REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW NO. 5 OF 2013

IN THE MATTER OF: ORDER 53 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF: THE EAST AFRICAN COMMUNITY CUSTOMS MANAGEMENT ACT 2004

AND

IN THE MATTER OF: AN APPLICATION BY ARYUV AGENCIES LIMITED FOR LEAVE TO APPLY FOR JUDICIAL REVIEW AGANST THE DECISION BY KENYA REVENUE AUTHORITY REFUSING TO RELEASE ITS GOODS ENTERED UNDER ENTRY NO. 2012/MSA/3818070

BETWEEN

ARYUV AGENCIES LIMITED.....APPLICANT

AND

KENYA REVENUE AUTHORITY.....RESPONDENT

RULING

The Application

1. By a Notice of Motion dated 31st January, 2013 the Ex parte Applicant prays for the following orders.

(a) That an Order of Certiorari do issue to remove into this Honourable Court for the purpose of quashing, the decision made by the Respondent on 28th November 2012 stopping and refusing to release the goods which were the subject of Entry No. 2012/MSA/3818070 to the Applicant, **ARYUV AGENCIES LIMITE**D and the demands dated the 4th November 2011, 29th October 2012 and 19th November 2012 upon which such wrongful and unlawful action is premised;

(b) That an order of prohibition do issue to prohibit the Kenya Revenue Authority (‘**KRA’)** from continuing to wrongfully demand from the Applicant any monies on account of the alleged underpayment of duty/taxes in respect of the various importation of consignments of rice made by the Applicant which were cleared by the **KRA** under Entry Nos. 2008 MSA 1413468, 2008 MSA 1523160, 2009 MSA 1570237 & 2009 MSA 1632324; and

(c) That the Costs of and occasioned by these proceedings be taxed and paid by the Respondent to the Applicant.

2. The application is premised on the grounds set out therein and is supported by Sanjay Kotecha on 15th January, 2013.

3. The Ex parte Applicant’s case is that in the years 2008 and 2009, the Applicant herein imported various consignments of Thai rice which were cleared for importation by the Respondent, Kenya Revenue Authority under Entry Nos. 2008 MSA 1413468, 2008 MSA 1523160, 2009 MSA 1570237 & 2009 MSA 1632324. That on 4th November 2011, 29th November 2012, and 19th November 2012, the Kenya Revenue Authority (‘KRA’) wrote to the Applicant demanding a sum of KShs.2,612,772.00 on account of duty allegedly uncollected due to application of a lower duty rate. The Applicant’s efforts to get clarification from the authors of the said letters were unsuccessful as they maintained that the said amounts were payable and that the KRA would not relent in pursuing the demand. On 28th November 2012, the

KRA withheld the clearance and release of the Applicant's cargo which was the subject of Entry No.2012/MSA/3818070 on the grounds that the Applicant had an outstanding query with its Debt Management Unit. Again, the Applicant's efforts to discuss the matter with KRA and have the issue resolved was unsuccessful. The Applicant states that whilst the demands for payment are premised on the allegation that the Applicant wrongfully applied the import duty rate of 35% instead of 75% (or USD200 per MT whichever is higher), the Applicant is aware that since the Tradex Simba System (an automated tax collection and import clearance system) was implemented sometime in 2005, the system does not allow or permit the importer (the Applicant in this case) to state the rate of duty applicable but rather requires the importer to state the Tariff Number of product/goods imported, country of origin and CDC on the basis of which KRA's said system ascertains the applicable rate of duty and determines the amount payable. Effectively, the said system is foolproof and devoid of external interference and, unless all the taxes calculated by the said system as being due and owing are paid in their entirety, the relevant Customs Clearance Entry will not be passed and the cargo shall not be cleared for importation. The Applicant states that in the instant case, the Applicant honestly and diligently declared the true status and origin of the cargo now in question and on the basis of which the KRA's system determined the duty payable. It is only upon payment of the relevant amounts that the various consignments were cleared for importation and released. The Applicant states that it legitimately expected fair administrative action from the KRA particularly given the fact that the KRA was aware that the subject goods were not for personal consumption but rather for trade purposes and that a major component in determining the cost of the importation for purposes of working out the selling price was the amount of duty paid/payable. The Applicant states that the belated demand almost four years after clearance for an alleged underpayment is, in the circumstances, unjustified and without any basis particularly given that the Applicant is not alleged to have mis-described the cargo or its origin. That in fact, prior to clearance and release, all this information contained in the Entry and the relevant documentation as well as the cargo itself was on each occasion inspected by KRA to confirm and verify the accuracy of the relevant information and declaration made prior to its release. The Applicant states that it believes that The East African Customs Management Act 2004 has not been ratified in Kenya and, if it has, it remains in conflict with local customs statues which take precedence over its provisions. To this extent, the Applicant does not accept that KRA is lawfully entitled to withhold the release of the Applicant's aforestated cargo nor make any demands pursuant to the provisions of the East African Community Customs Management Act 2004 as they have now sought to do and all their actions are unlawful, illegal and without any basis whatsoever. In the premises it is the Applicant's case that in the premises, I say that KRA has no legal right to refuse to release the Applicants' Cargo which is the subject of the aforementioned Entry or any other cargo whatsoever and its conduct in withholding the release is not only unfair and in contravention of Article 47 of the Constitution but also unlawful and wrongful aimed at extorting monies that are not due from the Applicant. The Applicant further states that even if KRA had a claim or duty or taxes allegedly on account of an underpayment, they are by reason of their own conduct estopped from pursuing or enforcing this and as such the said claims would be and remain extinguished. The decision by KRA refusing to release the Applicant's cargo is therefore *ultra vires* and one made in abuse of its statutory powers, and that the application herein praying for orders of Judicial Review should be allowed.

