



**REPUBLIC OF KENYA**

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

**COMMERCIAL AND TAX DIVISION**

**PETITION NO.3 OF 2019**

**MONIKOS LIMITED.....PETITIONER**

**VERSUS**

**KENYA REVENUE AUTHORITY.....1<sup>ST</sup> RESPONDENT**

**I&M BANK LIMITED.....2<sup>ND</sup> RESPONDENT**

**ECO BANK LIMITED.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. On 2<sup>nd</sup> April 2019 the petitioner herein, **MONIKOS LIMITED**, filed this petition against the respondents seeking the following orders:
  - i. An order of certiorari to bring into this court for purposes of being quashed the decisions contained in the letters dated 14<sup>th</sup> February 2019 and 11<sup>th</sup> March 2019 by the 1<sup>st</sup> respondent and addressed to the Managing Director of 1 & m Bank and Managing Director of Scania East Africa Limited respectively.*
  - ii. A mandatory injunction be and is hereby issued compelling the 2<sup>nd</sup> and 3<sup>rd</sup> respondents to immediately unfreeze the accounts of the petitioner being [xxxx], [xxxx], [xxxx] at 1&M Bank Valley Arcade Branch; [xxxx] and [xxxx] at Eco- bank.*
  - iii. An order of mandamus to compel the 1<sup>st</sup> respondent to issue and/or serve the petitioner with a Notice of Assessment in the prescribed form under the Section 29 of the Tax Procedure Act.*
  - iv. An order of prohibition restraining the 1<sup>st</sup> respondent from issuing letters to the petitioner's clients and other third parties un-procedurally and unreasonably.*
  - v. An order that the petitioner be awarded compensation for damages/losses incurred as a result of freezing of the bank accounts.*
  - vi. A declaratory order be and is hereby issued that the 1<sup>st</sup> respondent's acts of failing to issue a Notice of Assessment to the petitioner violates Article 47 of the Constitution of Kenya, 2010 and Section 26 of the Tax Procedure Act to the detriment of the petitioner.*
  - vii. A declaratory order be and is hereby issued that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents freezing the petitioner's accounts violates Article 40 of the Constitution of Kenya.*
  - viii. Costs of this petition.*
2. The petitioner's case is that it came to learn, through email sent from its bank, that the 1<sup>st</sup> respondent had sent out agency notices to the 2<sup>nd</sup> respondent demanding that tax arrears be paid within 7 days of the receipt of the notice. The petitioner contends that the 1<sup>st</sup> respondent issued the agency notices to their clients and banks without any formal assessment being issued to them thereby precipitating the filing of the petition.
3. The respondents opposed the petition through the replying affidavit of the 1<sup>st</sup> respondent's officer one **Shem Kerama** sworn on 25<sup>th</sup> April 2019.

4. The 1<sup>st</sup> respondent also filed a preliminary objection dated 2<sup>nd</sup> May 2019 in response to the petition in which it set out the following grounds:-

**1. The Tax Procedure Act confers original jurisdiction upon the Tax Appeals Tribunal for tax disputes such as the one that is currently before this Honourable Court, and the High Court can only take up appellate jurisdiction in such an instance.**

**2. The subject matter herein is resjudicata as the Chief Magistrate's Court in CMCC No. 1900 of 2019 Monikos Kitchen –vs- Kenya Revenue Authority & 2 Others has already pronounced itself on the issue of jurisdiction by striking out the suit therein and noting the jurisdiction of the Tax Appeals Tribunal, and therefore this is a gross abuse of court process.**

**3. The petition offends Sections 52,53 & 56(2) of the Tax Procedure Act; Sections 7(1) (b) and 9(2) of the Fair Administrative Action Act; Section 12 of the Tax Appeals Tribunal Act; Rules 3 and 5 of the Tax Appeals Tribunal ( Appeals of the High Court) Rules 2015; Articles 23(2) of the Constitution of Kenya.**

5. This ruling is therefore in respect to the said preliminary objection. The 1<sup>st</sup> respondent filed written submissions to the preliminary objection which I have carefully considered. The petitioner did not make any submissions to the Preliminary Objection despite proper service with the same.

6. The main issue for determination is whether the Preliminary Objection is merited.

7. The gist of the 1<sup>st</sup> respondent's objection is that the Tax Procedures Act (TPA) confers original jurisdiction, in matters such as the one before the court, on the Tax Appeals Tribunal (TAT) and that this court only assumes appellate jurisdiction from the decisions of Tax Appeals Tribunal. In *Mukhisa Biscuits Manufacturing Company Ltd v West End Distributors* (1969) EA 696, it was held:

**“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication of pleadings and which if argued as a preliminary point may dispose of the suit. Examples of an objection to jurisdiction of the court.....”**

8. The objection raised herein touches primarily on the issue of the jurisdiction of this court to entertain this petition in the face of clear provisions in the Tax Procedures Act (hereinafter **“the Act”**) vesting jurisdiction in tax matters, in the first instance, on the Tax Appeals Tribunal. The petitioner challenges the issuance of the agency notices to its bank and clients. The respondents, on the other hand, contend that an agency notice is an appealable decision within the meaning of Section 52 of the Tax Procedures Act. Section 3 of the Tax Procedures Act defines **“ tax decision”** as follows:-

**“tax decision”** means-

**a) An assessment;**

**b) A determination under Section 17(2) of the amount of tax payable or that will become payable by the tax payer;**

**c) A determination of the amount that a tax representative, appointed person, director or controlling member is liable for under Sections 15,17 and 18;**

**d) A decision on an application by a self assessment taxpayer under Section 31(2);**

**e) A refund decision;**

**f) A decision under Section 49 requiring repayment of a refund; or**

**g) A demand for a penalty;**

9. Section 42 of the other hand stipulates as follows:-

**“Power to collect tax from person owing money to a taxpayer**

**1. This section applies when a taxpayer is, or will become liable to pay tax and-**

**a) The tax is unpaid tax; or**

**b) The Commissioner has reasonable grounds to believe that the taxpayer will not pay the tax by the due date for the payment of the tax.**

**2. The Commissioner may, in respect of the taxpayer and by notice in writing, require a person (referred to as the “payer”).**

**a) Who owes or may subsequently owe money to the taxpayer;**

b) Who holds or may subsequently hold money, for or on account of, the taxpayer ;

c) Who holds or may subsequently hold money on account of some other person for payment to the taxpayer; or

d) Who has authority from some other person to pay money to the taxpayer, to pay the amount specified in the notice to the Commissioner, being an amount that shall not exceed the amount of the unpaid tax or the amount that the Commissioner believes will not be paid by the taxpayer by the due date.”

10. Section 52 of the said Act stipulates as follows:-

**“Appeals of appealable decision to the Tribunal**

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

**2. A Notice of appeal to the Tribunal relating to an assessment shall be valid if the taxpayer has paid the tax not in dispute or entered into an arrangement with the Commissioner to pay the tax not in dispute under the assessment at the time of lodging the notice.”**

11. Section 53 of the Act provides that a taxpayer who is dissatisfied with the decision of the Tax Appeals Tribunal can appeal to the High Court while Section 56 (2) of the Act provides that an appeal to the High Court or Court of Appeal shall be on a question of the law only.

12. From the above cited provisions of the Tax Appeals Act, courts have taken the view that they will not take up original jurisdiction in matters where their jurisdiction is limited to appeal only.

13. The rationale behind the setting up of specialized tribunals and institutions for dispute resolution is so that disputes are resolved by the people with the technical know- how in the various fields. This was the position adopted in *Rich Products Ltd v Kenya Pipeline company & Another* Petition No. 173 of 2014 wherein it was held:

**“The reason why the Constitution and the law establish different institutions and mechanism for dispute resolution in different sectors is to ensure that such disputes as may arise are resolved by those with the technical competence and the jurisdiction to deal with them. While the court retains the inherent and wide jurisdiction under Article 165 to supervise.....such supervision is limited in various respects, which I need not go into here. Suffice to say that it (the court) cannot exercise such jurisdiction in circumstances where parties before it seeks to avoid mechanisms and processes provided by law, and convert the issues in dispute into constitutional issues when it is not.”**

14. In the case of *George Owino Mulanya & 4 Others v Achieng Odonga & another* [2017] eKLR it was held:

**“Whenever an Act of Parliament has provided for a clear procedure or mechanism for redress, the same ought to be strictly followed. Indeed in the case of *Speaker of the National Assembly vs Karume*, the court states “.....Where there is a clear procedure for redress of any particular grievances prescribed by the Constitution of the Act of Parliament, that procedure should be strictly followed....” The Court of Appeal discussing the same subject reiterated as follows: ....This court in the past emphasized the need for aggrieved parties (sic) to strictly follow any procedures that are specifically prescribed for particular disputes.” *Speaker of the National Assembly v Karume* (supra). In *Kones vs Republic & another exparte Kimani Wa Nyoike & 4 Others* it was held that “.....where a specific dispute resolution mechanism is prescribed by the Constitution or a statute, to resort to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court. The basis for that view is first that Article 159(2) (c) of the Constitution has expressly recognized alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The use of the words “including” leaves no doubt that Article 159(2) (c) is not a closed catalogue. To the extent that the Constitution requires these forms of dispute resolution mechanisms to be promoted, usurpation of their jurisdiction by the High Court would not be promoting, but rather, undermining a clear constitutional objective. A holistic and purposive reading of the Constitution would therefore entail construing the unlimited original jurisdiction conferred on the High Court by Article 165(3) (a) of the Constitution I a way that will accommodate the alternative dispute resolution mechanisms.....In view of my above findings, I find that this matter is not properly before this court....The drafters of the Constitution were fully aware of articles 165 and article 85(a). The Constitution cannot contradict itself. I see no contradiction myself.....This court is obliged under Article 159(2) (e) of the Constitution to protect and promote the purposes and principles of Constitution. Also, the Constitution should be given a purposive, liberal interpretation. The provisions of the Constitution must be read as a integrated whole without any one particular provision destroying the other but each sustaining the other.”**

15. Taking a cue from the dictum in the above cited case, I find that a dispute over the issuance of the agency notice under Section 42 of Tax Procedures Act is a matter which the petitioner ought to have pursued before Tax Appeals Tribunal and only approach this court on an appeal.

16. For the above reasons, I find that the preliminary objection raised by the 1<sup>st</sup> respondent is merited and I therefore strike out the instant petition with no orders as to costs.

**Dated, signed and delivered in open court at Nairobi this 7<sup>th</sup> day of November 2019.**

**W.A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Marige for the 1<sup>st</sup> respondent

No appearance for applicant

Court Assistant – Sylvia