



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, SICHALE & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO 134 OF 2015

BETWEEN

FIVE FORTY AVIATION LIMITED.....APPELLANT

AND

KENYA REVENUE AUTHORITY.....1ST RESPONDENT

KENYA CIVIL AVIATION AUTHORITY.....2ND RESPONDENT

THE MINISTER FOR TRANSPORT.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya at Nairobi, by (G. V. Odunga J.), delivered on 16th January 2015

in

High Court Judicial Review Misc. Appl. No. 420 of 2012)

JUDGMENT OF THE COURT

[1] On or about 5th August 2011, the Minister for Transport, the 3rd respondent in the instant appeal as Minister in charge of Civil Aviation, published Legal Notice No. 100 of 2011. This was done pursuant to the provisions of the Civil Aviation Act Cap 394 (now repealed). The said Legal Notice authorized Kenya Aviation Authority, the 2nd respondent to increase the Air Navigation Services charges (ANS) with effect from 1st November 2011. Following the said Legal Notice No 100 of 2011, there were numerous complaints from civil aviation stakeholders regarding increased charges and the regulatory fees prescribed therein that were to take effect in November 2011. In response to those complaints, the 2nd respondent called several meetings of all stakeholders and he constituted a committee, to make recommendations on how to better regulate the aviation industry and to levy reasonable charges. The said committee held several meetings which resulted in revised ANS charges as well as the regulation fees

known as “*the 2012 Regulations.*” Meanwhile, it would appear, the impugned 2011 regulations continued being in force as there was no communication freezing their operation.

[2] What seems to have provoked the suit that was filed before the High Court by way of judicial review, was a demand notice issued by Kenya Revenue Authority, to the appellant seeking payment of ANS charges amounting to over Kshs 67 million that were owed to 2nd respondent under regulation 2011 for the period between, November 2011, to August 2012. The appellant may not have responded to the demand notices, therefore the 1st respondent issued agency notices to the appellants’ banks with instructions to collect ANS Charges that had accrued following Legal Notice 100 of 2011. The appellant filed judicial review application seeking several orders of certiorari and prohibition to quash the demand letters of 25th September 2012, the agency notice issued to the various banks and to prohibit the 2nd respondent from collecting, levying or recovering a sum of Ksh. 101, 455, 818/= from the appellant.

[3] The suit fell for hearing before Odunga J. who upon hearing all the parties and not persuaded the appellant had made a case justifying granting of any of the orders sought, the motion was dismissed and in so doing, the learned Judge posited as follows in a pertinent portion of the said judgment;-

“In this case I have similarly considered the legislation guiding the operations of the Kenya Revenue Authority and the allegations made herein and I am not satisfied that the respondents or the Kenya Revenue Authority did overreach its mandate. The mere fact that the respondents could resort to other legal means to recover the taxes due other than by way of agency notices does not necessarily render their actions liable to be quashed.

I hold that Legal Notice no 100 of 2011, Civil Aviation (charges for Air Navigation Charges) Regulations made on 19th July 2011 was valid and binding until the same was revoked on 1st November 2012 vide Legal Notice No. 110 of 2012, Civil Aviation (Regulatory fees and charges for Air Navigation Services) Regulations, 2012 published on 5th October 2012. Therefore any taxes which were payable before the revocation of Civil Aviation (Charges for Air Navigation Charges) Regulations, 2011 ought to have been paid in accordance to the said Regulations.”

[4] Aggrieved by the said orders the appellant filed the instant appeal basing it on some 7 grounds of appeal which challenges the judgement on the grounds that the learned Judge erred in finding and determining that:-

1. Decisions giving effect to the revoked Legal Notice No. 100 of 2011 could not be challenged in proceedings which were before the High Court.
2. The principle of legitimate expectation did not apply in this case because the respondents did not either expressly or by implication evince an intention not to enforce the regulations contained in Legal Notice No 100 of 2011.
3. The advice of the Air Operators Committee to stake holders to continue paying charges for the Air Navigation Services and Regulatory Fees based on the rates prescribed by the 2nd respondent under AIC Nos. 10/98, 3/99, 7/00, 9/00, 10/00, 6/00, and 8/00 did not bind the 2nd respondent.
4. The 1st and 2nd respondents did not act ultra vires the provisions of the Civil Aviation Act Cap 394 Laws of Kenya.
5. Any taxes which were payable before the revocation of the Civil Aviation (Charges for Air Navigation Charges) Regulations, 2011 ought to have been paid in accordance with the said Regulations.
6. The decision was against the weight of the evidence and all material placed on record.

