Amadi (Suing as the Official Representative of Kenya Renewable Energy Association) v Kenya Revenue Authority; Greentech Solutions Limited & 19 others (Interested Parties) (Petition E127 of 2022) [2024] KEHC 15729 (KLR) (Constitutional and Human Rights) (13 December 2024) (Judgment)

Neutral citation: [2024] KEHC 15729 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E127 OF 2022

LN MUGAMBI, J

DECEMBER 13, 2024

BETWEEN

ANDREW AMADI ..... PETITIONER

SUING AS THE OFFICIAL REPRESENTATIVE OF KENYA RENEWABLE ENERGY ASSOCIATION

AND

KENYA REVENUE AUTHORITY ..... RESPONDENT

AND

GREENTECH SOLUTIONS LIMITED ..... INTERESTED PARTY

ORB ENERGY PRIVATE LIMITED ..... INTERESTED PARTY

SONNEN ENERGIE TECHNIK ..... INTERESTED PARTY

LJOS COMPANY LTD (EOS SOLAR ..... INTERESTED PARTY

HELIOS AGROSOL LIMITED ..... INTERESTED PARTY

DAVIS & SHIRTLIFFF ..... INTERESTED PARTY

GLOSEC SYSTEMS LIMITED ..... INTERESTED PARTY

ENERGOOD EAST AFRICA LIMITED ..... INTERESTED PARTY

SOLAR POWER AND INFRASTRUCTURE LIMITED .... INTERESTED PARTY

POWER POINT SYSTEMS EAST AFRICA LIMITED ..... INTERESTED PARTY

SCANDNAVIAN SOLAR SYSTEMS LIMITED ..... INTERESTED PARTY

CHAMELEON SOLUTIONS LIMITED ..... INTERESTED PARTY

CENTRE FOR ALTERNATIVE TECHNOLOGIES LIMITED .... INTERESTED PARTY

CLIMAMCENTO GREEN TECH LIMITED ..... INTERESTED PARTY

TECHNOLOGIES LIMITED ..... INTERESTED PARTY

STEEL STONE KENYA LIMITED ..... INTERESTED PARTY

TECHNICAH ENGINEERING SERVICES LIMITED ..... INTERESTED PARTY

TILE & CARPET LIMITED ..... INTERESTED PARTY

SOLLATEK ELECTRONICS (KENYA) LIMITED ..... INTERESTED PARTY

YAOSHUN IMPORT & EXPORT LIMITED ..... INTERESTED PARTY

JUDGMENT

Introduction

1. The Petition dated 29th March 2022 is supported by the Petitioner's affidavit in support of even date.

2. The instant Petition challenges the Respondent's decision to re-classify solar water heaters tariff from HS 8419.19 to HS 8516.10 and the Respondent's alleged unlawful enforcement of its Ruling dated 22nd November 2021. Consequently, the Petitioner seeks the following reliefs:

    a. A declaration that the ruling dated 22nd November, 2021 reference No. KRA/CBC/BIA/THQ/GEN/099/11/2021 and the reclassification of the solar water heaters from HS 8419:19 to HS 8516:10 violates Article 10, 40, 47,201 and 232 of *the Constitution* and is therefore null and void.

    b. The Court be pleased to issue an order of prohibition against the Respondent restraining the implementation of its ruling dated 22nd November, 2021 reference No. KRA/CBC/BIA/THQ/GEN/099/11/2021 and specifically restraining the Respondent from reclassifying solar water heaters imported under HSC 8419:19 to HSC 8516:10 by collecting and/ or demanding payment of VAT and Import duty on importation of solar water heaters by themselves, their agents, their servants, employees or representatives.

    c. An order granting the Petitioner costs of this Petition.

    d. Any other relief that the court may deem just and expedient to grant in the circumstances.

Petitioner's Case

3. The Petitioner states that he represents the Kenya Renewable Energy Association, a non - profit organization keen on facilitating the growth and development of renewable energy business in Kenya. The Interested Parties are some of its members.

4. He explained that the Interested parties have been importing solar water heaters under the Harmonized Systems Convention (HS Code 8419.19.00) for the last 10 years and their tariff declarations under that code were always verified by the Respondent and the Kenya Bureau of Standards. Basically, the agents would ascertain that the declared tariff was correct and the Respondent never raised any issue or require further assessments.

5. In view of the said consistent practice, the Respondent created a legitimate expectation that in the future, it would continue classifying the solar water heaters under Hs Code 8419.19.00. Equally, the Petitioner and Interested Party also expected that in the event of any re-classification, the same would be done in compliance with Article 47 of *the Constitution* as read with Section 4, 5 and 6 of the Fair Administrative Actions Act.

6. He depones that in 2020, the Respondent notified the industry players of its intention to reclassify the solar water systems from HS Code 8419.19.00 to 8516.10.00, principally the traditional geysers systems. Tying to this, the Respondent is said to have directed the pertinent players to reimburse the duty and VAT for all the solar water heaters imports completed during the preceding 5 years.

7. Aggrieved by this directive, the Interested Parties protested the decision before the Tax Appeals Tribunal. The Petitioner clarified that the instant Petition does not cover the retrospective application of the Respondent's decision as that portion of the disagreement is pending determination before the Tax Appeals Tribunal.

8. He depones that the Petitioner's bone of contention is the re – classification of the solar water heaters to HS 8516.10. That the Petitioner engaged the Respondent in a number of meetings to discuss the matter. As a consequence, the Respondent sought advice on the matter from the World Customs Organization (WCO) through a letter dated 30th August 2021.

9. The Petitioner alleges that in the said letter the Respondent erroneously sought guidance on the classification of a dual system water heater instead of machinery, plant or laboratory equipment whether or not electrically heated. This approach was contested by the Petitioner and the Interested Parties who contended that even where the solar water heaters were classifiable under more than one category, Rule 3 of the General Interpretation Rules would entail a classification to be based on the material that gives the product its essential character.

10. He further argues that the WCO Ruling dated 3rd November 2021 was tainted with illegitimacy as it failed to adhere to the procedure set out under Article 16 of the HS Convention. Additionally, despite the HS Committee making amendments to the HS Code classifying solar water heaters as HS 8419:12, the WCO went ahead in its Ruling to classify the solar water heaters as HSC 8516.10.

11. Considering this, the Petitioner contends that the Respondent ought not to have relied on the WCO impugned Ruling. The Petitioner however states that the Respondent went ahead on 22nd November 2021 and made its Ruling to the effect that, solar water heaters were classified under HSC 8516.10 and a duty of 25% plus VAT was payable on all such imports.

12. In view of the foregoing, the Petitioner posits that the Respondent was required to comply with Article 47 of *the Constitution* and Section 5 of the *Fair Administrative Action Act*. Correspondingly that the Respondent ought to have invited the relevant stakeholders to give their comments on the same before making the impugned decision in line with the public participation principle envisaged under Article 201 and 232 of *the Constitution*.

13. Additionally, it was argued that Section 65 of the *Tax Procedures Act* provides that the Commissioner's Rulings are not binding on a tax payer and thus enforcement of the impugned Ruling is both illegal and unconstitutional.

14. He as well depones that importation of goods is guided by an international standard in classification of goods. For this reason, the Petitioner argues that the Respondent's directive has made it difficult for the Interested Parties to import the solar water heaters as they have a different classification

from the international classification of the same that is HS 8419.19. Consequently, he avers that the Respondent's directive has affected the Interested Parties right to transact business in Kenya.

15. It is further argued that since classification of solar water heaters is carried out by the HS Committee by virtue of Kenya being a contracting party of the WCO, the Respondent's Post Clearance Audit Department exceeded their mandate by undertaking to re-classify solar water heaters.

16. In view of the foregoing, the Petitioners contended that the Respondent failed to follow the laid down procedure in the reclassification of the products under the Harmonized Systems Convention (HSC) which applies by dint of Article 2(5) and (6) of *the Constitution* and nationally, Section 5 of the Fair Administrative Actions Act. As a consequence, the Respondent's actions are not only in breach of the Interested Parties right to property but also a direct cause of significant loss of investments in the industry.

Respondent's case

17. The Respondent's response to the Petition was through the Replying Affidavit of Dennis Kabiru sworn on 6th May 2022.

18. He depones that the Respondent through its Post Clearance Audit Unit conducted a desk review of the custom entries for companies that had imported solar water heating systems for the period between January 2016 to December 2020. This was pursuant to the mandate conferred by Sections 235 and 236 of the East African Community Customs Management Act, 2004 (EACCM Act).

19. He states that the audit disclosed that the solar water heating systems have an electric component and thus are dual water heating systems classifiable under tariff code 8516.10.00. He further makes known that the tariff classification of imported items is governed by the EAC HS Code as provided under Section 4 of the EACCM Act not the HS Code as averred by the Petitioner. Equally, he contends that the HS Code has not been amended as alleged by the Petitioner.

20. Upon this discovery, the Respondent proceeded to direct that these companies including the Interested Parties to pay the shortfall of the levied taxes due which was objected to by these companies. The Respondent reviewed the objections but eventually upheld its decision in the matter. Aggrieved the companies including the Interested Parties appealed the decision at the Tax Appeals Tribunal.

21. He avers that the Petitioner also requested the Respondent to review the Tariff classification of the dual system solar water heaters. This request is what led to the impugned Ruling dated 22nd November 2021.According to him, the Respondent gave its decision in accordance with Article 47 of *the Constitution*. The Respondent argued that the Petitioner's claim that the Respondent cannot enforce the Ruling is a misapprehension of the law.

