



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURT

MISCELLANEOUS CIVIL APPLICATION NO.181 OF 2011

**REPUBLIC .....APPLICANT**

**VERSUS**

**THE COMMISSIONER OF CUSTOMS SERVICES .....RESPONDENT**

**EX-PARTE.....UNILEVER KENYA LIMITED**

**JUDGEMENT**

Pursuant to powers found in the East African Community Customs Management Act, 2004 (hereinafter simply referred to as EACCMA) the Commissioner of Customs Services (the respondent) conducted a post clearance audit of the operations of Unilever Kenya Limited (the ex-parte applicant) for the period January, 2005 to December, 2009 and found that the ex-parte applicant had been using a wrong Harmonized System tariff code for some of its food flavours and was also under-declaring some of its pre-importation costs. As a result of the audit, the respondent issued a partial demand for Kshs.8,612,193.00. The ex-parte applicant fully settled this amount. The parties agreed that the ex-parte applicant would provide the respondent with technical data sheets so that the respondent could submit the same to its Customs Laboratory for analysis in order to determine the correct tariff classification. As a result of the analysis of the technical data by the respondent's Customs Laboratory, the respondent on 9<sup>th</sup> February, 2011 issued a notice to the ex-parte applicant demanding kshs.102,254,601.00 as unpaid tax.

By a letter dated 8<sup>th</sup> March, 2011, the ex-parte applicant wrote to the respondent requesting for a review of the decision pursuant to the provisions of Section 229 of EACCMA. The respondent agreed to review the decision and on 16<sup>th</sup> March, 2011 drew samples for purposes of subjecting the same to laboratory analysis. As a result of the second laboratory analysis the respondent through a letter dated 18<sup>th</sup> July, 2011 informed the ex-parte applicant that the tax due was Kshs.65,335,378.00. Following that demand the ex-parte applicant moved to court on 29<sup>th</sup> July, 2011 and obtained leave to commence judicial review proceedings.

Through a notice of motion dated 18<sup>th</sup> August, 2011 the ex-parte applicant therefore prays for orders as follows:-

**1. An Order of Certiorari to remove into the High Court for purposes of its being quashed the decision and order of the Commissioner of Customs Services dated 18<sup>th</sup> July, 2011 and consequently the demand dated 9<sup>th</sup> February, 2011.**

**2. An Order of Prohibition to prohibit the Commissioner of Customs Services from demanding the tax claimed in her decision dated 18<sup>th</sup> July, 2011 and consequently the demand dated 9<sup>th</sup> February, 2011.**

**3. An Order that the Respondent do pay the cost of the proceedings.**

The application is supported by grounds on its face, an affidavit sworn on 29<sup>th</sup> July, 2011 by Nazima Saeed Malik, a statement dated 29<sup>th</sup> July, 2011, a verifying affidavit sworn by John Ndungu Kigathi on 29<sup>th</sup> July, 2011, a further affidavit sworn by the same John Ndungu Kigathi on 20<sup>th</sup> January, 2012 and all the annexures to the affidavits.

The grounds in support of the application are:-

**(a) The Respondent issued a demand to the Applicant on 9<sup>th</sup> February, 2011 to recover tax amounting to Kshs.102,254,601.**

**(b) The Applicant, pursuant to the provisions of section 229(1) of the East African Community Customs Management Act (hereinafter referred to as “the Act”) lodged an application with the Respondent to review her decision.**

**(c) Section 229(4) of the Act requires the Respondent to communicate her decision in respect of an application to review brought under Section 229(1) and (2) within a period of 30 days and to state the reasons for her decision.**

**(d) Section 229(5) provides that where the Respondent fails to communicate her decision within the stated period, then the Respondent will be deemed to have allowed the Application for review.**

**(e) The Respondent failed to communicate her decision in respect of the Applicant’s Application for review within the 30 day time period stipulated in the Act. By virtue of the clear provisions of Section 229(5) of the Act, she is therefore deemed to have allowed the Application for review.**

**(f) As the Respondent is deemed to have allowed the Applicant’s Application for review, the Respondent has no jurisdiction to demand the tax stated in the demand dated 18<sup>th</sup> July, 2011 and consequently the demand dated 9<sup>th</sup> February, 2011.**

**(g) Alternatively and without prejudice to (f) above the Respondent is acting unreasonably and in excess her jurisdiction by demanding payment of the sum of kshs 65,335,378 and is also acting in excess of her jurisdiction in threatening to institute recovery measures.**

The respondent opposed the application through a replying affidavit sworn on 11<sup>th</sup> November, 2011. It is the respondent’s case that the tax demand was lawful. The respondent also argues that the ex-parte applicant ought to have resorted to the appeal procedure provided by EACCMA.

The facts of this case are not in dispute. Through a letter dated 8<sup>th</sup> March, 2011 the ex-parte applicant applied to the respondent for a review of the tax demand contained in the letter dated 9<sup>th</sup> February, 2011. The respondent informed the ex-parte applicant about the outcome of the review through a letter dated 18<sup>th</sup> July, 2011. The outcome of the review was that the tax demand had been revised downwards from the kshs.102,254,601.00 demanded on 9<sup>th</sup> February, 2011 to Kshs.65,335,378.00.

The ex-parte applicant says that this tax cannot be paid since it is assumed that the respondent had allowed its application for review when it failed to make a decision within 30 days from the date of the application for review namely 8<sup>th</sup> March, 2011. The ex-parte applicant’s case is squarely premised on the interpretation of subsections 4 and 5 of Section 229 of EACCMA. For the purpose of this judgment, I find it necessary to reproduce the entire Section 229 EACCMA which states as follows:-

**“229.(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 that, owing to 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 time specified in subsection (1), and there has been no unreasonable delay by the person in 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 had 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.**

My understanding of the above quoted section is that once a taxpayer lodges an application for review, the Commissioner of Customs who is the respondent in this case has 30 days within which to make and communicate a decision to the taxpayer. If the respondent does not communicate a decision within 30 days, then the respondent “shall be deemed to have made a decision to allow the application.” The law is so clear that it can only be interpreted in one way.

The ex-parte applicant lodged an application for review on 8<sup>th</sup> March, 2011 and provided further information on 16<sup>th</sup> March, 2011 when samples for laboratory tests were taken by the respondent. The 30 days therefore started running from 16<sup>th</sup> March, 2011. The respondent communicated the decision to the ex-parte applicant on 18<sup>th</sup> July, 2011. By communicating the decision four months from 16<sup>th</sup> March, 2011 the respondent was clearly in breach of the provisions of Section 229 EACCMA. There is evidence that the parties kept on communicating even after the 30 days had lapsed and one can say that ex-parte applicant had consented to the delay by continuing to communicate over the issue with the respondent. One can say the ex-parte applicant was being a wily fox by giving the respondent the impression that the awaited decision was going to be lawful. The ex-parte applicant was however being clever within the law and the law allows such cleverness. The law is however clear and even if the ex-parte applicant had consented to the delay, that would still not have made the respondent’s demand valid. The respondent’s letter dated 18<sup>th</sup> July, 2011 means nothing since the respondent’s failure to communicate a decision to the ex-parte applicant by 16<sup>th</sup> April, 2011 meant that the respondent had accepted the ex-parte applicant’s application for review. The implication of the respondent’s non-communication within the statutory period of 30 days is that the ex-parte applicant did not owe the taxes demanded by the demand notice of 9<sup>th</sup> February, 2011. The respondent’s decision in the letter dated 18<sup>th</sup> July, 2011 which revised the tax demand downwards from Kshs. 102,254,601.00 to Kshs. 65,335,378.00 was therefore void from the beginning. The law as it is presumes that by failing to communicate a decision by 16<sup>th</sup> April, 2011 the respondent was telling the ex-parte applicant that its appeal against the tax demand contained in the notice dated 9<sup>th</sup> February, 2011 had been allowed and the ex-parte applicant did not owe the respondent any tax in respect of that particular demand. It is clear that the respondent is

barred by the law from ever recovering the tax demanded in the letter dated 9th February, 2011 and revised by the letter dated 18<sup>th</sup> July, 2011.

The respondent also argued that the ex-parte applicant should have gone to the Tax Appeals Tribunal set up by Section 231 of EACCMA. The ex-parte applicant's counsel told the court that there was no decision from the respondent to appeal against and the respondent's purported demand of 18<sup>th</sup> July, 2011 was a clear violation of the law. I agree with the ex-parte applicant that due to the respondent's breach of the clear provisions of Section 229, there was no valid decision under Section 229(4) EACCMA which the ex-parte applicant could have appealed against to the Tax Appeals Tribunal. The letter dated 18<sup>th</sup> July, 2011 came three months late and by writing the letter, the respondent acted in gross violation of an Act of Parliament. The only avenue open to the ex-parte applicant was to come to this court and ask the court to deal with the respondent by way of judicial review. The ex-parte applicant had no obligation to appeal against an ultra vires decision. In the circumstances of this case, I find that the ex-parte applicant has knocked the right door with the correct application. The applicant's application is therefore allowed with costs to the applicant.

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

**W. K. KORIR**  
**JUDGE**