[5] During the hearing of this appeal, learned counsel, Mr. Mungu appeared for the appellant while Mr Nyaga held brief for Mrs Ngugi for the 1st respondent and Mr Malonza appeared for the 2nd and 3rd respondents. Counsel for all the parties agreed not to make oral highlights and urged the appeal be disposed of by way of written submissions filed on behalf of the respective parties. We have gone through the submissions; on the part of the appellant counsel collapsed the arguments into three thematic areas;

- The purpose and effect of the report by the committee of stakeholders that reviewed the charges and fees.
- The legitimate expectation of the appellant regarding the repealed Legal Notice No. 100 of 2011 that was published without public participation by stakeholders was that revenue would not be collected because it was predicated on the wrong premise.
- The evidence by the appellant regarding the ministerial committee that revised the charges and fees was not contradicted.

[6] In the appellants' submissions to support the above grounds, counsel emphasized that his client was challenging the decision of the respondents to collect revenue under a flawed process that led to the publication of Legal Notice No. 100 of 2011 which was later revoked following consultations with the stakeholders who included the appellant. During the period when the committee was considering views, the appellant could not challenge the Legal Notice no 100 of 2011, as it had in good faith filed its grievances with the Minister and all the stakeholders were engaged in finding solutions; it was unreasonable to expect the appellant to pay charges and fees according to the flawed instrument that required 300% increment. Counsel also faulted the learned trial Judge for finding the appellant had not challenged Legal Notice 100 of 2011 while overlooking the fact that this was not a feasible option in the duration that the committee was conducting hearings and discussing with stakeholders how to resolve the problems brought about by the impugned legal notice; therefore the appellant could not in good faith file judicial review application to declare the Legal Notice No. 100 of 2011 a nullity while the discussions, where it was represented were on going. The appellant had hope and that hope was realized when the legal notice was revoked.

[7] Counsel for the appellant went on to submit that the issue that was before the learned Judge in the Judicial Review proceedings was whether the action by the 1st respondent to seek to collect revenue set out under Legal Notice No 100 of 2011 was reasonable, fair and justified in view of the fact that the Minister had set up a Committee that successfully reviewed the navigation charges and regulatory fees that were proposed by the Minister in the impugned legal notice. For this preposition counsel relied on the dictum of **Lord Scarman in R (Inland Revenue Commissioners) v National Federation of Self – Employed and Small Businesses Limited** (1981) WLR 722 at page 746 E and F.

“In the daily discharge of their duties inspectors are constantly required to balance the duty to collect „every part? of tax due against the duty of good management. This conflict of duties can be resolved only by good managerial decisions, some of which will inevitably mean that not all the tax known to be due will be collected.”

On the duty of the 1st respondent to treat taxpayers fairly, the same Judge stated on page 747:

“I am persuaded that the modern law recognizes a legal duty owed by the revenue authority to the general body of tax payers fairly; to use the requirement of good management, discrimination between one group of taxpayers and another does not arise; to ensure that there are no favourites and no sacrificial victims. The duty has to be considered as one of several arising within the complex compromised in the care and management of a tax, every part of which it is their duty, if they can collect.”

[8] For the simple reason that the process under Legal Notice 100 of 2011 was flawed and therefore revoked, the appellant contends that it had a legitimate expectation that revenue would not be collected under the said Legal Notice; that the notice was published by mistake, the demand was made after the notice was revoked; and collection of charges and fees increased by 300% would translate to super profits at the expense of airlines and their customers, a situation that led to the revocation of the legal notice.

Finally counsel for the appellant urged us to find that none of the respondents who were represented in the Ministerial committee contradicted the position of the appellant; counsel therefore urged us to allow the appeal.

[9] On the part of the 1st respondent, it is generally agreed in their written submissions that the 3rd respondent published the said Legal Notice, No. 100 of 2011 and the stakeholders in the aviation industry registered complaints and consultative meetings were held but the appellant did not seek the intervention of the courts by way of judicial review to stay or to stop the immediate implementation of the Legal Notice, thus the 1st and 2nd respondents expected the appellant to remit the prescribed charges. The 1st respondent also admitted that as a result of the consultative meetings, and a report of the committee, the 2nd respondent published a new circular that contained reviewed charges and that is what informed the subsequent Legal Notice No. 110 of 2012 that revoked the earlier notice. The 1st respondent demanded a sum of **Ksh. 67,296,437.60/=** being the air navigation charges for the period between November 2011 and August 2012 which was according to Legal Notice 100 of 2011; by the time the appellant commenced the judicial review proceedings, it had accumulated charges, fees and penalties amounting to Ksh 101,455,818/=.

