vs Commissioner of Domestic Taxes**.

### **The Determination**

14. The Application was canvassed by way of written submissions. Komu & Kamenju Advocates for the Applicants filed submissions dated 7<sup>th</sup> May 2019, while Sega N. Addah Advocate filed submissions on behalf of the Respondent s dated 10<sup>th</sup> June 2019. 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 instant application is properly before this Court.
- b) If the answer to the foregoing issue is in the affirmative, whether the Respondent acted unfairly and unreasonably in issuing the agency notice to the Applicant.
- c) Whether the Applicant merits the prayers sought .

15. 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).”**

16. 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.”**

17. 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.

18. 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***

19. It is the Respondent's submission that the instant proceedings are invalid as judicial review is a remedy of last resort, which ought not to be resorted where another statutory procedure lies. Further, that the instant application seeks to delve into the merits as opposed to the process by which the impugned decision was arrived at, which is not within the province of judicial review. The Respondent also submits that the Applicant has not demonstrated serious arguable issues which are to be resolved. That, it is apparent that the instant matter deals with VAT exemptions under the VAT Act and the Tax Procedures Act, which ought to be substantially dealt with on its merits and as such not suited for judicial review.

20. The Applicant's submissions in rejoinder are that contrary to the Respondent's assertions, the figure in the agency notice of Kshs. 24,041,034/= is disputed, which is evident from the correspondences between the Applicant and the Respondent. In this regard, it is submitted that the Respondent's letter dated 26<sup>th</sup> February 2019 indicated that the Respondent could not offset an input claim of Kshs. 23,662,347/= because the Applicant allegedly did not claim input VAT during this tax period. This, it is submitted is a dispute which is a subject for determination before the tribunal.

21. The Applicant cautions that it is not inviting the Court to determine whether the Applicant is entitled to claim input tax. That, what the Applicant wishes is for the Court to find that the figure in the agency notice is disputed, with the dispute pending before the Tribunal. That therefore the agency notice is invalid to the extent that it is demanding the disputed figure of Kshs. 24,041,034.

22. This Court notes that it is not in dispute that the Applicant has lodged an appeal with the Tax Appeals Tribunal in **Nairobi Tax Appeal No. 381 of 2018 - Farab International FZE vs Commissioner of Domestic Taxes**, where the issue of the amount of tax due from the Applicant is pending hearing and determination. It is only in exceptional cases that this Court can entertain judicial review proceedings where such alternative remedies are not exhausted. This was the finding by the Court of Appeal in **Cortec Mining Kenya Limited vs. Cabinet Secretary Ministry of Mining & 9 others (2017) eKLR**. This Court in **Republic vs. National Environmental Management Authority, (2011) eKLR**, also set out the said principle as follows:

**"...in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it ..."**

23. **Section 9** of the **Fair Administrative Action Act** fortifies this position. **Section 9(2)** of the Act provides that this Court **shall not** review an administrative action or decision under the Act **unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted**. Sub-section **(3)** provides that *this Court shall*, if it is not satisfied that the remedies referred to in sub-section **(2)** have been exhausted, direct that an applicant *shall* first exhaust such remedy before instituting proceedings .

24. **The Applicant states that this case is exceptional, as the subject agency notice was issued with regard to an amount of tax that is still in dispute and pending before the Tax Appeals Tribunal, and was also issued without notice to it.** The question is whether these are matters that can adequately be dealt with by the Tax Appeals Tribunal, or can only be dealt with by this Court. It is my view that these are issues that would be properly ventilated in the Tax Appeals Tribunal for three reasons.

25. Firstly, the issue of the disputed tax can only be resolved in a forum that is at liberty to examine evidence and go into the merits of the case, which is not in the purview of a judicial review court, but would be for the Tax Appeals Tribunal where a similar matter is already pending. Secondly, the Applicant has a specific remedy with respect to the impugned agency notice before the Tribunal, as section 18 of the Tax Appeals Tribunal Act gives powers to the Tribunal to make orders to stay or affect the implementation of the decision under review as follows:

**"Where an appeal against a tax decision has been filed under this Act, the Tribunal may make an order staying or otherwise affecting the operation or implementation of the decision under review as it considers appropriate for the purposes of securing the effectiveness of the proceeding and determination of the appeal.."**

26. The Tribunal can therefore make the necessary orders as regards the implementation of the agency notice sought by the Applicant, who can thus raise the arguments herein before that forum. In the circumstances, this Court is obliged to exercise restraint, and it would not be in the best interests of the administration of justice for this Court to interfere with the Tribunal's functions especially in the wake of questions that it is best suited to determine.

27. Lastly, the Applicant still has the opportunity to appeal in the event that it is not satisfied with the Tribunal's decision under section 53 of the Tax Procedures Act, which provides that for appeals to the High Court. I therefore find that the instant application is prematurely before this Honourable Court, and the outstanding issues become moot.

28. In the premises this Court finds that the Applicant's Notice of Motion dated 12<sup>th</sup> April 2019 is incompetently before this Court, and the same is hereby struck out with no order as to costs.

29. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 2<sup>ND</sup> DAY OF OCTOBER 2019**

**P. NYAMWEYA**

**JUDGE**