Republic v Commissioner of Customs & Border Control & another; Ayan Tyres Limited (Exparte Applicant) (Judicial Review Miscellaneous Application E009 of 2021) [2022] KEHC 13296 (KLR) (26 September 2022) (Ruling)

Neutral citation: [2022] KEHC 13296 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

JUDICIAL REVIEW MISCELLANEOUS APPLICATION E009 OF 2021

GV ODUNGA, J

SEPTEMBER 26, 2022

IN THE MATTER OF JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI & PROHIBITION

AND

IN THE MATTER OF BREACH OF SECTION 4 OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 5 OF 2012 & SECTIONS 7, 9 & 11 OF THE FAIR ADMINISTRATIVE ACTION ACT

AND

IN THE MATTER OF BREACH OF ARTICLE 47 OF THE CONSTITUTION

AND

IN THE MATTER OF AN APPLICATION BY TYRES LIMITED TO APPLY FOR ORDERS OF CERTIORARI & PROHIBITION

BETWEEN

REPUBLIC ..... APPLICANT

AND

COMMISSIONER OF CUSTOMS & BORDER CONTROL .... 1ST RESPONDENT

KENYA REVENUE AUTHORITY ..... 2ND RESPONDENT

AND

AYAN TYRES LIMITED ..... EXPARTE APPLICANT

RULING

1. By a notice of motion dated 2nd December, 2021, the ex parte applicant herein, Ayan Tyres Limited, seeks the following orders:

    a. That the honourable court be pleased to issue an order of certiorari to remove into this court and quash the decision by the respondents contained in the letter dated August 23, 2021 requiring the applicant to pay kshs 2,384,436/- on account of additional import duty allegedly due from the applicant.

    b. That the honourable court be pleased to issue an order of prohibition prohibiting the Kenya Revenue Authority, whether by itself, its officers, employees and/or agents, from commencing, instituting or proceeding with any enforcement or prosecution actions against the applicant or its directors and/or officers on account of demand contained in the letter dated August 23, 2021 and subsequent related letters issued to the applicant.

    c. That the honourable court be pleased to grant the costs in the cause.

Ex Parte Applicant's Case

2. The application was supported by an affidavit sworn by Abdullahi Adan Jimale, the ex parte applicant's director and a shareholder. According to him, the applicant is a licenced trader who imports and sells different brands of tyres, among other activities contained in the companies memorandum & articles of association. He averred that vide a letter dated August 23, 2021, the respondents informed the applicant that they had conducted a desk audit of the applicant's custom entries for the period between 2016 to date which audit purportedly revealed several consignments of assorted tyres from supplies imported by the applicant, which were wrongly classified under tax tariff code 4011.20.20 which attracts Import Duty at 10%. The respondents indicated that the applicable tariff code for the tyres imported by the applicant is 4011.10.00 which attracts Import Duty at the rate of 25%.

3. As a result, the respondents demanded payment of short levy that included additional duties, taxes and interests in the sum of Kshs 2,384,436. On October 1, 2021, the respondents followed up the demand with a reminder. which was collected by the applicant's counsel at the respondents' offices on November 18, 2021. According to the deponent, the letter dated October 1, 2021 required the applicant to pay a sum of Kshs 2,384,436 within seven (7) days.

4. The ex parte applicant complained that in so far as the audit stretches back to the year 2016, the same violates the applicant's constitutional right of fair administrative action under article 47 of the *Constitution* and accused the respondents of abusing its statutory power. It was averred that while the respondents knew that they were making an administrative action that adversely affected the applicant, the respondents had an obligation under article 47 of the *Constitution* to ensure its action was expeditious, efficient, lawful, reasonable and procedurally fair.

5. It was deposed that the respondents acted irrationally by conducting audit of, inter alia, 2016 imports that subjected the applicant to huge loses since those goods had been sold and the applicant was unable to recover from the customers since the duty charged determines the final price of the products.

6. It was averred that the respondents acted illegally in breach of section 4(4) of the *Fair Administrative Actions Act* and rules of natural justice by failing to accord the applicant right to be heard and an opportunity to even participate in the computation process so as to ascertain how the final figures

demanded was arrived at. It was therefore averred that the respondents' decision contained in the letter dated August 23, 2021 and a reminder letter dated October 1, 2021 disappointed the applicant's legitimate expectation that it would be heard before adverse administrative decision was made. It further undermined the applicant's legitimate expectation that while the respondents have powers to conduct audit, it must do so expeditiously and the long time that lapsed between the time transactions took place in 2016 and the demand of the payment of additional taxes was a long time for a prudent and efficient authority to discover a mistake.