[10] The 1st respondent maintained that it was within its mandate as provided under **section 11 (4)** of the KRA Act to enforce collection of taxes, levy or surtax imposed by any law. Counsel for the 1st respondent made reference to **Section 131** of the KRA Act by which the Commissioner is authorized to appoint a person who owes or holds money on behalf of a person owing the Commissioner taxes as agent for purposes of collecting the sum owed; consequently the trial judge was right in finding that the 1st respondent acted within its statutory mandate in seeking to enforce the recovery of the charges owing from the appellant by issuing agency notices to their bankers. As regards the consultations that led to a report and publication of Legal Notices 109 and 110 of 2012, counsel for the 1st respondent maintains that, for the period until the Legal Notice no 100 of 2011 was repealed, it remained in force, the charges and fees were not waived; the negotiations were also not a promise and the mere act of negotiations with stakeholders cannot give a legitimate expectation to operate against the law. Counsel urged us to dismiss the appeal.

[11] The 2nd respondent maintained the same position as the 1st respondent, by supporting the judgment of the High Court. Counsel for the 2nd respondent went on to state that the judicial review proceedings were essentially a challenge of the Legal Notice no 100 of 2011 which could not be brought after 6 months. Counsel cited the case of **Municipal Council of Mombasa vs Republic & Umoja Consultants Ltd** Civil Appeal No 185 of 2001 where it was held as follows;-

“Where a decision is made and its making has been made known to the respondents who did not challenge the same within 6 months of its being made by way of certiorari to have it moved into the High Court and be quashed, it is not open for them to seek to have the appellant prohibited from implementing the decision as an order of prohibition would normally issue to stop or pre-empt a contemplated action where such contemplated action is either outside the jurisdiction of the decision-maker, or where the decision maker has evinced an intention to act contrary to law.”

[12] Counsel for the 2nd respondent maintained there was no abuse of power by the 1st respondent who was merely executing its mandate; the Legal Notice No. 100 of 2011 was never challenged within the timeframe provided by the law; it was never suspended notwithstanding complaints from the stakeholders that led to consultations and eventual revocation of the impugned Legal Notice, for the duration that it was in operation, the appellant was under an obligation to pay the charges and fees as provided therein. Counsel urged us to distinguish the authorities cited by the appellant as the factual context in which public bodies were found to have acted without fairness were completely different from the instant appeal that involved a statutory body undertaking its own mandate as per the law. As regards the contention that the appellant had legitimate expectation not to be required to pay charges and fees according to the impugned Legal Notice, counsel submitted that there was no promise given, so as to give rise to an

expectation of waiver. For this proposition counsel relied on the case of **Communications Commission of Kenya & Others v Royal Media Services Limited & 5 Others** [2014] e KLR. Counsel for the 2nd respondent also urged us to disallow the appeal.

[13] The aforementioned is a brief outline of the matters contained in the respective submissions by counsel, the impugned judgment, list of authorities and the record of appeal. In considering the issues that arose, it is important to revisit the guiding principles that guide the High Court in its exercise of judicial review powers. It is trite in judicial review; the High Court is not concerned with the merits of the decision by a public or statutory body but rather undertakes a consideration of the procedures that were undertaken to arrive at the decision that is under challenge to ensure, the decision took into account rules of natural justice and due process. This much was stated by this Court in the case of;- **Ransa Company Ltd vs. Manca Francesco & 2 others**[2015] eKLR -

“As we all appreciate, a court sitting on Judicial Review exercises a sui generis jurisdiction which is very restrictive indeed, in the sense that it principally challenges the process, and other technical issues, like excessive jurisdiction, rather than the merits of the case. It is also very restrictive in the nature of the remedies or reliefs available to the parties.”

The said jurisdiction was further expounded by Lord Green M.R. in the often cited case of **Associated Provincial Picture House vs. Wednesbury Corporation** [1914] 1 KB222as follows:10

“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.”

See also **Kenya National Examinations Council vs. Republic Ex parte Kemunto Regina Ouru** [2010] eKLR.

[14] It is common ground that the 1st respondent is a statutory body established under an Act of Parliament as a central body for the assessment and collection of revenue; for the administration and enforcement of the laws relating to revenue and for connected purposes. The 1st respondent can only operate within the Tax laws, and any acts that contravene the law are amenable to judicial review. This is the position postulated in many decisions that form the body of jurisprudence that guide judicial review. What did the respondents do, which was outside the statute, was unreasonable, unfair, unjustified; was there a waiver of rights or a unequivocal promise that gave the appellant a legitimate expectation and what was the effect of the process of consultation, and the report that led to the revocation of the impugned legal Notice No 100 of 2011. In answering those questions, we have also been guided by the dictum in the case of: See **Municipal Council of Mombasa vs Republic, ex parte Umoja Consultants Ltd.**, Nairobi 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.”

