REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC CIV APPLI 1048 OF 2006

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW BY AWAL LIMITED FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF: THE COMMISSIONER GENERAL AND COMMISSIONER OF CUSTOMS SERVICES OF KENYA REVENUE AUTHORITY

AND

IN THE MATTER OF: PAKISTAN RICE 100% BROKEN CROP 05-86 PRODUCE OF PAKISTAN IMPORTED BY AWAL LIMITED FOR MAVUNO INDUSTRIES LIMITED, MOMBASA ROAD NAIROBI

BETWEEN

REPUBLIC……APPLICANT

VERSUS

THE COMMISSIONER GENERAL &

THE COMMISSIONER OF CUSTOMS SERVICES

KENYA REVENUE AUTHORITY……..……RESPONDENTS

EX-PARTE: AWAL LTD

JUDGMENT

Awal Ltd, the exparte applicant herein, took out a motion pursuant to order LIII rule 3 of the Civil Procedure Rules in which itsought for issuance of Judicial review orders in the nature of certiorari, Mandamus and prohibition against the Commissioner General, the Commissioner of Customs and Services and the Kenya Revenue Authority, the Respondents herein. The motion is supported by affidavit of Iqbal Kanji sworn on 23rd November 2006. It is also accompanied by the statutory statement of facts. When served, the Respondents resisted the motion by filing the replying affidavit of Kenneth Ochola sworn on 14th May 2007.

In the motion, the applicant has prayed for three main orders. First, is for an order of certiorari to bring into this court for quashing the order and decision of the respondents contained in their letters dated 11th September 2006 and 21st September 2006 classifying the applicant's 100% broken rice (rice residue) parked in forty one (41)containers specified on the face of the motion, Nineteen (19) of those containers are detained in the Respondents' godowns at Embakasi, Nairobi while 25 of them are held at the port of Mombasa under tariff heading no. 100.40.00

Secondly, the applicant is also asking for an order of prohibition to prohibit the Respondents from classifying under tariff heading no. 1006.40 the applicant's aforesaid rice and any other commodities of the applicant imported as 100% broken rice and or rice residue.

Thirdly, the applicant also sought for an order of Mandamus to be directed against the Respondents to release forthwith the applicant's rice residue contained in the forty four (44) aforesaid containers upon payment of duty under tariff heading number 23.02

The facts leading to the filing of these proceedings appear to be short and straightforward. In the year 2006, the applicant herein imported 44 containers of Pakistan IRR1-6 long grain white rice 100% broken hereinafter called the rice residue. The applicant names the companies which sold the aforesaid rice to be Mavuno Industries Ltd and Garibsons (BVT) Ltd. Garibsons is said to have shipped the aforesaid rice to the port of Mombasa in two consignments i.e. On 25th July 2006 and on 7th August 2006 respectively. It is said at the time of importation, the applicant in liason with Garibsons properly classified the said rice residue under tariff heading no. 23. 02 H.S Code no. 23. 02. 20 tariff no. 2302.20.00 on declaration to customs with a corresponding duty rate of 10%. The applicant claims it has paid the aforesaid in respect of the first consignment. It is said that the Respondents had confirmed in their letter of 11th September 2006 addressed to the Senior Assistant Commissioner of the Respondent. The applicant now complains that the Respondents without any justification have rejected the said tariff classification and have instead opted to classify the said rice under heading no. 10.06 H.S Code no. 1006.40 tariff no. 1006.40.00 with a corresponding duty rate of 35% which the Respondent now demands to be paid before the said rice residue can be released to the applicant. It is stated by the applicant that the Kenya Bureau of Standards carried its independent laboratory tests upon which it is said it confirmed that the applicant's classification was proper. It is the submission of the applicant that the Respondent's classification of the said rice residue as stated above and the subsequent holding of the same is capricious, unlawful, malicious, ultravires and tantamount to abuse of office. The applicant avers that it applied to the Respondents to review their decision under section 229 of the East African customs management Act but the Respondents have refused to respond within the stipulated time.

In the replying affidavit of Kenneth Ochola, the respondents are of the view that the goods could not be released to the applicant because upon verification the same were found to have been classified under a wrong tariff by the applicant in which the same would attract duty at the rate of 10% whereas the correct classification is 1006.40.00 (broken rice) which attracted duty at the rate of 75%. It is the averment of the Respondents that the rice were taken for laboratory analysis by Kenya Bureau of standards whereupon it was found that the sample is 94.22% broken rice whereas the customs services Department Laboratory Analysis report of 11.9.2006 indicates that the samples tested are considered to be 100% broken white rice. According to the Respondents the aforesaid reports find the sample as broken rice which falls under tariff 1006.40.00 according to tariff classification rules. It is the submission of the Respondent that the

Kenya Bureau of Standards deals with matters of Standards only whereas the customs laboratory is mandated to do analysis and provide classification opinion. It is therefore the opinion of the Respondents that the rules of tariff classification, the goods are correctly classified under the heading which provides the most specific description and applicant's rice was classified as broken white rice/broken rice. It has been argued the rice which is broken during processing is classified under H.S Code no.1006.40. It is said that the applicant is under an obligation to pay correct amount of duty plus interest and penalties and warehouse rent. The respondents are of the view that Judicial review is not the appropriate procedure for the determination of this dispute because expert evidence is required which cannot be given in such proceedings.

I have considered the rival submissions tendered by learned counsels on both sides. I have also taken into account the material placed before this court. The whole dispute really revolves around the classification of the rice. Upon getting the correct classification then the issue relating to duty fits in automatically.

It is the submission of the applicant that the Respondents acted capriciously and in excess of its statutory to wrongly classify the rice thus arriving at a wrong estimate of duty payable by the applicant. For this reason I think the applicant was right to take out Judicial Review Proceedings. This is so in view of the fact that the Respondents' decision is likely to deprive the applicant some benefit which it had earlier benefited and it legitimately expected to continue enjoying so. In such a case it can be said that if the allegation is proved, then the Respondents will be guilty of Procedural Impropriety having failed to act fairly. The question is whether the correct tariff heading should have been under no. 1006.40.00 which attracts duty at the rate of 75% or it should have been under tariff heading no. 2302.20.00 which attracts duty at the rate of 10%.

In order to solve this conflict one must look at what the guiding Principles of Law regarding interpretation. In my humble view, the law regarding this issue appear to be clear. The customs and Excise Act, Chapter 472 laws of Kenya gives a breakdown of tariff classifications. Section 2(3) **provides** in part as follows:

"***(3) The interpretation of the first schedule shall be governed by the following principles:***

(a) the titles of sections, chapters and sub-chapters are provided for ease of reference only, and for legal purposes classification shall be determined according to the terms of the heading and tariff descriptions and any relative section or chapter notes and, where the headings or notes do not otherwise require, according to the following provisions of this subsection:

(b) (i)……..

(ii)…….

(iii)…….

(c) (i)…….

(ii)……

(iii)……..

(d)…….

(e) (i)…….

(ii)…….

(f) for legal purposes, the classification of goods in the tariff description of a heading shall be determined according to the terms of those tariff descriptions and any chapter notes relative to those tariff descriptions and, mutatis mutandis, according to this subsection, on the understanding that only the tariff description at the same level are comparable, and for the purposes of this subsection the relative section and chapter notes also apply, unless the context otherwise requires.

(g) the classification of goods within a tariff description shall have regard to the wording of the heading

(h) where in any tariff description parts of articles are classified with those articles, mention of any of those articles in a tariff description of that heading shall be deemed to include a mention of parts of those articles, except in so far as the contrary intention appears from the wording of the tariff description.

(i) where goods are classified according to their use either by way of general description of their use or by reference to the use intended on importation or clearance through customs, the conditions of use shall not be taken to be fulfilled unless, at the time of importation or clearance the intended direct use is proved to the satisfaction of the commissioner.

(j) where an alternative rate of duty is shown, the rate chargeable is that which results in the higher duty charge.

It is also imperative to note that the rules of interpretation of tariff classification are also provided for in the world customs organization explanatory notes of Harmonized commodity Description and coding systems (H.S. Code). They are the generalized rules of interpretation of harmonized systems in classification of goods in nomenclature issued by the world customs organization to which Kenya is a signatory. The H.S Code assists the customs Department in the interpretation of the tariff classification. I will apply the interpretation provided for under the customs and Excise Act plus the rules of H.S. Code to determine this dispute.

This court has been urged by the applicant to rule that the correct tariff heading is no. 2302.20.00. It is clear from tariff heading no. 2302.20.00 that it relates to residues and waste from food Industries prepared animal fodder. The items are specified as bran, sharps and other residues derived from the sifting, milling or working of cereals or leguminous vegetables.

According to the applicant, the rice it imported should have be classified in this heading because the rice is a residue product derived from sifting and exclusively meant for industrial use. On the other hand, the Respondents are of the view that the rice cannot be classified under this heading because the applicant's rice do not qualify to be called residue in that the rice is not a by-product of rice. It is the Respondents' view that broken rice is not a residue of rice but the nature and type of rice. Looking at the rival submissions it is important to examine what the applicant imported. What tells it all is the agreement attached to the affidavit of Iqbal Kanji sworn in support of the motion. The agreement reads in part:

"***Whereas the vendor agrees to sell and the buyer agrees to purchase one thousand (1000) metric tons of Pakistani IRR1-1 long white rice. 100% Broken and packed in 50kgs single P.P bags"***

It is also indicated in the bill of lading attached to the aforesaid affidavit that the cargo is "Pakistan rice, 100% broken"

The laboratory test report by Kenya Bureau of Standards annexed to the same affidavit indicates that the sample tested is "94.22% broken rice". The aforesaid report by Kenya Bureau of Standards states that it is the standard specification of milled rice.

It would appear the Respondents also carried out their tests and came to the conclusion that the rice is considered to be broken white rice classified in H.S. Code 1006.40.00 as opposed to H.S. Code no. 23.02 which was said to only cover bran, sharps and other residues.

What does H.S Code 1006.40 entail?. It is covered in chapter 10 which is in respect of cereals. It is noted that the chapter only covers those grains which have neither been hulled nor otherwise worked rice (husked milled, polished, glazed, parboiled converted or broken remains). It is the averment of the Respondent that broken rice is covered under this particular heading because it deals with actual rice product and not its residue.

In the end I must conclude that looking at the material placed before me and the submissions tendered by learned counsels, that the Respondents had the statutory duty to impose duty according to the tariff classification provided by law under the customs and Excise Act and under the Harmonised Commodity Description and Coding System provided by the world custom organization explanatory notes in which Kenya is a signatory. What was imported by the applicant is Pakistani 1RR-1-6 long grain white rice, 100% broken. According to the laboratory tests by Kenya Bureau of Standards, the imported rice is stated to be 94.22% broken rice being standard specification for milled rice. It is therefore right to state that the Respondents applied the correct tariff heading no. 10.06. This heading covers rice husked, milled, polished glazed, parboiled or broken. There is nothing showing that the Respondents acted capriciously or unfairly to warrant their decisions contained in the letter dated 11th September 2006 and the other dated 21st September 2006- being quashed.

In the end I dismiss the motion dated 29th November 2006 with costs to the Respondents.

Dated and delivered this 18th day of October 2008.

J. K. SERGON

JUDGE