IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., KENTE, J.A. And MURUKE, J.A.)

CIVIL APPEAL NO. 452 OF 2021

LAKAIRO INVESTMENT LIMITED ..... APPELLANT

VERSUS

COMMISSIONER GENERAL,
TANZANIA REVENUE AUTHORITY ..... RESPONDENT

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

(Mjemas, Chairman)

dated the 25th day of June, 2021

in

Tax Appeal No. 10 of 2020

.....

JUDGMENT OF THE COURT

14th August & 29th December, 2023

MWARIJA, J.A.:

This appeal is against the decision of the Tax Revenue Appeals Tribunal (hereinafter "the Tribunal") handed down on 25/6/2021 in Appeal No. 10 of 2020. That appeal originated from the decision of the Tax Revenue Appeals Board (hereinafter "the Board") in Customs and Excise Appeal (C & E Appeal) No. 13 of 2018 between the parties herein, LAKAIRO Investment Limited and the Commissioner General, Tanzania Revenue Authority (the Commissioner).

The facts giving rise to the appeal may be briefly stated as follows: The appellant herein was dissatisfied with the demand by the respondent for payment of taxes and duties amounting to a total of TZS 4,067,188.39 on exit goods alleged to have been illegally diverted by the appellant into domestic market without payment of taxes and duties. The demand was made vide the Commissioner's letter dated 24/1/2017.

As a result of having been aggrieved by the demand for payment of the above stated amount of taxes and duties, through his advocate, the appellant appealed by way of an application for review. He contended that, the calculations were based on external, not internal tariffs while the goods were manufactured in Kenya within the East African Community. The respondent did not respond to the application for review within the period of 30 days of the date of receipt of the letter as required by s. 229 (4) of the East African Community Customs Management Act, 2004 (the EACCMA). Instead, he wrote to the appellant on 19/12/2017 requiring him to pay the demanded amount.

Following that reply, the appellant decided to institute the C & E Appeal before the Board seeking *inter alia*, a declaration that, since the goods originated from Kenya, within the East African Community, the assessment of the demanded taxes and duties ought to have been based on the East African Community's preferential rates of 0% and VAT at 18% instead of Common External Tariffs rates of 25% and VAT at 18% which was applied by the respondent.

At the hearing of the C & E Appeal before the Board, the respondent raised a preliminary objection that the appeal was filed out of the period of 30 days of the date of receipt by the appellant, of the demand letter contrary to s. 229 (1) of the EACCMA. It was argued by the respondent's counsel that, whereas the demand for payment of taxes and duties was made by the respondent vide his letter dated 24/1/2017, the appellant filed his application for review before the Board on 1/3/2017 thus beyond the prescribed period of 30 days. On his part, the appellant's counsel countered the argument that the C & E Appeal was filed out of time. He argued that, time started to run from 12/2/2017 when the respondent replied the appellant's letter of application for review dated 29/11/2017.

According to the appellant's counsel, the appeal lodged before the Board was against the respondent's decision communicated through his letter dated 12/12/2017 not against the demand made vide the letter dated 24/1/2017.

Having considered the arguments of the learned counsel for the parties, the Board agreed with the learned counsel for the respondent that the C & E Appeal was filed out of time. Notwithstanding that finding, the Board was conversely of the view that, because the respondent did not reply to the appellant's application for review within the period of 30 days prescribed under s. 229 (4) of the EACCMA but did so on 21/11/2017 after the period of about 9 months, it ought to have considered the appellant's application for review because, in the circumstances, the application for review was not rendered time barred. On that reasoning, the Board overruled the preliminary objection and proceeded to allow the application. It stated as follows in its ruling at page 154 of the record of appeal;

> *"...since both parties were out of time in terms of section 229 of the EACCMA, it is our opinion that the Board proposes a way forward. In the result therefore, in the interest of justice, it is*

our settled opinion that the respondent's preliminary objection is overruled and the application for review be allowed so that the issues are sorted out and the legitimate duties and taxes are paid without further delay."

The respondent was aggrieved by the decision of the Board and thus appealed to the Tribunal. He contended, among other grounds, that the Board erred in proceeding to determine the C & E Appeal after it had found that the application for review lodged with the respondent was time barred. The Tribunal found that, from the parties submissions before the Board, there was no dispute that the appellant was served with the demand letter on 24/1/2017 and therefore, by filing the application for review on 1/3/2017 it did so out of time. It also considered the argument by the appellant that the preliminary objection was not based on pure point of law allegedly because the date on which the demand note was served to it was not ascertained. The Tribunal was of the view that, the argument was without merit because, as stated above, there was no dispute as regards the date of service upon the appellant of the demand letter. Having so found, the Tribunal allowed the appeal.

The appellant was dissatisfied with the decision of the Tribunal hence this appeal which is predicated on the following seven grounds:

1. *That the Tax Revenue Appeals Tribunal erred in law by upholding the respondent's appeal which was predicated on a preliminary objection which was not purely based on a point of law.*

2. *That the Tax Revenue Appeals Tribunal erred in law by failing to properly address and consider the provisions of section 50 (3) (c) (ii) of the Tax Administration Act, [Cap 438 R.E 2019] as they relate to determination of time limit for lodging an application for review under the provisions of section 229 (1) of the East Africa Community Customs Management Act, 2004.*

3. *That the Tax Revenue Appeals Tribunal erred in law by holding that the appellant's application for review was time barred*

4. *That the Tax Revenue Appeals Tribunal erred in law by holding that there was no valid application for review before the Commissioner to be considered in terms of the provision of section 229 (1) of the East Africa Community Customs Management Act 2004.*

5. *That the Tax Revenue Appeals Tribunal erred in law by holding that there was no final determination subject of appeal to the Tax Revenue Appeals Board in terms of Section 53 of the Tax Administration Act, [Cap 438 R.E. 2019].*

6. *That the Tax Revenue Appeals Tribunal erred in law by holding that the trial Tax Revenue Appeals Board had no jurisdiction to entertain the appellant's appeal lodged before it from the decision of the respondent.*

7. *That the Tax Revenue Appeals Tribunal erred in law by holding that there was no decision which was made by the respondent in respect of the time barred application for review and that the appellant herein had nothing to complain about or to be dissatisfied with for him to lodge a competent appeal before the trial Board while the respondent herein had already been deemed by law to have allowed the appellant's application for review."*

At the hearing of the appeal, the appellant was represented by Mr. Yusuf Mohamed assisted by Mr. Jovin Ndungi, learned advocates while the respondent was represented by Mr. Hospis Maswanyia,

learned Senior State Attorney. The appellant did not file written submissions and therefore, the appeal was argued orally. The appellant's counsel argued together grounds 1, 2, 3 and 4 and later grounds 5, 6 and 7.

Starting with the 5th, 6th and 7th grounds of appeal, Mr. Mohamed argued that, by failing to respondent to the appellant's application for review of the assessed taxes and duties within the prescribed period of 30 days from the date of receipt of the application as required by s. 229 (4), the respondent was deemed to have allowed it in terms of s. 229 (5) of the EACCMA.

For that reason, the learned counsel went on to argue, the Tribunal erred in holding that, there was no decision of the respondent which could be challenged by the appellant before the Board while to the contrary, there was a decision dated 12/12/2017 which, he said, was the subject of the appellant's appeal before the Board.

In reply, Mr. Maswanyia opposed the argument made by the appellant's counsel that the demand note did not constitute a decision capable of being challenged by way of an application for review. It

was the learned Senior State Attorney's submission that, the appellant's letter dated 29/11/2017 to which the respondent replied vide his letter dated 12/12/2017, was not an application for review. He stressed that, the appellant appealed against the respondent's decision communicated to it through the demand for payment of taxes and duties.

The issue which arises from those grounds is whether or not there was an appealable decision of the respondent prior to its letter to the appellant dated 12/12/2017. According to the appellant's counsel, it was through that letter the respondent communicated its decision, to the appellant and therefore, it was against such decision not the demand for payment vide the letter dated 24/1/2017, that the appellant lodged its application for review.

We have considered the submissions of the learned counsel for the parties on the above stated grounds of appeal. We need not be detained much in answering the issue stated above. We hasten to state that, the argument by the learned counsel for the appellant is without merit. It is clear from the record that, in his application for review the appellant was challenging the decision communicated to it

by the respondent vide the demand note dated 24/1/2017. In the application for review, the appellant prefaced it by stating that:

> *"We refer to the above matter, the Demand from Mr. Njaule Mdendu, Manager Control and Enforcement, and hereby withdraw all our previous correspondence* ***and now write to apply for a review in respect of the Demand.****"*
>
> *[Emphasis added]*

Clearly therefore, the answer to the issue is that, the application-for review was against the decision of the respondent requiring the appellant to pay Tshs. 4,067,711,188.39. That decision was communicated to it through the letter dated 24/1/2017.

On the first four grounds of appeal (the 1st, 2nd, 3rd and 4th grounds), the learned counsel for the appellant began by faulting the Tribunal for having failed to find that, the preliminary objection raised by the respondent during the trial was wrongly entertained because the same was not based on pure point of law. He contended that, the date on which the appellant was served with the demand note by the respondent was not ascertained and therefore, in order to determine whether or not the appeal before the Board was filed within the

prescribed time, evidence was required for that purpose. He cited the famous decision in the case of **Mukisa Biscuit Manufacturing Company Limited v. West End Distributors Company Limited** [1969] E.A 696 to support his argument.

The learned counsel for the appellant challenged also the finding by the Tribunal that, the application for review was time barred. In its decision, which was overturned by the Tribunal, the Board found that the application for review was filed outside the period of 30 days prescribed under s. 229 (1) of the EACCMA but held that, because the respondent did not also make a reply to the appellant's letter of application for review within the period of 30 days in terms of s. 229 (4) of the EACCMA, the delay by the appellant was excusable.

