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| Case Number: | Miscellaneous Application 29 of 2019 |
| Date Delivered: | 02 Oct 2020 |
| Case Class: | Civil |
| Court: | Tax Appeal Tribunal |
| Case Action: | Ruling |
| Judge: | Josephine K Maangi (Chairperson), Tanvir Ali (Member), Geoffrey Karuu (Member) & Delilah K Ngala (Member) |
| Citation: | Anthony Kariuki Mwai v National Transport & Safety Authority & 2 others [2020] eKLR |
| Advocates: | - |
| Case Summary: | - |
| Court Division: | Civil |
| History Magistrates: | - |
| County: | Nandi |
| Docket Number: | - |
| History Docket Number: | - |
| Case Outcome: | Application dismissed |
| History County: | - |
| Representation By Advocates: | - |
| Advocates For: | - |
| Advocates Against: | - |
| Sum Awarded: | - |
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REPUBLIC OF KENYA

IN THE TAX APPEALS TRIBUNAL AT NAIROBI

MISC. APPLICATION NO. 29 OF 2019

ANTHONY KARIUKI MWAI.....APPLICANT

VERSUS

KENYA REVENUE AUTHORITY.....FIRST RESPONDENT

NATIONAL TRANSPORT & SAFETY AUTHORITY.....SECOND RESPONDENT

ALLAN NJOROGE KUNGU.....THIRD RESPONDENT

RULING

1. The Applicant is a male adult and resident of Nairobi, in the Republic of Kenya and is the owner of Motor Vehicle Registration Number KCD 336D, the subject matter herein.

2. The First Respondent is established under Section 3 of the Kenya Revenue Act Cap 469 Laws of Kenya charged with the responsibility of assessment and collection of all Government tax revenue.

3. The Second Respondent is established through an Act of Parliament, to wit National Transport and Safety Authority Act No. 33 of 2012 charged with the responsibility of harmonization of the operation of the key road departments in the Republic of Kenya.

4. The Third Respondent is the previous legal owner of Motor Vehicle Registration Number KCD 336D, the subject matter herein.

5. On 31st July 2019, the First Respondent issued directives that directed all Stapols Kenya all Divisions crimes Kenya, among other police enforcement agencies to impound the Applicant's Motor Vehicle Registration Number KCD 336D together with other Motor Vehicles on suspicion of having been fraudulently registered. The said directives were allegedly received by the Applicant on 4th October, 2019 via social media.

6. The Applicant objected to the said directives on 8th October, 2019 which objection did not elicit any response from the First Respondent.

7. Having not received any response from the Respondent to its objection aforesaid, the Applicant, on 17th October, 2019 filed a Notice of Motion application dated 16th October 2019. He sought the following orders: -

a) That this application be certified urgent and heard *ex-parte* in the first instance.

- b) That this Honorable Tribunal be pleased to grant the Applicant an extension of time and leave to file appeal out of time.
- c) That pursuant to the provisions of Section 18 of the Tax Appeals Tribunal Act, the grant of leave herein do operate as stay of the implementation of the First Respondent's directives issued on 31st July, 2019 to impound motor vehicle registration Number KCD 336D.
- d) That the costs of this application be in favour of the Applicant.

8. The Applicant based its application on the grounds;

- a) That the Applicant received the First Respondent's directives dated 31st July 2019 on 4th October 2019 via WhatsApp communication.

b) That the delay in lodging the appeal was occasioned by the uncertainty surrounding the directives issued by the First Respondent which was never communicated to the Applicant who only learnt of its existence on 4th October, 2019.

c) That the Applicant was aggrieved by the directives and wished to appeal against it and thereafter wrote to the First Respondent on 8th October, 2019 objecting to the said directives.

d) That the Applicant is the third owner of the said Motor Vehicle that was previously owned by the Third Respondent and the Government of Kenya and that the logbook and search issued to the Third Respondent were subsequently issued to the Applicant which indicated that custom duty on the vehicle was paid.

e) That the Applicant stands to suffer substantial and irreparable loss as he will be deprived of use of the Motor Vehicle which will waste away and become dilapidated if the orders sought are not granted.

f) That the intended appeal is merited and the Respondent will not be prejudiced in anyway if this application is granted.

9. The Applicant further relied on his sworn Affidavit dated 16th October 2019. In the said affidavit, the Applicant stated that he is the legal owner of the subject motor vehicle and further restated the same grounds aforesaid.

10. Though the Second and Third Respondents were served with the said application, they did not enter appearance herein. However the First Respondent entered appearance.

Upon service, the Respondent opposed the application on the following grounds:

a) That the mandate of the First Respondent is to enforce Tax and Customs Laws and ensure correct tax is declared and paid by all taxpayers.

b) That the application offends the provisions of Section 135, 210, 229 and 211 of the East African Community Customs Management Act 2004 , which allows the First Respondent to demand for the short levied duty/tax.

- c) That it is only the First Respondent who has the mandate to determine whether correct duties have been paid and where necessary, demand for the short levied duty/tax.
- d) That the stay orders sought are pre-emptive and only aimed at forestalling the First Respondent's mandate of determining and demanding the correct tax with respect to the Applicant's Motor Vehicle.
- e) That there is no evidence to show how much tax/custom duty was paid before registration of the Applicant's Motor Vehicle.
- f) That prayer No. 3 of the Application is final in nature and can only be granted by the Tribunal upon hearing the main Appeal.
- g) That in view of the nature of the application, it is in the interest of justice that the same be determined together with the main Appeal instead of at the interim stage.
- h) That by virtue of Rule 10 (3) of the Tax Appeals Tribunal (Procedure) Rules 2015, this Honorable Tribunal may extend time for filing the Memorandum of Appeal if it is satisfied that the Applicant was unable to submit the documents because of either sickness, absence from Kenya or any other reasonable cause.
- i. That the Applicant had already started the process of review and had on 8th October 2019 written to the Commissioner of Investigation and Enforcement where he had stated his case and asked for a response from the Commissioner. The Applicant opted to abandon the process altogether and instead moved the Tribunal for leave to appeal out of time

11. The Tribunal has carefully studied the parties' pleadings and is of the respectful view that the only issue for its determination is whether the Applicant has exhausted the internal mechanism laid down by the law before moving this Honorable Tribunal for the orders sought.

12. The First Respondent contested the jurisdiction of the Tribunal to hear this application on grounds that there is no tax decision since it had not yet communicated to the Applicant on the Applicant's objection and as such there is no any appealable decision to be determined by this Honorable Tribunal as required under Section 229 (4) of the East Africa Community Customs Management Act, 2004, hereinafter referred to as EACCMA. The same provides as follows;

“ The Commissioner shall, within a period not exceeding thirty days of the receipt of the application under subsection (2) and any further information the Commissioner may require from the person lodging the application, communicate his or her decision in writing to the person lodging the application stating reasons for the decision”

13. We note that Section 229 and 230 of EACCMA, 2004, outlines the procedures for presenting an appeal. The said laid down legislation provide for mechanisms to be exhausted before a matter is moved to the Tribunal. The Applicant had started the process of review where he made an objection on 8th October 2019, which objection was still under review by the First Respondent, thus, pending the assessment, the Applicant opted to file an Appeal.

14. Moreover, under the Tax Procedures Act, 2015, an **“Appealable Decision” means an objection decision and any other decision made under a tax law other than (a) a tax decision; or (b) a decision in the course of making a tax decision.** Therefore, the Tribunal is of the considered view that a demand or directives made by the first Respondent cannot be termed as an appealable decision.

15. The Applicant would have waited for the First Respondent to exercise its power under Section 229(4) of EACCMA. Thereafter, upon being dissatisfied by the decision of the First Respondent on the Applicant's objection, the Applicant was at liberty to move this Honorable Tribunal by way of an appeal in accordance with Section 230 of EACCMA, which provides as follows; “ **A person dissatisfied with the decision of the commissioner under Section 229 may appeal to a tax appeals tribunal established in accordance with Section 231**”.

16. The Tribunal notes that the Respondent's directive was on 31st July 2019, receipt of which was acknowledged by the Applicant as on 4th October 2019. The Applicant then immediately objected to the same on 8th October, 2019 which objection was made within the statutory required timeline of thirty (30) days. However, before the same was responded to by the First Respondent, the Applicant filed an application to file an appeal out of time. The said application therefore is deemed as premature before this Honorable Tribunal as the Applicant had not exhausted the internal mechanism as set out in Sections 229 and 230 of EACCMA. The doctrine of exhaustion requires that the Applicant ought to have exhausted the internal dispute resolution mechanisms before moving to the Tribunal as it was cited in **Speaker of National Assembly Vs. Karume 1992 eKLR** which stated as follows; “**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**”.

17. It is worth noting that an internal mechanism for review of the Commissioner's decision is provided in Section 229 of EACCMA as follows;-

“229.(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.

(3)Where the Commissioner is satisfied that, owing to absence from the Partner State, sickness or other reasonable cause, the person affected by the decision or omission of the Commissioner was unable to lodge an application within the time specified in subsection (1), and there has been no unreasonable delay by the person in lodging the application, the Commissioner may accept the application lodged after the time specified in subsection (1).

(4) The Commissioner shall, within a period not exceeding thirty days of the receipt of the application under subsection (2) and any further information the Commissioner may require from the person lodging the application, communicate his or her decision in writing to the person lodging the application stating reasons for the decision.

(5) Where the Commissioner has not communicated his or her decision to the person lodging the application for review within the time specified in subsection (4) the Commissioner shall be deemed to have made a decision to allow the application.

(6) During the pendency of an application lodged under this section the Commissioner may at the request of the person lodging the application release any goods in respect of which the application has been lodged to that person upon payment of duty as determined by the Commissioner or provision of sufficient security for the duty and for any penalty that may be payable as determined by the Commissioner.”

18. In view of the foregoing, the Tribunal makes a finding that the Applicant has not exhausted the internal mechanisms set down by the law before making an application to file an appeal out of time.

19. Consequently, the application is unmerited and the Tribunal makes the following Orders:-

- a) The Notice of Motion application dated 16th October 2019 and filed on 17th October 2019 has no merits and is hereby dismissed.
- b) Each party to bear its costs.

DATED and DELIVERED at NAIROBI this 2nd Day of October, 2020.

JOSEPHINE K. MAANGI

CHAIRPERSON

TANVIR ALI

MEMBER

GEOFFREY KARUU

MEMBER

DELILAH K. NGALA

MEMBER



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