



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 463 OF 2018

**IN THE MATTER OF AN APPLICATION FOR LEAVE FOR JUDICIAL REVIEW ORDERS OF CERTIORAR,
PROHIBITIONI AND MANDAMUS**

AND

IN THE MATTER OF THE EAST AFRICAN COMMUNITY CUSTOMS MANAGEMENT ACT 2004

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

COMMISSIONER OF CUSTOMS AND BORDER CONTROL.....RESPONDENT

EX PARTE:

JAYRAJ IMPEX LIMITED

RULING

The Application

1. The *ex parte* Applicant, Jayraj Impex Limited, (hereinafter “the Applicant”), is a limited liability Company duly registered and incorporated as such to carry on business in the Republic of Kenya. The Commissioner of Customs and Border Control, who is the Respondent herein, is a statutory office established under the East African Customs Management Act of 2004

2. The Applicant filed a Chamber Summons application dated 27th November 2018, seeking the following orders :

1. The ex-parte applicant be granted leave to apply for:

a) An order of Certiorari to issue to remove and to bring before this Court for purposes of quashing the Respondent’s ruling and or decision dated 29th May 2018, and or any proceedings, authority, ruling decision and or order of the Respondent and or the Respondents officers, servants ,agents, subordinates and or employees classifying the consignment under review(ENTRY NO.2017 MSA 6540947) as HS Code 2403 of the East African Community Common External Tariff, on the basis of a physical verification and an assumption that “*chewing tobacco is highly fermented and liquored*” rather than on an empirical and scientific laboratory analysis of the samples.

b) An order of Certiorari to issue to remove and bring before this Court for purposes of quashing, any assessment of duty payable in respect of consignment under review(ENTRY NO.2017 MSA 6540947) on the basis of the Respondent’s ruling and or decision dated 29th May 2018 and or any proceedings, authority, ruling ,decision and or order of the Respondent and or the Respondent’s officers, servants, agents subordinates and or employees classifying the consignment under review (ENTRY NO.2017 MSA 6540947) as HS Code 2403 of the East African Community Common External Tariff, on the basis of a physical verification and as assumption that “*chewing tobacco is highly fermented and liquored*” rather than on empirical and scientific laboratory analysis of the samples.

c) An order of Prohibition do issue prohibiting the Respondent and or the Respondent’s officers, servants, agents, subordinates and/or employees from detaining, continuing to detain and or refusing to forthwith release the consignment under review (Entry NO.2017 MSA 6540947) to the Applicant on account of the Respondent’s ruling

and or decision and or order of the Respondent and or the Respondent's officers, servants, agents, subordinates and or employees classifying the consignment under review(ENTRY NO.2017 MSA 6540947) as HS Code 2403 of the East African Community Common External Tariff, on the basis of a physical verification and an assumption that "chewing tobacco is highly fermented and liquored" rather than on an empirical and scientific laboratory analysis of the samples.

d) An order of Mandamus do issue directing the Respondent and or the Respondent's officers, servants, agents, subordinates and or employees to cancel, delete and or remove any and all entries that may have been made in the Respondent's records which in any way adversely affects or prejudices the rights of the Applicant as a result of the Respondent's ruling of the 29th May,2018

2. The grant of leave herein do operate as a stay of the any proceedings authority, decision and or order of the Respondent and or the Respondent's officers, servants, agents, subordinates and/or employees dated the 29th May2018 and or subordinates and/ or subsequent thereto.

3. The cost if this application be provided for

3. The application was supported by the grounds on its face and by the Applicant's statement of facts and a verifying affidavit sworn on 27th November 2018 by Jayesh Patel, a director of the Applicant, and the annexures thereto. This Court directed that the said Chamber Summons be canvassed *inter partes* at a hearing held on 12th March 2018. Parties were thereupon directed by the Court to file and exchange written submissions on the application.

4. The Applicant's case in summary is that it imported a consignment of 480 bags (25kg per bag) of Sawaj Pandarpuri tobacco sometime in June 2017 for purposes of trading. Further, that the necessary taxes for the consignment amounting to Kshs 1,579,992/= were paid around the 7th July 2017. However that on 11th July 2017 the Respondent disputed the classification of the assignment, and in particular as to whether or not the same is raw or manufactured tobacco, and proceeded to raise a demand note for the payment of additional taxes amounting to Kshs 80,640,000/= making the total taxes payable in respect of the consignment to ksh 95,529,753/=.

