**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: G. B. M. KARIUKI, SICHALE & KANTAI, JJ.A.)**

**CIVIL APPEAL NO. 175 OF 2016**

**BETWEEN**

**INTERACTIVE GAMING & LOTTERIES LIMITED.....APPELLANT**

**AND**

**KENYA REVENUE AUTHORITY…..……....…….…..… RESPONDENT**

*(An appeal from the Judgment and Decree of the High Court*

*at Nairobi (Odunga, J.) dated 25th May, 2016*

***in***

***Judicial Review Misc. Appl. No. 251 of 2014)***

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**JUDGMENT OF THE COURT**

The history of the matter leading to this appeal is rather convoluted. Various suits were filed at the High Court by the appellant, **Interactive Gaming and Lotteries Limited**, against the respondent (KRA) and other parties. The appeal arises from the Judgment and decree of the ***High Court in Judicial Review Miscellaneous Application No. 251 of 2014***. The appellant as applicant in that suit approached the High Court for leave to institute Judicial Review proceedings seeking an order of certiorari to remove to that Court for purposes of being quashed the respondent's decision contained in the Notice of Assessment of Value Added Tax, Withholding Tax and Income Tax dated 17th June, 2014; an order of certiorari to remove to that Court for purposes of being quashed the respondent's decision contained in the Notice of Assessment of Value Added Tax dated 17th June, 2014 transferring the appellant's tax affairs from Nairobi to Meru; an order of prohibition to prohibit the respondent whether by itself or agents and/or whomsoever from executing and/or enforcing the respondent's decision contained in the Notice of Assessment of Value Added Tax, Withholding Tax and Income Tax dated 17th June, 2014 or issuing any agency notices in respect thereof. It was prayed that leave granted operate as stay of the said decision. In the statutory statement accompanying the application, it was stated amongst other things that the respondent had issued those notices; that the issue of such notices was irrational and unreasonable for various reasons. We shall come back to this in the course of this judgment.

The parties in HCCC No. 115 of 2011 were the appellant herein as plaintiff who sued a company called ***Flint East Africa Limited*** as 1st defendant (***hereafter "Flint"***), ***Safaricom Limited*** as 2nd defendant ***(hereafter "Safaricom")*** and the respondent as 3rd defendant ***(hereafter "KRA")***. It was stated in the plaint that the appellant herein was the promoter of a public lottery being carried out under a public lottery permit issued on 27th September, 2010 issued by the Betting Control & Licensing Board to run for a period from 1st October, 2010 to 31st December, 2010 and that the period was extended to 15th March, 2011. It was further stated that Flint was the holder of Short Code Platform 6969 assigned to it by Safaricom and other mobile service providers. Further that Flint was authorized by Safaricom to utilize the Short Code Platform for its own purpose or on behalf of third parties that may appoint it as a Premium Rate Service Provider (PRSP) in the promotion of a lottery or any other service. Further, that in pursuance of the said authorization the appellant herein vide a Memorandum of Understanding dated 7th December, 2010 appointed Flint as its PRSP agent in its promotion of its lottery. It was further claimed that Safaricom was aware that Flint was a PRSP agent of the appellant as the lottery permit holder. Details of profit sharing between the parties were given in the plaint. It was further stated that an invoice dated 14th January, 2011 Flint had sought payment from Safaricom of Kshs. 93,975,040.88 exclusive of Value Added Tax for the period ending 31st December, 2010 but that lottery had continued up to 17th January, 2011 by which time Safaricom had collected a further amount of Kshs. 52,480,592.74 exclusive of Value Added Tax. A net sum of Kshs. 146,455,633.28 was said to be owing to Flint on behalf of the appellant from Safaricom in unremitted lottery revenue.

Various declarations were sought in the plaint the court was asked to direct Safaricom to release the said sum to the appellant.

In the course of the proceeding in the said suit, Safaricom approached the Court by way of Notice of Motion asking for a stay of all proceeding in the suit and an order be made as to who was the rightful owner of the monies held by itself. In effect these were interpleader proceedings. It was stated in the motion and the affidavit in support that Safaricom held monies where there were competing claims for the same; that Safaricom had no claim to that money other than to meet its costs and expenses in connection with the defence of the suit and it (Safaricom) had not colluded with any of the claimants in respect of ownership of the money.

