



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW CASE NO. 77 OF 2020

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

KENYA REVENUE AUTHORITY.....1ST RESPONDENT

THE COMMISSIONER CUSTOMS AND BORDER

CONTROL, KENYA REVENUE AUTHORITY.....2ND RESPONDENT

EX PARTE:

KANNON CLEARING & FORWARDING LIMITED

RULING

The Application

1. This ruling is on an application filed by Kannon Clearing & Forwarding Limited, the *ex parte* Applicant herein, by way of a Chamber Summons on 31st March 2020. The *ex parte* Applicant is seeking leave to apply for judicial review orders of prohibition, mandamus and declarations, arising from the refusal to renew its licence as a customs agent by the Kenya Revenue Authority and its Commissioner for Customs and Border Control, (who are sued as the Respondents' herein).
2. The *ex parte* Applicant also seeks an order that the leave operates as a stay of the decision of the Respondents to block and withdraw its custom systems operating passwords, pending the hearing and determination of the application. This Court directed the parties to canvass the said application *inter partes* by way of written submissions.
3. The application is supported by the *ex parte* Applicant's Statement of Facts dated 31st March 2020, and a verifying affidavit sworn on the same date by Erastus Mwololo, who is its Director. In summary, the *ex parte* Applicant states that it is a limited liability company involved in the business of clearing and forwarding of cargo, and that on 31st December 2019 it made an application to the 2nd Respondent to renew its operation licence. However, that the 2nd Respondent has refused, neglected or ignored to communicate and/or renew the *ex parte* Applicant's licence, despite the *ex parte* Applicant lodging an appeal by way of a letter dated 12th March 2020, and a follow up by email on 27th March 2020.
4. Further, that the failure of the 2nd Respondent to communicate its decision within the 30-day time period stipulated in section 229(4) of the East African Community Customs Management Act deemed the *ex parte* Applicant's application for renewal to have been allowed. In addition, that there is no valid decision which the *ex parte* Applicant can appeal against to the Tax Appeals Tribunal. Among the evidence availed by the *ex parte* Applicant were copies of a letter dated 20th December 2019 requesting renewal of its customs licence for the year 2020, and a copy of its letter dated 12th March 2020.
5. The *ex parte* Applicant's advocates on record, Okundi & Company Advocates, filed submissions dated 13th April 2018, wherein it was contended that section 9(4) of the Fair Administrative Action Act does not compel the Applicant to first make an application for exemption before approaching the Court for judicial review. Further, that exemption is necessary in the present case as the Respondents had violated the *ex parte* Applicant's constitutional rights, and section 230 of the East African Community Customs Management Act would not be suitable

to determine the said violations, and is in any event not couched in mandatory terms. Reliance was placed on the decision in **Republic vs Firearms Licensing Board & Another ex parte Boniface Mwaura (2019) e KLR** for this position.

6. The *ex parte* Applicant reiterated that the Respondents failed to respond to its appeal within the prescribed timelines, and claimed that their letter dated 1st April 2020 was an afterthought and was never served on the *ex parte* Applicant. It also submitted at length as to why the Respondents actions were in violation of the law, and tainted with procedural and substantive impropriety.

The Response

7. The Respondents filed a replying affidavit sworn on 6th April 2020 by John Sunyai, a manager with the 2nd Respondent's Customs and Border Control Department. The said deponent explained that the Respondents had embarked on vetting of customs agents, and he detailed the processes involved. Further, that the *ex parte* Applicant was not vetted as it did not provide its bio-data as required, and that its licence was not renewed because it has not met the applicable criteria.

8. According to the Respondents, the *ex parte* Applicant has not exhausted all internal mechanisms available, as the Respondents responded to the *ex parte* Applicant's letter dated 12th March 2020 by way of a letter dated 1st April 2020, a copy of which was annexed. Therefore, that the *ex parte* Applicant has the option of appealing to the Commissioner under section 229(1) of the East African Community Customs Management Act, and that as the Commissioner has already issued a decision, this is also an appealable decision whose jurisdiction is at the Tax Appeals Tribunal.

9. The Respondents advocate, Sega N. Addah, filed submissions on the application dated 16th April 2020. While citing the decisions in **Council of Civil Unions vs. Minister for the Civil Service (1985) AC 2** and **An Application by Bukoba Gymkhana Club, [1963] EA 476** on the scope of the judicial review jurisdiction, the Respondents submitted that judicial review is a remedy of last resort, and is concerned with the process and not merits of a decision. Further, that the matter at hand is one that the Commissioner of Customs can deal with and is a matter of procedure in the Respondents' administrative work. In addition, that the Respondents have the statutory obligation and reasonable justification and basis for initiating the process of vetting the customs agents.

10. It was also submitted that the Tax Appeals Tribunal is fully seized of the issues herein has the Respondents issued their decision by their letter dated 1st April 2020, and the application is therefore premature, and should be dismissed for non-compliance with the mandatory provisions of section 9(2) of the Fair Administrative Actions Act, section 52 of the Tax Procedures Act, and section 12 and 13 of the Tax Appeals Tribunal Act.

11. The Respondents relied on various decisions for this position, including **Republic vs Sacco Societies Regulatory Authority ex parte Joseph Kiprono Maiyo & 3 Others (2017) e KLR**; **The Registered Trustees, Kenya Railways Staff Retirement Benefits Scheme vs Chairman, Rent Restriction Tribunal & 99 Others, (2018) e KLR**; **Republic vs Commissioner for Income Tax & another Ex-parte Stockman Rozen (K) Limited, (2015) eKLR**; **Speaker of The National Assembly vs. Karume Civil Application No. Nai. 92 of 1992** and **Republic vs. National Environment Management Authority (2011) Eklr.**

The Determination

12. I have considered the application dated 19th May 2020 and the substantive issue that require to be determined is whether leave should to be granted to the Applicant to commence judicial review proceedings, and if so, whether the leave should operate as a stay. I am in this respect mindful of the provisions of *Order 53 Rule 1* of the Civil Procedure Rules, which provide that no application for judicial review orders should be made unless leave of the court was sought and granted. The main reason for the leave as explained by Waki J. (as he then was), in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996**, is to ensure that an applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration.

13. Form the facts presented, and arguments made by the parties herein, there are two aspects to the issue of granting of leave that need to be considered in the present application. The first aspect is whether the *ex parte* Applicant's case is sufficiently meritorious to justify leave. It is trite that the Court in this regard ought not to delve deeply into the arguments of the parties, but should make cursory perusal of the evidence before it in arriving at a decision whether there is an arguable case. It was explained by Lord Bingham in **Sharma vs Brown Antoine (2007) I WLR 780**, that a ground of challenge is arguable if its capable of being the subject of sensible argument in court, in the sense of having a realistic prospect of success, however, that the test is flexible depending on the nature and gravity of the issues.

14. In the present application, the dispute between the *ex parte* Applicant and Respondent emanates from the refusal of the 2nd Respondent to renew the *ex parte* Applicant's licence as a customs agent. The *ex parte* Applicant has brought evidence of its applications for renewal, while the 2nd Respondent has also explained its reasons for refusal to renew the licence. I therefore find that to the extent that the evidence points to a dispute as regards the said licencing, the *ex parte* Applicant has thereby demonstrated an arguable case.

15. The second aspect that is material to the exercise of this Court's discretion to grant leave is that of the availability of an adequate alternative remedy, and in particular whether the *ex parte* Applicant has exhausted the available internal review mechanisms. It is in this respect trite law that judicial review is a remedy of last resort, and where an adequate alternative is available, the Court will usually refuse permissions to apply for judicial review, unless there are exceptional circumstances justifying the claim proceedings.

16. This position is provided for in sections 9(2) and (3) of the Fair Administrative Action Act which provide as follows:

“(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).

17. The Respondents have argued that the *ex parte* Applicant has not exhausted the review mechanism provided for under section 229 of the East African Community Customs Management Act of 2014, and the appeals procedure provided for by section 52 of the Tax Procedures Act. Furthermore, that these procedure are mandatory. The *ex parte* Applicant on its part argues that it is exempted from the said procedures, as the Tax Appeals Tribunal will not be able to provide an adequate remedy as regards violation of its constitutional rights.

18. Section 229 of the East African Community Customs Management Act of 2014 in this respect provides for a statutory dispute resolution mechanism as follows:

“(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.

(3) Where the Commissioner is satisfied other that, owing to the absence from the Partner State, sickness or other reasonable cause, the person affected by the decision or omission of the Commissioner was unable to lodge an application within the a time specified in subsection (1), and there has been no unreasonable delay by the person lodging the application, the Commissioner may accept the application lodged after the time specified in subsection (1).

(4) The Commissioner shall, within a period not exceeding thirty days of the receipt of the application under subsection (2) and any further information the Commissioner may require from the person lodging the application, communicate his or her decision in writing to the person lodging the application stating reasons for the decision.

(5) Where the Commissioner has not communicated his or her decision to the person lodging the application for review within the time specified in subsection (4) the Commissioner shall be deemed to have made a decision to allow the application.

(6) During the pendency of an application lodged under this section the Commissioner may at the request of the person lodging the application release any goods in respect of which the application has been lodged to that person upon payment of duty as determined by the Commissioner or provision of sufficient security for the duty and for any penalty that may be payable as determined by the Commissioner”.

19. Under section 230 of the said Act, a person dissatisfied with the decision of the Commissioner under section 229 may appeal to the Tax Appeals Tribunal established by the Partner States pursuant to the provisions of section 231, and a person intending to lodge an appeal under this section shall lodge the appeal within forty-five days after being served with the decision, and shall serve a copy of the appeal on the Commissioner. The said Tribunal is established by Tax Appeals Tribunal Act of 2013.

20. The *ex parte* Applicant in this respect annexed a copy of its letter dated 12th March 2020, addressed to the Commissioner of Customs and Border Control, whose subject is the renewal of its customs license of the year of 2020. The Respondents on their part provided evidence of a letter dated 1st April 2020 responding to the *ex parte* Applicant’s letter of 12th March 2020 and its appeal for renewal of its licence, indicating that they are not receiving any applications for licence renewals for un-vetted companies.

21. The primary dispute therefore between the parties is that of the renewal of the *ex parte* Applicant’s customs license and its continued operations. The questions of the legality and procedural propriety of the decision taken by the Respondents to refuse the renewal of the said licence as stated in the letter dated 1st April 2020 can be dealt with at the first instance by the Tax Appeals Tribunal, in light of the provisions on the Tribunal’s jurisdiction to hear appeals from decisions of the Commissioner under section 230 of the East African Community Customs Management Act of 2014, as detailed in the foregoing.

22. Section 12 of the Tax Appeal Tribunals Act in addition 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. In the present case, the Respondents’ impugned decision was made pursuant to powers and procedures provided by the East African Community Customs Management Act, which is a tax law within the jurisdiction of the Tribunal.

23. This Court therefore finds that there is an available alternative remedy that will adequately address the substance of the *ex parte* Applicant’s grievance. In the premises, I find that the *ex parte* Applicant’s Chamber Summons dated 31st March 2020 is incompetently filed before this Court, and I decline to grant the leave sought therein to apply for judicial review orders. The prayer that the leave granted operates as a stay therefore becomes moot, and is also denied.

24. Lastly, each party shall bear its own costs of the Chamber Summons dated 31st March 2020.

25. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 15TH DAY OF JUNE 2020

P. NYAMWEYA

JUDGE

FURTHER ORDERS ON THE MODE OF DELIVERY OF THIS RULING

In light of the declaration of measures restricting Court operations due to the COVID -19 Pandemic, and following the Practice Directions issued by the Honourable Chief Justice dated 17th March 2020 and published in the Kenya Gazette on 17th April 2020 as Kenya Gazette Notice No. 3137, this ruling will be delivered electronically by transmission to the *ex parte* Applicant's and Respondents' advocates respective email addresses.

P. NYAMWEYA

JUDGE