REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Judicial Review 157 of 2012

IN THE MATTER OF: AN APPLICATION BY AFRICA K- LINK INTERNATIONAL LIMITED FOR JUDICIAL REVIEW ORDERS BY WAY OF CERTIORARI AND PROHIBITION

IN THE MATTER OF: SECTION 229 OF THE EAST AFRICA COMMUNITY CUSTOMS MANAGEMENT ACT 2004

REPUBLIC …...APPLICANT

VERSUS

COMMISSIONER OF CUSTOMS SERVICES...........RESPONDENT

EX-PARTE
AFRICA K-LINK INTERNATIONAL LIMITED

J U D G M E N T

Pursuant to leave granted by this court on 16th April 2011 to the Exparte Applicant to commence judicial review proceedings, the Exparte Applicant Africa K-Link International Limited (hereinafter referred to as the applicant) filed a Notice of Motion dated 23rd April 2012 seeking the following orders

(1) An order of certiorari to remove, deliver up to the court and quash the decision of the respondent dated 19th January 2012 and subsequently the demand dated 17th November 2011.

(2) An order of prohibition to prohibit the respondent from demanding the extra taxes claimed in her decision contained in the letter dated 19th January 2012 and consequently the demand dated 17th November 2011.

(3) An order that the cost of this application be granted to the applicant.

The application is supported by the statutory statement dated 16th April 2012, the verifying affidavit and the further affidavit sworn by Caroline Ngima Gichuki on behalf of the Applicant together with annextures thereto.

The Respondent is the Commissioner of Custom Services, an employee of the Kenya Revenue

Authority an Agency established under the Kenya Revenue Authority Act Cap.469 Laws of Kenya mandated to collect and receive all revenue on behalf of the Government of Kenya – ***see Section 5(1) of Kenya Revenue Authority Act, Cap 469 Laws of Kenya***.

Under Section 5(2) of the Kenya Revenue Authority Act, the Kenya Revenue Authority is empowered to administer and enforce all provisions of the written laws set out in Part 1 and 2 of the first schedule thereof for purposes of assessing, collecting and accounting for all revenues in accordance with the stated laws. One of the laws listed in the said schedules which the Authority is mandated to enforce is the East African Customs Management Act 2004 ***(hereinafter referred to as EACCMA).***

The brief facts of this case are that the Respondent conducted a post clearance audit on the importation activities of the Applicant for the period between 1st January 2006 to 31st August 2012 with a view to establishing whether the Applicant had complied with Customs laws, Regulations and Procedures in its operations regarding the importation of goods and payment of correct taxes and duties for the period in question.

The audit revealed that the Applicant was under declaring the transaction values of its imported goods for custom purposes as the value declared was far much lower than the actual price paid for the goods. This led to the assessment and computation of additional taxes in respect of the undervalued imports in the total sum of Kshs.32,536,289.

The audit findings were communicated to the Applicant vide a management letter dated 17th November 2011. Accompanying the management letter was a demand notice requiring the Applicant to pay the short levied taxes amounting to Kshs.32,536,289 within a period of 30 days.

By letter dated 1st December 2011, the Applicant responded to the Respondent's communication of 17th November 2011 and objected to the demand for extra taxes claiming that there was no tax outstanding payable from it to the Respondent as it had allegedly paid all taxes due on its imports to the Respondent through its clearing agent Evafast Air Cargo Services Ltd.

The Applicant also denied having falsified the invoices used to under declare duty payable blaming it on its clearing Agent. It also disputed the correctness of the transaction values used by the Respondent in computing the extra taxes and sought an opportunity to further explain its position to the Respondent in better detail. The said letter was annexed to the Applicant's verifying affidavit and marked **CNG2.**

In letter dated 19th November 2012, the Respondent addressed the issues raised in the Applicant's letter of 1st December 2011 and agreed to a meeting with the Applicant on 25th January 2012.

From annexures marked **"F005"** attached to the Respondent's replying affidavit, it is clear that a meeting was held between the parties on the appointed dated (25th January 2012) in which deliberations were held regarding the computation of the extra taxes demanded by the letter of 17th November 2011.

The minutes of the said meeting annexed as exhibit **"FOO5"** show that at the end of their discussions, the Respondent informed the Applicant's representative Caroline Ngima Gichuki that its decision to demand the extra taxes still stood and the Applicant should organize to pay the amount demanded.

The said Carolone Ngima promised to consult the other directors who were allegedly outside the country and revert back to the Respondent within two weeks.

No further correspondence was exchanged between the parties subsequent to the meeting of 25th January 2012 until 11th April 2012 when the Respondent made what appears to be a final demand for the unpaid extra taxes amounting to Kshs.32,536,290 requiring their payment immediately and threatening to institute enforcement measures under EACCMA for the recovery of the same if the applicant failed to comply with the demand. This is what triggered the commencement of the instant judicial review proceedings.

The Applicant's case is that its letter dated 1st December 2011 amounted to an application for review of the Respondent's decision to demand extra taxes under Section 229(1) of EACCMA as communicated to it in letter dated 17th November 2011. That the Respondent communicated its decision on the application for review on 19th January 2012 which was beyond the 30 days allowed under Section 229(4). It is the Applicant's contention that the Respondent having failed to communicate its decision on the application for review within 30 days as prescribed by the law was deemed to have allowed its application by operation of Section 229(5) and was thereafter estopped from demanding payment of the extra taxes contained in the demand notice of 17th November 2011. The Applicant asserted that in view of the above, the Respondent acted in breach of the provisions of Section 229 of EACCMA in demanding payment of extra taxes in letter dated 19th January 2012 and that therefore its application should be allowed with costs.

In support of its submissions, the applicant heavily relied on the authority of **R Vs Commissioner of Customs Exparte Unilever Ltd misc Civil Appn No 181 of 2011.**

The Respondent opposed the motion through a replying affidavit sworn on its behalf by Franklin O. Ombake, an Assistant Commissioner in the Customs Service (post clearance Audit) Department of the Respondent.

In the replying affidavit, the Respondent denied the Applicant's claim that it had failed to comply with the mandatory provisions of Section 229(4) of the EACCMA ***(herein after referred to as the Act).***

The Respondent averred that the letter dated 17th November 2011 did not amount to a decision of the Commissioner under Section 229(1) of the Act and that the Applicant's letter dated 1st December 2011 did not amount to an application for review under the said Section.

The Respondent asserted that the letter of 17th November 2011 only communicated the Commissioner's preliminary findings as the Respondent after that date was still collecting information from the Applicant to assist the Commissioner make a final decision regarding the Applicant's tax liabilities. The Respondent submitted that it is only the commissioner's final decision after taking into account all information collected in the audit process that could constitute a decision under Section 229(1) of the Act. For this preposition, the Applicant relied on the case of **SDV Transami Kenya Ltd Vs Commissioner of Customs Services and Another Misc Appn No 81 of 2011**. The Respondent claimed that the decision contemplated under Section 229(1) of the Act was made by the commissioner in this case vide letter dated 11th April 2012 and since it was not contested by the Applicant, the Respondent was entitled to institute recovery measures in accordance with the law to ensure collection of the short levied taxes which were lawfully due from the Applicant.

I have carefully considered the pleadings herein, the submissions made by Mr. Githendu learned counsel for the Applicant and Mr. Mwamuye learned counsel for the Respondent and all the authorities cited. I find that the following main issues emerge for my determination namely:

(1) Whether the Respondent has breached the provisions of Section 229 of the EACCMA as alleged by the Applicant.

(2) Whether the Respondent has acted unreasonably or in excess of its jurisdiction in demanding the payment of short levied taxes through letters dated 17th November 2011, 19th January 2012 and 11th April 2012.

(3) Whether the Applicant is entitled to the reliefs sought.

(4) What order should be made on cost.

I have already summarized the party's respective positions regarding whether in responding to the issues raised by the Applicant in letter dated 1st December 2011 by letter dated 19th January 2012 the

Respondent breached the provisions of Section 229 (4) of the Act.

Given the positions taken by the parties on this matter, I find that the only way of resolving the first issue would be to determine whether the letter of 17th November 2011 amounted to a decision under Section 229(1) and whether the Applicant's letter dated 1st December 2012 was an application for review of that decision within the meaning of Section 229 of the Act.

I think it is important at this juncture to reproduce the provisions of Section 229 of the Act in its entirety in order to appreciate its full meaning and effect.

Section 229 States as follows:

(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). [Rev. 2009 East African Community Customs Management 125].

(5) ***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.***

From the material placed before me in this case, I have no doubt in my mind that the demand notice contained in letter dated 17th November 2011 amounted to a decision by the Commissioner of Customs to demand payment of extra taxes amounting to Kshs.32,536,289 from the Applicant. The demand notice and the management letter accompanying it which was dated the same day clearly stated that the demand for extra taxes was based on an assessment made by the Respondent following an audit of the Applicant’s import and export activities for the period between January 2006 and August 2011 which had revealed that transaction values of imported goods had been under declared using falsified invoices. The two letters in my view show clearly that the Respondent had crystallized its position after conducting the post clearance audit and made a decision that owing to under valuation of the Applicant’s imported goods, the Applicant was liable to pay short levied taxes in the sum of Kshs.32,536,289 which has to be paid within 30 days.

The two letters were a confirmation that the audit process had been completed hence the decision to demand payment of the extra taxes. This was clearly indicated by the opening paragraphs of both the demand notice and the management letter. The demand notice opened with the following words;

‘’Refer to the Post clearance audit carried out on your operations for the period January 2006 to August 2011 in relation to customs procedure pursuant to the provisions of the East African Community Customs Management Act (EACCMA) and the Customs and Excise Act cap 472 laws of Kenya’’.

The management letter started with the following words;

‘’Following our audit of the company for the period 1st January 2006 to 31st Augus 2011, the following issues were noted with regard to compliance with customs procedures, Laws and

Regulations".

The two letters did not give any impression that there was any aspect of the audit process that was awaiting conclusion before the commissioner wrote the demand notice of 17th November 2011. In my view, the wording of the letters show that by 17th November 2011 the audit process had been concluded.

The Respondent's submissions that the audit process was still going on even after 17th November and that the Respondent was gathering more information from the Applicant till 11th April 2012 when it made its final decision under Section 229(1) of the Act cannot be sustained in the light of the contents of the letters dated 17th November 2011. Secondly, it is significant to note that even the letter dated 11th April 2012 referred to the demand notice of 17th November 2011 and reminded the Applicant that owing to the said demand, payment of the sums specified therein was long overdue and threatened to take enforcement measures if the said demand was not complied with. The letter of 11th April 2012 was in the following terms:

*"**RE: DEMAND NOTICE FOR EXTRA TAXES KSHS.32,536,290***

We refer to our letter dated 19th January 2012 and the subsequent meeting held on 25th January regarding our letter of demand for extra taxes dated 17th November 2011.

We hereby inform you that the demand is long overdue and the extra taxes demanded amounting to Kshs.32,536,290 should be paid up immediately failure to which necessary enforcement measures will be taken without further reference to yourselves as per East African Customs Management Act, 2004. Not that interest continues to accrue in accordance with the provisions of Section 135(2) of the EACCMA, 2004.

P.O. Ombaka

For: Commissioner Customs Services Department"

It is clear from the said letter that the decision by the Commissioner of Customs to demand extra taxes from the Applicant had been made not on 11th April 2012 when the said letter was written but on 17th November 2011 when the first demand notice was issued. This explains why there was reference to the Respondent's letter of demand for extra taxes dated 17th November 2011 and the reminder that the demand was long overdue.

Had the Respondent made his/her decision on 11th April 2012, the Commissioner would have made a fresh demand for payment of extra taxes and it would not have been necessary to refer to the demand notice issued on 17th November 2011.

Besides, if the audit process had not been concluded and a decision made on its findings, the Commissioner would not have been categorical in the requirement that the amount assessed be paid within 30 days of 17th November 2011 and the commissioner would not have invited the Applicant to report to the Respondent's office for the compounding of offences under Section 219 of the Act.

Section 219 of the Act mandates the commissioner to compound offences and to impose appropriate penalties upon being satisfied that a tax payer had committed an offence under the Act. In my opinion, the Commissioner would not have been in a position to conclude that the Applicant had committed an offence or offences under the Act in order to invite it for the compounding of offences if the audit process had not been completed by the time the demand notice of 17th November 2011 was issued, Section 219 does not envisage a situation where the Commissioner would act on the basis of preliminary findings or an incomplete audit.

Unlike in the case **of SDV Transami Kenya Ltd Vs Commissioner of Custom services and Another (supra),** the correspondenceexchanged between the parties in this case does not show that the Respondent required any further information in order to make a final decision regarding the Applicant's tax liability. In the **SDV Transami case**, it is clear from the correspondence exchanged between the parties that the commissioner in that case needed to collect samples of the imported goods and carry out laboratory analysis in order to conclusively determine the correct tariff classification applicable to the goods imported by the applicant for tax purposes. The commissioner therefore could not have made a decision under Section 229 without having first received the results of the laboratory analysis. This was not the position in the instant case.

In view of the foregoing, it is my finding and decision that the demand notice in letter dated 17th November 2011 contained the Respondent's decision as contemplated under Section 229(1) of the Act regarding the Applicant's tax liability in the sum of Kshs.23,536,289 .

Having made that finding, I now wish to turn to a consideration of whether the Applicant's letter dated 1st December 2011 addressed to the Respondent amounted to an application for review under Section 229(1) of the Act. Section 229(2) of the Act requires that an application for review against the commissioner's decision or omission should be in writing stating the grounds upon which it is lodged.

The Applicant's long letter addressed to the Commissioner dated 1st December 2011 on the face of it shows clearly that the Applicant was not asking the Respondent to review the decision to demand the extra taxes specified in letter dated 17th November 2011 but sought to explain the circumstances under which falsified invoices were found in its possession during the post clearance audit. The letter while not denying the existence of fake invoices which was the basis for the demand of extra taxes sought to absolve the Applicant from liability to pay the extra taxes and sought to shift that liability to its authorized agent. In its concluding paragraph, the Applicant stated as follows:-

"For those reasons, we do not object to the demand notice and it is our humble request that you give us an opportunity to explain our position in further detail and try and solve what is clearly a mistake. We have in no way failed or evaded to pay our lawful taxes".

Looking at the said letter as a whole and taking into account its conclusion as duplicated above, there cannot be room for doubt that the Applicant was not seeking a review of the Respondent's decision to demand the extra taxes but was seeking an opportunity to further clarify its position in better details regarding its possession of fake invoices, its marketing strategy and procedure used in declaring transaction values to its imported goods and its claim that it had already settled its tax liability through its authorized agent.

The Applicant did not however request the commissioner to review his/her decision to demand the short levied taxes specified in letter dated 17th November 2011. This is confirmed by the Applicant in its conclusion to the said letter when it specifically stated that it was not objecting to the demand notice issued by the Respondent.

I have carefully scrutinized the provisions of Section 229 (1) and (2) of the Act and have come to the conclusion that an application for review under Section 229 of the Act must be worded in a way that leaves no doubt that a tax payer is applying for review of a decision under Section 229(1) of the Act and must clearly state the grounds upon which the application for review is premised. Clarity on this matter is important since it will enable the Respondent to know whether it was dealing with an application for review under Section 229(1) of the Act or with ordinary correspondence from a tax payer objecting to a demand to pay tax as assessed.

Looking at the contents of the letter dated 1st December 2011, I am of the firm view that it does not qualify to be an application for review within the meaning of Section 229(1) and (2) of the Act. It was just a letter responding to issues raised in the Respondent's management letter of 17th November 2011 concerning anomalies in the Applicant's operations discovered during the post clearance audit seeking an

opportunity to demonstrate that no tax was due owing to the Respondent. The Applicant was also seeking to shift its tax liability to its authorised agent.

In the premises, the Commissioner of Customs was not under any obligation to comply with the provisions of Section 229(4) of the Act when communicating his/her decision in response to the said letter. The Respondent was at liberty to respond to the Applicant's letter at his/her convenience but of course within a reasonable time given that it did not amount to an application for review under the Act. The Respondent did not therefore breach any law by responding to the said letter after 49 days.

I fully associate myself with the interpretation given to Section 229 of the Act by Korir J in **R Vs Commissioner of customs Exparte Unilever Ltd (supra)** in which he held that once an application for review is made against the Commissioner's decision under Section 229 of the Act, the commissioner must communicate his/her decision to the tax payer within 30 days and failure to do so means that the commissioner will be deemed to have allowed the application for review by operation of the law and will be barred from demanding payment of the taxes specified in the decision subject matter of the review.

However, it is my view that in order for Section 229(4) and (5) to apply in favour of a taxpayer, the taxpayer must lodge a valid application for review in terms that are clear and unambiguous and which show clearly that the tax payer was making an application for review under Section 229 of the Act.

In the instant case, since the letter dated 1st December 2011 did not amount to an application for review as envisaged under Section 229(1), It is my finding that the Respondent in responding to the Applicant's letter in letter dated 19th January 2012 did not breach any of the provisions of Section 229 of the Act. Consequently, the decision communicated by the Commissioner to the Applicant in letter dated 19th January 2012 was not ultra vires the provisions of Section 229(5) of the Act.

Turning now to the issue of whether the Respondents decision in letter dated 17th November was unreasonable or made outside the commissioner's jurisdiction, I find that it is not disputed that the Respondent conducted a post clearance audit on the operations of the Applicant between January 2006 and August 2011 and that the said audit unearthed fake invoices used to under declare the transactional value of goods imported by the Applicant. As a result of such under valuation, the Respondent assessed extra taxes whose payment it demanded by letters dated 17th November 2011, 19th January 2012 and 11th April 2012. It is clear from the documents availed to the court that the Applicant participated in the said audit and was duly informed of the outcome of the audit. As the Respondent's decision was based on the audit findings, it cannot be said that it was made arbitrarily or that it was unreasonable within the meaning of Wednesbury unreasonableness.

From the correspondence exchanged between the parties, it is clear to me that it was an objective decision made after investigations into the Applicants operations in which the Applicant was given a fair opportunity to present its case. The Respondent was mandated to conduct such investigations under Section 236 of the Act in order to ensure that correct taxes were being paid by tax payers while Section 135 of the Act empowered the Respondent to demand short levied taxes where the same had been assessed and found due from a taxpayer. This is what the Respondent did in the instant case.

It is clear from the foregoing that the Respondent followed the correct statutory procedure in assessing the Applicant's tax liability and properly demanded payment of the extra taxes in letter dated 17th November in accordance with its mandate under Section 135 of the Act.

Having established that the Respondent acted within his/her jurisdiction in demanding payment of short levied taxes from the Applicant in letters dated 17th November and 19th January 2012, I find no basis for interfering with the Respondent's decisions in the two letters as invited by the Applicant in its Notice of Motion.

It must always be remembered that judicial review is concerned with the process a statutory body employs to reach its decision and not the merits of the decision itself. Once it has been established that a

statutory body has made its decision within its jurisdiction following all the statutory procedures, unless the said decision is shown to be so unreasonable that it defies logic, the court cannot intervene to quash such a decision or to issue an order prohibiting its implementation since a judicial review court does not function as an appellate court. The court cannot substitute its own decision with that of the Respondent.

Besides, the purpose of judicial review is to prevent statutory bodies from injuring the rights of citizens by either abusing their powers in the execution of their statutory duties and function or acting outside of their jurisdiction. Judicial review cannot be used to curtail or stop statutory bodies or public officers from the lawful exercise of power within their statutory mandates.

Taking into account all the material placed before me in this case , I am satisfied that the Applicant has not established any of the grounds upon which judicial review remedies can issue which were summarized in the case of **Council of Civil Service Unions Vs Minister For Civil Service(1995) AC 374** as Illegality, Irrationality and Procedural impropriety.

In the circumstances, I find that the Applicant is not entitled to any of the reliefs sought in this case. Consequently, I find no merit in the notice of motion dated 23rd April 2012 and it is hereby dismissed with no orders as to costs.

DATED, DELIVERED and **SIGNED** this 15th day of October 2012.

C.W. GITHUA
JUDGE

In the presence of:
Florence – Court Clerk

Mr. Githendu for Applicant

Mr. Nyangweso holding brief for Mr. Nyaga for Respondent