The motion was heard by ***Odunga, J***., who in a judgment delivered on 30th April, 2014 found that the appellant herein was entitled to a sum of Kshs.139,132, 851.94 less costs and charges due to Safaricom; that from the net proceeds Flint was entitled to Kshs. 2/- per SMS of Kshs.50/- and various other orders were made including an order vacating orders that had stayed other suits.

The appellant herein also filed ***HCCC No. 281 of 2011*** where Flint was named as 1st Defendant and ***Airtel Networks Kenya Limited*** *(hereafter "Airtel")* was named as 2nd Defendant. In an interlocutory application filed in that suit, it was prayed that Airtel be ordered to distribute a sum of 12,518,270.24 between the appellant herein and Flint in terms of the Judgment in ***HCCC No. 115 of 2011*** which we have already referred to.

That application was heard by ***Farah Amin, J.,*** who in a Ruling delivered on 27th January, 2015 held that the appellant herein was entitled to the sum of Ksh.12,518,270.24 held by Airtel and that from the net proceeds Flint was entitled to Kshs. 2/- per SMS of Ksh.50/=. There were other orders that were issued which have no relevance in this judgment. The record also shows that there were other suits – HCCC No. 313 of 2011 and HCCC No. 161 of 2011 but it is not clear who the parties were or the orders sought.

As we have seen, judgment in the interpleader proceedings was delivered on 30th April, 2014 while a ruling in ***HCCC No. 281 of 2011*** was delivered on 27th January, 2015. Judicial Review proceedings which are subject of this appeal were instituted on 26th June, 2014.

Going back to the judicial review suit subject of this appeal it was further said that KRA had confirmed on oath in that suit that it was not claiming any taxes from the appellant and that a finding to that effect was made by the court in the judgment delivered on 30th April, 2014. It was further stated that in the said case KRA had made a claim for unpaid taxes against Flint to whom KRA was said to have issued agency notices for alleged tax arrears against funds claimed to belong to Flint but held by Safaricom. The appellant went on to state that it had been determined that funds belonged to the appellant; that no taxes were due from the appellant but that KRA had proceeded after the said judgment to issue assessment notices in respect of Value Added Tax, Withholding Tax and Income Tax . The appellant further stated that KRA's decision was made in bad faith and was malicious and contravened the appellant's ***Article 47*** of the Constitution rights and was therefore oppressive. Further, that the KRA's intention in issuing the said notices was purely to lay a basis for issuance of notices to Safaricom so that Safaricom could recover tax claimed by KRA which was not due from the appellant. The appellant went on to state that it was incorporated on 17th September, 2010 and could not have any tax liability by 31st December, 2010 and that the lottery that gave rise to the funds held by Safaricom was ran in December, 2010 and January, 2011 and KRA was aware that proceeds of the lottery had never been received by the appellant. It was alleged by the appellant that KRAhad confirmed in the proceedings in that suit that Safaricom had deducted Value Added Tax and Withholding Tax and remitted it directly to KRA and that a claim for tax could not be made again.

Finally, that the decision by KRA to transfer the appellant's tax affairs from Nairobi to Meru without the appellant's consent, notification or authority was unreasonable as the appellant had its business operations in Nairobi. All those matters were repeated in a verifying affidavit of ***Adil Bashir*** a director of the appellant.

In a replying affidavit sworn on 2nd February, 2015, **Kenneth Agolla**, who did not state the office he held at KRA described the various relationships between the appellant, Flint, Safaricom and KRA in the lottery run by the appellant. He deponed amongst other things that estimated assessments were issued to Flint on 31st January, 2011 for the period May 2010 to November, 2010 and agency notices issued to Safaricom and Ecobank Limited to recover taxes; that the appellant had sued Flint, Safaricom and KRA as we have already seen in HCCC No. 115 of 2011; that the appellant did not file tax returns contrary to the provisions of tax laws; that:

> ***"…. the Ex-parte Applicant is a non filer and the court having ruled that the income accruing from the lottery and held by Safaricom Ltd belonged to the Applicant, the respondent issued estimated tax assessment in accordance with Section 73(1) and 73(3) Income Tax Act."***

Mr. Agolla further deponed that the law provided for resolution of disputes where a mechanism was provided for tax assessments issued by the Commissioner where a party like the appellant, had a right to object to assessments within 30 days of the issue by the Commissioner of an assessment and that the procedure for objecting was clearly set out in the assessment notice. Further,:

> ***"THAT the Ex-parte Applicant's application is premature and mis-informed as the Ex-parte Applicant should have exhausted the dispute resolution mechanism provided by law."***

He further explained that withholding tax was charged by KRA on the basis of professional fees that were paid by the owner of a lottery for maintenance of the software used by PRSP in accordance with **Section 35** of the **Income Tax Act** and that the appellant was registered for VAT but did not file returns with KRA contrary to law. It was also deponed that KRA had noted that the appellant charged VAT on its invoices to the PRSP but was not remitting the same to KRA and that this was what led to issuance by KRA of assessments in accordance with the VAT Act. At paragraph 20 of that affidavit:

> ***"THAT the matter before the court is a fresh cause of action and the court never barred and neither determined the tax liability of the Ex-parte Applicant. The judgment in the previous suit was in favour of Flint Ltd and not the Ex-parte Applicant."***

The Judicial Review matter was heard by ***Odunga. J***., who delivered a judgment on 25th May, 2016 where the Judge found that it was wrong for the appellant to invoke the judicial review jurisdiction of the court when the relevant statutes provided alternative remedies. The motion was struck out, orders which did not please the appellant, leading to this appeal.

There are 8 grounds of appeal set out in the Memorandum of Appeal drawn for the appellant by its advocates ***M/s Mbugua Ng'ang'a & Company Advocates***.

When the appeal came up for hearing before us on 25th May, 2017, ***Mr. Ng'ang'a Mbugua***, learned counsel for the appellant, correctly, in our view, collapsed all those grounds into two broad grounds. The first is whether there exists an alternative remedy through which the appellant should have litigated its claim apart from judicial review and whether that other remedy was suitable to address the appellant's grievance. The second issue identified is the effect of the judgment in ***HCCC No. 115 of 2011*** to the appellant's claim.

The appellant had filed written submissions and a list of authorities as had the respondent.

In a highlight of those submissions, learned counsel for the appellant faulted the learned Judge for finding that the appropriate remedy available to the appellant was the appeal process enumerated in the ***Income Tax Act*** and other tax laws. According to counsel the appeal process set out in taxation laws where a taxpayer who is dissatisfied with an assessment is required to file an objection to the Commissioner only applied where the taxpayer has not filed a self-assessment return. According to counsel the appellant had seven days prior to receipt of assessment filed self-assessment returns. Learned counsel also faulted the learned Judge for making reference to the ***Fair Administrative Actions Act*** which according to counsel came into force after the judicial review suit had been filed. Learned counsel further faulted the learned Judge for not finding that judicial review was the most appropriate remedy available to the appellant when according to him there was a document which the respondent had not attached to the assessment notice for Value Added Tax.

In relation to ***HCCC No. 115 of 2011***, counsel submitted that the respondent had confirmed in that suit that it was not claiming any tax from the appellant. He asked us to allow the appeal.

In opposing the appeal, ***Mr. Andambi Chabala***, learned counsel for the respondent referred to us to ***Sections 73*** and ***84*** of the ***Income Tax Act*** and submitted that the said sections made provision for a taxpayer on whom an assessment notice had been served to object or appeal if they did not agree with the assessment. According to counsel if the appellant was dissatisfied with the way tax was assessed he should have gone back to the respondent for resolution of the issue as the respondent was clothed with the necessary expertise to assess tax. Counsel submitted that the Commissioner of the respondent was carrying out a statutory duty which duty should not be interfered with by the court. According to him reference to the ***Fair Administrative Actions Act*** by the Judge was merely made in passing and the judge did not make his decision based on the said ***Act***. Counsel referred to the case of ***Pili Management Consultants Limited v Commissioner of Income Tax Kenya Revenue Authority [2010] eKLR*** for the proposition that the Commissioner of Income Tax is an expert and should be allowed to carry out his duties. He asked us to dismiss the appeal.

