Njogu v Kenya Bureau of Standards (Tribunal Appeal 07 of 2019)
[2020] KEST 152 (KLR) (21 February 2020) (Ruling)

Neutral citation: [2020] KEST 152 (KLR)

REPUBLIC OF KENYA

IN THE STANDARDS TRIBUNAL

TRIBUNAL APPEAL 07 OF 2019

GM MBURU, CHAIR, H SIGEI, MS MAKHANDIA, P MUNGAI & L ABDIWAHID, MEMBERS

FEBRUARY 21, 2020

BETWEEN

ANTHONY NJOGU ..... APPELLANT

AND

KENYA BUREAU OF STANDARDS ..... RESPONDENT

RULING

1. This Honourable Tribunal pronounced itself on 13th December 2019 by dismissing the appeal filed by the now Applicant in an application dated 19th December, 2019 and filed on 24th December, 2019. The application seeks for orders to review the ruling in its entirety among other prayers.

2. The Honourable Tribunal on 24th January 2020 directed the respective parties to file and exchange written submissions on the application and reserved its ruling (this ruling) for 21st February, 2020.

3. The Application for review is premised on the following grounds among others;

    a. That this Honorable Tribunal per incurriam dismissed the Appeal, which was seeking to challenge two (2) specific decisions by the Respondent first that the Applicant's motor vehicle had altered chassis number; and secondly that the Applicant's motor vehicle had exceeded the eight (8) year limit; Submissions in support of the appeal are set-out in the Notice of Motion dated 19th December, 2019):

    b. Per incurriam the Tribunal dismissed the appeal, and held that notifying the Appellant 19 days late the Respondent had not acted unjustly.

    c. The Tribunal misapprehended the Appellant's grounds of appeal because the mere existence of a valid Certificate of Road Worthiness (hereinafter referred to as CoR) created a legitimate expectation for the Appellant in so far as the legality of the motor vehicle was concerned.

d. The Tribunal under Rules 4(1)& (2) as read with 5, of the *Standards Tribunal Rules of Procedure*, 2012 has powers to issue any orders it may deem appropriate.

Applicant's submissions

8. The Applicant submitted that the Honourable Tribunal erroneously held that there are discrepancies in the year of manufacture in the CoR, the email confirmation from the South Africa Police (hereinafter SAPs) and the online search. The Applicant further submitted that on the face of the CoR the year of manufacture is blank and has not been filled or set-out and as such no discrepancy as held actually exists.

9. The Applicant stated that the Honourable Tribunal misdirected itself in its analysis of the chassis number as contained in the various doc0uments. He however acknowledges that the chassis number was altered from the original number but asserts that an explanation to this effect was availed at the hearing.

10. He further submitted that the Tribunal per incurrium faults the Applicant for failing to avail a certificate of title or registration or a copy of the log book whereas the Applicant had tendered Customs Entry (C.17B Customs) Form that identified the vehicle and a certificate of ownership equally identifying the vehicle. We hasten to state that this document referenced here was actually not among the set of the documents filed alongside the appeal. They have been introduced and were attached to the application for review under the heading "appellants list and bundle of documents" dated 19th December, 2019 and filed on 23rd December, 2019.

11. The applicant further submitted that the Honourable Tribunal per incurriam misapprehended the CoR dated 30th October, 2018 terming it irrelevant as it refers to a different motor vehicle stating that the said CoR is key as it explains the modus operandi of the Respondent.

12. He concluded by submitting that the Tribunal's finding that it was "unable to ascertain the identity of the motor vehicle by way of the chassis number(s) or whatever other means" is an error apparent and sufficient ground for review.

Prayers sought

13. The Applicant finally prayed for orders of review of the ruling dated 13th December 2019 and for grant of the following reliefs among others:

a. An Order varying and or setting aside the Respondent's decision contained in their letter Ref No. KEBS/OP/10/1/Vol.125(01) and dated 4th October, 2019 notifying the Appellant that the subject motor vehicle will not be allowed into the country supposedly due to chassis number tampering and a purported allegation that the vehicle was overage; and/or in the alternative,

b. An Order directing the Respondent to re-inspect or analyses not just the subject motor vehicle but also the documents availed in support including seeking and obtaining any further clarifications form the relevant South African Authorities within fourteen [14} days of the Hon Tribunal's Order.

Respondent's submissions

16. It was the Respondent's submission that the Honourable Tribunal correctly exercised its discretion. That there are no grounds for review. It stated that the Applicant seeks to adduce fresh or new evidence,

that the purported new documents (import declaration form, single administrative document, motor vehicle and certificate of registration) were well within the Appellant's knowledge when the appeal was filed.

17. The Respondent refuted the claim that there was mistake or error on the face of record as alleged by the Appellant, and if any, is not self-evident and would require an elaborate argument to be established hence cannot be treated as an error apparent on the face of the record

18. The Respondent also submitted that an application for review is not meant to allow the losing party to re-litigate or re-open a matter merely because such a party is unhappy with the outcome.

19. In conclusion, the Respondent submitted that the Appellant has introduced a new relief in prayers sought by seeking an order directing the Respondent to re-inspect or analyze not just the subject motor vehicle but also the documents availed in support including seeking and obtaining any further clarifications from the relevant South African Authorities within fourteen(14) days of the Hon Tribunal's order.