[15] We also find while answering the above questions, the learned trial Judge fastidiously summarized the evidence and the issues that fell for determination that we need not repeat them. The Judge identified

two broad issues that was, whether by levying charges and fees according to impugned Legal Notice No. 100 of 2011, which was effective from 19th July 2011 up to when it was revoked 5th October 2012; was the 1st respondent unreasonable, arbitrary or irrational. The other issue was whether, by the 2nd respondent accepting the complaints by stakeholders, thereby forming a committee that revised the charges in the impugned Legal Notice and by coming up with a Legal Notice No. 110 of 2012, that revoked the impugned notice, did the respondents by their actions give legitimate expectation to the appellant that charges and fees will not be levied according to the said notice. On the first issue, the learned Judge was not persuaded that the appellant could challenge the implementation of the impugned Legal Notice without having first sought to challenge it by way of judicial review and on legitimate expectations, he was of the view that it cannot operate against or outside the law.

[16] On the first issue and as foretasted, when the impugned Legal Notice was issued proposing the increment in charges for air navigation on the owners of aircrafts making flights in Kenya, the proposed charges caused a remonstrations in the air industry principally among the stakeholders as the prescribed fees were going to have an adverse effect on their businesses. It is also common ground that following that remonstrations and submission of a memorandum to the Minister by the affected stakeholders, a committee was set up, which examined all the issues and came up with a report that recommended some practical solutions. The report was dated the 5th October 2012; and it was duly adopted after which the Minister published Legal Notice No. 109 of 2012 and 110 of 2012 which revoked Legal Notice No. 100 of 2011. As noted above we are fully cognizant that in judicial review proceedings the court is concerned in correcting procedural errors, abuse of power or irrationalities and such other administrative malpractices. In this case, the 1st respondent is accused of unfairness for issuing a demand notice dated 25th November 2012 to the appellant, demanding payment of over Ksh. 100 million being aviation charges and fees calculated for the period between November 2011, to August 2012. The said notice was issued pursuant to Legal Notice No 100 of 2011 that had brought dissatisfaction in the aviation industry and was subsequently revoked.

[17] The respondents contended that although the Legal Notice No 100 of 2011 brought remonstrations in the industry that triggered the setting up of a committee that gave a report that resulted in a new Legal Notice that revoked the impugned legal notice no 100 of 2011; before the revocation, the said notice remained in force; the charges so provided were not waived by the setting up of the committee or by revocation of the same. The appellant was further faulted for not challenging Legal Notice no 100 of 2011 within the time provided.

[18] We are not entirely persuaded that the appellant sat on its rights, this is because it was represented in the committee that came up with the report whose aim was to come up with acceptable policy of revenue charges and fees in the aviation industry that was to guide the industry to thrive, achieve efficiency and raise money to fund the operations of the 2nd respondent. What resulted from the committee's work was a report that changed the rules that regulated the charges and fees in aviation industry. The appellant was a stakeholder and was involved in finding solutions to the problems that accompanied the impugned Legal Notice. The appellant contends that as long as the committee was looking for solutions and its report was adopted thereby leading to the change of policy of revenue collections, it did not deem it necessary to challenge the impugned Legal Notice by way of judicial review as in any event, it was finally revoked which was a confirmation that the Legal Notice was unfair, and untenable for the aviation industry. Was the 1st respondent therefore unreasonable by requiring the appellant to settle outstanding charges based on the revoked Legal Notice? We recognize the 1st respondent is charged with the mandate to collect taxes on behalf of the 2nd respondent, however in the circumstances of this matter; there was certainly a problem in the aviation industry following the impugned Legal Notice no 100 of 2011. All the stakeholders were involved in solving the problems wrought by the said Legal Notice, and indeed a solution was found and sorted out by revoking the said Legal Notice.

[19] The pertinent question to follow is whether the 1st respondent acted fairly by demanding on 25th November, 2012 payment of charges under the repealed Legal Notice. We also recognize that the Legal Notice was not set aside, during the consultations. Also Legal Notice No 109 and 110 of 2012 could not operate retroactively; nonetheless it is discernable in the circumstances of this matter. That there was a

genuine concern or a gap in the policy that needed an explanation during the period when the committee was reviewing the impugned Legal Notice up until when it was revoked. The appellant contend that it did not challenge the Legal Notice because of their involvement in the reform committee whose outcome revoked the Legal Notice. We are persuaded, there is a grey area, a gap that was left and the 2nd respondent owed a duty of care to clarify to its stakeholders what to expect after the review; it is for this reason that the demand and agency notices issued by the 1st respondent seeking to levy charges under the revoked Legal Notice was viewed as unreasonable and unfair by the appellants. We are also of the view that the learned Judge, failed to appreciate the broad context within which the appellant was operating; the appellants involvement in the reform committee that was set up by the 2nd respondent. Due to this aspect, the 2nd respondent had a duty to explain to the industry and also to the 1st respondent, the problems that beset Legal Notice No. 100 of 2011 in the spirit of creating good order in the industry. Calling upon the appellant to pay charges that brought genuine grievances was in our view unreasonable and amenable to judicial review orders.

[20] The 1st respondent in execution of its mandate exercises some discretion in determining the levies or charges payable where it was satisfied that a person or entity failed to pay the taxes. Such discretion in our view ought to not to be exercised capriciously or arbitrarily. In **Associated Provincial Picture Houses Ltd. vs. Wednesbury Corporation** (supra) Lord Green expressed thus-

“It is true the discretion must be exercised reasonably. What does that mean? Lawyers familiar with the phraseology commonly used in relation to the exercise of statutory discretions often use the word „unreasonableness? in a rather comprehensive sense. It is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey these rules he may truly be said, and often is said, to be acting „unreasonably?. Similarly, you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J., I think it was, gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith. In fact, all these things largely fall under one head.”

[21] This now leads us to the last but most contentious issue of whether the conduct of the 2nd respondent, or the Minister, when he/she accepted the memorandum of remonstrance by the stakeholders against the charges in Legal Notice no 100 of 2011 and set up a committee comprising of all stake holders in the aviation industry including the appellant; adopted its recommendations that led to the repeal of the impugned Legal Notice no 100 of 2011 and the enactment of Legal Notice No 109 of 2012 and 110 of 2012, gave rise to a legitimate expectation on the part of the appellant. Both counsel for the 1st and 2nd respondents put forward very eloquent submissions discounting any element or applicability of the principle of legitimate expectation in this matter. First of all they argued there was no express promise given on behalf of the respondents nor was there existence of a regular practice which the appellant could reasonably expect to continue. For this proposition they cited the case of;- **Coastal Bottlers Limited v Commissioner of Domestic Taxes [2008] e KLR** and **Communications Commission of Kenya & Others v Royal Media Services Limited & 5 Others [2014] e KLR**.

[22] The instant appeal has some unique features that distinguishes it from the cited cases, in that all the respondents admitted there was a problem with Legal Notice No. 100 of 2011, the 2nd appellant involved the appellant in fixing the problem to find an amicable resolution that was going to ensure stability in the industry and indeed the committee report was accepted. The 2nd respondent cannot simply look the other way and watch the appellant suffer detriment by paying levies and charges that were found unsuitable for the aviation industry and for that matter were repealed. Since the demand notice and agency notices were issued after the repeal of Legal Notice No. 100 of 2011, the appellant was justified to expect that the charges and fees will be levied according to the regulations prior to the Legal Notice No. 100 of 2011 or

under the new regulations. Upon involving the appellant in reforming the charges and upon adoption of the recommendations, we find this was an acknowledgment that gave the appellant an expectation that it would not be condemned to pay charges under the repealed Legal Notice. It therefore behooved the respondents to balance all aspects of unfairness to determine whether in the circumstances of the successful involvement of the appellant in finding an amicable solution of the charges that would bring sustainability and growth in the aviation industry, overall, they should have asked themselves whether by applying the rates in the revoked Legal Notice, there would be conspicuous unfairness. Thus in our humble view the respondents did not consider the aspects of unfairness while issuing the demand and agency notices against the appellant and for that reason the notices should have been quashed and the matter referred to the 1st respondent to take fresh decisions while taking into account all aspects of unfairness in applying Legal Notice No. 100 of 2011.

[23] In the result, we find merit in this appeal, we allow the appeal, set aside the order dismissing, and substitute with an order allowing the Notice of Motion dated 7th December 2012 and referring the matter to the respondents for fresh consideration as directed here above. The appellant is awarded costs of this appeal, and in the High Court.

Dated and Delivered at Nairobi this 31st Day of March, 2017.

M. K. KOOME

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR