Arrow Hi-Fi (EA) Limited v Commissioner of Customs and Border Control (Customs Tax Appeal 005 of 2021) [2023] KEHC 20116 (KLR) (Commercial and Tax) (10 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20116 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CUSTOMS TAX APPEAL 005 OF 2021

A MABEYA, J

JULY 10, 2023

BETWEEN

ARROW HI-FI (EA) LIMITED ..... APPELLANT

AND

COMMISSIONER OF CUSTOMS AND BORDER CONTROL .... RESPONDENT

JUDGMENT

1. Pursuant to section 235 of the East African Community Customs Management Act 2004 (EAFCCMA), the respondent conducted a clearance audit on the appellant's business affairs regarding compliance with customs laws and regulations for the period 1/1/2002 to 31/12/2006. He notified the appellant of the audit vide a letter dated 23/10/2006.

2. Vide a letter dated 29/11/2006, the respondent requested to be furnished with additional documents by 5/12/2006 failure to which an estimated assessment would be made based on the documents provided earlier on. The appellant provided a comprehensive listing of all vehicles imported between 1/1/2002 and December 2006 inter alia but failed to avail records related to goods, warehouses and warehouse removals resulting to the respondent relying on the bonds register kept by the respondent as a basis for conducting the audit.

3. Vide a letter dated 23/2/2007, the respondent issued a tax demand against the appellant for a sum of Kshs. 909,656,082.00 and on 7/3/2007 the respondent's officers raided the appellant's premises and took away all records of ledgers. The appellant issued its objection vide a letter dated 12/3/2007 to which the respondent responded through various letters dated 12/3/2007, 11/4/2007, 16/4/2007, and 25/4/2007, respectively.

4. Vide a letter dated 24/5/2007, the respondent advised the appellant that it had not accepted the appellant's objection. On 22/8/2007, the respondent issued a notice of assessment against the

appellant in respect to VAT for the years 2001 to 2006 for Kshs. 12,597,363.15 and Corporation Tax for the years 2000 to 2004 and for Kshs. 248,930,863.14 both totaling to Kshs. 361,528,226.

5. The appellant denied owing the taxes vide an undated letter. On 10/4/2018, the respondent issued a notice of assessment and confirmed its assessment for Kshs. 577,954,080.00 and issued an auction notice on 3/6/2008. The appellant issued a cheque of Kshs. 20 million as a sign of goodwill to avoid the auction.

6. On 3/7/2018, the respondent advised the appellant that he would proceed to enforce a ruling of 27/7/2007 to recover the outstanding taxes. The ruling emanated from a Judicial Review application in HC Misc. App No. 534 of 2007 to quash the respondent's assessment of 23/2/2007 which was declined on 27/7/2007.

7. On 6/4/2018, 11 years after their first demand, the respondent issued an agency notice against the appellant's bankers and notice of distress for all goods and chattels on its premises. On 28/6/2018, the appellant applied for abandonment of the tax demand under section 37(1) of the TPA since the business had not been operational for over 11 years after closure by the respondent. The same was declined by the respondent vide a letter dated 26/9/2018.

8. On application by the appellant and by consent of the parties, the appeal before the Tax Appeals Tribunal ("the Tribunal") was admitted out of time and the appellant filed its memorandum of appeal and statement of facts on 19/2/2020. The respondent filed its statement of facts on 18/3/2020.

9. Fide its judgment delivered on 4/6/2021, the Tribunal found that the appeal was partially merited only on account of the unspecified total payments made by the appellant towards the tax demand and ordered that the respondent's tax demand of 23/2/2007 be varied to exclude the various payments made by the appellant on diverse dates and offset the same from the demand.

10. Being dissatisfied with that judgment, the appellant filed the instant appeal vide a Memorandum of Appeal dated 28/7/2021.

11. The appeal was based on 5 grounds which are that the Tribunal erred in; finding that the appeal was res judicata; finding that the appellant failed to make a valid application for review under section 229 of the East African Community Customs Management Act (EACCMA); failing to consider whether the respondent's assessment of extra taxes was merited, failing to find that the respondent had failed to prove how it arrived at the additional tax assessments forming the basis of the tax demand; and failing to set aside the additional taxes assessments and tax demands made against the appellant.

