Havi v Kenya Revenue Authority (Judicial Review Application E129 of 2023) [2024] KEHC 3006 (KLR) (Judicial Review) (25 March 2024) (Ruling)

Neutral citation: [2024] KEHC 3006 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW APPLICATION E129 OF 2023

J NGAAH, J

MARCH 25, 2024

BETWEEN

NELSON ANDAYI HAVI .... APPLICANT

AND

KENYA REVENUE AUTHORITY .... RESPONDENT

RULING

1. By a chamber summons dated 4 September 2023 expressed to be brought under section 8 (2) of the *Law Reform Act*, cap. 26, Order 53 rule 1 of the *Civil Procedure Rules* and Part III of the *Fair Administrative Action Act* No. 4 of 2015, the applicant sought leave to file a substantive motion for judicial review reliefs. In particular, the applicant prayed as follows:

   " 1. This application be and is hereby certified urgent and heard ex parte.

   2. The applicant be and is hereby granted leave to apply for an order of certiorari to remove and bring into the High Court, and quash the demand dated 28th August, 2023 for Kshs. 17,081,968.63 from Kenya Revenue Authority to Nelson Andayi Havi.

   3. The applicant be and is hereby granted leave to apply for an order of certiorari to remove and bring into the High Court and quash the agency notices dated 29th August, 2023 from Kenya Revenue Authority in respect to Nelson Andayi Havi and directed to: NCBA Bank Kenya Plc; Standard Chartered Bank Limited (K); Co-operative Bank of Kenya; Absa Bank of Kenya Plc; Kenya Commercial Bank; CFC Stanbic Bank Limited; I & M Bank Limited; and Equity Bank Limited.

4. The applicant be and is hereby granted leave to apply for an order of prohibition to prohibit Kenya Revenue Authority from demanding and collecting Kshs. 17,081,968.63.00(sic) from the accounts of Nelson Andayi Havi operated with NCBA Bank Kenya PLC or any other bank.

5. The applicant be and is hereby granted leave to apply for an order of mandamus directing Kenya Revenue Authority to rectify the payment registration for value added tax on the Kenya Revenue Authority itax for Nelson Andayi Havi, and remove the following entries: April, 2016-Kshs 180,633.00; December, 2016-Kshs 3,856,964.00; March, 2017-Kshs 37, 155.00;December, 2017-Kshs 4,111,319.00; December, 2018-Kshs 3,860,581.00; July 2019-Kshs 147,874.00; October 2019-Kshs-Kshs 10,000.00; January, 2020-Kshs 67,604.00; February 2020-Kshs 51, 764.00; March, 2020-Kshs 1,927,796.00; April, 2020-Kshs 10,000.00; and June, 2021-Kshs. 201,185.00 all in the total sum of Kshs 14,462,875.00.

6. The grant of leave do(sic) operate as a stay of enforcement of the agency notice dated 29th August, 2023 from Kenya Revenue Authority in respect to Nelson Andayi Havi and directed at NCBA Bank Kenya Plc.

7. Applicant be and is hereby granted exemption from the obligation to exhaust the objection and appellate remedies under sections 51 and 52 of the *Tax Procedures Act* No. 29 of 2015 in so far as the challenge to the demand dated 28th August, 2023 for Kshs 17,081,968.63 by the respondent and the agency notices issued pursuant thereto on 29th August 2023 are concerned.

8. The costs of this application be provided for."

2. The application is based on a statutory statement dated 4 September 2023 and an affidavit sworn by Mr. Nelson Andayi Havi on even date, verifying the facts relied upon.

3. In summary, the applicant's case is that he is a tax payer registered under personal identification no. A002xxxxxxK and that there is no unpaid tax owing from him. However, on 28 August 2023, the respondent demanded tax arrears from the applicant in the sum of Kshs 17,081,968.63 comprising income tax of Kshs 1,050,960.88 for the period January, 2015 to December. 2020 and Value Added Tax of Kshs 16,031007.75 for the period April, 2016 to July, 2023.

4. Based on these tax claims, the respondent issued agency notices directed at the applicant's banks described in prayer (3) in the chamber summons. Despite the applicant's response to the respondent's demand letter and agency notices, the respondent has refused or failed to withdraw and revoke the notices. Consequently, the applicant has been unable to operate his bank accounts because they have, apparently, been frozen.

