REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Judicial Review 96 of 2008

REPUBLIC

-VERSUS-

KENYA REVENUE AUTHORITY …..... 1ST RESPONDENT

THE COMMISSIONER OF

CUSTOMS AND EXCISE …..……. 2ND RESPONDENT

EX-PARTE

MODERN COAST BUILDERS

& CONTRACTORS LTD ……..…….. 1ST APPLICANT

VANTAGE CLEARING

AND FORWARDING CO. LTD …… 2ND APPLICANT

JUDGMENT

Applicant's Case

1. The 1st *ex-parte* applicant, Modern Coast Builders and Contractors Limited ("MCBC"), imported 160 pieces of passenger seats from China for use in their business operating in Kenya. It claims that import duty was verified and demanded and on 11th February 2008, it paid Kshs. 207,211.00 on account of duty through its clearing agent, the 2nd *ex-parte* applicant. The applicants aver that on 25th February 2008, the respondents, instead of releasing the imports, demanded an additional Kshs. 27,742/= after appraisal of the import value. This sum was duly paid.

2. The ex-parte applicants further claim that instead of releasing the goods, the respondent further demanded an additional sum of Kshs.325,179.00 and a Kshs.100,000/- fine. It is the additional demand for duty that compelled the *ex-parte* applicants to bring these proceedings for judicial review by way of the Notice of Motion dated 18th March 2008. The *ex-parte* applicants seek the following orders;

(a) An order of certiorari removing to this Honorable Court for the purpose of being quashed the decision of the respondents to hold and detain the applicants' imported goods (Bus-Passenger Seats) and imposing on the applicants an additional duty of Kshs. 325,179.00 and a fine of Kshs.100,000 for alleged under declaration of quantity of imported goods.

(b) The applicants be awarded costs of this Application.

3. The motion is supported by the verifying affidavit of Osman Abdulaziz sworn on 12th March 2008 and the statutory statement dated 12th March 2008.

4. When the matter was filed, the Court (Wendoh J) granted leave and ordered that the seats be released on condition that the *ex-parte* applicants deposit the sum of Kshs. 425,179.00 in court. The *ex-parte* applicants duly complied with the order by depositing the sum in court on 12th March 2008 and the seats were duly released.

5. Mr Kaluma, counsel for the applicants, relied on the submissions dated 17th April 2012. He submitted that in law the duty payable on imported goods is determined based on the value of the imports and not "the quantity of the imports." The *ex-parte* applicants furnished the respondents with the import documents which were the basis of the computation of duties payable on the subject goods; which the *ex-parte* applicant duly paid.

6. Counsel contended that the respondents are vested with power to appraise duty payable on imports, based on value of similar goods. In this case, the respondent's officers conducted 100% verification process for the imported goods and considered the value of similar goods in the marked before appraising demanding and receiving from the applicants Kshs.27,472.00

7. The applicants' contention is that the seats in issue were 160 pieces, with each made to carry 2 passengers and not 320 pieces as claimed by the respondents in later attempt to justify their unlawful actions. The respondents took into account irrelevant considerations in coming to the decision the subject matter of this action.

8. Counsel also contended that the imposition of a fine was illegal and payable upon conviction in a criminal process as the applicant was not subjected to any criminal process the claim for fine is unmerited misplaced and unlawful.

9. Mr Kaluma submitted that there was no basis in these circumstances to demand extra duty or fines from the *ex-parte* applicant and the application should be allowed.

Respondent's Case

10. The respondents have opposed the motion based on the replying affidavit of Peter Kipserem Bitok sworn on 17th April 2005. He was an officer who was, at the time material to this case, working in the Customs Services Department.

11. Mr Bitok depones that MCBC had on 9th February 2008 imported a 1 x 40 ft container said to contain passenger seats which were subsequently declared in Customs import entry No. 2008 MSA 1078563. The quantity was shown as 160 Units and the Unit FOB price as US$18.00

12. Upon registration of the import entry for processing with Customs, it was recommended that the quantity and value of the seats be determined before the processing of the entry. The container was duly verified and found to contain 80 cartons of passenger seats of a kind fitted in buses. Each box contained four individual seats, packed in sets of two, the total number of seats was found to be 320. In addition there were 3 cartons containing fittings for fixing the seats on the floor of buses according to the verification report.

13.The valuation of the seats was done and a value of US$23.00 was recommended. The Customs Value, CIF, was determined at Kshs.1,147,764.00 and the value declared was Kshs. 449,128.00 The balance of Kshs. 698,640.00 undervaluation yielded a tax liability of Kshs.325,179.00.

14. A report of the offence of undervaluation was prepared and duly reported but on 3rd March 2008, the clearing agent, the 2nd applicant, requested for the settlement of the offence under the provisions of **section 219** of the ***East African Community Customs Management Act, 2004*** ("***the EACCMA"***).

15. In the process of compounding of the offence, the clearing agent changed his mind and decided to write a letter to the Commissioner of Customs demanding immediate release of the goods. According to the respondents the compounding process stalled and a fine of Ksh.100,000.00 was imposed on MCBC.

16. Mr Ontweka, counsel for the respondents, relied on the written submissions dated 23rd May 2012. Counsel submitted that the import duty was paid based on self-assessment and declaration using the automated customs clearing system known as SIMBA system for entry and clearance of imported goods.

17. Counsel submitted that in accordance with the provisions of the ***EACCMA*** the respondent verified the value of the goods and concluded that there was an undervaluation. This undervaluation yielded a tax liability.

18. It is the respondent's position that its actions were proper and in accordance with the applicable statutory procedures hence the orders sought in the motion cannot be granted.

Determination

19. In considering this matter I must bear in mind that in judicial review proceedings the court is not concerned with the merit of the decision but the decision making process itself. The court cannot act as an appellate court from the decision of the respondent and as long as it is established that the respondent had jurisdiction to demand payment of tax from the applicant in accordance with statutory procedures, the court will not impose its own view as to the merits of the respondent's decision (See ***R v Judicial Service Commission ex-parte Pareno*** **(2004) I KLR 203,** ***R v Kenya Revenue Authority ex-parte Beirsdorf East Africa Ltd*** **Nairobi HC Misc Civil Appl. No. 413 of 2009 (Unreported).**

20. Unfortunately the applicant based its case on the ***Customs and Excise Act (Chapter 472 of the Laws of Kenya)*** and a misapprehension of the application of the ***EACCMA*****. Section 8** of the ***Treaty for the Establishment of the East Africa Community Act (Chapter 4A of the Laws of Kenya)*** provides that any Act of the East Africa Community ("EAC") shall have the force of law in Kenya therefore the ***EACCMA*** being an Act of the EAC has the full force of law in Kenya.

21.The ***EACCMA*** came into force on 1st January 2005 and by virtue of **section 252** applies to all

transactions after the commencement date. Under **section 253,** the provisions of ***EACCMA*** take precedence over the laws of a partner state in respect to any of the provisions to which it is related. In other words, the provisions of the ***Customs and Excise Act*** are impliedly repealed to the extent that the subject matter is dealt withby the ***EACCMA***. Computation of duty is dealt with under **Part X** of ***EACCMA*** as read with the **4th Schedule.** Therefore the ***Customs and Excise Act*** does not apply to circumstances of this case. The leave granted to institute these proceedings was on the based on the provisions of the ***Custom and Excise Act*** which are no longer applicable the determination of the applicants' tax liability.

22. According to the respondents, the clearing agent requested for settlement of the undervaluation. **Section 219** of ***EACCMA, 2004*** entitles the Commissioner to compound an offence but only when such an offence is admitted. Since the clearing agent withdrew such consent, the offence could not be compounded consequently no fine or penalty could be imposed without due process.

Conclusions

23. In the circumstances, I dismiss the Notice of Motion dated 12th March 2008. I order that each bear their own costs.

24. Since the tax imposed has not been challenged under the ***EACCMA.*** I order the tax claimed of Kshs. 325,179.00 be paid to the respondent from the deposit held in court. The balance thereof, which constitutes the fine which I have found has no basis, shall be released to the *ex-parte* applicants.

DATED and **DELIVERED** at **NAIROBI** this 19th day of June 2012.

D.S. MAJANJA

JUDGE

Mr Kaluma instructed by Lumumba, Mumma and Kaluma Advocates for the *ex-parte* applicants.

Mr Ontweka, Advocate instructed by the Kenya Revenue Authority for the respondents.