



REPUBLIC OF KENYA



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Kenya Revenue Authority & another v Mutamba & 26 others (Civil Appeal 124 of 2017) [2022] KECA 808 (KLR) (24 June 2022) (Judgment)

Neutral citation: [2022] KECA 808 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 124 OF 2017**

DK MUSINGA, P, A MBOGHOLI-MSAGHA & KI LAIBUTA, JJA

JUNE 24, 2022

BETWEEN

KENYA REVENUE AUTHORITY 1ST APPELLANT

COMMISSIONER OF INVESTIGATIONS & ENFORCEMENT, KENYA

REVENUE AUTHORITY 2ND APPELLANT

AND

LYDIA WANJIRU MUTAMBA & 26 OTHERS RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nairobi (Odunga, J.) dated 7th December 2016 in Judicial Review Misc. Application No. 233 of 2012.)

JUDGMENT

1. This appeal before us principally turns on the question whether the respondents were denied their right to be heard by the appellants before they were issued with forfeiture notices in respect of outstanding taxes involving their respective motor vehicles.
2. A precis of the facts leading to the appeal is that the first appellant, after conducting post import investigations to establish whether import duty had been properly paid and accounted for in respect of a number of motor vehicles, realized that import duty for a number of them had been mis-declared; for some the import duty had not been fully paid; and for others duty had not been paid at all. The motor vehicles in question included registration numbers KBC 746M, KBB 494T, KBB 793F, KAW 776H, KAT 644J, KAZ 108S, KBB 181T, KAU 280Z, KAT 953U, KAV 673A, KAX 659N, KAU 283D, KAY 374K, KBB 852X, KAY 020Q, KBB 192T, KBA 164G, KBB 552A, KBB 559A, KBC 065D, KAZ 147Z, KAZ 183B, KBC 137G, KBB 419M, KBA 813A, KBA 546Z, KAY 280G, KAY 356G, KBA 633N, KAZ 516G and KAW 354G, all said to belong to the respondents individually. The mis-declaration, failure to pay full duty or no duty at all was contrary to specific provisions of the *East*



African Community Customs Management Act, 2004 (hereinafter referred to as ‘the EACCM Act’) and ultimately, amounted to loss of government revenue.

3. The second appellant, pursuant to the outcome of the post- import investigations, caused to be published a Notice in the “Daily Nation” newspaper on 21st May 2012 requiring the owners of the motor vehicles appearing in the said notice which were said to have outstanding tax issues to liaise with the motor vehicle inspection section of the first appellant and, thereafter deliver the vehicles and relevant documents for verification by the appellants’ officials.
4. Being aggrieved by the said notice, the respondents filed a Judicial Review application, to wit, H.C. Misc. Civil Application No. 233 of 2012 seeking, inter alia, “an Order for Certiorari to remove into the High Court for purposes of quashing the decision of the first appellant given vide the notice dated 21st May 2012; an Order of Prohibition prohibiting the first appellant from impounding, levying distress or in any way interfering with the respondent’s possession and usage of their respective motor vehicles.”
5. The argument by the respondents was that the appellants denied them opportunity to be heard before issuing them with the forfeiture notices; that no demand notice on outstanding duty was issued to them by the appellants, which action amounted to a denial of their right to be heard as entitled to under the Act; and that they were entitled to an explanation as to how the duty was arrived at.
6. The trial court in its judgment dated 7th December 2016 made a finding that the appellants had not granted the respondents an opportunity to be heard before issuing the forfeiture notices. Accordingly, the court issued “an order for Certiorari removing into the Court for purposes of quashing the decision of the 1st appellant given vide the Notice dated 21st May 2012” and “an Order of Prohibition prohibiting the 1st appellant from impounding, levying distress or in any way interfering with the respondents’ possession and usage of their respective motor vehicles.”
7. Being dissatisfied with the decision of the trial court, the appellants appealed to this Court. The grounds of appeal as contained in the Memorandum of Appeal dated 12th May 2017 are, inter alia, that the trial judge erred in law and in fact: in failing to note that the Notice issued by the appellants was for verification only; in failing to note that the Notice issued by the appellants meant to give the respondents an opportunity to be heard; and in failing to note that the appellants are mandated by law to issue Notices under sections 233 and 236 of the *EACCM Act*.
8. At the hearing of this appeal, the appellants were represented by Mr. Twahir, learned counsel. There was neither appearance for the respondents nor had they filed any written submissions. Mr. Twahir elected to rely wholly on his written submissions without any oral highlighting of the same.
9. The crux of the appellants’ argument vide their written submissions dated 11th March 2022 is that the notice issued was for verification purpose only, and that the appellants are mandated to issue such notices pursuant to the provisions of sections 234(3) and 236 of the *EACCM Act*. The notice required the owners of the listed motor vehicles, who included the respondents, to first liaise with the appellants, after which they would present the relevant documentation of the vehicles for verification purposes. According to the appellants, this was an opportunity for the respondents to be heard. The respondents failed to comply with the notice and, therefore, cannot argue that they were denied an opportunity to be heard.
10. This being a first appeal, it is the duty of the Court to review the evidence adduced before the trial court and satisfy itself that the decision was well-founded. *See Selle & Another v. Associated Motor Boat Co. Ltd & Others [1968] EA 123.*



11. We have considered the record, submissions on record and the law. As earlier noted, the appeal turns on the singular issue of whether the respondents were granted an opportunity to be heard by the appellants before the issuance of the impugned notice.
12. The first appellant is established under the *Kenya Revenue Authority Act*, 1995. The mandate of the first appellant as per section 4 of that Act includes collection and receipt of all revenue. In the performance of its functions, the first appellant is guided by several written laws including the *EACCM Act*.
13. It is not in dispute that the provisions of the *EACCM Act* apply to Kenya as a State pursuant to the provisions of section 1(2) of the Act. The appellants' notice was said to be anchored on section 234(3) and 236 of the *EACCM Act*. Section 234(3) reads as follows:

“ (3) Where the proper officer requires any document to be produced for any goods which have been imported, exported, transferred, or declared in transit, the proper officer may require the document to be submitted in original and duplicate and the proper officer may retain the original.”
14. Section 236, on the other hand, reads as follows:

The Commissioner shall have the powers to -

 - (a) verify the accuracy of the entry of goods or documents through examination of books, records, computer stored information, business systems and all relevant customs documents, commercial documents and other data related to the goods;
 - (b) question any person involved directly or indirectly in the business, or any person in the possession of documents and data relevant to the goods or entry;
 - (c) inspect the premises of the owner of the goods or any other place of the person directly or indirectly involved in the operations; and
 - (d) examine the goods where possible for the goods to be produced.”
15. Our reading and interpretation of both sections 234(3) and 236 of the Act accords with the appellants' argument that they are mandated to verify the accuracy of the entry of goods or documents otherwise referred to in this appeal as post import investigations and where discrepancies are noted, to require that relevant documents be produced. The notice dated 21st May 2012 was, in our view, issued within the ambit of the law.
16. The point of contention between the parties to this appeal is whether the said notice in its very manner afforded the respondents an opportunity to be heard or not. The notice published by the appellants in the “Daily Nation” on 21st May 2012 read in part as follows:

“Kenya Revenue Authority wishes to inform the public that the vehicles listed below have outstanding tax issues. The owners are required to liaise with motor vehicle investigation section of KRA on the 6th floor at the Times Tower, Nairobi and thereafter bring the vehicles and relevant documents for verification.”



17. At the foot of the notice, the appellants requested persons who desired to get any further information to get in touch with a Mr. Alfred Nthiwa through three telephone numbers that were availed in the notice.
18. Article 47(1) of *the Constitution* of Kenya, 2010 provides that “Every person has the right to an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”
19. Article 50(1), which underscores the right to be heard provides that:
- “Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”
20. *Black's Law Dictionary*, 11th Edition at page 865 defines
- “hearing” in relation to administrative law as:
- “Any setting in which an affected person presents arguments to a decision-maker.”
- “Fair Hearing” is defined as:
- “A judicial or administrative hearing conducted in accordance with the due process.”
21. The legal principle that requires that no one should be condemned unheard ('audi alteram partem') is explained in *Halsbury Laws of England, 5th Edition 2010 Vol. 61 at para. 639* as follows:
- “The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the audi alteram partem rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court.”
22. This Court in *Pashito Holdings Limited & Another v. Paul Nderitu Ndungu & 2 Others* [1997] eKLR held that:
- “The rule of audi alteram partem, which literally means 'hear the other side', is a rule of natural justice. It is an indispensable requirement of justice that the party who has to make a decision shall hear both sides, giving each an opportunity of hearing what is urged against him.”
23. The notice that was published by the appellants in the “Daily Nation” was, in our view, plain and unambiguous. The notice required owners of the listed motor vehicles to liaise with the appellants’ motor vehicle investigation section. We agree with the appellants that the notice did not make any immediate demand on the payment of duty. The notice opened an avenue for the respondents to present their case to the appellants through the appellants’ vehicle inspection section. The appellants therefore provided the respondents with an opportunity to be heard, which the respondents declined to take up. The appellants did not shut their doors on the respondents, and neither did they decline to receive any form of representations from them.



24. We laud the trial judge for having espoused the right to fair hearing so eloquently and in detail in the impugned judgment. However, we are unable to agree with his finding that the respondents were denied a fair hearing by the appellants for the reason that the respondents were given prior notice and an opportunity to be heard, which they declined to take up.
25. The upshot of the foregoing is that we find the appeal meritorious and hereby allow the same. The judgment of the trial court dated 7th December 2016 is set aside in its entirety. The appellants shall have costs of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JUNE, 2022.

D. K. MUSINGA, (P)

JUDGE OF APPEAL

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A. MBOGHOLI MSAGHA

JUDGE OF APPEAL

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DR. K. I. LAIBUTA

JUDGE OF APPEAL

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I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

