



**Fazal Dharamshi & Company Limited v Kenya Revenue Authority (Constitutional  
Petition E009 of 2023) [2024] KEHC 2717 (KLR) (19 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2717 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MOMBASA**  
**CONSTITUTIONAL PETITION E009 OF 2023**  
**OA SEWE, J**  
**MARCH 19, 2024**  
**CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION**  
**CONSTITUTIONAL PETITION NO. E009 OF 2023**  
**IN THE MATTER OF THE EAST AFRICAN COMMUNITY CUSTOMS MANAGEMENT ACT**  
**AND**  
**IN THE MATTER OF ARTICLES 10, 20, 21, 22, 23, 35, 40, 47, 48, 159, 258, AND**  
**SECTION 19 OF THE SIXTH SCHEDULE OF THE CONSTITUTION OF KENYA 2010**  
**AND**  
**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION**  
**OF RIGHTS & FUNDAMENTAL FREEDOMS) PRACTICE & PROCEDURE**  
**RULES 2013 AND ARTICLE 23 OF THE CONSTITUTION OF**  
**KENYA 2010 AND ORDER 53 OF THE CIVIL PROCEDURE RULES**  
**AND**  
**IN THE MATTER OF A DEMAND MADE BY THE KENYA REVENUE AUTHORITY**  
**AGAINST FAZAL DHARAMSHI & COMPANY LIMITED FOR KSHS. 29,205,925.00**  
**AND**  
**IN THE MATTER OF THE CONTRAVENTION OF**  
**FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLESU**  
**21, 28, 40 & 47 OF THE CONSTITUTION OF KENYA 2010**  
**BETWEEN**  
**FAZAL DHARAMSHI & COMPANY LIMITED ..... PETITIONER**  
**AND**  
**KENYA REVENUE AUTHORITY ..... RESPONDENT**



## RULING

1. Before the court for determination is the respondent's Notice of Preliminary Objection 13<sup>th</sup> March 2023. It was filed in objection to both the petitioner's application and Petition dated 16<sup>th</sup> February 2023. The respondent relied on the following grounds in challenging the jurisdiction of the Court:
  - (a) The demand date 8<sup>th</sup> February 2022 is properly made by the respondent in accordance with Section 135 and 136 of the East African Community Customs Management Act (EACCMA).
  - (b) b] Section 229(1) of the EACCMA grants the petitioner the right to object to the demand dated 8<sup>th</sup> February 2022 by applying for a review; which the petitioner has failed to do;
  - (c) The application and the Petition are improperly before the Court as this Court lacks the jurisdiction to entertain them;
  - (d) The petitioner has come before the Court before first going before the Tax Appeals Tribunal which is the forum of first instance for customs disputes, pursuant to Section 230(1) of the EACCMA;
2. Accordingly, the respondent prayed that the application and the Petition be dismissed for want of jurisdiction and that costs be provided for. Directions were then given on the 20<sup>th</sup> March 2023 that the Preliminary Objection be canvassed by way of written submissions. Thus, learned counsel for the parties filed their written submissions which were highlighted on 25<sup>th</sup> July 2023. On behalf of the petitioner, Mr. Khagram proposed one issue for determination, namely, whether the Preliminary Objection raised by the respondent has any merit. He made reference to the decision of the Court of Appeal in Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others [2015] eKLR for a reiteration of the applicable principles as laid down in the case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors [1969] EA 696.
3. Counsel accordingly submitted that, in so far as the issues in contest herein revolve around the manner in which the respondent made its demand for short levied duty, the Petition and the interlocutory application are properly before the Court. He emphasized the point that this is not an appeal and therefore nothing bars the petitioner from approaching the Court in search of a constitutional remedy; notwithstanding the existence of the alternative judicial review mechanism referred to by the respondent. In support of the petitioner's submissions reliance was placed on the following decisions in which similar preliminary objections were dismissed:
  - (a) Civil Appeal No. 67 of 2017: Krish Commodities Ltd v Kenya Revenue Authority (Unreported);
  - (b) Civil Appeal No. 66 of 2017: Corrugated Sheets Ltd v Kenya Revenue Authority (Unreported);
  - (c) Kenya Revenue Authority v Export Trading Company Ltd [2022] KESC 31 (KLR);
  - (d) Mombasa High Court Constitutional Petition No. E010 of 2022: Papyrus Paper & Paper Products Limited v Kenya Revenue Authority.
4. On its part, the respondent proposed the following two issues for determination:
  - (a) Whether the applicant has exhausted the available remedies before approaching the Court;



