**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 155 OF 2019**

**GUPTA UMESH SUBHASH.....................................................................1ST PETITIONER**

**MINAL SHAH..........................................................................................2ND PETITIONER**

**-VERSUS-**

**KENYA REVENUE AUTHORITY.......................................................1ST RESPONDENT**

**COMMISSIONER OF INVESTIGATION & ENFORCEMENT**

**KENYA REVENUE AUTHORITY.......................................................2ND RESPONDENT**

**COMMISSIONER OF CUSTOMS & BORDER CONTROL**

**KENYA REVENUE AUTHORITY.......................................................3RD RESPONDENT**

**JUDGEMENT**

1. The 1st Petitioner, Gupta Umesh Subhash, is the husband of the 2nd Petitioner, Minal Shah. By way of the petition dated 15th April, 2019 and amended on 25th February, 2020 they seek against the 1st Respondent (Kenya Revenue Authority), the 2nd Respondent (Commissioner of Investigation & Enforcement, Kenya Revenue Authority) and the 3rd Respondent (Commissioner of Customs & Border Control, Kenya Revenue Authority) the following reliefs:

> **a) A declaration that the 1st, 2nd and 3rd Respondents herein infringed and violated the Petitioners' right to human dignity and freedom, security of person as enshrined under Articles 28 and 29(a) of the Constitution of Kenya, 2010.**
>
> **b) A declaration that the 1st and 2nd Respondents herein have infringed on and violated the Petitioners' right to access to justice and fair hearing decreed and protected under Articles 48 and 50(1) of the Constitution of Kenya, 2010.**
>
> **c) A declaration that the 1st Respondent illegally and unprocedurally collected KES. 1,032,422.00 on 23rd April 2019 from the 2nd Petitioner as fines under the Customs Act.**
>
> **d) The Honourable Court be pleased to hold and declare the provisions of Section 45(9) of the Tax Procedures Act, 2015 conflicts with Article 1(3), 10, 159(1), 160, 165(3) and 232 of the Constitution of Kenya, 2010 thus unconstitutional, void and of no effect.**
>
> **e) The Honourable Court be pleased to award the Petitioner general damages against the Respondents herein jointly and severally for breach of fundamental rights and freedoms.**
>
> **f) An Order of Mandamus do remove into this Honourable Court for the purposes of compelling the 1st Respondent to refund to the 2nd Petitioner KES 1,032,422.00 paid on 23rd April 2019 vide eslip No. 2019NBI745639F.**
>
> **g) Any other order(s) as this Honourable Court shall deem just.**

2. The petitioners' case is that the 2nd Petitioner organised an exhibition held between 5th and 7th April, 2019 named *Asia Wedding Lounge* at Diamond Plaza II building in Nairobi. The 1st Petitioner who was on vacation from his place of work in Canada accompanied the 2nd Petitioner to Nairobi. The petitioners aver that the 2nd Petitioner was later pursued by the respondents for duty taxes on the ground that the exhibited goods had been undervalued.

3. According to the petitioners, the 2nd Petitioner informed the respondents that she was only an organiser and not an exhibitor in the exhibition and any taxes owing was payable by the exhibitors.

4. It is the petitioners' case that on 9th April, 2019 as they were about to board a flight back to Canada where they hold permanent residency, the 1st Petitioner was accosted by immigration officials and his passport was confiscated pursuant to a departure prohibition order issued by the respondents. The petitioners claim that the 1st Petitioner was eventually released but was threatened with arrest and prosecution by the respondents for evasion of duty contrary to Section 203(e) of the East Africa Community Customs Management Act, 2004 (EACCMA).

5. It is the petitioners' case that despite attempts to resolve the issue through diplomatic channels, the respondents were adamant that the tax had to be paid and it was only after the 2nd Petitioner sent Kshs. 1,032,422.00 to the respondents on 23rd April, 2019 that the 1st Petitioner's passport was returned and he managed to travel to Canada.