***Mr. Mbugua*** in a brief reply agreed entirely with the ***Pili Management Consultants*** *(supra)* case. According to him the wording in ***Section 84*** of the ***Income Tax Act*** is permissive but there was no valid assessment notice issued to the appellant to enable a trigger of the appeal process as envisaged by the ***Act.*** According to him the judgment should be impugned even on the mere fact that the learned Judge made reference to an ***Act*** which did not exist when the judicial review proceedings were instituted.

We have already considered the Record of Appeal, the submissions made and the law.

We have identified the two issues that call for our consideration. The first being whether there was an alternative remedy available to the appellant instead of the route he chose of judicial review proceedings. The second issue relates to the effect of the judgment and findings of the High Court in ***HCCC No. 115 of 2011***.

On the second issue, determination of which will have a major bearing on the determination of the first issue, the learned Judge in the judgment appealed from recognized that judgment in the said suit arose out of interpleader proceedings brought under various provisions of the ***Civil Procedure Act*** in which Safaricom disclosed that it was in possession of a sum of money which was being claimed by various parties in the suit and that Safaricom had no claim to the money. The learned Judge found that the main issues for consideration in the interpleader proceedings was who was the owner of the money held by Safaricom. He also found that the issue of whether the appellant or Flint owed taxes to the respondent was not an issue before the court in the interpleader proceedings. The Judge found that the respondent could not be barred by the said judgment from claiming taxes if they were due from the appellant. He said at para 36 of the judgment:

> ***"It is therefore my view that the judgment in the civil case did not have the effect of barring Kenya Revenue Authority from claiming any taxes from IGL (read appellant) if the same were due. What was appreciated in the said judgment is that Kenya Revenue Authority was not making any claim against IGL for taxes due in the said proceedings".***

We have perused the interpleader proceedings that were filed before the trial court. The same was commenced through a Notice of Motion under ***Order 34*** of the ***Civil Procedure Act.*** The main prayers were that the motion be heard on priority; that there be a stay of all further proceedings of the suit pending the hearing and determination of the application; that the court be pleased to determine the rightful owner(s) of the monies held by Safaricom in the sum of Kshs.139,132,851.94; that there be provision for costs and charges properly due to Safaricom. It was further prayed that the court do give appropriate orders with regard to the manner in which the funds should be held pending the determination of the application.

As we have seen in the judgment delivered on 30th April, 2014 in relation to interpleader proceedings, it was found that the appellant was entitled to the sum of Kshs. 139,132,851.94 less costs and charges due to Safaricom and that from the net proceeds Flint was entitled to Kshs 2/- per SMS of Kshs. 50/-.

Looking at the whole record, nowhere in the proceedings in any of the suits particularly in the interpleader proceedings was the issue of taxes due either from the appellant or Flint an issue before any court. We disagree with the appellant in the submission or contention that the issue of taxes due from itself was an issue or was dealt with in ***HCCC No. 115 of 2011*** or any other suit. The evidence of the witness called by KRA which we have summarized in this judgment was to the effect that the issue of taxes was not an issue at all in the interpleader proceedings. Interpleader proceedings such as those that were before the learned Judge are filed by a party who is in possession of funds or other property ownership of which is claimed by adverse or various parties. Safaricom was holding money which was claimed by the appellant, Flint and the respondent. The respondent was entitled to collect that money directly from Safaricom using various provisions of taxation law if it was owed taxes by a party doing business with or through Safaricom. Safaricom therefore took the appropriate route of approaching the court for orders to determine who amongst the competing parties was entitled to the money it held. That money was held out of the lottery that we have discussed in this judgment and the respondent had not collected taxes due to itself from the said lottery. The issue of whether or not the respondent was owed taxes by the appellant was not and could not have been an issue in interpleader proceedings. A court in such proceedings could not determine taxes due to the respondent as the only issue before a court in such proceedings is a determination of the ownership of money or other property held by a party who has no claim to the same. Flint, the appellant and KRA had competing claims to money held by Safaricom and the court found that the money belonged to the appellant with appropriate fees due to Flint as per agreement. The judge did not determine what level of taxation applied to the money to be released by Safaricom to the appellant and to Flint.

That deals with the second issue we have identified. What about the first issue?

The appellant was served with assessment notices by the respondent claiming various taxes under the ***Value Added Tax Act*** and ***Income Tax Act***. The appellant did not agree with the assessment and moved to court to challenge the same through judicial review subject of discussion in this appeal. The judge found that judicial review was not the appropriate remedy since there was a process provided in tax laws on how to challenge an assessment served on a taxpayer by the Commissioner of KRA.

Under ***Section 84*** of the ***Income Tax Act Cap 470 Laws of Kenya*** a procedure is set out which obligates a person on whom an assessment has been made and who disputes the same to object the same to the Commissioner of Income Tax or Commissioner of VAT, as the case may be. The said and other provisions of taxation laws set out an elaborate procedure for a person who disputes the assessment to object or appeal against the same.

The learned judge in the judgment appealed from has set out in full the provisions of **Section 84** of the **Income Tax Act.** That provision is to the effect that a person who disputes an assessment made upon him may by notice in writing to the Commissioner object to the same. The said section proceeds to set out the steps such a person must take for the objection to be valid.

Under the Value Added Tax Act No. 35 of 2013 which replaced the **Value Added Tax Act Cap 476** of the **Laws of Kenya** there is established an appeals tribunal for purposes of hearing appeals under that Act**. Section 50** of that **Act** requires a person who disputes an assessment made by the Commissioner to by notice in writing object to the assessment. An elaborate procedure for that objection is set out in the Act. At **Section 51:**

> ***"(1) A tax payer who wishes to dispute a tax decision shall first lodge an objection against that tax decision under this section before proceeding under any other written law.***
>
> ***(2) A tax payer who disputes a tax decision may lodge a notice of objection to the decision, in writing, with the Commissioner within thirty days of being notified of the decision."***

By **Section 52** of the said **Act:**

> ***"(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, 2013."***

Procedure to objections and appeals is elaborated including an appeal to the High Court.

In **Pili Management Consultants Limited** (supra) which was an appeal from a judicial review suit on whether the apellant was liable to tax it was recognsied that where a statute donates power to a body or institution to carry out a duty that body should be allowed to carry out its mandate without intervention by the court. It was held:

> ***"As the trial judge rightly pointed out, the jurisdiction of a court in judicial review is concerned primarily with the decision making process not with the merits of the decision. For the judge to be able to conclude that no tax was due from Pili for the year 2004, the judge would have to determine first whether the money in Pili's account at the bank was or was not liable to tax. No material was placed before the judge on that point..... It was not the role of the superior court nor of this court to determine the correctness or otherwishe of the tax which Pili was liable or whether Pili was liable to pay any tax at all for the year 2004."***

It was also held in the case of **Municipal Council of Mombasa v Republic and Another [2002] eKLR** that judicial review is concerned with the decision making process not with the merits of the decision itself.

The learned judge in the judgment appealed from in the course of the judgment relied on a passage by **Professor Wade** in **Administrative Law 5th edition** at **page 362** quoted with approval in the case of **Boundary Commission [1983] 2WLR 458** where at page 475 the following passage appears:

> ***"The doctrine that powers must be exercised reasonably has to be reconciled with a no less improtant 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."***

It has been held by this Court in the case of **Niazons K. Limited v China Road and Bridge Corporation (Kenya) [2000] eKLR** that estoppel cannot operate against a statute.

We have traveled through all those cases and the provisions of taxation law to show that there was a remedy available to the appellant when it was served with assessments by the respondent . There were elaborate processes under the **Income Tax Act** and the **Value Added Tax Act** giving the appellant an opportunity to object to assessment notices as received. He was required to object against the assessment notices and had it done so the respondent was duty bound in law to consider the same and if the dispute was not settled processses in the statutes gave appropriate remedies to the appellant. It was wrong for the appellant to file judicial review proceedings after receiving assessment notices when the appropriate remedy was to file objeciton proceedings before the Commissioner. We agree with the learned judge that the matter before him was incompetent and

we agree with the decision reached. This appeal has no merit and we dismiss it with costs to the respondent.

We regret delay in delivery of this judgment which was caused by administrative mix up on the part of the Court.

The judgment is issued under **rule 32(3)** of **the rules of this Court,** G.B.M. Kariuki, J.A. having since retired from the Judiciary.

**Dated and delivered at Nairobi this 28th day of September, 2018.**

**F. SICHALE**

**.....**

**JUDGE OF APPEAL**

**S. ole KANTAI**

**.....**

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

***DEPUTY REGISTRAR***