- (b) Whether the matter falls within the purview of the Tax Appeals Tribunal by virtue of the prayers sought.
5. The respondent conceded that it issued a demand on 8<sup>th</sup> February 2022 to the petitioner in respect of taxes due, amounting to Kshs. 29,205,925/=; and that the demand was made pursuant to the provisions of Sections 135 and 236 of EACCMA. Hence, according to the respondent, the petitioner had 30 days from the date of the demand to apply for review of the said decision pursuant to Section 229(1) and (2) of the EACCMA. Accordingly, the respondent submitted that the Court lacks the jurisdiction to entertain the dispute in so far as the petitioner has not exhausted the alternative dispute resolution mechanism provided for in the EACCMA. The respondent placed reliance on *Republic v Kenya Revenue Authority & Another, Ex Parte Centrica Investments* [2019] eKLR to buttress its argument.
6. It was further the submission of the respondent that, since the impugned decision is an administrative decision, it falls under the purview of the *Fair Administrative Action Act*; and therefore ought to have been taken on appeal to the Tax Appeals Tribunal. In this regard, the respondent made reference to Section 9(2) and (3) of the *Fair Administrative Action Act* which make it mandatory for available remedies be exhausted before the jurisdiction of this Court can be invoked. In addition, the respondent relied on *Judicial Review Application No. 359 of 2018: Krystalline Salt Limited v Kenya Revenue Authority, Republic v Kenya Revenue Authority & Another; Ex Parte Centrica Investments* [2019] eKLR, *Geoffrey Muthinja Kabiru & Others v Samuel Munga Henry & 1756 Others* [2015] eKLR and *Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 Others* [2017] eKLR to buttress the submission that the petitioner ought to have appealed the impugned decision to the Tax Appeals Tribunal instead.
7. On whether its actions of demanding taxes and issuing enforcement notices were justified, the respondent submitted that the impugned actions were not only within their mandate, but were also lawful and justifiable, and in line with the provisions of Sections 135 and 236 of EACCMA. Thus, it was the contention of the respondent that the Court has no reason to interfere with the respondent's statutory action of demanding taxes rightfully owed by the petitioner. The respondent referred the Court, in this connection, to *Civil Appeal No. 134 of 1987: Nyaga v Housing Finance Company of Kenya Ltd*, *High Court Miscellaneous Civil Application No. 534 of 2007: Republic v Kenya Revenue Authority & 2 Others, Ex Parte Arrow Hi-fi (EA) Limited and Republic v Commissioner of Domestic Taxes, Ex Parte Sony Holdings Limited* [2019] eKLR on when an administrative action or quasi-judicial decision can be challenged for illegality, irrationality or procedural impropriety. Accordingly, the respondent urged that the Petition be dismissed in its totality for want of jurisdiction.
8. I have given due consideration to the grounds set out in the respondent's Notice of Preliminary Objection dated 13<sup>th</sup> March 2023 with a view of, first and foremost, ascertaining whether the objection has been properly taken. What amounts to a preliminary objection was aptly captured in *Mukisa Biscuits Manufacturing Co. Ltd. v West End Distributors* [1969] EA 696 thus:
- ...a 'preliminary objection' consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion..."



9. Similarly, in *Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 Others* [2015] eKLR the Supreme Court emphasized the point that: -

...a preliminary objection may only be raised on a “pure question of law”. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record...”

10. The same position was explicated in *Oraro vs. Mbaja* [2005] 1 KLR 141, thus:

...A “preliminary objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed...Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...”