6. According to the petitioners, the respondents violated the 1st Petitioner's right to freedom of movement under Articles 28, 29(a) and 39(2) of the Constitution by issuing a departure prohibition order against him without notifying him of the same and without any just cause. They further argue that the failure to notify the 1st Petitioner of the issuance of the departure prohibition order violated Section 45(3) of the Tax Procedures Act, 2015, Article 47 of the Constitution, and sections 3 and 4 of the Fair Administrative Action Act, 2015 as the 1st Petitioner was denied an opportunity to respond to any tax assessment made by the respondents hence violating his right to a hearing.

7. It is additionally asserted that the 1st Respondent threatened the 1st Petitioner with arrest and prosecution which is in violation of the provisions of Articles 48, 49 and 50 of the Constitution.

8. The petitioners also assert that Section 45(9) of the Tax Procedures Act, 2015 is unconstitutional for taking away the right of a taxpayer to challenge a departure prohibition order.

9. The respondents filed grounds of opposition dated 7th May, 2020 contending that the petition is an abuse of the court process as a tax dispute cannot be litigated in the form of a constitutional petition when there is a Tax Appeals Tribunal specifically set up to determine such disputes.

10. It is additionally the respondents' case as encompassed in their replying affidavit sworn on 7th May, 2020 by Reuben Walufu that upon being approached by the respondents' enforcement officers on 6th April, 2019 the petitioners, contrary to their averments, produced F147s generated at the airport as proof of payment of the taxes. The respondents state that upon verification of the goods unsold at the exhibition centre they found that the tax paid was undervalued and the petitioners were issued with a demand for unpaid tax assessed at Kshs. 1, 032, 422 on 8th April, 2019.

11. The respondents allege that on 9th April, 2019 the 1st Petitioner attempted to leave the country to avoid paying the taxes and was restrained by immigration officials pursuant to a departure prohibition order that had been lodged by the respondents in accordance with the provisions of Section 45 of the Tax Procedures Act, 2015. It is the respondents' case that after the petitioners paid their taxes the departure prohibition order was lifted.

12. The respondents point out that the petitioners wrote to them on 18th April, 2019 making a mitigation request after they had already filed their petition on 17th April, 2019.

13. On the allegation that Section 45(9) of the Tax Procedures Act, 2015 offends the Constitution, the respondents aver that the petitioners have misinterpreted the provision.

14. The 1st Petitioner filed a supplementary affidavit dated 19th June, 2020 in which he deposes that if the duty had been underpaid or undervalued then the respondents ought to have pursued the person(s) who had paid the duty in the first instance for the balance. The 1st Petitioner asserts that according to the EACCMA, import duty is to be paid by an importer or his agent and he was neither of those.

15. It is further averred that the respondents have not produced any evidence to show that the 1st Petitioner was an agent of an importer making him liable to pay import duty. Further, that all the letters attached to the respondents' replying affidavit were addressed to the 2nd Petitioner thus confirming that no taxes were owed to the respondents by the 1st Petitioner.

16. The 1st Petitioner complains that he was never served with the departure prohibition order issued against him by the 1st Respondent as required by Section 45(3)(1) of the Tax Procedures Act, 2015.

17. On the respondents' claim that this Court has no jurisdiction over the matter, the 1st Petitioner states that this case is well within the jurisdiction of this Court. It is the 1st Petitioner's averment that this is not a tax appeal disguised as a constitutional petition as alleged by the respondents.

18. The parties filed and exchanged submissions in support of their respective positions. An issue of the jurisdiction of this Court has been raised by the respondents and it is important that the question be first addressed before I can delve into the substance of the petition. In challenging the jurisdiction of this Court, the respondents through their submissions dated 1st July, 2020 stated that there is a mechanism set in law for challenging a decision made under the tax laws. They point to sections 51 and 52 of the Tax Procedures Act, 2015 as providing the procedure for challenging the tax decisions of the Commissioner.

19. The respondents' case is that Section 9(2) of the Fair Administrative Actions Act, 2015 bars this Court or a subordinate court from reviewing an administrative action or decision unless the mechanisms, including internal mechanisms for appeal or review and all remedies available under any other written law, are first exhausted. According to the respondents, where the departure prohibition order is concerned there is a clear mechanism in law for challenging the same under sections 229 and 230 of the EACCMA, as well as the Tax Appeals Tribunal Act, 2013.

20. The respondents assert that by seeking that Section 45(9) of the Tax Procedures Act, 2015 be declared unconstitutional, the petitioners are simply giving a tax dispute the semblance of a constitutional petition. The respondents support their submission that alternative dispute resolution mechanisms should be exhausted before resorting to the courts by relying on the decisions in the cases of **Rich Productions Ltd v Kenya Pipeline Company & another, Petition No. 173 of 2014; John Harun Mwau v Peter Gastrow & 3 others [2014] eKLR;** and **George Owino Mulanya & 4 others v Achieng Odongo & another [2017] eKLR.**

21. The respondents further argue that the Tax Appeals Tribunal is better equipped to answer the questions as to whether the 2nd Petitioner ought to have been served with the departure prohibition order and if the tax demand should not to have been made against the 2nd Petitioner because she was an event organiser and not an exhibitor.

22. In response, the petitioners through their submissions dated 18th June, 2020 assert that the petition has raised weighty constitutional issues which cannot be determined by the Tax Appeals Tribunal as it has not been granted jurisdiction to hear and determine matters relating to violation of constitutional rights arising from tax disputes.

23. In addressing the above issue, the starting point is Article 159(2)(c) of the Constitution which provides that the employment of alternative forms of dispute resolution is one of the principles that should guide courts and tribunals in exercise of judicial authority. Section 9 of the Fair Administrative Action Act, 2015 restates this principle by providing that:

> **(1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the Constitution.**
>
> **(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.**

24. The above provision indicates that courts are obligated to hold off hearing and determining matters for which alternative dispute resolution mechanisms have been provided. It is only after the alternative mechanisms and remedies have been exhausted that the courts should engage in the matters. This position of the law finds firm voice in the holding of the Court of Appeal in **Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015] eKLR** 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 the 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."**

25. In the case of **Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR**, the High Court explained the importance of the doctrine of exhaustion of remedies as follows:

> **"84. […] 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 Justice J.B. Ojwang' has felicitously called an "Ascendant Judiciary." The Constitution does not create an Imperial Judiciary zealously fuelled by tenets of legal-centrism and a need to legally cognize every social, economic or financial problem in spite of the availability of better suited mechanisms for comprehending and dealing with the issues entailed. Instead, the Constitution creates a Constitutional preference for other mechanisms for dispute resolution – including statutory regimes – in certain cases."**

26. The principle of exhaustion of alternative remedies is therefore firmly rooted in Article 159 of the Constitution and serves the purpose of

directing disputes to cheap, faster and reconciliatory dispute mechanisms before the adversarial court system is engaged. The authority of the alternative dispute resolution bodies must therefore be respected and affirmed by the courts.

27. It is imperative to note that according to Section 9(3) of the Fair Administrative Action Act, 2015, a party may be exempted from pursuing the alternative remedies and mechanisms where they show that there are exceptional circumstances allowing them to directly approach the courts. Some of the exceptional circumstances to be considered by the courts were enumerated in **Republic v Firearms Licensing Board & another Ex parte Boniface Mwaura [2019] eKLR** as follows:

> **"50. Factors to be taken into account in deciding whether exceptional circumstances exist are whether the internal remedy is effective, available and adequate. An internal remedy is effective if it offers a prospect of success, and can be objectively implemented, taking into account relevant principles and values of administrative justice present in the Constitution and the law, and available if it can be pursued, without any obstruction, whether systemic or arising from unwarranted administrative conduct. An internal remedy is adequate if it is capable of redressing the complaint.**
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> **51. The principle running through decided cases is that where there is an alternative remedy or where Parliament has provided a statutory appeal process, it is only in exceptional circumstances that an order for Judicial Review would be granted. *First,* in determining whether an exception should be made and Judicial Review granted, it is necessary for the court to look carefully at the suitability of the appeal mechanism in the context of the particular case and ask itself what, in the context of the internal appeal mechanism is the real issue to be determined and whether the appeal mechanism is suitable to determine it.**
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> **52. The exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. Indeed, in this case, the *ex parte* applicant has cited infringement of his constitutional rights. The Cabinet Secretary cannot determine questions touching on violation of fundamental rights. These are issues within this court's jurisdiction, hence, on this ground, this case passes the exception requirement.**
>
> **53. *Second*, the other principle suggested by case law for limiting the applicability of the doctrine of exhaustion in appropriate cases is that a statutory provision providing an alternative forum for dispute resolution must be carefully read so as not to oust the jurisdiction of the court to consider valid grievances from parties who may not have audience before the forum created, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit. The rationale behind this reasoning is that statutory provisions ousting court's jurisdiction must be construed restrictively. This cases passes this test as well.**
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> **54. *Third,* the language of the provision ousting the court's jurisdiction must be clear and unambiguous."**

28. With the brief statement of the law, the question that follows is whether this is a matter for the Tax Appeals Tribunal or whether the same is properly before this Court. In other words, I must consider the questions raised by the petitioners and whether the Tax Appeals Tribunal has the jurisdiction to answer them. The petitioners have raised the question of whether the 1st Petitioner's constitutional rights to fair administrative action, freedom of movement and fair hearing were infringed by the respondents. This is a question that lends itself to judicial consideration. Alongside the constitutional questions, the petitioners raise the questions of whether or not they should have been pursued for the alleged underpaid taxes and whether the departure prohibition order should have been served upon the 1st Petitioner prior to its execution. The latter questions would require the Court to look into the merits of the decision by the respondents.

29. When a court is reviewing the decision of an administrator it is bound by certain rules which were illustrated by the Court of Appeal in **Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others [2016] eKLR** as:

> **"58. […] Under the Fair Administrative Actions Act, there is no power for the reviewing court to substitute the decision of the administrator with its own decision. This imposes a limit to merit review under the Act. Section 11 (1) (e) and (h) of the Fair Administrative Action Act permits the court in a judicial review petition to set aside the administrative action or decision and or to declare the rights of parties and remit the matter for reconsideration by the administrator. The power to remit means that decision making on merits is the preserve of the administrator and not the courts."**

30. This position was reiterated in the case of **Republic v Nairobi City County Ex parte Registered Trustees of Sir Ali Muslim Club [2017] eKLR** where it was held that:

> **"46. However, it is important to remember that Judicial Review is a special supervisory jurisdiction which is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal (rehearing) on the merits. The question is not whether the judge disagrees with what the public body has done, but whether there is some recognisable public law wrong that has been committed. Whereas private law proceedings involve the claimant asserting rights, judicial review represents the claimant invoking supervisory jurisdiction of the Court through proceedings brought nominally by the Republic."**

31. In the petition before me, there are questions raised by the petitioners which this Court cannot delve into as they do not raise any constitutional questions. I cannot determine whether the respondents should have pursued the petitioners for the underpaid tax or whether the departure prohibition order was served on the proper person as those are issues that squarely fall within the jurisdiction of the Tax Appeals Tribunal. The Court would therefore be offending the principle of exhaustion of statutory remedies were it to address those issues in the pretext of dealing with constitutional questions.

32. An important consideration in this matter is whether there exists a forum which the petitioners could have approached for the resolution of their complaint and whether the petitioners would have had an audience before the forum or have had the quality of audience before the forum which is proportionate to the interest which they wish to advance in the petition. The respondents are of the view that the petitioners should have approached the Tax Appeals Tribunal as this petition is a disguised tax appeal.

33. Section 52 of the Tax Procedures Act, 2015 sets up an appeal procedure as follows:

> **(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.**

34. An 'appealable decision' is defined in Section 3 of the Tax Procedures Act, 2015 as an objection decision and any other decision made under a tax law other than a tax decision, or a decision made in the course of making a tax decision. The same Section defines a 'tax decision' as:

> **(a) an assessment;**
>
> **(b) a determination under section 17(2) of the amount of tax payable or that will become payable by a taxpayer;**
>
> **(c) a determination of the amount that a tax representative, appointed person, director or controlling member is liable for under sections 15, 17, and 18;**
>
> **(d) a decision on an application by a self-assessment taxpayer under section 31(2);**
>
> **(e) a refund decision;**
>
> **(f) a decision under section 48 requiring repayment of a refund; or**
>
> **(g) a demand for a penalty.**

*35. The petitioners in this case are objecting to the issuance of a departure prohibition order under Section 45 of the Tax Procedures Act, 2015. This is a matter appealable to the Tax Appeals Tribunal. Therefore, the decision to impose a departure prohibition order could have been appealed to the Tax Appeals Tribunal. It is important to acknowledge that a party is entitled to appeal to the High Court under Section 53 of the Tax Procedures Act, 2015 but that right can only be exercised against the decision of the Tax Appeals Tribunal. Additionally, according to Section 56 of the Tax Procedures Act, 2015, an appeal can only lie to the High Court or Court of Appeal on a question of law.*

*36. Section 29(3) of the Tax Appeals Tribunal Act, 2013 gives the Tax Appeals Tribunal wide jurisdiction as follows:*

> **(a) affirming the decision under review;**
>
> **(b) varying the decision under review; or**
>
> **(c) setting aside the decision under review and either—**
>
> **(i) making a decision in substitution for the decision so set aside;**
>
> **or**
>
> **(ii) referring the matter to the Commissioner for reconsideration in accordance with any directions or recommendations of the Tribunal.**

37. *From the cited statutory provisions, it is clear that the Tax Appeals Tribunal would be able to give the petitioners* the quality of audience which is proportionate to the interest which they wish to advance in the petition. Moreover, the Tax Appeals Tribunal is according to sections 230 and 231 of the East African Community Customs Management Act, 2004 capable of determining complaints arising from the Act. I am therefore of the opinion that the Tax Appeals Tribunal would have provided the petitioners with a solution had they approached it since the Tribunal has the authority to determine the complaints raised.

38. The petitioners ride on the claim that Section 45(9) of the Tax Procedures Act, 2015 is unconstitutional in an attempt to give their case some constitutional foundation. The petitioners assert that the impugned provision is unconstitutional for taking away the right of a taxpayer to challenge a departure prohibition order. On their part, the respondents urge this Court to find that Section 45(9) is constitutional. They submit that the provision cannot be read in isolation but should be read together with the definitions of the terms "appealable decision" and "tax decision" in Section 3. Further, that the provision is very clear that it will only protect an action that is done "lawfully". According to the respondents, the provision does not protect all actions and it is only the judicial institutions which can determine whether the actions of the Commissioner were lawful or not.

39. Section 45(9) of the Tax Procedures Act, 2015 provides that:

> **"No proceedings, criminal or civil, may be instituted or maintained against the Government, the Director, the Commissioner, an officer authorised to act under this section, or a customs, immigration, police, or any other person for anything lawfully done under this section."**

40. The respondents are indeed correct that the impugned provision does not bar access to courts. In my view, it is a provision that adds no value to the Tax Procedures Act but there is nothing unconstitutional about it as it does not expressly deny an aggrieved party an opportunity to access the Tax Appeals Tribunal or the High Court. As correctly pointed out by the respondents, the judicial authorities are the organs to determine whether anything done by the respondents is lawful or not.

41. In conclusion therefore I find that the petitioners are guilty of failing to exhaust the alternative dispute resolution mechanism before approaching this Court. The petition before this Court does not raise any constitutional questions. The petitioners ought to have dispensed with the alternative remedies provided under the Tax Procedures Act, 2015 before pursuing an appeal before this Court. This is particularly true as the petitioners seek a finding by this Court that they were wrongfully approached for the underpaid import taxes and that they ought to be refunded the paid amount. Those are questions which could have been competently addressed by the Tax Appeals Tribunal.

42. In the circumstances, I find the petitioners' case without merit and the same is therefore dismissed. The parties shall bear their own costs in respect to the proceedings.

**Dated, signed and delivered virtually at Nairobi this 22$^{nd}$ day of September, 2021.**

**W. Korir,**

**Judge of the High Court**