REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(MILIMANI LAW COURTS)

Miscellaneous Application 788 of 2007

IN THE MATTER OF AN APPLICATION BY ENKASITI FLOWERS GROWERS LIMITED FOR AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF PROHIBITION AND CERTIORARI

AND

IN THE MATTER OF THE KENYA REVENUE AUTHORITY

AND

IN THE MATTER OF THE EAST AFRICAN COMMUNITY CUSTOMS

MANAGEMENT ACT

BETWEEN

ENKASITI FLOWERS GROWERS LIMITED…………………………………. APPLICANT

VERSUS

KENYA REVENUE AUTHORITY…………………………………………… RESPONDENT

RULING

Enkasiti Flower Growers Ltd, has by the notice of motion dated 27.07.2007 challenged the decision of the Kenya Revenue Authority (hereinafter referred to as KRA) classifying of the its consignment to another Tariff. The notice of motion was based on grounds found in the statutory statement and the verifying affidavit of Manshukhlal Shantital Patel, the managing director of Enkasiti flowers. Submissions filed on 03.09.2010.

The notice of motion was opposed and Hadi Abdullahi Sheikh, an Assistant Commissioner in the service of the Customs Services Department of the respondent swore a replying affidavit dated 20.03.08 and

submissions were filed on 09.11.2008.

The only issues that seem to need this court\'s determination are:

1. Whether Applicants had an alternative remedy.

2. Whether the respondent\'s decision is illegal and therefore ultra vires the East African Community Customs Management Act (EACCMA).

3. Whether the Respondent acted arbitrarily and capriciously.

Briefly, the facts that lead to this dispute are that Enkasiti is a horticultural and flower growing firm in Kenya and has been using coconut fibre products, a substitute to soil as an artificial media in order to keep the plants healthy and free from pests and diseases. The said fibre is imported from India and Sri Lanka. All had been well untill Enkasiti received the Respondent\'s letter dated 29.01.2007 questioning and reclassifying the 17 raw coconut fibre consignments imported in 2004-06, alleging that they were wrongly declared under Tariff Index (TI) 5305, Instead of TI 2703.00.00. The letter is (PRP 1). After reclassifying the raw cocout, KRA also demanded Kshs 1,530,821.00 as Import Duty and VAT. On 07.03.2007, another letter was addressed to Enkasiti demanding 1,705,733/= inclusive of penalties and a demand that the same be paid within 7 days (PRP 2).

In that letter of 22.03.2007, Enkasiti\'s clearing and forwarding agents wrote to the KRA explaining why the classification of coconut fibre under TI 2703 was wrong and as the said raw fibre did not have the same properties as peat, mosses or minerals all of which are classified under 2703.00.00, and that the said product had been sent for analysis earlier and it was classified under (TI) 5305.19.00. (letter is PRP 3). At paragraph 10 of his affidavit, Patel set out the facts regarding cocopeat and coconut coir fibre which is an end product of dry coconut fibre, dust and husk compressed and has gone through a processing whereas the coir fibre is not. The deponent referred to the letter of the respondent dated 19.05.2007 in which Amiran Kenya Ltd advised the said entity regarding coconut fibre. (See paragraph 11 of the verifying affidavit). The said letters are exhibited as PRP 4 and that the fibre was classified as TI 5305.11. It is Enkasiti\'s contention that KRA has failed to take into account relevant considerations and has treated the applicant unfairly and unjustly and hence acted ultra vires the powers and statutory provisions of the EACCMA.

Reliance was made on CA 265 of 1997 **DAVID MUGO VS REPUBLIC** where the Court of Appeal held that existence of an alternative remedy is no bar to Judicial Review.

Reliance was also made on REPUBLIC V CRIMINAL COMPENSATION BOARD EX.P LAIN (1967) 2 QB 864 and REPUBLIC V ELECTRICITY COMMISSIONERS EX.PARTE LONDON ELECTRICITY JOINT COMMITTEE CO 1920 LTD (1924) 1K.B.171 and CA 97/1998 BAHAJJ HOLDINGS LTD V ABDI MOHAMED BAHAJJ & ANOR.

In opposing the notice of motion, Hadi deponed that he is assigned to the post of clearance and audit with Custom Services Department of KRA and conversant with this dispute.

He deponed that Section 135 of EACCMA empowers the Respondent to demand payment of any amount of duty that has been short levied. That Enkasiti was said to have used the. wrong Tariff in classification of raw coconut fibre which it had imported and demand for the short levy was made. An agency notice was issued on 14.03.07 in accordance with Section 131 of EACCMA(HAS 3). Enkasiti\'s agents wrote to the respondent disputing the TI classification (HAS 4) but a reply was clone indicating that the new classification under 2703.00.00 stood (HAS 5). That the applicant\'s import was a compressed Block mixture of brown particles and fibres used in horticulture which could not be classified under 5305.19.00 as that covers vegetable textile fibres obtained from leaves of monocotyledonous plants. That Raw coconut fibres used for soil improvement is classified under TI 2703 and attracts an import duty of 25% and VAT of 16%. That it does not fall under TI 5305.19.00 as declared by Enkasitis agents.

That the classification accords with the Harmonized Commodity Description and Coding System Explanatory Notes Third Ed (2002) (HAS 7). The KR.A contend that they have acted within the provisions of EACCMA and there is no evidence of arbitrariness or caprice or unfairness on their part. Further, it is contended that under Section 229 of the EACCMA, a party aggrieved by the Respondent\'s decision ought to seek review and there is no reason why Enkasiti did not seek review before the tribunal set up under EACCMA.

The law is that availability of an alternative remedy is not a bar to Judicial Review. This is because Judicial Review is a different kind of remedy. It does not address the merits of the impugned decision but the court looks at whether the process by which the decision was arrived at was fair and in accordance with the statutory provisions. Section 229 of EACCMA does provide the mode of redress for a taxpayer who is aggrieved by the decision of the Commissioner. The party has a right to seek review within 30 days. However, it is a requirement that the aggrieved party seeking Judicial Review should disclose to the court at the time of seeking leave that there exists an alternative remedy and demonstrate how that remedy was not suitable in the circumstances. An applicant for Judicial Review has a duty to make full and frank disclosure of all material facts as to whether there was an alternative remedy, delay or adverse authority etc.

Michael Fordtham in his book **"JUDICIAL REVIEW HANDBOOK,** 5th Ed at paragraph 10.2. says that Failure to disclose -existence of an alternative remedy at the leave stage for the court decide whether or not to grant leave is a material omission that can disentitle an applicant the remedy sought.

The issue at hand is the classification of raw coconut fibre that was imported by the applicant. Once that issue is determined, the remaining issue whether the respondent can recover the disputed duty.

The issue of classification revolves around interpretation of the applicable law. It does not seem to be in issue that it is the Harmonized Commodity Description and Coding System (H.S. Code) under the E. A. Community Custom Union Common External Tariff that is the applicable law. H.S. Code sets out the principles applicable to classification of goods for purposes of charging duty. In his case, whereas the Applicant classified the fibre under Code No.53.05, the Respondents are of the view that the applicable Code is 27.03. The question is whether the applicable Tariff is 53.05 or 27.03.

I will set out some of the provisions on interpretation under that H.S Code. Rules I provides in part:

"(1) for legal purposes, classification shall be determined according to the terms of the headings and any relative section of chapter notes and provided such headings or notes do not otherwise require according to the following provisions

2a Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unlimited, provided that, as presented, the incomplete or refirned article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (for failing to be classified as complete finished by virtue of this rule) presented unassembled or disassembled.

b. Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be classified according to the principles of Rule 3.

4. When by application of Rule 2(b) or for any other reason, goods are, prima facie, classifiable under two or more headings classification shall be effected as follows:

a. The heading which provides the most specific description shall be preferred to headings providing a mere general description. However, when two or more headings each refer to part only of the material or substance contained in mixed or composite goods or to part only of that item in a set put up for retail

sale, these headings are to be regarded as equally specific in relation to these goods even if one of them gives a more complete or precise description of the goods.

b. ……………………

c. ……………………

d. *Goods which cannot be classified in accordance with the above rules shall be classified under the heading appropriate to the goods to which they are most akin."*

Classification of the applicant\'s good must be classified in accordance to the above principles or interpretation of the Rules. The goods had been classified under Chapter 53 of H.S code which falls under Section XI. THAT section is titled **"other vegetable, textile fibres, paper yarn and woven fabrics or paper yarn"**

The explanatory notes state

"In general and with certain exceptions referred to in the explanatory note Heading 53.05, this chapter deals with vegetable textile materials (other than cotton) at the various stages from the raw materials to their transformation into woven fabrics."

Further explanatory notes to 53.05 states as follows:

"This heading covers vegetable textile fibres obtained from the leaves or fruits of certain monocotyledonous plants or in case of ramie, obtained from the skin of dicotyledonous plants of the family *urticaceae,* ***and not specified or included in any other heading (sisal, for instance falls in heading 53.04)***

However fibres obtained from vegetable material, which, when raw or in certain other forms fall in Chapter 14 (in particular kapok) are classified here only when they have undergone treatment indicating their use as textile materials e.g when they have been crushed, corded or combed in preparation for spinning.

The vegetable textile fibres classified above include:

Coconut ……………………….

Abaca …………………………

Remie …………………………

Alfa or esparto.... etc"

I think it is necessary to set out Tariff Heading 27.03 and the explanatory notes thereto in order to ably compare the two and ascertain which of the two applies to the coconut fibre.

The Heading is **"PEAT (INCLUDING PEAT LITTER) WHETHER OR NOT AGGLOMERATED"** Peat which is formed of partly carbonized vegetable material, is generally light and fibrous. The heading covers all kinds of peat, including dried or agglomerated peat used as fuel, crushed peat, peat litter, etc used in stables, for soil improvement or for other purposes.

"Mixtures of peat and sand or clay, the essential character of which is given by the peat, are also included in this heading, whether or not they contain small quantities of the fertilizing elements nitrogen, phosphorus or potassium. Such products are generally used as potting soils"

The material imported by the applicant was analyzed by the Customs Services Laboratory and found to be

a fibrous waste and dust derived from the production of coconut fibre. That the product is then processed or compressed into blocks for transportation purposes. That like peat, the Glow Coir contains no nutrients while peats, the coir lasts in the soil from three to five years.

The said material keeps the plants healthy and free from pests and diseases and that the coconut fibre was a good soil substitute for floriculture and horticultural crops (potting soil). Whereas under Heading 53.05, the material covered there under is used for making textiles, Code 27.04 is concerned with material used for soil improvement. Going by the interpretation given by the HS Code and specifically No.3, apart looking at the heading under which the goods fall, if the goods are classifiable under two or more headings then the most specific description will apply or under 3 (d) if the goods cannot be classified under the heading appropriate to the goods, then the heading most akin to the goods will apply. In this case, the goods could fall under either 53 or 27 but the most appropriate is the manner in which the goods are used which falls squarely under chapter 27.

The coconut fibre imported by the applicant is excluded from the H.S 53.05 because it is used for oil improvement not as textile. For the above reason, I will agree with the Respondents that they have adopted the correct tariff classification and there is no evidence that the classification is illegal, unlawful or are that it was made in bad faith or Capriciously. The Respondents interpretation of the H.S. Code seems to be to be the correct one and this court finds that to be the correct classification.

So then, should the applicants pay the duty claimed? Since the court has found the coconut material to have been classified with the correct tariff for purposes of tax. I find and hold that the Respondents were performing their statutory duty their decision cannot be faulted.

The applicant contends that the decision to issue agency notices was rushed and they were not given a chance to respond. The first demand was made on 19.01.2007 and payment was due within 30 days. The reminder was on 07.03.2007, about two months later, and thereafter, the applicant was only allowed 7 days within which to pay. In my view, the time was reasonable and the Respondent acted within its mandate and I cannot construe any malice on the part of the Respondents. The result is that the Notice of Motion is hereby dismissed with the applicants bearing the costs.

Dated and delivered at Nairobi this 14th day of October 2010.

R.P.V. WENDOH
JUDGE

In the Present of:

Mr. Kibara……………………… For Applicant

Mr. Muli………………………… For Respondent

Kajuju…………………………. Court Clerk