5. Thereafter, a dispute arose as to the classification of the consignment as to whether the same was raw or manufactured tobacco, and under which code it was to be classified. That the Applicant took the view that the consignment was raw and unprocessed, while the Respondent insisted that it was processed/manufactured tobacco. Further, that tests were conducted by various public agencies which included the Respondent's internal department which found that the consignment was raw and/or unmanufactured tobacco.

6. However, that the Respondent in disregard of the findings made a ruling on 29th May 2018 to the effect that it is the only competent authority mandated to pronounce and issue a tariff ruling (classification), and that the consignment was considered to be chewing tobacco, classified in HS Code 2403.99.00 of EAC Common External Tariff. The Applicant thereupon lodged an appeal with the Tax Appeal Tribunal on 8th October 2018 being Appeal No. 296 of 2018, and averred that the same cannot be heard owing to the fact that the Tribunal as constituted lacks quorum as it has no members except the Chairman.

7. The Applicant faulted the Respondent's ruling for being contrary to the findings of the various laboratories where the samples of the consignment were sent for testing at the instance of the Respondent, and for being made in opaque without accountability, arbitrarily and in a highhanded manner, unpredictably and in disregard of the principles of natural justice. He further termed the decision as unjust in the manner in which it was arrived at or made, and therefore it's in the interest of justice.

8. The Applicant's advocates, Eliakim Owala & Company Advocates, in written submissions dated 24th January 2019 urged that the application is opposed by the Respondent on the ground that statutorily established dispute resolution mechanism has been exhausted by the Applicant pursuant to section 51 of the Tax Procedures Act of 2015 and section 9 of the Fair Administrative Action Act of 2015.

9. While acknowledging the existence and content of the said provisions, and that the right to approach the court for judicial review is subject to all other mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law being exhausted, the Applicant submitted that it had pleaded that that the Tribunal is yet to be constituted and hence inoperative as the chairman is the only one appointed. Therefore, that the lack of quorum at the Tax Appeals Tribunal for an indefinite period makes it impossible for taxpayers to access justice under the available statutory mechanism, and is an exceptional circumstance referred to in section 9 of the Fair Administrative Action Act.

The Response

10. The application was opposed through grounds of opposition dated 11th December 2018 were as follows

1. The application is incompetent, legally unsuitable and amounts to forum shopping and as such an abuse of the court process.

2. That the court lacks jurisdiction to hear the application on the grounds that there exists statutory dispute resolution mechanism under section 229 of the East African Community Customs Management Act which has been invoked through Tax Appeal Tribunal Appeal No 296 of 2018 which is pending hearing

3. The application is fatally defective as it offends the mandatory provisions of Section9(2),(3) and (4) of the fair administrative Action Act No 4 of 2015

4. This application for leave to commence Judicial review proceedings is therefore fatally defective for want of compliance with section 51(1) and (2) of the Tax Procedures Act 2015

5. Under the Circumstances, this application is a misconception and ought to be dismissed with costs to the Respondent.

11. The Respondent in addition filed a replying affidavit sworn on 4th April 2018 by Faith Kiara, an employee of the Kenya Revenue Authority from where the Respondent derives its mandate. The Respondent gave an account of the importation of and classification of the Applicant's consignment of tobacco, and averred that after conduction 100% verification of the consignment, it found that it contained sachets packed for retail as chewing tobacco, an applied a tariff of 240319 which attracts import duty of 25%, VAT of 16% and excise duty at Kshs 7000 per kg. That the total weight of the tobacco was 11,500 kgs, and the tax assessed was Kshs, 95, 529,753/= , and its ruling communicated to the Applicant by a letter dated 29th May 2018.

12. Further, that notwithstanding the Applicant seeking a review of the said ruling outside the statutory timelines by a letter dated 4th June 2018, it proceeded to file an appeal at the Tax Appeals Tribunal, to which the Respondent responded and which is pending hearing and determination. Therefore that the Applicant is seeking to invoke parallel litigation process through these proceedings.

