IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPEAL NO. 66 OF 2017

BETWEEN

CORRUGATED SHEETS LIMITED .....APPELLANT

AND

KENYA REVENUE AUTHORITY.....RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Mombasa (Emukule, J.) dated 14th October, 2016 ***in H.C Misc. Appl. No. 85 of 2012.*****)**

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JUDGMENT OF THE COURT

1. By a letter dated 30th August, 2012 **Kenya Revenue Authority** (the respondent) demanded payment of Kshs.50,500,743 being Value Added Tax (VAT) arrears for the period between January and September, 2008 from **Corrugated Sheets Limited** (the appellant). This came as a surprise to the appellant who believed it had paid VAT relating to the period in question. Consequently, the appellant wrote to the respondent explaining its position. In particular, the appellant claimed that the respondent had failed to take into account the returns it had filed with respect to that period. More so, that as at January, 2008 the appellant had an opening tax credit balance of Kshs.75,605,085.30 in its favour. Further, at the end of that period in September, 2008, the respondent paid to the appellant a tax refund of Kshs.63,851,603. Therefore, there was no basis for the additional tax claimed since the appellant had diligently and faithfully paid its taxes.

2. While agreeing that the appellant had the aforementioned tax credit in its favour as at January, 2008, the respondent's opinion was that the manner in which the appellant treated the said tax credit in its returns was erroneous. According to the respondent, the appellant having claimed a tax refund of Kshs.63,900,394.70 on 24th January, 2008 should not have carried forward the said tax credit to the next tax period, that is, February, 2008. In doing so, the appellant had contravened the provisions of ***Section 11(2)*** of the ***VAT Act, Chapter 476 (repealed)*** as well as a Public Notice No. 23 of 2003 issued by the respondent in respect of VAT refund claims. What was more, carrying forward of the said credit amounted to a double claim on the part of the appellant which interfered with the subsequent payment returns.

3. The said anomaly was detected by the respondent when it conducted a reconciliation of the appellant's account in July, 2012. It is then that the respondent made the necessary adjustments and raised the demand in question. Unwavering, the respondent once again by a letter dated 10th September, 2012 demanded payment of the outstanding VAT immediately. This state of affairs instigated the appellant to invoke the High Court's jurisdiction under judicial review proceedings.

4. Pursuant to leave of the High Court which was granted on 5th October, 2012 the appellant sought:-

> **i) An order of certiorari to quash the respondent's decision to demand payment of Kshs.50,500,743 in respect of VAT from the appellant as contained in the letters dated 30th August, 2012 and 10th September, 2012.**
>
> **ii) An order of prohibition to prohibit the respondent from continuing to wrongfully demand from the appellant the amount in issue for the period between January and September, 2008.**
>
> **iii) Costs be taxed and paid by the respondent**.

The application was anchored on the grounds that the respondent's conduct was not only actuated by malice but was also irrational. Furthermore, the said conduct went against ***Article 47*** of the ***Constitution*** which enshrines the right to fair administrative action.

5. In response, the respondent through its then Principal Revenue Officer, Tomkys Kandie Kigen, maintained that its actions were within the law. The process leading to the assessment and demand of the outstanding VAT for the period in question was above board. The respondent also questioned the suitability of the High Court to entertain the proceedings in light of the available alternative remedies under the ***VAT Act***. The respondent maintained that the judicial review proceedings were misconceived.

6. Faced with the foregoing, the learned Judge (**Emukule, J**.) in a ruling dated 14th December, 2016 found for the respondent on the grounds; firstly, the dispute revolved around the merits of the tax demand; and secondly, the respondent acted within the provisions of the law. In dismissing the application, the learned Judge in his own words stated:-

> **"Once the taxman's antennae are raised and he acts in accordance with the provisions of Section 9 of the Seventh Schedule to the Act, there can be no ground for holding either that he acted illegally, irrationally, or without candour or fairness, when he has also complied with the rules of natural justice."**

7. It is that decision that is the subject of this appeal which is predicated on the grounds that the learned Judge erred by:-

> **a. Misapprehending the issue(s) that arose for determination before him thus arriving at the wrong conclusion.**
>
> **b. Accepting the affidavit evidence of Tomkys Kandie Kigen without taking into account Section 11 of the VAT Act.**
>
> **c. Failing to hold that availability of alternative remedy is not a bar to judicial review proceedings.**

8. The parties prosecuted the appeal by way of written submissions as well as oral highlights by their respective counsel.

9. Mr. Khagram, learned counsel for the appellant, began by faulting the learned Judge for misconstruing that the issue before him was whether the respondent's conduct of demanding the VAT in question was within the law or *ultra vires* the ***VAT Act***. Rather, what arose for determination was whether the respondent acted fairly and rationally in making the demand for Kshs.50,500,743.

10. Citing ***Article 47*** of the ***Constitution***, counsel submitted that every person has the right to fair administrative action which is expeditious, efficient, lawfully reasonable and procedurally fair. Procedural fairness extends beyond affording a person the right to be heard but also requires the decision making authority to act fairly. In support of that proposition, the Court was referred to the persuasive decision of the High Court in ***Immanuel Masinde Okutoyi & Others vs. National Police Service Commission & Another [2014] eKLR***.

11. He argued that in line with the provisions of ***Section 11(1)*** of the ***VAT Act***, ***Chapter 476 (repealed)*** the appellant was obligated to deduct the tax credit of Kshs.75,605,081 which the respondent admitted had accrued in its favour, from the tax payable for the period in question. The respondent's allegations to the effect that such credit could not be carried forward due to the tax refund claim made in January, 2008 was contrary to the aforementioned statutory provisions. Moreover, ***Section 11(2)*** which the respondent relied on was clear that such a tax credit should be carried forward to the next tax period. The respondent's irrational and unfair behaviour was further portrayed by its conduct of issuing an agency notice on 5th October, 2012 to the appellant's banker for purposes of collecting the tax demanded.

12. As far as the appellant was concerned, no tax was owing to the respondent for the period in question otherwise, the respondent would not have paid it a tax refund of Kshs.63,851,603 in September, 2008. Therefore, the respondent was highly unreasonable and acted illegally in demanding payment of the colossal amount in issue which principally comprised of interest and penalties. Referring to the House of Lords decision in ***Inland Revenue vs. National Federation Of Self Employed & Small Business Limited [1982] A.C 16***, counsel contended that the appellant failed in its statutory duty and abused its power by trying to implement Public Notice No. 37 of 2003 which was contrary to statutory provisions.

13. According to counsel, despite the learned Judge correctly stating the scope of judicial review, he erred in finding that proper forum for the appellant to ventilate its complaints would be through the alternative mechanisms established under ***Part X*** of the ***VAT Act***. The learned Judge's finding was informed by his misconception that the issue being raised by the appellant revolved around the merit review of the demand in question.

14. In opposing the appeal, Ms. Sanga, holding brief for Mr. Ado, for the respondent, argued that the learned Judge's decision was sound in law and incapable of reproach. All the learned Judge was mandated to look into was the process that gave rise to the decision in issue. Had he embarked on interrogation of the correctness or otherwise of the tax demanded, as suggested by the appellant, the learned Judge would have acted beyond his jurisdiction. To that extent, counsel relied on this Court's decision in ***Republic vs. Kenya Revenue Authority, exparte Yaya Towers Ltd [2008] eKLR***.

15. Making reference to ***Section 9*** of the ***Fair Administrative Action Act***, ***2015*** counsel contended that save in exceptional circumstances, the High Court was prohibited from reviewing decisions prior to exhaustion of alternative remedies. Even in such circumstances, the applicant is required to make an application to the court for exemption from pursuing the alternative remedies. The appellant did not meet any of the foregoing requirements. The issue before the learned Judge was purely a tax issue which ought to have been ventilated in accordance with the alternative remedies under the ***VAT Act***.

