REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO. 509 OF 2017

IN THE MATTER OF AN APPLICATION FOR LEAVE TO COMMENCE PROCEEDINGS IN THE NATURE OF JUDICIAL REVIEW

AND

IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM ACT (CAP 26) LAWS OF KENYA

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION

AND

IN THE MATTER OF THE KENYA REVENUE AUTHORITY ACT (NO. 2 OF 1995)

AND

IN THE MATTER OF A CONSIGNMENT OF BEAUTY PRODUCTS ENTERED ON ENTRY NO. 2017 MLB429102 HELD AT MALABA

CUSTOMS BORDER STATION

AND

IN THE MATTER OF TAX DEMAND DATED 4TH AUGUST 2017

AND

IN THE MATTER OF ARTICLE 47 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

KENYA REVENUE AUTHORITY.....RESPONDENT

***EX PARTE*: SPEAR HEAD LIMITED**

RULING

Introduction

1. By a Notice of Motion dated 12th September, 2017, the *ex parte* applicant herein, **Spear Head Limited,** seeks the following orders:

> **1. That this honourable court be pleased to grant judicial review order certiorari to remove to this court and quash the respondents decision dated 4th August 2017 to illegally hold a consignment of beauty products entered on entry number 2017MLB429102 at Malaba Customs Border station.**
>
> **2. That this honourable court be pleased to grant judicial review order Mandamus directing the respondent herein to release to the ex parte applicant a consignment of beauty products entered on entry number 2017MLB429102 at Malaba Customs Border station.**
>
> **3. That costs be provided for.**

Ex Parte Applicant's Case

2. According to the ex parte applicant, it imported a consignment of beauty products entered on entry number 2017MLB429102 at Malaba Custom's border station from Uganda and duly paid the requisite custom and excise duty to the respondent therefor and an exit for the same granted on the 2nd August 2017.

3. However, on 4th August 2017 the respondent herein decided to hold the consignment of beauty products entered on entry number 2017MLB429102 at Malaba Custom's border station ostensibly due to non-payment of past customs and excise duties for the year 2015 and 2016 and which amounts had never been demanded by the respondent prior to this detention of the current consignment, Similarly, no demand and/or notice was ever issued to the applicant contrary to the rules of natural justice and/or no due process was observed.

4. The applicant in any event averred that custom and excise duty for the years 2015 and 2016 were fully settled and all the respective consignment released.

Respondent's Case

5. The application was however opposed by the Respondent.

6. According to the Respondent, it is a statutory body established under the ***Kenya Revenue Authority Act***, Cap 469 Laws of Kenya, as a Central Agent of the Government for the assessment and collection of all Government Revenue. In the exercise of its mandate, it was averred that the Respondent is under section 5(2)(a)(i) of the Act empowered to enforce and administer all provisions of the written laws set out in Part 1 of the First Schedule to the Act, among them the ***Income Tax Act*** (Cap. 470 of the Laws of Kenya), ***Value Added Tax Act***, ***Excise Duty Act 2015*** and the ***East African Community Customs Management Act, 2004***.

7. The Respondent's statutory obligation, it was averred, is enshrined under Articles 210(1) of the Constitution of Kenya to assess and collect taxes on behalf of the Government of Kenya.

8. It was averred that the Respondent has been conducting investigations on cases of smuggling of beauty products through the various border stations within the region and that through the said investigations, it was established from both KRA and URA Customs officials that various consignees were importing beauty products without making any declaration in customs Simba system. According to the Respondent, the *ex-parte* Applicant herein was one of the consignees whose records indicated that it had imported a number of consignments from Uganda in the years 2015 & 2016, all of which had proper clearing details at Uganda customs but no corresponding record of clearing on the Kenyan side. Pursuant to the Respondent's routine system surveillance activities, it identified entry 2017MLB429102 lodged by the *ex-parte* Applicant on 1st August 2017 which entry was targeted and a system stop alert put on 1st August 2017, for verification of both quantity and value and also as security to have the *ex-parte* Applicant avail himself and account for the previous consignments as mentioned above. Pursuant thereto, on the 4th August 2017, one **Peter Gacheru** presented himself at the Respondent's Kisumu offices seeking the release of the consignment and was apprised of the issues but was not in a position to address the issues of old consignments whose outstanding taxes was in contention.

9. It was disclosed that pursuant to the meeting, a demand letter dated 4th August 2017 was issued to the *ex-parte* Applicant requesting for evidence of clearance, and payment of taxes plus indicating the taxes payable of KShs.15,834,692.00 in the event no evidence was provided. On 8th August 2017 the *ex-parte* Applicant's wrote a letter, wherein he largely complained of unfair treatment but he did not address the issues in the Respondent's letter of 4th August 2017. The Respondent deposed that on 14th August 2017, it wrote to the *ex-parte* Applicant, reiterating the Respondent's willingness to release the consignment held upon the *ex-parte* Applicant either providing evidence of proof of payment of taxes or addressing the demand letter dated 4th August 2017. On the same day 14th August 2017, the *ex-parte* Applicant's agent wrote back to the Respondent through email attaching some clearance documents used in the previous consignments and requesting for unspecified time to look for other documents. It was however averred that whereas the documents availed were said to have cleared 10 consignments, however key documents e.g. invoices were not attached/provided and a further a scrutiny of the said documents indicated that the taxes paid were way too low compared to the taxes payable.

10. It was the Respondent's case that while the Respondent was awaiting the *ex-parte* Applicant to provide the remaining documents or at least give a commitment as to when he would do that, the *ex-parte* Applicant commenced these Judicial Review proceedings and that to date, the *ex-parte* Applicant has neither objected to the tax demand as provided under section 51(1) and (2) of the ***Tax Procedures Act***, 2015 nor has it provided any record to proof payment of outstanding importation taxes on the said consignments as requested in the letter dated 4 th August 2017. While appreciating that taxes have been paid on the current consignment entered on entry 2017MLB429102, it was contended that section 130 (2) of the ***EACCM Act 2004*** gives the Commissioner power to hold goods as security for unpaid taxes in the following

terms:

> ***"Goods under Customs control which belong to any person from who duty is due, and any goods afterwards imported or entered for export by that person, shall be subject to a lien for such debt and may be detained by the partner state until such duty is paid and the claim of the relevant partner state shall have priority over the claims of whatever nature of any other person upon the goods and the goods may be sold to meet the duty if the duty is not paid within two months after the goods are detained.***

11. The Respondent's case was therefore that the *ex-parte* Applicant's current consignment was duly held as security for the taxes due on previous consignments. Further, the *ex-parte* Applicant was given opportunity to have its current consignment released by providing evidence of payment of taxes on previous consignments but failed to do so, and where documents were provided, they were incomplete and/or served to show that proper taxes were not paid, thereby implying the same were smuggled. The Respondent averred that its decision was informed by previous experiences where unscrupulous traders who are not regular importers, would stop importing in their name or incorporate new companies upon being issued with tax demands making it hard to trace them.

12. To the Respondent, the *ex-parte* Applicant's contention that all taxes had been paid on the previous consignments is incorrect for want of collaborative evidence and indeed even the provided records indicate significant variances between the taxes paid and the taxes payable. The Respondent asserted that they are obligated by law, to collect any short levied duty from the owner of the goods because the liability for any outstanding duty falls on the owner of the goods pursuant to the provisions of sections 130 and 135 (a read with section 203 and Part IV) of ***EACCMA, 2004***. Therefore where the Applicant's taxes have not been fully paid, it cannot rely on the principle of legitimate expectation to avoid payment of taxes.

13. It was the Respondent's case that in view of the foregoing, the said decision as to demand taxes, cannot be termed as unfair and/or amounting to a Wednesbury unreasonable to warrant Judicial Review remedies since in order to justify interference of the decision in question, the same must be so grossly unreasonable, in defiance of logic that no reasonable authority, addressing itself to the facts and the law would have arrived at such a decision, which was not the case herein.

14. In the Respondent's view, the *ex-parte* Applicant is not entitled to the orders sought as these Judicial Review proceedings are founded on a fundamental misapprehension of the jurisdiction of this Honorable Court in proceedings brought by way of judicial review, in that:

(i) The Application is premature as there exist statutory dispute resolution mechanism under section 229 of the ***East African Community Customs Management Act*** which has not been exhausted.

(ii) In view of the foregoing, these judicial review proceedings are fatally defective for offending the mandatory provisions of section 9(2), (3) and (4) of the ***Fair Administrative Action Act***, No. 4 of 2015.

(iii) This Application therefore fails to meet the minimum threshold for grant of the orders sought and it is thus an abuse of the process of the Court.

(iv) The Respondent has demonstrated that it executed its mandate within the boundaries of the law and has not violated the *ex-parte* Applicant's Right to Fair Administrative Action.

(v) The Respondent's actions were lawful, procedural and in accordance with the various laws administered by the Respondent.

15. It was therefore the Respondent's case that the *ex-parte* Applicant's Notice of Motion application dated 12th September 2017 be dismissed with costs.

16. It was submitted on behalf of the Respondent that it is well laid down law that Judicial Review is a remedy of last resort and where another statutory procedure lies then the same ought to be followed before resort to Judicial Review. In this regard, the Respondent relied on section 229 of the ***East African Community Customs Management Act 2004*** as read together with section 51 of the ***Tax Procedures Act*** No. 29 of 2015 provides an elaborate process to be followed when a tax payer objects to tax decisions made against him. The outcome of such a decision escalates to an appeal to the Tax Appeals Tribunal established under the ***Tax Appeals Tribunal Act No. 40 of 2013*** whose decision can be subject to an appeal to the High Court (section 53) and an appeal to the Court of Appeal can follow (section 54).

17. In the Respondent's submissions, the Applicant has not demonstrated with precision to this court that Judicial Review is a more effective and convenient remedy than the statutory laid down dispute resolution mechanism and that judicial review is not the appropriate and efficacious way of resolving the dispute herein. The Applicant has not demonstrated what exceptional circumstances existed in its case which would remove it from the procedural mechanisms set out in the statute. In this respect the Respondent relied on **Speaker of the National Assembly –vs- Njenga Karume's Nrb. C.A.C.A. No. 92 of 1992, Kipkalya Kones vs. Republic & Another ex-parte Kimani Wanyoike & 4 Others (2008) 3 KLR (EP) 291, Francis Gitau Parsimei & 2 Others vs. National Alliance Party & 4 Others Petition No.356 and 359 of 2012, Damian Belfonte vs. The Attorney General of Trinidad and Tobago C.A 84 of 2004 Republic vs. National Environment Management Authority** (supra), **Anne Wambui Njoroge vs. Kenya Revenue Authority & another [2017] eKLR,** and section 9(2) of the ***Fair Administrative Action Act***.

18. It was submitted that Judicial Review is a discretionary remedy and the Court has a wide discretion to issue orders in Judicial Review. However, this discretion is limited. Indeed, even the ***Law Reform Act*** at section 8(1) limits such of the courts discretion. Based on various authorities it was submitted that the court in such proceedings looks at the process rather than the merits of the case. Therefore the court has to therefore look at the issues raised by the Applicants to see whether those issues fall within the scope of Judicial Review and call for the court to exercise its supervisory jurisdiction over the respondent. To the Respondent, the Application before the court is one that is not within the scope of Judicial Review since the Applicant is calling upon this Court to delve into the merits of the statutory decision made by the Respondent, yet there is another forum in which the decision the Respondent is seeking to be quashed on its merits, can be examined. The

Applicant has not demonstrated to this court in its supplementary affidavit that the process/manner in which the decisions to issue the notice of assessment was outside its statutory mandate save for making averments.

19. It was further submitted that it is not mere unreasonableness which would justify the interference with the decision of the Commissioner under the circumstances. We submit that unreasonableness is a subjective test and therefore to base a decision merely on unreasonableness places the Court at the risk of determination of a matter on merits rather than on the process. To justify interference the decision in question must be so grossly unreasonable that no reasonable authority, addressing itself to the facts and the law would have arrived at such a decision. In other words, such a decision must be deemed to be so outrageous in defiance of logic or acceptable moral standards that no sensible person applying his mind to the question to be decided would have arrived at it.

20. It was submitted that whereas it is correct that taxes have been paid on the current consignment entered on entry 2017MLB429102, section 130 (2) of the ***EACCM Act 2004*** gives the commissioner power to hold goods as security for unpaid taxes. To buttress our submissions, the Respondent relied on **Aburili, J's** decision in **Cimbria East Africa Limited vs. Commissioner of Investigation and Enforcement & Another [2016] eKLR** that:

> **52.In the instant case, it has not been shown that the respondents failed to act in a particular way stipulated by statute or that the respondents abused their powers in a manifestly unreasonable way or acted in bad faith. In my humble view, anomalies relating to the entries concerning importation of goods, the types of goods imported and the names of clearing agents are not matters which relate to procedure but call for evidence to be adduced to determine the merits of the decision of the respondent to demand for Customs Duty.**
>
> **53.Furthermore, where the Customs Duty is demanded in error, the exparte applicant has a remedy. It can object to such demand as stipulated in Sections 229 and 230 of East African Community Customs Management Act (EACCMA) or to appeal to the Tax Appeals Tribunal stipulated in the TAT Act of 2013 to challenge the correctness of the demanded tax since determination of taxes due involves calculations and verification of what was imported, and their value as declared by the importer.**
>
> **54. This court does not buy the argument by the exparte applicant that the objection or appeal would only lie if reasons had been given to enable the applicant apply for review under sections 229 and 230 of the EACCMA or on appeal before the Tax Appeals Tribunal and that it has invoked Article 47(2) of the Constitution. In my humble view, the applicant can still challenge the demanded taxes through the statutory available channels by stating that it was not given reasons for the demand, or that the applicant did not import the goods for which Customs Duty was being demanded or that some of the clearing agents named were not contracted by the applicant and provide evidence to that effect.**

21. The Respondent therefore prayed that the application be dismissed with costs.

Determinations

22. I have considered the issues raised in this application by way of affidavits, Statement of Facts, grounds and submissions by the respective parties.

23. According to the Statutory Statement in support of the application the ground upon which the application is based is that the custom and excise duty having been paid to the respondent for the subject consignment number 2017MLB429102 and an exit for the same granted, the Respondent's decision to hold the consignment ostensibly because of non-payment of past customs and excise duties which amounts had never been demanded was contrary to the rules of natural justice and was unreasonable.

24. On its part the Respondent contends that the *ex-parte* Applicant herein was one of the consignees whose records indicated that it had imported a number of consignments from Uganda in the years 2015 & 2016, all of which had proper clearing details at Uganda customs but no corresponding record of clearing on the Kenyan side. Pursuant to the Respondent's routine system surveillance activities, it identified entry 2017MLB429102 lodged by the *ex-parte* Applicant on 1st August 2017 which entry was targeted and a system stop alert put on 1st August 2017, for verification of both quantity and value and also as security to have the *ex-parte* Applicant avail himself and account for the previous consignments as mentioned above. While appreciating that taxes have been paid on the current consignment entered on entry 2017MLB429102, it was contended that section 130 (2) of the ***EACCM Act 2004*** gives the Commissioner power to hold goods as security for unpaid taxes.

25. Apart from that the Respondent contended that, the applicant ought to have resorted to other available dispute resolution mechanisms before instituting these proceedings. In this respect reliance was placed on section 229 of the ***East African Community Customs Management Act 2004*** as read together with section 51 of the ***Tax Procedures Act*** No. 29 of 2015.

26. Section 9(2), (3) and (4) of the ***Fair Administrative Action Act***, No. 4 of 2015 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.

27. It is however my view that the onus was upon the applicant to satisfy the Court that she ought to be exempted from resorting to the available remedies. This was the position adopted by the Court of Appeal in **Republic vs. National Environment Management Authority [2011] eKLR**, where the Court held 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."**

28. Therefore as was stated by **Nyamu, J** (as he then was) in **Republic vs. The Commissioner of Lands Ex parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998:**

> **"Availability of other remedies is no bar to the granting of the judicial review relief but can however be an important factor in exercising the discretion whether or not to grant the relief..."**

29. This Court in **Republic vs. Ministry of Interior and Coordination of National Government and Another ex parte ZTE** Judicial Review Case No. 441 of 2013 held that:

> **"…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 vs. 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."**

30. 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 vs. 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."**

31. 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.

32. Lord Chancellor, **Lord Hailsham of St. Marylebone** in the House of Lords decision in **Chief Constable vs. Evans [1982] 3 ALL ER 141**, stated at p 143 as follows with respect to the judicial review remedy:

> ***"This remedy, vastly increased in extent, and rendered, over a long period in recent years, of infinitely more convenient access than that provided by the old prerogative writs and actions for declaration, is intended to protect the individual against abuse of power by a wide range of authorities, judicial, quasi-judicial, and, as would originally have been thought when I first practiced at the Bar, administrative. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner".***

33. **Mumbi Ngugi, J** in **Rich Productions Limited vs. 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."

34. Section 229 of the ***East African Community Customs Management Act 2004*** provides as hereunder:

(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.

35. 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.

36. It is my view that the applicant's grievances could have been properly dealt with under the aforesaid provisions. No reasons has been given to me why the applicant opted to bypass the aforesaid mechanisms which in my view are not any less appropriate, convenient, effective and/or beneficial.

37. In the premises I find that this Notice of Motion is misconceived and incompetent. 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 proceedings.

Order

38. In the result the Notice of Motion dated 12th September, 2017 is struck out with costs to the Respondent.

39. Orders accordingly.

Dated at Nairobi this 26th day of February, 2018

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Chaballa for the Respondent

CA Ooko