13. The Respondent denied that its decision was made in an opaque, arbitrary, highhanded or whimsical manner and in disregard of the principles of natural justice, and pointed the court to its letter of demand for the assessed tax dated 28th July 2017, a copy of which was annexed. The Respondent further averred that the Applicant has not met the threshold for the grant of the orders sought as the Respondent actions were lawful procedural and in accordance with the various laws it administers. Lastly, that should the Court be minded to grant the Applicant leave, the Respondent sought that the Court's discretion be exercised to order for cash security for the taxes demanded.

14. Andambi Chabala Advocate for the Respondent filed submissions dated 28th January 2019, wherein reliance was placed on the case of **Republic vs County Council of Kwale & Another ex-parte Kondo & 57 Others**, and **Meixner & Another vs AG(2005) 1 KLR 189** on the importance and purpose of obtaining leave in a judicial review application, which is to filter out frivolous applications. It was the counsel's submission that in order to succeed in an application for judicial review, the applicant has the burden of demonstrating that the decision complained about is illegal unfair and irrational and that it must raise a serious issue, which had not been done in the present application.

15. Furthermore, that the application is fatally defective as it offends the mandatory provisions of section 229(1) of the East African Community Customs Management Act, which provides a dispute resolution mechanism under section which is not only adequate to resolve the dispute but would also offer an adequate remedy . The Respondent further submitted that it is from the decision of the Commissioner under section 229(4) that an appeal lies to the tax Appeals Tribunal under section 230 of the East African Community Customs Management Act. Therefore, that the application for leave is contrary to the provisions of sections 51(1) and (2) of the Tax Procedures Act 2015 and section 9(2)(3) and (4) of the Fair Administrative Action Act.

16. On the appeal filed by the Applicant at the Tax Appeal Tribunal being Appeal No 296 of 2018, the Respondent submitted that the same will be heard as soon as the membership of the tribunal is constituted. However, that the Applicant ought to have exhausted the laid down appellate mechanism before approaching the court, and that this case is therefore premature and should be remitted back to the Respondent for exhaustion as no exceptional circumstances arise in this case.

17. The Respondent cited the decisions in **Speaker of National Assembly vs Karume, (1992) KLR 21**, and **In The Matter Of The Mui Coal Basin Local Community, (2015) e KLR** for the proposition that once there is a clear procedure for redress of any particular grievance prescribed by the constitution or an Act of Parliament, the procedure should be strictly followed.

The Determination

18. The applicable law on leave to commence judicial review proceedings is *Order 53 Rule 1* of the Civil Procedure Rules, which provides that no application for judicial review orders should be made unless leave of the court was sought and granted. On whether leave once granted should operate as a stay, *Order 53 Rule 1(4)* of the Civil Procedure Rules further provides as follows:

“The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise.”

19. The reason for the leave was explained by Waki J. (as he then was), in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996** as follows:

“The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived... Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full *inter partes* hearing of the substantive application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised judicially”.

20. In the present application, it is evident that the Applicant is directly affected by the decisions of the Respondent, as it is required to pay a sum of Kshs 95, 529,753/= as assessed tax, and therefore has *locus* to bring the present proceedings. The substantive issues that require to be determined is whether leave should be granted to the Applicant to commence judicial review proceedings, and if so, whether the leave should operate as a stay.

21. There are two limbs to the issue as regards granting of leave to the Applicant in the present application. First, it is trite that in an application for leave such as the present one, the Court ought not to delve deeply into the arguments of the parties, but should make cursory perusal of the evidence before court and make the decision as to whether an applicant's case is sufficiently meritorious to justify leave. The merits test commonly applied is whether the challenge of challenge is arguable. In **Sharma vs Brown Antoine (2007) I WLR 780**, Lord Bingham explained that a ground of challenge is arguable if its capable of being the subject of sensible argument in court, in the sense of having a realistic prospect of success, however, that the test is flexible depending on the nature and gravity of the issues.