In reply to the submissions made in support of the 1st, 2nd, 3rd and 4th grounds of appeal, Mr. Maswanyia argued that, the appellant's application for review was served on the respondent outside the period of 30 days of the date when the former received the letter of demand to pay the assessed taxes and duties. According to the learned Senior State Attorney, since the application was time barred in

terms of s. 229 (1) of the EACCMA, the respondent had nothing to consider by way of a review.

He argued further that, in its decision at page 121 of the record of appeal, the Board found that the application was time barred and since the appellant did not challenge that finding by way of a cross appeal, its move to bring up the issue calling for ascertainment of the date of service of the demand note is nothing but an afterthought. On those arguments, the learned Senior State Attorney prayed that the appeal be dismissed.

Having duly considered the submissions of the learned counsel for the parties on the 1, 2, 3 and 4th grounds of appeal, we are of the settled mind that the same are devoid of merit. To begin with the argument that the preliminary objection was not based on a pure point of law allegedly because the date of service upon the appellant, of the demand note was not ascertained, we agree with Mr. Maswanyia that the contention is without merit. There was no dispute before the Board as regards the date of service of the demand note on the appellant. In his submissions in support of the preliminary objection, Mr. Maswanyia is recorded to have stated as follows:

"...the Commissioner for customs made its decision dated 24th January 2017. In that view,.. in relation to section 229 (1) of the EACCMA, 2004 the 30 days began to run against the appellant on 24th January 2017."

The learned counsel for the appellant did not dispute that contention by the respondent. His argument which was, with respect, a misconception, was that the appeal before the Board was against the decision communicated to the appellant through the respondent's letter dated 1/3/2017. In its finding, the Board agreed with the computation as submitted by the respondent's counsel and thus based its finding on that computation. The Board's finding was not challenged by the appellant by way of a cross-appeal. It cannot thus be heard to complain at this stage, on the issue of the date of service which he did not dispute at the trial before the Board.

With regard to the contention that the finding of the Tribunal that the application for review was time barred is erroneous, we similarly find no merit in the arguments made by Mr. Mohamed. In its decision, the Board found that, the appellant had lodged his application for review outside the period of 30 days prescribed under

s.229 (1) of the EACCMA. It observed as follows in its ruling at page 151 of the record of appeal;

> *"It is undisputed from the circumstances of this case that the letter dated 24th January 2017 by the respondent to the applicant is the tax demand note in this case. This tax demand note was objected by the applicant on 30th January 2017 but was disregarded by the applicant by the letter dated 1st march 2017 which is an application for review. Therefore, it is undeniable that* ***the application for review was made after the mandatory 30 days had elapsed*** *contrary to the requirement of s. 229 (1) of the EACCMA, 2004"*
>
> [Emphasis added].

Contrary to that finding however, the Board went on to state as follows in its ruling at page 152 of the record of appeal:

> *"With the foregoing explanation, we are of the unanimous opinion that both parties in this case did not carry out their respective submissions and reply within the mandatory prescribed time by law. Hence based on evidence on record adduced by the parties in*

this case, ***it is deemed that the present appeal is competent before the Board.***"

[Emphasis added].

With respect, we find that the Tribunal was justified to disagree with the reasoning of the Board. This is because, as is well known, two wrongs do not make a right. The fact that the respondent had delayed to respond to the appellant's application for review did not have the effect of condoning the delay on the part of the appellant. Section 299 (4) of the EACCMA applies only where an application for review is filed within time. It does not, as held by the Tribunal, apply to an incompetent application. In that regard, the provisions of section 50 (3) (c) (ii) and 53 of the Tax Administration Act, Chapter 438 of the Revised laws cited by Mr. Mohamed are of no assistance to the appellant.

Of course, we agree that, as matter of good practice and as a responsible Authority, notwithstanding the fact that the appellant's letter of application for review was time barred, the respondent ought to have replied to it promptly. However, his failure to do so did not have the effect of regularizing the defects of the appellant's

application. The available remedy on the part of the appellant was to apply for extension of time. In our considered view, the Tribunal was right in its finding that the Board erred in proceeding to entertain the application for review after having found it to be time barred. In the event, we dismiss the appeal with costs.

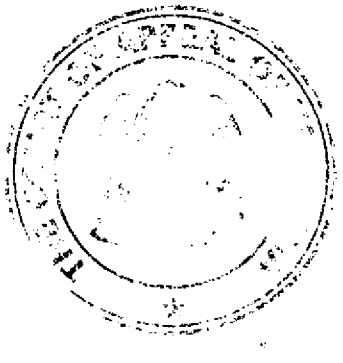
DATED at **DAR ES SALAAM** this 27th day of December, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

Z. G. MURUKE
JUSTICE OF APPEAL

The Judgment delivered this 29th day of December, 2023 in the presence of Mr. Jovin M. Ndungi, learned counsel for the Appellant and Mr. Achileus Charles Kalumuna, Mr. Rashidi Kiliza and Mr. Andrew Kevela both learned State Attorney for the Respondent, is hereby certified as a true copy of the original.



E. G. MRANGU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL