



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI [CENTRAL REGISTRY]
J R MISC. APPLICATION NO. 58 OF 2013

IN THE MATTER OF: KENYA REVENUE AUTHORITY ACT

AND

**IN THE MATTER OF: EAST AFRICAN COMMUNITY CUSTOM
MANAGEMENT ACT**

AND

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO
APPLY FOR ORDERS OF JUDICIAL REVIEW IN THE NATURE
OF CERTIORARI PROHIBITION AND MANDAMUS**

AND

REPUBLICAPPLICANT

VERSUS

**KENYA REVENUE AUTHORITY
COMMISSIONER OF CUSTOM SERVICES.....RESPONDENTS**

AND

ROMAGECO KENYA LIMITEDEX PARTE APPLICANT

RULING

1. By Chamber Summons dated 11th February 2013, the ex parte applicant herein sought the following orders:

- 1. That this application be certified as urgent and disposed of ex parte forthwith.**
- 2. That leave be granted to the Applicant to apply for orders of certiorari to remove into this Honourable Court and quash the decision of the Respondents communicated to the Applicant by e-mail on 4th January 2013 in response to the Applicant’s letter of**

Application for Review dated 29th November 2012 in accordance with the Provisions of Section 229(1) giving reasons for the Application under Section 229(2) of the EACCMA.

3. That leave be granted to the Applicant to apply an order of Mandamus to issue to compel the Respondents to correctly classify semi finished steel products under heading 72.07 of the World Customs Organization Harmonized Systems.

4. That leave be granted to the Applicant to apply and Order of prohibition to issue to prohibit the Respondents from re-classifying semi-finished steel products under heading 87.08 of the World Customs Organization Harmonized Systems.

5. That leave be granted to the Applicant to apply an order of prohibition to issue to prohibit the respondents from re-classifying semi-finished steel products under heading 87.08 of the World Customs Organization harmonized Systems.

6. That the leave so granted do operate as a stay of the decisions of Respondents, to demand tax on the re-classification of the goods and issuance or enforcement of distress, distraint or any agency notices based on the said entries.

7. Costs of and incidental to the application be provided for.

8. Such further and other reliefs that the Honourable Court may deem just and expedient to grant.

2. On 25th February, 2013, I granted the Ex parte applicant leave to apply for judicial review in terms of prayers 2, 3, 4 and 5 of the Chamber Summons dated 12th February 2013. I further granted a temporary stay of demand of the disputed tax pending the hearing of the prayer for the said stay *inter partes* and further directed that the Motion be filed and served within 10 days.
3. Order 53 Rule 1(4) of the Civil Procedure Rules provides:

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:

Provided that where the circumstances so require, the judge may direct that the application be served for hearing inter partes before grant of leave. Provided further that where the circumstances so require the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days.

4. Whereas the said provision does not, strictly speaking, provide for the grant of a temporary stay pending inter partes hearing, it is my view that in deserving cases the Court may grant a temporary stay in the exercise of its inherent jurisdiction pending *inter partes* hearing hence the said temporary stay was granted pursuant to the said inherent jurisdiction.
5. When counsel for the parties appeared before me on 11th March 2013 for the hearing of the said prayer for stay inter partes, **Mr Wanderi**, learned counsel for the Respondent informed the Court that the Respondent would not wish to file papers in opposition to the said prayer but taking into account the fact that similar prayers were sought in Judicial Review Application No. 232 of 2008 which was dismissed, a conditional stay ought to be granted to the effect that the applicant ought to provide security by way of a banker's guarantee for the disputed sum of Kshs 14,695,185.00 in favour of the 1st respondent herein. **Mr Ogonji**, learned counsel for the applicant, on his part offered a security in the sum of Kshs 1,000,000.00.
6. I have had the advantage of perusing the proceedings in the said Judicial Review Application No. 232 of 2008 and it is true that the same was dismissed on 9th March 2012.
7. Taking into account the fact that the earlier suit was dismissed for want of prosecution, it is only

just that the applicant ought to offer security. Accordingly the order that commends itself to me is that the stay sought be granted on condition that the applicant secures a bank guarantee from a financial institution agreeable to both parties in favour of the 1st Respondent in the sum of Kshs 5,000,000.00 within 14 days from the date hereof. In default of compliance the stay will be deemed to have been denied.

8. This order will similarly apply to Judicial Review Miscellaneous Application No. 73 of 2013 between the same parties.

Dated at Nairobi this day 15th day of March 2013

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr. Wanderi for Respondent

Mr. Ogola for Applicant