



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Miscellaneous Application 256 of 2007

REPUBLIC.....APPLICANT

THE COMMISSIONER OF CUSTOMS..... RESPONDENT

EX PARTE: MULCHAND RAMJI & SONS LIMITED

JUDGMENT

On 2/4/07, Inamdar and Inamdar Advocates filed this notice of motion on behalf of the ex parte Applicant, Mulchand Ramji & Sons Ltd, against the Commissioner of Customs (the Respondent). The Applicant seeks the following orders;

(a) An order of certiorari to remove into this court and quash the decision of the Commissioner of Customs to demand the sum of Kshs.2,882,049 allegedly due from the Applicant in respect of additional import duty and value added tax on goods imported by the Applicant on various dates between 16th April 2004 and 16/8/2006 as expressed in their letter dated 28/11/06 to the Applicant (the letter of demand).

(b) An order of certiorari to remove into the court and quash the decision of the Respondent to demand and collect the sum of Kshs.4,706,711/= allegedly due from the Applicant in respect of additional import duty and value added tax (inclusive of penalties and interest thereon) on certain specified goods (hereinafter referred to as the said goods) imported by the Applicant on various dates between 16/4/04 and 16/8/06 and referred to the notice dated 21/2/07 (erroneously dated 21/2/05)

hereinafter known as the agency notice) addressed to the Applicant's bankers, Guardian Bank Ltd, requiring them, as agents under S 131 of East African Community Customs Management Act, (the Act) to pay over to the commissioner of Customs the said sum of Kshs.4,706,711/= from the Applicant's account with the said bank.

(c) An order prohibiting the Commissioner of Customs from levying or demanding from the Applicant any sums of money by way of additional import duty and value added tax on the said goods imported by the Applicant on various dates between 10/4/04 and 16/8/06.

(d) Costs of this application be provided for.

The notice of motion is predicated on grounds found in the statement dated 14/3/07, the verifying affidavit of Mr. Sanjay Shah of the same date, a list of authorities dated 10/3/07, submissions filed in court on 8/7/08 and supplementary submissions filed in court on 15/4/09. Mr. Hadi Abdulahi Sheikh of Customs Services Department filed a replying affidavit dated 26/11/07 on behalf of Respondent and skeleton submissions dated 26/11/08. The Applicant was represented by Amoko Advocate whereas the Respondent was represented by Mr. Ontweka.

The Applicant's case as I understand it is set out in Mr. Shah's affidavit. The Applicant is a Limited Liability Company that distributes alternative medicinal and herbal products in Mombasa. On 2/12/06, the Applicant received a demand from the Respondent claiming additional import duty and value added tax on the basis that between 16/4/04 and 16/8/06 the Applicant had declared imported goods under the wrong Customs Protocol TI 3004.90.90 instead of under TI 2106.90.90. The letter of demand is dated 28/11/06 (Ex SRSI). The letter exhibited the particulars of the affected consignments but five consignments of which were unknown to the Applicant while others had been imported with the approval of the Pharmacy and Poisons Board (hereinafter referred as PPB). Mr. Shah

replied to the demand denying some of the consignments and indicating that their goods were cleared by the PPB as medicinal herbs and were properly cleared under TI 3004.90.90 and zero rated as opposed to 2106.90.90 which related to food stuffs which the Applicant does not deal in. In the reply, the deponent also asked the Respondents to clarify the reasons for arriving at the decision to ask for tax but the Respondent did not reply till 15/1/07 rejecting the issues raised by the Applicant but merely referred the Applicants to chapter 1 (a) of chapter 30 of the World Customs Organisation Council (hereinafter referred to as WCO). Apart from that, the sums claimed were now raised from Kshs.2,882,049/= to Ksh.4,706,711/= without any explanation. On 21/2/07 the Respondent issued an agency notice on the Manager of Guardian Bank. The Applicants Bank requiring the payment of Ksh.4,706, 711/= despite the fact that the Respondent had not notified the Applicant that they contemplated issuing an agency notice. Despite Mr. Shah's efforts to clarify to the Respondent that the goods could not attract duty (pg. 45 – 41 of SRI) it fell on a deaf ears. The Respondent never contested the therapeutic and prophylactic functions of the products. Mr. Amoko submitted that the Respondent's reliance on explanatory notes to the coding system is mistaken and the goods are expressly excluded from duty as they are medicaments not food preparations. He submitted that the issue of coding is a matter of law which should be decided by the court. He relied on J. Nyamu's decision in ***KEROCHE INDUSTRIES LTD V THE REVENUE AUTHORITY HMSC APP. 743/06*** Where the court described classification as a 'naked question of law'. That since there is an error committed this court can quash the decision to charge duty by way of Judicial Review. It is also the Applicants contention that the Respondent abused their powers in that they did not invite the Applicants to make any representations on the issues raised but instead came up with a unilateral decision, to classify the goods; that the Respondent did not have any factual basis for arriving at the determination that the goods were food preparations even after being confronted with evidence from the Ministry of Health that the products were medicaments with therapeutic and prophylactic functions, that the conclusions by the Respondent were riddled with mistakes; that the prayers in the letter of demand and the agency

