REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Misc Appli 1031 of 2006

IN THE MATTER OF: AN APPLICATION BY RAMNIKLAL P. SHAH

AND

KETAN RAMNIKLAL SHAH t/a ARPEES……APPLICANT

VERSUS

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

R U L I N G

Ketan Ramniklal Shah t/a ARPEES took out the motion dated 17th November 2006 pursuant to order LIII Rule 3 and 4 of the Civil Procedure Rules and under Sections 8 and 9 of the Law Reform Act in which he sought for the following orders against Kenya Revenue Authority, the Respondent herein:

a) An order of certiorari to bring into this court for quashing the Respondent's decision contained in the letter dated 9th November 2006.

b) An order of prohibition to prohibit the Respondent from classifying the applicant's goods declared under import entry No. 186930, 186995, 186964 and 186099 all of 11th January 2006 or the applicant's any other Ayurvedic Medicines under any tariff Hs code other than 3004.90.00.

c) An order of Mandamus directing the Respondent to refund all or any moneys or payments that may have been collected from the applicant's bank account.

d) Costs of the motion

The motion is supported by the verifying affidavit of Ketan Ramankilal Shah sworn on 15th March 2006 and a Statutory statement of the same date.

The Respondent vehemently opposed the motion by filing two separate replying affidavits of E.M. Njuguna and Bernard Oyucho sworn on the same date.

It is the submission of the exparte applicant that the Respondent has wrongly classified the applicant's goods under another tariff other than tariff code No. 3004.90.00. It is the argument of the applicant that the laboratory analysis from the Herbal/Ayurvedic Medicines show that the applicant's products are medicaments and therefore fall under the classification of tariff its code 3004.90.00.

It is further argued that the Respondent acted arbitrarily and capriciously when it invoked the provisions of Section 131 of the East African Community Customs Management Act to declare Investments and Mortgages Bank as an agent for it to collect a whooping sum of Kshs.1,740,841/- as due tax vide a letter dated 9th November 2006. The exparte applicant now says that the Respondent's demand for payment of tax is illegal and unlawful.

The Respondent on its part opposed the motion on various fronts. It is argued that the applicant had used an incorrect tariff Index hence the Respondent was entitled to correct the anomaly under the East African Community Customs Management Act 2004 to demand for payment of an under collected import duty.

The Respondent has also pointed out that the Respondent had been notified of the audit query and that his clearing agent had filed an objection which is still pending the determination of the Respondent's commissioner, hence the issue of the Respondent breaching the rules of natural justice or acting arbitrarily does not arise.

I have considered the arguments put forward for and against the motion. I have also perused the pleadings placed before me. The issues which must be determined are basically first whether or not the Respondent acted without jurisdiction when purporting to classify the applicant's goods. Two, whether or not the Respondent acted arbitrarily or capriciously and in breach of the rules of natural justice. As far as I am concerned these were the only serious issues which were put forward for my determination.

In relation to the first issue as to whether or not the Respondent acted without or in excess of jurisdiction, the answer to it can be derived by critically looking at the matter in dispute. It is not in dispute that the Respondent carried out laboratory analysis on the samples of the products supplied by to the Respondent for analysis, the applicant obviously knew that the Respondent was entitled to analysis his goods in order to determine the applicable tariff to ascertain the import duty.

After a careful consideration of the matter I am satisfied that the Respondent acted within the provisions of the East African Community Customs Management Act, 2004 and correctly applied the general rules for the harmonized system to determine the tariff classification. The Respondent in fact came to the conclusion that this analysis revealed that the applicant used the wrong tariff index hence it was entitled to demand payment of the under-collected import duty under section 135 of the East African Community Customs Management Act, 2004. My understanding of the applicant's complainant is that he thinks that the Respondent applied the wrong code in determining whether or not his goods attracted import duty. His argument is that he had previously imported similar products and did not attract the kind of duty the applicant now demands. The response to this assertion given by the Respondent is that the applicant had applied the outdated harmonized commodity description and coding system of 1987 instead of that of 2002. It is quite clear that the applicant is contesting the merits of the Respondent's decision. The matter before me is a judicial review application which is concerned with the decision making process and not the merits of the decision. In my view the applicant's complaint can easily be determined in the ordinary civil process and not through such proceedings.

The second issue raised is whether or not the Respondent acted capriciously, arbitrarily and in breach of the rules of natural justice. It is not denied that the Respondent issued an agency notice to Investments and Mortgages Bank. I have carefully perused the provisions of Section 131 of the East African Customs Management Act and it is clear that the Respondent had jurisdiction to issue the notice hence it acted within the law. It cannot be accused of having acted capriciously or arbitrarily. In any case there is evidence that the applicant's clearing agent had raised an objection to the Respondent's act and that his objection was heard and referred to the Respondent's Commissioner general for determination. I find that the Respondent has not breached any rules of natural justice nor did it act capriciously nor without jurisdiction.

In the end I find no merit in the motion, in the result the same is ordered dismissed with costs to the respondent. In view of the fact that the parties agreed that the outcome of this matter should apply to Mombasa H.C. Misc. Civil Application 1030 of 2006, it means that the aforesaid application shall suffer

the same fate as this motion.

Dated and delivered at Mombasa this 30th day of April 2007.

J.K. SERGON

J U D G E

In open court in the presence of Mrs

h/b Mr. Matuku for the Respondent

N/A for Mabeya for the Applicant.