The Response

4. The Respondent oppose the application through a Replying Affidavit sworn by **Peter Wambua** on 23rd April, 2013. The Respondent's case is that in the year 2011, the Respondent conducted a desk audit on several companies that were importing rice into the country and established that the companies were applying the wrong import duty rates that were occasioning loss of revenue to the government. The Ex-parte Applicant was one of such companies. By a letter dated 4th November 2011, the Respondent demanded from the Ex-parte Applicant the payment of Kshs.2, 612,772.00 being the short levied duties payable to the Commissioner because of the wrong import duty rates applied in relation to importation of rice in the years 2008 and 2009. By letters dated 24th September 2012 and 19th November, 2012, the Respondent reminded the Ex-parte Applicant of the outstanding taxes and requested the Ex-parte Applicant, in absence of any query to settle the same together with the accrued interest failing which enforcement measures for recovery of the same would be taken. On or about 28th November 2012, there being no query for clarification nor settlement by the Ex-parte Applicant, the Commissioner of Customs was left with no option other than to enforce the collection of the short levied taxes by detaining the Ex-parte Applicant's consignment/cargo at the port of Mombasa. This prompted the Ex-parte Applicant to file this Application. It is the Respondent's case that the application lacks merit and should be dismissed because the tax due was always known to the Applicant and it was duty bound to pay it.

Submissions

5. Parties with the leave of Court filed submissions. Mr. Khagram learned counsel for the Ex parte Applicant submitted that the Ex-Parte Applicant recognizes that it is the statutory mandate of the Respondent (KRA) to collect taxes and it is in public interest that it does so. However, it is the Ex-Parte Applicant's contention that in the exercise of this administrative mandate, the Respondent must act and conduct itself fairly and pursuant to the National Values and Principles of governance including, inter-alia, good governance, integrity, transparency and accountability enshrined in **ARTICLES 47 AND 10 OF THE CONSTITUTION OF KENYA 2010** respectively. Counsel cited Justice Majanja in **NBI MILIMANI CONSTITUTIONLAL NO. 476 OF 2013 – TATA CHEMICALS MAGADI LIMITED –AND – THE COMMISSIONER OF DOMESTIC TAXES (LARGE TAXPAYERS)[2014]eKLR**:

> **"The purpose of Article 47 is to uplift the standards of administrative action by providing constitutional standards (see DRY ASSOCIATES LIMITED –v- CAPITAL MARKETS AUTHORITY & ANOTHER – NRB Petition No. 328 of 2011 [2012] eKLR). The National Values & Principles of good governance articulated in Article 10 among them good governance, integrity, transparency and accountability must be infused in administrative action..."**

6. Majanja J. in the same case also quoted the decision of Ojwang J. (as he then was) in the case of **R –V- KENYA REVENUE AUTHORITY EX-PARTE LAB INTERNATIONAL KENYA LIMITED - HC MISC NO. 82 OF 2010 [2011] eKLR** where the Learned Judged observed that: -

> **"In practical terms, Government has a public duty to effect change to any unprogressive arrangements, such as those that may characterize the Operational Linkage of the Respondent to the slothful structures, so as to render the Respondent, as well as such structures, capable of responding to the overriding demands of the Constitution; and in this regard, ordinary statutory arrangements cannot quality the Constitutional provisions. On this account, the Respondent has no justification for failing to make VAT refunds timeously."**

7. Mr. Khagram also cited Justice Odunga in **NBI HIGH COURT MISC CIVIL APPLICATION NO. 30 OF 2013 – REPUBLIC –VS- COMMISSION FOR HIGHER EDUCATION EX-PARTE PETER SHOITA SHITANDA [2013] eKLR** where the Court had occasion to extensively consider and determine issues arising out of a body's improper and unreasonable exercise of statutory functions and powers by administrative authority.

8. The Applicant has also questioned the applicability of **THE EAST AFRICAN CUSTOMS MANAGEMENT ACT 2004** in Kenya (pursuant to which the demands for tax were made) particularly when this Act has not been ratified and adopted as law in Kenya where **THE CUSTOMS & EXCISE ACT (CAP. 472)** which provides for the management and administration of the Customs, for the assessment, charge and collection of customs and excise duties and for matters relating thereto and connected therewith subsists and remains good law. Mr. Khagram submitted that under **the Tariff Code 10064000** applicable for broken rice contained in the First Schedule to above Act, the applicable rate of duty is specified as Shs.4.20 per Kg or 35% and it is the Ex-Parte Applicant's submission that this rate has not been amended in law and continues to subsist as the lawfully collectable duty on importation of rice – hence the specification of the rate as the import duty payable displayed on the Integrated Tariff Management Tradex Simba System used by the Respondent. Counsel relied on **REPUBLIC -VS- CABINET SECRETARY FOR TRANSPPORT & INFRASTRUCTURE & OTHERS -EX-PARTE- KENYA COUNTRY BUS OWNERS ASSOCIATION (Suing through Paul G. Muthumbi & Others)** where Mr. Justice Odunga cited with approval and adopted the decision of the High Court of Justice in England in **QUARK FISHING LIMITED -VS- SECRETARY OF STATE FOR FOREIGN AFFAIRS (2002) EWCA 149** where the Court held: -

> **'The duty of good faith and candour lying in a party in relation to both the bringing and defending of a judicial review application is well established. The duty imposed on public duties and not least on central government is a very high one. That this should be so is obvious. Citizens seeking to investigate or challenge governmental decision making start off at a serious disadvantage in that frequently they are left to speculate as to how a decision was reached. As had been said, the Executive holds the cards. If the Executive were free to cover up or withhold material or present it in a partial or partisan was the citizen's proper recourse to the court and his right to a fair hearing would be frustrated. Such a practice would engender cynicism and lack of trust in the organs of the State and be deeply damaging of the democratic process, based as it is upon trust between the governed and the government ...A breach of the duty of candour and the failure by the Executive to give a true and comprehensive account strikes at the heart of a central tenet of public law that the court has the guardian of the legal rights of the citizen should be able to rely on the integrity of the executive arm of the government to accurately, fairly and dispassionately explain its decision and actions".**

9. Mr. Khagram submitted that the Constitution which the Respondent is bound by, requires that the Respondent upholds the national values and principles of governance particularly those of good governance, integrity, transparency and accountability - **ARTICLE 10(2).** Counsel cited the case of **REPUBLIC -V- PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD & ANOR EX-PARTE PARLIAMENTARY SERVICE COMMISSION (2013) eKLR** where Justice Odunga adopted the decision of Lord Diplock in the English case of **COUNCIL FOR CIVIL SERVICE UNIONS -V- MINISTER FOR CIVIL SERVICE (1985) A.C. 374** which set out the purview of Judicial Review in the following terms: -

> **"Judicial Review as I think developed to a stage to day when ..... one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality'. The second 'irrationality' and the third 'procedural impropriety'..... By illegality' as a ground for judicial review I mean that the decision maker must understand correctly the law that regulates his decision-making power and must give effect to it ..... By 'irrationality' I mean what can now be succinctly referred to as "Wednesbury unreasonableness'..... it applies to a decision which is so outrageous in its defiance of logic of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.... I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision".**

10. Mr. Khagram submitted that the question that arises for determination is whether the Respondent has legally, properly, expediently, reasonably, rationally and fairly exercised its Statutory Powers without any abuse or excesses or, in any other manner, acted arbitrarily, whimsically, capriciously or in flagrant regard of the rules of natural justice. Counsel submitted that the KRA fell short of all above virtues and so their demand for more tax should be quashed by this Court.

11. Mr. Khagram submitted, in addition, that the Applicant had a legitimate expectation that the rate applied and duty calculated by the Simba System was correct. More so, since the Applicant's agent had candidly inputted the requisite details in the said system which details were subsequently verified by the Respondent's officers. Having paid the duty so assessed, it was unfair and unjust for the Respondent to try and impose the alleged short levied duty four years later taking into consideration that the purported erroneous application of the wrong rate of duty was attributable to the Respondent. Counsel argued that in as much as ***Section 135(3)*** of ***EACCMA*** imposes a time limit of 5 years for demanding unpaid duty on the Respondent, the same does not derogate the Respondent from its duty to conduct itself expeditiously and fairly. It is settled that every person has the right to fair administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair. In violation of the said right, the Respondent made no attempt to give an explanation as to why it made the demand in question four years later. This delay was inordinate and prejudicial to the Applicant. Consequently, the Respondent's conduct could by no means be termed as reasonable. To that extent, reliance was placed in the High Court's decision in ***Kenya Ports Authority vs. Industrial Court of Kenya & 2 Others [2014] eKLR***.

12. **Mr. Nyaga** learned counsel for the Respondent submitted that the application is not merited and should be dismissed. Counsel submitted that what the Respondent did was merely to demand the short levied duty, which was already within the knowledge of the Ex parte Applicant. Counsel cited the Court of Appeal decision in ***Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 Others [2012] eKLR***. Counsel submitted that by virtue of ***Section 5(1)*** of the ***Kenya Revenue Authority Act***, the respondent is charged with the duty of collecting and receiving all revenue on behalf of the government. In line with that duty, under ***Section 5(2)*** of the ***Kenya Revenue Authority Act***, the respondent is mandated to administer and enforce all tax laws set out in the first schedule thereto. One of which is the ***EACCMA***. Counsel submitted that the EACCMA is constitutional and applicable in this matter, and relied on ***Peter Anyang' Nyongo & 10 others vs. Attorney General & Another [2007] eKLR***. Mr. Nyaga submitted that the Respondent conducted a post clearance audit on the

consignment imported by the Appellant between 2008 and 2009. The results revealed that the wrong duty rate of 35% had been used in computing the duty payable for the said consignment. The right rate was 75% which meant that the duty paid by the Appellant fell short of Kshs. 2,612,772.00. Pursuant to ***Section 135(1)*** of the ***EACCMA*** the Respondent demanded payment of the aforementioned shortfall. Counsel submitted that the process and decision to demand the said duty was anchored on the law hence the decision was not amenable to Judicial Review.

13. On the issue of legitimate expectation, Mr. Nyaga contended that the Kenyan tax system is based on self-accounting and self-assessment. Everybody is required to make a declaration of how much tax is due and payable and the Respondent is empowered to audit such declarations. Counsel submitted that the essence of a post clearance audit is succinctly captured in the Guidelines for Post Clearance Audit (PCA) Volume 1 by the World Customs Organization, June, 2012. Despite the Simba System applying the wrong rate of duty, the Applicant was aware that the correct rate was 75%. The Applicant had the option of paying the short levied duty through a manual process which entailed requesting the Respondent to raise the said difference manually. Counsel submitted that the fact that the Applicant was aware of the correct rate precluded it from relying on the doctrine of legitimate expectation. Besides, legitimate expectation cannot be contrary to the law. In support of that proposition, counsel cited Court of Appeal decision in ***Oindi Zaippeline & 39 others vs. Karatina University & Another [2015] eKLR***. The Simba System was a platform erected to facilitate efficient clearance of goods and could not oust the provisions of ***EACCMA***. Counsel submitted that there was nothing prohibiting the Respondent assessing any short levied duty even where the same is a result of miscalculation by the Simba System. In the respondent's opinion, the Applicant's right to an expeditious administrative action, in this case, the audit was constitutionally limited in accordance with ***Article 24*** of the ***Constitution***. This is evidenced by ***Section 135(3)*** of the ***EACCMA*** which allows the respondent to demand short levied duty within five years.