notice have no relationship. In the supplementary submissions, the Applicants considered the cases relied upon by the Respondents and found them to be irrelevant to this case. The Applicant also contends that at para. E (ii) of their submissions the Respondents, introduced evidence not contained in the affidavit to the effect that the Respondent can only be held responsible if samples are drawn and submitted for analysis at the Customs laboratory which assists the officer to define and classify the goods under WCOS which is embedded in the EACCA through the Common External Tariff). Further the Applicant contends that the Respondent has introduced the ground of legitimate expectation which the Applicant has not relied upon but only relied on two grounds of illegality and abuse of power.

In opposing the application, Hadi Sheikh, a Principal Revenue Officer with KRA, deponed that he is well versed with this matter and that the ex parte Applicant had wrongly declared its goods under TI 3004.90.90 and a demand dated 28/11/06 was sent to the clearing agent (HAS I). The demand was made pursuant to S 135 of EACCMA 2004, was payable in 30 days and attracted an interest of 5%. That the unpaid tax attracted 25% import duty, 16% for VAT and 10 % excise duty. There was an exchange of correspondence, between the parties and meanwhile the interest and penalties continued to rise (HA52). Upon the Applicant failing to pay the said sums an Agency notice was issued to Guardian Bank Ltd on 21/2/07 appointing it as an agent for payment of Kshs.4,706,711/= on account of the Applicant's tax liability. That the assertion by the Applicant that the Pharmacy and Poisons Board had authorized the goods has no bearing on the description of the goods because it is the practice that samples are drawn on the various consignments when goods are still under customs control or upon request of the importer after entry or they are verified randomly by the customs to verify their description. That goods are described by their basic characterizes as defined in the Tariff under the Tariff nomenclature as known under the Harmonized System of Commodity Description issued by the Council of the World Custom Organisation in 2002 which has been demisticated by the Finance Act 2002 and applied by the Common External Tariff of East Africa Customs Union. That the law allows the Respondent to demand

additional taxes and the issuance of agency Notices as per the EACCMA. That the applicant failed to deal with the merits of the case and resisted payment till Agency Notices were sent that the Applicant came to court. That the Applicant has come to court with dirty hands which is an abuse of the court process and should not be granted the orders sought. That the Applicant was given an opportunity to be heard from 28/11/06 till 21/2/07 when the agency notice was issued. In his submissions, Mr. Ontweka submitted that what the Applicants imported in were body boosting but not medicines and therefore do not fall under TI 3004.90.00. he relied on the case of **HMS MIS 1031/06 ARPEES V KRA** where an issue of classification arose and orders were almost similar counsel also made reliance on the case of **FOREVER LIVING PRODUCTS (K) LTD V COMMISSIONER OF CUSTOMS HMIS 307/07** where the court allowed the Commissioner to proceed to collect the sums due in respect of tax KEROCHE as counsel submitted that it is distinguishable from the present case in that in that case, the Applicant had been told what mode of classification was applicable. As regard **UNCA LTD V COMMISSIONER GENERAL OF CUSTOMS AND EXCISE (1978) KLR I** counsel said that it set out guiding principles on interpretation that is, deal with description of the goods, the heading, and then notes before the sub paragraph of the Tarrif. Mr. Ontweka concluded that the goods are properly classified as supplements and duty is payable.