16. We are conscious that the learned Judge in declining to issue the judicial review orders sought was exercising his discretion. As such, in determining the appeal before us, we are guided by the principles enunciated in ***Coffee Board of Kenya vs. Thika Coffee Mills Limited & 2 Others [2014] eKLR***. In a nutshell, we ought not to interfere with the exercise the learned Judge's discretion unless we are satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision.

17. In our minds, this appeal turns on two broad issues; one, whether the trial court had jurisdiction to entertain the judicial review

application and secondly, whether orders of certiorari and prohibition could issue in the circumstances of this case.

18. On the first issue, it is trite that the availability of an alternative remedy is not a bar to judicial review proceedings. It is only in exceptional cases that the High Court can entertain judicial review proceedings where such alternative remedies are not exhausted. In other words, judicial review ought to be as a last resort. This position is fortified by a number of decisions of this Court. To mention but a few, ***Cortec Mining Kenya Limited vs. Cabinet Secretary Ministry of Mining & 9 Others*** ***[2017] eKLR*** and ***Kenya Revenue Authority & 5 Others vs. Keroche Industries Limited – Civil Appeal No. 2 of 2008 (unreported***).

19. It is not in dispute that the repealed ***VAT Act*** which was subject of this matter provided internal mechanisms of dealing with disputes arising therefrom. In particular, **Part X** thereof stipulated that a person aggrieved with a decision made thereunder can first file an objection with the Commissioner and thereafter lodge an appeal with the Appeals Tribunal. Did the appellant's case fall within the exception?

20. We must mention that the respondent's contention that the appellant should have applied for exemption to pursue the alternative remedies as stipulated under ***Section 9*** of the ***Fair Administrative Action Act*** falls by the way side. For the reason that the said Act had not come into force at the time the appellant instituted the judicial review proceedings in the year 2012.

21. Be that as it may, this Court while discussing the criteria for determining such exceptional circumstances in ***Speaker of National Assembly vs. Njenga Karume*** ***[1990 – 1994] EA 546***, observed that:-

> **"Where there was an alternative remedy and especially where parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that 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."** *[Emphasis added]*

22. From the proceedings, the central theme of the appellant's case was that demand of the VAT in issue was not only contrary to the right of fair administrative action but was also irrational which to us, called for the interrogation of the process. Of course, judicial review proceedings are meant to be an avenue to interrogate the procedure followed in the making of an impugned decision. Accordingly, we cannot think of a more efficacious process than judicial review in the circumstances of this case.

23. Moving on to the second issue it is trite that in judicial review the court is not concerned with the merits of the decision by a public body but rather undertakes a consideration of the manner in which the decision was made. See ***Ransa Company Ltd vs. Manca Francesco & 2 Others*** ***[2015] eKLR***. Expounding further, **Lord Green M.R.** in the often cited case of ***Associated Provincial Picture House vs. Wednesbury Corporation*** ***[1914] 1 KB 222***, held:

> **"Decisions of person or bodies which perform public functions will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the Court concludes that the decision is such that no such person or body properly directing itself on a relevant law and acting reasonably could have reached that decision."**

24. It follows therefore that the essence of judicial review remedies are to ensure that an individual is given fair treatment by the authority to which he/she has been subjected. In furtherance of that objective, the court's role is certainly not to substitute its opinion for that of the authority constituted by law to decide the matter in question. This Court in ***Captain (Rtd) Charles Masinde vs. Augustine Juma & 8 Others*** ***[2016] eKLR*** appreciated as much.

25. From our consideration of the ruling, it is quite clear that the learned Judge appreciated the nature of the judicial review proceedings before him and the role of the court in the circumstances. However, the learned Judge adopted a peculiar approach in determining whether the decision complained of was amenable to judicial review. He went as far as distinguishing between 'input tax' and 'output tax' and setting out what he believed were circumstances under which a tax credit may be carried forward to the subsequent tax period for purposes of demonstrating that the respondent had acted in accordance with the law. With respect, we differ with the approach taken by the learned Judge which we find delved into the merits of the tax demanded and was outside the court's jurisdiction.