22. For context, he stated that Kenya operates a self – assessment and declaration system, where a taxpayer makes declarations and pays taxes on the items that they import. In the event a tax payer defaults, Section 135, 235, 236 and 249 of the EACCM Act authorizes the Respondent to within 5 years of importation to assess and demand the short-levied taxes through the post clearance audit system. The Petitioner notes that this is in line with the dictates of the Kyoto Convention on authentication of declarations through examination of the relevant documentation. In this matter, he avers that the legal procedure was duly followed and the audit carried out within the 5-year window period.

23. In closing, he further argues that due to the dispute mechanism procedure set out in the EACCM Act, the Petitioner ought to have applied for review of the impugned Ruling in accordance with Section 229, 230 and 231. For this reason, it is claimed that the Petitioner failed to exhaust the available mechanism. (It is worth noting that this issue was also raised in the Respondent's Notice of Preliminary Objection

dated 4th May 2022.This Court subsequently rendered its Ruling in the matter on 30th September 2022 where the Preliminary Objection was dismissed and this Court's jurisdiction to hear this Petition was upheld).

24. On the other hand, it is asserted that the WCO Ruling dated 3rd November 2021 does not raise a constitutional question for determination by this Court.

Parties Submissions

Petitioner and Interested Party's Case Submissions

25. Thiong'o and Partners Advocates filed two sets of submissions in this matter dated 27th April 2023 and 20th June 2023 respectively. Counsel identified the issues for determination as:

> "whether the impugned ruling dated 22nd November 2021 contravenes the Petitioner's constitutional right to a fair administrative action and the right to property; whether the impugned decision contravened the Petitioner's legitimate expectation and whether the decision was tainted with procedural and legal impropriety."

26. On the first issue, Counsel submitted that the Respondent in making its decision of reclassification in the impugned ruling was required to comply with the requirements of *the Constitution* but it failed to do so. It was argued that the Respondent failed to give a public notice inviting the public and relevant stakeholders to give their views and opinions before the reclassification decision was made contrary to Articles 10, 201 and 232 of *the Constitution*.

27. Equally, that the Respondent failed to provide an avenue for appealing against the impugned Ruling.

28. Reliance was placed in Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 Others [2017] eKLR where it was held that:

> "...Article 10 (2) of *the Constitution* is justiciable and enforceable immediately. For avoidance of doubt, we find and hold that the values espoused in Article 10 (2) are neither aspirational nor progressive; they are immediate, enforceable and justiciable. The values are not directive principles. Kenyans did not promulgate the 2010 Constitution in order to have devolution, good governance, democracy, rule of law and participation of the people to be realized in a progressive manner in some time in the future; it could never have been the intention of Kenyans to have good governance, transparency and accountability to be realized and enforced gradually. Likewise, the values of human dignity, equity, social justice, inclusiveness and non-discrimination cannot be aspirational and incremental, but are justiciable and immediately enforceable. Our view on this matter is reinforced by Article 259(1) (a) which enjoins all persons to interpret *the Constitution* in a manner that promotes its values and principles.
>
> Consequently, in this appeal, we make a firm determination that Article 10 (2) of *the Constitution* is justiciable and enforceable and violation of the Article can found a cause of action either on its own or in conjunction with other Constitutional Articles or Statutes as appropriate."

29. Like dependence was placed in Mui Coal Basin Local Community & 15 Others v Permanent Secretary Ministn; of Energy & 17 Others [2015] eKLR.

30. On the right to property, Counsel submitted that the Respondent's un-procedural and illegal actions of enforcing a private ruling had affected the Interested Party's rights to transact due to the different classification of the solar water heaters against the global standard classification of the same. For this reason, the Interested Parties have had a difficulty in importing this product.

31. On the second issue, Counsel stated that the consistent practice by the Respondent to classify the imported the solar water heatersunder Tariff 8419.19.00 and not any other code created a legitimate expectation in the Interested Parties that this practice would continue in the future. Considering this, it was argued that the Respondent should be estopped from acting contrary to its consistent representation. Reliance was placed in Oindi Zaippeline & 39 others v Karatina University & another [2015] eKLR where it was held that:

> " Legitimate expectation applies the principles of fairness and reasonableness, to the situation in which a person has an expectation, or interest in a public body retaining a long-standing practice, or keeping a promise. An instance of legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfill a promise."

32. Similar dependence was placed in Kenya Revenue Authority v Universal Corporation Ltd [2020] eKLR, *Communications Commission of Kenya & 5 Others vs Royal Media Services Limited & 5 Others, Petition No. 14 of 2014* and Krish Commodities Limited v Kenya Revenue Authority [2018] eKLR.

33. Turning to the third issue, Counsel submitted that the Respondent in addition to violating the Petitioner's constitutional rights proceeded to enforce the impugned Ruling contrary to Section 65 (5) of the Tax Procedure Act which provides that these Rulings are not binding. Furthermore, it was submitted that it is the WCO which is charged with the mandate to amend the Harmonized Systems Code (HSC). Accordingly, Counsel submitted that the Respondent was enjoined to follow the laid down procedure in reclassification of products under the HSC but failed to do so. For this reason, it was argued that the Respondent's reclassification could not stand the test of legality.