5. The applicant urges that the respondent's action in issuing demand and agency notices violates his right to a fair administrative action under Article 47 of the *Constitution* and also contravenes Part II of the *Fair Administrative Action Act* No. 4 of 2015.

6. In particular, the applicant has averred that the agency notices were issued before the respondent's compliance with the mandatory procedure prescribed in Part VIII of the *Tax Procedures Act* cap. 469B which entitle the applicant to object to the respondent's decision in terms of section 51 of that Act and thereafter to appeal to the Tax Appeals Tribunal in terms of section 52 of the same *Act*. According

to the applicant, this is an exceptional circumstance which entitles him exemption from exhaustion of appellate avenues under the *Tax Procedures Act*.

7. The respondent's conduct is also faulted for the reasons that, it has denied the applicant the opportunity to state his case; it is procedurally unfair; it is an error of law and it is ill-motivated only calculated to prejudice the applicant's rights. The decision is also impeached on the grounds that the respondent has failed to take into account relevant considerations in making its demands and issuing demand notices.

8. The respondent's conduct is also said to be irrational and in bad faith and contrary to the applicant's legitimate expectation. The applicant pleads that it is unfair and it is also an abuse of power.

9. The application for leave to institute judicial review proceedings would, ordinarily, be heard ex parte but in this particular instance, I directed the applicant to serve the application for hearing on the question of exemption from exhaustion of the appellate mechanisms provided under the *Tax Procedures Act* and the *Tax Appeals Tribunal Act*.

10. In so directing, my attention had been drawn to prayer 7 in the summons in which the applicant specifically asked for the exemption. The prayer reads as follows:

> "7. Applicant be and is hereby granted exemption from the obligation to exhaust the objection and appellate remedies under sections 51 and 52 of the *Tax Procedures Act* No. 29 of 2015 in so far as the challenge to the demand dated 28th August, 2023 for Kshs 17,081,968.63 by the respondent and the agency notices issued pursuant thereto on 29th August 2023 are concerned."

11. The ground upon which this prayer is based is ground no. 22 on the face of the application in which the applicant has averred as follows:

> "22. The respondent's curtailment of the applicant's right to object to the respondent's action and decision in terms of section 51 of the *Tax Procedures Act* No 29 of 2015 and thereafter, to appeal to the Tax Appeal Tribunal in terms of section 52 of the *Tax Procedures Act* is an exceptional circumstance entitling the applicant to exemption from the obligation to exhaust the objection and appellate remedies under the said sections of the *Tax Procedures Act* No 29 of 2015."

12. In the wake of these pleadings, I directed, inter alia, that the application be served for the hearing of the question of exemption from exhaustion of the statutory procedures and remedies provided thereunder. This, I did the very first time I dealt with the applicant's application for leave on 4 September 2023. My directions were in the following terms:

> "I have considered the applicant's application dated 4 September 2023 filed under this Honourable Court's recess rules. Considering that the applicant seeks to be exempted from exhausting the appellate mechanism under the *Tax Procedures Act* and the *Tax Appeals Tribunal Act*, it is necessary that this particular question be resolved first before the court can consider whether or not leave to file the substantive motion for judicial review orders can be granted. In other words, leave will be granted or refused only after hearing parties on whether the applicant deserves to exempted from exhausting the statutory alternative dispute resolution mechanisms. Accordingly, I direct that this application be served for hearing on this particular question on 2 October 2023. The applicant shall serve the

application within seven days of the date of this ruling. The respondent and interested party shall file and serve their response within seven days of the date of service of the applicant's application. It is so ordered."

13. My direction on the hearing of the question of exemption was informed by section 9(4) of the *Fair Administrative Action Act* which provides that while it is mandatory under section 9(2) and (3) for a party to exhaust internal mechanisms for appeal or review before invoking this Honourable Court's judicial review jurisdiction, a party may be exempted from these processes in exceptional circumstances and where justice of the case so demands. For better understanding, it is necessary that I reproduce the entire section 9 here; it reads as follows:

    9. Procedure for judicial review.

    (1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the *Constitution*.

    (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.

    (3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

    (4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

    (5) A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal. (Emphasis added).

14. Section 9(4) would be the legal basis for the application for exemption. There is no suggestion in this provision that the application would be heard and determined ex parte and it is for this very reason that I directed that the application for leave in which the prayer for exemption was subsumed be served for the hearing and determination of the question of exemption and, later, for the court to consider whether leave ought to be granted or not.

15. Ms. Beatrice Kamanthe Musau swore a replying affidavit on behalf of the respondent. Ms. Musau has sworn that she is an officer of the respondent and that she is aware that the applicant is a registered individual tax payer under personal identification no. A002946851.

16. On or about 28 August 2023, the respondent demanded tax arrears of Kshs. 17, 081, 968.63 comprising income tax of 1,050, 960.88 for the period January 2015 to December 2020 and Value Added Tax of Kshs 16, 031,07.75. The respondent then proceeded to issue agency notices to the applicant pursuant section 42 of the *Tax Procedures Act*. The agency notices were, however, lifted sometimes in September and October 2023.

17. According to the respondent, the applicant ought to have questioned or challenged the demand and agency notices at the Tax Appeals Tribunal in accordance with section 52 of the *Tax Procedures Act* since the respondent's decision in question is an "appealable decision" as defined under section 3 of the *Tax Procedure Act*.

18. It is also the respondent's case that the applicant has not demonstrated any justification why he should be exempted from the pursuing the appellate mechanisms provided by the law and, in any event, the facts do not warrant the applicant's case an exceptional one. If anything, the applicant has, in his own affidavit, detailed the various engagements he has had with the respondent prior to the filing of this application and, therefore, there is no basis for the apprehension that the alternative dispute resolution mechanisms provided by the *Act* will not suffice or the remedies provided in the *Act* are inadequate.

19. It is apparent from the pleadings and affidavits filed by both parties, together with their submissions, that they are in agreement that the resolution of the applicant's dispute would ordinarily be subject to the *Tax Procedures Act*. Section 2(2) of that *Act* is to the effect that procedures in administration of tax law specified in this Act would apply unless any particular tax law provides for a specific procedure.

20. The respondent's impugned decision would, in my humble view, fit the description of a "tax decision" which is defined in section 3 of the *Tax Procedures Act* to mean:

> " (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) a refund decision;
>
> (f) a decision under section 48 requiring repayment of a refund; or
>
> (g) a demand for a penalty;

21. The respondent's decision would probably fall under section 3 (1) (a) and (b). According to the same interpretation section, "an assessment" has been defined to mean:

> " a self-assessment, default assessment, advance assessment, or amended assessment, and includes any other assessment made under a tax law."

22. If the respondent's decision was a tax decision, then any grievance arising therefrom would be subject to section 51 of the *Act* which provides for objection to the tax decision. It states as follows:

51. Objection to tax decision:

> (1) A taxpayer 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 taxpayer 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.

(3) A notice of objection shall be treated as validly lodged by a taxpayer under subsection (2) if—

(a) the notice of objection states precisely the grounds of objection, the amendments required to be made to correct the decision, and the reasons for the amendments;

(b) in relation to an objection to an assessment, the taxpayer has paid the entire amount of tax due under the assessment that is not in dispute or has applied for an extension of time to pay the tax not in dispute under section 33(1); and

(c) all the relevant documents relating to the objection have been submitted.

(4) Where the Commissioner has determined that a notice of objection lodged by a taxpayer has not been validly lodged, the Commissioner shall immediately notify the taxpayer in writing that the objection has not been validly lodged.

(5) Where the tax decision to which a notice of objection relates is an amended assessment, the taxpayer may only object to the alterations and additions made to the original assessment.

(6) A taxpayer may apply in writing to the Commissioner for an extension of time to lodge a notice of objection.

(7) The Commissioner may allow an application for the extension of time to file a notice of objection if—

(a) the taxpayer was prevented from lodging the notice of objection within the period specified in subsection (2) because of an absence from Kenya, sickness or other reasonable cause; and

(b) the taxpayer did not unreasonably delay in lodging the notice of objection.

(8) Where a notice of objection has been validly lodged within time, the Commissioner shall consider the objection and decide either to allow the objection in whole or in part, or disallow it, and Commissioner's decision shall be referred to as an "objection decision".

(9) The Commissioner shall notify in writing the taxpayer of the objection decision and shall take all necessary steps to give effect to the decision, including, in the case of an objection to an assessment, making an amended assessment.

(10) An objection decision shall include a statement of findings on the material facts and the reasons for the decision.