26. Our position is guided by this Court's sentiments in ***Municipal Council of Mombasa vs. Republic, Ex parte Umoja Consultants Ltd*** ***- Civil Appeal No. 185 of 2001***, where this Court held as follows:-

> **"Mr. Justice Waki clearly recognized this and stated so; so that in this matter, for example, the court would not be concerned with the issue of whether the increases in the fees and charges were or were not justified. 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."**

27. In our view, the pertinent issue was not whether the respondent had power to assess and demand the tax in question, as framed by the learned Judge. Rather, it was whether in doing so, the respondent acted reasonably and fairly.

28. Whereas this Court is not entitled to question the merits of the decision of taxing authority, that authority must exercise its powers fairly.

The obligation to act fairly in the decisions rendered by a public authority is enshrined under ***Article 47*** of the ***Constitution*** as the right to fair administrative action. Of relevance, **sub article 1** provides:-

> **"Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."**

29. Did the respondent act fairly and reasonably? As was appreciated by **Professor Wade** in a passage in his treatise on ***Administrative Law, 5th Edition*** at page ***362***:-

> **"The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too lightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended."**

30. It is common ground that the respondent is a statutory body established under an Act of Parliament as the central body for the assessment and collection of revenue under several legislations. Even so, having in mind the more recent decision of this Court in ***Fleur Investments Limited vs. Commissioner of Domestic Taxes & Another –Civil Appeal No. 158 of 2017 (unreported)***, the respondent was still required to exercise its statutory powers and duties reasonably and fairly.

31. Taking into account the circumstances of this case we find that the respondent did not act fairly or reasonably. Why do we say so? It is common ground that the tax demanded was for the period between January-September, 2008. Similarly, it is not in contention that the appellant had paid what it believed was the VAT for the period in question and had also filed its returns with the respondent. As to why the respondent never raised the anomaly alluded to during that period and only raised it about four years later is not clear. The very returns upon which the respondent alleges to have relied on in discovering the anomaly were undeniably in its possession for over four years. To us, the respondent's action of waking up after four years and demanding tax for a period which the appellant believed had been fully paid certainly cannot be termed as being fair or reasonable. More so, coupled with the fact that as admitted by the respondent's counsel the amount so demanded principally comprised of penalties with regard to non- payment from the period in question up to the year 2012 when the fresh assessment was done.

32. It is not enough for the respondent to say it has the statutory power to assess and demand payment of tax to excuse its actions. We take guidance from this Court decision in ***Republic vs. Commissioner of Co-Operatives, Kirinyaga Tea Growers Co-operative & Savings & Credit Society Ltd [1999] 1 EA 245***:-

> **"It is axiomatic that statutory power can only be exercised validly if exercised reasonably and not arbitrarily or in bad faith."**

Additionally, we agree with the findings in ***Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300*** which we believe apply in the appeal before us:-

> **"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..."**

33. For the reasons herein above stated, we find that the respondent's decision was amenable to judicial review and we interfere with the learned Judge's discretion to that extent.

34. Accordingly, the appeal has merit and is hereby allowed with costs. We hereby set aside the impugned ruling in its entirety and substitute the same with an order allowing the appellant's judicial review application. For clarity, we hereby issue the following orders:

> **a. An order of certiorari is hereby issued quashing the respondent's decision to demand payment of Kshs.50,500,743 in respect of VAT from the appellant as contained in the letters dated 30th August, 2012 and 10th September, 2012.**
>
> **b. An order of prohibition is hereby issued prohibiting the respondent from continuing to wrongfully demand from the appellant the amount in issue for the period between January and September, 2008.**

The appellant shall also have costs at the High Court.

Dated and delivered at Mombasa this 14th day of June, 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR