



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

MISCELLANEOUS APPLICATION NO.38 OF 2010

**IN THE MATTER OF AN APPLICATION BY BIDCO OIL REFINERIES LIMITED FOR
ORDERS OF CERTIORARI AND PROHIBITON**

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

THE REPUBLICAPPLICANT

AND

KENYA REVENUE AUTHORITYRESPONDENT

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 same parties in the instant application. By a consent order entered on 28th October, 2009 in the first application, that application was withdrawn to be settled out of court.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 Five 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 of

Kenya Shillings 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 of 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 (hereinafter referred to by the abbreviation 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/=).

The applicant is through this application challenging the fresh demand by the respondent. 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 Department 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 and annexures to the affidavits.

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 the same Ruth Wachira on 15th February, 2011 and annexures to the affidavits.

I have perused all the papers filed in this case and in my understanding the applicant is saying that the report of the TTE should be quashed for the following reasons:-

- 1. The TTE was constituted and concluded its work 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 28th October, 2009;**
- 3. The TTE report substantially and prejudicially considered other extraneous matters beyond its terms of reference thereby specifically contravening clause (c) 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 the demand letter dated 22nd January, 2010 for the payment of the um 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.

In my view therefore, the issues for determination in this case are limited to the implementation of the consent order dated 28th October, 2009 entered in **Nairobi High Court Misc. Application No. 568 of 2009** by the parties herein. The issues can be summarized as follows:-

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 rules of 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. The negotiations must have made it possible for the parties to record the consent order. 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. The documents placed before this court will however enable the court to understand what took place before the consent was recorded. The consent order refers to a letter dated 25th September, 2009 addressed to the Managing Director of the applicant by the Commissioner General of the respondent. The said letter 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 (6) of EACCMA 2004 has 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.”**

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 did 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 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 further 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 stated 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 team of technical experts made up of persons from outside the respondent’s employees could not be formed since that would amount to the respondent abdicating its statutory responsibilities. She further stated that the applicant’s counsel appreciated the respondent’s position and that is why the word independent was dropped from the consent order. In paragraph 79 of his replying affidavit sworn on 2nd June, 2010 Vimal Shah denies that the ex-parte applicant was aware of the composition of the **TTE** before receiving its report.

I have carefully looked at the submissions in respect of the composition of the **TTE**. I have considered the affidavits in as far as they relate to the composition of the **TTE**. I have also looked at the annexures

relating to the constitution of the **TTE**. Looking at the letter of the Commissioner General of the respondent 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 application for review made by the respondent under Section 229 of EACCMA. That the applicant had made an application for review of the tax assessment is clear from the Commissioner General's letter dated 25th September, 2009. It is clear from a reading of Section 229 EACCMA that the Commissioner is the person empowered to make a decision on the application for review. The taxpayer, in this case the applicant, does not have any role to play in the manner in which the Commissioner handles the application for review.

Secondly, it should be noted that when the parties entered the consent order in question, the expertise of the members of the **TTE** was not included in the consent. Failure to include the composition of the **TTE** in the consent order can only mean that the composition of the **TTE** was left in the hands of the Commissioner General. In the affidavits filed in court the respondent has clearly explained that the members of the **TTE** were selected because of their experience and expertise in matters of customs, valuation and assessment. Matters of customs, valuation and assessment of taxes had been raised by the applicant in its application for review. I am therefore in agreement with counsel for the respondent when he submits that the respondent cannot be faulted for constituting the **TTE** in the manner it did. The applicant's argument that the **TTE** was not properly composed and that it was not made up of technical experts is therefore rejected.

Another issue to be considered is whether the **TTE** was composed within 7 days from the date of the consent order and whether it concluded its work within 15 days from the date it was appointed. It is the applicant's case that the **TTE** was not constituted within 7 days from the date of the consent and neither did it conclude its work within 15 days from the date of its appointment. 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** unacceptable. 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 after its composition. In the second letter Mr. Vimal Shah, the Managing Director of the ex-parte applicant, 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 placed 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 mere allegation. Not much can be read from the fact that one of the letters was not delivered to the offices of the applicant on the date it was written. From the dates on the two letters above cited, the only conclusion one can reach is that the **TTE** was constituted within 7 days and it concluded its work within 15 days as per the consent order. I therefore reject the applicant's claim that the 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 making assessment under Paragraph 3 of the Fourth Schedule and yet the consent had specifically referred to assessment under Paragraph 2 of the same Schedule. It is the respondent's case that the **TTE** restricted itself to the terms of clause (c) of the consent order. 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”).”

It is important to note from the outset that Section 122 EACCMA clearly provides that the value of imported goods shall be determined in accordance with the Fourth Schedule. The consent order through clause (c) however specifically limits the respondent to determine the value of the goods in question and to assess duty “as provided for under Section 122 and the Rules 2, with adjustments under Rule 9 in the Fourth Schedule” of EACCMA. In my view clause (c) of the consent order does not come out very clearly. However, my understanding of this clause is that the parties were agreeing that Section 122 and rules/paragraphs 2 and 9 of the Fourth Schedule of EACCMA were to be applied by the TTE when determining the value of the goods and assessing the duty payable. I am of the view that the decision in this case will turn upon the provisions of the law contained in clause (c) of the consent order and I find it necessary to reproduce the relevant parts of these provisions for the purpose of this judgement. Section 122 of EACCMA provides that:-

“122.(1) Where imported goods are liable to import duty *ad valorem*, then the value of the goods shall be determined in accordance with the Fourth Schedule and import duty shall be paid on that value.

(2) Upon written request, the importer shall be entitled to an explanation in writing from the proper officer as to how the Customs value of the importer’s goods was determined.

(3) Where, in the course of determining the customs value of imported goods, it becomes necessary for the Customs to delay the final determination of such customs value, the delivery of the goods shall, at the request of the importer be made:

Provided that before granting such permission the proper officer may require an importer to provide sufficient guarantee in the form of a surety, a deposit or some other appropriate security as the proper officer may determine, to secure the ultimate payment of customs duties for which the goods may be liable.

(4) Nothing in the Fourth Schedule shall be construed as restricting or calling into question the rights of the proper officer to satisfy himself or herself as to the truth or accuracy of any statement, document or declaration presented for customs valuation purposes.

(5) The Council shall publish in the Gazette judicial decisions and administrative rulings of general application giving effect to the Fourth Schedule.

(6) In applying or interpreting this section and the provisions of the Fourth Schedule due regard shall be taken of the decisions, rulings, opinions, guidelines, and interpretations given by the Directorate, the World Trade Organization or the Customs Cooperation Council.

(7) The rate of exchange to be used for determining the equivalent of a Partner State currency of any foreign currency shall be the selling rate last notified by the Central Bank of the respective Partner State when an entry is presented to and accepted by the proper officer.”

The Fourth Schedule provides for the determination of value of imported goods liable to *ad valorem* import duty. Rule/Paragraph 2 deals with transaction value and partly provides that:-

“2.(1) The customs value of imported goods shall be the transaction value, which is the price actually paid or payable for the goods when sold for export to the Partner State adjusted in accordance with the provisions of Paragraph 9.....”

Paragraph/Rule 9 provides for adjustments to value and the relevant subparagraphs in as far as this case is

concerned are (2), (3) and (4) and they state as follows:-

“9. (2) In determining the value for duty purposes of any imported goods, there shall be added to the price actually paid or payable for the goods:-

(a) the cost of transport of the imported goods to the port or place of importation into the Partner State, provided that in the case of imports by air no freight costs shall be added to the price paid or payable;

(b) loading, unloading and handling charges associated with the transport of imported goods to the port or place of importation into the Partner State; and

(c) the cost of insurance.

(3) Additions to the price actually paid or payable shall be made under this paragraph only on the basis of objective and quantifiable data.

(4) Additions shall not be made to the price actually paid or payable in determining the customs value except as provided in this paragraph.”

This court will therefore have to find out whether the **TTE** acted outside Section 122 EACCMA and paragraphs 2 and 9 of the Fourth Schedule of the same Act. The applicant submitted that in the Executive Summary of the **TTE** report it is indicated that Rule 3 of the Fourth Schedule which deals with “transaction value of identical goods” had been used instead of Rule 2 as agreed in the consent. In the further affidavit sworn on 20th September, 2010, Ruth Wachira averred that the invoices of other players in the same industry were only used to **“show that other suppliers of similar and identical goods from the same geographical region were compensating at the invoice value and was not a basis of computation of taxes as under Paragraph 3 of the Fourth Schedule of EACCMA....”** The explanation given by Ruth Wachira is supported by Section 122(4) EACCMA which gives room to the proper officer to get information from other sources. The **TTE** was not under an obligation to rely solely on the information supplied by the applicant. In fact the respondent had already demonstrated by carrying an audit on the applicant’s operations that the information the applicant had supplied was not reliable. The report of the **TTE** shows that the value of the applicant’s imports was based on the provisions of Paragraph 9(2) of the Fourth Schedule. The price of the imported goods was arrived at after the transportation and insurance costs were taken into account as provided by paragraphs 2 and 9 of the Fourth Schedule. I therefore do not agree with the applicant’s claim that the **TTE** took extraneous matters into consideration when arriving at its decision. The only conclusion is that the **TTE** made its decision within the terms of the consent order.

Another important issue to be addressed 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 to the Commissioner General of the respondent through a letter dated 16th November, 2009. The applicant argued in the written submissions filed in court that the said letter was addressed to the Commissioner General and not the **TTE** and it cannot be said the letter amounted to representations made to the **TTE**. This argument cannot be bought when one considers that the **TTE** was formed by the Commissioner General after an application for review made under Section 229 of EACCMA. In fact the said letter is clearly titled **“MEMORANDUM OF SUBMISSION BY BIDCO OIL REFINERIES LIMITED TO THE TEAM OF EXPERTS APPOINTED BY THE COMMISSIONER GENERAL.....PURSUANT TO A CONSENT ORDER DATED 28TH OF OCTOBER 2009 IN MISC. CIVIL APPLICATION NO. 568 OF 2009....”** Why then should the applicant be heard to say it was not afforded a hearing? There is nothing placed before this court by the applicant to show that the submissions it made were not considered by the **TTE**.

It was also argued by the applicant that even if it was given an opportunity to be heard, then what took place cannot be called a hearing because Mrs. Wambui Namu the Commissioner of Customs Services had influence over the majority of the members of the **TTE**. The applicant submitted that the application for

review made to the Commissioner General was made against the decision of the Commissioner of Customs Services. This argument does not resonate with the provisions of EACCMA. The **TTE** was formed after an application for review was made by the applicant in accordance with Section 229 of EACCMA. An application for review under Section 229 EACCMA is made to the Commissioner of Customs who in the Kenyan case is Mrs. Wambui Namu (Section 2 of EACCMA refers). Parliament therefore clearly intended that the Commissioner of Customs be given an opportunity to review his/her decision before a taxpayer starts the appeal process. That means Mrs. Wambui Namu was by law entitled to actively participate in the review of the decision she had made earlier. The applicant has not demonstrated that the Commissioner of Customs was biased and cannot therefore complain of any bias in the circumstances of this case.

Finally it was argued by the applicant that the assessment and findings by the **TTE** are contrary to EACCMA and contrary to known customs of valuations by customs authorities and the general agreement of customs valuation by the World Customs Organization. The applicant would have really assisted this court by pointing out the specific customs valuation rules breached by the respondent. Without any evidence placed before the court to show that the respondent indeed broke the law when making the assessment, the only conclusion is that the respondent did not contravene the law.

At the end of the day it is clear that the **TTE** executed its mandate in accordance with the consent order dated 28th October, 2009 and the law. The procedure used cannot therefore be faulted. Judicial review looks into the process of making a decision and not into the correctness of the decision made. The applicant may not be happy about the decision reached by the **TTE** and could have good reasons for challenging that decision. 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 it had nowhere to go to after the **TTE** made its report. Even if a Tax Appeals Tribunal had not been established by the time the respondent demanded payment of taxes from the applicant, the only way the applicant could have approached this court was to challenge the decision through an appeal as provided by Section 251(6) of EACCMA.

In conclusion, I find that the applicant did not suffer any prejudice under the procedure used by the respondent to handle its application for review. When a public body has 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. The ex-parte applicant's case is not a case befitting the issuance of judicial review orders. The same therefore fails and it is dismissed with costs to the respondent.

Dated and signed at Nairobi this 8th day of March, 2012

W. K. KORIR
JUDGE