Upon considering the pleadings and submissions made by both sides of this dispute, the issues that seem to stand out for determination are:-

1. Whether the Applicants' goods are classified under TI 3004.90.00 or TI.2106.90.90 of the Harmonized commodity. Whether the Respondent acted illegally or abused his powers under the EACCMA, 2004.
2. Whether the Applicant is guilty of material non-disclosure.
3. Whether this court has no jurisdiction to hear the Applicant.
4. Whether the orders sought can be granted.

There is no dispute that the Respondent is charged with the duty of collecting and administering revenue under various laws. These include the EACCMA 2004 and the VAT Act Cap 476 Laws of Kenya. The Applicant does not deny the Applicants authority under the said statutes save that the Respondent could only have invoked S 135 of EACCMA to issue if there was a short levy under payment or mine payment of duty. Equally the Applicant also urges that an agency notice could only issue if there was short levy or none payment of duty which the Applicant denies applies in this case.

I think it is appropriate to set out the applicable law in this case at this stage:-

1. The Kenya Revenue Authority Act Cap 469 S 5 (2) (a) (i) and (c) thereof mandates the Respondent to collect, receive revenue and administer all written laws dealing with revenue.
2. The East African Community Customs Management Act 2004:

The applicable sections are S 131, 135, 229 and 230.

Section 131 (1) empowers the Respondent by a written notice to appoint a person who holds a taxpayer's funds to be the taxpayers agent and require the agent to pay the said money. The section reads as follows:

(a) "S 131 (1) The Commissioner may by written notice addressed to any person (in this section called the agent) appoint that person to be the agent of another person (in this section called the principal) for the purposes of collecting duty due under this Act from the Principal where the commissioner is satisfied that the agent —

(a) Owes or is about to pay money to the principal.

(b) Holds money for or on account of the principal.

(c) Holds money on account or some other person for payment to the principal.

(d) Has authority from some other person to pay money to the principal.

(e) Holds goods belonging to the principal which are liable to duty and which duty has not been paid, and the commissioner shall in the notice specify the amount of duty to be collected by the agent, which amount shall not exceed the amount or value of the goods held or owing by the agent for or to the principal.

Under the above section, the Commissioner had the mandate to issue the agency notice if in his opinion, money was owed by the Applicant.

(b) S 135 (1) donates power to the Respondent to assess and collect uncollected or under-collected tax

That section reads:

“135 (1) where any duty has been short levied or erroneously refunded, then the person who should have paid the amount short levied or to whom the refund has erroneously been made shall, on demand by the proper officer, pay the amount short levied or repay the amount erroneously refunded, as the case may be and any such amount may be recovered as if it were duty to which the goods in relation to which the amount was short levied or erroneously refunded, as the case may be were liable.

(2) where a demand is made for any amount pursuant to subsection (1), the amount shall be deemed to be due from the person liable to pay it on the date on which the demand note is served upon him or her, and if payment is not made within thirty days of the date of such service or such further period as the Commissioner may allow and further duty of a sum equal to five percent of the amount demanded shall be due and payable by that person by way of a penalty and a subsequent penalty of two percent for each month in which he or she the defaults”

(c) S 229 of EACCMA - provides for a dispute resolution

mechanism on the merits. It reads:

“S 229 (1) A person directly affected by the decision or omission of the commissioner or any other officer shall within thirty days of the date of the decision or omission lodge an application for review of that decision or omission.

(2)

(3)

(4)

(5)

230 (1) A person dissatisfied with the decision of the commissioner under S 229 may appeal to a tax appeals tribunal established in accordance with S 231

(2) A person intending to lodge an appeal under this section shall lodge the appeal within forty-five days after being served with the decision and shall serve a copy of the appeal on the commissioner”.

4. Protocol on the Establishment of the East Africa Customs Union.

The protocol on the establishment of the East African Customs Union at part 8 provides for Harmonised Commodity Description and coding System and read with Article 7 they provide for the relevant aid for interpretation together with explanatory notes issued by the World Customs Organisation to which Kenya is a member/signatory. The notes give clarification, opens and guidelines on interpretation of the Harmonized system (H).

