IN THE MATTER OF: AN APPLICATION BY MOHAMED SHEIKH T/A MSB

ENTERPRISE FOR LEAVE TO APPLY FOR AN ORER OF MANDAMUS DIRECTED AT THE COMMISSIONER – CUSTOMS AND EXCISE, KENYA REVENUE AUTHORITY TO RELEASE TWO MOTOR VEHICLE UNITS MERCEDES BENZ ATEGO AND MERCEDES BENZ INSULATED VAN TO THE APPLICANT

AND

IN THE MATTER OF: THE COMMISSIONER-CUSTOMS AND EXCISE, KENYA REVENUE AUTHORITY, SECTION 3(2) AND SECTION 11 OF THE KENYA REVENUE AUTHORITY ACT CAP 469 LAWS OF KENYA AND SECTIONS 2 AND 27 OF THE CUSTOMS AND EXCISE ACT CAP 472 OF THE LAWS OF KENYA

AND

BETWEEN

REPUBLIC.....APPLICANT

V E R S U S

THE COMMISSIONER-CUSTOMS AND EXCISE KENYA REVENUE AUTHORITY.....RESPONDENT

EX-PARTE

MOHAMED SHEIKH T/A MSB ENTERPRISES

JUDGEMENT

Pleadings

1. On 1st December 2009 the Court granted leave to the Exparte Applicant to take out these Judicial Review proceedings. Following that leave the Exparte Applicant, in a Notice of Motion dated 11th December 2009 and filed on the same day, seeks the following order-

"An order of Mandamus directed at The Commissioner – Customs and Excise, Kenya Revenue Authority to compel him to release two used motor vehicles described as a USED MERCEDES BENZ ATEGO Chassis No. WDB9506052K771127 and Engine No. 90692600260750 and a MERCEDES BENZ INSULATED VAN Chassis NO. WDB9700232K867998 and Engine NO. 90491600343047 lying at the Container Freight Station to the Applicant herein who is the importer and has paid the duty assessed as per the entries."

2. The Respondent filed a reply to the application by way of a Replying Affidavit sworn on 21st July

2010 by Collins Wekesa Masinde a Revenue officer working under him.

The Evidence

3. It is said that sometime in July 2009 the Exparte Applicant imported two used Mercedez Benz vehicles (an Atego and a van). As required by law the importer was under a duty to pay Customs Duty and Value Added Tax (hereinafter jointly called the taxes)

4. The Respondent who by dint of Section 5(1) of The Kenya Revenue Authority Act Cap 469 is an agent of the Government for collection and receipt of the taxes has put in place a procedure for the assessment and collection thereof.

5. The Exparte Applicant, following this procedure, prepared the requisite self-assessment documents. According to the self-assessment, the taxes payable for the Mercedez Benz Atego was Kshs. 439,999/- and that for the Mercedes Benz Van Kshs. 225,142/-. It is the Applicants case that the assessed values were accepted by the Respondent and that on 14th July 2009 he paid the taxes in full into the Respondents Bank Account with National Bank of Kenya.

6. From this point the story given by the parties is at variance. According to the Applicant (see the Applicants affidavit sworn in support of the application for leave and the main motion) the Respondent refused to release the motor vehicles and refused to respond to three letters written to him by the Applicant.

7. The gist of these letters, dated 10th August 2009, 12th August 2009 & 21st August 2009, was the Applicant complaining about a re-assessment and demand for further taxes by the Respondent. One such letter illustrates this. In the letter of 12th August 2009 the Applicant says as follows-

"Our Ref: MSB/COR-008/7/09 12/08/2009

The Deputy Commissioner,
Customs Services Department,
Southern Region,
MOMBASA

Dear Sir/Madam,

RE: APPEAL FOR CRSP'S

IE'S 2009MSA 1802706 & 2009MSA 1805462

Please kindly note that we have conducted a market survey to establish the actual and correct current retail market prices for the trucks who's prices are illustrated on the certification letters.

Therefore be advised that the values declared were put in consideration on the type and condition of the motor vehicles in subject and relatively on the mileage covered.

In view of the same, kindly review the values on input messages to be applied and appropriately reconsider the same re-conditioned motor vehicles and acknowledge valued certified by the dealer as true to the best of your apprehension and date recommendation and or alternatively advise us to carry out pre-verification exercise on the two units to establish the actual values in respect of their reconditioned status.

Sir/Madam, acknowledge request for appeal and kindly apply to same vehicles the most appropriate values to enable us take delivery of the same.

With thanks.

Yours faithfully,
For Managing Director

MSB ENTERPRISE."

8. The Respondents position is that, as authorized by Section 236 of The East African Community Customs Management Act, 2004 (EACCMA) he carried out a physical verification of the vehicles. This verification exercise, so he says, revealed that the Invoice value declared by the Applicant did not match the retail selling prices of the vehicles that were current in Kenya at the time the vehicles were imported. That the Applicant had undervalued the vehicles and the self-assessment was insufficient.

9. Following this and applying the Current Retail Selling Prices (CRSP) from DT Dobie, the authorized Dealers of Mercedes Benz in Kenya, the Respondent re-assessed the taxes and demanded a further sum of Kshs. 515,420/- for the van and Kshs. 842,954/- for the Atego. That the Respondent verbally advised the Applicant of this re-assessment and on 8th October 2009 detained the vehicles pending the payment of the demanded tax.

10.Vide a letter dated 30th October 2009 the Respondent explained the basis of the re-assessment to the Applicant. In a letter of 1st December 2009 the Applicant accepted the reworking as 'elaborate and accurate" but later on the same day countermanded that acceptance and a dispute arose. The stage was set for litigation, these proceedings!

Applicants Case

11. The Applicant argues that he paid the duty passed by the Respondent and the Respondent was therefore under a duty to release the vehicles to him. He cites Section 127(8) of The Customs & Excuse Act (Chapter 472 Laws of Kenya) in support of this position. The Section provides that-

"where an entry has been checked and accepted by the proper officer, the duty payable shall be paid within five days from the date of the acceptable, and in default, a new assessment of the value shall be determined in accordance with Subsections (3) and (9)"

12. The Applicant further complains that the Respondent failed to explain why it had refused to release the motor vehicles notwithstanding the many letters written by the Applicant seeking this explanation.

The Reply

13. The Respondent submits that he was not bound to accept the self-assessment of the Applicant and was in lawful exercise of his powers when he re-assessed the duty and made a determination of what was payable. The Respondent thinks that Section 236 of EACCMA allows him to do so.

14. On the detention of the vehicles, the Respondent is of the view that he is empowered to do so by virtue of the provisions of Section 210 of EACCMA. That the vehicles being uncustomed goods were liable to forfeiture.

15. Lastly it was the submission of the Respondent that he gave a written explanation to the Applicant as to how duty was assessed and so he complied with Section 122(2) of EACCMA.

Issues

16. These, in the courts view, are the issues to be resolved-

(i) What is the procedure for assessing the taxes payable on importation of a motor vehicle.

(ii) Has the Respondent breached that procedure.

<u>Findings of the Court</u>

17. An antecedent issue that this Court must determine is the statute applicable to the dispute. The Applicant was of the view that it is The Customs and Excise Act (Chapter 472 Laws of Kenya). It was argued that this is the domestic law that deals with the management and administration of Customs and Excise duties and for matters relating thereto and connected therewith. On the other hand it is the position of the Respondent that EACCMA applies.

18. One objective of The East African Community is to establish a Customs Union amongst its member states (Article 75 of The Treaty Establishing The East African Community). EACCMA is a statute providing for the management and administration of customs and for related matters and is applicable to each of the partner states. This statute was made in furtherance to the objective of a Customs Union. I agree with the submissions of counsel for the Respondent that EACCMA binds the partner states of the community in relation to Customs matters. It is the statute that brings harmony in the customs regime of the partner states.

19. What then is the interplay between EACCMA and The Customs and Excise Act? The answer is found in Section 253 of EACCMA which provides-

"This Act shall take precedence over the partner state laws with respect to any matter to which its provisions relate."

20. The dispute herein is about the assessment of duty payable for two imported vehicles. If EACCMA provides the manner for assessment of that duty then by dint of Section 253 of EACCMA those provisions will take precedence over the Customs and Excise Act. Section 252(1) then provides a pointed answer. It reads-

"The provisions of the partner states customs laws in force at the commencement of this Act and all regulations, warrants and acts of the Commissioners under the Partner States Customs laws shall continue in force and apply to-

(a) the payment of duty payable before the commencement of this Act;

(b) <u>the assessment of and payment of any duty assessed or payable before the commencement of this Act, as if this Act had not been passed</u>." (my emphasis)

The date of commencement of EACCMA was 1st January 2005 and from then on EACCMA was the law on the assessment of duty payable.

21. This Court was told, and accepts, that the Applicant carried out a self-assessment of the duty payable. The Respondent has designed self-assessment so as to reduce paperwork and bureaucracy. The Applicants took the position that having passed that assessment the Respondent had accepted it as the amount of duty payable. There is however Section 236 of EACCMA which gives the Respondent power to carry out a physical verification of goods where in his opinion it is necessary to do so. Section 236 (where relevant) provides-

"The Commissioner shall have power to;

(a) Verify the accuracy of the entry of goods or documents through examination of books, records, computer stored information, business system and all relevant customs documents and other data related to the goods …..

(b) …

(c) …

(d) Examine the goods where it is possible for the goods to be produced."

22.The verification and examination can lead to a re-assessment of duty. The Respondents witness, Mr. Collin's Wekesa Masinde, was of the opinion that the Applicant had under-declared the value of the vehicles and so he carried out a physical verification on them. The Applicant indeed submitted to the verification exercise as is evident from letters written by him to the Respondent. In the letters of 10th August 2009, 12th August 2009 and 21st August 2009 the Applicant does not dispute the power of the Respondent to verify the goods or re-assess the duty payable, but is making a plea on the values to be placed. This is what the Applicant says in paragraph 6 of his affidavit of 9th August 2010-

"It is true that I sought to appeal against the pre-verification exercise since the two used motor vehicles could not be sold at the sums that were allegedly quoted by the Respondent as current retail selling prices that emanated from D.T. Dobie. Besides the Respondent also failed to consider the respective depreciation rates applicable from the date of manufacture."

The Court finds that the self-assessed duty was not the final duty payable and the Respondent was entitled to review it.

23.The Respondent through a letter dated 30th October 2009 gave a written explanation to the Applicant on how the duty was arrived at. By a letter of 1st December 2009 the Applicant accepted the values given as "***elaborate and accurate***." But in an about-turn the Applicant on the very same day countermanded the earlier letter in the following terms-

"After proper scrutiny on tax assessment as per given values by Valuation Branch Nairobi, we later came to establish that the additional taxes were still higher than we had expected of. We are hereby lodging the letter of withdrawal of the above said letter so as to pursue a dispute on the un-imaginary values given by the authority."

24.So the additional duty remained unpaid and the motor vehicles were deposited at the Customs warehouse. In depositing the vehicles there, the Respondents relied, in my view correctly, on Section 210(c) of EACCMA which allows the forfeiture of any uncustomed goods. Since full duty had not been paid for the motor vehicles then they are uncustomed goods. See definition of uncustomed goods under Section 2 of EACCMA, which includes-

"dutiable goods on which the full duties due have not been paid and any dutiable goods which are imported, exported or transferred or in any way dealt with contrary to the provisions of the Customs laws."

25. The decision I reach is that the Respondent acted in conformity with statute when he carried out the re-assessment, demanded further tax and detained the motor vehicles.

26.Although not contained in the statement and affidavit in support of the application for leave, the Applicant introduced another dimension to the dispute at a later stage of the proceedings. The new argument of the Applicant was that the values reached by the Respondents were unreasonable and without a basis. This would not be available to the Applicant for two reasons. No leave was sought as required by Order LIII Rule 4 of The Former Civil Procedure Rules to amend the proceedings to include this new ground. Secondly having found that the Respondent acted within the procedure in carrying out the re-assessment, this Court cannot interfere with the Respondent decision unless it is shown to be unreasonable in the Wednesbury sense. That is, the decision was so unreasonable that no reasonable public officer would possibly reach it. The Respondent has told Court that it derived the values from current Retail Selling Prices (CRSP) availed to him by DT Dobie. The closing line of the Respondents letter of 30th October 2009 in respect to these values is of importance, it reads-

"This is within range as given through the letters submitted by yourselves from D.T. Dobie."

The Applicant did not place material before this Court that the values reached by the Respondent was unreasonable in the Wednesbury sense.

27. As I close, it is necessary, I think, for this Court to say something on the procedure to be followed in challenging the decision of the Respondent in a dispute of this nature. By virtue of the provisions of Section 229 of EACCMA a person affected by the decision of the Commissioner may apply to the Commissioner for review of that decision. If dissatisfied with the decision on review a person has a right of appeal provided by Section 230(1) in the following terms-

"A person dissatisfied with the decision of the Commissioner under Section 229 may appeal to a Tax Appeals Tribunal established in accordance with Section 231."

Section 231 requires the establishment of a Tax Appeals Tribunal and provides-

"Subject to any law in force in the partner states with respect to tax appeals, each Partner State shall establish a Tax Appeals Tribunal for the purpose of hearing appeals against the decisions of the Commissioner made under Section 229." (my emphasis)

28.Counsel for the Applicant and Respondent informed Court that an Appeals Tribunal was appointed on 4th December 2009 under Section 127E(1) of The Customs & Excise Act. For that reason the Applicant would not have appealed to a non-existent tribunal when it commenced the leave proceedings on 30th November 2009.

29.This Court is, however, aware of the provisions of Section 252(6) of EACCMA which reads-

"If, at the commencement of this Act, a Tax Appeals Tribunal is yet to be established by a partner state as required by Section 231, appeals against the decision of the Commissioner made under Section 229 shall lie to the High Court of The Partner State."

The avenue open to the Applicant was to first seek review from the Commissioner and, if still dissatisfied, to appeal to the High Court. It may not be entirely correct for the Applicant to maintain that the only avenue for redress was to seek Judicial Review.

30. For the reasons given the Court finds no merit in the application and dismisses the Notice of Motion dated 11th December 2009 with costs.

Dated and delivered at Mombasa this 23rd day of August, 2012.

F. TUIYOTT
JUDGE

Dated and delivered in open court in the presence of:-
Obura for the Applicant
Wafula for the Respondent
Court clerk - Moriasi

F. TUIYOTT
JUDGE