11. In so far as the objection was taken on the ground of jurisdiction, it is manifest that the Preliminary Objection was properly taken. As to whether the Court has jurisdiction to entertain the application and the Petition, the Supreme Court was explicit in *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others* [2012] eKLR, that:

A court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred by law. We agree with counsel for the first and second Respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings...Where *the Constitution* exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power on Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

12. Accordingly, in determining whether or not it has jurisdiction to hear and determine the Petition and the interlocutory application filed therewith, the Court must confine itself to the pleadings filed herein by the parties. Thus, in the South African case of *Vuyile Jackson Gcaba v Minister for Safety and Security First & Others CCT 64/08 (2009)* which was quoted with approval in *Republic v Kenya Revenue Authority & Another, Ex Parte Centrica Investments* [2019] eKLR, it was aptly pointed out that:

...Jurisdiction is determined on the basis of pleadings...and not the substantive merits of the case...in the event of the Court's jurisdiction being challenged at the outset (in limine), the Applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleading – including in motion proceedings, not only the formal terminology of the notice of motion but also the contents of the supporting affidavits must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognizable only in another court. If however the pleadings properly interpreted, establish that the applicant is asserting a claim... one that is to be determined exclusively by the Labour court, the High Court would lack jurisdiction...”



13. In the premises, I have perused the Petition dated 16<sup>th</sup> February 2023 in respect of duty that was allegedly short-levied. The petitioner has therein alleged violation of several provisions of *the Constitution*, including Articles 10, 40, 47 and 50 thereof. There can be no doubt therefore that this Court has the requisite jurisdiction to entertain the Petition, granted the provisions of Article 165(3) (a) and (b) of *the Constitution*, which state:

Subject to clause (5), the High Court shall have—

- (a) unlimited original jurisdiction in criminal and civil matters;
- (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
- (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
- (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
  - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
  - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
  - (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
  - (iv) a question relating to conflict of laws under Article 191; and 100
- (e) any other jurisdiction, original or appellate, conferred on it by legislation.

14. It is plain therefore that the Court has jurisdiction to hear and determine the Petition as presented. Nevertheless, a question has been raised by the respondent as to whether or not the Petition is premature from the standpoint of the doctrine of exhaustion, granted the provisions of the EACCMA. In this regard, Section 229(1) of the EACCMA provides that:

A person affected by the decision or omission of the Commissioner or any other officer on matters relating to Customs shall within thirty days of the date of the decision or omission lodge an application for review of that decision or omission.”

15. Moreover, Section 230(1) of the Act provides that:

A person dissatisfied with the decision of the Commissioner under section 229 may appeal to a tax appeals tribunal established in accordance with Section 231.”

16. That the petitioner did not employ that procedure is not in dispute; yet in *Speaker of National Assembly v Karume* [1992] KLR 21 it was held that:

Where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.”



17. Likewise, in *William Odhiambo Ramogi & 3 Others v Attorney General & 4 Others* (supra) it was held that:

The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of *the Constitution*."

18. The Court of Appeal restated the principle in *Geoffrey Muthinja Kabiru & 2 others v Samuel Munga Henry & 1756 others* [2015] eKLR, thus:

It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The Ex Parte Applicants argue that this accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution."

19. It is noteworthy that, in defending the Petition, counsel for the petitioner relied on the *Krish Commodities Ltd v Kenya Revenue Authority* (supra), for the proposition that the issue herein is not one of merit but the process. Hence counsel relied on the following excerpt from that decision:

...the pertinent issue was whether the manner in which the decision was made or the process followed was reasonable, fair and in conformity with Article 47 of *the Constitution*..."

20. Similarly, counsel relied on *Corrugate Sheets Ltd v Kenya Revenue Authority* (supra) and *Kenya Revenue Authority v Export Trading Co. Ltd* (supra) in which the issue was the irrationality, arbitrariness and capriciousness of the respondent's conduct. Needless to underscore the point that judicial review is now a constitutional remedy and that a party cannot be faulted for approaching the Court directly by way of a constitutional petition, for purposes of Article 47, such a party would have to bear in mind the provisions of the *Fair Administration Action Act*. Thus, it is pertinent that the *Fair Administrative Action Act*, whose preamble states that it is an Act of Parliament to give effect to Article 47 of the Constitution, and for connected purposes, provides at Section 9(2) and (3) thereof that:

(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(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 subsection (1).

21. Nevertheless, as has been pointed out herein above, the petitioner chose the route of a constitutional petition as opposed to a judicial review application. I have accordingly gone further to consider whether the circumstances hereof constitute an exception to the exhaustion doctrine. This is because Section 9(4) of the *Fair Administrative Action Act* is explicit that:

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.