(11) The Commissioner shall make the objection decision within sixty days from the date of receipt of—

(a) the notice of objection; or

(b) any further information the Commissioner may require from the taxpayer, failure to which the objection shall be deemed to be allowed.

23. It follows that the applicant ought to have lodged an objection with the Commissioner in accordance with section 51(1) of the *Act*. Upon considering the objection, the commissioner would have been bound to make what is described an 'objection decision' under section 51(1). As the Acts states, in an objection decision, the Commissioner may allow the objection either in whole or in part, or disallow it altogether.

24. If the commissioner came to the conclusion that the applicant's objection is meritorious, he would certainly allow the objection. But if he reached a decision contrary to the applicant's expectation, it would still be open to the applicant to invoke section 12 of the *Tax Appeals Tribunal Act*, cap. 469A 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'. Section 13 of the Tax Appeals Act details the procedure for making of the appeal.

25. If still dissatisfied with the decision of the Tax Appeals Tribunal, the applicant would be entitled to move this Honourable Court by way of an appeal under section 32 of the *Tax Appeals Tribunal Act* to impeach that decision. Under this provision of the law, a party to proceedings before the Tribunal may, within thirty days after being notified of the impugned decision or within such further period as the High Court may allow, appeal to this Honourable Court.

26. The prayer for exemption from exhausting these procedures is, by itself, an acknowledgement by the applicant that those alternative dispute resolution mechanisms exist and that he is bound to follow them. The question before court is not whether there exist alternative dispute resolution mechanisms for settlement of what the applicant believes are valid grievances arising from the respondent's decision; the question is whether he should be allowed to sidestep those procedures and approach this Honourable Court directly for judicial review reliefs.

27. Section 9(2) of the *Fair Administrative Action Act*, No. 4 of 2015 provides in rather peremptory terms that '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.'

28. It is trite that the existence of an alternative remedy is never enough to oust jurisdiction in judicial review (see *Leech v Deputy Governor of Parkhurst Prison* (1988) AC 533 per Lord Bridge at 562D). However, it has been held in *R v Inland Review Commissioners, ex p Preston* (1985) AC 835 that:

> " A remedy by way of judicial review is not to be made available where an alternative remedy exists...Judicial review is a collateral challenge: it is not an appeal. Where parliament has provided by statute appeal procedures, as in taxing statutes, it will only be very rarely that the courts will allow the collateral process of judicial review to be used to attack an appealable decision..."

29. Addressing the same issue in *R v Peterkin, ex p Soni* (1972) Imm AR 253 Lord Widgery CJ had this to say:

> "Where Parliament has provided a form of appeal which is equally convenient in the sense that the appellate tribunal can deal with the injustice of which the applicant complains this court should in my judgement as a rule allow the appellate machinery to take its course. The prerogative orders form the general residual jurisdiction of this court whereby the court supervises the work of inferior tribunals and seeks to correct injustice were no other adequate remedy exists, but both authority and common sense seem to me to demand that the court should not allow its jurisdiction under the prerogative orders to be used merely as an alternative form of appeal when other and adequate jurisdiction exists elsewhere."

30. The Court of Appeal has held in the *Speaker of the National Assembly v. Karume*, Civil Application No. NAI 92 of 1992 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.

31. Thus, both the statute and precedent point to the conclusion that it is pertinent for an aggrieved party to embrace alternative remedies including appellate procedures before moving court for judicial review remedies. The reviewing courts will always be conscious that in considering whether a public body may have abused its powers, they must not abuse their own by entertaining matters which they otherwise ought not to have entertained.

32. I am minded that section 9(4) of the *Fair Administrative Action Act*, which I have reproduced earlier in this ruling, provides a window for exemption from the requirement to invoke what the Act describes as the "internal mechanisms for appeal or review" and seek for other available remedies under any other written law before moving the court for judicial review reliefs. The exemption would be granted on condition that, first, an applicant's case presents what, in the eyes of the law, are "exceptional circumstances" and, second, that it is in the interest of justice that the applicant need not exhaust the available alternative remedies.

33. The immediate question would be whether the applicant's application for exemption meets the threshold of exceptional circumstances and whether it would be in the interest of justice that the applicant be exempted from exhausting the procedures and remedies prescribed by *Tax Procedures Act* and the *Tax Appeals Tribunal Act* or any other written law, for that matter.