7. The deponent lamented that the respondents' decision stretching back to 2016 transaction is irrational and does not meet proportionality test as it denies the applicant recourse of recovering the additional taxes from the customers since those goods have been sold and the applicant has lost an opportunity to adjust prices of its products in order to factor in the selling prices which would have included additional taxes.

8. It was averred that the Objection and request for review and a meeting by the applicant vide a letter dated November 15, 2021 was declined and the adverse decision upheld. The ex parte applicant wondered how the respondents arrived at the principal amount without the knowledge of the ex parte applicant and was of the view that had the respondents agreed to meet with the applicant, the applicant would have known how figures were arrived at factoring in the initial payment.

9. According to the applicant, the respondents in breach of rules of natural justice did not seek clarification from the applicant to verify that it did not import tyres for buses and lorries, which rate for those whose rim is over 17 inches is 10% under East Africa Community Common External Tariff (EAC/CET), Rules 2017, tariff code 4011.20.20, before arriving at its decision. It was its case that physical examination of the tyres and verification that indeed some tyres are those of lorries and buses that attract 10% import duty is not possible for the reason that owing to the long period taken by the respondents to conduct audit, the same have been sold.

Preliminary Objection

10. In opposing the application, the respondents took up preliminary objections set out as follows:

    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.

11. Based on the said objection, the respondents prayed that the application dated December 2, 2021 be struck out with costs so that the applicant can comply with the laid down procedure for challenging a tax decision.

Respondents' Submissions

12. It was submitted on behalf of the respondents that section 230 of the *East African Community Customs Management Act*, 2004 (EACCMA) provides that a person who is dissatisfied with the decision of the commissioner may appeal to the Tax Appeals Tribunal and that section 231 of the EACCMA provides for the establishment of the Tax Appeals Tribunal by each of the partner states of the East African

Community. It was further submitted that section 2 of the *Tax Procedures Act* sets down the object and purpose of the Act as follows: -

1. The object and purpose of this act is to provide uniform procedures for-
    a. consistency and efficiency in the administration of tax laws;
    b. facilitation of tax compliance by taxpayers; and
    c. effective and efficient collection of tax.
2. Unless a tax law specifies a procedure that is unique to the administration of a tax thereunder, the procedures provided for under this act shall apply.
3. This act shall be interpreted to promote the object of the act.

13. The respondents also referred to section 3 of the *Tax Procedures Act* which defined an "appealable decision" in the following terms:-

> "appealable decision" means an objection decision and any other decision made under a tax law other than—
>
> a. a tax decision; or
>
> b. a decision made in the course of making a tax decision.

14. According to the respondent, the only reason why an "appealable decision" is distinguished from a "tax decision" is not that one of them is brought under the ambit of the *Tax Procedures Act* while the other is not but that both have distinct processes of challenging each within the *Tax Procedures Act*. For instance, the first line of challenging a "tax decision" is by lodging an objection. Therefore, a "tax decision" must graduate to an "appealable decision" before being lodged at the Tax Appeals Tribunal, otherwise it will be premature.

15. In the instant case, it was submitted that the Commissioner issued a review decision on November 15, 2021 and went further o advise the applicant its recourse to appeal the said decision with the Tax Appeals Tribunal. In the Respondent's view, the review decision clearly falls within the meaning of an "appealable decision", because it is definitely a decision made under a tax law as the second limb of the definition to an "appealable decision" states. It was submitted that an "appealable decision" begins its life in the Tax Appeals Tribunal pursuant to section 230 of the EACCMA as discussed above and section 52 of the *Tax Procedures Act* which provides as follows: -

Appeals of appealable decision to the Tribunal

1. 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 (No 40 of 2013).
2. A notice of appeal to the Tribunal relating to an assessment shall be valid if the taxpayer has paid the tax not in dispute or entered into an arrangement with the Commissioner to pay the tax not in dispute under the assessment at the time of lodging the notice.

16. In the respondents' view, even an appeal to the Tribunal is not valid unless the taxpayer pays the tax not in dispute. The respondents reiterated the object and purpose of the *Tax Procedures Act* particularly, object (b) and (c) of section 2(1) of the *Tax Procedures Act* which in its view especially capture the spirit quite aptly as facilitation of tax compliance by taxpayers and effective and efficient collection of tax.

17. It was submitted that the reason why a piece of legislation would want to create an environment where effective and efficient collection of tax is achieved is that the respondents do not collect taxes for their own benefit; it is not a selfish pursuit for self-aggrandizement. The respondents are agents of "the people", and tax is imposed under article 210 of the Constitution.

18. As regards the jurisdiction of this court it was submitted, firstly, that the *Tax Procedures Act*, which is a legitimate limb of the Constitution, has established the procedure for challenging a decision made under a tax law. It was noted that if a taxpayer is dissatisfied by the decision of the Tax Appeals Tribunal, then pursuant to section 53 the taxpayer can appeal to the High Court and if the taxpayer or the Commissioner (by extension) is dissatisfied with the decision of the High Court, then pursuant to section 54 either party can appeal to the Court of Appeal and the right of appeal ends there. The *Tax Procedures Act*, however, provides under section 56(2) that "An appeal to the High Court or to the Court of Appeal shall be on a question of law only."

19. In the respondent's view, the danger of the High Court taking up original jurisdiction on such a matter is that it limits the right of appeal to only one, further it expands its jurisdiction from matters of law to matters of fact. What that means is that by taking up original jurisdiction, the High Court in effect makes nonsense of the *Tax Procedures Act* and the Tax Appeals Tribunal in one blow. In such a scenario, tax administration becomes unpredictable. It would even be absurd to argue the case in the High Court by quoting sections of the *Tax Procedures Act* because those sections can in no way be binding concerning certain aspects of tax administration but only persuasive concerning others. And it is not just the *Tax Procedures Act* that sets down the procedure for challenging such a decision as the one the commissioner made in the present case. The Fair Administrative Actions Act calls such a decision an administrative action and goes ahead to set down the procedure for challenging an administrative action.

20. It was submitted that it is for this reason that the emerging jurisprudence from the High Court's Judicial Review section is that before a party applies for judicial review remedies in the High Court they must demonstrate that they have exhausted all internal mechanisms for challenging such a decision pursuant to section 9(2) of the *Fair Administrative Actions Act*. Reference was therefore made to *The Registered Trustees, Kenya Railways Staff Retirement Benefits Scheme v Chairman, Rent Restriction Tribunal & 99 Others* [2018] eKLR and *Republic v Kenya Revenue Authority Ex-Parte New Frarims Wholesalers Limited & 3 Others* [2017] eKLR.

21. It was submitted that the question of procedure has been dealt with before in so many cases by this court in inter alia, the following cases: -

    i. *Rich Productions Ltd. v Kenya Pipeline Company & Another*, Petition No 173 of 2014:

> " The reason why the Constitution and the law establish different institutions and mechanism for dispute resolution in different sectors is to ensure that such disputes as may arise are resolved by those with the technical competence and the jurisdiction to deal with them. While the court retains the inherent and wide jurisdiction under article 165 to supervise... such supervision is limited in various respects, which I need not go into here. Suffice to say that it (the court) cannot exercise such jurisdiction in circumstances where parties before it seek to avoid mechanisms and processes provided by law, and convert the issues in dispute into constitutional issues when it is not."

ii. Constitutional Petition Number 359 of 2013 - *Diana Kethi Kilonzo v IEBC & 2 Others*:

> " We note that the Constitution has allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities."

iii. *David Ramogi & 4 Others v The Cabinet Secretary, Ministry of Energy & Petroleum & 7 Others* [2017] eKLR:

> " Third is the verdict that while the Constitution guarantees rights to access courts, the same Constitution neither operates in a vacuum nor does it automatically oust other statutory provisions brought to life by the legislative arm of government; a delegate and trustee of the sovereign power of the people of Kenya under article 1 as read with article 94 of our constitution. As such, where alternative forum lies such as enforcement mechanisms under statute, say enforcement of a simple contract, a constitutional petition will most likely not be admitted. Similarly, where particular institutions are tasked under the Constitution or statute to deal with specific grievances, then these channels need to be first explored and exhausted before the intervention of the court is sought unless these are shown to be ineffective or unwilling to discharge their mandate in which case the court may flex its supervisory muscle under article 165(6) and possibly issue the necessary prerogative writs against the impugned quasi-judicial body or other appropriate relief under article 23(3)."

iv. *John Harun Mwau v Peter Gastrow & 3 Others* [2014] eKLR:

> " courts will not normally consider a constitutional question unless the existence of a remedy depended on it; if a remedy is available to an applicant under some other legislative provision or some other basis, whether legal or factual, a court will usually decline to determine whether there has been in addition to a breach of other declaration of rights ... it is an established practice that where a matter can be disposed of without recourse to the Constitution, the Constitution should not be evoked at all."

v. *George Owino Mulanya & 4 Others v Achieng Odonga & Another* [2017] eKLR:

> " Whenever an Act of Parliament has provided for a clear procedure or mechanism for redress, the same ought to be strictly followed. Indeed in the case of Speaker of the National Assembly vs Karume, the court stated "...Where there is a clear procedure for redress of any particular grievances prescribed by the Constitution or the Act of Parliament, that procedure should be strictly followed..." The court of appeal discussing the same subject reiterated as follows: -"... This court in the past emphasized the need for aggrieved parities (sic) to strictly follow any procedures that are specifically prescribed for resolution of particular disputes." Speaker of the National Assembly v. Karume (Supra). In Kones v Republic & Another Ex Parte Kimani Wa Nyoike & 4 Others it was held that "...Where a specific dispute resolution mechanism is prescribed by the Constitution or a statute, to resort to that mechanism first before purporting to invoke the inherent jurisdiction of

> the High Court. The basis for that view is first that article 159(2)(c) of the Constitution has expressly recognized alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The use of the words "including" leaves no doubt that article 159(2)(c) is not a closed catalogue. To the extent that the Constitution requires these forms of dispute resolution mechanisms to be promoted, usurpation of their jurisdiction by the High court would not be promoting, but rather, undermining a clear constitutional objective. A holistic and purposive reading of the Constitution would therefore entail construing the unlimited original jurisdiction conferred on the High Court by article 165(3)(a) of the Constitution in a way that will accommodate the alternative dispute resolution mechanisms. ... In view of my above findings, I find that this matter is not properly before this court... The drafters of the Constitution were fully aware of articles 165 and article 85(a). The Constitution cannot contradict itself. I see no contradiction myself...This court is obliged under article 159(2)(e) of the constitution to protect and promote the purposes and principles of the constitution. Also, the constitution should be given a purposive, liberal interpretation. The provisions of the constitution must be read as an integrated whole without any one particular provision destroying the other but each sustaining the other."

22. According to the respondents, this is a tax dispute that cannot through some innovation be transformed into a judicial review application and that the East Africa Community Customs Management Act and the Tax Procedure's Act has established a clear mechanism for addressing the dispute currently before this court and that the forum of first instance is the Tax Appeals tribunal. Consequently, the court was urged to strike out the application with costs, so that the applicant can take the obvious path set down by law for addressing the current tax grievance.

Ex Parte applicant's Submissions

23. In its submissions, the x parte applicant contended that the respondent's action f conducting an audit that stretches back to the year 2016 and demanding taxes thereon violated the applicant's constitutional right of fair administrative action under article 47 of the *Constitution* hence the respondents are guilty of an abuse of statutory power. It was contended that due to the inaction of the respondents for many years a legitimate expectation was created that the respondents would not claim more VAT as to do so subjects the applicant to serious injury since goods have already been sold and he cannot recover VAT being demanded by adjusting prices anymore. In support of the submissions the ex parte applicant cited the case of *Republic v Kenya Revenue Authority Exparte Cooper K-Brands Limited* (2016) eKLR.

24. As regards the Preliminary Objection, it was submitted that it does not confine itself with the facts and that the respondents are under obligation to explain the delay to conduct audit for many years. Accordingly, in the absence of any justifiable grounds, the respondents are deemed to be intended to exercise powers in order to achieve collateral purposes. The Preliminary Objection, it was submitted cannot be decided without verification of such facts.

25. According to the x parte applicant, the final decision of the respondents does not rest on an issue whether or not the respondents were legally entitled to collect the taxes due or not taxes were actually due. The decision rests on the process that was being adopted by the respondents in the exercise of statutory obligation, an issue, not for an appeal but one that falls squarely within the judicial review jurisdiction.

26. The *ex parte* applicant submitted, that whereas the availability of an alternative remedy is a factor to be taken into consideration, the court ought not to sanitise a patently illegal action simply because there is right of appeal provided by the statute.

27. It was submitted that the provisions of the East African Community Customs Management Act, 2004 are not a bar to court's intervention to remedy or sanitize patently illegal action.

28. Consequently, it was submitted that the Preliminary Objection is not merited and should be dismissed with costs.

Determinations

29. This ruling is in respect of the preliminary objections. Though the applicant has briefly dwelt on the merits of the application, in this ruling the court will restrict itself to the preliminary objection. The said object, in a summary, is that this application was prematurely filed before this court before the applicant had exhausted the available remedies. In other words, the respondents are relying on the doctrine of exhaustion of remedies as the ground for seeking that this application be struck out.

30. This exhaustion doctrine has been restated by the Court of *Appeal in Geoffrey Muthinka Kabiru & 2 Others v Samuel Munga Henry & 1756 others* [2015] eKLR viz,

> "Courts ought to be for a 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 party is first of all diligent in the protection of his own interests within the mechanisms in place for resolution outside the courts..."

31. *In the Matter of the Mui Coal Basin Local Community* [2015] eKLR the court held that:

> "the reasoning is based on the sound Constitutional policy embodied in article 159 of the Constitution: that of a matrix dispute resolution system in the country. Our Constitution creates a policy that requires that courts respect the principle of fitting the fuss to the forum even while creating what Supreme Court justice J.B. Ojwang' has felicitously called an 'Ascendant Judiciary'...the Constitution creates a preference for other mechanisms for dispute resolution – including statutory regimes..."

32. The doctrine was restated by the Court of Appeal in *Geoffrey Muthinja & Another v Samuel Muguna Henry & 1756 Others* [2015] eKLR, where it was held that:-

> "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 within churches, as is bound to happen. 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 of courts. This accords with article 159 of the Constitution which commands courts to encourage alternative means of dispute resolution. We find and hold that the exhaustion doctrine applies even where, as was argued by the appellants herein, what is sought to be challenged is the very authority of the organs before whom the dispute was to be placed."

33. section 9(2), (3) and (4) of the *Fair Administrative Action Act*, No 4 of 2015, a piece of legislation which the ex parte applicant has cited in support of its case, provides:

(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.

34. It is however my view that the onus is upon the applicant to satisfy the court that he ought to be exempted from resorting to the available remedies.

35. As was held by this court in R*epublic v Ministry of Interior and Coordination of National Government and Another ex parte* ZTE Judicial Review Case No 441 of 2013:

> "...one must not lose sight of the fact that the decision whether or not to grant judicial review orders is an exercise of judicial discretion and as was held by Ochieng, J in John Fitzgerald Kennedy Omanga v The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No 997 of 2003, for the court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort though the applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. Therefore, unless due to the inherent nature of the remedy provided under the statute to resort thereto would be less convenient or otherwise less appropriate, parties ought to follow the procedure provided for under the statute. This position was re-affirmed by the Court of Appeal in Speaker of The National Assembly v Karume Civil application No Nai. 92 of 1992, where it was held that there is considerable merit in the submission 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."

36. It was similarly held in *Republic v National Environment Management Authority* [2011] eKLR, that where there is an alternative remedy and especially where Parliament has provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted. The Court of Appeal had this to say at page 15 and 16 of its judgment,

> "The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal process, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it. – see for example R v BIRMINGHAM CITY COUNCIL, ex parte FERRERO LTD case. The

Learned judge, in our respectful view, considered these strictures and come to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute with respect we agree with the judge."

37. There is now a chain of authorities from the High Court as well as the Court of Appeal that where a statute has provided a remedy to a party, this court must exercise restraint and first give an opportunity to the relevant bodies or State organs to deal with the dispute as provided in the relevant statute. This principle was well articulated by the Court of Appeal in *Speaker of National Assembly v Njenga Karume* [2008] 1 KLR 425, where it held that;

> " Irrespective of the practical difficulties enumerated...these should not in our view be used as a justification for circumventing the statutory procedure....In our view, there is considerable merit in the submission 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. We observe without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional provisions and statutory provisions."

38. The same principle has been underlined in the cases of *Kipkalya Kones v Republic & Another ex-parte Kimani Wanyoike & 4 Others* (2008) 3 KLR (EP) 291, *Francis Gitau Parsimei & 2 Others v National Alliance Party & 4 Others* Petition No356 and 359 of 2012.

39. It is now a 'cardinal principle that save in the most exceptional circumstances, the judicial review jurisdiction would not be exercised and the court must not exercise it where there exist alternative remedy *In Re Preston* [1985] AC 835 at 825D Lord Scarman was of the view that a remedy by judicial review should not be made available where an alternative remedy existed and should only be made as a last resort.

40. Mumbi Ngugi, J in *Rich Productions Limited v Kenya Pipeline Company & Another* [2014], explained why the court must be slow to undermine prescribed alternative dispute resolution mechanisms thus:

> " The reason why the Constitution and law establish different institutions and mechanisms for dispute resolution in different sectors is to ensure that such disputes as may arise are resolved by those with the technical competence and the jurisdiction to deal with them. While the court retains the inherent and wide jurisdiction under article 165 of the Constitution to supervise bodies such as the 2nd respondent such supervision is limited in various respects, which I need not go into here. Suffice it that it (the court) cannot exercise such jurisdiction in circumstances where parties before court seek to avoid mechanisms and process provided by law, and convert the issues in dispute into constitutional issues when it is not."

41. The gravamen of the respondent's objections is section 229 of the East African Community Customs Management Act 2004 as read with section 51 of the *Tax Procedures Act* No 29 of 2015. The former provides that:

(1) A person directly 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.

(2) The application referred to under subsection (1) shall be lodged with the commissioner in writing stating the grounds upon which it is lodged.

42. On the other hand, section 51 of the *Tax Procedures Act* No 29 of 2015 provides as follows:

> 51. (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; and
>
> (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.

43. In this case, the ex parte applicant's grievances are that in so far as the audit stretches back to the year 2016, the same violates the applicant's constitutional right of fair administrative action under article 47 of the *Constitution* and amounts to abuse of power. Under the said article, it is contended, the respondents were enjoined, while making an administrative action that adversely affected the ex parte applicant to ensure its action was expeditious, efficient, lawful, reasonable and procedurally fair. In this case the failure to act expeditiously and efficiently, it was contended, amounted to irrationality, as the inaction, since 2016 has exposed the applicant to huge loses since the goods, the subject of taxation, had been sold and the applicant is unable to recover, from the customers, the duty charged which determines the final price of the products. This action by the Respondent, it was contended violated the ex parte applicant's legitimate expectation informed by the long delay in taking the said action that no such action would be taken. It was further alleged that the respondents acted illegally in breach of section 4(4) of the *Fair Administrative Actions Act* and rules of natural justice by failing to accord the applicant right to be heard and an opportunity to even participate in the computation process so as to ascertain how the final figures demanded was arrived at.

44. It is clear from the foregoing that the ex parte applicant is complaining about the power of the respondents to demand for payment of taxes in the circumstances of the case. In the case of HCPetition No 203 of 2012; *Kapa Oil Refineries Limited v The Kenya Revenue Authority, The Commissioner of Customs Services and The Attorney General*, the Lenaola, J (as he then was) had this to say at page 13:

> "Looking at the Petition again, I am clear that the major issue for determination in this Petition is whether it is lawful under article 210 of the Constitution and section 235 (1) of the EACCMA for the 1st and 2nd respondents to demand the taxes so demanded. The issue in my view is one that ought to be determined by the procedure provided for under section 230 of the Act."

45. Similarly, in this case, the issue revolves around the determination as to whether the respondents ought to lawfully demand for the taxes in question taking into account the time lapse. That is a matter that ought to be dealt with pursuant to section 229 of the *East African Community Customs Management Act* 2004 as read with section 51 of the *Tax Procedures Act* No 29 of 2015.

46. I associate myself with the position of the Court of Appeal in Kisumu in *Eliud Wafula Maelo v Ministry of Agricukture and 3 Others* [2016] KLR where it was held that:

> "The jurisdiction of the High Court in particular matters or instances can be ousted or restricted by statute...The subject's right of access to the courts may be taken away or

> restricted by statute...Where a tribunal with exclusive jurisdiction has been specified by a statute to deal with claims arising under the statute, the county court's jurisdiction to deal with those claims is ousted, for where an act creates an obligation to and enforces the performance of it in a specified manner only, the general rule is that performance cannot be enforced in any other manner."

47. In this case no reasons have ben advanced why the applicant opted to bypass the prescribed alternative mechanisms which in my view are not any less appropriate, convenient, effective and/or beneficial. In the premises I find that this notice of motion is misconceived and incompetent for contravening the doctrine of exhaustion of remedies. Consequently, I do not wish to deal with the other matters raised herein in order not to prejudice any proceedings that might be commenced under the said provisions.

Order

48. In the result the notice of motion dated December 2, 2021 is struck out with costs to the respondent. Orders accordingly.

G V ODUNGA

JUDGE

RULING READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 26TH DAY OF SEPTEMBER, 2022

M W MUIGAI

JUDGE

Delivered the presence of: