



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 86 OF 2017

FAIR LOGISTIC AGENCY LIMITED.....PLAINTIFF

-VERSUS-

KENYA REVENUE AUTHORITY.....DEFENDANT

RULING

1. This ruling concerns and seeks to dispose the Defendant's Preliminary Objection filed on 16th July, 2018 inviting this court to strike out the suit and dismiss these proceedings citing the following grounds: -

- a) **The suit offends the mandatory provisions of Section 229, 230 and 231 of the East African Community Customs Management Act, 2004.**
- b) **That the suit fails to conform with the Mandatory provisions of Section 12 of the Tax Appeal Tribunal Act, 2013.**
- c) **The suit offends the provisions of Section 9 of the Fair Administrative Actions Act, 2015.**
- d) **That the Suit offends the provisions of Section 220 of the East African Community Customs Management Act, 2004.**

2. In order to appreciate the basis and substance (if any) of the Respondent's Preliminary Objection so as to have a proper perspective of the dispute, it is necessary to briefly outline the facts which triggered these proceedings.

Facts as pleaded

3. By the Plaint dated 28th August, 2017 the Plaintiff avers that it engages in inter alia, the business of clearing and forwarding and that it was licensed and authorized to undertake the business under the auspice of the Defendant's system through online access to the **Tradex system** upon supply of a password. To that effect the Defendant issued the Plaintiff with password particulars being **TP051220974ZA**-(The log address) and **FAIR2017** as the Log password which would enable the Plaintiff to access the Tradex system in order to engage in the business of clearing and forwarding.

4. It is further pleaded that on 22/08/2017, the plaintiff discovered that its access to the Tradex System was unavailable and upon enquiry from the Defendant it was informed that its access had been locked-out following a complaint by an independent third party in respect of a consignment belonging to another independent third party, which consignment was being handled by the Plaintiff. The Plaintiff avers that the lock-out caused it immense loss in its business and its claim against the Defendant is for reinstatement of access to the Tradex System through issuance of a new-valid password and compensation for the lost income as a consequence of the Lock-out.

5. For the pleaded and alleged wrongs, Plaintiff prays for the following orders: -

- a) **A declaration that the Defendant's acts and/or omissions in respect of suspending/Disabling the Plaintiff's password access to the Tradex System were illegal null and void.**
- b) **A declaration that by virtue of grant of prayer 1 above, the Defendant is liable to compensate the Plaintiff for lost income occasioned during the period w.e.f 28/08/2017 at the Rate of Kshs. 200,000/= per day until payment in full.**
- c) **An order do issue compelling the Defendant to forthwith permanently reinstate the Plaintiff's access to the Tradex System through issuance of a new, permanent, valid password.**

- d) **An order do issue compelling the Defendant to forthwith compensate the Plaintiff for lost income in line with the provisions of Prayer 2 herein above.**
- e) **Cost of the suit and interests on prayer 4 herein above.**
- f) **Any other prayer this honourable court may deem fit to grant.**

6. On 19th July 2018, the court, with the consent of the parties, directed that the Preliminary objection be heard in limine by way of written submissions and a date was reserved for highlighting the same. Parties reconvened in court on 22/01/2020 when they were proceeded with the highlighting. Mr. Lemiso advocate appeared for the Defendant/Applicant whilst Mr. Ngonze represented the Plaintiff and both offered the respective highlights of the filed submissions.

The Defendant/Applicant's Submissions

7. It was submitted for the Defendant that before the cancellation of the Plaintiff's log address and password, the Defendant had earlier communicated the reasons thereof. The Plaintiff was aggrieved by Defendant's decision to disable its password and initiated the suit herein and consequently obtained an order for temporary reinstatement of the password pending the hearing and determination of the suit. The Defendant then filed the instant preliminary objection among other pleadings.

8. On the first ground of the Preliminary Objection, the Defendant argues that the Plaintiff's suit fails to comply with the Mandatory provisions of sections 229, 230 and 231 of the East African Community Customs Management Act (EACCMA) for the reasons that the decision by the Commissioner of customs to suspend the Plaintiff's password was lawful and made pursuant to the provisions of section 145(3) of EACCMA and the plaintiff's remedy thereof was to file for a review of the decision as provided under Section 229 of the EACCMA but if still dissatisfied with outcome of the Review, then the Plaintiff ought to further appeal to Tax Appeals Tribunal in line with section 230 of the EACCMA.

9. It was submitted on the second limb that the Commissioner's decision or omission touching on a customs agent licensed under EACCMA is a decision relating to customs administration and any person affected therewith, including the Plaintiff herein, ought to apply for review as envisaged under Section 229. The Plaintiff herein is therefore accused of having kipped a statutory laid out procedure and for that reason this suit should be dismissed with costs. Reliance is Placed on the case of ***Speaker of National Assembly –vs- James Njenga Karume (2008) 1KLR*** where the court held that;

“Where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”

10. Thirdly, it was submitted that the suit herein contravenes Section 220 of the EACCMA as read with Section 12 of the Appeals Tribunals Act for the reasons that the decision being challenged herein is decision under Section 145 (3) of the EACCMA which is a tax law. It follows that any tax disputed is ought to be heard before the Tax Appeals Tribunal and not before this court pursuant to Section 12 of the Tax Appeals Tribunals Act. It was further argued that where an alternative remedy exists then the courts should exercise restraint and first give an opportunity to the relevant bodies which can adequately ventilate the issues in dispute. On this line of argument, the counsel relied on excerpts from the case of ***Kenya Revenue Authority & 2 others –vs- Darasa Investments Limited [2018] eKLR***.

11. Lastly the defendant submits that the decision to cancel the Plaintiff's password is an administrative decision which is only challengeable through judicial review proceedings and not a suit the way the plaintiff has done.

Plaintiff's Submissions

12. It was submitted for the Plaintiff that the Defendant's position is grossly misguided because the Plaintiff's claim is neither hinged on licensing nor a decision of the commissioner that is legally eligible for appeal to the Appeals tribunal. According to the Plaintiff the decision to suspend and/or disable the Plaintiff's password is not an administrative decision grounded in law when it is viewed against the backdrop of the express provisions of Section 4 of Tax Procedures Act which provides for the powers and duties of the commissioner. The counsel for the Plaintiff disagrees with the Defendant's contention that the instant suit ought to have been initiated by way of judicial review. He submitted that judicial review is concerned not with the legality of the decision itself but mainly concerns the process by which the decision itself was reached.

13. The learned counsel further contends that the instant preliminary Objection doesn't raise any pure point of law because a Preliminary objection cannot be raised on a point or facts which are to be ascertained or in the circumstances where the relief sought is an exercise of Judicial discretion. To buttress this line of argument, the counsel relies on the case of ***Mukisa Biscuit Manufacturing Co. Ltd-vs-West End Distributors Ltd (1969) E.A.***

14. I have given due consideration to the rival and diametrically opposed positions presented by the parties on the objection and I take the view that the matter would be resolved by posing two questions; *Whether this suit has been brought prematurely against the doctrine of exhaustion of remedies and Whether this suit ought to have been brought by way of Judicial review in line with Section 9 of the Fair Administrative Actions Act, 2015.*

15. On the first issue, the Defendant's counsel submitted that by filing this suit the Plaintiff moved the court pre-maturely. He cited Section 229 of the EACCMA which provides that any person dissatisfied by the decision of the commissioner has to first file a review thereof and if further dissatisfied he (the aggrieved party) can appeal to the Appeals tribunal on basis of Section 230 of EACCMA. The counsel also relies on Section 12 of the Tax Appeals Tribunal Act, which provides that any person who disputes the decision of the Commissioner in 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 Tax Appeals Tribunal. On the foregoing, the Counsel for the Defendant submitted that where an alternative mechanism for a remedy is provided by either the Constitution or Act of parliament, then the courts should be reluctant from entertaining such disputes unless it satisfies itself that the alternative statutory mechanisms under the Act have been exhausted.

16. Part XX of the EACCMA, at section 229 provides for application for Review to the Commissioner by a *person directly affected by the decision or Application omission of the Commissioner or any other officer on matters for review or relating to Customs within thirty days of the date of the decision or omission. It provides for remedies available including the power of the commissioner to extend time and sets time within which a written decision on review must be made and communicated, at no more than 30 days, with a rider that failure to communicate the decision within the timeline, deems the application as successful.*

17. Whatever decision made by the commissioner is made appealable to the tribunal within 45 days after being served with the decision^[1]

18. The above provisions are to be read together with section 231 of EACCMA which provides for establishment of Tax Appeals Tribunals and pursuant to which Tax Appeals Tribunal Act was enacted and the tribunal established by section 3 thereof. The jurisdiction of the tribunal is set for hearing of appeals from the tax decisions of the commissioner made under a tax law as defined.

19. The preamble to the Tax Procedures Act provides that it is an act of Parliament to **harmonise and consolidate the procedural rules for the administration of tax laws in Kenya**, and for connected purposes. The statute thus establishes the sole procedure for dealing with tax administration disputes, unless a tax statute established an alternative a specific unique procedure.^[2]

20. The Act underscores that the Act shall be interpreted to promote its objects^[3], provides that if aggrieved by an appealable decision, the definition of which is given may appeal the decision to the Tribunal^[4] established under section 3 of the Act. An "**appealable decision**" is defined to mean an objection decision and any other decision made under a tax law other than a tax decision; or decision made in the course of making a tax decision.

21. The foregoing provisions of the law warrant no novel nor extravagant. The question is whether the dispute herein is one of those envisaged to be heard before the Appeals Tribunal and if so whether this court has the jurisdiction to entertain this dispute in view of the above said provisions.

22. In this case the dispute is centered upon the question of propriety of the commissioner's decision to cancel the Plaintiff's password to access the Defendant's Tradex system. While the Plaintiff contends that the decision was wrongful, and that being not a tax decision it is not the kind intended for resolution outside the court system, the defendant on the other hand argues that the Decision to cancel the Plaintiff's password was made under Section 145(3) of the East African Community Customs Management Act, 2004 (EACCMA) which allowed the Commissioner to suspend any such license on the grounds that the Commissioner may deem fit and further that under Section 147 of EACCMA that an authorized agent who performs any act on behalf of the owner of any goods is deemed to be owner of the goods and is personally liable for payment of any duties and the performance of all acts in respect of the goods.

23. In my opinion, the commissioner's decision was made pursuant to his mandate under a tax law. The corpus of the regime of the Kenyan Tax law has an in built dispute resolution mechanism which I consider to be not only robust, progressive and underlining need for expeditious disposal of disputes but equally very efficient and efficacious. The trite law in this country, and I think in common law jurisdictions generally, is that where a statute establishes a specific procedure for handling a particular issue, that procedure needs to be strictly followed and exhausted before a party comes to court and that the court should let such other alternative dispute resolution mechanisms operate freely without undue intrusion. It is called the doctrine of exhaustion of alternative or administrative remedies. The essence of that doctrine dictates that where the constitution or a statute confers a jurisdiction on a court, tribunal, person, body or authority, the jurisdiction must be exercised in accordance with the constitution or the statute conferring it^[5]. The decision to cancel the password was made by the commissioner under a tax statute and when it aggrieved the plaintiff it was by law, bound to seek review by virtue of section 229 of EACCMA. I do find that the dispute squarely fits within the matters to be dealt with in accordance with The Tax Appeals Act and was improperly and prematurely filed here. I find that the decision to cancel the Plaintiff log password is an appealable decision under the Tax Procedures Act. In **Kenya Revenue Authority & others vs Darasa Investments Ltd (2017)eklr** the court of appeal spoke of the jurisdiction created under the Tax Appeals Act in the following words:-

"The wording used thereunder is clear that any decision which is made by the commissioner or any other officer under the Respective acts is subject to review by the commissioner under section 229 of the EACCMA and appeal to the Tax Appeals Tribunal"

24. I have doubt in my mind whatsoever and I have no iota of any reason to depart from the established position of the law 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. This was the position held by the court of appeal in the case of **Geoffrey Muthinja Kabiru & 2 Others – vs – Samuel Munga Henry & 1756 Others** where the court 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... 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 the courts...This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution."

25. The Plaintiff has not shown that there are exceptional circumstances excusing it from following the laid down procedure. In view of my analysis and the determination of the issues discussed above, it is my conclusion that the Plaintiff ought to have exhausted the available

mechanism before approaching this court. In conclusion, I find and hold that the Plaintiff's suit offends the doctrine of exhaustion of statutory available remedies and it is prematurely brought before this court. It must fail. On this ground alone.

26. Accordingly, I uphold the Preliminary objection and the suit herein filed on 28th August, 2017 is hereby struck out with costs.

27. It is so ordered.

Dated, delivered and signed at Mombasa this 15th day of May 2020.

P. J. O. OTIENO

JUDGE

[\[1\]](#) Section 230

[\[2\]](#) Section 2, Tax procedures Act

[\[3\]](#) Section 2(3)

[\[4\]](#) Section 52(1)

[\[5\]](#) Secretary, public service Board vs Hulbhai Gedi Abdille (2017) eklr