The Determination

14. I have carefully considered the application and rival submissions. I have also reconciled the issues raised for determination by parties and in my view the issues for my determination are whether the EACCMA is applicable in Kenya and whether the decision of the Respondent can be a subject of Judicial Review.

15. In the cause of these proceedings Mr. Khagram learned counsel for the Ex parte Applicant brought to the attention of this Court the Court of Appeal decision in **Krish Commodities Limited vs. Kenya Revenue Authority Civil Appeal No. MSA 67 of 2017**. The issues raised in that appeal were in all parameters similar with the issues raised herein. Mr. Khagram submitted that this Court should adopt wholesome the said Judgment and allow the application. Mr. Nyaga learned counsel for the Respondent on his part disagreed. Counsel stated that the Respondent was not satisfied with the decision of the Court of Appeal and that they were headed to the Supreme Court.

16. I have carefully considered the said decision of the Court of Appeal. The material facts in that case, and the applicable law are exactly the same as herein. As per the constitutional hierarchy of our Courts system, I am bound by that decision. The said Court of Appeal raised the two issues that I have raised herein, and answered them in the affirmative, that is – that EACCMA is applicable in this country; and that the Respondent's decision was amenable to Judicial Review. The Court of Appeal allowed the appeal and granted the Judicial Review orders sought.

17. However, this Court is of the view that the Ex parte Applicant was under the duty to pay applicable tax since as submitted by Mr. Nyaga, learned counsel for the Respondent, Kenya tax system is based on self-accounting and self-assessment. Every tax payer is required to make a declaration of how much tax is due and payable and the Respondent is empowered to audit such declarations. In my view the Ex parte Applicant knew the tax it was expected to pay. It was given a lesser tax to pay. It accepted to pay the lesser tax without asking any questions. A responsible tax payer cannot hide the truth about tax that has become due. If there was a mistake in the Simba System, this mistake was immediately known to the Ex parte Applicant when they were asked to pay lesser tax than what their self-assessment of tax required them to pay. The Ex parte Applicant knew about the faulty system but declined to share this fact with the Respondent. The Respondent only learnt about this fact much later, however, early enough to enable it to demand payment of the shortfall within the five years as provided under Section 135 (1) of the EACCMA which stipulates that:

> ***"Where any duty has been short levied or erroneously refunded, then the person who should have paid the amount short levied or to whom the refund has erroneously been made shall, on demand by the proper officer, pay the amount short levied or repay the amount erroneously refunded, as the case may be; and any such amount may be recovered as if it were duty to which the goods in relation to which the amount was short levied or erroneously refunded, as the case may be, were liable."***

The Applicant's failure to pay the said amount left the respondent with no choice but to detain the Applicant's containers by dint of ***Section 235(3)*** of the ***EACCMA***. In any event, despite the error in the Simba System, the Applicant was at all material times aware of the correct rate applicable to the rice it had imported.

18. In my view, the demand made by the Respondent for payment of the shortfall in tax was within the law. Further, this demand did not offend any articles of the constitution. To be specific, this demand did not offend Article 47 of the constitution since what the Ex parte Applicant was being asked to pay was the shortfall in tax which was already within its knowledge.

Disposition

19. This Court takes a different view from that of the Court of Appeal in **Krish Commodities Limited (supra)**. However, this Court is bound by that decision of the Court of Appeal with the result that the motion before the Court praying for Judicial Review remedies is granted in terms of prayers (a) and (b).

20. This Court, for the foregoing reasons, declines to grant order on costs and directs each party to bear own costs.

Orders accordingly.

Dated, Delivered and Signed in Mombasa this 6th day of May, 2019.

E. K. OGOLA

JUDGE

In the presence of:

Ms. Wamboi for Respondent

Mr. Mohamed holding brief Mr. Khagram for Ex parte Applicant

Mr. Kaunda Court Assistant