

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
(CIVIL DIVISION)
HCC MISC NO E310 OF 2024

KISII SAFARI INNS LTD.....APPLICANT

VERSUS

THE KENYA REVENUE AUTHORITY.....RESPONDENT

JUDGMENT

1. The applicant filed an ex parte chamber Summons application dated **3rd October 2024** seeking to be granted leave to apply for judicial review orders of prohibition, on the grounds that there was a threatened auction of its assets by the respondent, acting through the interested party, for realization of a wrongfully stated tax of **Kes.70,004,499/-**, which amount was, in its view twice what it owed.
2. Upon considering the matter Sewe, J found that there was a triable issue meriting investigation by way of a substantive judicial review application. The learned judge ordered that:-

 - (1) Leave do issue to the applicant, to apply for to review orders of prohibition in terms of prayers 2 and 3 of the ex parte chamber summons dated **3rd October 2024**;

- (2) That leave so granted do operate as stay of any action by either the respondent or the interested party pending the hearing and determination of the substantive motion;
 - (3) The substantive application to be filed within 14 days from **9th October 2024**; and
 - (4) Mention on **28th October 2024**.
3. On **28th October 2024**, the learned judge gave directions on the hearing of the substantive motion. Further directions were given on **19th December 2024**. Vide the said directions, the substantive motion was to be canvassed by way of written submissions, which were to be highlighted on **12th February 2025**.
 4. It is necessary that I set out the pleadings of the parties for reasons which shall become apparent below.
 5. The applicant's substantive motion is dated **23rd October 2024**. Vide the said application, the applicant sought the following orders:-
 1. That the honourable Court be pleased to issue judicial review orders of prohibition to prohibit the respondent and the interested party from auctioning the ex parte applicant's assets on controverted tax arrears, penalties, and interest based on

wrong accounts purportedly standing at a sum of **Kes.70,064,449/-** unless the same are reviewed;

2. That the honourable Court be pleased to issue judicial review orders of prohibition to prohibit the respondent from taking any other action against the ex parte applicant as far as the controverted accounts are concerned;
 3. That both the respondent and the interested party be condemned to pay the ex parte applicant's costs.
6. The grounds upon which the application was brought were that the exparte applicant owns and operates a beach hotel at the South Coast under the name and style of **Kaskazi Beach Hotel**. It was stated that the applicant submitted "*an erroneous statement of tax accounts*" to the respondent, which the latter relied upon without going through its system, to levy tax, interest, and penalties on the exparte applicant, the sum of which was assessed as being **Kes.70,064,499/-**. The exparte applicant reckoned, after what it says was a revisit of all payments made, and amnesty of interest and penalties received, that the correct amount is **Kes.38.957,181/-** and not **Kes.70,064,499.00** as claimed by the respondent.

7. It was argued that the respondent had instructed the interested party, who in turn had threatened to auction the ex parte applicant's assets in realization of the wrongfully stated tax. On its part, the interested party issued a redemption notice dated 30th June 2023, vide which it threatened to sell by public auction the exparte applicant's assets known as Title **No. Kwale/Diani Beach Block/655, on which Kaskazi Beach Hotel was erected**, on account of the claimed outstanding amount of **Kes.70,064,494/-**.The exparte applicant urged that it was given a 45-day **redemption notice** to pay the said sum, failing which the auction would be staged.
8. The exparte applicant's application was supported by the affidavit of **Charles Gekonde Otara**, sworn on **23rd October 2024**. The said deponent is a director of the exparte applicant. His deposition restates what the grounds I have stated above say, save that it attached as an exhibit "GGO1" a report prepared by a firm of Omare & Associates, Certified Public Accountants, which stated in a letter to the respondent that the amount outstanding is **Kes.38,957,181/-**
9. The respondent opposed the application through a replying affidavit sworn by Alice Suguta Marigo and filed on 18th December

2024. Ms Marigo deposed that the application was fact-based and did not impugn the procedure applied by the respondent, warranting the invocation of the judicial review jurisdiction of this Court. She contended that contrary to what was alleged in the application, taxes had been admitted by the exparte applicant in Misc Application No 42 of 2023 and that there were several un-honoured payment proposals. She further contended that the application breached the doctrine of exhaustion, as the Tax Procedures Act provides that questions regarding the quantum of taxes are issues to be dealt with by the Tax Appeals Tribunal, not the High Court in exercise of its judicial review jurisdiction. It was also urged that the suit contravened section 9 of the Fair Administrative Action Act.

10. Ms. Marigo deposed that the instant suit was an abuse of the process of the Court as the previous suit, to wit, High Court Misc Civil Application No E042 of 2023, was withdrawn after the Court ascertained that no tax dispute existed. The costs of **Kes. 10,000./-**, which were ordered by the Court, had not been paid. She stated that the fact that the previous suit was filed was not disclosed. Further, she contended that exparte orders were issued after the applicant deceitfully served the respondent through a general email address, callcentre@kra.go.ke, knowing that it

would take a long time for the pleadings to be rerouted to the correct address.

- 11.** On the amount of taxes due, Ms Marigo deposed that the figure of **Kes.70,064,499/-**, which was due as at **29th July 2024**, was correct and that the same was being questioned as a way of frustrating tax collection.
- 12.** Ms Marigo stated that the exparte applicant proposed payment plans which it did not adhere to. She deposed that the respondent was not interested in dispossessing the exparte applicant of its property but was merely pursuing undisputed tax liability.
- 13.** The deponent urged that it followed the correct procedure and cannot be faulted. She deposed that, given the nature of the matter, the application ought to be struck out.
- 14.** The respondent also filed a notice of preliminary objection dated **17th December 2024** vide which it was urged that the application contravenes express provisions of section 9(2) of the Fair Administrative Action Act, that the application was filed contrary to the provisions of Section 12 and 13 of the Tax Appeals Tribunal Act and that the application was in beach of the doctrine of exhaustion.

- 15.** For the foregoing reasons, it was urged that the application was an abuse of the process of the Court and should be struck out with costs of the Respondent.
- 16.** The application was canvassed by way of written submissions. The submissions of the exparte applicant are dated 19th February 2024 (sic!) while those of the Respondent are dated **4th March 2024** (sic!). I shall give a *precis* of each party's submissions below.
- 17.** In its submissions, filed by its counsel Richard O & Co. Advocates, it was submitted that the corrected amount of tax due, as assessed by its accountants, Omare & Associates, was **Kes.38,957,181/-**. **The sum was arrived at after taking into account** the payments made, and upon consideration of the amnesty in respect of interest and penalties given, as evidenced by certificates of amnesty received, which document was attached to the supporting affidavit. Counsel submitted that further payments had been received, which reduced the amount further to **Kes.33,957,181/-**.
- 18.** It was contended that the tax demand was based on erroneous self-assessment. Further, the respondent had failed to file a complete tax account, disproving the alleged payment, yet it owed

the exparte applicant a duty to ensure that the taxes demanded and paid by the exparte applicant and other taxpayers were the correct taxes.

- 19.** While admitting it filed a previous suit, the exparte applicant submitted that Mombasa JR2 No E042 of 2023 was withdrawn and had nothing to do with this suit. The exparte applicant denied that Sections 12 and 13 of the Tax Appeals Tribunal Act and Section 52(1) of the Tax Procedures Act are applicable, as it was not challenging the commissioner's decision but rather seeking a restatement of the correct figures. Counsel stated that in any case, the Tax Appeals Tribunal does not have jurisdiction to issue judicial review orders as these were within the exclusive province of the High Court. The exparte applicant therefore prayed that the orders sought be issued as sought in the Notice of Motion dated **23rd October 2024** with costs.
- 20.** The exparte applicant therefore prayed that the orders sought do issue as prayed in the Notice of Motion dated 23rd October 2024 and that the Court do proceed to allow the same with costs.
- 21.** Mr Gaya Ochieng, learned counsel for the 1st Respondent, urged in his submissions that this Court lacked jurisdiction to hear

and determine the matter. He contended that the issues for determination in this matter were the following: -

1. Whether the application was properly before the Court or if it was in breach of section 52(2) of the Tax Procedures Act and 9(2) of the Fair Administrative Action Act; and
 2. Whether the application meets the threshold for the issuance of the orders sought.
- 22.** Counsel contended that the decision to proceed to recover the taxes through the issuance of distress orders was made in line with Section 41 of the Tax Procedure Act and hence was a decision made under a tax law. That being the case, an appeal against the said decision by the *ex parte* applicant ought to have been to the Tax Appeals Tribunal pursuant to section 52(1) of the Tax Appeals Tribunal Act and Section 12 of the Tax Appeals Tribunal.
- 23.** Counsel contended, relying on the decisions of the Supreme Court in the case of **Samuel Kamu Macharia v Kenya Commercial Bank Limited [2011]eKLR**, and that of the Court of Appeal in **Owners of the Motor Vessel Lilian “S” v Caltex Oil (Kenya) Ltd [1989]eKLR**, that since the court, in its view, lacked jurisdiction, it should down its tools.

24. Mr. Ochieng submitted that the ex parte applicant had not exhausted all the remedies available to them at law. The contested decision was an applicable decision that should have been filed at the Tax Appeals Tribunal. He urged that the matter ought to be remitted to the Tax Appeals Tribunal for hearing and determination. In support of the said contention, he relied on the case of the **Speaker of the National Assembly v Karume [1992] KLR 21, Geoffrey Muthinja Kabiru & 2 others v Samuel Munga Henry & 1756 others [2015]eKLR**, and the **In the matter of the Mui Basin Local Community [2015]eKLR**.
25. Though conceding that there were exceptions to the doctrine of exhaustion, it was denied that such an exception was present in the instant cause.
26. On the merits of the case, counsel urged that the matter was an abuse of the process of the Court, as a previous suit was filed, consequent to which the ex parte applicant made several payment proposals which were not honoured.
27. The respondent's counsel submitted that the amount alleged as due by the ex parte applicant did not take into account the most recent reconciliation by the parties, wherein it was acknowledged that the amounts owing stood at **Kes.63,571,444/-**, as stated in the

annexure “ASM2”. The same did or also take into account accrued interests and penalties under sections 38 and 84A of the Tax Procedures Act.

- 28.** Counsel stated that the ex parte applicant did not provide any evidence that the respondent breached the law or the applicable procedure as would justify a judicial review of its actions. For that reason, he urged that the case should be dismissed with costs.
- 29.** Mr Gaya Ochieng therefore urged that he application be dismissed with costs and that the costs payable in the previous matter be paid.
- 30.** I have carefully considered the judicial review application, the responses thereto, the annexures attached to the depositions filed herein, as well as the written submissions of the parties. In my view, the issues requiring determination by the Court are the following:-

 - i. Whether the substantive judicial review application is an abuse of the Court process;
 - ii. Whether this Court has jurisdiction to hear the matter;
 - iii. Whether the doctrine of exhaustion is applicable;
 - iv. Whether the substantive judicial review application has merit;

- v. What orders should issue; and
- vi. Who should pay costs?

31. The Notice of Preliminary Objection dated 14th December 2024 raises jurisdiction question. It contends that this Court lacks jurisdiction to hear and determine the matter, as the determination challenged is a tax decision that should be appealed to the Tax Appeal Tribunal.

32. That being the case, I must first determine whether the preliminary objection was rightly raised in this matter. What amounts to a preliminary objection, and when such an objection can be raised, was considered in the case of **Mukisa Biscuit Manufacturing Company Ltd v West End Distributors (1968) EA 696**. In the said case Law JA stated as follows: -

“...A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which, if argued as a preliminary point, may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration.”

33. Sir Charles Newbold P in the same case observed as follows: -
- “...The first matter related to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. 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 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.**
34. Since the issue raised by counsel for the 1st respondent is one of jurisdiction, it follows ineluctably that the preliminary objection was rightly taken. Having decided as foregoing, does the preliminary objection have merit? Does the High Court have jurisdiction?
35. The centrality of jurisdiction in litigation cannot be gainsaid. In the laconic words of Nyarangi JA in **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KECA 48 (KLR)**, jurisdiction is everything. The learned Judge of Appeal stated that:-
- “I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity, and the court seized of the matter is then**

obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction.

36. The above holding was reiterated by the Supreme Court of Kenya in the case of **Macharia & another v Kenya Commercial Bank Ltd & 2 others [2012] KESC 8 (KLR)**. The apex court held that:-

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of

the matter, for without jurisdiction, the Court cannot entertain any proceedings.”

37. The basis of the application before the Court is the finding made by the respondent that the ex parte applicant owes taxes amounting to **Kes.70,064,499.00** and its intention to recover the said amount through auction. The question this Court ought to answer is whether the matter should have been filed in the Tax Appeals Tribunal or this Court, and whether judicial review proceedings were appropriate in the circumstances.

38. Section 52 of the Tax Procedures Act states that: -

“(1)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 (Cap. 469A).

(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.”

39. “Appealable decision” is defined in section 3 of the Tax Procedures Act

““appealable decision” means an objection decision and any other decision made under a tax law other than—

(a)a tax decision; or

(b)a decision made in the course of making a tax decision;”

“Tax decision,” on the other hand, is defined as: -

“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 a taxpayer;

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

(d)a decision on an application by a self-assessment taxpayer under section 31(2);

(e)*deleted by Act No. 4 of 2023, s. 49 (a);*

(f)a decision under section 48 requiring repayment of a refund; or

(g)a demand for a penalty or late payment interest;”

40. In my view, the decision in this case was an appealable decision, made under the tax law. That being the case, the matter filed herein ought to have been filed at the Tax Appeal Tribunal pursuant to section 12 of the said Act, which provides that: -

“A person who disputes the decision of the Commissioner on any matter arising under the provisions of any tax law may, subject to the provisions of the relevant tax law, upon giving notice in writing to the Commissioner, appeal to the Tribunal...”

41. This wasn't done in this case. That being the case, I find and hold that this Court lacks jurisdiction. In keeping with the decision of the Court of Appeal in the case of Owners **of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KECA 48 (KLR)**, I must down my tools, by dismissing this matter.

42. Even assuming I was wrong, I agree with the submissions of the counsel for the respondent that the applicants had an obligation to exhaust all remedies available to them at law before coming to the High Court. Section 9(2) of the Fair Administrative Actions Act provides that

“(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.”

43. In the case of **Speaker of the National Assembly v Karume [1992] KECA 42 (KLR)** the Court of Appeal held that: -

“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”

44. Further in the case of **Geoffrey Muthinja Kabiru & 2 others v Samuel Munga Henry & 1756 others [2015] eKLR**, it was held that:-

“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 court..... This accords the Article 159 of the Constitution, which commands courts to encourage alternative means of dispute resolution.”

45. Although there are circumstances under which a court may depart from the requirement that a party exhaust available remedies before coming to court, I have not seen any grounds that would justify departure from the doctrine of exhaustion.
46. That being the case, there is no reason for me to depart from the doctrine of exhaustion in this instance. I am therefore satisfied that, as found by W Korir, J (as he then was), in **Master Freighters Ltd v Kenya Bureau of Standards & another [2019]eKLR**, where no justification is given for the court to depart from the requirement that a party exhausts available remedy, the Court would be justified to deny a party the remedy that it seeks.
47. The upshot of the foregoing is that the application has no merit. Having found that the Court has no jurisdiction, there is no need for this Court to consider the matter on its merits.

48. I must add that the applicant did not disclose prior litigation. To the extent that it lacked candour, the exparte applicant misused the Court process.

49. In the circumstances, I dismiss the substantive judicial review application. The orders that therefore command themselves to me are the following: -

- 1.** The substantive judicial review application is dismissed;
- 2.** All subsisting orders are discharged forthwith; and
- 3.** The 1st defendant shall have the costs.

50. It is so ordered.

Dated and signed at Mombasa, this 21st day of November 2025.

Delivered virtually through **Microsoft TEAMS**

GREGORY MUTAI

JUDGE

In the presence of:-

Mr Gaya Ochieng, for the Respondent;

No appearance for the Exparte Applicant; and

Arthur – Court Assistant.