



Republic v Commissioner for Investigations & Enforcement, Kenya Revenue Authority; Anaj Warehousing Limited (Exparte) (Application E192 of 2023) [2024] KEHC 4150 (KLR) (Judicial Review) (30 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4150 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
APPLICATION E192 OF 2023**

**J NGAAH, J
APRIL 30, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

**COMMISSIONER FOR INVESTIGATIONS & ENFORCEMENT, KENYA
REVENUE AUTHORITY RESPONDENT**

AND

ANAJ WAREHOUSING LIMITED EXPARTE

RULING

1. The motion before court is expressed to be made under order 53 Rule 3 of the [Civil Procedure Rules](#). It seeks for the orders that:
 - “i. An order of Certiorari to bring to this court for the purposes of quashing, the respondent’s tax assessment dated 29th June 2022, the respondent’s objection decision dated 24th January 2023 and the respondent’s Kshs 9,156,760 tax demand dated 9th November 2023.
 - ii. An order of Prohibition to restrain the Respondent, his servants, agents and/or officers from enforcing the impugned tax assessment dated 29th June 2022, objection decision 24th January 2023 and tax demand dated 9th November 2023 against the ex parte Applicant.”



The applicant has also asked for costs of the application.

2. The application is based on a statutory statement dated 30 November 2023 and an affidavit of even date sworn by Harshil Patel, verifying the facts relied upon. According to these documents, the applicant is a taxpayer, registered as such with the respondent and that at times material to this suit, the applicant was also the registered proprietor of all that piece of land known as LR No MNNI/3603. The applicant leased this parcel of land to an entity called Kipevu Inland Container Depot which is a separate and distinct entity from the applicant. The said entity was licensed by the Commissioner of Customs to operate an inland port and receive imported goods at Mombasa port. Those goods would be cleared upon payment of appropriate taxes.
3. On 15 January 2015, the Commissioner of Customs revoked the appointment of Kipevu Inland Container Depot through Gazette Notice No 380. Prior to the revocation, and for the time that Kipevu Inland Container Depot operated at the applicant's premises, the applicant was not responsible for the goods held in the depot and even after Kipevu Inland Container Depot was degazetted, the goods in its custody were never handed over to the applicant.
4. That notwithstanding, in the year 2022, the respondent conducted an investigation into the applicant's operations and goods allegedly left in its custody by Kipevu Inland Container Depot after its degazettement. Following these investigations, on 5 May 2022, the respondent wrote to the applicant communicating its findings and concluded, among other things, that there was no proper accounting for the cargo which was in the hands of Kipevu Inland Container Depot.
5. Based on its findings, the respondent imposed a tax obligation on the applicant for taxes arising from the goods that were in the hands of Kipevu Inland Container Depot and raised assessments for various taxes including the impugned assessment which is the subject of these proceedings.
6. Vide letters respectively dated 14 September 2022 and 23 September 2022, the applicant objected to the tax assessment setting out its grounds for objection and also through the online iTax system. On 24 January 2023, which was 120 days after the applicant's objection, the respondent made his objection decision contrary to the prescribed timeline under section 51 (11) of the [Tax Procedures Act](#).
7. According to the applicant, the objection decision reveals that the respondent proceeded on the mistaken belief that the applicant is a legal successor of Kipevu Inland Container Depot hence his decision to impose the tax burden on the applicant. The applicant denies that it is the legal successor of Kipevu Inland Container Depot whose relationship with the applicant was that of landlord-tenant relationship.
8. On 9 November 2023, the respondent issued a demand for payment of Kshs 9,1 56,760 on account of income taxes and gave a 14-day notice for payment failure of which he threatened to take enforcement measures against the applicant. On 21 November 2023, the applicant responded to the demand reiterating its ground for objections and the fact that the taxes were not due from the applicant.
9. In response to the application, the applicant filed a preliminary objection dated 7 December 2023 raising the following grounds:
 - “1. The [Tax Procedures Act](#) confers original jurisdiction upon the Tax Appeals Tribunal for tax disputes such as the one that is currently before this Honourable Court, and the High Court can only take up appellate jurisdiction in such an instance.



2. The Application offends Sections 230 of the East African Community Customs Management Act, 2004, Sections 52, 53 & 56(2) of the [Tax Procedures Act](#); Sections 7(1) (b) and 9(2) of the [Fair Administrative Actions Act](#); Section 12 of the [Tax Appeals Tribunal Act](#); Rules 3 and 5 of The [Tax Appeals Tribunal \(Appeals to the High Court\) Rules 2015](#); Article 23 (2) of the [Constitution](#) of Kenya.”

10. This ruling is respect of the preliminary objection. I have considered the submission filed by the parties’ representatives on their respective positions on the preliminary objection.

It is obvious from the applicant’s own pleadings and affidavit that the respondent made a tax decision to which the applicant objected. As a result of this objection, the respondent made an objection decision. These processes are covered in section 51 of the [Tax Procedures Act](#), cap. 469B; it reads 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.
11. The applicant lodged an objection with the Commissioner in accordance with section 51(1) of the Act. It is assumed that upon considering the objection, the commissioner made an 'objection decision' under section 51(8). It would appear that, according to this decision, the commissioner disallowed the applicant's objection.
 12. Being aggrieved by the Commissioner's decision, the applicant was bound 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.
 13. Rather than file the appeal to the Tax Appeals Tribunal as contemplated under section 12 of the *Tax Appeals Tribunal Act*, the applicant has invoked the judicial review jurisdiction of this Honourable Court.

I am minded 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 Revenue 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...”

14. 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.”

15. 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.

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.

16. But even if the applicant was to exhaust the procedures under the *Tax Procedures Act* and the *Tax Appeals Tribunal Act*, it would still not be open to it to approach this court by way of judicial review. If it turned out that the applicant was dissatisfied with the decision of the Tax Appeals Tribunal, the applicant could only have moved to 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. This section provides 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).

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.

17. There should not be any doubt that an appeal is not synonymous with judicial review and that the court cannot assume appellate jurisdiction in exercise of its judicial review jurisdiction. One of the hallmarks of appellate jurisdiction, for instance, 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. 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).
18. 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.

19. The same point was emphasised in *Chief 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).

20. What these decisions point to is that to the applicant is enjoined to exhaust the procedures prescribed under the *Tax Procedures Act* and the *Tax Appeals Tribunal Act*. Once those processes have been exhausted, the only means by which the applicant can approach this Honourable Court is by way of an appeal and not by judicial review. To the extent that the applicant has done the contrary, its application is misconceived and an abuse of the process of this Honourable Court. It is struck out with costs.

SIGNED, DATED AND DELIVERED ON 30 APRIL 2024

NGAAH JAIRUS

JUDGE

