



**Republic v Commissioner for Legal Services and Board Co-Ordination; LLP (Exparte)  
(Application E114 of 2023) [2024] KEHC 4371 (KLR) (Judicial Review) (26 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4371 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
APPLICATION E114 OF 2023**

**J NGAAH, J**

**APRIL 26, 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**COMMISSIONER FOR LEGAL SERVICES AND BOARD CO-ORDINATION ..... RESPONDENT**

**AND**

**COULSON HARNEY LLP ..... EXPARTE**

**RULING**

1. The applicant in this application seeks leave of this Honourable court to file a substantive motion for the orders of certiorari, prohibition and mandamus. The application is expressed to be brought under Article 47 of *the Constitution*; sections 7 to 9 of the *Fair Administrative Action Act*, 2015; Order 53 Rule 1 of the Civil Procedure Rules; Rule 25 of the Civil Procedure (Amendment) Rules. Specifically, the applicant has prayed as follows:

- “a. an order of Certiorari directed at the Respondent to bring to this Court for purposes of being quashed the decisions made by the Respondent in the impugned letter dated 14 September 2023 purporting to be a valid Objection Decision, and demanding an amount of KES 88,632,475 (Tax Demand) being corporate income tax from the Ex Parte Applicant in respect of the 2017 year of income;
- b. an Order of Prohibition be and is hereby issued prohibiting the Respondent, its servants, agents, staff, employees and persons acting through the



Respondent from issuing any further Tax Demands for the alleged corporate income tax amounting to KES 88,632,475, the same having been set aside by operation of the law pursuant to Section 51(11) of the [Tax Procedures Act](#);

- c. an order of mandamus compelling the Respondent, its servant, agents, staff, employees and persons acting through it to immediately withdraw the letter to the Ex Parte Applicant dated 14 September 2023 as the same has no force of law, and consequently vacate the Assessment in relation to which the alleged Objection Decision was issued;
- d. a declaration that the Ex Parte Applicant's Objection dated 20 July 2023 against the Respondent's Assessment dated 22 June 2023 is deemed to be allowed and successful by operation of the law pursuant to section 51(11) of the [Tax Procedures Act](#), 2015, the Respondent having failed and /or declined to issue an Objection Decision within the statutory stipulated period of sixty (60) days;
- e. a declaration that the Respondent, in purporting to issue the Objection Decision has abrogated the Ex-parte Applicant's rights to fair administrative action, as guaranteed under Article 47 of [the Constitution](#) and as provided for under sections 3, 4, 5, 6 and 7 of the [Fair Administrative Action Act](#); and
- f. a declaration that in the exercise of its powers as vested in it by statute and otherwise, the Respondent has failed to comply with the requirements and tenets of fair administrative action contrary to the provisions of section 5, 6 and 7 of the [Fair Administrative Action Act](#) and Article 10 of [the Constitution](#); The grant of leave do operate as stay restraining the Respondent whether by itself, its officers, servants, agents or employees from further enforcing and executing the Tax Demand dated 14 September 2023 in any manner including by demanding taxes, enforcing, collecting, issuing or enforcing agency notices or such other enforcement notices or measures to the Ex Parte Applicant's trading partners, bankers, debtors or any That further, the grant of leave do operate as a stay of the appeal lodged at the Tax Appeals Tribunal by the Ex Parte Applicant on 12 October 2023, pending the determination of the Judicial Review proceedings commenced in this Honorable Court."

2. The applicant has also asked for costs of the application.

The application is supported by the affidavit of Eric Jones sworn on 19 October 2023 and a statutory statement of even date.

According to the verifying affidavit, the applicant is law firm set up as a limited liability partnership. It provides legal services to the private sector, institutional and multinational organisations. Its other client portfolio includes foreign investors, governments and government institutions.

3. On 9 October 2023 at about 5:23 P.M. the respondent emailed the applicant informing the applicant that it had made an objection decision to the applicant's objection to an assessment of corporate income tax for 2017 (hereinafter "the assessment") due from the applicant to the Kenya Revenue Authority. Attached to the email was the objection decision. The applicant was, therefore, required to withdraw its assertion that the objection decision was not issued within the stipulated timeline as prescribed under the [Tax Procedures Act](#) 2015.



4. The respondent's 9 October 2023 letter was in response to the applicant's letter of even date in which the applicant notified the respondent that the applicant had filed its objection on 20 July 2023 objecting to the assessment. The assessment had been done on 22 June 2023. It is the applicant's position that pursuant to section 51(11) of the [Tax Procedures Act](#), the respondent was required to respond to the objection within sixty days of receipt of the objection. Since the objection was deemed to have been validly filed on the filing date, the objection decision ought to have been made on or before 18 September 2023. But because the applicant had not received any decision by this date, its objection is deemed to have been accepted by the operation of the law pursuant to the provisions of section 51(11) of the [Tax Procedures Act](#). This section reads:

51.

- (11) The Commissioner shall make the objection decision within sixty days from the date of receipt of a valid notice of objection failure to which the objection shall be deemed to be allowed.

The applicant contends that this provision of the law implies that the respondent's assessment was vacated by operation of the law and, therefore, the applicant does not owe the respondent any taxes in relation to the respondent's assessment.

5. The respondent opposed the applicant's application and, through Ms. Joan Kimotho, filed a replying affidavit to that end. Ms. Komotho has sworn that she is an officer at the respondent's Independent Review of Objections unit.

She also states that the respondent is established under the [Kenya Revenue Authority Act](#), cap. 469 and under Section 5 (1) thereof, the Kenya Revenue Authority is established as an agency of the Government tasked with the collection and receipt of all revenue. According to section 5(2) on the performance of the Kenya Revenue Authority's under subsection (1), the Authority is mandated to administer and enforce all provisions of the written laws as set out in Part 1 & 2 of the First Schedule to the Act for the purposes of assessing, collecting and accounting for all revenues in accordance with those laws.

6. At all times material to the applicant's application, the applicant was a registered taxpayer with at tax personal identification no: Po51229962P. On 22nd June 2023, the respondent, after carrying out a tax audit on the applicant covering the years of income 2017 to 2021, and after several correspondences and a meeting held on 12 June 2023, issued its audit findings or formal assessments and asked the applicant to settle the outstanding tax liability of Kshs 110,839,972.

7. On 20 July 2023, pursuant to Section 51(2) of the [Tax Procedures Act](#), the applicant issued its notice of objection requesting the respondent to vacate the assessments on the basis that it was erroneous, without legal basis and founded on a misunderstanding of the law and facts.

On or about 14 September 2023, the respondent, in compliance with the section 51(11) of the [Tax Procedures Act](#) and Article 201 (b) (i) of Constitution, issued its decision on the outstanding tax liability which reduced from Kshs 110,839,972 to Kshs. 88, 632,475. This decision was communicated to the applicant through its email address.

8. It is the respondent's case that, at times material to this application, the dispute between it and the applicant was a tax dispute and, therefore, the provisions of the [Tax Procedures Act](#), 2015 and Tax Appeal Tribunal Act, 2013 applied. It follows that the applicant ought to have challenged the objection decision or any other incidental tax dispute at the Tax Appeals Tribunal in accordance with section 52 of the [Tax Procedures Act](#) since the decision is "an appealable decision" as defined in section 3 of the Act.



9. Ms. Kimotho has been advised by her counsel which advice she believes to be true that the issue of an objection decision being issued out of time or the legality of the decision in any other respect is a matter, which the Tax Appeals Tribunal would be seized of to determine. She has also been advised by her counsel, which advice she verily believes to be true that under the doctrine of exhaustion, a person challenging an agency decision must first of all exhaust the alternative remedies before seeking to invoke judicial review proceedings. In the instant application, the applicant has not demonstrated any justification why it should be exempted from the mandatory and directory provisions of the Fair Administrative Action, Act, 2015.
10. Further, there is nothing to show that the statutory provision providing for an alternative forum for dispute resolution is not effective or that the applicant cannot obtain an effective remedy from the Tax Appeals Tribunal. If anything, the applicant has already filed an appeal with the Tribunal against the objection decision.
11. I have considered the application, the response thereto and the submissions of the parties' respective representatives.

