

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 28 OF 2018

IN THE MATTER OF AN APPLICATION BY THE APPLICANT FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY WAY OF AN ORDER OF CERTIORARI, PROHIBITION ND DECLARATION PURSUANT TO ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

AND

IN THE MATTER OF TAX APPEALS TRIBUNAL ACT

AND

IN THE MATTER OF TAX PROCEDURES ACT

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

BETWEEN

VITROCISSET S.P.A. KENYA.....APPLICANT

VERSUS

THE COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

RULING

1. By chamber summons dated 22nd January 2018 and supported by a statutory statement and verifying affidavit sworn by **Justus Masabe** the exparte applicant **VITROCISSET S.P.A** a limited liability company seeks from this court leave to institute Judicial Review proceedings against the respondent. The Commissioner of Domestic Taxes (The Commissioner) for the orders of

a) Certiorari to remove to this court for purposes of being quashed the Kenya Revenue Authority notice under Section 42 of the Tax Procedures Act to the Managing Director of Trust bank freezing the tax payer's account

b) Prohibition to prohibit the Kenya Revenue Authority, its agents, or servants from taking any enforcement or recovery measures in respect of the tax payer based on the demand notice dated 15th January, 2018 directed to the applicant and the notice to Managing Director Diamond Trust Bank dated 15th January 2018;

c) A declaration that the respondent has breached the tax payer's right to fair administrative action guaranteed by Article 47 of the Constitution and

d) Compensation for breach of Article 47 of the Constitution.

2. The applicant also prays that the leave so granted do operate as a stay of enforcement and collection

action taken by the respondent including the demand notice dated 15th January 2018 and the notice to the Managing Director, Diamond Trust Bank dated 15th January, 2018, which notices were allegedly not brought to the attention of the applicant and which should therefore be lifted.

3. The applicant also urged the court to grant any other orders and directions as it may deem fit and just to issue under the circumstances and that costs incidental to the application to abide by the result of the substantive motion.

4. The *ex parte* applicant claims that on 18th January 2018, its manager went to the Diamond Trust Bank to undertake routine transactions when they found that surprisingly, the account had been frozen and therefore they could not carry out the intended transactions. That upon inquiry it was informed that Kenya Revenue Authority was demanding taxes from the applicant.

5. It is alleged by the applicant that as at the time, it had not received any demand for tax from Kenya Revenue Authority and that neither did it have notice of the order of Kenya Revenue Authority to freeze the bank accounts and only learnt of the freezing from the Bank. That upon further inquiry from Kenya Revenue Authority, the applicant was handed 2 notices both dated 15th January 2018 addressed to the applicant and the applicant's bankers demanding kshs 75,179,105 and requiring immediate payment failure to which enforcement measures would be instituted.

6. The other addressed to the managing director Diamond Trust Bank required the bank to pay kshs 75,179,105 being tax due by the applicant and to be remitted to the Kenya Revenue Authority's accounts held at Central Bank of Kenya.

7. The applicant acknowledges that parties have been disputing over taxes claimed and that there is a judgment delivered by the Tax Appeals Tribunal on 11th November 2017 in **Tax Appeals No. 109 of 2015 Vitrociset SPA vs Commissioner of Domestic Taxes** where the Tribunal annulled the withholding tax assessment issued by Kenya Revenue Authority against the applicant but upheld Kenya Revenue Authority's assessment in respect of corporation tax, value added tax and disallowed expenses.

8. It is however claimed by the applicant that following the annulment, it would not have been possible for Kenya Revenue Authority to collect the taxes without amending the assessment in accordance with Section 31 of the Tax Procedures Act whose purpose ***"is to ensure the taxpayer is liable for the correct amount of tax payable in respect of the reporting period to which the original assessment relates."*** Further, that the judgment of the Tax Appeals Tribunal did not decree the tax which is now being demanded by the Respondent.

9. Accordingly, it was asserted that the demand notices dated 15th January 2018 constitute an amended assessment and is issued contrary to law as it does not provide the 30 days period.