22. Whereas no application was made by the petitioner for exemption, the Court is under obligation to consider the alternative mechanism in the context of each particular case to ascertain whether or not exceptional circumstances exist to warrant the direct approach. Hence, in the case of *Krystalline Salt Limited v Kenya Revenue Authority* (supra) it was held:

...what constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. Thus, where an internal remedy would not be effective and/or where its pursuit would be futile, a court may permit a litigant to approach the court directly. So too where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile...

...The *Fair Administrative Action Act* does not define 'exceptional circumstances.' However, this court interprets exceptional circumstances to mean circumstances that are out of the ordinary and that render it inappropriate for the court to require an applicant first to pursue the available internal remedies. The circumstances must in other words be such as to require the immediate intervention of the court rather than to resort to the applicable internal remedy..."

23. This position was reiterated by the Court of Appeal in *National Assembly of Kenya v Kina & another* (Civil Appeal 166 of 2019) [2022] KECA 548 (KLR) (10 June 2022) (Judgment), in which it was held:

...On exhaustion of other legal relief or other constitutional remedies, where an alternative remedy would entail delay or uncertainty in providing a remedy, then such an alternative remedy is not available or effective and the doctrine of exhaustion does not apply. In addition, when the constitutionality of a statute is legitimately challenged, the only available remedy is to urge the court to nullify the offending provisions..."

24. In the instant matter, the petitioner averred, at paragraphs 10, 11, 13 of the Petition that the demand for additional taxes, years after the goods were sold, infringes on its right to property as well as the national values as set out in Section 10 of the Constitution. Then at paragraphs 17 and 18 of the Petition, reference was made to Articles 19, 20, 21, 22, 23, 24, 27, 35, 40, 47 and 50 of the Constitution and how the rights of the petitioner, as protected thereunder have been violated. Those are not issues that would be amenable to resolution in the alternative forum provided for under EACCMA.

25. In the premises, I am satisfied that the petitioner was justified in bringing the instant Petition, notwithstanding the existence of the alternative procedure provided for in EACCMA. Indeed, in *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 Others* (Interested Parties) (supra) was held:

60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in *the Constitution* or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in *Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others* [2018] eKLR.



62. In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere “bootstraps” or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court...”
26. The Supreme Court took a similar position in the case of *Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties)* (Petition E007 of 2023) [2023] KESC 113 (KLR) (28 December 2023) (Judgment), and held:
105. We agree with the above reasoning and find that the availability of an alternative remedy does not necessarily bar an individual from seeking constitutional relief. This is because the act of seeking constitutional relief is contingent upon the adequacy of an existing alternative means of redress. If the alternative remedy is deemed inadequate in addressing the issue at hand, then the court is not restrained from providing constitutional relief. But there is also a need to emphasize the need for the court to scrutinize the purpose for which a party is seeking relief, in determining whether the granting of such constitutional reliefs is appropriate in the given circumstances. This means that a nuanced approach to the relationship between constitutional reliefs for violation of rights and alternative means of redress, while also considering the specific circumstances of each case to determine the appropriateness of seeking such constitutional reliefs, is a necessary prerequisite on the part of any superior court...
- ...
107. Flowing from the above findings and in that context, it is our view that, where the reliefs under the alternative mechanism are not adequate or effective, then there is nothing that precludes the adoption of a nuanced approach, as we have stated. What must matter at the end is that a path is chosen that safeguards a litigant’s right to access justice while also recognizing the efficiency and specificity that established alternative dispute resolution mechanisms can offer. This is because, to achieve a harmonious and effective legal framework, it is imperative to strike a judicious balance between the emphasis on providing the initial opportunity for resolution to entities established by law and the assertion of a litigant’s right to access the court. However, such convergence requires a case-by-case assessment by considering issues such as the nature of the dispute and the adequacy of the alternative dispute mechanism. See also our decision in *Bia Tosha Distributors Ltd v Kenya Breweries Ltd & 6 Others* (Pet.No.15 of 2020) [2023] KESC 14(KLR) (Const. and JR) (17 February 2023) (Judgment)”
27. It is in the light of the foregoing that I find no merit in the respondent’s Preliminary Objection dated 13<sup>th</sup> March 2023. The same is hereby dismissed with an order that the costs thereof be in the cause.
28. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 19<sup>TH</sup> DAY OF MARCH 2024**

**OLGA SEWE**

**JUDGE**