12. In response, the respondent filed his statement of facts dated 31/8/2021. He contended that the assessment of Kshs. 906,656,082 was merited and was based on the information held by him as the appellant had failed to produce the information that was requested. That the appellant had filed the judicial review application in HC Misc. No. 534 of 2007 seeking, inter alia, to quash his decision of 23/2/2007 wherein he had made the assessment for Kshs. 906,656,082.

13. That the court in the Judicial Review case found that there was sufficient evidence and admission by the appellant of instances of under declaration of value of vehicles, vehicles warehoused and vehicles actually entered, possession of vehicles whose duty status could not be explained and falsification of invoices and the application was thus dismissed.

14. That when the appellant filed the appeal before the Tribunal based on the same facts as those before the Judicial Review court, the Tribunal dismissed the appeal on grounds that it was res judicata.

15. He thus contended that the current appeal was not justified in law and the Tribunal's finding on res judicata was sound. That the Tribunal correctly found that the appellant failed to make a valid

application for review under section 229 of the EACCMA. That the appellant should have applied for the review of the assessment within 30 days of receipt of the same.

16. That the Tribunal's finding on the merit of the assessment was sound. That despite the length of time the matter had taken between the parties, the Tribunal correctly upheld his assessment less the sums paid by the appellant. That the Tribunal was correct in its finding on how he had arrived at the assessment as the appellant had failed to provide documentation sought. He therefore urged the Tribunal's judgment be upheld and the appeal be dismissed.

17. The appeal was canvassed by way of written submissions. The appellant's submissions were dated 22/3/2022 whereas those of the respondent were dated 28/3/2022. The Court has considered the rival submissions and the entire record.

18. The appeal is grounded on the tribunal's finding on the 5-years statutory timeline for assessment and audit.

19. As a first appellate court, this Court has a duty to examine matters of both law and fact and subject the whole of the evidence to a fresh and exhaustive scrutiny, before drawing its own independent conclusions. See Peter M. Kariuki v Attorney General [2014] eKLR wherein it was held that: -

> " We have also, as we are duty bound to do as a first appellate court, to reconsider the evidence adduced before the trial court and revaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence. See NGUI V REPUBLIC, (1984) KLR 729 and SUSAN MUNYI V KESHAR SHIANI, Civil Appeal No. 38 of 2002 (unreported)."

20. The Court will first consider the first two ground of appeal as their determination will inform the fate of the other grounds.

21. The grounds were that the Tribunal erred in finding that the appeal was res judicata and in finding that the appellant failed to make a valid application for review under section 229 of the East African Community Customs Management Act (EACCMA).

22. The Tribunal found that the issue of whether or not the appellant had made an objection had been dealt with in the judicial review application and that the Tribunal was bound by precedent in the superior courts. It therefore made a finding the appeal before it was res judicata and that the appellant had failed to make a valid application for review as provided for under section 229 of the EACCMA.

23. On this, the appellant submitted that it was a well settled principle of law that res judicata does not apply to judicial proceedings as was held in Wycliffe Indalu & 2 Others Vs Directorate of Criminal Investigations & Another (2019) Eklr. That res judicata was concerned with the process of decision making and not the merits of the decision made by a public body.

24. That the appellant had raised substantive issues regarding the additional taxes assessed by the respondent and those issues were properly before the Tribunal. That the appeal was by way of consent which was adopted by the Tribunal thus the Tribunal could not claim that the issues had already been determined.

25. That the Tribunal ought to have determined the issue whether the appellant had made a review application in its letter dated 12/3/2007. That in doing so, the Tribunal would have found that the letter amounted to a review application.

26. It is not in dispute that the appellant filed a judicial review application in HC Misc. No. 534 of 2007. In it, the appellant sought various orders including; an order of certiorari to quash the respondent's decision of 23/2/2007 making an assessment of Kshs. 906,656,082/-, an order for mandamus to compel the respondent to withdraw the agency notices against the appellant's bank accounts as well as those of its director, release of the seized motor vehicles belonging to the appellant and its customers.

27. The court therein found that by virtue of section 229(5) of EACCMA, an objection that did not unconditionally state a clear and unambiguous position of the taxpayer and which suggest a discussion or a meeting is not an application under section 229(2) of EACCMA and is incapable of taking effect under that section. That for it to be effective, it must unequivocally deal with all aspects of the assessment and specify the taxpayer's position on each with clear answers and figures admitted or not admitted.

