REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NO. 38 OF 2010

IN THE MATTER OF AN APPLICATION BY BIDCO OIL REFINERIES LIMITED FOR ORDERS OF CERTIORARI AND PROHIB ITON

IN THE MATTER OF THE EAST AFRICAN CUSTOMS MANAGEMENT ACT 2004

THE REPUBLIC .....APPLICANT

AND

KENYA REVENUE AUTHORITY .....RESPONDENT
EX-PARTE
BIDCO OIL REFINERIES LTD

JUDGEMENT

The genesis of this application (Nairobi High court Misc. Application No. 38 of 2010, Republic Vs. Kenya Revenue Authority Ex-parte Bidco Oil Refineries Limited) is a consent order which was entered in Nairobi High Court Misc. Civil Application No. 568 of 2009, Republic vs. Kenya Revenue Authority Ex-parte Bidco Oil Refineries Limited. As can be seen, the parties in the first application are the parties in the instant application. By a consent order entered in the first application on 28th October, 2009 the same was withdrawn to be settled out of court. The issues in dispute in the first application are therefore not before this court for determination.

The consent order entered in the first application was in the following terms:-

(a) The Respondent shall unconditionally withdraw all assessments of duty and decisions leading to the letter dated 16th of September, 2009 calling upon the applicant to make payment of Kenya Shillings Seven Hundred and two Million Three Hundred and Forty four thousand Give Hundred and Twenty Seven (kshs.702,344,527/=) and all consequential actions based on the same.
(b) The Applicant shall unconditionally withdraw this Judicial Review proceeding in its entirety seeking orders of certiorari and Prohibition challenging all assessments of duty and decisions based on the letter dated 16th September, 2009 calling upon the applicant to make payment Seven Hundred and Two Million three Hundred and forty Four Thousand Five hundred and Twenty Seven (Kshs.702,344,527/=) and all consequential actions based on the same.
(c) The Commissioner General of the Respondent as per his letter of 25th, September, 2009 shall within Seven (7) days of this order appoint a team of technical experts to look into the dispute and to interpret the statutory regimes and parameters of determination of value and assessments of duty as provided for under Section 122 and the rules 2, with adjustments under rule 9 in the fourth Schedule of the East African Community Customs Management Act, 2004 (EACCMA Act).
(d) The Applicant shall be at liberty to make such technical and legal representations to the team

of technical experts.
(e) The team of technical experts shall make their report to the parties herein within fifteen (15) days of their appointment.
(f) The expenses incidental to the Bank Guarantee for Kshs.351,172,263.00 to abide the report of technical experts only in the event that the report of the technical experts come up with a finding that there are no taxes owed to the Respondent under the circumstances.
(g) Notwithstanding the provisions paragraph (a) above the Commissioner shall be at liberty to issue fresh demands, as by law provided, should the technical experts come up with a report that taxes are owing from the imports under reference.
(h) Notwithstanding the provisions of paragraph (b) above this agreement does not restrict in any way the applicant's right to challenge any fresh assessment demands by the Respondent, as by law provided.

Subsequent to the consent order the respondent set up a team of technical experts (**TTE**) who came up with a report. Acting on that report the respondent addressed to the applicant a letter dated 22nd January, 2010 demanding payment of Kenya shillings Seven Hundred and Eighty Million Eight Hundred and Seventy One thousand Two Hundred and Ninety Two (Kshs.780,871,292/=). It is the applicant's case that the **TTE** was not formed in accordance with the consent order and neither was its formation and execution of its mandate within the timelines set in the consent.