10. According to the applicant, it ought to have been given 30 days notice to pay up any taxes assessed. Secondly, that obligation to pay tax as per the impugned notice should not be simultaneous with enforcement proceedings for recovery of the demanded tax and thirdly that freezing of the tax payer's accounts without notice amounts to breach of the tax payer's right to fair administrative action guaranteed by Article 47 of the Constitution and the Fair Administrative Action Act, 2015.

11. Further, that Section 42 of the Tax Procedures Act relied on by the respondent is inapplicable to the circumstances of this case. It was asserted that a demand notice which does not allow the taxpayer time to settle the tax allegedly due is illegal, defective and null and void and malicious and that therefore contrary to Article 47 of the Constitution.

12. It is alleged that the applicant has already filed a notice of appeal to challenge the judgment and decision of the Tax Appeals Tribunal but that the demand notices by the Commissioner are administrative decisions which were made in excess of jurisdiction and intended to paralyze the

applicant's operations and obligations hence this court should intervene.

13. The respondent filed grounds of opposition and a preliminary objection both dated 1st February 2018 contending that the applicant's chamber summons is filed outside the provisions of Section 29(6) and (7) of the Tax Appeals Tribunal Act, 2013; that the application is filed in the wrong forum outside the provisions of Section 32 of the Tax Appeals Act, 2013; and that the application is filed contrary to legal notice No. 226 of 2015 (The Tax Appeals Tribunal, (Appeals to the High Court Rules).

14. In the grounds of opposition, the respondent adds that the applicant is challenging the judgment of the Tax Appeals Tribunal by way of Judicial Review proceedings.

15. Further, that the demand letter of 15th January 2018 is not a fresh assessment but what was contained in the judgment of the Tax Appeals Tribunal.

16. The respondent contends that the applicant should prefer an appeal to the Commercial and Tax Division of the High Court and that the orders sought herein cannot issue because this court's jurisdiction is ousted by virtue of Section 9(2) of the Fair Administrative Action Act, 2015.

17. It is further contended that the orders sought are a back door challenge to the findings of the Tax Appeals Tribunal. It was further contended that Section 31 of the Tax Procedures Act does not apply in this instance because what is being undertaken is the enforcement of the judgment of the Tax Appeals Tribunal as provided for by Section 29(6) of the Tax Tribunal's Act hence the applicant is abusing the court process by hood winking the court that there are administrative issues, in order to simply obtain a stay of the judgment of the Tribunal.

18. The respondent further contends that the application by the applicant/tax payer is frivolous, vexatious and an abuse of the court process, only meant to delay and halt the collection of the taxes found to be due and payable hence it is misconceived and that the same should be dismissed with costs.

19. The parties' advocates made oral submissions to canvass the application with Mr Kashindi advocate arguing the application on behalf of the applicant tax payer whereas the respondent was represented by Miss Mburugu advocate.

20. Mr Kashindi reiterated the grounds, facts and depositions of the applicant and maintained that the respondent should have issued notice and given time to the applicant to settle the taxes demanded before proceeding to enforce by freezing the applicant's accounts with Diamond Trust Bank which is contrary to Section 32 of the Act that requires notice of 30 days prior to enforcement, not to demand and enforce simultaneously.

21. According to the applicant, failure to allow it time to pay is abuse of statutory power as Section 42 of the Act, under which the 2 notices were issued had not crystallized.

22. Mr Kashindi maintained that his client is challenging the administrative power exercised by the Commissioner hence the matter lies within the Judicial Review jurisdiction. He relied on the case of **Council of Civil Service Union vs Minister for Civil Service** where the learned Lord Diplock defined what Judicial Review is.

23. It was submitted that the Commercial and Tax Division of the High Court will not issue Judicial Review reliefs sought herein which are intended to deal with breach of the Constitution.

24. Further, that whereas the applicant is appealing against the decision of the Tax Appeal's Tribunal made in 11th December 2017, but that the breach complained of hereto is the infringement of the right to fair administrative action and as such, it is only this court which has jurisdiction to hear and determine the fairness, legality or procedural propriety of the impugned notices issued on 15th January 2018.

25. It was further submitted that when enforcing the judgment of the Tribunal, the law must be followed. In this case, it was submitted that the respondent must recompute figures of assessment because the tribunal did not give any specific figures for collection by the Commissioner as required under Section 31 of the tax Procedures Act. Counsel for the applicant maintained that it is impossible to collect tax without reassessing the collectable amount and that there is no decree issued stating the amount assessed for collection. It was therefore submitted that the applicant had shown an arguable prima facie case for consideration at the substantive stage.

26. With respect to the prayer for stay, it was submitted that the applicant company's operations had been disrupted by the freezing of its account and that it was unable to pay its suppliers, salaries or operating expenses which act on the part of the respondent is considered to be an economic sabotage as it will cause redundancy and closure, hence, a stay of implementation of the notices should issue, since taxes will only be paid if the company is in operation. It was submitted that the applicant had paid taxes from 2014 to date and that so far, it has paid 173 million income tax; 162 million VAT and other taxes during the pendency of this dispute.

27. It was further submitted that the tax payer had submitted 7.5 million security when the matter was before the Tax Appeals Tribunal, which is adequate security.

28. In opposition to the application by the applicant, and relying on the preliminary objection and the grounds of objection filed, the respondent's counsel Miss Mburugu submitted that there is a judgment by the Tax appeals Tribunal made on 11th December 2017 and that it was clear that the Tribunal never interfered with the assessments which are claimed herein in the notices.

29. Further, that the applicant is enforcing the judgment of the Tribunal and that Section 29(6) of the Act stipulates that when the judgment is delivered, it takes effect on the date of judgment hence, the aggrieved tax payer could only appeal the decision and seek stay in the Commercial and Tax Division of the High Court, and not to approach this court by way of Judicial Review.

30. It was submitted that albeit an appeal was filed against the judgment of the Tribunal, an appeal per se is not a stay and that only the court handling the appeal could grant stay of execution of the judgment of the Tribunal as stipulated in Rule 20 of the Tax Appeals Tribunal Act Rules which confirms Order 42 of the Civil Procedure Rules on stay pending appeal.

31. It was further submitted that there is no order freezing the applicant's accounts but that the respondent only issued a notice to the tax payer to settle the tax decreed by a competent Tribunal as per Section 42 of the Tax Appeals Tribunal Act, as the power to collect tax had crystallized immediately the decision of the tribunal was delivered.

32. On allegations that a reassessment ought to have been done, it was submitted that no fresh assessment was necessary as that would be subject to another objection to the Tax Appeals Tribunal hence the application is an abuse of court process.

33. It was also submitted that should the court grant leave and stay, it should order that a full guarantee of the claimed tax be given since the applicant is a subsidiary company of an Italian Company whose contract with the Kenyan Government had lapsed.

34. In a brief rejoinder, Mr Kashindi submitted on behalf of the applicant stating that the sums of money claimed are not contained in the judgment of the Tax Appeals Tribunal and were not the same sums of money in contest before the Tax Appeals Tribunal.

35. Further, that these proceedings are not challenging the decision of the Tribunal but the demands and enforcement without notification. It was also submitted that the tax payer has been in Kenya for the last 20 years managing a space station in Malindi and involved in Government to Government contracts hence it cannot run away as it has been paying taxes.

36. It was further submitted that there was no rebuttal of the depositions in the affidavits and that due to the hardship occasioned by the enforcement notice freezing the applicant's account, the company should be allowed to operate before the Government can collect tax.

DETERMINATION

37. I have carefully considered the applicant's chamber summons the statutory statement, grounds, annexures and verifying affidavit I have also considered the respondent's grounds of opposition and preliminary objection, as well as the respective parties' advocates oral submissions.

38. The main issues for determination in my humble view are

1) Whether this court has jurisdiction to hear and determine this matter.

2) Whether the applicant is entitled to the orders for leave and stay sought.

3) What orders should the court make.

39. On the first issue of jurisdiction of the court, the respondent in its preliminary objection notice filed on 2nd February 2018 contends that this court's jurisdiction in the matter is divested for reasons that the application seeks to challenge the judgment of the Tax Appeals Tribunal made on 11th December 2017 yet the law under Section 32 of the Tax Appeals Tribunals Act, 2013 and LN No. 226/2015 the Tax Appeals Tribunals (Appeals to the High Court Rules provides for an appeal process from the Tax Appeals Tribunals to the High Court and not a challenge by way of Judicial Review.

40. It also contended that Section 9(2) of the Fair Administrative Action Act, 2015 bars this court from hearing a matter where an alternative remedy is provided for.

41. The respondent further contends that Section 29(6) of the Tax Appeals Tribunal stipulates when the decision of the tribunal takes effect which is on the date of notice of the decision and that therefore the applicant cannot seek to challenge that decision by way of Judicial Review but in the appeal already filed where it can also seek for stay under Order 42 of the Civil Procedure Rules. The first question is whether the preliminary objection raised meets the threshold laid in the **Mukisa Biscuits manufacturing Company Ltd vs West End Distributors Company Ltd [1969] EA 696** in that it must raise a pure point of law which can determine the application without delving into the merits.

42. A preliminary objection consists of a point of law which had been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the application or suit. In the Mukisa biscuit case(supra), it was held that examples of preliminary objection are (1) an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

43. The court further held that a preliminary objection 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 raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

44. In the instant case, considering the issue raised on jurisdiction of this court to hear and determine the matter, I am satisfied that the preliminary objection is a pure point of law as it is grounded on the issue of jurisdiction of the court.

45. This is so because in the celebrated case of **Motor Vessel 'Lilian S' vs Caltex Oil (K) Ltd CA 50/1989**, the court held that a question of jurisdiction may be raised by a party or by a court on its own motion and must be decided forthwith on the evidence before the court. In the aforesaid case of Motor Vessel 'Lilian S' the Court of Appeal made it clear that jurisdiction is everything, without which a court of law acts in vain. Further, that once a court of law establishes that it has no jurisdiction to hear and determine a matter, it must down its tools and do/say no more.

46. The respondent contends that this court is bereft of jurisdiction to hear and determine the application as intended because the application seeks to challenge the judgment of the Tax Appeals Tribunal made on 11th December 2017 yet Section 32 of the Tax Appeals Tribunal Act and LN No. 226/2015(Tax Appeals Tribunal Appeals to the High Court Rules 2013) clearly stipulate that an appeal from the Tax Appeals Tribunals lies to the High Court and therefore judicial review jurisdiction herein is ousted as provided for by Section 9(2) of the Fair Administrative Action Act, 2015. Further, that what the respondent was doing by issuing enforcement notices was to implement the judgment of Tax Appeals Tribunals of 11th December 2017 as there is no stay issued by the High Court.

47. It was also contended that in any event, only the High Court in an appeal as filed by the applicant can stay the enforcement of the assessed tax as the said judgment took effect on the date of judgment as per Section 29(6) of the Tax Appeals Tribunal Act.

48. The impugned notices dated 15th January 2018 demand immediate payment of tax arrears amounting to kshs 75,179,105 made out as follows

Tax head	Principal	Penalty	Interest	Total
1. VAT	31,379,125	-	174483323	48,827,4482
2. Corporate tax	15,032,253	3,773,133	7,546,266	26 351,657
Total	46,411,383	3,773,133	24,994,589	75,179,105

49. The notices are addressed to the applicant and its bankers Diamond Trust Bank Ltd under Section 42 of the Tax Procedures Act, 2015.

50. The respondent claims that it was by the two named notices, simply enforcing the judgment of 11th December 2017 hence this court cannot interfere with the process which process can only be interfered with by the High Court on appeal vide Order 42 of the Civil Procedure Rules.

51. I have read the judgment dated 11th December 2017, I have not seen any figures similar or closer to the amounts of tax under the three heads forming the subject of the appeal proceedings before the Tax Appeals Tribunal.

52. For this court to find that the respondent was implementing judgment of 11th December 2017, it must be shown copy of decree and also a comparison of the amounts claimed before the appeal was filed to the Tax Appeals Tribunal and how those figures had accumulated to over seventy five million now being claimed.

53. Further, if the tax due as per the judgment is recoverable immediately on the date the notice of the decision is given, or on such date as the tribunal may give in the notice, then it is expected that the decision of the Tribunal discloses exactly how much tax is due for collection.

54. For this court therefore to find that it is the judgment of 11th December 2017 which was under implementation through the impugned notices, there must be disclosure of the total sum of tax claimed. There is no affidavit evidence disclosing how the over Ksh 75 million was arrived at by the respondent which then raises a triable issue capable of indepth investigation at the substantive stage, and whether the notices given were indeed intended to implement the judgment of 11th December 2017 or contained reassessed tax which would be subject of another Notice and possible objection altogether.

55. This court at this stage entertains doubt as to whether there is full disclosure by the respondent and that doubt must go to the benefit of the applicant.

56. Accordingly, I find and hold that the preliminary objection as raised invites discretion of the court hence it cannot stand. It must be disallowed and I hereby disallow it.

57. This court agrees that section 32 of the Tax Appeals Tribunal Act and the procedures thereunder stipulate that an appeal from the decision of the Tribunal lies to the High Court. Further, that Section 9(2) of the Fair Administrative Action Act 2015 bars this court from hearing and determining Judicial Review proceedings where there is an effective alternative remedy by way of internal review or appeal. However, the respondent has not at this stage demonstrated that the demanded tax is related in any way to the judgment of the tax Appeals Tribunal.

58. This finding does not, however, preclude the respondent from enforcing the judgment of the Tax Appeals Tribunal where there is no stay of its implementation and neither has this court precluded the applicant from seeking for stay of enforcement of the judgment of the Tax Appeals Tribunal, which stay can be sought from the court hearing the appeal.

59. For the above reasons, this court finds that the application for leave to apply is not frivolous or vexatious or abuse of legal process. It raises a prima facie arguable case which may or may not succeed but the applicant in such circumstances must be given the benefit of doubt to ventilate its grievances.

60. Accordingly, I grant to the applicant leave to institute Judicial Review proceedings to challenge the respondent's decisions made vide two demand letters dated 15th January 2018 as prayed in prayers Nos 2 a-d of the chamber summons dated 24th January 2018.

61. The substantive motion shall be filed and served within 10 days from the date hereof.

62. I however must mention that the applicant did not require any leave of court to institute Judicial Review proceedings where the prayers sought are for compensation and a declaration. Leave is only necessary in seeking the traditional judicial review orders of mandamus, certiorari and prohibition as stipulated in sections 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules, 2010.

63. On the prayer for stay of implementation of the said notices, the applicant claims that it was never given an opportunity to consider the claimed taxes as the notices demand for immediate payment of tax, which tax it was never made aware of prior. There is no denial that the notices as issued demand for immediate payment of the claimed tax, which presupposes that the applicant was aware of the sums claimed in the notices prior to that date, yet the respondent has not demonstrated at this stage as to when the alleged tax became due and payable by the applicant, especially where the notices issued do not make any reference to the judgment of 11th December 2017.

64. Thus, there is nothing to demonstrate that the applicant had been notified that it owed over shs 75 million prior to the date of the notices. An agency notice to the bank effectively freezes the tax payer's accounts until all the demands are met.

65. That being the case, and in the absence of any rebuttal that the applicant stands to suffer from redundancy as well as non payment of salaries and other obligations to its suppliers, I find that the applicant has demonstrated that unless a stay is granted, the application as intended, if successful shall be rendered nugatory and the applicant shall be rendered a mere pious explorer in the judicial process as it shall not be in existence.

66. Accordingly, I hereby order that the leave herein granted shall operate as stay of implementation of the two notices issued on 15th January 2018 to the applicant and to the applicant's Bankers Diamond Trust Bank Ltd respectively as sought in prayer No. 3 of the chamber summons dated 24th January 2018 until further orders of this court. However, this stay shall be conditional upon the applicant providing a **BANK GUARANTEE** of Kenya Shillings Fifty Million (Kshs50,000,000) from a reputable local Bank within 14 days from the date of this ruling, which guarantee shall also be filed in court for approval as security.

67. Costs shall be in the main motion as may be ordered.

Dated, signed and delivered in open court at Nairobi this 7th day of February, 2018.

R.E. ABURILI

JUDGE

In the presence of:

Miss Musau h/b for Kashindi advocate for applicant

Mir Ochieng h/b for Miss Mburugu for advocate for the respondent

CA: Kombo