28. The court also found that there was sufficient evidence and admission by the appellant of instances of under declaration of value of vehicles, vehicles warehoused and vehicles entered, possession of vehicles whose duty status could not be explained and falsification of invoices. The court therefore dismissed that application. That decision was never appealed against.

29. Almost 13 years later, the appellant filed an appeal before the Tribunal challenging the said assessment.

30. The doctrine of res judicata is set out in section 7 of the *Civil Procedure Act*. In Invesco Assurance Company Limited & 2 others v Auctioneers Licensing Board & another; Kinyanjui Njuguna & Company Advocates & another (Interested Parties) [2020] eKLR, the court analysed the necessary ingredients for the doctrine of res judicata and held that: -

> " A close reading of section 7 of the Act reveals that for the bar of res judicata to be effectively raised and upheld, the party raising it must satisfy the doctrine's five essential elements which are stipulated in conjunctive as opposed to disjunctive terms. The doctrine will apply only if it is proved that:
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> i. The suit or issue raised was directly and substantially in issue in the former suit.
>
> ii. That the former suit was between the same party or parties under whom they or any of them claim.
>
> iii. That those parties were litigating under the same title.
>
> iv) That the issue in question was heard and finally determined in the former suit.
>
> iv. That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit."

31. In the judicial review application, the appellant was challenging the efficacy and/or legality of the respondent's assessment and the actions that arising therefrom. The issues raised before the Tribunal were but a challenge on the respondent's subject assessment. Can it be said that the issues were different?

32. It cannot be denied that proceedings under judicial review do not determine the issues between the parties on merit. A judicial review court will normally quash a decision on various grounds including that the decision is ultra vires, against legitimate expectation of an applicant amongst other grounds.

33. In the present case, the issue before the judicial review court and the Tribunal related to procedure, such that a finding by the judicial review court would have an effect on the Tribunal.

34. The judicial review court was faced with the issue as to whether the appellant had applied for review of the respondent's assessment. It considered, amongst other issues, whether the appellant's letter dated 12/3/2007 amounted to a review application and made a negative determination. It is the same issue that was raised in the appeal before the Tribunal. Any attempt by the Tribunal to make a determination on that issue would have amounted to sitting on an appeal against the decision of the judicial review court.

35. The issues raised in the appeal before the Tribunal were substantially in issue in the judicial review application. The parties were the same and were litigating under the same title. The issue of whether the appellant had filed a review against the respondent's assessment had been heard and determined in judicial review application and, the court which heard that issue was competent to try that suit.

36. On the contention that res judicata is not applicable to judicial review proceedings, that is the law. However, the proceedings before the Tribunal were not a judicial proceeding but a suit. The doctrine does not apply to judicial review proceedings but it applies to all suits.

37. In this regard, since the appeal before the Tribunal was a suit, the doctrine applies. It follows that where a matter has been determined in a judicial review proceeding, it cannot be raised in a subsequent suit. This is so because, whilst section 7 of the *Civil Procedure Act* talks of a 'previous suit', section 2 of the *Civil Procedure Act* defines a suit to mean "all civil proceedings commenced in any manner prescribed". Although judicial review is not a civil proceeding, it is nevertheless an action commenced in a manner prescribed by law.

38. This Court therefore finds that the Tribunal correctly found that the matter was res judicata. The basis of the appeal was the respondent's letter dated 23/2/2007, this was also the basis of the judicial review. The issue of whether there was a valid objection or application for review was before the judicial review court and was determined. The same issue was brought before the Tribunal in the appeal and it could not be entertained for the above reasons.

39. It also follows that there was no basis of filing an appeal before the Tribunal. The fact that the respondent consented to its filing, it did not preclude him from, raising an objection to it on a point of law. What was sought to be challenged was the respondent's decision and nothing else.

40. The upshot is that the finding by the Tribunal on the issue was merited and ought not to be upset.

41. There was evidence before the Tribunal that the appellant had paid several unspecified amounts towards the outstanding taxes. The Tribunal correctly varied the respondent's assessment of 23/2/2007 to exclude those payments.

42. In the premises, the rest of the grounds are of no basis and do not merit consideration.

43. Accordingly, the appeal is without merit and is dismissed with costs.

It is so decreed.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF JULY, 2023.

A. MABEYA, FCIArb

JUDGE