34. But related to this question and a more fundamental question is whether, it would be open to the applicant, in the first place, to invoke the judicial review jurisdiction of this Honourable Court instead of filing an appeal. The point is this, assuming the applicant has exhausted the internal mechanisms of appeal or review, or he is granted exemption, would he file and application for judicial review or institute an appeal?

35. Section 32 of the *Tax Appeals Tribunal Act* provides what, in my humble view, is an instant answer to this question. For this reason, I can do no better than reproduce this provision here; it states as follows:

> 32. Appeals to the High Court on decisions of the Tribunal
>
> (1) A party to proceedings before the Tribunal may, within thirty days after being notified of the decision or within such further period as the High Court may allow, appeal to the High Court, and the party so appealing shall serve a copy of the notice of appeal on the other party.

(1A) A party that has appealed against the decision of the Tribunal in subsection (1) shall within two days of lodging a notice of appeal, serve a copy of the notice on the other party.

(2) The High Court shall hear appeals made under this section in accordance with rules set out by the Chief Justice. (Emphasis added).

36. This provision of the law is explicit and leaves no doubt that it is an appeal rather than an application for judicial review that ought to be filed against decisions of the Tax Appeal Tribunal.

37. Granted, in the instant application, no decision has been made by the Tax Appeals Tribunal against which the applicant can appeal. However, the only route prescribed by the Act by which an applicant aggrieved by a tax decision is through an appeal and not judicial review.

38. There should be little debate that an appeal is not synonymous with judicial review and that the court cannot assume appellate jurisdiction in exercise of its judicial review jurisdiction.

39. One of the hallmarks of appellate jurisdiction is that the appellate court is entitled to substitute its own decision for that of the subordinate court or tribunal. Not so for judicial review where the court would be concerned more about the process rather than the merits of the decision.

40. It is not part of the purpose for judicial review to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question (see *Lord Hailsham in Chief Constable of the North Wales Police v Evans* (1982) 1 WLR 1155 at 1160F).

41. It has also been held in *R v Entry Clearance Officer, Bombay ex p Amin* (1983) 818 at 829 (B-C) (per Lord Fraser) that judicial review is entirely different from an ordinary appeal. It is made effective by the court quashing an administrative decision without substituting its own decision, and it is to be contrasted with an appeal where the appellate tribunal substitutes its own decision on the merits for that of the administrative officer.

42. The same point was emphasised in C*hief Constable of North Wales Police v Evans* (*supra*) where Lord Brightman said at page 1173F and 1174G that:

> "Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power...Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made."(Emphasis added).

43. Lord Hailsham stated in the same case that:

> "The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court." (At page 1161A).

44. On his part Lord Roskill said in *R v Inland Revenue Commissioners ex parte National Federation of Self-Employed and Small Businesses Ltd* 1982(AC) 617 at 633C that:

> "The court must not cross that boundary between administration whether good or bad which is lawful and what is unlawful performance of a statutory duty".

45. What this boils down to is that, even if the applicant was to persuade the court that there are exceptional circumstances compelling him to move to court before exhaustion of the remedies under the *Tax Appeals Tribunal Act*, and that it is in the interest of justice that he be so exempted, the procedure which he seeks to invoke to address his grievances is not available to him. In other words, exempting the applicant under section 9(4) of the *Fair Administrative Action Act* would be an exercise in futility since it would be contrary to law to grant the applicant leave to seek judicial review reliefs yet he is restricted to approaching this Honourable Court by way of an appeal.

46. The window to apply for exemption under section 9(4) of the Fair Administrative Action is on the understanding that it is an application for judicial review that would be filed, if the court grants the exemption. And the exemption will not be granted to file an application for judicial review when the Act expressly provides for a different procedure to approach the court.

47. What this implies is that section 9(4) is not even available to the applicant. To the extent that he is restricted to filing an appeal rather than application for judicial review, he has no alternative but to exhaust the procedures and remedies prescribed by the *Tax Procedures Act* and the *Tax Appeals Tribunal Act* or any other written law, for that matter. It follows that the question whether his case is an exceptional case as to warrant exemption from internal mechanisms of appeal or review and the appurtenant remedies has turned out to be a moot point.

48. For these reasons, I hereby dismiss the applicant's application for exemption. For the same reasons, I decline the application for leave. The respondent will have costs. It is so ordered.

SIGNED DATED AND UPLOADED ON THE CTS ON 25 MARCH 2024

NGAAH JAIRUS

JUDGE