An application for leave would, in ordinary circumstances, be heard and, in deserving cases, be granted ex parte. When the applicant's application came up for hearing, at the first instance, my attention was drawn to ground number 18 of the grounds upon which the application is based. The ground is expressed as follows:

“In light of the above reasons, and in accordance with the provisions of section 9 (4) of the *Fair Administrative Action Act*, the Ex Parte Applicant hereby applies for exemption from the obligation to exhaust other remedies and therefore prays that the Honourable Court grant leave for the matter to be addressed by way of Judicial Review. It is in the interest of justice that this exemption be granted, as the Respondent is clearly acting in excess of its statutory authority, and only this Court will be able to grant the reliefs or remedies necessary to protect its rights. Indeed, the Court is vested with specific powers under Section 11 of the *Fair Administrative Action Act* to grant the exact Orders that are necessary to prevent this flagrant violation of the law.”

12. As a result of this pleading, I invited the parties to address the court on the question of exhaustion of alternative procedures and remedies available to the applicant before the court could consider exercising its discretion in favour of the applicant and grant leave to file the substantive motion for the judicial review reliefs. In particular, I noted and directed as follows:

“In view of this pleading, the court has to determine the question of exemption from the obligation to exhaust alternative remedies before it can consider the applicant's application for leave. I, therefore, direct that this application be served within 7 days from today's date. The respondent will have 7 days to file and serve his response after he has been served with the applicant's application. Once served with the respondent's response, the applicant shall file and serve written submissions within 7 days of the date of service of the respondent's response. On his part, the respondent will have 7 days to file and serve his submissions. Highlighting of submissions will be on 19 December 2023. It is so ordered.”

13. So, the question at hand is not even whether the applicant has arguable case which, upon further consideration may, subject to the discretion of this Honourable Court, yield judicial review reliefs. The question that is up for determination is whether the applicant ought to have exhausted the procedures and the remedies provided under the *Tax Procedures Act* and the *Tax Appeals Tribunal Act* or, put



differently, whether the applicant should be exempted from exhausting those alternative procedures and remedies under statute.

14. Two concessions, important to the determination of this application, have been made by the applicant. The first is that, everything else being equal, it ought to have invoked the appellate mechanisms prescribed by the *Tax Procedures Act* and the Tax Appeals Act before approaching this Honourable Court. This can be the only reason why it is seeking exemption in the first place.
15. The second concession is closely related to the first one and it is that the applicant has, in fact filed an appeal with the Tax Appeals Tribunal. This is apparent from paragraph 19 of the grounds upon which the application is made where the applicant has pleaded that:

“ 19. Due to the likelihood of enforcement action by the Respondent, the Ex Parte Applicant filed a Notice of Appeal at the Tax Appeals Tribunal on 12 October 2023 in order to protect its interests, as the law under the *Tax Procedures Act* requires a taxpayer to lodge an appeal within 30 days of receiving an Objection Decision. This Notice of Appeal was lodged, not in acknowledgment of the Objection Decision, but only for purposes of ensuring that the Respondent does not use its illegal Objection Decision to enforce collection on the basis that the Ex Parte Applicant did not lodge a Notice of Appeal as required by law”.

16. To begin with, as much as the applicant has invoked section 9(4) of *Fair Administrative Action Act*, to seek for exemption, I note that there is no specific prayer for exemption in the motion under consideration. Section 9(4) is clear that it is only “in exceptional circumstances and on application by the applicant” that one may be exempted. Failure by the applicant to make a specific prayer for exemption would render its application defective and incompetent and, would, on that account alone, fail.

But that turns out to be a moot point because the window for exemption under section 9(4) is only open to an applicant who would be entitled to apply for judicial review in the first place. The applicant is not so entitled because a challenge to an objection decision would be first, by an appeal to the Tax Appeals Tribunal and, subsequently, under section 12 of the Tax Appeals Act, by an appeal, to this Honourable Court. It would not be open for applicant to challenge the decision by way of judicial review.

17. As far as challenging the tax decision and the making of an objection decision are concerned, section 51 of the *Tax Procedures Act* 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.
18. It is common ground that the assessment was a tax decision to which the applicant objected and thereby, subsequently, provoked an objection decision. The applicant has admitted that it lodged the objection in accordance with section 51(1) of the Act. Upon considering the objection, the commissioner made the objection decision under section 51(8). This, however, is disputed by the applicant. This denial is a point to which I will return in due course.
19. The applicant was aggrieved by the objection decision and, certainly it is for this reason that it invoked section 12 of the *Tax Appeals Tribunal Act* 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.



20. The applicant's appeal to the Tax Appeals Tribunal betrays its stance that the Commissioner did not make an objection decision. The argument that it only appealed to the Appeals Tribunal "due to the likelihood of enforcement action by the Respondent...in order to protect its interests" cannot hold. Similarly, the reason that the "notice of Appeal was lodged, not in acknowledgment of the objection decision, but only for purposes of ensuring that the respondent does not use its illegal objection decision to enforce collection on the basis that the ex parte applicant did not lodge a Notice of Appeal as required by law" is also not viable. All these are, in my humble view, lame excuses because the only one reason why a party would appeal to the Tax Appeals Tribunal is clear from section 13 of the Tax Appeals Act is this: it is in a case where one is dissatisfied with decision of the commissioner on any matter under tax law, including an objection decision.
21. Once the applicant appealed, it was bound to follow through its appeal and wait the determination of the Tax Appeals Tribunal. If, peradventure, it would be dissatisfied with the decision of the Tax Appeals Tribunal, the applicant is 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. It reads 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).
22. 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.
23. Section 9 (4) of the *Fair Administrative Action Act* provides exemption to an applicant who would otherwise be required to file an application for judicial review. It does not exempt a party who ought to file an appeal against decisions of a tribunal such as the Tax Appeals Tribunal. The entire section 9 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).

24. There is no dispute 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.

25. 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 versus Evans* (1982) 1 WLR 1155 at 1160F).

It has also been held in *R versus 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.

26. The same point was emphasised in *Chief Constable of North Wales Police versus 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).

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).

On his part, Lord Roskill said in *R versus 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”.

27. What these decisions point to is that to the extent that the applicant is enjoined to file an appeal rather than an application for judicial review against an objection decision, the court has no jurisdiction under



section 9(4) of the *Fair Administrative Action Act* to exempt it from invoking the appellate mechanisms prescribed by the *Tax Procedures Act* and the *Tax Appeals Tribunal Act*.

It is trite that the existence of an alternative remedy is never enough to oust jurisdiction in judicial review (see *Leech versus Deputy Governor of Parkhurst Prison* (1988) AC 533 per Lord Bridge at 562D). However, it has been held in *R versus 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...” (Emphasis added).

28. Addressing the same issue in *R versus 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.”

29. Our very own 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 need not have entertained. In the instant case judicial review would not even be available to the applicant.

30. In the final analysis, the question whether the applicant’s case is an exceptional case as to warrant exemption from internal mechanisms of appeal or review and the appurtenant remedies need not arise. It is, as it were, a moot point.

For the foregoing reasons, I am inclined to hold that the applicant’s application is misconceived and an abuse of the due process of this Honourable Court. It is dismissed with costs. It is so ordered.

**SIGNED, DATED AND DELIVERED ON 26 APRIL 2024**

**NGAAH JAIRUS**

**JUDGE**