Analysis and Findings

20. From the very onset, we are in agreement with the applicant that we have the jurisdiction to entertain this application because we are bound by the decision cited by the applicant of *Shanzu Investments Ltd V Commissioner of Lands* [1992]eKLR where the Court followed and cited its decision in *Wangechi Kimita and Another V Mutahi Wakubiru* CA No 81 of 1985 (Unreported) by holding that a Court in reviewing its decision may do so on account of an error apparent, discovery of new and important evidence but also on account of any other sufficient reason.

21. Having read and considered the submissions by both parties, it is now our turn to establish what grounds are available to a party seeking to review a decision rendered. In answering this question, Guidance can be obtained from the case of *National Bank of Kenya Ltd v Ndungu Njau* whe {1996} KLR 469 (CAK) at Page 381 where it was held:-

> "A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review."
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> The Court went further to state;
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> > "...an order cannot be reviewed because it is shown that the judge decided the matter on a foundation of incorrect procedure and or that his decision revealed a misapprehension of the law, or that he exercised his discretion wrongly in the case. Much less could it be reviewed on the ground that the other judges of coordinate jurisdiction and even the judge whose order is sought to be reviewed have subsequently arrived at different decisions on the same issue? In my opinion the proper way to correct a judge's alleged misapprehension of the procedure or the substantive law or his alleged wrongful exercise of discretion is to appeal the decision unless the error be apparent on the face of the record and therefore requires no elaborate argument to expose."(Emphasis added).

22. In *Abasi Belinda v Fredrick Kangwamu and another*{1963} E.A 557, Bennet J held that:-

> " a point which may be a good ground of appeal may not be a good ground for review and an erroneous view of evidence or law is not a ground for review though it may be a good ground for appeal"

23. The question before this Tribunal is whether the applicant has met the threshold for review based on his submissions. The applicant has submitted among others that there was an error apparent in the finding by the Tribunal that it was impossible to establish the year of manufacture of the said motor vehicle owing to the discrepancies in the CoR, the email confirmation from SAPS as well as the online search since the year of manufacture is blank in the CoR and thus no discrepancy as held actually exists.

24. A discrepancy is where there is lack of congruence, inconsistency and disagreement. The Applicant rightly submitted that the CoR lacks a set-out and definite date of manufacture, this in itself supports the inconsistency noted by this Honorable Tribunal as it does not offer much help in ascertaining the year of manufacture.

25. It was submitted in the documents filed in the appeal, and we indeed established that there were various chassis numbers to the subject motor vehicle. There was the original chassis number AHTCSGXXXXX78, Second chassis number AHTCS1XXXX876 (CoR of 30/4/19, Email from VCIU), actual chassis number AAPV0XXXX403 (CoR of 30/4/19, email from VCIU). In the absence of compelling and convincing explanation for the changes in the chassis numbers, the Tribunal had no option but to enter a finding that the mere existence of various chassis numbers which are not well explained was sufficient ground for the Tribunal to conclude that it was not possible to confidently ascertain the year of manufacture of the motor vehicle in question. Consequently, we maintain that there is no error in our finding on this part.

26. The Applicant's assertion to the effect that the Tribunal erred in its finding that there was a discrepancy in the chassis numbers, and by extension the year of manufactures its well with our interpretation and understanding of what amounts to an incorrect exposition of facts and an erroneous conclusion reached an not an error on record. Therefore, we see no error apparent that warrant review of the decision by this Honorable Tribunal.

27. Our position above is buttressed by the finding in the case of yamogo & *Nyamogo v Kogo* (2001) EA 174 the Court said that ...

> "There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view and is certainly no ground for a review although it may be a ground for an appeal. (emphasis added).

28. This laid down principle of law is indeed applicable in the matter before us and supports our finding that there was no error apparent on the face of record.

29. A review cannot be claimed or sought to present an opportunity for fresh arguments or for correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being required.

Re-appraisal of the entire body of evidence or interpretation of the law or how discretion was exercised would amount to exercise of Appellate Jurisdiction. This is what the application before us seeks us to do; which is not possible.

30. On whether we can allow the application on the basis of violation of the Applicant's fundamental rights and freedoms, the finding that there was no delay in notification of the decision by the Respondent still holds in our considered view. This is because Rule 14(2) of this *Tribunal's Rules of Procedure* require the Applicant to lodge an appeal within 14 days of being notified of the decision and not upon the decision being made as alleged by the Applicant. A decision is deemed made once notified to the affected party. One can however move the court to compel an administrative body to make a decision if an administrative body has failed to make a decision that is within its legal mandate we however note that this is not the case under this application. There is therefore no error at all in our finding and in our considered view the Applicant has misinterpreted the rules.

31. In conclusion, we find that an alleged misapprehension of facts does not amount to an error apparent in the face of the record and as such not a ground for review.

32. Consequently, the application for review dated 19th December, 2019 and filed on 24th December, 2019 lacks merit and the same is hereby dismissed with no orders as to cost.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF FEBRUARY, 2020.

Gladys Muthoni Mburu - (Chairperson)

Hillary Sigei - (Member)

Moses Sande Makhandia - (Member)

Peter Mungai - (Member)

Lul Abdiwahid - (Member)

Delivered in the presence of: