



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
JUDICIAL REVIEW NO. 79 OF 2016
IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW
FOR ORDER OF CERTIORARI AND PROHIBITION
AND
IN THE MATTER OF: INCOME TAX ACT CAP 470
BETWEEN
ELSEK & ELSEK(K) LTD.....EX PARTE APPLICANT
VERSUS
KENYA REVENUE AUTHORITY.....RESPONDENT

RULING

Preliminary Objection

1. By a Notice of Preliminary Objection filed herein on 21.8.19 the Respondent herein Kenya Revenue Authority seeks to strike out the petition herein on grounds that:

- (a) The Application is incompetent, legally unsuitable and amounts to forum shopping and as such an abuse of the court process.
- (b) The Court lacks jurisdiction to hear the application on the grounds that there exists statutory dispute resolution mechanism under the Tax Appeals Tribunal Act, 2013.
- (c) The Application is fatally defective as it offends the mandatory provisions of Section 9 (2), (3) and (4) of the Fair Administrative Action Act No. 4 of 2015.
- (d) The Application is fatally defective for want of compliance with section 52 (1) and (2) of the Tax Procedures Act, 2015.
- (e) Under the circumstances, this Application is a misconception and ought to be dismissed with costs to the Respondent.

2. The genesis of the Preliminary Objection is that on 9.11.16 the Ex parte Applicant herein sought for

orders of certiorari and prohibition to stop the Respondent from collecting taxes alleged to be due amounting to Kshs. 37,438,059/= demand for which was issued vide an Agency Notices dated 22.9.16 and 13.9.16. The Ex parte Applicant objected to the said Agency Notices on grounds:

(i) That by issuing an Agency Notices the Respondent acted un-procedurally and in excess of its statutory powers.

(ii) That by issuing the Agency Notices without first issuing a Notice to the Ex parte Applicant as demanded by Section 85(2) or 85(3) as read together with Section 128(2) of the Income Tax Cap 470, the Respondent denied the Ex parte Applicant the right to respond to the Respondent's assessment thereby denying Ex parte Applicant the right to be heard on the same as contemplated under Section 86 of the Income Tax Act. The Respondent thus acted without due regard to the rules of natural justice.

(iii) That by issuing the Agency Notices as indicated above, the Respondent acted unlawfully, illegally and ultra vires the provisions of the Income Tax Act thus rendering the decision null and void.

3. Now before the Ex parte Applicant's application could be heard the Respondent filed the current Preliminary Objection stating that this Court lacks the jurisdiction to entertain the matter because there exists other channels of dispute resolution which the Ex parte Applicant has not exhausted.

4. On 24.9.19 the Court directed the parties to file submissions to the Preliminary Objection and the matter was to be mentioned on 7.10.19 to receive the submissions.

5. On 7.10.18 Mr. Twahir learned counsel for the Respondent was in Court and confirmed that he had filed submissions. Mr. Wameyo learned Counsel for the Ex parte Applicant was not in Court and did not file his submissions. The Court being satisfied that Mr. Wameyo was aware that submissions were due on 7.10.19, reserved the Ruling for 6.11.19 because Mr. Twahir relied on his submissions and requested for a date for the Ruling.

6. Mr. Twahir submitted that the application offends the mandatory provisions of Section 9 (2), (3) and (4) of the Fair Administrative Action Act No. 4 of 2015. Counsel submitted that this is a matter which should be dealt with under the Tax Appeal Tribunal as per the requirement of **Section 9 (2) of the Fair Administrative Action Act, No. 4 of 2015**, which states:

“The High Court or a subordinate court shall not review an administrative action or decision unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.”

7. Counsel referred the Court to **Republic vs. Kenya Revenue Authority, Commissioner of Investigation and Enforcement Department Ex-parte Centrica Investments [2019]** where it was held that:

“In view of my analysis and determination of the issue under consideration herein above, it is my conclusion that the ex parte applicant ought to have exhausted the available mechanism before approaching this court. First, I find that this case offends section 9 (2) of the Fair Administrative Action Act Second, the ex parte applicant has not satisfied the exceptional circumstances requirement under section 9 (4) of the Fair Administrative Action Act. Third, it is a requirement under the above sections that an applicant applies for exemption. The ex parte applicant never applied for an exemption, hence its argument that the Tribunal is not sitting or is not properly constituted cannot assist. As stated earlier the provisions of section 9 of the Fair Administrative Action Act cited above are expressed in mandatory terms. As observed earlier, the ex parte applicant never applied for exemption under section 9 (4) discussed herein above.”

8. Mr. Twahir submitted that the Application is fatally defective for want of compliance with section 52 (1) and (2) of the Tax Procedures Act, 2015. The Tax Procedures Act requires that a person who is

dissatisfied with an appealable decision may appeal to the Tribunal. The Petitioner should have approached the Tribunal to appeal against the decision by the Respondents.

Section 52 (1) of the Tax Procedures Act thus states:

“A person who is dissatisfied with an appealable decision may appeal the decision to the Tribunal in accordance with the provisions of the Tax Appeals Tribunal Act, 2013.”

9. Mr. Twahir further cited the following cases in which the Court has approved Section 52 (1) of the Tax Procedures Act.

- **In Republic vs. Kenya Revenue Authority Ex-parte Portside Freight Terminals Ltd [2018] eKLR** the Court held as follows:

“Further, it is the finding hereof that if the ex parte Applicant was aggrieved by the decision disclosed in the letters aforesaid, it should file an appeal with the Tax Appeal Tribunal, since the issue remains dispute on amount of tax payable.”

- **In Republic vs. Kenya Revenue Authority, Commissioner of Investigation and Enforcement Department Ex-parte Centrica Investments [2019]**, the Court held as follows:

“Additionally, section 52 (1) of the act provides that a person who is dissatisfied with an appealable decision may appeal the decision to the Tribunal in accordance with the provisions of the Tax Appeals Tribunal Act.”

The Determination

10. In Judicial Review Application No. 2 of 2017 Mombasa Portside Freight Terminals Limited vs. Kenya Revenue Authority which raised similar issues as herein, I had this to say:

“This Court is only concerned with the process of the decision making. It is the finding of the court that the letters dated 3rd and 6th February, 2017 did not offend the tenets of natural justice. Further, it is the finding hereof that if the ex parte Applicant was aggrieved by the decision disclosed in the letters aforesaid, it should file an appeal with the Tax Appeal Tribunal, since the issue remains dispute on amount of tax payable.”

11. In Judicial Review Application No. 447/2018 Kenya Revenue Authority & Others vs. Central Investments, Justice Mativo had the following to say in a matter similar with the one at hand:

“52. Additionally, section 52(1) of the act provides that a person who is dissatisfied with an appealable decision may appeal the decision to the Tribunal in accordance with the provisions of the Tax Appeals Tribunal Act.[48] Further, section 53 of the act provides for appeal to the High Court in the following words, that is, a party to proceedings before the Tribunal who is dissatisfied with the decision of the Tribunal in relation to an appealable decision may, within thirty days of being notified of the decision or within such further period as the High Court may allow, appeal the decision to the High Court in accordance with the provisions of the Tax Appeals Tribunal Act.[49]

53. In view of my analysis and the determination of the issue under consideration herein above, it is my conclusion that the *ex parte* applicant ought to have exhausted the available mechanism before approaching this court. *First*, I find that this case offends section 9 (2) of the Fair Administrative Action Act. [50] *Second*, the *ex parte* applicant has not satisfied the exceptional circumstances requirement under section 9(4) of the Fair Administrative Action Act. [51] *Third*, it is a requirement under the above sections that an applicant applies for exemption. The *ex parte* applicant never applied for an exemption, hence, its argument that the Tribunal is not sitting or is not properly constituted cannot assist. As stated earlier the

provisions of section 9 of the Fairs Administrative Action Act [52] cited above are expressed in mandatory terms. As observed earlier, the ex parte applicant never applied for exemption under section 9(4) discussed herein above.”

12. Further I have noted that the Ex parte Applicant’s case is hinged on alleged violation of Sections 89-91A of the Income Tax [Cap 470 Laws of Kenya]. Sections 89–91A of the Income Tax [Cap 470, Laws of Kenya] were repealed by item 5 of the Second Schedule to the Tax Procedures Act 2015 (No. 29 of 2015) which came into force on 19th January, 2016. Reference to Sections 89 – 91A of the Income Tax Act may therefore be inappropriate. The agency notices were issued under Section 42 of the Tax Procedures Act, 2015 and the procedures prescribed in that Section must be complied with by the agency Banks, and the Respondent. The Applicant is duty bound to comply with the relevant provisions of the Tax Procedures Act, 2015 including its objection and appeals procedure.

13. From the foregoing paragraphs of this Ruling it is the finding of this Court that the Preliminary Objection before the Court is merited and the same succeeds with the result that the Ex parte Applicant’s application dated 9.11.16 is hereby struck out with costs to the Respondent.

Dated, Signed and Delivered at Mombasa this 6th day of November, 2019.

E. K. OGOLA

JUDGE

In the presence of:

Mr. Gikandi holding brief Wameyo for Applicant

Mr. Otieno holding brief Twahir for Respondent

Mr. Kaunda Court Assistant