Jurisdiction:

Whereas the Applicant contends that this court has jurisdiction to entertain this matter, the Respondents is of a different view. Mr. Amoko submitted that the Respondent applied the wrong code to the Applicants goods and coding is a question of law not fact and that is why this court has jurisdiction to determine this matter. The Respondent on the other hand is of the view that this court is being

asked to determine the merits of the Respondent's decision which is not within the jurisdiction of this court under Judicial Review. The applicant relied on the ***KEROCHE INDUSTRIES CASE (supra)***. I must at this stage emphasize the purview of Judicial Review. In ***THE COMMISSIONER OF LANDS V KUNSTE HOTEL LTD CA 234/1995*** the Court of Appeal said this of Judicial Review **“The purpose of Judicial Review is to ensure that an individual receives fair treatment, and not to ensure the authority, after according fair treatment, reaches on a matter which it is authorized by law to decide for itself a conclusion which is correct in the eyes of the court.”** In other words it is not for the court to consider the merits of the public body's decision save whether it was arrived at its decision fairly. In ***KEROCHE INDUSTRIES LTD CASE (supra)*** the brief facts of the case are that Keroche Industries were granted a licence classified under Tariff Heading 22.04 under which they paid duty. Later, the Respondent purported to change the Tariff and indicated that they should have been classified under a different heading 22.06 which attracted a higher rate of duty. Code is 22.04 attracted 60% instead of the older one of 45%. The Respondent also purported to issue new tax assessment based on the new tariff which was backdated. That is the decision that was challenged. Unlike the above case, in the instant case, the Applicants were not issued with any specific licence with a specific code or Tariff under which their goods would be assessed for purposes of taxation. In the ***KEROCHE*** case, the Respondent was trying to change the code classified and retrospectively charging duty due as in this case no code or classification was given by the Respondent. It is the code under which assessment has been done that is under challenge.

It is not in dispute that the East Africa Union has by virtue of Article 8 of the Protocol on the establishment of the E. Africa Customs Union adopted the Harmonized Commodity Description and coding system. Article 8 reads as follows

“Commodity Description and coding system.”

- 1. The partner states agree to harmonize their customs nomenclature and standardize the foreign trade statistics to ensure, comparability and reliability of the relevant information.**
- 2. The partner states hereby adopt the Harmonized Commodity Description and Coding System specified in Annex 5 to this protocol.”**

The above has been reproduced in a Tariff Handbook, 2007. The parties agree that to ascertain what code is applicable to particular goods, one has to look at the General interpretation rules for the classification of goods, which sets out the principles of interpretation in conjunction with the various chapters, describing the goods, the duty due. The Explanatory notes which were all exhibited by the parties also help in classifying the goods. Whereas the Applicants purported to apply code 30 under chapter 30 of the Harmonized code which relates to pharmaceutical products, the Respondent contends the applicable code as 21 under chapter 21 which relates to miscellaneous Food preparations. Since it is the duty of the Respondent to levy and collect taxes, it follows that, It is the Respondent who determines the codes applicable to the various goods guided by the Harmonized code. It is necessary to establish the exact contents of the goods and I believe the Respondent would have the necessary manpower or technical knowledge to do that. The Applicant has actually assessed the duty, and the question for determination follows whether in doing so, the Respondent acted illegally and abused its powers under the various laws. That will only be answered after the court considers the grounds relied upon by the Applicant.

Illegality

The Applicant has taken issue with the Respondent's reliance on chapter Notes 1 (a) of chapter 30 of the WCO explanatory notes to classify the Applicant's goods and has therefore misconstrued the HS code, has erred in doing so and hence acted contrary to the law. The second submission on illegality is that the Respondent failed to serve a thirty days notice requiring the Applicant to pay the sums claimed. In **COUNCIL OF CIVIL SERVANTS UNIONS V MINISTER FOR CIVIL SERVICE (1984) 3 ALL ER 938** Lord Diplock in considering

the three grounds in Judicial Review said as follows of the ground of illegality. **“By illegality as a ground for Judicial Review, I mean the decision-maker must correctly understand the law that regulates his decision-making power and must give effect to it**”

In *UNGA LTD V COMMISSIONER OF CUSTOMS & EXCISE* (supra) observed that in classifying of goods one had to look at the heading, the notes and then the sub paragraph. This case boils down to this court merely interpreting what was really the intention of the legislature in the various codes in contention Halsbury Laws Vol. 44 at para 892 states that to construe a codifying statute, the proper course is to examine the language and ask what the natural meaning is and the intention of Parliament has to be taken into account because that is the purpose of interpretation of any written instrument (Halsbury’s Law 44th Ed. Pg.856). S 21 of the HS code which the Respondent relies on in classifying the Applicants good provides for classification of Miscellaneous edible preparations. Code 21 06.90. covers **‘food preparations not elsewhere specified or included’**. In the explanatory notes of the HS Code, goods were the classified under sub para. 14 as

“Products consisting of a mixture of plants or parts of plants (including seeds or fruits of different species or consisting of plants including seeds or fruits) of a single or of different species mixed with the substances such as one or more plant extracts, which are not consumed as such; which are of a kind used for making herbal infusions or herbal teas including products which are claimed to offer relief for ailments or contribute to general health and well being.

The heading excludes products which are infusion constitutes therapeutic or prophylactic dose of an active ingredient specific to a particular ailment (heading 30.03 of 30.04). The applicants contend that their goods are expressly excluded under that heading. The Applicants goods are described as ‘Medicinal Herbal Products’ while code 21, the goods are ‘food preparation’s’. (See HAS I the demand query from the Respondent to the Applicant).

Chapter 30 under which the Applicants claim their goods should have been classified, specifically at 3004, provides for

“medicaments (excluding goods of heading 30.62, 30.18 or 30.06 consisting of mixed or unmixed

products for therapeutic prophylactic uses, put up in measured doses (including those in the form of transdermal administration systems) or in forms of packings for retail sale.”

The explanatory notes at 30.04 covers medicaments (excluding goods of heading No. 30.02, 30.02, 30.05 or 30.06) consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses or form of packings for retail sale. Heading 3004.90 – covers medicaments consisting of mixed and unmixed products, provided that they put up measured doses in form of tablets, capsules, to be taken as doses of therapeutic or prophylactic use or in packing for retail for therapeutic or prophylactic use.

The Respondent does admit that it is the practice of the customs that samples are drawn on the goods when still under customs control upon request by an importer after entry of the goods or randomly by customs to verify the proper description of the goods. The applicant had their goods verified by the Ministry of Health and certified by the Registrar Pharmacy and poisons Board on behalf of the Permanent Secretary Ministry of Health and the goods were described as Assortical Herbal Medicinal Products (see page 6-20 of the verifying affidavit). The respondent has not bothered or attempted to show that, contrary to what the Pharmacy and Poisons Board found, the goods were actually food preparations which fell under chapter 21. The Respondent should have been in a position to tell the court the basis for classifying the Applicant’s goods food preparations as opposed to medicines. The description of the goods under chapter 21 is very different from those under chapter 3004. Code 3004.90,00 is zero rated and under that code, the Applicants would not be called upon to pay tax and in my considered view, although the respondent is charged with the duty of assessing tax and classifying the code under which the goods should be assessed, yet it seems the respondent fell into error by applying the wrong code the correct one being 3004.90.00, which was applied by the applicants. Tax law is that a tax statute must be clear in its provisions and in the event of any ambiguity, that has to be resolved in favour of the subject. In **KEROCHE** case, Justice Nyamu cited **BENNION ON STATUTORY INTERPRETATION – A CODE**, 4th Ed at page 726-727 where he says;

“nevertheless taxation is clearly ‘penal’ within this section of the code, and must not be enforced by the courts unless clearly imposed it is necessary to consider the legal analysis with the utmost precision so that the taxpayer shall not become liable to levies unless this is clearly and unequivocally the object of the statutory provision. The courts are reluctant to adopt a Construction permitting a person’s tax liability to be fixed by administrative discretion”.

In the instant case, the Respondent has not come out clearly why it decided to adopt 2106 as the code applicable yet the goods described at 2106 ‘food preparations’ are very different from those at 3004.90 Again at page 727 Bennion MA states as follows;

“--- in a taxing Act, one has to look at what is clearly said. There is no equity about tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.

In the instant case, the description of the goods is clear and I find no ambiguity in the language of the provisions that could have caused the Respondent to classify the goods under chapter 2106 which deals with food preparations whereas 3004.90 deals with medicaments with therapeutic and prophylactic functions and supported by the opinion of the Ministry of Health.

I find and hold that the respondent erred in using the wrong code to assess the duty due from the applicant’s goods. The said goods attract no tax or are zero rated and the self assessment by the applicant was proper. The assessment is contrary to the provisions of law under the EACCMA and the Harmonized Description and Coding System or HS Code and is therefore illegal – see CCSU case on illegality supra. In **ANISMINIC LTD V FOREIGN COMPENSATION COMMISSION (1969) I ALL ER 207**, the court held that certiorari lies to quash jurisdictional errors. Whereas the Respondent was acting within its jurisdiction, it fell into error when it applied the wrong code in classifying the Applicants goods and

that decision is subject to Judicial Review order of certiorari.

The applicant also alleges that the decision was illegal for failure by the respondent to issue a 30 days notice to the Applicant requiring the applicant to pay the sums due. S.135(2) requires that the person from whom duty is due be allowed 30 days to pay, from the date of demand. The Applicant alleges that a demand of Kshs.2,882,049.00 was made from the applicants but the agency notice required the applicant to pay a sum of 4,706,711/= yet there had been no demand notice issued for that sum. In my view, if the sums of Kshs.2,882,000/= had been found to be due, the court would not quash a decision because different figures had been given in the demand notice. This is because this court would not be concerned with the merits but fairness of the decision making process. The Respondent had explained that since the demand for duty was made, and the sums had not been paid, there were penalties and charges which had accrued on the original figure. Penalties are allowed under the same S.135 EAMCCA. I do not think that a fresh notice would have been necessary in the circumstances and there is no illegality disclosed.

Abuse of power and unfairness:

The Applicant also alleges that the manner in which the Respondent issued the letter of demand and agency notice and the fact that there was no factual basis for classifying the Applicant's goods as food preparations, and by ignoring the evidence from Ministry of Health that the products were medicaments, the respondent abused its power and acted unfairly.

A power may be abused in various ways for example, when one acts beyond his limits of power, or acts irrationally or acts for an improper purpose or seeks to frustrate the legitimate expectation of another. Every public body or officer is expected to act fairly in decision making, so that if he does not, then he is deemed to abuse his powers. In the case of

R V SECRETARY OF STATE FOR THE HOME DEPT ex parte BRIND (1991) I AC 696 the court held that, “**judicial review is a remedy invented by the judges to restrain the excess or abuse of power**”

In the instant case, I have found above that there seems to be no legal or factual basis upon which the Respondent decided and classified the applicants goods under chapter 21 of the HS code and therefore abused its power and unfairly exercised its discretion.

In ***R V SECRETARY OF STATE FOR THE ENVIRONMENT ex parte NOTTINGHAMSHIRE COUNTY COUNCIL (1986) AC 240***, the court held that the grounds upon which the court will review the exercise of administrative discretion by a public officer is abuse of power.

In the circumstances of this case, I find the Respondent to have exercised its powers unfairly and will call upon the decision to be quashed by an order of certiorari.

The Respondent seemed to want to raise the grounds that there was an alternative remedy available to the Applicant under S 229 of EACCMA but made no submissions on it.

Another ground that the Respondent seemed to be raising was that the Applicant failed to make free and frank disclosure of material facts but never elaborated.

Having found that the Respondent's decision was illegal and the Respondent abused their power by exercising their discretion unfairly, the court will call up the Respondent's decision to be quashed by an order of certiorari in terms of prayer (a) and (b) of the Notice of Motion. Prayer (c) for an order of prohibition is also granted to bar the Respondent from collecting duty and VAT from the Applicant on the said goods. The Respondent will bear costs of this application.

Dated and delivered this 17th day of February 2010

R.P.V. WENDOH

JUDGE

Present:

Mr. Amoko for Applicant

Mr. Ontweka for Respondent

Muturi: Court clerk