By a notice of motion dated 11th February, 2010 and filed in court on 12th February, 2010 the applicant therefore prays for orders as follows:-

1. THAT this Honourable court do grant the Applicant Orders of Certiorari to remove into this Honourable Court and to quash the Report of the Team of Experts appointed by the Commissioner General, Kenya Revenue Authority to look into the decision made by Kenya Revenue Authority, Customs Services De4partment pursuant to a consent Order dated 28th of October, 2009 in Misc. Civil Application No. 568 of 2009 THE REPUBLIC VS. KENYA REVENUE AUTHORITY EX-PARTE: BIDCO OIL REFINERIES LIMITED forwarded by the letter of 20th November, 2009.
2. THAT this Honourable Court do grant the applicant Orders of Certiorari to remove into this Honourable court and to quash the decision contained in the letter from the Commissioner of Customs Services of the Kenya Revenue Authority dated 22nd of January, 2010 calling upon the applicant to make payment of Kenya shillings Seven Hundred and Eighty Million Eight Hundred and Seventy One thousand Two Hundred and Ninety Two (Kshs.780,871,292/=).
3. THAT this Honourable Court do grant the applicant an order of prohibition to prohibit Kenya Revenue Authority from demanding enforcing, collecting or in any other way from taking any step or action in respect of or connected with the Report of the Team of Experts appointed by the Commissioner General, Kenya Revenue Authority to look into the decision made by the Kenya Revenue Authority, Customs Services Department pursuant to a consent Order dated the 28th October, 2009 in Misc. Civil application No. 568 of 2009 THE REPUBLIC VS. KENYA REVENUE AUTHORITY EX-PARTE BIDCO OIL REFINERIES LIMITED forwarded vide the letter of 20th November, 2009.
4. THAT this Honourable Court do grant the applicant an order of prohibition to prohibit the Kenya Revenue Authority from demanding, enforcing collecting, issuing agency notices to the applicant's Trading Partners, Distributors, Bankers or in any other way from taking any step or action in respect of or connected with the decision contained in the letter from the Commissioner of Customs Services of the Kenya Revenue Authority dated 22nd of January, 2010 calling upon the Applicant to make payment of Kenya Shillings Seven Hundred and Eighty Million Eight Hundred and Seventy One Thousand Two Hundred and Ninety Two (Kshs.780,871,292/=).
5. THAT the costs of this application be in the cause.

The application is supported by a statement dated 10th January, 2010, a verifying affidavit sworn by Vimal Shah on 10th February, 2010 a replying affidavit sworn by Vimal Shah on 2nd June, 2010.

The respondent opposed the application through a replying affidavit sworn by Ruth Wachira on 10th May, 2010, a further affidavit sworn by Ruth Wachira on 20th September, 2010, a supplementary affidavit sworn by Ruth Wachira on 15th February, 2011 and annexures to the affidavits.

I have perused all the papers filed in this case. In my view the applicant is saying that the report of the **TTE** should be quashed because:-

1. The TTE was constituted outside the mandatory time schedules contained in the consent order dated 28th October, 2009;
2. The TTE was made up of the employees of the Respondent and was not an independent team of experts as envisaged by the consent order dated 18th October, 2009;
3. The TTE report substantially and prejudicially considered other extraneous matters beyond its terms of reference thereby specifically contravening clause (b) of the consent order dated 28th October, 2009 ; and
4. The TTE contravened the provisions of the East African Community customs Management Act in arriving at its findings.
5. The TTE failed to observe the rules of natural justice since the Respondent cannot be a prosecutor, witness and judge in its own cause.
The respondent on its part argues that:-
1. The TTE was appointed within 7 days and completed its work within 15 days as per the terms of the consent order.
2. The TTE was properly composed and executed its mandate professionally thereby generating a report which resulted in the issuance of a demand letter dated 22nd January, 2010 for the payment of the sum of kshs.780,871,292.00 by the Applicant.
3. The TTE specifically addressed itself to its mandate and did not take into account any extraneous matters.
4. The TTE complied with the provisions of the East African Community Customs Management Act in executing its mandate.

As I clearly stated at the outset the issues for determination in this case are limited to the consent order dated 28th October, 2009 entered by the parties herein in Nairobi High Court Misc. application No. 568 of 2009.

In my view those issues are:-

1. Whether the **TTE** was formed and executed its mandate within the consent order timelines;
2. Whether the **TTE** was properly constituted;
3. Whether the **TTE** breached the respondent's right to natural justice; and
4. Whether the **TTE** exceeded its mandate.

It is important to note at this stage that before the consent order was recorded in court the parties had been engaged in behind the scenes negotiations.

In the papers filed in court, the parties do not seem to be in agreement as to what took place before the consent order was recorded. In the consent order a letter dated 25th September, 2009 written by the Commissioner General of the respondent referred to the said letter which was addressed to the Managing Director of the applicant states in part that :-

"I have read through the provisions of section 229 of EACCMA, 2004 and wish to make the following decision;

· **That my office will constitute a team of technical experts to look into the dispute with a view of reaching an amicable solution.**
· **That the agency notice will be lifted subject to BIDCO paying of security amount of 50% of kshs.703,344,527 pending the findings of the constituted team – Section 229 (b) of EACCMA 2004**

had reference.

- **That the findings of the team will be final and subject to no further appeal to my office.**
- **That if BIDCO is not comfortable with the aforesaid then the company is at liberty to seek arbitration elsewhere as they deem fit."**

Looking at that letter it is clear that the **TTE** was to be constitute by the Commissioner General of the respondent without any input from the applicant. It is the applicant's case that the **TTE** was supposed to be made up of independent experts and not employees of the respondent. The respondent does not dispute the fact that the **TTE** was made up of its employees. The respondent submitted that the **TTE** was up to the task because its membership was drawn from various departments and the members had vast experience and expertise in the customs, valuation and tax matters. The respondent also submitted that the members of the **TTE** were professionals who came up with an independent report. The respondent also submitted that the applicant was all along aware that the **TTE** would be made up of its employees since the respondent's statutory mandate cannot be transferred to a third party. Ruth Wachira who is a Senior Deputy Commissioner in the respondent's Customs Service Department deponed in paragraphs 66 to 70 of her replying affidavit sworn on 10th May, 2010 that the applicant's counsel Mr. Ochieng Oduol was clearly told that a **TTE** made of independent persons could not be formed since that would amount to the respondent abdicating its statutory responsibilities. She further deponed that the applicant's counsel appreciated the respondent's position and that is why the word independent was dropped from the consent. In paragraph 79 of his replying affidavit sworn on 2nd June, 2010 Vimal Shah denies that the respondent was aware of the composition of the **TTE** before receiving the report of the **TTE**.

I have carefully looked at the submissions in respect of the **TTE**. I have considered the portions of the affidavits relating to the composition of the **TTE**. I have also looked at the annextures relating to the constitution of the **TTE**. Looking at the letter of the Commissioner General dated 25th September, 2009 addressed to the Managing Director of the applicant and the consent order dated 28th October, 2009 it becomes clear that the constitution of the TTE was left in the hands of the Commissioner General of the respondent. It should be noted that the formation of the **TTE** was as a result of an appeal made by the respondent under Section 229 of EACCMA. That Section gives the Commissioner power to make a decision on an application for review. The taxpayer in this case the applicant does not have any role to play in the manner in which the Commissioner decides to go about handling the application for review. My understanding is that an appeal under Section 229 is made to the Commissioner of Customs (see the definition in Section 2 of EACCMA) and not to the Commissioner General of KRA. I do not wish to say anything else on this point because the issue has not been taken up by any of the parties.

When the parties entered the consent order in question, the expertise of the members of the **TTE** was not put in the consent this clearly shows that the composition of the **TTE** was left in the hands of the Commissioner General. I am therefore in agreement with the respondent that the respondent cannot be faulted for constituting the **TTE** in the manner it did. The applicant's submission that the TTE was not properly composed and that it was not made up of technical experts is therefore rejected.

Another issue is whether:-

a) The **TTE** was constituted within 7 days; and
b) The **TTE** completed its work within 15 days.

It is the applicant's case that the **TTE** was not constituted within 7 days and neither did it conclude its work within 15 days. The applicant submits that failure by the Commissioner to constitute the TTE within 7 days and failure by the **TTE** to conclude its work within 15 days resulted in a breach of the terms of the consent order thereby rendering the report of the **TTE** useless. It is the respondent's case that the timelines set in the consent order were complied with. The respondent cited a letter dated 5th November, 2009 addressed to the applicant's advocates to demonstrate that the **TTE** was constituted within 7 days. In the said letter the applicant's advocate is being informed that the **TTE** had been constituted and his client was at liberty to make representations to the **TTE**. The respondent cites another letter dated 20th November, 2009 to demonstrate that the **TTE** completed its work within 15 days. In that letter Mr. Vimal

Shah the managing Director of the respondent is being informed that the report of the **TTE** was ready for presentation. The applicant argued that the two letters exhibited by the respondent were backdated to meet the consent order timelines. The applicant submitted that the letter dated 20th November, 2009 was delivered to its offices on 25th November, 2009.

Looking at the evidence place before the court on the issue of the timelines set in the consent order, it is clear that no evidence has been tendered by the applicant to show that the respondent backdated its letters. The word of the Managing Director of the applicant has been used as evidence of backdating of the letters by the respondent. Without any other evidence the word of the Managing Director remains were allegation. From the dates on the two letters above cited, only conclusion one can reach is that the TTE was constituted within 7 days and it concluded its work within 15 dates as per the consent order. I therefore reject the applicant's claim that that timelines provided in the consent order were not met. Another question to be answered in this judgement is whether the TTE overstepped its mandate. Counsel for the applicant submitted that the TTE overstepped its mandate by make assessment under paragraph 53c of the Fourth Schedule and yet the consent had specifically referred to assessment under paragraph 2 of the Fourth Schedule. According to clause (c) of the consent order the TTE was to:-

".....look into the dispute and to interpret the statutory regime and parameters of determination of value and assessment of duty as provided for under Section 122 and the Rules 2, with adjustments under Rule 9 of the Fourth Schedule of the East African Community Customs and Management Act, 2004 ("EACCMA Act").

I do not know why the respondent opted to have the determination of the value of the goods of duty restricted to rules/paragraphs 2 and 9 of the Fourth Schedule and yet Section 122 EACCMA clearly provided that the value of imported goods shall be determined in accordance with the Fourth Schedule. Having said so, I must state that the TTE confined itself to the mandate given to it under clause (c) of the consent order. There is no evidence whatsoever to show that the TTE took extraneous factors into consideration when reaching its report.

Another question on the same line with the question I have just determined is whether the applicant was given a hearing by the TTE. The letter dated 5th November, 2009 shows that the applicant was invited to make submissions to the TTE. The applicant did make submissions and those submissions were considered by the TTE. The applicant cannot therefore say it was not heard. It was also argued by the applicant that even if it was heard then the hearing was biased because Mrs. Wambui Namu the Commissioner Customs Services had influence over Several members of the TTE. This argument is difficult to follow because in the first place the TTE was formed after an application for review was made by the applicant in accordance with Section 229 of EACCMA. As I have already shown, an application for review under Section 229 EACCMA is made to the Commissioner of Customs who in the Kenyan case is Mrs. Wambui Namu Parliament therefore clearly intended that the commissioner of Customs be given an opportunity to review his/her decision before a tax payer starts the appeal process. The applicant cannot therefore complain of any bias in the circumstances of this case.

At the end of the day I find that the TTE executed its mandate as envisaged in the consent order dated 28th October, 2009. The procedure used cannot therefore be faulted. Judicial reviews is about the process and not the merits of the case. The applicant may not be happy about the decision reached by the TTE. The applicant could genuinely have good reasons for challenging the decision reached by the TTE. The route the applicant should have taken was that provided by Sections 230 and 231 of EACCMA. The respondent told the court that Tax Appeals Tribunal Envisaged by Section 231 was established in December, 2009 and the applicant cannot say he had nowhere to go to after the TTE made its report. Even if a Tax Appeals Tribunal had not been established, the only way the applicant could have approached this court was to challenge the decision as provided by Section 251 (6) of EACCMA.

In conclusion, I find that the applicant did not suffer any procedural prejudice in the hands of the respondent. Why a public body had followed the correct procedure in reaching a decision, an aggrieved party can only attack such a decision through an appeal and not by way of judicial review. In the circumstances of this case, the applicant's case fails and its application is dismissed. Considering that the

relationship between the ex-parte applicant and the respondent will outlive this judgment, I make no order as to costs.

Dated and signed at Nairobi this 28th day of February , 2012 .

W. K. KORIR
JUDGE