22. In the present application, the dispute between the Applicant and Respondent emanates from the classification made by the Respondent in a letter dated 29th May 2018, of a consignment of tobacco imported by the Applicant, and assessment of tax thereon based on the said classification. The Respondent alleges it followed due process and acted according to the law in reaching the said classification. The Applicant on the other hand alleges that the process of classification employed by the Respondent was arbitrary and disregarded the principles of natural justice, and relied on two analytical reports on the consignment prepared by the Intelligence and Strategic Operations Department of the Kenya Revenue Authority and the Government Chemist, which he claimed made contrary findings to that reached by the Respondent. The Applicant did annex the said report, and to this extent I find that it has shown an arguable case.

23. This brings into play the second limb as regards the exercise of this Court's discretion to grant leave. The Respondent argued that the Applicant is yet to exhaust the internal review mechanisms, and in particular that the Applicant has not exhausted the review mechanism provided for under section 229 of the East African Community Customs Management Act of 2014, and the appeals procedure provided for by section 31 of the Tax Procedures Act. Furthermore, that these procedure are mandatory under section 9(2) and (3) and (4) of the Fair Administrative Action Act which provide as follows:

“(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

24. The Applicant on its part did not dispute that its first port of call in terms of review after the Respondent's decision of 12th May 2018 was to the Commissioner under section 229 of the East African Community Customs Management Act, and thereafter the Tax Appeals Tribunal under section 230 of the Act. Its position is that it is exempted from the said procedures due to the lack of quorum at the Tax Appeals Tribunal under section 9(4) of the Fair Administrative Action Act. The incomplete constitution of the Tax Appeals Tribunal was not disputed by the Respondent. The said section 9(4) provides as follows:

(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.”

25. It is trite law that judicial review is a remedy of last resort, and where an adequate alternative is available, the Court will usually refuse permissions to apply for judicial review, unless there are exceptional circumstances justifying the claim proceedings as provided for in section 9 (4) of the Fair Administrative Action. Section 229 of the East African Community Customs Management Act of 2014 in this respect provides a statutory dispute resolution mechanism that the Applicant was required to engage in at the first instance as follows:

“(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 other that, owing to the 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 a time specified in subsection (1), and there has been no unreasonable delay by the person 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”.

26. Under section 230 of the said Act, a person dissatisfied with the decision of the Commissioner under section 229 may appeal to the Tax Appeals Tribunal established by the Partner States pursuant to the provisions of section 231, and a person intending to lodge an appeal under this section shall lodge the appeal within forty-five days after being served with the decision, and shall serve a copy of the appeal on the Commissioner. Similar provisions are provided for in sections 51 and 52 of the Tax Procedures Act as regards objections from tax decisions, and appeals therefrom to the Tribunal. Lastly, the said Tribunal is established by Tax Appeals Tribunal Act, 2013 (No. 40 of 2013).

27. The Applicant in this respect annexed a copy of letter dated 4th June 2018 to its verifying affidavit, which was addressed to the Commissioner of Customs, seeking a review of the ruling dated 29th May 2018, and the reasons for the Objection to the said ruling. No evidence was brought by the Applicant to show that the said objection was heard and dismissed to warrant the appeal to the Tax Appeals Tribunal, or of its fate. The Applicant therefore needs to exhaust this particular remedy before relying on the difficulties that are presented by the Constitution of the Tax Appeals Tribunal and before approaching this Court.

28. Therefore, this Court finds that contrary to the Applicant’s averments, there was an available alternative remedy that would have adequately addressed, in terms of outcome, the substance of the Applicant’s grievance and the protection orders it seeks, and also in an expeditious manner, as illustrated in the foregoing. The appeal to the Tax Appeals Tribunal is a second tier in the dispute resolution process that is established by the cited applicable laws, and to this extent was a premature intervention by the Applicant.

29. As the Applicant has not shown any difficulty faced in accessing the Commissioner under section 229 of East African Community Customs Management Act or section 51 of the Tax Procedure Act in this regard, this Court cannot usurp the functions of the Commissioner of Customs in resolving the dispute presented by the Applicant.

30. In the premises, I find that the Applicant’s Chamber Summons dated and annexed is not merited, and I decline to grant the leave sought by the Applicant. The Applicant is however at liberty to request for extension of time to lodge its request for review dated 4th June 2018 with the Commissioner of Customs, in accordance with the provisions of section 229 of the East African Community Customs Management Act.

31. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 18TH DAY OF MARCH 2019

P. NYAMWEYA

JUDGE