Respondent's Submissions

34. Counsel, Diana Almadi filed submissions for the Respondents dated 7th June 2023. Counsel sought to discuss: whether the Respondent's Ruling dated 22nd November 2021 infringed the Petitioner's constitutional rights under Articles 2, 10, 40, 47, 201 and 232 of *the Constitution*; whether this Court should grant orders of prohibition restraining the Respondent from reclassifying solar water heaters imported under HS Code 8419.19 to 8516.10 and whether the Petitioner exhausted all avenues of redress in regards to the instant suit.

35. Counsel in the first issue submitted that the Respondent had not violated the Petitioner's constitutional rights as alleged. In fact, Counsel submitted that the Petitioner had not demonstrated how these rights had been violated and neither pleaded his case within the threshold set out in the Anarita Karimi Njeru vs the Republic (No.1) (1979) 1 KLR 154.

36. According to Counsel the reclassification of the solar water heaters from HS Code 8419.19 to 8516.10 was done lawfully including the demand for the short-levied taxes which is provided for under Section 135(1) of the EACCMA, 2004.

37. Moreover, Counsel argued that the impugned Ruling had been determined in conformity with Article 47 of *the Constitution* and Section 4(2) of the Fair Administrative Actions Act in that the attendant

reasons for the reclassification were shared. To buttress this argument reliance was placed in Republic vs Registrar of Companies ex parte Githungo(2001)KLR 299 where it was held that:

> " Natural justice requires that persons who might be affected by administrative acts, decisions or proceedings be given adequate notice of what is proposed."

38. Correspondingly it was argued that the impugned Ruling had been issued in line with the Respondent's statutory mandate. To buttress this, reliance was placed in Samura Engineering Limited & others vs Kenya Revenue Authority (2012) eKLR where it was held that:

> " Kenya Revenue Authority as the state agency charged with the collection of taxes is bound by the provisions of the Bill of Rights to the fullest extent in the manner in which it administers the laws concerning the collection of taxes. The values contained in Articles 10 must at all times permeant its functions and activities which it is mandate to carry out by statute."

39. Additionally, Counsel contended that the Petitioner's claim of violation of his right to property was unfounded as the taxation is constitutionally sanctioned under Article 209 and 210 of *the Constitution*. Reliance was placed in Kenya Union of Domestic, Hotels, Education Institutions and Hospital Workers (Kudheiha Workers Union) vs Kenya Revenue Authority & 3 others (2014) eKLR where it was held that:

> " Finally, the imposition of taxes is a constitutional imperative and the power to impose taxes is reposed in legislature. The imposition of tax by statute cannot itself, amount to arbitrary deprivation of property contrary to Article 40 of *the Constitution*."

40. Turning to the second issue, Counsel submitted that reclassification of the solar water heaters is part of the Respondent's statutory power and thus issuance of the order would only bar the Respondent's mandate. As such, Counsel submitted that this Court should refrain from interfering with the Respondent's mandate. Counsel urged the Court to be guided by Mate & another v Wambora & another (Petition 32 of 2014) [2017] KESC 1 (KLR) (Civ) (15 December 2017) (Judgment) where the Supreme Court held that:

> " 63. From the course of reasoning emerging from such cases, it is possible to formulate certain principles, as follows:
>
> a. each arm of Government has an obligation to recognize the independence of other arms of Government;
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> b. each arm of Government is under duty to refrain from directing another Organ on how to exercise its mandate;
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> c. the Courts of law are the proper judge of compliance with constitutional edict, for all public agencies; but this is attended with the duty of objectivity and specificity, in the exercise of judgment;
>
> d. for the due functioning of constitutional governance, the Courts be guided by restraint, limiting themselves to intervention in requisite instances, upon appreciating the prevailing circumstances, and the objective needs and public interests attending each case;

e. in the performance of the respective functions, every arm of Government is subject to the law."

41. Like dependence was placed in Pevans East Africa Limited and another v Chairman, Betting Control & Licensing Board & 7 others (2018) eKLR.

42. On the third issue, Counsel submitted that it is the Petitioner who had violated the dictates of Section 9(2) of the *Fair Administrative Action Act* for failing to exhaust the dispute mechanisms provided under Section 229, 230 and 231 of the EACCMA, 2004.Counsel noted that similar sentiments were also stated in Chelagat Yatich vs Baringo North Sub-county Alcoholic Drinks & another (2019) eKLR which was cited in support.

43. In like manner, Counsel submitted that the Petitioner under Section 51 of the Tax Procedure Act, 2015 was first required to lodge an objection against a tax decision before proceeding under any other law. This was not done. To buttress this point, Counsel cited the case of Speaker of the National Assembly vs James Njenga Karume (1992) eKLR where it was held that:

> "Where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."

44. Similar dependence was placed in Geoffrey Muthinja Kabiru & 2 others vs Samuel Munga Henry & 1756 others (2015) eKLR.

Analysis and Determination

45. Having reviewed the pleadings and the submissions by both the Petitioner and the Respondent, I find the following to be the issues that fall for determination:

i. Whether the Respondent's reclassification of the HS Code for solar water heaters from HS 8419.19 to HS 8516.10 and its ruling dated 22nd November 2021 infringed the Petitioner's and Interested Parties constitutional rights under Articles 2, 10, 40, 47, 201 and 232 of *the Constitution*.

ii. Whether the Respondent violated the Petitioner's and Interested Parties right to legitimate expectation; and

iii. Whether the Petitioner and the Interested Parties are entitled to the relief sought.

Whether the Respondent's reclassification of the HS Code for solar water heaters from HS8419, 19 to HS 8516.10 and its Ruling dated 22nd November 2021 contravenes the Petitioner's constitutional rights under Articles 2, 10, 40, 47, 201 and 232 of *the Constitution*

46. This particular issue as is clear from its framing has two features; namely: the alleged unprocedural re-classification of the solar water heaters HS code and, the alleged unlawful enforcement of the impugned Ruling dated 22nd November 2021 based on this re – classification.

47. To begin with, it is important to ascertain if the threshold for Constitutional petition has been met as per Anarita Karimi Njeru case (supra). The Supreme Court in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR affirmed the test as follows:

> "(349) .... Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru v. Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement..."

48. Next, the Petitioner has to prove that Respondent violated the purported constitutional provisions. In this respect, the Supreme Court in Gwer & 5 others v Kenya Medical Research Institute & 3 others (Petition 12 of 2019) [2020] KESC 66 (KLR) (Civ) (10 January 2020) (Judgment) guided as follows:

> "(49) Section 108 of the *Evidence Act* provides that, "the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;" and Section 109 of the Act declares that, "the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."
>
> (50) This Court in Raila Odinga & Others *v. Independent Electoral & Boundaries Commission & Others, Petition No. 5 of 2013*, restated the basic rule on the shifting of the evidential burden, in these terms:
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> > "...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden...."

49. I have carefully read the Petition and I am convinced that it is properly pleaded and the case against the Respondent is well articulated by identifying of the Articles of *the Constitution* alleged to have been violated and also manner of the alleged violation is also disclosed.

50. Classification of tariff codes is provided for in the International Convention on the Harmonized Commodity Description and Coding System (HS Convention). It defines the tariff code as follows under Article 1:

> The Nomenclature comprising the headings and subheadings and their related numerical codes, the Section, Chapter and Subheading Notes and the General Rules for the interpretation of the Harmonized System, set out in the Annex to this Convention.

51. The HS Convention provides under Article 3(1) (a) that contracting parties are obliged as follows:

1. Subject to the exceptions enumerated in Article 4:

a. Each Contracting Party undertakes, except as provided in subparagraph (c) of this paragraph, that from the date on which this Convention enters into force in respect of it, its Customs tariff and statistical nomenclatures shall be in conformity with the Harmonized System. It thus undertakes that, in respect of its Customs tariff and statistical nomenclatures:

i. it shall use all the headings and subheadings of the Harmonized System without addition or modification, together with their related numerical codes;

ii. it shall apply the General Rules for the interpretation of the Harmonized System and all the Section, Chapter and Subheading Notes, and shall not modify the scope of the Sections, Chapters, headings or subheadings of the Harmonized System; and

iii. it shall follow the numerical sequence of the Harmonized System.

52. The attendant two codes in this suit are described as follows in the:

> 8419.19 - Machinery, plant or laboratory equipment, whether or not electrically(heated excluding furnaces, ovens and other equipment of heading 85:14) for the treatment of materials by a process involving a change of temperature such as heating , cooking , roasting, distilling, rectifying , sterilising, pasteurising, steaming, drying, evaporating, vaporising, condensing or cooling, other than machinery or plant of a kind used for domestic purposes, instantaneous, or storage water heaters, non-electric."
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> 8516.10 - Electric instantaneous or storage water heaters and immersion heaters, electric space heating apparatus and soil heating apparatus, electro-thermic hair dressing apparatus (for example, hair dryers, hair curlers, curling tong heaters) and hand dryers; electric smoothing irons; other electro-thermic appliances of a kind used for domestic purposes; electric heating resistors, other than those of heading 85.45.

53. In this regard, the General Rules for the Interpretation of the Harmonized System provide the following principles on classification of goods:

1. The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions:

(a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished 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 (or falling to be classified as complete or 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 given 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 according to the principles of Rule 3.

2. 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 more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

    b. Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3 (a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

    c. When goods cannot be classified by reference to 3 (a) or 3 (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

3. 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.

4. In addition to the foregoing provisions, the following Rules shall apply in respect of the goods referred to therein:

    a. Camera cases, musical instrument cases, gun cases, drawing instrument cases, necklace cases and similar containers, specially shaped or fitted to contain a specific article or set of articles, suitable for long-term use and presented with the articles for which they are intended, shall be classified with such articles when of a kind normally sold therewith. This Rule does not, however, apply to containers which give the whole its essential character;

    b. Subject to the provisions of Rule 5 (a) above, packing materials and packing containers presented with the goods therein shall be classified with the goods if they are of a kind normally used for packing such goods. However, this provision is not binding when such packing materials or packing containers are clearly suitable for repetitive use.

5. For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related Subheading Notes and, mutatis mutandis, to the above Rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this Rule the relative Section and Chapter Notes also apply, unless the context otherwise requires.

54. Furthermore, the HS code in classification of items can only be changed as per the dictates of Article 16 which reads as follows:

    Amendment procedure

    1. The Council may recommend amendments to this Convention to the Contracting Parties.

2. Any Contracting Party may notify the Secretary General of an objection to a recommended amendment and may subsequently withdraw such objection within the period specified in paragraph 3 of this Article.

3. Any recommended amendment shall be deemed to be accepted six months after the date of its notification by the Secretary General provided that there is no objection outstanding at the end of this period.

4. Accepted amendments shall enter into force for all Contracting Parties on one of the following dates :

   a. where the recommended amendment is notified before 1 April, the date shall be the first of January of the second year following the date of such notification, or

   b. where the recommended amendment is notified on or after 1 April, the date shall be the first of January of the third year following the date of such notification.

5. The statistical nomenclatures of each Contracting Party and its Customs tariff nomenclature or, in the case provided for under paragraph 1 (c) of Article 3, its combined tariff/statistical nomenclature, shall be brought into conformity with the amended Harmonized System on the date specified in paragraph 4 of this Article.

6. Any State or Customs or Economic Union signing without reservation of ratification, ratifying or acceding to this Convention shall be deemed to have accepted any amendments thereto which, at the date when it becomes a Contracting Party, have entered into force or have been accepted under the provisions of paragraph 3 of this Article.

55. In Republic V Commissioner General & Another Ex-Parte Awal Ltd [2008] eKLR it was observed that:

> "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..."

56. I do not intend to consider whether solar water heater systems fall under either classification code HS 8419.19 or 8516.10 for that is not what this Court sitting as a Constitutional Court is called upon to resolve. This Court is only interested in considering whether the change of classification was done in a procedurally fair manner by the Respondent. The Respondent says that it conducted post-audit verification and discovered that the classification tariff which had been in use to classify solar water heaters had been wrong all through. The Petitioner on the other hand states that, code HS1819.19 had been in use for the last ten years, a fact that the Respondent never disputed. According to petitioner, following the results of the post audit verification, the Respondent changed the tariff classification from HS8419.19 to HS8516.10 which saw increase in tariffs and demanded the tax shortfall that had hitherto not been levied for the past five years.

57. Under Article 47 (1) of *the Constitution*; it the right of every person to an administrative action that is 'expeditious, efficient, lawful, reasonable and procedurally fair.' Procedural fairness enshrines the component giving notice to the person likely to be affected by the decision and the need to hear that person. These key components have been amplified in the Fair Administrative Actions Act that was enacted to give effect to Article 47 of *the Constitution*. Section 5(1) of the Fair Administrative Actions Act, provides what should be done when an administrative action affecting the public is proposed to be taken. It states:

> In any case where any proposed administrative action is likely to materially and adversely affect the legal rights or interests of a group of persons or the general public, an administrator shall–
>
> (a) issue a public notice of the proposed administrative action inviting public views in that regard;
>
> (b) consider all views submitted in relation to the matter before taking the administrative action;
>
> (c) consider all relevant and materials facts; and
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> (d) where the administrator proceeds to take the administrative action proposed in the notice–
>
> (i) give reasons for the decision of administrative action as taken;
>
> (ii) issue a public notice specifying the internal mechanism available to the persons directly or indirectly affected by his or her action to appeal; and(iii)specify the manner and period within the which such appeal shall be lodged.

58. Further, under the principles of public service; accountability for the administrative acts and the need to involve the people in the process of policy making is a requirement under Article 232 (1) (d) & (e) besides the general requirement laid down in Article 10 of *the Constitution*.

59. The Respondent shift from HS Classification 8419.19 to 8516.10 in reclassifying solar water heaters from what had been in place for over 10 years does not appear to have complied with the Constitutional and Statutory Principles in making that policy shift that was likely to adversely affect a large section of the members of the public, who included, the importers of solar water heaters. They were slapped with a decision that adversely increased the tariff rates that they had known and applied for ten years without being granted a chance to air their views for the consideration by the Respondent prior to the decision being taken. The Respondent now says the 'ruling' it gave in response to a protest letter by petitioner seeking a review of its decision is the proof that it engaged them and gave reasons for the decision. A response to a protest letter which seeks a review of a decision that has already been made cannot amount to public participation if anything it is an indication of discontent due to lack of prior involvement.

60. It is manifest therefore that Articles 10, 47, 232 and Section 5 of the Fair Administrative Actions Act was contravened by the conduct of the Respondent which the petitioners complained of.

61. Turning to the impugned Ruling and the enforcement of the same by the Respondent against the Petitioner and the Interested Parties; one notes that it was prompted by the Petitioner writing to the Respondent seeking a review of the Respondent's action.

62. This Court in its Ruling dated 30th September 2022 while pronouncing itself on the preliminary objection addressed the legal implication of that ruling. The Court found that the ruling could not be used to invoke or raise the doctrine of exhaustion of remedies because the ruling by the Commissioner under Section 65 of the *Tax Procedures Act* is not binding on the taxpayer. To illustrate, the Court's decision on the respondent's P.O. was as follows:

> "67. The petitioner has argued that the EACCMA 2004 is not applicable herein and that the Tax Procedure Act is the one that applies. The respondent has on the other hand argued to the contrary. For this court to determine which Act applies in the circumstances herein, it is important to consider the nature of the ruling dated 22nd November 2021. This will give guidance as to which Act is applicable.
>
> 68. I have perused the ruling by the respondent dated November 22, 2021 and I have noted the following: that the ruling is as a result of a request by the petitioner/ applicant to the respondent seeking for review of tariff classification of dual system water heaters. I have also noted that after forwarding the matter to the W.C.O, the respondent rendered its ruling determining the dual solar water heaters as classifiable in EAC/CET 2017 HS Code 8516.10.00.
>
> 69. The petitioner/applicant is aggrieved that the decision which it terms an opinion has been enforced by the respondent contrary to the provisions of the *Tax Procedures Act*. According to the petitioner that decision is not appealable and non- binding and there is no mechanism or procedure provided in the two statutes for appealing against such a decision.
>
> 70. Section 229 of the EACCMA 2004 referred to by the respondent provides as follows
>
> 229.
>
> (1) A person directly affected by the decision or omission of the Commissioner or any other officer on matters relating to Customs shall within thirty days of the date of the decision or omission lodge an application for review of that decision or omission.
>
> (2) The application referred to under subsection (1) shall be lodged with the Commissioner in writing stating the grounds upon which it is lodged.
>
> 71. In my view the said section does not apply to the impugned ruling, as it was an opinion and not a decision, to be appealed against. I have considered several provisions of the law among them sections 2(2), 3, 51(1) & (2), and 52, of the Tax Procedure Act and sections 12 & 13 of the *Tax Appeals Tribunal Act*. My finding from this is that it is only a decision by the commissioner that is appealable to the Tax Appeals Tribunal. What is the subject of the impugned ruling is an opinion and not a decision.
>
> 72. Section 65 on binding private rulings provides

(1) A taxpayer may apply to the Commissioner for a private ruling which shall set out the Commissioner's interpretation of a tax law in relation to a transaction entered into, or proposed to be entered into, by the taxpayer.

(4) If the taxpayer has made a complete and accurate disclosure of the transaction in relation to an application for a private ruling and the transaction has proceeded in all material respects as described in the application, the private ruling shall be binding on the Commissioner

(5) A private ruling shall not be binding on a taxpayer.

Section 67(5) provides:

(5) A private ruling shall set out the Commissioner's opinion on the question raised in the ruling and is not a decision of the Commissioner for the purposes of this Act or the *Tax Appeals Tribunal Act*, 2013 (No. 40 of 2013).

73. Based on the above cited provisions of the Tax Procedure Act and the *Tax Appeals Tribunal Act*, it is clear that the ruling dated November 22, 2021 by the respondent was a private ruling pursuant to the provisions of section 65(5) of the Tax Procedure Act and it is not binding on the petitioners. Further pursuant to section 67(5) of the Tax procedure Act it is an opinion of the commissioner and as such not appealable. It is also important to note that this Act does not provide for a procedure for appealing against the private ruling or the opinion of the respondent as the case may be, neither does the EACCMA Act."

63. The Respondent cannot purport to apply and enforce a non-binding ruling which was of no legal effect it. The action of applying the said ruling against the Petitioners members (Interested Parties) is thus unconstitutional, null and void and against the rule of law principle under Article 10 (2) (a) of *the Constitution*.

Whether the Respondent violated the Petitioner's and Interested Parties right to legitimate expectation

64. The Supreme Court explained what legitimate expectation is in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (Petition 14, 14A, 14B & 14C of 2014 (Consolidated)) [2014] KESC 53 (KLR) (29 September 2014) (Judgment) by stating thus:

"(264) In proceedings for judicial review, legitimate expectation applies the principles of fairness and reasonableness, to the situation in which a person has an expectation, or interest in a public body retaining a long-standing practice, or keeping a promise.

(265) An instance of legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. A party that seeks to rely on the doctrine of legitimate expectation, has to show that it has locus standi to make a claim on the basis of legitimate expectation.

(266) Wade and Forsyth in their work, Administrative Law, 10th ed (pages 446-448), discuss the relevant legal principles on legitimacy of an expectation. For an expectation to be legitimate, it must be founded upon a promise or practice by the public authority, that is said to be bound to fulfil the expectation..."

65. The Court went on to state the principles of legitimate expectation as follows:

> "(269) The emerging principles may be succinctly set out as follows:
>
> a. there must be an express, clear and unambiguous promise given by a public authority;
>
> b. the expectation itself must be reasonable;
>
> c. the representation must be one which it was competent and lawful for the decision-maker to make; and
>
> d. there cannot be a legitimate expectation against clear provisions of the law or *the Constitution*."

66. In addition, the Court in Republic vs Kenya Revenue Authority Ex-parte KSC International Limited (In Receivership) (2016) eKLR speaking to this expectation observed as follows:

> "My view on this issue is informed by the need to achieve certainty in economic sphere. As was appreciated by Nyamu, J in Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others HCMA No. 743 of 2006 [2007] KLR 240 at 295:
>
> > "...legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher public interest beneficial to all including the respondents, which is, the value or the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation. An abrupt change as was intended in this case, targeted at a particular company or industry is certainly abuse of power. Certainty of law is a major requirement to business and investment...certainty of law is an important pillar in the concept of the rule of law."
>
> The same principle was re-asserted in Republic vs. Attorney General & Another Ex Parte Waswa & 2 Others [2005] 1 KLR 280 where it was held that:
>
> > "The principle of a legitimate expectation to a hearing should not be confined only to past advantage or benefit but should be extended to a future promise or benefit yet to be enjoyed. It is a principle, which should not be restricted because it has its roots in what is gradually becoming a universal but fundamental principle of law namely the rule of law with its offshoot principle of legal certainty. If the reason for the principle is for the challenged bodies or decision makers to demonstrate regularity, predictability and certainty in their dealings, this is, in turn enables the affected parties to plan their affairs, lives and businesses with some measure of regularity, predictability, certainty and confidence. The principle has been very ably defined in public law in the last century but it is clear that it has its cousins

in private law of honouring trusts and confidences. It is a principle, which has its origins in nearly every continent. Trusts and confidences must be honoured in public law and therefore the situations where the expectations shall be recognised and protected must of necessity defy restrictions in the years ahead. The strengths and weaknesses of the expectations must remain a central role for the public law courts to weigh and determine."

67. The Court of Appeal in Kenya Revenue Authority & 2 others v Darasa Investments Limited MLD [2018]eKLR affirmed as follows:

> " Legitimate expectation refers to the principle of good administration or administrative fairness that, if a public authority leads a person or body to expect that the public authority will, in the future, continue to act in a way either in which it has regularly (or even always) acted in the past or on the basis of a past promise or statement which represents how it proposes to act, then, prima facie, the public authority should not, without an overriding reason in the public interest, resale from that representation and unilaterally cancel the expectation of the person or body that the state of affairs will continue. This is of particular importance of an individual has acted on the representation to his or her detriment."

68. In the instant case, it is not denied that for a long time, (more than 10 years) the Respondent had classified solar water heaters under classification code HS8419.19 but opted to change to HS 8516.10, after post-audit verification exercise it had conducted. Ten years is a long duration and a practice that has been there for such a long period acquires the status of a custom or practice. The Petitioner is right to feel aggrieved when the Respondent brusquely makes such a change without regard to the repercussions of the persons the action is directed at. Even if the Respondent may have the power to introduce such changes, that cannot be done mechanically without giving sufficient notice and holding public participation on such a major policy shift. I hold that it is unconscionable and against the principle of legitimate expectation to make instant policy directions without prior involvement of the persons affected. It is a violation of Article 47(1) of *the Constitution* as it is not procedurally fair or reasonable.

69. In view of the foregoing, it is the finding of this Court that this Petition is merited. I therefore grant the following reliefs:

1. A declaration is hereby issued that the ruling dated 22nd November, 2021 reference No. KRA/CBC/BIA/THQ/GEN/099/11/2021 violates the rule of law principle under Article 10 (2) (a) of *the Constitution* and is thus unenforceable against the Petitioner and the Interested parties.

2. A declaration is hereby issued that the reclassification of the solar water heaters from HS 8419:19 to HS 8516:10 violates Article 10 (2) (a), 47 (1), and 232 (d) & (e) of *the Constitution* and is therefore null and void.

3. An order is hereby issued quashing the ruling dated 22nd November, 2021 reference No. KRA/CBC/BIA/THQ/GEN/099/11/2021 and the decision reclassifying solar water heaters to be imported under HSC 8516:10 and further the respondent is restrained from collecting or by payment of VAT and Import duty on importation of solar water heaters either by themselves, their agents, their servants, employees or representatives under the new classification code HS8516.10.

4. Costs of this Petition shall be borne by the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 13TH DAY OF DECEMBER, 2024.

.....

L N MUGAMBI

JUDGE