REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)

MISC CIVIL APPLICATION 1061 OF 2007

DOSHI IRONMONGERS LTD……………………………………….APPLICANTS

Versus

COMMISSIONER CUSTOMS & ANOTHER..…………..……….RESPONDENTS

JUDGMENT

By a Notice of Motion dated 12th September 2007, Doshi Ironmongers Ltd., the ex parte Applicant herein, sought the following Judicial Review orders against the Commissioner of Customs and the Kenya Revenue Authority;

1) An order of certiorari to remove into the High Court for purposes of being quashed the demand notice for duties and taxes issued on 17th July 2007 together with all the consequential demands and notices;

2) That an order of mandamus do issue commanding the Respondents to release forthwith the Applicant's consignment in container marked numbered TCIU 451 9078 and entry No. 649 99 of 26th March 2007;

3) An order of prohibition barring the Respondent from levying further penalties and/or seizing the consignment as per entry No. 2007 MSA 649099 for future;

4) An order of mandamus to compel the Respodnent to consider the Applicant's protest dated 25th July 2007 and re-assess and/or re verify the applicant's consignment in container 4519078 entry No. 649099 of 26th March 2007

The Motion is supported by a statement and Verifying Affidavit of Ashok Doshi, both dated 11th September 2007. The Applicant's Counsel Mr. Omulele also filed skeleton arguments on 4th October 2007.

The Application was opposed by the filing of the Affidavits of Evanson Mairura who works as a Revenue Officer with the 2nd Respondent and another sworn by John Changole an Ag. Principal Revenue Officer with the 2nd Respondent, both dated 24th September 2007. Ms. Odundo, Counsel for the Respondent also filed skeleton arguments on 28th September 2007.

This dispute seems to have started when the Respondents subjected the Applicant's consignment of

goods to a physical verification between 26th March 2007 to 17th July 2007 and a demand notice for a further Kshs.1,007,650/= in addition to the self evaluation of Kshs.573,873/= which had been paid was made. The uplifted duty was demanded to be paid within 7 days. The demand notice is dated 17th July 2007 (AD 3). The Applicant disputed the uplifted assessment by letter of 25th July 2007 (AD 4) and to avoid incurring extra storage and demurrage charges, the Applicant gave a bank guarantee cheque of the uplifted sum so that the containers could be released but the Respondent rejected the bank guarantee without giving any reasonable explanation and still demanded the payment of the uplifted sum by letter of 5th September 2007 (AD 7). It is the Applicants case that they had previously imported similar goods but had never been taxed so highly. The Applicant believes that the goods will expire and the Applicant will therefore suffer loss if they are not released.

The grounds upon which this Application is founded are at paragraph C of the Statement and out of the 13 sub-paragraphs only 4 of the subparagraphs amount to grounds that;

(iv) The Respondents have not issued any reasons for the upliftment of duties and taxes;

(v) The Respondent have also for no reason rejected or denied the Applicants bank guarantee;

(vii) The actions of the Respondent in light of the bank

guarantee are unsuitable and calculated to occasion the Applicant damage in terms of demurrage charges, penalties, fines and the total loss of goods through expiry;

(viii) The Respondents have denied the applicant due process and reasonable expectation of justice.

The above grounds can be summarized in one ground that the Respondent breached the rules of natural justice by not giving reasons for their decision in uplifting the tax and duty payable and rejecting the bank guarantee and not giving the Applicant a fair hearing.

In his submission, Mr. Omulele urged that the Respondents contravened S. 122 of the East Africa Customs Management Act (EACM) which allows the Respondent to levy import duty on imported goods but that under S.122 (2) the importer is allowed to question the levying of duty by written request and further that under S. 122 (3) if the determination of the customs value is delayed, the goods can be released provided that upon request the importer provides security. Counsel urged that once the bank guarantee was issued on 25th July 2007 the goods should have been released.

It was also Counsel's submission that under S.229 of the EAC & M Act, a person affected by the Commissioner's decision may lodge Review proceedings to the Commissioner. That an objection was lodged pursuant to S. 229 (2) and Under S.229(4) the Respondent was supposed to communicate their decision. That since the objection was lodged on 25th July 2007, the response of the Commissioner should have been made by 25th August 2007 and since none was forthcoming, S. 229 (5) became effective so that the Respondent is deemed to have conceded to the Application and that no duties should have been asked for after 25th August 2007.

That when a response was made on 5th September 2007 declining the Bank guarantee and demanding payment, they were out of time and that in any event they never gave reasons for refusal of the guarantee which was contrary to the provisions of the law. Counsel said that the reasons given belatedly by Mr. Changole on how he did the assessment contravenes the law. That the Applicant does not agree with the "fall back" method used by the Respondent which was subjective, and that Changole therefore acted arbitrarily and in bad faith.

Ms. Odundo basing her submissions on the two Affidavits of Mairura and Changole, maintained that tax the system is based on self assessment but the system has been abused by importers undervaluing their goods. That they got information (EMI) that the Applicants were undervaluing goods and the Respondent decided to carry out 100% verification of all their containers. The Applicants were referred to valuation

Section in accordance with S.122 of the EACM Act and that at para 11 of his Affidavit Mr. Changole depones to using the 'fall back method' which is a flexible method of assessment, as the other methods were not suitable. That on 25th July 2007 the Applicants objected, and provided a bank guarantee and the same was considered and rejected because the Applicant had not come to court with clean hands and that it was the Respondent to set the security to be provided and that the letter of 25th July 2007 did not request for release of the goods.

Contrary to the Applicant's contention that they had previously imported similar consignments which were assessed at about 500,000/= Ms Odundo in considering exhibit EM8 which included the Appliants containers, the goods imported and taxes charged, pointed out the differences in the quantities in the goods imported and the different taxes imposed. That in any event, 3 of the consignments had been and were uplifted and 2 are paid for ie 118/07 and 055/07. It was Ms Odundo's submission that the Respondents have complied with S.5 of Kenya Revenue Authority Act which mandates them to collect taxes but the Applicants breached S.203(b) of EACM Act in making incorrect entries. That under S. 213 EACM Act the Respondents are allowed to detain the consignment till the dispute is resolved whereas S. 135 allows for demand of taxes that are short levied.

Counsel said that orders cannot issue because Judicial Review is only concerned with the decision making process not the merits of the decision. The Respondent relied on the **KENYA NATIONAL EXAMINATION COUNCIL V REP CA 266/1996** and **PILI MANAGEMENT V R HUISAN 525/06** for the above proposition.

I have now considered the submissions by both Counsel, the Application, the Statement and Affidavits. Under Order 53 Rule 4(1) Civil Procedure Rules, no grounds shall be relied upon in the Notice of Motion except the grounds set out in the Statement. Earlier in this judgment I endevoured to set out what I consider to be the only grounds in the Statement, that no reasons were given for the decision and that the decision was therefore unreasonable. That is the only ground that should have been argued by the Applicant. However, in his submissions Mr. Omulele endevoured to show that the decision of the Respondent was illegal/unlawful in that the Respondent failed to comply with S.122 and 229 of the EAC Management Act; or that the decision of Mr. Changole was arbitrary and irrational. These grounds were not pleaded in the statement. In Judicial Review, the grounds upon which a Judicial Review application can be brought are broadly, illegality, irrationality and impropriety. The only ground pleaded is that of procedural impropriety that reasons were not given and due process not followed. The court will not therefore bother to go into the other grounds raised during the submissions though the Respondent responded to them.

It is common ground that the Respondents did subject the Applicants goods to 100% verification. This is because the Respondents claim to have had reason to suspect that the Applicants were undervaluing the goods for purposes of evading tax. This process is allowed under S.122 of the EACM Act. which allows for charging of import duties on imported goods in accordance with the fourth schedule.

Under S. 122 (2) of the EACM Act, upon written request, the importer shall be entitled to an explanation in writing from the proper officer as to how the customs value of the goods was determined. By the letter dated 25th July 2007 the Applicants protested the uplifting of the duty and with the letter, gave a bank guarantee of the uplifted sum which was not accepted by the Respondents.

Under S. 122 (3) it is the proper officer who should ask the importer to provide sufficient guarantee and it is that officer to determine what is the proper security. The Applicants conferred that discretion upon themselves by providing a guarantee and I do agree with the Respondents that the Respondents were not bound to accept the guarantee and the law being clear the Respondent were not bound to give reasons for the refusal. Though S. 122 (2) imposes a duty on the proper officer to give reasons for the assessment, it seems no reasons were given by the Respondent.

According to the Applicants, the letter of 25th July 2007 protesting the uplifting of duty was an Application for review to the Commissioner which is envisaged under S.229 (1) of the EACM Act. That

Application for review should be made within 30 days of the decision. The decision was made on 17th July 2007 and the Application for review (protest) was made on 25th July 2007 which was within time. S. 229 (2) provides that such an Application should state the grounds upon which the said Application is lodged. The letter of 25th July 2007 only protested the uplifting of the taxes. It did not state the grounds upon which they were protesting. Under S. 229 (4) the Commissioner is supposed to render his decision on the Application for review within 30 days giving the reasons for it. According to the Applicants, the 30 days within which the Commissioner's decision should have been communicated lapsed on 25th August 2007 and under S. 229 (5), the Commissioner is deemed to have allowed the Application. The decision declining to accept the bank guarantee and asking for payment was made on 5th September 2007. No reasons were given. It is not until 24th September 2004 when John Changole filed a replying Affidavit to this Application in which at paragraph 11 he explained how he came up with the uplifted tax. He considered all the modes of assessment provided under the 4th schedule of the Act. He resorted to using the 'Fall Back' method to arrive at the correct value because according to him the other methods were not suitable. It is apparent that the officer had wide discretion in carrying out that assessment. The said assessment can only be challenged by the Applicants if it was done in bad faith or arbitrarily. As pointed out earlier in this judgment, the Applicant never pleaded the grounds of bad faith and arbitrariness and this court cannot venture to consider these grounds as a basis for the grant of Judicial Review orders.

Mr. Omulele attempted to consider each method of assessment adopted and how the 'Fall Back' method was the most unsuitable. But in my view, that is going to the merits of Mr. Changole's decision as to why he arrived at that assessment. If the assessment was based on the wrong principles then, the Applicant's recourse is to appeal as Judicial Review does not concern itself with the merits of the decision. The Applicants cannot challenge the mode of assessment of duty at this venue.

The Respondents do acknowledge that the letter dated 25th July 2007 where the Applicant lodged a protest on the assessment of duty, amounts to an Application for review to the Commissioner. The procedure for review is provided for under part XX, S. 229 of EACM Act S.229 (4) which is couched in mandatory terms, provides that the Commissioner should in a period not exceeding 30 days of the receipt of the Application, communicate his decision in writing to the person lodging the Application stating the reasons for his decision. S. 229 (5) then provides that if the Commissioner does not render his decision as provided in paragraph (4) then he is deemed to have allowed the Application. The protest having been lodged on 25th July 2007, the Commissioner's decision was due by 25th August 2007 after 30 days. No such decision was forthcoming and by virtue of S. 229 (5) the Commissioner was deemed to have allowed the Application. It is not until the Application was filed that on 24th September 2007 Mr. Changole gave his reasons for arriving at the uplifted value, that he adopted the 'Fall Back' method. That decision came 2 months latter and the Respondents have not explained why the delay in communicating their decision. Should the court disregard the Respondent's reasons for their decision, though belated. I would compare the filing of this Replying Affidavit by Changole, giving reasons why the Respondent arrived at the uplifted assessment to a defence filed late in civil proceedings, where an Application for interlocutory judgment has been made. Once the defence is on record, and discloses triable issues, the court cannot ignore it. The court cannot therefore ignore the reasons given by Changole in his Affidavit. The Respondent has a discretion under the fourth schedule of the Act on assessment of duty. As earlier noted going into the merits of the assessment is outside the scope of Judicial Review.

Section 5 of the Kenya Revenue Act Cap 469 mandates the Respondent to collect and receive in respect of the imported goods and S.203 (b) of EACM Act makes it an offence for any body who makes a false or incorrect declaration relating to customs. The Respondent is also mandated by S.135 of the EACM Act to demand any duty that has been short levied. The Respondents are of the view that the Applicants manipulated import records to evade tax. That was discovered after the Respondent carried out their investigation and this court cannot go into that. Having given an explanation as to how the Respondent arrived at the uplifted duty, even if late in the day, this court cannot decline to accept that explanation because the Respondents are carrying out their mandate under the statutes relating to collection of revenue. It would be absurd for the court to let the law be flouted and the Government to lose revenue by the court attempting to enforce S.229 (4) & (5) EACM Act in favour of the Applicant who is said to have flouted the same Act in avoiding to pay taxes. The Respondents are in the business of collecting revenue

and a slight omission of failure to communicate their decision on time cannot vitiate their decision. I find that reasons have been given by the Respondents on how the extra duty/tax was arrived at the delay not withstanding.

So can the Judicial Review orders lie?

In the first prayer, the Applicant seeks to have quashed the decision of the Respondents dated 17th July 2007 demanding the uplifted sum plus all consequential demands and notices. I have found that the Respondents have given reasons for the increased duty and hence rules of natural justice have not been flouted. An order of certiorari will only lie to quash a decision which is made without or in excess of jurisdiction or where rules of natural justice have not been complied with. (See **KENYA NATIONAL EXAMINATION COUNCIL V REP CA 266/96)**. The only ground relied upon is that no reasons were given by the Respondents. The said reasons have now been given in the Affidavit of John Changole and there is no basis for the grant of the order. Prayer one must fail.

Prayer 2 & 4 seek orders of mandamus compelling the Respondents to release forthwith the Applicant's consignment and also consider the protest dated 25th July 2007 and reassess or re verify the consignment. It is noteworthy that when these prayers were sought, John Changole had not explained how he came up with the assessment. An order of mandamus lies to compel a public body to perform a statutory duty imposed on it that it has failed or neglected to perform. The protest of 25th July 2007 has been considered and rejected in that the assessment done by Mr. Changole stands. An order to consider the protest of 25th July 2007 reverify or reassess tax will be an order in vain and cannot therefore lie. As for release of the goods, I believe they can only be released after payment of the uplifted taxes and any extra costs due. This is because under S. 122 (3) EACM Act the Applicant had the option of seeking to have the goods released upon payment of the demanded duties as they awaited the decision of the Commissioner on the protest. Instead they took it upon themselves to issue a guarantee without being asked to do so. In the event that they succeeded they would have got a refund and mitigated their losses had they paid the new taxes. The Applicant preferred the longer winded route.   Mandamus cannot lie.

In prayer 3, an order of prohibition is sought, to bar the Respondent from paying further penalties and/or seizing the consignment as per entry No. 2007 MSA 649099 for future. Prohibition is an order from the High Court to a tribunal prohibiting a decision that is yet to be made. The duty on the Applicants goods has already been assessed. These particular goods have been detained to await payment of the extra taxes. The court cannot prohibit what is already decided and will also not prohibit the charges that may flow from the detention of the consignment since July 2007. That prayer cannot lie.

Judicial Review remedies are discretionary in nature and the court may decline to grant them even if deserved. The court finds that these orders are not deserved for the reasons given in this judgment. The Applicant seems to be dissatisfied with the assessment of duty. That goes to the merits of the decision. The Applicant should have appealed against that decision or filed civil proceedings disputing it. Judicial Review was not the most suitable

remedy in the circumstances. As a result I dismiss the Notice of Motion dated 12th September 2007 with costs to Respondents.

Dated and delivered this 5th day of December 2007.

R.P.V. WENDOH

JUDGE

Read in the presence of:-

Ms. Odundo)

Mr. Twahir) for the Respondents

No appearance for Applicant

Daniel: Court Clerk