IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUSSA, J.A., MUGASHA, And J.A., LILA, J.A.)

CIVIL APPEAL NO. 80 OF 2018

THE COMMISSIONER GENERAL (TRA) ..... APPELLANT

VERSUS

MOHAMED AL-SALIM ..... 1ST RESPONDENT

OMARY ALLY HASSAN .....2ND RESPONDENT

(Appeal from the Judgment of the Tax Revenue Appeals Tribunal at Dar es Salaam)

(Twaib, J.)

dated 23rd day of February, 2017

in

Tax Appeal No. 3/2015

JUDGMENT OF THE COURT

9th & 29th April, 2019

MUGASHA, J.A.:

The dispute upon which this appeal hinges is related to the seizure and forfeiture of the respondents' goods which was carried out by the appellant on 20th July, 2013 on ground that, the respondents were found in possession of unaccustomed goods contrary to section 200(d) (iii) of the East African Community Customs Management Act of 2004 (the EACCMA).

This was followed by the appellant's compounding the offence in accordance with section 219 of the EACCMA subsequent to the alleged

admission of the offence by the respondents. Aggrieved by the appellants' action, on 24th July, 2014 the respondents lodged an appeal to the Tax Appeals Board (the Board) under section 16(1) of the Tax Revenue Appeals Act, Cap 408 R.E. 2002, and sections 230(1), (2) and 231 of the EACCMA among others. The appellant raised a preliminary objection on ground that the Board was not vested with jurisdiction to entertain the matter. The Board upheld the preliminary objection and struck out the appeal.

The respondents successfully lodged an appeal before the Tax Revenue Appeals Tribunal (the Tribunal) which reversed the decision of the Board having stated at page 124 of the record of appeal as follows:-

> *"With respect, we agree with the appellants on this point. The issue that they presented to the Board for its determination was that their confession was obtained under undue influence or duress, which would mean, if proved, that the admission that led to the compounding order was not obtained freely. That is essentially like saying that section 219(3) (e) of the EAC Customs Management Act, 2004 cannot be invoked to bar an appeal to the Board because, what the appellant asserts is that the conditions for a free admission of guilt that is appellant asserts is*

that the conditions for a free admission of guilt that is essential for a valid compounding order under subsection (2) of section 219 were not complied with. In other words, the crucial issue before the Board related to the legal validity of the compounding order, which could only be resolved upon an ascertainment of disputed facts.

Clearly, by delving into an exercise of ascertaining and evaluating factual points that were disputed, and in framing issues of fact when determining the preliminary objection, the Board erred in law and misdirected itself. It will be recalled that the Board had itself refused to allow the parties to adduce evidence, holding that preliminary objections cannot be based on evidence. However, in determining the preliminary objection, the Board committed the same sin: it conducted an examination of points of fact in which the parties were in dispute, and made conclusions on those facts. As counsel for the appellant submitted, in doing so, the Board allowed itself to be caught up in evidential matters, which were irrelevant in the determination of the preliminary objection. This was contrary to the principles in ***Mukisa Biscuits and Selcom Gaming Limited***

v. Gaming Management (t) Limited and Another *(both supra).*

It was therefore necessary for the appellants to be given an opportunity to prove that compoundment was done under undue influence. The appellants had the burden to prove the allegation by way of evidence."

Aggrieved by said the decision of the Tribunal, the appellant has appealed to the Court raising three grounds of complaint namely:

(1) The Tribunal erred in law in not holding that an order by Commissioner for customs under Part XVIII of the EACCMA is final and not subject to appeal.

(2) The Tribunal erred in law by directing the Board to hear on merit the appeal against the compounding order of the Commissioner for customs issued under Part XVIII of the EACCMA.

Parties filed written submissions containing arguments for and against the appeal respectively in terms of Rule 106(1) and (8) of the Tanzania Court of Appeal, Rules, 2009 (the Rules).

The grounds of appeal and the written submissions basically revolve on three main issues namely: **One,** whether the Board had jurisdiction to entertain the appeal against the Commissioner's compounding the offence order. **Two,** whether the Tribunal was justified in not holding that an order by the Commissioner for Customs under Part XVIII of the EACCMA is final and not appealable. **Three,** whether the Tribunal was justified to direct the Board to hear the merit of the respondents' appeal against the compounding order of the Commissioner for Customs issued under Part XVIII of the EACCMA.

At the hearing of the appeal, the appellant was represented by Mr. Marcel Busegano learned counsel, whereas the respondents had the services of Mr. Bernard Mbakileki, learned counsel.

The appellant faulted the Tribunal which ordered the Board to hear the appeal on merit arguing that to have contravened the provisions of section 219 (3) (e) of the EACCMA which subjects the compounding order to finality and not appealable and that such order may be enforced in the same manner as a decree or order of the High Court. Mr. Busegano submitted that, since the compounding order is final and not appealable, it may be challenged by way of Judicial Review and not by instituting an

appeal to the Board under section 16(1) of the Tax Revenue Appeals Act Cap 408 RE. 2002 (the TRAC). To back up his proposition reference was made to the case of **STEPHEN KIBERENGE AND OTHERS VS REPUBLIC** 1986 TLR P6. Moreover, Mr. Busegano urged the Court to rely on the persuasive decisions of the Board in **ISLAM SALEHE NAHID vs. COMMISSIONER GENERAL** (2008) Vol. 1 TTLR, 12, **RUNGWE FREIGHT (T) LTD VS COMMISSIONER GENERAL** (2002) TTLR, 106. In all those decisions, the Board categorically stated to lack jurisdiction to entertain an appeal against the Commissioner's compounding the offence order.

On the other hand, in the submission in opposition of the appeal, though it was not disputed that, the Commissioner's compounding the offence order is final, it was argued that, the finality is subject to the admission being obtained by free consent as envisaged by section 219(2) of the EACCMA before the offence is compounded. As such, in the determination of the preliminary objection, the Board did not consider that, there was no written admission of the respondents who were induced to admit the offence having signed the admission documents in exchange of a promise of paying the difference in tax between Zanzibar and Mainland Tanzania. Mr. Mbakileki argued this to be contrary to the provisions of

section 219 (1) and (2) of the EACCMA which necessitated the Tribunal to order the Board to hear the merits of the case instead of confining itself to the hearing and the determination of the so called preliminary objection which was mishandled.

He further added that, the statutes establishing Administrative Tribunals with provisions containing ouster or finality clauses are violative of the principles of natural justice as they adjudicate matters in which they have interest, pass decisions without hearing the parties and giving reasons thereto. To support this proposition, Mr. Mbakileki relied on cases cited in the list of authorities filed to wit: **JAMES FUNKE GWAGILO VERSUS ATTORNEY GENERAL** (2004) TLR 161, **RACECOURSE BETTING CONTROL BOARD VERSUS SECRETARY FOR AIR** (1944) 1 All ER 60,**ZUBERI MUSSA VERSUS SHINYANGA TOWN COUNCIL**, Civil Appeal No. 100/2004, **MUKISA BISCUIT MANUFACTURING CO. LTD VS WEST END DISTRIBUTORS LTD** [1969] 1 EA 696 (CAN),**SELCOM GAMING LIMITED VERSUS GAMING MANAGEMENT (T) LIMITED AND ANOTHER**, Civil Application No. 175 of 2005; **NATIONAL INSURANCE CORPORATION OF (T) LTD AND ANOTHER VERSUS SHENGENA LIMITED**, Civil Application No. 20 of 2007 at page 8 and

9 and **MOHAMED ENTERPRISES (T) LIMITED VERSUS MASOUD MOHAMED NASSER,** civil Application No. 33 of 2012 at page 10 and 11.

At the outset we must point out that jurisdiction of a Court or Tribunal is a creature of statute and not otherwise. This was demonstrated in the case of **ISIHAKA MZEE MWINCHANDE VS HADIJA ISIHAKA,** Civil Appeal No. 99 of 2010 (unreported) where the Court among other things said:

> "... *the term "jurisdiction" connotes the limits which are imposed by statute upon the power of a validly constituted court to hear and determine issues between parties seeking to avail themselves of its process,...* "

As such, whether or not the presiding Tribunal or Court has jurisdiction is the initial matter to begin with before proceeding to entertain and determined any matter before it. Secondly, an example of the preliminary on point of law is one that touches on jurisdiction of the court. (See **MUKISA BISCUIT MANUFACTURING CO. LTD VS WEST END DISTRIBUTORS LTD** [1969] EA 696. Thus, the preliminary objection on the question of

jurisdiction can be raised at any stage of the proceedings. (See- **MATHIAS EUSEBI SOKA (As personal representative of the late EUSEBI M. SOKA VS THE REGISTERED TRUSTEES OF MAMA CLEMENTINA FOUNDATION, JOHN AMOS UDUMBE AND THE NATIONAL INSURANCE CORPORATION,** Civil Appeal No. 40 of 2001 (unreported). Therefore, the preliminary objection raised on the question of jurisdiction must initially be heard and determined before dealing with the merits of the matter.

In the light of the stated preface which we consider crucial, it is undisputed that, the matter under consideration falls under section 219 of the EACCMA which regulates the mode of settlement of disputes by the Commissioner as follows:

"219. (1) The Commissioner may, where he or she is satisfied that any person has committed an offence under this Act in respect of which a fine is provided or in respect of which anything is liable to forfeiture, compound the offence and may order such person to pay a sum of money, not exceeding the amount of the fine to which the person would have been liable if he or she had been prosecuted and

convicted for the offence, as the Commissioner may deem fit; and the Commissioner may order any thing liable to forfeiture in connection with the offence to be condemned.

(2). The Commissioner shall not exercise his or her powers under subsection (1) unless the person admits in a prescribed form that he or she has committed the offence and requests the Commissioner to deal with such offence under this section.

(3). Where the Commissioner makes any order under this section –

(a). the order shall be put into writing and shall have attached to it the request of the person to the Commissioner to deal with the matter;

(b). the order shall specify the offence which the person committed and the penalty imposed by the Commissioner;

(c). a copy of the order shall be given to the person if he or she so requests;

(d). the person shall not be liable to any further prosecution in respect of the offence; and if any prosecution is brought it shall be a good defence for the person to prove that the offence with which he or she is charged has been compounded under this section; and

(e). the order shall be final and shall not be subject to appeal and may be enforced in the same manner as a decree or order of the High Court."

It is glaring that, under the cited provisions where the Commissioner is satisfied that any person has committed an offence punishable by a fine, if such person admits to have committed the offence the Commissioner may compound the offence and require such person to pay the fine. Therefore, the Commissioner's compounding the offence order originate from admitted criminal conduct or offence. As such, and taking into account that jurisdiction to adjudicate is mandated by the law, we asked

ourselves if the Board is vested with jurisdiction to entertain an appeal emanating from the Commissioner's compounding the offence order? We do not think so because since the offence was compounded in July, 2013 and the respective appeal filed before the Board on 24th July, 2014 this was before the coming into force of the Tax Administration Act of 2015. As such, the appellate jurisdiction of the Board was couched by section 7A of the Tax Appeals Revenue Act Cap 408 RE. 2002 as hereunder:-

> *"The Board shall not entertain any appeal arising from assessment of tax unless section 12 of this Act is complied with".*

As the matter at hand was not a dispute which arose from objection to tax assessment as envisaged by the repealed provisions of section 12 of TRAC; the respondents' appeal was not covered by that provision. Moreover, the provisions of sections 16 (1) of TRAC and 230(1) and (2) of the EACCMA under which the respondents' appeal was preferred do not confer the Board with the criminal appellate jurisdiction. Therefore, it was in the first place improper for the respondents to seek before the Board a remedy of an appeal against the Commissioner's compounding the offence order. Thus, with respect, the Tribunal erred in law to hold and direct the Board

to hear the respondents appeal to prove whether or not the compounding order was done under duress or undue influence because that did not fall under the domain of the Board whose jurisdiction is prescribed by law.

This takes us back to Section 219 (3) (e) of EACCMA under which the offence was compounded as it contains the finality clause which ousts the remedy of an appeal against the Commissioner's compounding the offence order. While Mr. Busegano argued that, such order may be challenged by way of Judicial Review instead of instituting an appeal to the Board, Mr. Mbakileki argued that, the jurisdiction of the Board was not ousted provided that it inquired on whether the respondents' admission was obtained by free consent and not by undue influence.

In resolving the matter under scrutiny, we have opted to borrow a leaf from the following decisions where the court was called upon to determine the jurisdiction of courts *vis a vis* the finality clauses appearing in statutes. In **EDWARDS VS BAIRSTOW** [1955] 3 ALL E.R. 48 the Court had to determine whether the word "final" contained in section 36 (3) of the National Insurance (Industrial Injuries) Act of 1946 of the United Kingdom ousted the entire jurisdiction of the court having said:

" *that the decision should be "final" merely meant that the decision should be final on the facts and should not be subject of appeal,* ***and the subsection did not exclude jurisdiction by certiorari."***

[Emphasis supplied]

Similarly, Dictum of Lord Summer in **R VS NAT BELL LIQUORS**, LTD [1922] 2 AC at page 159,160 applied Per DENNING L.J as follows:-

" *... on looking... into the old books I find it very well settled that* ***the remedy by certiorari is never to be taken away by any statute except by the most clear and explicit words. The word 'final' is not enough. That only means 'without appeal'. It does not mean 'without recourse to certiorari'.*** *It makes the decision final on the facts, but not final on the law."*

[Emphasis supplied]

The bolded expressions show that, the finality clauses oust remedy by way of an appeal and give recourse to judicial review.

We fully subscribe to the above holdings. Apparently, in Tanzania, decision of quasi judicial body which is final and not appealable can be challenged by seeking a judicial review before the High Court. This is in terms of Part VII sections 17 to 19 of the Law Reforms (Fatal Accidents and Miscellaneous Provisions) Act Cap 310 RE.2002.

Since the EACCMA is a Regional legislation which binds the partner states in its implementation, again we have considered it prudent to borrow a leaf from our close neighbour in Kenya on initial remedy to challenge the Commissioner's compounding order. In the case of **KENYA REVENUE AUTHORITY, COMMISSIONER OF CUSTOMS AND TWO OTHERS VS MODERN COAST BUILDERS AND CONTRACTORS** (2012) eKLR, the entitlement of the Commissioner to compound an offence in accordance with section 219 of the EACCMA where the Commissioner is satisfied that any person has committed an offence was challenged by way of judicial review.

Similarly, in the case of **KENYA REVENUE AUTHORITY AND SPECTRE INTERNATIONAL LIMITED** Civil Appeal No. 235 of 2010 [2013] eKLR, the

Court of Appeal dealt with an appeal from the High Court whereby the respondent commenced judicial review proceedings seeking certiorari, prohibition and mandamus against the appellant, after being informed that he had contravened section 200 of the EACCMA for diverting into local market 25 litres of local spirit. As such, the respondent was required to pay taxes and penalties in terms of section 210 of the EACCMA among others and also informed that, an offence would be compounded in line with section 219 (3) of the EACCMA.

Apart from subscribing to the mode of intervention by the Kenyan Courts, we are satisfied that the words " *the order shall be final and shall not be subject to appeal"* contained in section 219 (3) e of EACCMA mean that, the Commissioner's compounding the offence order is not subject to appeal. It can be challenged by way of Judicial Review at the High Court under the Law Reforms (Fatal Accidents and Miscellaneous Provisions) Act (supra). Thus, the complaints on undue influence and absence of free consent raised before the Tribunal as echoed by Mr. Mbakileki at the hearing of the appeal would be best addressed in a judicial review before the High Court instead of the ousted remedy of an appeal before the Board.

In this regard, since the Board is not clothed with appellate criminal jurisdiction, **One,** we are satisfied that, the Board was justified to conclude that it lacked jurisdiction to determine an appeal against the Commissioner's compounding the offence order under section 219(3) (e) of the EACCMA. **Two,** the Board ought to have only determined the preliminary objection which challenged its jurisdiction instead of entertaining the evidence on the propriety or otherwise of the respondents' admission before compounding of the offence. **Three,** the Tribunal faulted to overrule the Board that, since it had entertained evidential matters in the preliminary objection, then it ought to have considered if the admission was obtained by free consent or otherwise because the Board is not vested with jurisdiction to determine appeals from the Commissioner's compounding the offence order. Instead, the Tribunal ought to have invoked its revisional jurisdiction under section 11(1) of TRAC to correct the anomaly committed by the Board. **Four,** since it is settled law that the Board has no jurisdiction to entertain an appeal against the Commissioner's compounding the offence order, with respect, the Tribunal's direction to the Board to entertain the appeal was contrary to the provisions of section 219 (3) (e) of the EACCMA and section 7A of the TRAC.

In view of what we have endeavored to demonstrate, we find the appeal merited and it is allowed. We thus proceed to nullify the decision of the Tribunal and uphold the decision of the Board in its determination that it is not vested with jurisdiction to entertain an appeal against the Commissioner's compounding the offence order under section 219 (3) (e) of the EACCMA.

If the respondents so wish, they may seek a remedy of Judicial Review before the High Court subject to the law of limitation.

DATED at **DAR ES SALAAM** this 16th day of April, 2019.

K.M. MUSSA
JUSTICE OF APPEAL

S.E.A. MUGASHA
JUSTICE OF APPEAL

S.A. LILA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

B.A.MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL